

Report issued at the request of the Commission for the Guarantee of the Right of Access to Public Information in relation to the claim presented by the general secretary of the Police Union of Catalonia against a city council for denying access to the tests carried out by the participants in a selection process to fill three corporal positions in the local police force of the city council

The Commission for the Guarantee of the Right of Access to Public Information (GAIP) asks the Catalan Data Protection Authority (APDCAT) to issue a report on the claim submitted by general secretary of a trade union against a city council for denying access to the tests carried out by the people participating in a selection process to fill three corporal positions in the local police force of the city council, through the competition competition selection system, reserved for the internal promotion round.

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

Background

1. On October 3, 2022, the general secretary of a union and a person representing the trade union section of the same union in a town hall send a letter to said town hall in which they request the following public information:

"I request: That the present request for information be submitted, accepted for processing, giving access to this part of the SYLLABUS TEST-TYPE EXAMS AND THE CORRECTIONS OF THE PRACTICAL CASES EXAMS THAT OPEN IN THE RELATIVE CALL IN THE SELECTION PROCESS FOR THE DEFINITIVE COVERAGE OF THREE CORPORAL POSITIONS IN THE LOCAL POLICE BODY OF THE TOWN OF (...).

THAT THE SAME CAN BE FACILITATED BY DELETING OR COVERING ANY KIND OF PERSONAL DATA OF THE PERSONS AFFECTED (...)".

2. On November 14, 2022, the same general secretary of the union presents a claim to the GAIP against the city council for denying access to the requested public information.

In the letter that accompanies the claim, it states that, following the numerous complaints received by officials participating in the selection process, they requested access to the file on January 27, 2021, which occurred on May 19, 2021, even though they were not provided with a copy of the documentation forming part of the file. Faced with this fact, it states that they subsequently repeated the access up to three times and confirms , in this

same letter, the receipt of a copy of part of the documentation of the disputed file, but not of the test exams and practical cases carried out by the participating people.

3. On November 28, 2022, the GAIP will send the claim to the city council, requiring it to issue a report on which to base its positions, as well as the complete file relating to the request for access to public information and the identification of third parties affected by the requested access.

4. On December 22, 2022, the city council sends the GAIP a copy of the file relating to the access request that is the subject of this claim. I am also sending you the report issued by the Department of Human Resources and Organization on the city council's position in this regard.

In this report, the city council confirms that the applicants have had in-person access to the requested administrative file and that, subsequently, they have been given a copy of the following documentation:

- Resolution approving the call and basis of the selection process for the definitive coverage of three corporal positions, reserved for internal promotion.
- Edict approving the call and regulatory bases of the selection process.
- Publications in official newspapers.
- Applications submitted to participate in the selection process.
- Resolution approving the provisional list of persons admitted and excluded from the selection process and its publication.
- Resolution approving the definitive list of persons admitted and excluded from the selection process.
- Act 1 of the selection body.
- Theoretical exercise of the selection process (test) with the correct solutions.
- Exercise correction template.
- Result of the exercise.
- Announcement of the publication of the results of the theoretical test (test).
- Record 2 of the selection body, correction template of the practical test and result broken down by each person participating in the selection process.
- Practical exercise
- Announcement of the publication of the results of the practical test.
- Act 3 of the selection body.
- Act 4 of the selection body.
- Report issued by the psychology services team in relation to the psychotechnical test and competency interview.
- Announcement of the publication of the results of the psychotechnical test and competency interview.
- Instances of exam review requests.

In this same report, the city council maintains that a copy of the exams taken by the participants has not been given, given that *"it could represent a violation of the right to privacy and it would be personal data subject to protection by the Administration"*. He adds that *"the possibility of anonymizing the same is almost nil given that the number of participants is very small and from the final result of the same the identity of each of the participants can easily be deduced."*

also identifies a total of 18 people who would be affected by the access being claimed.

5. On January 11, 2022, the GAIP requests this Authority to issue the report provided for in article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good government, in relation to the claim presented.

Legal Foundations

I

In accordance with article 1 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, the APDCAT is the independent body whose purpose is to guarantee, in the field of the competences of the Generalitat, the rights to the protection of personal data and access to the information linked to it.

Article 42.8 of the LTC, which regulates the complaint against resolutions regarding access to public information, establishes that if the refusal is based on the protection of personal data, the Commission must request a report to the Catalan Data Protection Authority, which must be issued within fifteen days.

For this reason, this report is issued exclusively with regard to the assessment of the incidence that the requested access may have with respect to the personal information of the persons affected, understood as any information about an identified or identifiable natural person, directly or indirectly, in particular through an identifier, such as a name, an identification number, location data, an online identifier or one or more elements of physical, physiological, genetic, psychological, economic, cultural or social security of this person (article 4.1 of Regulation 2016/679, of April 27, 2016, relating to the protection of natural persons with regard to the processing of personal data and the free circulation of such data and by which repeals Directive 95/46/EC (General Data Protection Regulation, hereafter RGPD).

Therefore, any other limit or aspect that does not affect the personal data included in the requested information is outside the scope of this report.

The deadline for issuing this report may lead to an extension of the deadline to resolve the claim, if so agreed by the GAIP and all parties are notified before the deadline to resolve ends.

Consequently, this report is issued based on the aforementioned provisions of Law 32/2010, of October 1, of the Catalan Data Protection Authority and Law 19/2014, of December 29, of transparency, access to public information and good governance.

In accordance with article 17.2 of Law 32/2010, this report will be published on the Authority's website once the interested parties have been notified, with the prior anonymization of personal data.

II

The object of the complaint is, as can be seen from the statements of the complaining party and the set of information contained in the file, access and copy of the tests carried out by the people participating in the selective process led to term by the city council for the definitive coverage of three positions of corporal in the Local Police force, through the selection system of competitive competition, reserved for the internal promotion round.

As stated in the antecedents of this report, the city council would have estimated access and given the applicants a copy of part of the documentation that makes up the file relating to the selection process in question. However, he would not have handed in the test-type exams and the practical cases carried out by the participants.

Article 4.2) of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, relating to the protection of natural persons with regard to the processing of personal data (RGPD) considers "*« tratamiento »: any operation or set of operations carried out on personal data or sets of personal data, either by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, diffusion or any other form of enabling access, comparison or interconnection, limitation, suppression or destruction.*"

The RGPD provides that all processing of personal data must be lawful (Article 5.1.a)) and, in this sense, establishes a system of legitimizing data processing based on the need for one of the legal bases to be met established in its article 6.1. Specifically, section c) provides that the treatment will be lawful if "*it is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment*".

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

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

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

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

Article 2.b) of the LTC 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 documentation relating to the selection process carried out by the city council that is the subject of the complaint is public information for the purposes of article 2.b) of the LTC and, consequently, remains subject to the regime of the right of access (article 18 LTC).

III

The first additional Provision, section 2, 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.*"

According to the information available, the person making the claim is the general secretary of a police union. Now, both in the request for access to public information that is the subject of this claim, and in the previous requests for access submitted linked to the selection process in question, which has been mentioned in the antecedents of this report, the applicant for access, apart from the police union, is the trade union section of this union at the town hall, represented by one of its members.

From the information sent, it is not clear whether the person representing the trade union section holds the position of trade union delegate at the town hall, although, taking into consideration that the town hall would have already facilitated in-person access to the file in question, as well as a copy of certain documents, it cannot be ruled out that he acted as a union representative of the workers, a fact that, if so, must be taken into account when assessing the possibility of accessing the specific information subject to controversy.

In this sense, it must be borne in mind that the rights recognized to unions or union sections are different from those corresponding to union delegates and workers' representatives.

Article 8.2 of Organic Law 11/1985, of August 2, on Freedom of Association (LOLS) foresees that, without prejudice to what the collective agreement may establish, the union sections of the most representative unions and those that have representation in works committees and in the representative bodies established by public administrations or that have staff delegates, they have rights related to the disclosure of information relating to working conditions, collective bargaining and the use of premises when the company or workplace has more than 250 workers.

For its part, article 10.3.1 of the LOLS grants union delegates the same guarantees legally established for members of company committees or representative bodies established by public administrations, in cases where they are not part of these representative bodies. In particular, for the purposes that interest us, it must be borne in mind that this article of the

LOLS recognizes, among others, the right to "*have access to the same information and documentation that the company makes available to the works committee, being obliged trade union delegates to keep professional secrecy in those matters in which it legally applies*".

Therefore, it should be borne in mind that, with regard to this right of access to information and documentation, the LOLS covers it exclusively in relation to union delegates and not in respect of unions or union sections as such.

Thus, in the event that the person exercising the right of access to public information, representing the trade union section, has the position of trade union delegate (a question that cannot be ruled out), the provision of the article must be taken into account 10.3.1 of the transcribed LOLS, by which trade union delegates are recognized as equal, in terms of access to information and documentation, to members of the works committee or representative bodies in public administrations.

Therefore, if this is the case, it is necessary to take into account as a matter of priority the specific regime of access to information established for the representatives of the workers by the revised text of the Law of the Basic Statute of the public employee, approved by the Royal legislative decree 5/2015, of October 30 (EBEP), as well as by the revised text of the Workers' Statute Law, approved by Royal legislative decree 2/2015, of October 23 (ET). And this without prejudice to the fact that the provisions of the transparency regulations must additionally be taken into account.

IV

The EBEP and the ET attribute to the boards or staff delegates (article 39 EBEP), as well as to the staff delegates or Company Committee (articles 62 and 63 ET), as specific bodies representing officials and public workers with employment contracts, respectively, certain functions for the exercise of which they are recognized as having the right to access certain information, which could include workers' personal data.

Specifically, article 40.1 of the EBEP attributes to personnel boards and personnel delegates, the right to "*receive information, on the personnel policy, as well as on the data referring to the evolution of the retributions, evolution probable employment in the corresponding field and performance improvement programs*" (letter a)), as well as the function of "*monitoring the compliance with the current rules regarding working conditions, prevention of occupational risks, Social Security and employment and exercising, if necessary, the appropriate legal actions before the competent bodies*" (letter e)).

With regard to labor personnel, article 64 of the ET attributes to the Works Council and by extension also to the staff delegates (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 as "*the transmission of data by the employer to the works committee, so that it has knowledge of a certain question and can proceed to its examination*" (article 64.1 ET). Section 7 of this same precept also attributes to the representative bodies the function, among others, of "*monitoring the fulfillment of the current rules in labor matters, of Social Security and employment, as well as the rest of the*

acts, company conditions and usages in force, formulating, as the case may be, the appropriate legal actions before the employer and the competent bodies or courts.”

Both legal texts recognize the role of monitoring the compliance of the current rules in the matter of employment to the representative bodies. The EBEP further adds the right to receive information about personnel policies.

In view of this, the eventual access to the personal information of the workers by their representative bodies and also by the trade union delegates, by application of article 10.3.1 of the LOLS, should, in any case, find its qualification in this function of monitoring the current rules.

However, beyond the aforementioned precepts, there is no other specific provision that is directly related to personnel selection processes for the provision of jobs and/or professional promotion. For this reason, apart from the provisions of the specific access regime mentioned (EBEP and ET), it is necessary to take into account the provisions of the transparency legislation, the purpose of which is, as can be seen from article 1.2 of the 'LTC, establish a relationship system between people and the Public Administration and other obliged subjects, based on the knowledge of public activity, the encouragement of citizen participation, the improvement of the quality of public information and administrative management and the guarantee of retention of accounts and responsibility in public management.

In this context, if citizens must be able to have this capacity to control and hold public administrations to account, with more reason, if applicable, this capacity must be recognized to the union representatives of the workers, as representatives of the corresponding collective interests.

The right of access to public information (Article 18 LTC) is not absolute and may be denied or restricted for the reasons expressly established in the laws (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 the limitations and criteria provided for in the transparency legislation (articles 23 and 24 LTC), and the principles of the personal data protection regulations.

In accordance with section 7.a) of the basis of the call for the selection process, the opposition phase includes the completion of the following exercises: a theoretical exercise, one or more practical cases, a test of language knowledge Catalan, a psychotechnical test and a competence interview. Apart from this, once the competition phase has been evaluated, it is planned to carry out a medical test for the applicants classified in the first three positions.

Both in the request for access and in the letter of claim, the requesting party limits the object of your request on this occasion to the test-type exams and practical cases carried out by the participants. Therefore, the information linked to the rest of the exercises (Catalan language knowledge tests if they have been carried out, psychotechnical tests, interviews and medical tests) should be excluded from the requested access.

In view of these considerations, the access and obtaining a copy of the requesting party to the theoretical exercises and practical cases carried out by the people participating in said selective process who are affected by the access

V

Article 23 of the LTC 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, the 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 it 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 bases of the call for the selection process, to which mention has been made previously, the first exercise of knowledge consists of " a test-type questionnaire of 40 questions related to the subjects of the annex 1" (the syllabus); and the practical test consists of "solving in writing, one or more practical cases proposed by the Court related to the syllabus".

Taking this into account, it does not appear that the examinations of the participating persons referred to in the application for access 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 request had provided the express consent of the affected persons or that some other of the enabling circumstances provided for in article 15.1 of the LT, cited. If none of these circumstances occur, the right to data protection would prevail over the right to access this information.

VI

In view of this, access to said examinations requires a reasoned weighting between the public interest in the disclosure of information and the rights of the persons affected, as provided in article 24.2 of the LTC:

"2. 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.

(...)."

For the purposes of said weighting, it must be borne in mind that the information requested (exams) is not part of the information that, in accordance with the regulations applicable to the selection process in question (basis of the call, public service regulations and transparency), must be made public by virtue of the principle of transparency, so the participating people can have a certain expectation of privacy in this respect, at least in the sense that this information must not be known by any outsider to the selection process that requests it.

Given that in the present case the request is understood to be made by a union representative of public workers at the City Council, it is necessary to analyze whether access to this information would be necessary to achieve the purpose of access pursued, which it should be framed within the exercise of trade union functions, or at least if it would be justified to access it to achieve the purposes of transparency provided for in the LTC.

Although the exercise of the right of access is not subject to motivation (article 18.2 LTC), knowing the motivation for which the person claiming wants to access the information or, in this specific case, a minimum explanation of the need or relevance of the data requested for the exercise of its union functions may be a relevant element to take into account for these purposes.

This is evident in the recent STS of February 9, 2021, by noting (FJ VI) that *" it is relevant, therefore, that it mediates the proper relationship between the personal data of the statutory staff that are requested, with the important union function that develops So that only when these personal data are necessary for the exercise of trade union work, they could be considered exempt from consent, but not when they are disconnected or their relationship is unknown, as their connection with said trade union functions has not been made clear. (...) when the documentation and information is requested, no explanation is expressed, nor is any reference or mention made, on the usefulness of it for the fulfillment of its trade union duties. There is also no attempt to link your request for data with the tasks legally attributed to union representatives. (...)."*

Taking into account the equation that article 10.3.1 of the LOLS makes of trade union representatives and workers' representatives, in terms of access to certain information, and the role that the former carry out in the defense of interests groups of workers, it can be

said that the trade union representative should be able to have the necessary information to monitor the evolution of the City Council's employment or personnel policy (articles 40 EBEP and 64 ET). This would include being able to have information about the calls made, their content, the advertising mechanisms used, the number of people who participated or other information about the calls.

However, the fact of having to have information relating to the selection and/or professional promotion processes carried out by the City Council does not necessarily imply that access to the information of all the people who participate must be given as applicants, so that they are identifiable.

This Authority considers in the context examined (among others, in reports [IAI 18/2021](#), [IAI 20/2021](#) or [IAI 26/2022](#), available on its website) that it is convenient in these cases to distinguish access to information from the participating people not selected from access to this same information of the people finally selected.

Thus, given that the present request for information from the union representative of the workers must be understood as made in the context and for the purposes of control over the actions carried out by the City Council in the controversial selection process, which necessarily is governed by the principles of merit, capacity, equality, publicity and transparency (article 78 EBEP and article 9.1.e) LTC), it is not seen, in this sense, what impact it can have on the control of the administrative action of the selection body by the trade union representative the fact of knowing information (such as the exams) relating to people participating in the selection process who have not been selected, so that they are identifiable.

These people, despite opting for one of the three corporal positions called for, have not been finally selected, so they have not been favored at any time with the decision taken by the acting administration.

The reasons adduced by the complaining party in its request for access relating to the observation of irregularities, without more concreteness in this regard ("*due to the numerous complaints received by the participating officials*"), cannot be considered sufficient for the purposes of justifying the prevalence of the right of access claimed by the trade union representative over the right to data protection of the affected persons (unselected participants).

anonymized data must be ruled out . In a case like this, the removal of personal data that would allow the identification of the people who took the exams would not be an effective tool to guarantee their anonymity , given that the information could easily be linked to a specific identifiable person . In this regard, it is necessary to bear in mind the context in which the request is made and the fact that the information on the identity and the broken down score obtained by all the participants in relation to the tests carried out would already be in the possession of the requesting party, in attention to the information available.

Therefore, from the perspective of the data protection regulations, it would not be justified to obtain access and copy the content of the exams relating to the people participating in the selection process who have not been selected. This, unless you have the consent of these people.

On this matter, the file submitted shows that the hearing procedure provided for in article 31 of the LTC has been complied with, so in the event that any of the non-selected participants give their consent to the requested access there would be no inconvenience in giving the applicant a copy of the corresponding exam.

With regard to the people finally selected, and given the reference to the observation of possible irregularities in the selection process by the trade union representative in his request for access, it is necessary to consider whether the access to said information could be justified in view of what is established in article 31.6 of the EBEP.

Article 31.6 of the EBEP provides the following:

"6. The most representative trade union organizations in the field of Public Service are authorized to file administrative and judicial appeals against the decisions of the selection bodies."

This precept recognizes the legitimacy of the most representative trade union organizations to challenge the agreements of the selection bodies. And, consequently, this legitimization allows us to presuppose his qualification to analyze the file before making the challenge.

As was highlighted in reports [IAI 20/2021](#) and [IAI 26/2022](#), to which we refer (available on the Authority's website), if the person requesting the information is part of a trade union organization that has the more representative condition to carry out the control of the administrative action, it seems that the access could cover not only the identity of the person or persons selected, but also the knowledge of the different aspects that have been assessed in the process selective, such as knowledge and abilities (through access to the exams taken), alleged merits (qualification, training, courses, experience, services rendered) and the score obtained.

In said reports, the Authority considers that, although this access would lead to a considerable impact on the right to data protection of the persons selected as a result of the selection process, given that it would make it possible to know not only the scores obtained, but other aspects relevant to their academic or professional life that allow a profile to be obtained, this limitation seems to be necessarily derived from the recognition of the legitimacy mentioned by the EBEP, given that it would not make sense to recognize the legitimacy to appeal administratively or through contentious, without being able to access the information necessary to analyze the viability of the appeal.

Therefore, in the specific case, the legal recognition of this legitimacy to challenge the resolutions of the selection body towards the most representative trade unions and the lack of evidence in the specific case of the concurrence of certain personal circumstances of the three people finally selected participants who could justify the limitation of the right of access of the requesting party to the examinations carried out (article 31 LTC), could justify the union representative's access to said information as long as he is part of a union organization that has the condition of being more representative, in the terms of article 6 of the LOLS.

If so, for the purposes of studying the feasibility of filing an appeal, it seems that access to said exams should also include the possibility of obtaining a copy, bearing in mind that the exams are part of the fundamental information that has been taken into account in the

selection process; that it is information that would allow the correction of the assessment made in the evaluation reports of the selection body already delivered to be checked; that the limited number of people selected (according to the information available would be three) would allow, if necessary, to eliminate those data that may be irrelevant; and the duty of confidentiality that LOLS imposes on trade union representatives regarding information obtained in the exercise of their trade union functions, so that it cannot be used for a purpose other than that which justifies access.

But in the case of not being a representative of a trade union organization that has the status of more representative, the information to which he could have access should be limited to the query of the identity of the people who have been selected (which to be members of a police force should be done through their TIP (article 70.3 RLTC)) and the scores obtained by them in the different exams.

conclusion

The right to data protection would not prevent access and obtaining a copy of the exams taken by the people participating in the selection process who have been selected by the requesting party to the extent that it is a union representative of 'a trade union organization that is considered more representative.

Barcelona, January 30, 2023

Machine translation