Autoritat Catalana de Protecció de Dades

Opinion in relation to the query formulated by a University on the access of the social part of the Negotiating Commission of the working conditions of the Equality Plan to the personal data of the remuneration register regulated by the Workers' Statute.

A letter from the data protection delegate of a University is presented to the Catalan Data Protection Authority, in which it raises whether the social part of the Negotiating Commission for the working conditions of the University's Equality Plan can have access to the personal data that the University processes in order to draw up the remuneration register regulated by article 28.2 of the Workers' Statute.

The consultation also asks about the technical and organizational measures to be adopted so that access, if relevant, complies with data protection regulations.

The consultation is accompanied by a copy of the operating regulations of the Negotiating Commission, a copy of the University's Equality Plan, among other information related to the consultation.

After analyzing the consultation and considering the current applicable regulations, and in accordance with the report of the Legal Counsel, the following is ruled:

I

(...)

II

According to the Operating Regulations of the Negotiating Commission, which accompanies the consultation, this is a joint Commission made up of institutional and trade union representation, and has a mixed nature (art. 2.1). The purpose of the Commission is to negotiate working conditions, which will be approved by the Governing Council at the proposal of the Presidency, integrating into the University's Equality Plan (art. 2.2).

According to the consultation, the social part of the Commission would have requested to have access to the personal data used to create the remuneration register regulated by article 28.2 of Royal Legislative Decree 2/2015, of October 23, which approves the revised text of the Workers' Statute Law (ET), according to which:

> *" 2. The employer is obliged to keep a register with the average values of the salaries, salary supplements and extra-salary benefits of its workforce,*

disaggregated by sex and distributed by professional groups, professional categories or jobs of equal or equal value .

Working persons have the right to access, through the legal representation of the workers in the company, the salary register of their company."

The consultation explains that in response to this request, the University would have explained that, in accordance with the applicable regulations, the social party could have access to the anonymized data of the remuneration register but not to the personal data used for its elaboration.

The consultation explains that the social part of the Commission would have reiterated its request to have access to all the data that has been used to carry out the various studies, including the salary register, and that given the uniqueness of many jobs allows to identify the people occupying them.

For all this, the consultation formulates the following questions:

"a) The social part of the Negotiating Commission for the working conditions of the University's Equality Plan ... may have access to the personal data that the University ... processes to prepare the remuneration register regulated by article 28.2 of the Workers' Statute?

b) If this is the case, what technical and organizational measures should be adopted in order for access to comply with personal data protection regulations?"

III

Remuneration information corresponding to a job, associated with the natural person who occupies it, so that this is identified or identifiable, directly or indirectly, without disproportionate efforts, is considered personal data and, therefore, its treatment must comply with the principles and guarantees established by Regulation 2016/679, of April 27, 2016, regarding the protection of natural persons with regard to the processing of personal data and the free movement of such data and which repeals Directive 95/46/EC (RGPD).

Article 4.2) of the RGPD defines data processing as *"any operation or set of operations carried out on personal data or sets of personal data, whether 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, such as, in this case, the communication of retributive data) must be lawful (Article 5.1.a)) and, in this sense, establishes a system for legitimizing data processing which is based on the need for one of the legal bases established in article 6.1 of the same RGPD to apply.

Among these, it is interesting to highlight in the present case the one established in section c), regarding that the treatment will be lawful when *"it is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment."*

T as follows from article 6.3 of the RGPD and expressly includes article 8 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD), the data processing can only be considered based on the legal basis of article 6.1.c) of the aforementioned RGPD when this is established by a rule with the rank of law.

IV

This Authority has examined the concurrence of a legal provision that legitimizes access to remuneration information of public employees by their representative bodies, among others, in reports IAI 10/2022, IAI 81/2021, IAI 44 /2021 or IAI 42/2021, available on the website www.apdcat.cat , on the provisions of Law 19/2014, of December 29, on transparency, access to public information and good governance (LTC), which recognizes the the right of people to access *"public information"* (article 18).

Thus, the Authority agrees that the representative bodies of public workers have a specific regime of right of access to information, so this regime is the one that should be applied as a matter of priority, without prejudice to the application additional to the access regime provided for in the transparency legislation (additional provision 1a, section 2, LTC).

Given the terms of the consultation, it should be borne in mind that article 64 of the ET attributes to the works committee, and by extension also to the staff representatives (article 62.2 ET), the right to be informed "(*...) on those issues that may affect the workers, as well as on the situation of the company and the evolution of employment in it, in the terms provided for in this article."*

Adding that information is understood to mean *"the transmission of data by the employer to the company committee, so that it has knowledge of a certain issue and can proceed to its examination"* (article 64.1 ET). And section 7 also attributes to the representative bodies the function, among others, *of "vigilance in the fulfillment of the rules in force in labor matters, of Social Security and employment, as well as the rest of the agreements, conditions and uses of company in force, formulating, as the case may be, the appropriate legal actions before the employer and the competent bodies or courts."*

As this Authority has decided on previous occasions (in addition to the aforementioned reports, in opinions CNS 41/2018 or CNS 28/2017), aside from the personal data that may be included in the basic copy of the contracts and that may be known by the Works Council in the legally established terms (articles 8.3.a) and 64.4 ET), in general, the provisions of the ET translate into a right of the Works Committee to receive information on the various issues which are broken down in the precepts of the ET, without this rule clearly stipulating that this information must be linked, individually, to each worker.

For the relevant purposes, the right to obtain information on the situation of the company and the evolution of employment in the company - or on the evolution of remuneration - which the regulations recognize in the representative bodies of workers does not it is equivalent to knowing the details of the remuneration of all public workers. Delivering this information, individually and associated with all workers, would go beyond the ET's forecasts regarding the information that must be communicated to said representative bodies.

In view of this, the need to also take into account the provisions of the LTC and the application, in particular, of article 24 of the LTC is made clear in said reports. Thus, in the cases examined, it has been considered that a reasoned weighting should be carried out between the public interest in the disclosure of remuneration information and the rights of the workers affected, in the terms of article 24.2 of the 'LTC.

In this sense, it should be noted that this Authority has been considering that, in view of the provisions of article 11.1 b) of the LTC and article 31 of Decree 8/2021, of February 9, on transparency and the right of access to public information (RLTC), workers' representatives must be able to access the remunerations, compensations and per diems received by senior officials of the Public Administration and by the management staff of public bodies, companies, foundations and consortia, as the case may be, individually for each job and for any remuneration concept.

Criterion that this Authority has been making extensive with respect to personnel who occupy positions of trust, command, or special responsibility within the organization, with management functions, singular positions of free appointment, contingent personnel or positions that involve a high level remuneration or a certain margin of discretion regarding its provision. That is, positions that, due to their uniqueness and also due to the remuneration level that they usually have associated, or due to the fact that they are freely appointed, the knowledge of their remuneration may be relevant for the control of the use of public resources, for the which the result of the weighting would be in these cases the prevalence of the public interest in its disclosure and, consequently, the possibility of accessing the individualized retributive information on said positions, even identifying the people affected .

With regard to the rest of the workers in whom these circumstances do not apply, the Authority has considered that, in general, the evaluation of the use of public resources can be done by having the information on remuneration grouped together by categories or according to the different types of workplace and not individually. In this regard, it has been pointed out that the disclosure of the income of a natural person facilitates the obtaining of an economic profile of that person, which may end up causing him harm, both in the professional field and in front of 'financial, social institutions, etc.

In some specific cases, however, it has been considered that, in order to achieve the surveillance objective intended by the representative bodies, the information could be given to them in a pseudonymized manner (article 4.5 RGPD and article 70.6.b) RLTC), this is replacing the first and last name by a code assigned to each of the workers, as long as they are jobs that have a sufficiently large number of workers to prevent their re-identification. On this issue, we refer to the aforementioned IAI Report 42/2021.

In other cases, it may even be necessary to finally have the identification of a specific worker, for example, if there are indications of any irregularity in which the identity of the affected worker may be relevant, without prejudice to the previous procedure hearing to the affected person (article 31 LTC). On this issue we refer to the CNS opinion 46/2019, mentioned.

Therefore, as can be seen from the considerations made so far, with regard to the possibility of accessing certain remuneration information of public employees by their representative bodies, it will always be necessary to be in the circumstances of the specific case.

v

It is necessary to take into account the provisions of Organic Law 3/2007, of March 22, for the effective equality of women and men.

Article 45 of this LO 3/2007, relating to the preparation and application of equality plans, provides that *"companies are obliged to respect equal treatment and opportunities in the workplace and, with this purpose , must adopt measures aimed at avoiding any type of labor discrimination between women and men, measures that must be negotiated, and where appropriate agreed, with the legal representatives of the workers in the manner determined in the labor legislation" (paragraph 1*) and adds that *"in the case of companies with fifty or more workers, the equality measures referred to in the previous section must be directed to the development and application of an equality plan, with the scope and content established in this chapter, which must also be subject to negotiation in the manner determined in the labor legislation"* (section 2).

Article 46 of LO 3/2007 regulates the content of companies' equality plans, in the following sense:

> *"1. (...)*
> *2. The equality plans will contain an ordered set of evaluable measures aimed at removing the obstacles that prevent or hinder the effective equality of women and men. In advance, a* ***negotiated diagnosis will be drawn up, as the case may be, with the legal representation of the workers*** *, which will contain at least the following matters:*
> *a) Selection and recruitment process.*
> *b) Professional classification.*
> *c) Training.*
> *d) Professional promotion.*
> *e) Working conditions,* ***including the wage audit*** *between women and men.*
> *f) Responsible exercise of personal, family and work life rights.*
> *g) Female underrepresentation.*
> *h)* ***Retributions*** *.*
> *i) Prevention of sexual harassment and because of sex.*
>
> ***The preparation*** *of the diagnosis will be carried out within* ***the Negotiating Commission*** *of the Equality Plan, for which* ***the management of the company***

will provide all the data and information necessary to prepare it in relation to the matters listed in this section, as well as the data of the Registry *regulated in article 28, section 2 of the Estatuto de los Trabajadores.*

3. (...).”

Point out that in the negotiating Commission of the Equality Plan, referred to in this article 46.2, the company's representation and the workers' representation must participate equally (article 5.1 of Royal Decree 901/2020, of 13 October, which regulates equality plans and their registration and modifies Royal Decree 713/2010, of 28 May, on registration and deposit of collective labor agreements and agreements).

Therefore, in accordance with article 46.2 of LO 3/2007, the members of the negotiating committee of the entity's equality plan - and therefore also the representatives of the workers who are part of it - have the right to access all that information that, in relation to the matters listed in this article, is necessary to carry out the diagnosis of the situation prior to the preparation of the Equality Plan.

This would include certain retributive information available to the University, without these legal provisions implying that said information must be provided on an individual basis. In fact, to achieve this diagnostic purpose, it would not be necessary to have personal data of working people (Article 5.1.c) RGPD).

This article of LO 3/2007 expressly mentions the delivery of data from the Register regulated in article 28.2 of the ET, known as the Payroll Register, to which the query refers, according to which:

" 2. The employer is obliged to keep a register with ***the average values*** *of the salaries, salary supplements and extra-salary benefits of its workforce,* ***disaggregated*** *by sex and* ***distributed*** *by professional groups, professional categories or jobs of equal or equal value .*

Working persons have the right to access, through the legal representation of the workers in the company, the salary register of their company."

Article 5 of Royal Decree 902/2020, of 13 October, on equal pay between women and men, specifies that this Remuneration Register must cover the entire workforce of the company, including managerial staff and senior positions (section 1).

And, in relation to the *"average values"* and the level of aggregation at which the remuneration information must be included in the Register , it states that *"for these purposes, they must be established in the remuneration register of each company, conveniently broken down by sex, the arithmetic mean and the median of what is actually perceived by each of these concepts in each professional group, professional category, level, position or any other applicable classification system. In turn, this information must be disaggregated according to the nature of the remuneration, including base salary, each of the supplements and each of the extra-salary payments, specifying each payment separately.* (section 2).

According to article 7.1 of RD 902/2020, relating to the remuneration audit, referred to in the applicant's letter, which accompanies the consultation:

"1. Companies that draw up an equality plan must include one remuneration audit, in accordance with article 46.2.e) of Organic Law 3/2007, of March 22, for the effective equality of women and men, prior to the negotiation required by said equality plans.
The purpose of the remuneration audit is to obtain the necessary information to verify whether the company's remuneration system, in a transversal and complete manner, complies with the effective application of the principle of equality between women and men in terms of remuneration. Likewise, it must allow defining the needs to avoid, correct and prevent existing obstacles and difficulties or that could occur in order to guarantee equal pay, and ensure the transparency and monitoring of said pay system."

In view of these forecasts, although the representatives of the workers who are part of the Negotiating Commission of the Equality Plan have the right to access the information on the wages contained in the Remuneration Register, it must be taken into consideration that it is of information that, a priori, would not be considered personal data (Article 4.1) RGPD), given that this Register does not have to include the salary of each working person (Article 26 ET) but only the "average values" *of* the salaries, salary supplements and extra-salary perceptions of the entity's workforce, disaggregated by sex and distributed by, in this case, professional groups (article 28.2 ET).

Therefore, it can be said that the representative members of the Commission, for the purposes of assessing the salary audit that has been carried out as part of the diagnosis of the remuneration situation of the entity, must not access the full salaries of all the company's employees, individually, but only for aggregated information.

However, we cannot ignore the fact that this information could become personal data regarding those professional categories or groups with a small number of workers, given that in these cases they would be perfectly identifiable by mere deduction by those who have access in the said Remuneration Register.

This question is mentioned in the same consultation, which refers to the fact that *"given the singularity of many workplaces, it makes it possible to identify the people occupying them (...)."*

It is certainly so, but this is an inevitable consequence of the fact that the examined application regulations provide that the remuneration information that must be included in the Remuneration Register must necessarily be grouped by professional groups, professional categories or equal jobs or of equal value

There is no record of what these professional categories or singular positions would be in the case raised. Point out that in the case that they correspond to the management staff of the entity or to other people who hold positions of responsibility or high retributive level, the impact on their privacy derived from an eventual disclosure of the salary they perceive would be minor, bearing in mind that, as this Authority has said and explained at length, it is information that, for purposes of transparency, could be known not only by the workers' representative bodies but even by any citizen.

In any case, taking into account that the request is made by representatives of the workers who are part of the Negotiating Commission of the Equality Plan; that the applicable sectoral legislation expressly recognizes the possibility of accessing all the information they require for the diagnosis of the entity's remuneration situation; that the information in the Remuneration Register is fundamental information in this regard, it can be concluded that the members of the University Workers' Committee who are part of the Negotiating Commission of the Equality Plan must be able to access the personal information contained in the Register remuneration, which must be adjusted to the terms of article 28.2 of the ET, despite having professional categories with a small number of workers, or with unique positions, so that the affected person can be identified.

For all the above, and taking into account the considerations that will be made below regarding the application of the principles and guarantees of data protection to the case at hand, it can be concluded that the weighting of conflicting interests should lead to the present case to admit the possibility of knowing this information from the Remuneration Register, even though the affected persons may be identifiable.

VI

Having said that, we refer below to the second question posed:

"b) If this is the case, what technical and organizational measures should be adopted in order for access to comply with personal data protection regulations?"

It is necessary to start from the basis that the University is responsible (art. 4.7 RGPD) for the processing of data it has for the fulfillment of its functions, among others, of the personal data relating to its staff, which may be subject to treatment in relation to the functions of the Negotiating Commission to which the query refers, in the terms that follow from the applicable regulations.

From the point of view of data protection, the University, as data controller, has the general task of ensuring that the data processing carried out through its information systems is in line with the data protection regulations, and must be able to demonstrate this compliance, in application of the principle of proactive responsibility (article 5.2 RGPD).

This means, basically, that the person in charge must comply with the principles and guarantees of the data protection regulations, in all phases of data processing (art. 4.2 RGPD), specifically, in the communication of data, in this case, to the members of the Commission.

Specifically, and given the terms of the question asked, we remember that according to article 5.1.f) of the RGPD the data must be:

> *"f) processed in such a way as to guarantee adequate security of personal data, including protection against unauthorized or illegal processing and against*

accidental loss, destruction or damage, through the application of appropriate technical or organizational measures ("integrity and confidentiality")."

At the outset, clarify that the technical and organizational measures to which the query refers, that the University must implement with respect to the processing of personal data for which it is responsible, will be those that correspond to apply given the necessary and prior analysis of risks required by the regulations (art. 32 RGPD), not already in relation to possible access or communication by the Commission, but in any phase of the processing of these or other personal data for which it is responsible.

Having said that, and for the purposes of the query formulated, in the present case it must be taken into account that the duty of confidentiality applies with respect to the personal information to which access is given, not only due to the imposition of data protection regulations (art. 5.1.f) cited), but also of the applicable sectoral regulations.

Specifically, the regulations require the members of the Negotiating Commission to respect the information obtained (Article 5.8 RD 901/2020 and Article 4 of the Operating Regulations of the University's Negotiating Commission, according to which: "The members of the CN *must negotiate with full respect for the principles of confidentiality and professional secrecy, without prejudice to the duty of information with workers").*

Therefore, the treatment of the information provided by the University to the members of the Negotiating Commission, which it does, must always be linked to the exercise of its functions, not being able to use it outside the strict scope of the Commission or for other purposes, given that personal data must be collected for specific, explicit and legitimate purposes, and will not be subsequently processed in a manner incompatible with these purposes (art. 5.1.b) RGPD).

For all the above, the following are done:

Conclusions

The access of the representative bodies of public workers to the remuneration information of these people in an individualized way will be conditioned by the applicable regulatory provisions and the concurrent circumstances in the specific case.

Having examined the regulations governing Equality Plans in companies, it can be said that the members of the University Workers' Committee who are part of the Negotiating Commission of the Equality Plan must be able to access the information in the Remuneration Register, which must be adjusted to the terms of article 28.2 of the ET, despite having professional categories with a small number of workers , excluding those obliged to respect the confidentiality of the information obtained, as well as the principle of purpose .

The technical and organizational measures that the University must implement with respect to the processing of data for which it is responsible, will be those that correspond to apply given the necessary and prior risk analysis required by the regulations (art. 32 RGPD), at any stage of the treatment. This, without prejudice to the

necessary compliance with the rest of the principles and guarantees of the data protection regulations.

Barcelona, May 5, 2023