

## **Legal report issued at the request of the Commission for the Guarantee of the Right of Access to Public Information in relation to the claim against the partial estimate of a Department of information on access to the file of a provision process at the request of a participating person**

The Commission for the Guarantee of the Right of Access to Public Information (GAIP) asks the Catalan Data Protection Authority (APDCAT) to issue a report, in relation to the response by a Department to the request for access to a file relating to the provision process for the position of Head of the Centers and Students Section of the Territorial Services of a Department.

Having analyzed the request, which is accompanied by a copy of the administrative file processed before the GAIP, in accordance with the report of the Legal Counsel, the following is reported:

### **Background**

1. On July 18, 2022, the claimant submitted to the Department the request for access to *"the ATRI offer file (...) for the provision of the position of Head of the Centers Section and Student of SSTT (...) of the Department (...)"* as an interested person.

2. On August 22, 2022, the Department informs the applicant by letter of August 16, 2022, of the estimate of the request for access to public information, specifically they inform her:

*"In relation to your request, you are informed that this documentation has already been delivered to you. Through a letter dated January 19, 2021, sent by courier by the head of the Personnel Provision and Selection Area of the Administration and Services, where the claimant was given the selection report, duly anonymized in compliance with the regulations for the protection of personal data and on February 16, 2021 when the secretary of Territorial Services (...) sent the person claiming the curricular assessment and assessment of the interview of the candidates".*

3 . On August 30, 2022, the person making the claim presented to the GAIP a claim in which he requested again *"the complete file of the ATRI call (...) for the provision of the position of Head of the Section of Centers and Students of the Territorial Services (...)"*, and bases his request, among others, because he *considers that "I have not been given access to the entire electronic file which is what I had requested on several occasions in writing. I have only been provided with a report. That my right to defense has been violated."*

4 . On September 1, 2022, the GAIP sends the claim to the Department and requests a report setting out the factual background and the foundations of its position in relation to the three claims, as well as the complete files and, where appropriate, that specify the third parties affected by the claimed access.

5. On September 20, 2022, the Department responds to the request, and among others, reiterates that the documentation was already delivered to it. Through a letter dated January 19, 2021, sent by courier by the head of the Personnel Provision and Selection Area of the Administration and Services, where the selection report was delivered to the person claiming, and on 16 of February 2021 when the Secretary of Territorial Services sent the person claiming the curricular assessment and assessment of the interview of the candidates.
6. On November 16, 2022, the GAIP requests a report from this Authority, in accordance with the provisions of article 42.8 of Law 19/2014, of December 29, on transparency, access to information public and good government.

## Legal Foundations

### I

In accordance with article 1 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, the APDCAT is the independent body whose purpose is to guarantee, in the field of the competences of the Generalitat, the rights to the protection of personal data and access to the information linked to it.

Article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good governance, which regulates the claim against resolutions on access to public information, establishes that if the refusal has been based on the protection of personal data, the Commission must request a report from the Catalan Data Protection Authority, which must be issued within fifteen days.

For this reason, this report is issued exclusively with regard to the assessment of the incidence that the requested access may have with respect to the personal information of the persons affected, understood as any information about an identified or identifiable natural person, directly or indirectly, in particular through an identifier, such as a name, an identification number, location data, an online identifier or one or more elements of physical, physiological, genetic, psychological, economic, cultural or social security of this person (art. 4.1 of Regulation 2016/679, of April 27, 2016, relating to the protection of natural persons with regard to the processing of personal data and the free circulation of such data and by which Directive 95/46/CE (General Data Protection Regulation, hereafter RGPD) is repealed.

Therefore, any other limit or aspect that does not affect the personal data included in the requested information is outside the scope of this report.

The deadline for issuing this report may lead to an extension of the deadline to resolve the claim, if so agreed by the GAIP and all parties are notified before the deadline to resolve ends.

Consequently, this report is issued based on the aforementioned provisions of Law 32/2010, of October 1, of the Catalan Data Protection Authority and Law 19/2014, of December 29, of transparency, access to public information and good governance (hereafter LTC).

In accordance with article 17.2 of Law 32/2010, this report will be published on the Authority's website once the interested parties have been notified, with the prior anonymization of personal data.

## II

The object of the claim is the request for access to the complete file of a provision process for the position of Head of the Section of Centers and Students of the SSTT of the claimed Department, in which the person making the claim states who has participated

The data protection regulations, in accordance with what is established in articles 2.1 and 4.1) of the RGPD, apply to the treatments that are carried out on any information " *on an identified or identifiable natural person ("the interested party »); Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person "*

Article 4.2) of the RGPD considers " *treatment*": *any operation or set of operations carried out on personal data or sets of personal data, either by automated procedures or not, such as collection, registration, organization, structuring, conservation , adaptation or modification, extraction, consultation, use, communication by transmission, diffusion or any other form of enabling access, comparison or interconnection, limitation, deletion or destruction .*

In accordance with the provisions of article 5.1.a), any processing of personal data must be lawful, loyal and transparent in relation to the interested party and, in this sense, the RGPD establishes the need to participate in some of the legal bases of article 6.1, among which section c) provides for the assumption that the treatment " *is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment "*

As can be seen from article 6.3 of the RGPD and expressly included in article 8 of Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (hereinafter the LOPDGDD), the processing of data can only be considered based on these legal bases of article 6.1. c) and e) of the RGPD when so established by a rule with the rank of law.

For its part, article 86 of the RGPD provides that " *the personal data of official documents in the possession of any public authority or public body or a private entity for the performance of a mission in the public interest may be communicated by said authority , organism or entity in accordance with the Law of the Union or of the Member States that applies to them in order to reconcile the public's access to official documents with the right to the protection of personal data under this Regulation .*

From all of this it follows that the claimant's access to the personal data that may contain the requested information on the basis of the fulfillment of a legal obligation by the Department (responsible for the treatment (art. 6.1 .c) RGPD), must necessarily be covered by a rule with the status of law.

The right of access to information held by public authorities or public bodies is regulated in our legal system in Law 19/2014, of December 29, on transparency, access to public information and good governance (hereinafter, LTC), which recognizes people's right of access to public information, understood as such "*the information prepared by the Administration and that which it has in its power as a result of its activity or of the exercise of its functions, including that supplied by the other obliged subjects in accordance with the provisions of this law*" (article 2.b) and 18 LTC). State Law 19/2013, of December 9, on transparency, access to public information and good governance (hereafter, LT), is pronounced in similar terms, in its articles 12 (right of access to public information) and 13 (public information).

In the same sense, article 53.1 of Decree 8/2021, of February 9, on transparency and the right of access to public information (hereafter the RLTC) specifies that public information is subject to the right of access "*all the information, any data or documents that the public administrations have drawn up, possess, or can legitimately demand from third parties as a result of their activity or the exercise of their functions*".

The information on the data relating to natural persons contained in a provision process file constitutes personal data and is public information for the purposes of article 2.b) of the LTC, and is subject to the right of access (article 18 of the LTC).

### III

In this case, the claim is filed against the partial estimate on access to the information in the file offered by ATRI (...) for the provision of the position of Head of the Section of Centers and Students of the Department's SSTT . According to the file, the established selection procedure was the curricular assessment plus an interview and four candidates presented themselves. One such person is the person making the claim.

As has been made clear in the background of this report, the Department would have partially appreciated the information request of the person now claiming. To this end, on January 19, 2021, he would have been given the selection report and on February 16, 2021, he would have been given the evaluated scales of the curricula and the interviews with the curriculum assessment and the assessment of the interviews of each of the candidates. Therefore, it is necessary to understand your request satisfied in this end .

However, the complainant believes that the report with each candidate's scores is not sufficient, and continues to ask to see the entire file or obtain a copy of it.

In view of these considerations, the claimant's access to the documents that may appear in the provision file that are affected by access is examined .

### IV

Before starting to analyze the merits of the claim, it is appropriate to determine the legal regime applicable to the request for access to personnel selection records by a participating person.

The first additional provision of the LTC establishes that *"the access of the interested parties to the documents of the administrative procedures in progress is governed by what is determined by the legislation on legal regime and administrative procedure"*.

In the case at hand, and according to the information provided by the Department, on November 30, 2020, the job offer was published on the ATRI portal, on December 22, 2020, the person was informed claiming that she had not been selected and on December 29, 2020, the person claiming requested, via email, for the first time access to the complete file. Therefore, although it is now a closed procedure, at the time when the person claiming requested access to the information, the procedure was still open to the extent that the possibility of filing an appeal was open.

In accordance with this provision, when the access request is made by a person interested in an administrative procedure that is pending, the administrative procedure regulations will apply.

In this regard, article 53.1.a) of Law 39/2015, of October 1, on the common administrative procedure of public administrations (LPAC), recognizes the persons interested in an administrative procedure the right to access and obtain a copy of the documents contained in the procedures in which they have this condition.

And, in the same sense, article 26 of Law 26/2010, of August 3, on the legal regime and procedure of the public administrations of Catalonia, recognizes that citizens who have the status of persons interested in a administrative procedure in progress have the right to access the file and obtain a copy of the documents that are part of it.

According to the information available, the person requesting access to the complete file of the aforementioned provision process is a person participating in the same process, who, according to the provisions of article 4 of the LPAC, has the status of an interested person, insofar as it may be affected by the result of this administrative procedure.

Likewise, according to the information available, the aforementioned provision process for which access is requested had not ended at the time the access request was submitted. As this Authority has highlighted, it must be understood that the right of access provided for in the administrative procedure regulations must also be exercised once the respective procedure (initial or administrative appeal) has been completed, while the deadline for filing an administrative appeal or administrative dispute is open.

Therefore, it can be concluded that the access request subject to report, to the extent that the person making it holds the status of a person interested in the procedure and that it is a procedure not completed in the at the time of the request, it must be governed by the right of access that regulates the administrative procedure regulations.

This right of access is directly linked to the right of defense of the person concerned and, as we have seen, is formulated in quite broad terms. However, this does not mean that it is an absolute right but that, when it conflicts with other rights, such as the fundamental right to the protection of personal data (Article 18 CE), it will be necessary to weigh the different rights at stake, in order to decide which should prevail and to what extent.

In fact, the LPAC itself establishes that it is necessary to apply the limitations provided for in the transparency legislation when it regulates the obtaining of copies or access to the file of the persons interested in the hearing procedure provided for in article 82.1, or when it regulates the right of interested persons to request the issuance of authentic copies of public administrative documents issued by the public administrations provided for in article 27.4.

These provisions must also be understood as applying with respect to the right of access provided for in article 53.1.a) of the LPAC and, consequently, what is established in articles 23 and 24 of the LTC.

This same analysis, from the point of view of the limitations provided for in articles 23 and 24 of Law 19/2014, would also be applicable in the event that access is governed directly by the transparency regulations.

## v

Article 23 of the LTC provides:

*"Requests for access to public information must be denied if the information sought contains particularly protected personal data, such as those relating to ideology, trade union affiliation, religion, beliefs, racial origin, health and sexual life, and also those relating to the commission of criminal or administrative offenses that do not entail a public reprimand to the offender, unless the affected party expressly consents by means of a written which must accompany the application."*

In similar terms, article 15.1 of Law 19/2013, of December 9, on transparency, access to public information and good governance (hereafter, the LT) in the wording given by the eleventh final provision of the LOPDGDD has:

*"If the requested information contained specially protected data referred to in section 2 of article 7 of Organic Law 15/1999, of December 13, on the Protection of Personal*



*Data, access may only be authorized in the event of that there is the express and written consent of the affected person, unless said affected person had made the data manifestly public before access was requested.*

*If the information includes specially protected data referred to in section 3 of article 7 of Organic Law 15/1999, of December 13, or data relating to the commission of criminal or administrative offenses that did not lead to a public reprimand to the offender, access can only be authorized if the express consent of the affected person is obtained or if the latter is covered by a rule with the rank of law."*

Article 70.1 of Decree 8/2021, of February 9, on transparency and the right of access to public information provides:

*"For the purposes of what is provided for in article 23 of Law 19/2014, of December 29, it is up to the person requesting to provide the express written consent of the persons holding the personal data affected by the access alone. tendered The public administrations can transfer the request and the consent to the person holding the data in order to certify the written consent provided, in case of doubt about its veracity.*

It does not appear from the information available that the person making the claim has the consent of the other affected persons.

In the event that the public information that is requested contains information from specially protected categories, such as health data or data relating to criminal or administrative offenses and convictions, the confidentiality of this information must be preserved and exclude it from the claimant's access, unless, in the absence of the express consent of the affected persons, which is not stated in this case, any other of the circumstances provided for in the aforementioned article 15.1 occurs.

In this case, the Department should deny access to the documentation that is part of the provision process file that contains particularly protected personal data (for example those linked to psychotechnical tests, disability situations, etc.), unless the express and written consent of the affected persons is available.

## VI

Regarding access to the rest of the information in the file that does not contain particularly protected personal data, it is necessary to balance the right to data protection of the affected persons, and the public interest in the disclosure of the information in accordance with the provisions of article 24 of the LTC, according to which:

*"1. Access to public information must be given if it is information directly related to the organization, operation or public activity of the Administration that contains merely identifying personal data unless, exceptionally, in the specific case it has to prevail over the protection of personal data or other constitutionally protected rights."*

*"2. If it is other information that contains personal data not included in article 23 (specially protected data), access to the information can be given, with the previous*

*reasoned weighting of the public interest in the disclosure and the rights of the affected people To carry out this weighting, the following circumstances must be taken into account, among others:*

- a) The elapsed time.*
  - b) The purpose of the access, especially if it has a historical, statistical or scientific purpose, and the guarantees offered.*
  - c) The fact that it is data relating to minors.*
  - d) The fact that it may affect the safety of people.*
- (...).”*

At the outset, with regard to the personal information itself, it should be remembered that article 15 of the RGPD regulates the right of access to one's personal information, so that, in the case examined, the claimant has the right to access all the information that appears on your person in the file processed by the Department, in relation to the call for staff provision in which you have participated as an applicant.

With regard to the merely identifying information of the people who have intervened in the processing of the provision process by reason of their position (article 24.1 of the LTC). Article 70.2 of the RLTC is merely identifying personal data *"the ones consisting of the name and surname, the position or position held, body and scale, the functions performed and the telephone and the addresses, postal and electronic, of professional contact, referring to the personnel in the service of the public administrations, high positions and managerial personnel of the public sector of public administrations.(...)"*.

In this case, there would be no problem in providing the interested person with the merely identifying information of the people who have intervened in the processing of the provision process by reason of their position.

With regard to the information that has been the subject of publication during the provision process that may be included in the file, article 9.1.e) of the LTC establishes the obligation to publish *"the calls and the results of the selective processes of staff provision and promotion"*

Article 21.2 of the RLTC specifies that *"The data to be published must refer, at least, to the announcement of the call, the bases, the official announcements and the first and last name and the four numbers of the national identity document or equivalent document of the persons admitted to each test or exercise of the process and of the person finally selected, in accordance with the criteria established in the field of data protection."*

In accordance with what has been said, in principle it does not seem that facilitating access to information that has been the subject of dissemination during the provision process that may be included in the file should have particular relevance in terms of the right to the protection of personal data of the affected persons, particularly in this case where the person requesting access has participated in this selective process of provision, so it is likely that it is already known to them.



With regard to the rest of the information linked to the three people who have participated in the provision process apart from the person claiming, for the purposes of granting access, a reasoned weighting will have to be done between the public interest in the disclosure of information and the rights of the affected persons, in accordance with the provisions of article 24.2 of the LTC.

In this case, the claimant would have participated in the provision process. In this sense, the status of interested party that the person making the claim has with respect to the provision procedure grants him a reinforced or privileged right of access with respect to potential information requesters who have not participated in that process.

In this sense, article 22.1 of the LTC provides that: *"The limits applied to the right of access to public information must be proportional to the object and purpose of protection. The application of these limits must take into account the circumstances of each specific case, especially the concurrence of a higher public or private interest that justifies access to the information."*

In the case at hand, knowing the motivation and purpose of the access is an element to take into account, for the purposes of weighing the access to personal information of the other people who have participated in the provision process together with the person claiming. The claimant motivates his request for access to the complete file, in a personal or particular interest, given his status as a participant in the provision process.

When weighing the rights at stake, the principle of data minimization (Article 5.1.c) RGPD) must be taken into account, according to which the data to be processed must be adequate, relevant and necessary for the fulfillment of the purpose according to which the access occurs, in this case transparency in the provision process.

In this case, for the purposes of weighting and attention to this principle, of the four candidates, it would be necessary to clearly differentiate between the personal information related to the candidate who obtained the position or with a score higher than his, from the information regarding to the other people participating in the procedure who obtained information inferior to her.

The exercise of the right of defense can justify access to the information obtained by the position, and also to that of other applicants who have obtained a higher score than the applicant, but, on the other hand, it does not seem justified to give access to the personal information of the two applicants who have not passed the competitive procedure, since this information would be irrelevant to achieve the alleged purpose pursued by the person making the claim. In this case, the impact on your right to the protection of personal data does not seem justified. In this sense, it is not clear what impact it can have on the control of the actions of the Administration responsible for the provision procedure, access to personal information (certificates and diplomas, academic and work information, curriculum vitae ...) of the people who have not been finally selected for the position, or who have not obtained a score higher than that of the person making the claim.

Therefore, given the weighting of Article 24.2 LTC, from the perspective of data protection it does not seem justified to give access to the information, documentation, reports or evaluations that may be included in the file relating to the two applicants not selected before the claimant.

## VIII

Having said that, I respect the documentation relating to the person or persons who have obtained a better result than the person making the claim from the perspective of the weighting of article 24.2 LTC, the analysis must be different.

In order to control the actions carried out by the Administration in the scope of the provision process, which is governed by the principles of merit, capacity and equality, it may be relevant, with respect to the candidate finally chosen and, where appropriate, those who have obtained a higher score, to know the minutes or equivalent documents of evaluation of the merits, as well as the evaluative elements taken by the court in relation to this person. Thus, it would be justified to facilitate the score obtained by the selected candidate in relation to the alleged merits or the curricular or professional aspects that the court has assessed.

Knowing the elements assessed in relation to the score obtained by the people in a better position than the person claiming in the final results of the process, in relation to professional experience and academic training, would provide necessary information if what is intended is detect possible arbitrary actions on the part of the body in charge of making the provision, which should act within the parameters of technical discretion attributed to it.

In this regard, with regard to the curricular documentation of this participating person, despite the fact that it may contain personal information of a different nature that may allow the preparation of an academic, work and professional profile of the candidate and, therefore, facilitate - it would lead to a strong impact on your right to the protection of personal data, in a case such as the one examined, it must be considered that its knowledge, together with the identity of the candidate, is indispensable to be able to defend your rights regarding to the legality of the provision process and to be able to detect, where appropriate, an arbitrary treatment in the assessment of this profile, which could have harmed the interests of the person making the claim.

This, without prejudice to the fact that if this documentation contains other personal information that is not relevant to achieve the intended purpose, it should be excluded from access. For example, the documents contained in the file about the candidate we are referring to (applications for participation in the selection process, affidavits, diplomas and certificates, academic and employment information, etc.), provide detailed information about the profile, training and professional career of a candidate, as well as other aspects of skills and competences required for the development of the job offered, but the documents that are part of the file may also include other data such as address, ID, phone, no. of SS or date of birth, which are not relevant for the purposes we are concerned with, taking into account the principle of minimization (art. 5.1.c) RGPD).

In short, it may be relevant to know the data that allows you to accredit the merits assessed by the court, but not other personal data that do not provide relevant information in relation to the assessment of these merits.

Thus, taking into account that access must be limited to the information strictly necessary to provide a satisfactory response to the exercise of the legitimate purpose mentioned, access to the documentation presented and to the curriculum of the person concerned should to limit

to data relating to training, professional experience and other occupational data that have been taken into account in the assessment of the merits of this candidate. It will therefore be necessary to omit, prior to access, personal data ( identifying or other categories) that are unnecessary, irrelevant or not indispensable for the intended purpose.

Regarding the personal interview test, in the information provided by the GAIP, the Department states that it was conducted by Teams on the same day consecutively, and that the information on the scales evaluated with the people's score candidates was already given to the claimant on February 16, 2021. In addition, the criteria established by the Court for the interview of all candidates are specified, which are specified in a grid that includes, for each of the applicants with a score relative to the analyzed items (*“training and career path, adaptability to the organizational context, teamwork and networking, communication, persuasion and influence, adaptability and flexibility and direction and development of people”*). It cannot be ruled out that the interview includes an assessment of certain traits or aspects of the candidate's personality and development or professional capacity.

However, it cannot be considered that, in this case, the professional interview must contain particularly protected information. Therefore, it does not seem that giving the person claiming access to an evaluation report of the applicant in the interview, only in relation to the participants with the highest score, should be contrary to the data protection regulations. And if there is a recording (remember that it was done by Teams ) it would allow to complement and contrast what can be known through the corresponding report. This ability to contrast that the recording would give in relation to the professional and communicative ability of the participants with the best score, means that it can be considered relevant information for the purpose intended by the person making the claim.

All this, without prejudice to the fact that certain personal circumstances of the candidates could justify the limitation of the claimant's right of access.

## **conclusion**

The person claiming has the right to access the information contained in the file of the provision process in which he/she has participated, excluding documentation containing specially protected personal data, as well as those identifying or other data that are unnecessary to achieve the purpose pursued.

The claimant's access to information relating to applicants who have obtained a final score lower than that of the claimant is not justified, except for that which has been the subject of publication in accordance with current regulations.

Barcelona, December 12, 2022

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