

Opinion in relation to the query made by a City Council regarding the request for access to public information made by a person in relation to the total number of disciplinary files of municipal staff corresponding to the year 2022

A query made by a City Council is presented to the Catalan Data Protection Authority in relation to the request for access to public information made by a person who is interested in knowing the following information:

"total number of disciplinary files for municipal staff, opened in 2022. I would ask that it preferably be in a spreadsheet or equivalent or, in any case, in a reusable format"

The query adds that this person is not part of the City Council's workforce, nor is he a union representative, nor does he have the status of an interested party in any of the disciplinary procedures affected by the request.

In particular, the City Council sends the query to this Authority "[...] in order to be able to obtain an assessment of the right of access to the requested information [...]".

Having analyzed the request, which is not accompanied by further information, in view of the current applicable regulations and in accordance with the report of the Legal Counsel, the following is ruled:

I

(...)

II

The City Council states in the consultation that it has received a request for access to public information in which it is requested to know the *"total number of disciplinary files against municipal staff, opened in the year 2022"*. 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 must 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 background, without having sent a copy of the access request received.

At the same time, it should be noted that the terms of the query formulated do not make it clear what is the scope of the access request made by the applicant. On the one hand, it may seem that the applicant only wants to know the total number of disciplinary proceedings initiated by the City Council in 2022, but, on the other hand, it is noted that he requests that

this information be provided in a spreadsheet or equivalent or, in any case, in a reusable format. This calls into question whether the requesting person intends to obtain certain information that goes beyond the total number of disciplinary records.

For these reasons, the possibility of access will be analyzed below from both perspectives, that is to say, whether what interests the applicant is to know only the total number of disciplinary files initiated by the City Council in the year 2022, or also aims to obtain other information related to the files.

Once the formulated query is located, in any case, it must be taken into account that the Regulation (EU) 2016/679 of the Parliament and of the Council, of 27 April 2016, relating to the protection of natural persons with regard to the processing of personal data and the free circulation of such data and which repeals Directive 95/46/CE (General Data Protection Regulation), hereinafter RGPD, provides that its provisions are applicable to the treatments carried out on any information "on an identified or identifiable natural person (*"the interested party"*); *Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person "* (arts. 2.1 and 4.1).

On the basis of what we have just explained, in the event that the applicant only requests to know the number of disciplinary proceedings initiated by the City Council in 2022, it does not appear that personal data should be affected and, consequently, data protection regulations would not prevent access to the person requesting this information.

III

A different analysis is required in the case that the applicant not only has an interest in knowing the total number of disciplinary proceedings initiated by the City Council in 2022 but also requests information regarding their content. It is worth saying that to the extent that, in accordance with the information transferred, the applicant has requested that the information be provided in a spreadsheet or equivalent, his interest in accessing the files is discarded from the analysis whole

Well, in this case, it is necessary to start from the basis that the data protection regulations, in accordance with the provisions of article 5.1.a) of the RGPD, establish that any processing of personal data must be lawful, loyal and transparent in relation to the interested party and, in this sense, the RGPD establishes the need to agree on one of the legal bases of article 6.1, among which section c) foresees the assumption that the treatment "*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 can only be considered based on these legal bases of article 6.1. c) and e) of the RGPD when so established by a rule with the rank of law.

For its part, article 86 of the RGPD provides that "*the personal data of official documents in the possession of any public authority or public body or a private entity for the performance*

of a mission in the public interest may be communicated by said authority , organism or entity in accordance with the Law of the Union or of the Member States that applies to them in order to reconcile the public's access to official documents with the right to the protection of personal data under this Regulation .

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

In the case at hand, according to what has been explained, it is possible that the person requesting is interested in accessing certain information relating to the disciplinary proceedings initiated by the City Council in 2022. This information it must be considered public for the purposes of article 2.b) of the LTC, and subject to the right of access (article 18 of the LTC), as it is documentation in its possession as a result of its activity, and from the perspective of data protection regulations, it is necessary to analyze the possibility of access from the point of view of the limits of articles 23 and 24 of the LTC.

IV

At the outset, it must be noted that it is not known, if applicable, what information the applicant intends to access that exceeds the total number of disciplinary files initiated by the City Council in 2022.

However, from a perspective of the categories of people affected, it is clear that the information relating to the persons responsible (or presumed responsible) for the facts under investigation and that of public employees could be affected by the access request who have intervened in the exercise of their functions in the processing of the various files. In addition, it cannot be ruled out that the information relating to whistleblowers and witnesses may be affected.

Regarding the information relating to the persons responsible, or allegedly responsible, it should be borne in mind that this information affects categories of specially protected data referred to in article 23 of the LTC and, in particular, data relating to the commission of 'criminal or administrative offences, regardless of whether others may also be affected, such as those relating to health.

In accordance with what is analyzed below, the information relating to disciplinary infractions must be considered relative to the commission of criminal or administrative infractions in respect of which article 23 of the LTC establishes the denial of the 'access, except in the case of a public warning to the offender, or the express consent of the affected person is available .

In relation to this, it should be borne in mind that the Public Administration is endowed by the legal system with administrative powers, among which is the sanctioning power or *ius puniendi*, that is, the power to impose certain sanctions when an administrative offense has occurred (art. 25.1 of the Spanish Constitution).

Reference should be made to Constitutional Court ruling 66/1984, of June 6 (and, before that, STC 2/1981, or 81/1983), which distinguishes between two categories of administrative sanctions: those that protect order general and those that pursue the self-protection of the administrative apparatus and that are the result of a special relationship of subjection, among which includes those of a disciplinary nature.

Although the distinction is sometimes imprecise, the Constitutional Court has been specifying material criteria that facilitate this differentiation. Thus, he has considered that the relations of special subjection are situations from which the citizen integrates into a pre-existing institution that projects its authority over him, apart from his common condition as a citizen, and the fact of acquiring a specific status of individual subject to a public power that is not common to all citizens, as well as that this relationship must be inserted in the organization of public services (SSTC 2/1987, 42/1985, 50/2003 and 81/2009).

The sanctioning power that protects the general order can affect various spheres of life (such as public order, traffic, urban planning, etc.), and all citizens can be active subjects. In accordance with the aforementioned sentence of the Constitutional Court, these sanctions are *"[...] close to the punitive and demanding ones, in line of principles, of guarantees that, having their initial field of application in the punitive, are extensible to the sanctioner [...]"*.

With regard to administrative sanctions resulting from a special relationship, as would be the case with disciplinary ones, the Administration only seems to pursue its own protection as an organization or institution, with respect to those directly related to it. According to STC 66/1984, these sanctions are *"[...] established for cases of transgression of the obligations included in the regulations applicable to the case and assumed voluntarily [...], sanctions that, in the exercise of a power inserted in the table we have discussed, correspond to the action of the Administration within the legal framework established to that effect and with submission to the purposes that justify them and which, within the consecration of the full submission of the Administration to jurisdictional control in the terms defined today in article 106 of the Constitution, guarantee the jurisdictional protection of the hypothetical transgressor"*.

In the case of disciplinary proceedings concerning personnel of public administrations, it must be taken into account that disciplinary proceedings in respect of their workers processed by public administrations are part of their sanctioning power, in this case in respect of their own workers, for the commission of disciplinary administrative infractions. As can be seen from article 94 of the Basic Statute of the public employee (EBEP), approved by Royal Legislative Decree 5/2015, of October 30, and as recognized by jurisprudence (among others STS of July 3, 2012, FJ 6) disciplinary procedures must conform, with some nuance, to the general principles of administrative sanctioning law.

So, it seems clear that we are dealing with the exercise of an administrative power in the exercise of a public function that must be subject to the principles of *ius punishment* of the administration, and to which the same guarantees must be applied by the affected persons.

That being so, it would not seem justified to deprive persons sanctioned under a disciplinary scheme which forms part of a public function from the provisions of Article 23 LTC.

But in addition, if we analyze them from the point of view of the impact that the disclosure of this type of information can have on the private lives of the people affected, there also does not seem to be any reason to make a distinction that leads to the exclusion of disciplinary sanctions from what is established in article 23 LTC.

It should be noted that the categories of data that were included in article 15.1 LT and article 23 LTC, led to the data that were provided as specially protected in article 7 of Organic Law 15/1999 , of December 3, on the protection of personal data (LOPD), which included in the category of specially protected data the data relating to the commission of criminal or administrative offenses (7.5), which granted special protection to administrative violations. And the truth is that the reasons that led to granting administrative sanctions a special protection are fully applicable to disciplinary infractions.

Thus, although the lack of precision in this aspect of article 23 is evident, its wording obeyed precisely the reproduction of article 7.5 of the LOPD, with respect to which this Authority has been systematically considering which also includes disciplinary offenses (opinions and reports CNS 45/2015, CNS 14/2018, IAI 47/2017, IAI 30/2021 or IAI 69/2021, among others).

It is obvious that the disclosure of administrative offenses can reveal information about a person's conduct, or better, about aspects of his conduct that have given rise to a reprimand. In certain cases, it is the legal system that provides for the disclosure of the sanctions imposed (in the case of sanctions consisting of a public reprimand or other cases in which the publication of the sanction is foreseen). But outside of these cases, it should be borne in mind that the disclosure of this type of information can lead to a significant interference in the right to data protection in terms of its public image and, especially, due to the risks of discrimination or stigmatization that may occur in different areas (social, professional, work, or even family). All these considerations are fully applicable to disciplinary sanctions, even, given their nature, with more reason than other administrative sanctions whose disclosure may have less interference.

Violations and disciplinary sanctions must therefore be considered included within the scope of protection of Article 23 LTC.

On the other hand, it should be borne in mind that currently the provisions relating to the processing of data relating to infringements and administrative sanctions are found in article 27 of the LOPDGDD, as the LOPD has been repealed in accordance with the terms the single repealing provision of the LOPDGDD.

Article 27.1 of the LOPDGDD provides, in relation to article 86 of the RGPD (treatment and public access to official documents), that the processing of data relating to infringements and administrative sanctions requires that the person responsible is the competent body for the instruction of the sanctioning procedure, for the declaration of infringements or the imposition of sanctions, and that the treatment is limited to the data strictly necessary for the purpose pursued by it.

It is clear that the citizen who exercises the right of access to public information is not a competent person in the sense of article 27.1 of the LOPDGDD. In these cases, the second

section of this article provides that the treatment must have the consent of the person affected or be authorized by a rule with the rank of law, which must regulate the additional guarantees for the rights and freedoms of affected. In other words, this section foresees two cases that enable the treatment:

- a) The consent of the affected person, or
- b) That the treatment is authorized by a rule with the rank of law, which also regulates additional guarantees for the rights and freedoms of those affected.

In conclusion, regardless of whether article 23 of the LTC does not contain an express reference to infractions and disciplinary sanctions, based on the data protection regulations, they must be considered included in the reference to infractions and sanctions administrative included in this article.

And, in relation to this, the request for access to information that affects specially protected categories of article 23 of the LTC, must be denied unless the person affected expressly consents by means of a written must accompany the access request or the circumstances referred to in article 15.1 of the LT occur.

v

Regarding access to the data of public employees, which are affected by the request for access due to the exercise of their functions, it must be analyzed from the point of view of what is provided for in article 24.1 of the LTC, that is, *"Access to public information must be given if it is information directly related to the organization, operation or public activity of the Administration that contains data merely identifying personal data unless, exceptionally, in the specific case the protection of personal data or other constitutionally protected rights must prevail"*.

For this purpose, it is necessary to take into account article 70.2 and .3 of Decree 8/2021, of February 9, on transparency and the right of access to public information (RLTC), which provides for the following:

" 2. For the purposes of what is provided for in article 24.1 of Law 19/2014, of December 29, personal data consisting of the name and surname, the position or position occupied, body and scale, the functions performed are purely identifying personal data and the telephone number and addresses, postal and electronic, of professional contact, referring to personnel in the service of public administrations, senior positions and managerial staff in the public sector of public administrations.

In cases where the publication or access to an administrative document requires the identification of the author, the location data, the number of the national identity document or equivalent document must be removed in particular and the handwritten signature. If the signature is electronic, the electronically signed document must be published in such a way that the properties of the electronic certificate used for the signature cannot be accessed.

The location data must be deleted in the event that it is not merely identifying data of the author in his position or staff in the service of the public administrations.

3. In the case of members of the forces and security forces or other groups that for security reasons require special protection, their identification with names and surnames must be replaced by the publication of a code or professional identification number ."

Thus, with regard to access to the merely identifying data (name and surname and position) of public employees who have intervened in the exercise of their functions within the framework of actions in disciplinary proceedings, or identifying data of public employees that had intervened in the different procedures being investigated, as long as their actions are not directly related to the alleged irregular conduct being investigated, the person requesting access to this data must be estimated on the basis of article 24.1 of the LTC, unless there is an exceptional circumstance for the affected person (for example, being in a situation of special vulnerability).

But, in addition to the data of the public employees we have just referred to, among the requested information could also be the one relating to the people reporting to the City Council, if applicable. In this case, the analysis of the possibility of access must be carried out case by case, that is, for each file, on the basis of what is provided for in article 24.2 of the LTC, whereby:

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

In accordance with what has been stated above, this Authority does not have more information than that which has been transmitted with the consultation formulated by the City Council. In this sense, it seems that the applicant is not part of the City Council's staff, nor is he a trade union representative, nor does he hold the status of an interested party in any of the disciplinary procedures affected by the request, these are elements which could determine the regime of access to the requested information and, if they coincide, it is necessary to take into account the specific regimes of access to the regulations, such as those relating to freedom of association, labor or the regulations governing the common administrative procedure, according to each case.

Without prejudice to this, reference must be made to the fact that in the weighting referred to in article 24.2 of the LTC, the purpose of the access request is one of the elements that can be taken into account to carry out the weighting. Although article 18.2 of the LTC provides that the exercise of the right of access is not conditional on the concurrence of a personal interest, and is not subject to motivation nor does it require the invocation of any rule, knowing the motivation for which the applicant wishes to obtain the information may be a relevant element to take into account in the weighting.

In the case raised, the City Council has not stated whether the applicant has provided any motivation in his request for access. Thus, in the absence of this information, it is necessary to carry out the analysis from the perspective of the general purpose of the transparency regulations, that is to say, taking into account that the purpose of the regulations is the possibility of offering tools to citizens for the control of the performance of the public authorities.

In relation to this question, a priori, it does not seem that from the perspective of this purpose, there is a special public interest in the disclosure of the identity or information relating to the reporting persons for the purposes of being able to supervise and control the performance of the public body. For this reason, access to this information does not appear to be necessary.

And, on the basis of the principle of data minimization (art. 5.1.c) of the RGPD), from which the personal data provided must be adequate, relevant and limited to what is necessary for for the intended purpose, this would also prevent access to said information.

And, in general, the same conclusion would be reached with respect to the possibility of access, if applicable, to the information relating to witnesses that may be included in the information or documentation to which access is sought.

conclusion

Based on the information that the City Council has provided to the consultation, data protection regulations would not prevent access to the number of disciplinary files initiated in 2022.

However, in the event that the applicant is interested in accessing other information that exceeds the number of disciplinary files initiated, the City Council must analyze the possibility of access according to the categories of personal data affected, taking in consideration of the foundations that have been exposed.

Barcelona, July 6, 2023