

## **Opinion in relation to the query made by a City Council regarding the limits to be applied to the information requested in relation to ongoing legal proceedings involving elected officials.**

A query formulated by a City Council on the limits to be applied to the information requested by a councilor in relation to ongoing judicial proceedings involving elected officials is presented to the Catalan Data Protection Authority .

The consultation states that they have received , "*(...) several questions pursuant to the provisions of articles 19 and 20 of the Municipal Organic Regulation (ROM), which include the request of the affected elected officials for judicial reasons*" .

As indicated , "*Given that the requested information could affect the rights of elected officials affected by legal proceedings and with the desire to guarantee the rights of both parties, it is considered appropriate to raise a query with the Catalan Data Protection Authority*" .

Having analyzed the consultation, given the current applicable regulations and in accordance with the report of the Legal Counsel, I issue the following opinion:

I

(...)

II

First of all, it should be made clear that this opinion will only analyze the limits derived from the protection of personal data in relation to the consultation carried out, relating to requests for access by municipal elected officials, to the information on other elected officials affected by judicial causes.

It is necessary to start from the basis that, according to article 4.1) of Regulation (EU) 2016/679, of April 27, general data protection (RGPD), personal data are "*all information about an identified or identifiable natural person ("the interested party"); an identifiable natural person will be considered any person whose identity can be determined , directly or indirectly , in particular by means of an identifier, como por ejemplo a number, an identification number , location data , an online identifier or one or several elements proper to the physical, physiological , genetic , psychic, economic , cultural or social identity of said person;*

The information on the elected officials affected by legal cases to the extent that they reveal their personal data is subject to the principles and guarantees of the data protection regulations (RGPD, and Organic Law 3/2018, of December 5, of Protection of Personal Data and Guarantee of Digital Rights (LOPDGDD)).

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) of this article 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.

Article 6.3 of the RGPD establishes that the basis of the treatment indicated in this article 6.1.c) must be established by the Law of the European Union or by the law of the Member States that applies to the person responsible for the treatment.

This reference to the legitimate basis established in accordance with the internal law of the Member States requires that the development rule, when dealing with the protection of personal data of a fundamental right, has the status of law (Article 53 CE), as recognized by the article 8 of the LOPDGDD.

For its part, article 86 of the RGPD provides that *"the data personnel of official documents in possession of some public authority or body public or a private entity to carry out a mission in interest public may be communicated by said authority , organism or entity in accordance with the Law of the Union or of the States members that apply them in order to reconcile public access to official documents with the right to data protection personal under this Regulation . "*

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

The second section of the first additional provision of the LTC provides 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 ."*

Given that the case we are dealing with refers to the access of a councilor to municipal information, the local regime regulations apply, fundamentally, Law 7/1985, of April 2, regulating the bases of the regime local (LRBRL) and the Consolidated Text of the Municipal and Local Regime Law of Catalonia, approved by Legislative Decree 2/2003, of April 28 (TRLMRLC), without prejudice to the fact that, in everything not provided for in these regulations, s apply additionally the LTC.

### III

As this Authority has done on previous occasions (among others, reports IAI 48/2019, IAI 52/2019, IAI 56/2019, IAI 3/2020, IAI 41/2020 or CNS 1/2023) that can consult on the website <http://apdcat.cat>), 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 . As also mentioned in these reports, the right of access to municipal information belongs to councilors and not to the municipal group.

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"*.

In the same sense, the TRLMRLC pronounces itself, by providing, in its article 164.1, that *"all members of local corporations have the right to obtain (...) all the background, data or information that are in the possession of the services of the corporation and are necessary for the development of its function."*

The right to obtain all the antecedents, data or information that are in the possession of the services of the local corporation and that are necessary for the exercise of their functions, in accordance with repeated jurisprudence on this matter (SSTS September 27 of 2002, June 15, 2009, among others), is part of the fundamental right to political participation enshrined in Article 23.1 of the EC.

In this sense, the recent judgment of the Supreme Court 167/2022 of February 10 recalls *"(...) the core basic law \_ fundamental political participation inherent in the position of councillor is integrated by the right to obtain how many background , data or information are held by the Corporation 's services and are necessary for the development of its function " .*

The elected officials take part 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 that have the services of the City Council, for its control task and to document itself for the purposes of adopting decisions in the future (among others, STS of March 29, 2006) or STS 167/2022, mentioned, which in this sense remember:

*"The purpose of the councilor 's right of access to information is the normal exercise of his duties with due diligence knowledge of cause, but yes add none another complement that exceeds the end of being fully informed of everything contained in the various services municipalities , as indicated by the aforementioned STS of July 19 , 1989 (RJ 1989, 5650) ( appeal appeal 303/1989) by stating that " Indicated the core substantial part of the right that corresponds to councillors , in relation to the topic at hand we observe that the same it supposes a faculty to access the documentation and information existing , so su activity in the City Hall can develop properly \_ knowledge of cause, but yes add none another complement that exceeds the end of being able to be fully informed of everything contained in the various services municipal " .*

*It was said in STS of November 8 , 1998 [sic] (RJ 1988, 8655) (ROJ: STS 7847/1988 - ECLI:ES:TS:1988:7847), and now we repeat , that effective participation in public action is manifested in a wide range of issues concrete among which it is worth highlighting the right to audit the actions municipal and to the control, analysis , study and information of the antecedents necessary , working in the services municipal , both for this work of control and for documentation with a view to decisions to be adopted in the future .*

*What is certain is that none of the sentences dictated , of which the previous ones are merely ejemplificativas , has considered valid than the right to obtain information it can be*

*conditional on the data you want obtain they have to be related to those that will be discussed in the Plenary Sessions municipal and, therefore , less even with those that are going to be celebrated in a certain month, which is what the contested sentence admits to deny the violation of the right fundamental denounced and which was imputed to the Castañeda City Council (Cantabria).*

*On the contrary, the STS of May 28 , 1997 (RJ 1997, 4286) (ROJ: STS 3745/1997 - ECLI:ES:TS:1997:3745), issued in cassation appeal 4383/1994, stated that " if It is true that the Law links the right to information of the Councilors to whom they belong use keep in mind the development of your function , although this is not limited to the study of the issues that appear on the agenda of the government bodies nor from then the examination of the documentation that it deems necessary to prepare its documents is left to it interventions or to ensure that they are introduced new issues for debate ".*

It should be noted that local legislation and the jurisprudence of the Supreme Court (among others, STS of November 5, 1999) do not require councilors that, in order to access municipal information, they must explain or substantiate the purpose of their request, given that the reason for their request must be understood as implicit in the exercise of their functions that correspond to them as councilors, namely, the control and supervision of the governing bodies of the corporation, as explained in article 22.2.a) of the LRBRL.

On the other hand, it must be borne in mind that although the right of access of the members of the local corporations operates on all the antecedents, data and information that are in the possession of the services of the corporation, these must be necessary for the development of the its function Therefore, it is important to assess whether the information to which the councilor intends to access is necessary for the performance of his duties.

In this regard, it should be borne in mind that councilors' 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 is recognized by the local legislation itself, in regulating the conditions for the exercise of the right of access to municipal information by the members of the corporations (art. 164 TRLMRLC sections 2 and 3), which establishes, as a possible basis for deny with reason the request for information, that *"the knowledge or dissemination of the information may 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 when other fundamental rights may be affected such as the right to the protection of personal data (Article 18.4 EC).

Therefore, in the case we are concerned with, the fundamental right to the protection of personal data could be a limit to access to the requested information. However, according to repeated doctrine of the Constitutional Court, the limitation of fundamental rights can only occur in a proportionate manner (SSTC 11/1981, 57/1994, 66/1995, 11/2006, 206/2007), among others . For this reason, it will be necessary to carry out a weighting of the rights at stake taking into consideration the specific circumstances of the case.

In this weighting, the specific circumstances must be taken into account in such a way that the limit to the councilors' right of access to the requested information could be given, for

example, if the relevance that the identification of the specific people about whom information is requested for the exercise of the functions attributed to them as elected officials.

#### IV

As indicated in the consultation, the request for access to the information is made by a councilor and the information refers to *"elected officials affected by judicial causes"*. It should be emphasized that, beyond this description, there is no other information available relating to the aforementioned legal cases, the people affected, or the specific functions of the requesting councilor that would allow a weighting of the rights in game to determine if a possible limitation of the councilor's right of access, based on the protection of the personal data of the councilors affected, would be proportionate. In any case, and in general, the following considerations can be made.

In the case of completed judicial proceedings, in respect of which the city council has the judgments, it is necessary to take into account the regulation contained in the judicial regulations already establishing that access to the text of the judgments can only be made with the prior anonymization of personal data. Thus, Organic Law 6/1985, of July 1, of the Judiciary, in article 235, establishes that *"Access to resolutions judicial, or certain extremes of the same, or others performances proceedings, by those who are not parties to the proceedings and claim an interest legitimate and direct, podra be carried out beforehand dissociation, anonymization or other measure to protect the personal data that the same contuvieren y con pleno respect for the right to privacy, the rights of persons who require a special duty of protection or the guarantee of the anonymity of victims or victims, when proceed."*

Article 235 ter of the Organic Law of the Judiciary, lists the crimes in which access to the personal data contained in the final judgments is public. Therefore, in cases where the city council has a final conviction against a councilor for any of these crimes, it may provide the requested information.

Likewise, it must be taken into consideration that the LTC itself considers that certain judicial decisions may have public relevance and for this reason foresees their publication. Thus, within the obligations of active publicity, article 10.1.h) LTC requires administrations to make public *"Administrative and judicial resolutions that may have public relevance and final judicial resolutions that affect the persons obliged to comply with this law and draft regulations."* However, section 3 of the same article 10 of the LTC establishes that *"the information must not include personal data or references"*. In other words, the publication of judicial decisions with public significance must be done anonymously.

With respect to access to the personal data of these judgments by municipal councilors, it is worth recalling the considerations made by this Authority in Opinion CNS 23/2021, in which it was stated that:

*"This principle implies, on the one hand, that access to municipal information that includes certain personal data, without the consent of those affected, must necessarily be linked to the exercise of the functions that correspond in each case to the councilor of whatever it is, in the terms provided for in the local regime legislation."*

*The application of the principle of data minimization implies that the processing of essential data to fulfill the purpose is justified. Therefore, this entails carrying out, in each specific case, a weighting exercise in order to evaluate the implications that the exercise of the councilors' right of access to information may have for the rights of the people affected.*

*The Authority points out, as elements to be considered when carrying out this weighting - which corresponds to the City Council, as responsible for the treatment (Article 4.7) RGPD) - the personal data contained in the information or documentation requested, the intended purpose, the terms in which the request is made, the possible subjects affected or other circumstances of the specific case.*

*anonymized form, that is to say, without reference to data, should not be ruled out personal data, if this possibility does not detract from the legitimate purpose provided for by the LRBRL and the rest of the aforementioned local regulations.*

*This possibility, which is not required in general and will have to be assessed in each case, could be relevant in those cases in which a satisfactory response can be given to the councilors' request without including specific data that can identify or make identifiable natural persons (consideration 26 RGPD).*

*In any case, the councilor requesting information must be granted, at least, the same guarantees regarding access to information as other citizens who do not have this condition of elected office. Therefore, in the case subject of the consultation when the request for access to the judgments is made by a municipal councilor, they must be recognized as having the right to access the data of judges, magistrates, administrative lawyers of justice and of public employees or positions that have intervened in the procedure of what is the cause of the sentence, as we have already explained above, with regard to the rest of the citizens.*

***With respect to the rest of the information that contains personal data, it will be necessary to weigh the different rights at stake in order to assess the implications that the exercise of the right of access to councilors' information may have, in the right to protection of the personal data of the affected persons and, ultimately, in order to decide which should prevail and to what extent.***

*In accordance with article 19.1 of Law 7/1985, of April 2, regulating the bases of the local regime (LRBRL), the government and municipal administration corresponds to the City Council, - integrated by mayor and councilors-. Councilors are part of the City Council, and as such they are not properly a third party "stranger" to the relationship between the natural persons holding the data and the City Council itself and will be able to access the information that it deals with these people at all times that this is necessary for the development of the functions and powers attributed to them.*

*It should be borne in mind that the positions elected as a result of their integration into the municipal plenum participate in a public action that manifests itself in a wide range of specific matters derived from the functions attributed to this body in article 22 of LRBRL, among which, the control and supervision of governing bodies, the determination of own resources of a tax nature; the approval and modification of the budgets, and the disposition of expenses in matters of their competence and the approval of the accounts,*

*as well as the exercise of judicial and administrative actions and the defense of the corporation, among others.*

***In the exercise of these functions entrusted to them, it cannot be ruled out that it may be necessary for them to access information relating to the other party litigating or even to data of third parties that may appear in the judgments requested, especially when it comes to judgments in relation to acts adopted by bodies of which they are part, or in respect of which the law foresees that they must be informed (mayoral decrees).***

*It should be noted that local regime legislation and the jurisprudence of the Supreme Court show that it is not necessary to require councilors to explain or substantiate the purpose of their request, in order to access municipal information, since the reason for their request must be understood as implicit in the exercise of their functions as councilors, who are responsible for the control and supervision of the governing bodies of the corporation, as explained in the article 22.2 a) of the LRBRL.*

*Now, 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 could be convenient **that the councilors, when making the request for access to information that contains personal data, in this case to a certain sentence, specify in relation to the purpose for which they are requesting this access and/or the terms of their sole request, in order to facilitate the weighting that the City Council, as responsible, must carry out to assess the relevance of access to certain personal data, based on the aforementioned principle of data minimization.***

v

In the case of ongoing legal proceedings, the first question that can be taken into consideration is whether or not the city council is a party to the corresponding legal proceedings.

In the event that the City Council is not a party in person in the case, it would not, in principle, have information about the instruction of those judicial procedures. In this case, it is considered that any request for access should be addressed to the corresponding Court or Courts of Inquiry, which would be the relevant bodies to assess the request for access, and not the City Council.

On the other hand, in the event that the City Council was one of the parties in the judicial proceedings, as long as the secrecy of the summary has not been decreed, it would be necessary to start from the premise that the City Council would have the information contained in those proceedings judicial

In the event that the information was related to ongoing criminal proceedings, it should be taken into account that article 164.3.b) of the TRLMRLC, provides as a reason to justify the denial of access to the information: "When it comes to *matters affected by the general legislation on official secrets or **summary secrecy***".

The legal regime for the instruction of the summary is regulated in articles 299 et seq. of the Law of Criminal Procedure ( LECrim ). During the investigative phase, the proceedings of the summary are reserved and do not have a public character until the oral trial opens (art. 301 LECrim ). At this stage, the proceedings are only public for the parties in person - who can be aware of the proceedings and intervene in the corresponding proceedings -, with the exceptional possibility that the investigating judge, ex officio, at the proposal of the Prosecutor or any of the parties may declare it totally or partially secret for the parties (art. 302 LECrim ).

In any case, it must be noted that even in the event that certain information was requested that was part of a judicial procedure in respect of which the secrecy of the summary had been decreed, this situation would only affect the documents that are strictly part of the summary, since there may be information *that was public before the summary* , in this sense it is necessary to take into account STC 13/1985 according to which "the secrecy of the summary would only affect if *the request for information was documents that form part of the summary itself and only from it* , but this circumstance is not predicable of those about which *it is requested information because said documentation pre-existence in the summary and from luego* , have or not been incorporated into the same , *su public nature is prior, therefore* , *the partial refusal contained in the act is not in accordance with law whose constitutionality is questioned* "

According to the LRBRL, the municipal government and administration corresponds to the City Council, which is made up of the mayor and councillors. Therefore, for procedural purposes, if the City Council is a party to the judicial process, the councillors themselves, as an integral part of the council, would not strictly be third parties unrelated to the judicial cause in question.

In this context and based on the premise that councillors must have access to municipal information whenever the specific functions they carry out so require, a weighting should be done on the need to know the requested information from the perspective of the principles established by the regulations for the protection of personal data and, in particular, of the principle of minimization, according to which personal data must be adequate, relevant and limited to what is necessary for the purposes for which they are processed (article 5.1.c ) RGPD).

In this sense, it must be remembered that the right of access is not set up as a uniform and indistinct right for all councillors, but rather responds to the specific functions of each one of them.

For these purposes, as has been explained, the councillor is not required to explain or justify the purpose of his request, since the reason for his request must be understood as implicit in the exercise of their functions as councillors, to whom the control and supervision of the governing bodies of the corporation corresponds (article 22.2.a) of the LRBRL).

However, as has also been explained, interpreting the provisions of the TRLMRLC and the jurisprudence analyzed, in connection with the data protection regulations and with the need to circumscribe the communication of data within the framework of a legitimate purpose, if the councillors, when making the request for information that contains personal data, specify the need for the information in relation to the development of the functions attributed to them by the applicable regulations, it would be an element that would play in favor of access to the information



This specification could facilitate the weighting that the City Council, as responsible for the processing of personal data, must carry out to assess the appropriateness of access to personal data. In cases such as the one raised in the consultation, in which the information refers to issues that are before the court, and given the effect that this may have on the rights of the persons affected (the mere fact of having the status of person investigated - and even the fact of having to testify as a witness in a criminal case - has a significant impact on the personal rights of those affected) this realization, in the sense of linking access in relation to the councillor's own functions within the council are particularly relevant.

In short, it may be particularly relevant that the councillor who requests information has functions directly related to the representation and defense of the corporation, with the legal defense of the case, or in another matter directly related to ongoing legal proceedings, to give a few examples. Thus, the exercise of functions directly related to the substantive issues of the judicial proceedings is an element that, as has been explained, in case of concurrence, can justify access to information by the councillor.

However, access could also be justified by the exercise of the general functions attributed to the plenary relating to the control and supervision of governing bodies (Article 52.2.a) TRLMRLC). In these cases, access could be justified in the cases in which the judicial processes are directly related to the professional field and linked to the functions of the accused or investigated in the municipal government and not linked to matters of the private field or staff of these.

## VI

Finally, it should be remembered that whenever the councillors' access to personal data is carried out due to the functions entrusted to them as such, they must be governed, apart from the duty of reservation imposed by the local regulations (article 164.6 TRLMRLC), by the principle of purpose limitation (article 5.1.b)) and by the principle of integrity and confidentiality (article 5.1.f)) established in the RGPD.

Thus, article 164.6 of the TRLMRLC provides that "*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 could harm the interests of the local entity or third parties.*"

Likewise, in accordance with the principle of purpose limitation (Article 5.1.b) RGPD), any use of personal information after access by councillors should also be based on a legitimate purpose. Otherwise, we could be faced with a treatment not adjusted to the RGPD, even though the access to personal data was initially considered legitimate.

In addition, this purpose in which the subsequent processing of personal data by councillors could be framed should not be incompatible with that which at the time would have justified the access, that is the exercise of the legally attributed functions .

For its part, in accordance with the principle of integrity and confidentiality (Article 5.1.f)) RGPD "*the data personal they will be treated in such a way as to guarantee adequate data security personal , including the protection against unauthorized or illegal treatment and against it loss , destruction or accidental damage , through the application of measures technical or organizational appropriate .*"

## **conclusion**

The local regime regulations and extensive jurisprudence regulate and specify the right of councilors to obtain all the antecedents, data or information that are in the possession of the services of the local corporation and that are necessary for the exercise of their functions.

In the event that the information requested contains personal data, as in the case raised in the consultation, the councilor's access could be justified for the exercise of the general functions attributed to the full body of the corporation relating to the control and inspection of the governing bodies, in the cases in which the judicial processes are related to matters relating to the professional field and linked to the functions in the municipal government of the accused or investigated and not linked to matters of the private or personal field of these.

Access could also be justified, in cases where the councilor has functions directly related to the control of the representation and defense of the corporation, with the legal defense of the case, or in another matter directly related to the ongoing legal proceedings.

All this, without prejudice to the result of the weighting of the rights at stake, and taking into account the circumstances of each specific case, it is considered necessary to preserve the right to data protection of the affected persons.

Barcelona, May 31, 2023