

## **Legal report issued at the request of the Commission for the Guarantee of the Right of Access to Public Information in relation to the claim against the refusal by a City Council of the file of the uploading of the destination complement of civil servants.**

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 in relation to the refusal by the City Council (...) of the file of the increase of the destination complement of the civil servants.

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

### **Background**

1. On March 4, 2022, the SIP-FEPOL union section (...), on behalf of that union section, requests the following documentation from the City Council of (...):

*"We ask for the record of the uploading of the destination complements of the civil servants of (...) that has been applied recently, where it also shows which definitive complement each of the civil servants has" .*

2. On January 12, 2023, the trade union section presents a claim to the GAIP in which it states that the City Council has not provided it with the information and claims the record of the increase in the destination supplements of the civil servants of (... ) with an indication of the final complement of each of the officials .

3. On January 24, 2023, the GAIP sent the claim to the City Council of (...) and asked for a report setting out the factual background and the foundations of its position in relation to the claim, as well as the complete file and, if applicable, specifying the third parties affected by the claimed access.

4. On January 26, 2023, the GAIP requests a report from this Authority, in accordance with the provisions of article 42.8 of Law 19/2014, of December 29, on transparency, access to public information and good government

### **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 Law 19/2014, of December 29, on transparency, access to public information and good governance, which regulates the claim against resolutions on access to public information, establishes that if the refusal has been based on the protection of personal data, the Commission must request a report from the Catalan Data Protection Authority.

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 (art. 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 Directive 95/46/CE (General Data Protection Regulation, hereafter RGPD) is repealed.

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 data available to the City Council, which identify and refer directly to staff, as well as other data that may refer more specifically to the workplace they occupy, but which can be associated or can be linked to a specific worker, and which both identify you, are personal data and are protected by the principles and guarantees established by the RGPD.

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

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

Article 18.1 of the LTC establishes: "People have the right to access public information, referred to in article 2.b, individually or in the name and representation of any legally constituted legal person" . The mentioned 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 the one supplied by the other obliged subjects in accordance with the provisions of this law*".

In this sense, the information related to the remuneration of the Corporation's staff is information that must be considered public for the purposes of article 2.b) of the LTC and, therefore, remains subject to the right of access provided for in this regulation. In any case, the right to public information is not absolute and can be denied or restricted for the reasons expressly established in the laws.

In addition, with regard to the regime of access to public information, the first Additional Provision of the LTC provides that "*2. Access to public information in subjects that have established a special access regime is regulated by their specific regulations and, additionally, by this law.*"

Thus, in the case at hand, it will be necessary to analyze whether there is a special regime that enables access to the information requested or, alternatively, whether this access is possible in accordance with the transparency regulations.

### III

At the outset, before the analysis of the substantive issue, it is appropriate to touch on certain issues that affect the information subject to the claim, as well as the person who exercises the right of access to public information.

The union section's claim aims to access "*the record of the uploading of the destination complements of the civil servants of (...) that has been applied recently, where it also shows which definitive complement each of the civil servants has*". Without this Authority having more information .

In this case, the temporal scope of the claim is not indicated. Therefore, in the absence of more concreteness, it is understood that you are referring to the destination supplement corresponding to the year 2022.

Regarding the information related to the destination complement, it is only requested with respect to the City Council's official staff. Therefore, it is understood that the person making the claim is only interested in knowing this information regarding the staff who have the status of official staff. In any case, the considerations that can be made, from the point of view of the personal data protection regulations, would be applicable to both the working staff and the official staff of the City Council.

Regarding the person who presents the claim, although the claim to the GAIP has been presented by the trade union section itself, the fact that the person who presents it, links their request with their union delegate status, and according to the file sent by the GAIP, he is part of the workers' representation body at the City Council from April 1, 2022.

This information may be relevant for the purpose of carrying out the analysis of the case at hand to the extent that the rights recognized to unions, or union sections, are different from those corresponding to union delegates and representatives of workers or staff, according to what will be analyzed below.

It should be borne in mind that the trade union section can be made up of both union members and workplace delegates in accordance with the provisions of its statutes, and therefore the trade union section is not necessarily made up of only trade union delegates, in which the aforementioned rights are recognized. Consequently, the union section, as an entity or legal person, would not have the rights recognized by the LOLS in its article 10.3, being exclusive to the union delegates, regardless of whether they are part of the works committee.

On the other hand, union delegates are recognized with the same legally established guarantees for members of company committees or representative bodies established by public administrations.

In particular, for the purposes that interest us in this report, article 10.3.1 of Organic Law 11/1985, of August 2, on Freedom of Association (LOLS), recognizes, among others, the right to: "*Have access to the same information and documentation that the company makes available to the works committee, union delegates being obliged to maintain professional secrecy in those matters in which they legally proceed.*"

In accordance with what has been explained, article 10.3 of the LOLS recognizes union delegates as equal, in terms of access to information and documentation, to members of the works committee or the bodies of representation in public administrations, in cases that do not form part of these representative bodies.

Taking this circumstance into consideration, it is considered that the case raised must be analyzed from the point of view of the possibility of the trade union delegates to access the requested information to the extent that they are the holders of the right to the information collected by the article 10.3 of the LOLS, and not the union section.

In this case, the analysis of the access request made by a trade union delegate, or by someone who is part of the specific bodies representing the staff, requires recourse to the access to information regime established by the Royal Legislative Decree 5/2015, of October 30, which approves the revised text of the Law of the Basic Statute of the public employee (hereafter EBEP) as well as the revised text of the Law of the Statute of Workers, approved by Royal Legislative Decree 5/2015, of 23 October (hereinafter, ET). And this without prejudice to the fact that the provisions of the transparency regulations must additionally be taken into account.

According to the regulations, they are the boards or staff delegates (art. 39 EBEP), as well as the staff delegates or Company Committee (art. 62 and 63 ET), the specific bodies representing civil servants and public workers with employment contract respectively, and as such they exercise the functions granted to them by the corresponding regulations (art. 40

TRLEBEP and art. 64 ET), among others, the function of monitoring compliance with the regulations, which recognizes the right to access certain information, which could include personal data of workers.

With regard to civil servants, article 40.1.a) of the EBEP, provides that the Personnel Boards and personnel delegates must receive information on personnel policy, as well as data relating to the evolution of remuneration, likely employment trends in the relevant field, and performance improvement programs. However, there is no specific regulation in the EBEP that would enable individual access to the requested information.

In this sense, the STS of February 9, 2021, relating to the communication to trade union delegates and workers' representatives of their personal data, based on the regulatory framework that regulates the right to information of these representatives, is relevant.

According to the fifth FJ of the said STS of February 9, 2021: *"(...), the mentioned articles 40.1.a) of the TR of the Law of the Basic Statute of the Public Employee, 10.3. 1ª of the Organic Law of Trade Union Freedom, which the appellant invokes, in addition to the general article 64 of the Workers' Statute, attribute information rights to the union representatives of the workers, in this case, of the statutory staff, which are essential for the exercise of its work of control and the defense of the interests of the workers . "*

According to the sixth FJ of the same STS:

*"(...). It is relevant, therefore, that it mediates the proper relationship between the personal data of the statutory staff that are requested, with the important trade union function that is carried out. 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.*

*(...).*

*Consequently, the mere invocation, without justification, of the trade union representation cannot serve as an excuse to access all types of documentation, if it is not wanted by this means to empty the content of the fundamental right to data protection, when the holder de los mismos ignore the use that is made of their data, losing their power of disposal, in cases where the concurrence of any of the legally established exceptions is not justified . "*

Taking into account the aforementioned STS, the provisions of the specific regime applicable to the right of access to information of the workers' representatives in the applicable regulations, and that the claimant requests the information alleging his status as a union delegate of the City Council, the regulations provide that trade union representatives can access information relating to the data relating to the evolution of remuneration, and therefore, in this case to the evolution of the destination supplement of the Corporation's officials, but not to associated or individualized information for each worker, but it would be general information. Therefore, it does not appear that in the light of the specific regime applicable to trade union delegates, the requested information can be accessed.

In this sense, in accordance with the above, to analyze the possibility of accessing the information in the terms requested by the claimant, the provisions of the transparency legislation must be followed.

#### IV

The claimant requests access to " *the record of the uploading of the officials' destination supplement (...) which also shows which definitive supplement each of the officials has*". The reason justifying his request is that " *we are aware that workers of the same group, scale and category have different destination complements*".

It is necessary to underline the fact that access to information on the destination supplement awarded to the whole of the Corporation's workforce would not present problems from the point of view of the right to data protection. In this case, and in the absence of more concreteness, the file could contain the description of a job, this description materializes in a physical document called "job description file" in which it is analyzed the content of the job, not the personal characteristics of the person who occupies it. Therefore, these are objective data, referring to the workplace and not the person.

Now, in the terms in which the claim is formulated before the GAIP, taking into account that the claimant is asking for access " *where it also shows which definitive supplement each of the officials has*" and in the absence of more information, it seems that this information is wanted individually for each employee, and therefore identify the affected workers. In this case, it must be based on the possibility of knowing personal data that could relate to an identified or identifiable natural person, so it will be necessary to analyze whether this information can be accessed.

As has been said, the requested information is public information for the purposes of article 2.b) of the LTC and subject to the right of access (article 18 of the LTC). However, the right of access to public information is not absolute and can be denied or restricted for the reasons expressly established in the laws. In this sense, we will have to adhere to what is derived from the limit consisting of the right to the protection of personal data contained in articles 23 and 24 of the LTC.

In principle, given the nature of the information requested, it does not appear that it is particularly protected data in the terms established by article 23 LTC. However, in the event that there is information of this type and in the absence of the owner's express written consent, access should be limited.

Beyond the specially protected data referred to in article 23 of the LTC, the criteria of article 24 of the LTC will have to be taken into account, according to which:

*"1. 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 merely identifying personal data unless, exceptionally, in the specific case it has to prevail over the protection of personal data or other constitutionally protected rights.*

*2. If it is other information that contains personal data not included in article 23, access to the information can be given, with the previous reasoned weighting of the public interest in the disclosure and the rights of the people affected. 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."*

Pursuant to article 24.1 of the LTC, there would be no inconvenience in providing certain identifying information of the people who have intervened in the processing of the file by reason of their position. However, this information would not cover any identifying data of these people, but only those specified in article 70.2 of the RLTC which states: "*For the purposes of what is provided for in article 24.1 of Law 19/2014, of 29 of December, are purely identifying personal data consisting of the name and surname, the position or position held, body and scale, the functions performed and the telephone and the addresses, postal and electronic, of professional contact, referred to the staff at the service of public administrations, senior officials and management staff of the public sector of public administrations.*"

In accordance with article 24.2 of the LTC, access to the personal information requested goes through a prior reasoned weighting, which must take into account all the circumstances that affect each specific case, with the aim of determining whether the public interest must prevail in the disclosure of the information or the right of the affected persons.

In this sense, the people affected would be the City Council officials affected by the modification of the destination supplement. These people, as civil servants, include both staff who occupy positions of high positions and the rest of the workers.

With regard to the retributive concept that is the reason for a claim, article 93 of Law 7/1985, of April 2, Regulating the Bases of the Local Regime, provides:

- "1. The basic remuneration of local officials will have the same structure and the same amount as those established with a general character for all public functions.*
- 2. Complementary remuneration will also comply with the structure and objective assessment criteria of those of the rest of the public servants. Its global amount will be set by the Plenary of the Corporation within the maximum and minimum limits that are indicated by the State.*
- 3. The Local Corporations will reflect annually in their budgets the amount of the remuneration of their officials in the terms provided for in the basic legislation on public service."*

In similar terms, Decree 214/1990, of July 30, is issued, which approves the Regulation of personnel in the service of local entities, when it provides that the plenary session of each corporation must determine the list of jobs the level corresponding to each of them within the minimum and maximum limits determined by the state regulations on the public function. With regard to the amount of the destination supplement, it is identical for all public sector services and must be reflected annually in the budget of each corporation, according to what is established for each level by the General Budget Law of the state (article 166 et seq.).

In this context, it should be remembered that the destination supplement is fixed based on the classification of jobs in levels. This assignment of levels by the plenary is not arbitrary but obeys criteria of technical discretion, it requires a prior assessment and a classification of the site according to its functional content.

On the other hand, the destination complement level, once approved and assigned to the site, becomes an essential and necessary content of the RLT that must be public (article 74 of the EBEP, article 283 of the TRLMRLC). Regarding active advertising, article 9.1.d) of the LTC provides:

*" The information relating to the institutional organization and the administrative structure that the Administration must make public in application of the principle of transparency must include:*

*(...)*

*d) The list of jobs for official, labor and casual staff, and the staff and the list of temporary contracts and internships not linked to any job in said list of positions."*

For the purposes of letter d) of article 9.1 of Law 19/2014, of December 29, article 20.1.a) of the RLTC provides that public administrations must publish:

*"The list of jobs for official, labor and temporary staff, in accordance with the minimum content provided for in the regulations in force in the field of public service."*

In this sense, the obligation to advertise the RLT, which includes the complementary remuneration of each job, derives from both the public service regulations and the transparency regulations.

In addition, in the matter of remuneration , article 11.1.b) of the LTC obliges public administrations to publish individually:

*"Remuneration, compensation and per diems, the activities and assets of members of the Government, senior officials of the Public Administration and the management staff of public bodies, companies, foundations and consortia, and the compensation they must receive upon ceasing to hold office".*

For these purposes, with regard to the local area, article 7.1 of Decree 8/2021, of February 9, on transparency and the right of access to public information (hereinafter the RLTC) provides that *" have the consideration of senior officials and local management personnel, in any case, the elected officials and the holders of the bodies that exercise management or executive functions of a superior nature, adjusting their performance to the guidelines set by the governing body of the corporation, in accordance with the provisions of the local regulations."* This same criterion, as this Authority has highlighted in other reports, can be extended with respect to access to the remuneration of staff who occupy positions of trust, of special responsibility within the organization, of free appointment, or who they carry a high level of remuneration. This criterion should also be taken into account in relation to sites that involve a certain margin of discretion in terms of their provision.

For the rest of the workers, article 11.1.e) of the LTC obliges to publish:

*"General information on remuneration, compensation and allowances received by public employees grouped according to levels and bodies."*

For these purposes, article 25.1.a) of the RLTC details what is meant by remuneration and provides that *"information must be given on the overall gross annual remuneration of the different bodies and levels, with details of the basic remuneration and the supplements that correspond according to the regulations, and the agreement or non-agreements that apply."*



*In this sense, the remuneration tables of the personnel in the service of the public administrations must be published, with an indication of the basic and complementary remunerations, in the case of civil servants, and with an indication of the basic remunerations, complement of seniority, extraordinary payments and other supplements and specific bonuses according to the agreement or outside of the agreement, in the case of labor personnel.”*

This obligation of active advertising in the matter of remuneration must involve recognizing the right of access to the remuneration information of the destination complement of high-ranking local officials on an individual basis and, as regards the rest of civil servants, the information must be published in an aggregated manner, that is to say, associated with the public administration jobs in question grouped according to the levels and the bodies to which they belong, without having to indicate the identity of the specific person who occupy a certain job.

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In accordance with all the above, the fact that the person making the claim is a trade union representative is a special consideration, given the functions, among others, of control and monitoring of compliance with current regulations, of established agreements, as well as, obtain information on the evolution of remuneration, which, as explained, is attributed to them by the EBEP, the ET and union legislation.

With regard to the purpose of access to the file, in the absence of concreteness about the content of the file and without further information on the matter, it would seem that, purely, the claimant wants to access a file for the requalification of the workplace since it would involve a change in level and at the same time a change in the destination complement of one or several City Council officials, in order to exercise their functions of controlling the evolution of remuneration and thus to be able to control possible wage discrimination that involves certain people doing the same tasks with different bodies and/or at different levels, as can be deduced from the purpose alleged by the claimant.

In this sense, the remuneration information of civil servants affected, would allow the union delegate to know the reasons that justify the decision adopted, elements that may be relevant for the purposes of evaluating the criteria and decisions taken by the City Council in this matter and power exercise their functions of monitoring compliance with the current regulations that they have been assigned, as well as to control whether the regulations are being respected with regard to the evolution of remuneration, and to detect any irregular actions that may have occurred.

It must also be taken into account that the information requested, specifically, the destination supplement, is a remunerative concept of an objective nature, directly linked to the workplace and independent of the person who exercises it, and is a generic supplement, in the sense that it is generally allocated in the same amount for all jobs at the same level, therefore, it does not take into account the personal circumstances of the officials who develop them.

On the other hand, given the terms of the current regulation on the active advertising of the list of jobs, it does not seem that access to the remuneration information contained in the RLT can be restricted. In this sense, it is clear that once the group to which a certain job is attributed is known through the RLT, this can easily be related to the remuneration for the

staff in the service of the public administrations established in the successive budget laws for each group of the civil service. In addition, it could be thought that the publication of the RLT has no impact on the protection of personal data, however, it is obvious that despite the fact that it does not include the direct identification of City Council workers, in many cases these may be easily identified indirectly.

In short, in these cases, the prospects of privacy that the affected person or persons (officials affected by the supplement increase) may have with respect to the relationship maintained with the municipal administration, are limited, given the advertising regime to which they are exposed

Consequently, it is clear that to the extent that the regulations provide for the obligation to publish this information, there is not and should be no inconvenience in providing the requested information.

However, in application of the principle of minimization (Article 5.1.b) of the RGPD) and, given the purpose of access in this case, it is considered that the city council could, at the outset, provide the information without need to sacrifice the privacy of the affected workers.

Therefore, it does not seem that in a case like the one raised, the claimant's right of access should prevail, since there are no specific circumstances from which it can be considered that the right of access should prevail to the data protection rights of the affected employees.

In this sense, the data protection regulations do not prevent access to the individualized information relating to the amount that the modification of the destination complement of the Corporation's officials who hold managerial positions, senior positions, positions of trust, of free designation has entailed, of special responsibility within the organization that involve high levels of remuneration. With regard to the rest of the official staff, it will have to be provided in an aggregated way, without identifying the affected workers by first and last name.

Finally, it must be remembered that whenever access to personal data is carried out due to the functions entrusted to him as a trade union delegate, this must be governed by the duty of secrecy in article 10. 3 LOLS. As well as, by the principle of purpose limitation (Article 5.1.b)) and by the principle of integrity and confidentiality (Article 5.1.f)) established in the RGPD complemented by the duty of secrecy that is included in Article 5.1 of the LOPDGDD.

## **conclusion**

In accordance with the terms in which the claim is formulated, the data protection regulations do not prevent the trade union representative from accessing the individualized information relating to the amount of the final destination supplement for senior positions involving high levels of remuneration. As for the rest of the civil servants, it can only be provided in an aggregated way, without identifying the affected workers with names and surnames.

Barcelona on March 3, 2023

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