

Opinion in relation to the query made by a City Council regarding the request for access to the tests of a selective process

A letter from a City Council is presented to the Catalan Data Protection Authority, in which it is considered whether a copy of the theoretical and practical exams with solutions and correction criteria, proposed in 2019 for the creation of a cultural technician job board.

Adds the query that the person requesting the public information is not part of the City Council's staff, nor is he a union representative or a representative of the workers, nor did he participate in the selection process to which his request refers .

Having analyzed the query, in view of the current applicable regulations, and in accordance with the report of the Legal Adviser, I issue the following opinion.

I

(...)

II

The City Council states in the consultation that it has received a request for access to public information in relation to a selective process carried out in 2019 in the following terms:

*"Proof request to Human Resources. Pursuant to Law 19/2014 on transparency, access to information and good governance, I request **a copy of the exams** , theoretical and practical with solutions and correction criteria, **proposed in 2019** for the technician job board of culture."*

The City Council requests that this Authority issue an opinion in which it assesses, according to the terms of the consultation, the possibility of being able to provide this information or not.

Before the analysis of the substantive issue, it should be noted that this opinion is issued on the basis of the information that the City Council has provided with its consultation, which has been referred to in the antecedents of this opinion, without having sent a copy of the access request received.

The Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereinafter, RGPD), is applicable to the processing

of personal data carried out (article 2.1), meaning "personal data" as "***all information about 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 4.1) .

Taking into account the terms in which the request is made, which could reveal a mere interest of the applicant in accessing the statements of the tests (theoretical and practical) proposed by the competent body, as well as the templates and/or the correction criteria used, it should be done considering that, from the perspective of data protection regulations, there would be no inconvenience in providing you with a copy of this information, since a priori there would be no data personal data of the candidates and, consequently, the principles and guarantees provided for in this regulation (articles 2.1) and 4.1) RGPD would not apply.

Access to the individualized copy of each of the tests carried out by the candidates in the said selection process would be a different matter . In this case, it would be information relating to natural persons and, therefore, when assessing access, the provisions of data protection legislation should be taken into account, as explained below .

III

Article 4.2) of the RGPD considers treatment "*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, suppression or destruction "*.

Therefore, the communication of documentation contained in a file of a selective process to a citizen, which contains personal data (such as the delivery of a copy of the tests carried out by the candidates), is data processing that must be subject to the principles and guarantees of the personal data protection regulations, that is the RGPD and the Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (hereinafter, LOPDGDD).

Article 5.1.a) of the RGPD establishes that all processing of personal data must be lawful, fair and transparent (principle of lawfulness, loyalty and transparency).

Article 6.1 of the RGPD regulates the legal bases on which the processing of personal data can be based, among which it is worth highlighting for the specific case the legal basis of section 1.c), regarding that "*the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment"*.

It must be taken into account that, as is apparent from article 6.3 of the RGPD and expressly included in article 8 of the LOPDGDD, data processing can only be

considered based on the legal basis of article 6.1 .c) of the aforementioned RGPD when so established by a rule with the rank of law.

In this sense, and taking into account that, as can be seen from the consultation itself, the selective process referred to in the access request would have already ended, it is necessary to bear in mind the provisions of Law 19/2014, of December 29, on transparency, access to public information and good governance (hereafter, LTC).

Article 18 of the LTC states that *"people have the right to access information public, referred to in article 2.b, in an individual capacity or in the name and representation of any legally constituted legal person"* (section 1).

The aforementioned article 2.b) defines "public information" as *"the information prepared by the Administration and that which it has in its power as a result of its activity or the exercise of its functions, including that supplied by the other obliged subjects in accordance with the provisions of this law"*.

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

The information that makes up the file of the call for the selection process to which the query refers is public information for the purposes of article 2.b) of the LTC and, therefore, remains subject to the access regime provided for in this regulation, which establishes, as a general criterion, that the right of access to public information can only be denied or restricted for the reasons expressly established by law (article 20 et seq. LTC).

Specifically, and with regard to the right to the protection of personal data, it is necessary to take into account what is established in articles 23 and 24 of the LTC, as well as the principles of the personal data protection regulations.

IV

According to the information available, the selective process in respect of which information is requested refers to the call for selective tests for the creation, through the competitive competition system, of a mid-culture technician job board, for the selection of interim staff and temporary workers of the City Council.

In accordance with section 8.7.1 of the bases for the call for said selection process (available on the City Council's electronic site), the opposition phase included the completion of the following exercises: a theoretical test, a practical test, a test of knowledge of the Catalan language and a competence interview.

As the City Council points out, in the access request the requesting party would limit the object of their request to *"exams, theoretical and practical"*. Therefore, it should be

borne in mind that the information linked to the rest of the exercises (tests of knowledge of the Catalan language in case they had been carried out and interviews) should remain outside the requested access.

With regard to the possibility of accessing the *"exams, theoretical and practical"* requested, at the outset, the established in article 23 of the LTC should be taken into consideration.

This Article 23 provides that 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 sex 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 to by means of a written document that must accompany the request."*

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

"1. If the requested information contains personal data that reveal the ideology, trade union affiliation, religion or beliefs, access can only be authorized if there is the express and written consent of the affected person, unless said affected person had made it manifestly public the data before access was requested. If the information includes personal data that refers to racial origin, health or sex life, includes genetic or biometric data or contains data related to the commission of criminal or administrative offenses that did not lead to a public reprimand to the offender, access only it may be authorized if the express consent of the affected person is counted or if the latter is covered by a rule with the force of law."

In the present case and in accordance with the said bases of the call, the first theoretical exercise of knowledge consists of *"a quiz-type test of the topics in Annex I"*, and the practical test consists of *"the development of a subject taken at random from Annex II within a maximum period of 1 hour 30 minutes."*

Taking this into account, it does not seem that the examinations of the people participating in the selection process should contain information of special categories or specially protected by article 23 of the LTC. In any case, if there was any data from a special or specially protected category, it would have to be excluded from access, unless the express consent of the affected persons had been provided with the request or if some other of the enabling cases provided for in article 15.1 of the LT, cited. Otherwise, the right to data protection would prevail over the right to access this information.

From here, access to said exams would require a reasoned weighting between the public interest in the disclosure of the information and the rights of the people affected, as provided in article 24.2 of the LTC, in what we mention next.

According to article 24.2 of the LTC *"if it is other information that contains personal data not included in article 23, access to the information can be given, with the prior weighting of the public interest in disclosure and the rights of the affected persons. 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.*
- (...)."*

As stated in the consultation, the applicant is not listed as a participant in the selection process to which his request for access refers.

Point out that, in the event that the applicant had participated in the selection process and had not been selected, he would have the status of an interested party in the selection process that was carried out at the time and, once the procedure, this condition would grant him a reinforced or privileged right of access, unlike other potential applicants for information who have not participated in said selective process.

In this sense, as this Authority has maintained (among others, in reports IAI 44/2017, IAI 49/2018 or IAI 32/2019, available on the [Authority's website](#)) and, as supported by jurisprudence (as an example, we can cite the Judgment of the National Court of April 26, 2012 or the Judgment 623/2018 of the Superior Court of Justice of Madrid), it must be possible to access the information relating to candidates who scored better than the applicant, but not the information about who scored worse. This would also cover the tests carried out by the highest scorer, in which no special categories of data are included.

However, as has been pointed out, this would not be the case we are dealing with, given that it is not known that the applicant had participated in the selection process for the creation of the job board.

It is worth noting that it is also not known that the person requesting in this case holds the status of union delegate and/or representative of the City Council's public workers, nor that the request for access has been made, therefore, in the exercise of 'this condition.

Given this, the examination of the feasibility of the access requested by the applicant based on this possible motivation is not considered the subject of this opinion. In any case, on this issue we are referred to the considerations made in reports IAI 18/2021, IAI 20/2021 or IAI 40/2021, among others, also available on the Authority's website.

Given the information provided, it seems that the applicant would not have specified any specific reason why he would be interested in obtaining access and a copy of the theoretical and practical exercises, a fact that, despite not being strictly required (article

18.2 LTC), could be particularly relevant for the purposes of making a correct weighting, as provided for in article 24.2.b) of the LTC.

Therefore, in the absence of more specific information about the intended objective, access should be understood as framed in any case within the purpose of the transparency law itself, which, in accordance with its article 1.2, is "*establish a relationship system between people and the public administration and other obliged subjects, based on knowledge of public activity, the encouragement of citizen participation, the improvement of the quality of public information and administrative management and the guarantee of accountability and responsibility in public management.*"

Given that public administration staff selection procedures are competitive procedures that must necessarily be governed by the principles of merit, capacity, equality, publicity and transparency (article 78 EBEP, article 91.2 LRBRL, article 287.2 TRLMRLC, Decree 214/1990 and article 9.1.e) LTC), from the point of view of the applicant, for the purpose of controlling the actions of the City Council in this area of municipal activity, it may certainly be relevant to access the tests carried out and to know the score obtained by each participant in each phase of the selection process, as well as the final score obtained and the order in which they became part of the job board, in order to verify that the procedure in matter has been processed with full respect for the guiding principles of this type of procedure.

In this sense, it must be borne in mind that the same applicable regulations (public service and transparency regulations, and the corresponding basis of the call), with respect to certain information that affects the selection processes, makes the public interest prevail in the access to the identity of the people who participate in the selective processes of the public administrations and to the result of the process, with regard to the people who pass it, against the right to privacy of these participants.

Highlight the fact that, in accordance with article 9.1.e) of the LTC, the Administration must make public the call and the result of the selective processes for provision and promotion of personnel, which includes in accordance with article 21 of the RLTC, the result of the procedures for the selection of temporary staff or temporary workers, including temporary staff exchanges (section 1.d)).

In this sense, the same specific rule that "*the data to be published must refer, at least to the announcement of the call, the bases, the official announcements and the name and surname and the four numbers of the national document of "identity 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" (article 21.2 RLTC).*

As can be seen from the available information, in the present case the City Council would have already made public the lists with all the results and scores obtained by the candidates in both the opposition and competition phases, as well as the final result of the process (points 6.6 and 11 of the basis of the call), information that any person, including the applicant, may have known and that in principle may be sufficient to comply with the general purpose of transparency and control of a selective process by citizens.

There is, however, other information on which the aforementioned regulations do not provide that it must be made public by virtue of the principle of transparency, as is the case with the content of the tests carried out by each applicant, so the affected persons can have a certain expectation of privacy in this respect, at least in the sense that this information must not be known by any person outside the selection process who requests it.

In this sense, from the perspective of the rights and interests of the people affected, it must be taken into account that access to the content of the tests carried out would be a rather invasive measure of their privacy, which could affect both the deployment of their life in the personal sphere, as in the social sphere or professional

Although knowing this information (content of the tests carried out) could, for example, be relevant to achieve the purpose that could be intended by a participating person who has not been selected (linked to his right of defense) or by a trade union representative of a trade union organization that is considered the most representative (linked to its legitimacy to challenge the decisions of the selection body), this relevance would not apply to the applicant, so that access could mean a grievance in the private sphere of the affected persons, derived from the communication of their data without a purpose justifying it. At least, access would not seem sufficiently justified for a general purpose of transparency.

For these reasons, in view of the information provided and given that there is no evidence of the concurrence of other weighting elements that can be taken into consideration in the specific case, from the perspective of data protection regulations it would not seem sufficiently justified to give to the person requesting access and a copy of the tests carried out in the selection process to which their access request refers.

This, without prejudice to the possibility of delivering said exams after anonymisation of the personal data contained therein. This is an option expressly provided for in the transparency regulations, specifically, article 70.5 of the RLTC provides that *"in cases where, in application of the reasoned weighting of article 24.2 of Law 19/2014, of December 29, access to public information that contains personal data is denied, public administrations, in application of the principles of proportionality and partial access, must grant access to the rest of the information, after anonymization or pseudonymization of this data, when possible."*

As this Authority has decided on numerous occasions, in the resolution of access requests the option to anonymize personal data beforehand should be the general rule, provided that the personal data are not relevant to satisfy the public interest or private that motivates access to the information in question. It cannot be ruled out that this could happen in the case now examined, given the lack of a specific motivation intended for access.

To this end, it should be borne in mind that article 70.6.a) of the RLTC defines anonymization as *"the elimination of the personal data of the natural persons affected contained in the information and any other information that may allow identify them directly or indirectly without disproportionate efforts, without prejudice to being able to*

maintain, where appropriate, the merely identifying data of the positions or personnel in the service of the public administrations that dictate or intervene in the administrative act".

In the context in which we find ourselves, despite not having specific information about it, it can be assumed that the requested tests will not contain the identification (name and surname) of the candidates of the selective process, but a code identifier designed to guarantee anonymity at the time of its correction. It is what is known as the use of pseudonymization techniques, which, in terms of article 4.5) of the RGPD, 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 is not attributed to an identified or identifiable natural person".*

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 RGPD).

Starting from this basis, it must be borne in mind that, depending on the scores obtained during the selection process, the use of this coding would not exclude the possibility of identifying the candidate authors of the tests through of the score obtained, given that, as we have seen, the identification of the applicants together with the score achieved in each exercise of the selection process would have been the subject of publication and dissemination on the website and on the notice board of the 'City Council, if we adhere to the corresponding bases of the call.

Obviously, if the information about the qualifications obtained by the candidates for each exercise is public knowledge, access to the exams could not be accepted as valid in which, despite using a code to replace the identification data of the candidates, the score obtained by them was indicated, given that the people who took the tests could be identified without requiring disproportionate efforts (it would only be necessary to compare the grade that it appears in the test that has been accessed with the note from the published list of qualifications to obtain the identification of its author).

For this reason, in a case like the one proposed, accessing and obtaining a copy of the exams in question should, in any case, be carried out without the code used or the score obtained, in such a way that it is not could relate a priori each test to the specific person who performed it.

In addition to this, it should be noted that the option contemplated here may not be valid in all the selective processes carried out by the City Council, but that its effectiveness will depend to a large extent on the specific conditions that may occur in the selective process in question (for example, a more or less large number of people participating). For this reason, it would be advisable, in any case, to verify prior to the granting of access that the information provided certainly could not be used to carry out an individualized identification of the candidate author of the test in question.

conclusion

Based on the information that the City Council has made available to the consultation, the data protection regulations would not prevent access to the statements of the practical and theoretical exams, together with the correction criteria, proposed in the selective process to which refers to the request. In the event that the request refers to obtaining a copy of the exams in question, its delivery would only be possible after anonymization of this information, given the non-concurrence of qualified circumstances in the individual bidding to the extent that the specific purpose of the access has not been specified and the general purpose of transparency does not allow weighing how reasonable this access is.

Barcelona, July 20, 2023

Machine Translation