

## **Report issued at the request of the Commission for the Guarantee of the Right of Access to Public Information in relation to the claim submitted by a councilor against a town hall for denying access to information on the holiday quadrants of members of the Local Police**

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 on the claim submitted by a councilor against a city council for denying access to information on the holiday quadrants of members of the Local Police.

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

### **Background**

1. On July 27, 2022, a councilor of a municipal group of a town hall sends an email to the Mayor's Office of that same town hall in which he requests file 2022-2750 relating to the Local Police .

2. On August 1, 2022, the City Council makes the requested file 2022-2750 available to the councilor, providing him with a link to a document repository and an access key to access it.

It is noted in the communication addressed to the councilor that file 2022-2750 has previously been anonymized .

You are also warned that the repository contains file 2021-7824, for which you would have previously requested access.

3. On August 22, 2022, the councilor filed a complaint with the GAIP against the City Council for denying access to the requested public information.

4. On August 31, 2022, the GAIP will send the claim to the City Council, requiring it to issue a report on which to base its positions, as well as the complete file relating to the request for access to public information and the identification of third parties affected by the requested access.

5. On September 20, 2022, the City Council responds to GAIP's request by sending it the file relating to the access request that is the subject of this claim.

The file contains the e-mail addressed to the City Council's Data Protection Delegate in which the possibility of delivering the requested information to the councilor is consulted, and also the reply e-mail in which the Delegate considers that *"it is necessary provide him with a vacation calendar, but anonymized, without identifying the agents, since the permits and vacations of a worker constitute personal data"*.

6. On December 1, 2022, the GAIP requests this Authority to issue the report provided for in article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good government, in relation to the claim presented.

## 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 the LTC, which regulates the complaint against resolutions regarding access to public information, establishes that if the refusal is based on the protection of personal data, the Commission must request a report to 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 (article 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 repeals Directive 95/46/EC (General Data Protection Regulation, hereafter RGPD).

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.

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

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."*

The RGPD provides that all processing of personal data must be lawful (Article 5.1.a)) and, in this sense, establishes a system of legitimizing data processing based on the need for one of the legal bases to be met established in its article 6.1. Specifically, section c) provides that the treatment will be lawful if *"it 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 guarantee of digital rights (LOPDGDD), the processing of data it can only be considered based on this legal basis of article 6.1.c) of the RGPD when this is 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 Member States that applies to them in order to reconcile public access to official documents with the right to the protection of personal data under this Regulation."*

Law 19/2014, of December 29, on transparency, access to public information and good governance (LTC), aims to regulate and guarantee the transparency of public activity.

The first additional provision, section two, of this Law establishes that *"access to public information in matters that have established a special access regime is regulated by their specific regulations and, additionally, by this law."*

In the case at hand, the person making the claim has the status of a councillor, which is why the provisions established by the local regime legislation are applicable, fundamentally, Law 7/1985, of April 2, regulating the bases of the local regime (LRBRL) and Legislative Decree 2/2003, of April 28, which approves the revised Text of the Municipal and Local Government Law of Catalonia (TRLMRLC), with regard to Councilors' access to municipal information.

This without prejudice to the fact that the complaining councillor must be granted at least the same guarantees in terms of access to information - including the possibility of lodging a claim with the GAIP - as the rest of the citizens who do not have this

condition of elected position, given the supplementary application of the LTC (DA1a. section 2).

### III

As this Authority has decided on previous occasions (among others, in opinions CNS 10/2017, CNS 29/2018 or CNS 2/2021, as well as in reports IAI 58/2021, IAI 19/2022 or IAI 21 /2022, available on the Authority's website), the local regime legislation recognizes a right of access to all elected officials, regardless of whether they are in the government team or in the opposition, to the information of what their local corporation has and that may be necessary for the exercise of the functions that correspond to them.

Thus, article 77.1 of the LRBRL establishes that *"all members of local corporations have the right to obtain from the Mayor or President or the Government Commission any background, data or information held by the services of the Corporation and are necessary for the development of their function"*.

For its part, article 164 of the TRLMRLC provides for the following:

*"164.1 All members of local corporations have the right to obtain from the mayor or mayoress or the president, or from the governing commission, all the background, data or information that is in the possession of the corporation's services and are necessary for the development of their function."*

*164.2 Corporation services must provide information directly to corporation members when:*

- a) Exercise delegated functions and the information refers to matters of their own responsibility.*
- b) These are matters included in the agenda of the sessions of the collegiate bodies of which they are members.*
- c) It is about access to information or documentation of the local corporation that is freely accessible to citizens.*

*164.3 In the other cases, the request for information is understood as accepted by administrative silence if a negative resolution is not issued within four days from the date of presentation of the request. In any case, the negative decision must be motivated, and can only be based on the following assumptions:*

- a) When the knowledge or dissemination of the information may violate the constitutional right to honor, personal or family privacy or one's image.*
- b) When it comes to matters affected by the general legislation on official secrets or summary secrecy.*

*(...)*

*164.6 The members of the corporation must respect the confidentiality of the information to which they have access by virtue of their position if the fact of publishing it may harm the interests of the local entity or third parties."*

In the same sense, the Municipal Organic Regulations of the City Council regulate the right to information of municipal councillors. Article 20.4, in relation to the convocation of the Plenary, provides that *"the complete documentation of the matters included in the Agenda of the Plenary must be available to the Councillors, from the moment of the convocation, in the Secretariat General of the Corporation, and can be consulted freely during office hours"*. And article 62.1.e) provides that councillors have the right to *"obtain from the Mayor and other Government Bodies all the background, data or information that are in the possession of the Corporation's services and are necessary for the development of their function, in the terms mentioned in this Regulation."*

It should be borne in mind that the elected officials participate in a public action that manifests itself in a wide range of specific matters, such as the right to audit the actions of the corporation, the control, analysis, study and information of the necessary antecedents, which have the services of the City Council, for their control task and to document themselves for the purposes of adopting decisions in the future (among others, STS of March 29, 2006). In relation to this, the STS of June 27, 1998 already stated that *"[...] To be able to carry out this supervisory and controlling function, it is necessary to know beforehand the data and background that are needed for this purpose, which implies the need to have access to all the data, antecedents and information [...] to then select those that can be useful in the fulfillment of the function entrusted to the councillors [...]"*.

In the same way, it should be noted that the local regime legislation does not require councillors that, in order to access municipal information, they must explain or justify the purpose of their request, given that the reason for their request is 'must be understood as implicit in the exercise of their functions that correspond to them as councillors (among others, STS of November 5, 1999).

However, it should be borne in mind that the regulations set out provide that although the right of access of the members of the local corporations operates on all the background, data and information that are in the possession of the services of the corporation, these must be necessary for to the development of its function. Therefore, it is relevant to take into consideration whether the information to which the councillor intends to access is necessary for the performance of his duties.

On the other hand, it should also be borne in mind that the councillors' right to information is not an absolute right. If it conflicts with other rights, it is necessary to weigh the different rights at stake, in order to decide which one should prevail and to what extent.

This has come to be recognized by the local regime legislation itself. The aforementioned article 164 of the TRLMRLC, in regulating the conditions for the exercise of the right of access to municipal information by the members of the corporations (sections 2 and 3), establishes, as a possible basis for denying the request with reasons 'information, that *"the knowledge or dissemination of the information could violate the constitutional right to honor, personal or family privacy or one's own image"* (section 3, letter a), but obviously access could also be denied- se when other fundamental rights may be affected such as the right to the protection of personal data (Article 18.4 CE).

In the case at hand, the City Council alleges that the information requested by the councilor has been provided prior to anonymization at the direction of its Data Protection Officer.

Although in the request for access that motivates the present claim, the councilor requests access to file 2022-2570 of the Local Police without further details, of the file sent by the City Council to the It follows from GAIP that the requested information would refer to the Local Police holiday quadrants, detailing the names of officers and superiors.

Point out that, according to the information available, it seems that the object of the access coincides with that of the Claim (...), in which the councilor expressly requests the vacation quadrants of members of the Local Police corresponding to the years 2021 and 2022, regarding which the IAI report 49/2022 has been issued.

Since the exercise of the councilor's right of access, which aims to access an individualized record of the holidays of the members of the Local Police, could lead to a limitation of the fundamental right to the protection of personal data, it will be necessary to determine whether it is a proportional limitation, given that, according to repeated doctrine of the Constitutional Court, the limitation of fundamental rights can only occur in a proportional way (SSTC 11/1981, 57/1994, 66/1995, 11/2006, 206/2007, others).

It is therefore necessary to examine the circumstances that come together in the particular case taking into account the intended purpose, if this information is necessary to achieve said purpose, the possible people affected and if it requires special protection.

#### IV

For the information available, the councilor requests access to the vacation calendar of the members of the Local Police for the years 2021 and 2022, individually.

By application of the principle of data minimization (article 5.1.c) RGPD), access to municipal information that includes personal data must necessarily be linked to the exercise of the functions that correspond in each case to the councilor, in the terms provided for in the local regime legislation, and must always refer only to the personal data that are strictly necessary to give a satisfactory response to the legitimate right exercised by the councillor.

According to the information available to the complaining councilor, he would not have been assigned management responsibilities in the planning of the personal resources of the Local Police or in the matter of human resources of the City Council. Therefore, the requested access must be understood as part of the functions of control and supervision of the performance of the governing bodies that the LRBR expressly attributes to councilors (article 22.2.a)).

At this point, it should be remembered that the local regime legislation does not require elected officials that, in order to access the information held by the corporation, they must explain or justify the purpose of their request, given that the reason for their

request must be understood as implicit in the exercise of said control and inspection functions.

However, interpreting the provisions of local regime legislation and the jurisprudence of the Supreme Court, in connection with the RGPD and with the need to circumscribe access to personal data within the framework of a legitimate purpose, it may be appropriate that councillors, when making the request for access to information that contains personal data, specify the purpose for which they are requesting this access and/or the terms of their request.

In the present case, the councilor does not present a motivation that justifies the interest to be satisfied by obtaining the requested information. However, given the type of information requested and the fact that it refers to two different but consecutive periods (years 2021 and 2022), it can be assumed that the request would be related to the control of municipal management in matters of planning of the services of the Local Police, with the aim, apparently, of checking the coverage of the services during these periods, but also that no irregularity or favoritism is occurring in the determination of the vacation periods that correspond to each worker .

The disclosure of the information requested on an individual basis, that is so that the working people are identified, as requested by the councilor, can have a significant impact on their privacy.

It is stated in the file that the City Council would have given the councilor the quadrants requested, albeit after anonymizing the information on the physical persons affected, that is to say, without stating the identity of the members of the Local Police or other data that could make them identifiable.

Point out that this possibility (delivering anonymized information ), which is not required in general and must be evaluated in each case, could be relevant in those cases in which, without including data that may relate to an identified natural person or identifiable (Article 4.1) RGPD), a satisfactory response can be given to the councilor's access request.

In the area of municipal action in which we find ourselves, this could be relevant if, for example, the councilor's request for access was only intended to find out the way in which the Local Police is organized or if the municipality has sufficient cash in specific periods.

However, in the present case, given the terms of the request, the intended control objective could go further and be related to the detection of any irregular action by the City Council in the approval of the holidays of members of the Local Police, in the sense that certain workers are not benefited or harmed.

For the purposes of achieving this type of control, which would require being able to correlate the decisions made in relation to each member of the Local Police throughout successive years (2021 and 2022), a valid option would be to deliver the requested information after pseudonymisation of the data .

In terms of article 4.5) of the RGPD, pseudonymization consists of *"the treatment of personal data in such a way that they can no longer be attributed to an interested party without using additional information, provided that said additional information appears separately and is subject to technical and organizational measures aimed at ensuring that personal data are not attributed to an identified or identifiable natural person"*.

Pseudonymization is also provided for in article 70.6.b ) of Decree 8/2021, of February 9, on transparency and the right of access to public information (RLTC).

Thus, in the present case, the councilor could be given the information related to the vacation quarters of the years 2021 and 2022 of the members of the Local Police by introducing a coding system that preserves the identity of the people affected (a fixed numerical code for each local police officer - not including, therefore, names and surnames or other identifying information -, known only to the City Council), so that they are not identifiable by third parties.

In this regard, note that, in the case of members of the Local Police, the use of their professional identification number (TIP) could not be considered a suitable means of pseudonymisation, given that it is a numerical code which can easily be known, without disproportionate effort, by third parties and, in the specific case, by the councilor requesting the information.

For all of this, and with the information available, it must be concluded that in the present case the councilor's right of access to pseudonymised information about the Local Police holiday quadrants for the years 2021 and 2022 must prevail.

This is without prejudice to the convenience that, at the time of handing it over, it is convenient to remind the councilor of the duty of confidentiality regarding this information imposed on him by both the local regime legislation (article 164.6 TRLMRLC) and the data protection regulations (article 5.1 .f) RGPD and article 5 LOPDGDD), so that the processing it does must always be linked to the exercise of its functions of control and supervision of municipal action.

Remember that pseudonymized data, unlike anonymized data, are for all purposes personal data (Article 4.1) RGPD), so the principles and obligations of the data protection regulations are fully applicable (recital 26 of the RGPD).

All this without prejudice to the fact that, if in view of the quadrants facilitated there is any justified circumstance, certain working people could be identified.

## **conclusion**

Data protection regulations do not prevent the councilor's access to the Local Police holiday calendars for the years 2021 and 2022, subject to pseudonymisation of personal data.

Barcelona, December 22, 2022

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