

## **Legal report issued at the request of the Commission for Guaranteeing the Right of Access to Public Information in relation to the claim against the refusal by a City Council to request a view and copy of the Workplace Harassment Protocol of a file.**

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 a City Council of the request of view and copy of the Labor Harassment Protocol of a file.

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, I inform you of the following:

### **Background**

On October 25, 2022, a citizen makes a request for access to public information to a City Council in which she requests the following information:

*"(...), career employee of this town hall, as interested in the file (...) for having filed a complaint of workplace harassment, as stated in the documents (...), also acting in representation of the workers of the town hall (...), in the capacity of Delegate of the Official Personnel and as General Secretary of the Trade Union Section of the Central Independent Trade Union of Officials (CSIF) of the town hall(...) . That in accordance with what is established in article 53.1 a) of Law 39/2015, of October 1, of the common administrative procedure of Public Administrations, and in accordance with the powers established; in article 40.1.e) of Royal Legislative Decree 5/2015, of October 30, which approves the revised text of the Law on the Basic Statute of the public employee, in article 34.2 of the Law 31/1995, of November 8, on the Prevention of Occupational Risks, and in articles 52.7, 53. 5. 6. 7., and 66 of the Agreement on Official and Labor Personnel of the City Council(...), approved in year 2009.*

*request*

*View and copy of the Labor Harassment Protocol of the file(...), in accordance with the provisions of article 53.1 a), of Law 39/2015, of October 1, on the administrative procedure common of Public Administrations, in article 12 of Law 19/2013, of December 9, on transparency, access to public information and good governance, approved by the General Courts, and in article 18 of Law 19 /2014, of 29 December, on transparency, access to public information and good governance, approved by the Autonomous Community of Catalonia".*

1. On December 8, 2022, the applicant submits a claim to the GAIP in which he alleges that he claims access to the information:

*"View and copy of the Protocol of Labor Harassment of the file (...), in agreement with the one established in article 53.1 a), of Law 39/2015, of October 1, of the procedure administrative common of Public Administrations , in article 12 of Law 19/2013, of December 9, on transparency , access to public information and good governance , approved by the General Courts , and in article 18 of Law 19 /2014, of December 29, on transparency , access to public information and good governance , approved by the Community Autonomous of Catalonia."*

2. On December 23, 2023, the GAIP sends the claim to the City Council and asks 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.

3. On January 30, 2023, the GAIP reiterates the request for a report to the City Council and, given the lack of response, reiterates the request on February 8, 2023. It is not stated in the file that the City Council has issued the report on the events or provided the requested documentation.

4. On February 13, 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, 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 (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 person making the claim requests access to and a copy of the Labor Harassment Protocol of a file processed by a City Council, as indicated in the claim, as interested in the file for having submitted the complaint for labor harassment and, in addition also acting as a representative of the workers of the town hall in the capacity of representative of the civil servants and as General Secretary of the Trade Union Section of the Central Independent Trade Union of Officials (CSIF) of the same town hall.

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 Labor Harassment Protocol of the file carried out by the City Council that is the object of the complaint is public information for the purposes of article 2.b) of the LTC and, consequently, remains subject to the legal regime 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 certificate issued by the president of the Management Committee of the Provincial Union of Barcelona of the Central Independent Trade Union and of Employees, CSI.F, provided by the claimant in his claim, he holds the position of staff delegate at the City Council claimed

The claimant states that she acts as a whistleblower as a victim of workplace harassment as well as a staff representative. From the point of view of her status as staff representative, the priority nature of the specific regime of access to information established for the representatives of workers by the revised text of the Law of the Basic Statute of the public employee, approved by Royal Legislative Decree 5/2015, of October 30 (EBEP). And this without prejudice to the fact that the provisions of the transparency regulations must additionally be taken into account.

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 the following functions to staff boards and staff delegates:

- "a) Receive information on the personnel policy, as well as on the relevant data to the evolution of remuneration, probable evolution of employment in the corresponding field and performance improvement programs.*
- b) Issue a report, at the request of the corresponding Public Administration, on the total or partial transfer of facilities and implementation or review of their systems of organization and work methods.*
- c) Be informed of all the sanctions imposed for very serious offences .*
- d) To know and be heard about the establishment of the working day and schedule of work, as well as the vacation and leave regime.*
- e) Monitor compliance with current regulations regarding working conditions, occupational risk prevention, Social Security and employment, and exercise, where appropriate, the actions appropriate laws before the competent bodies.*
- f) Collaborate with the relevant Administration to achieve the establishment of all the measures that seek to maintain and increase productivity."*

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 pacts , 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.*"

For its part, article 34.2 of Law 31/1995, of November 8, on the Prevention of Occupational Risks establishes:

*"To the Works Councils , to the Personnel Delegates and to the representatives unions correspond to them , in the terms that, respectively , are recognized by the Estatuto de los Trabajadores , the Law on Personal Representation Bodies in the Service of Public Administrations and the Law Orgánica de Libertad Sindical , the defense of the interests of workers in matters of risk prevention at work . For this , the staff representatives will exercise the powers you say rules establish in matters of information , consultation and negotiation , surveillance and control and exercise of actions before companies and bodies and courts competent ."*

The legal texts analyzed recognize the workers' representative bodies as having the function of monitoring compliance with current rules regarding working conditions and occupational risks. It is not known what is the Workplace Harassment Protocol applied by the City Council,

however, in general the union representatives have functions related to the definition of the municipal policy against harassment, participation in the preparation of the Prevention Protocol and management of harassment, support workers who may be experiencing harassment situations, act as guarantors of established processes and commitments, etc.

Likewise, in accordance with article 40.1.c) of the EBP, staff delegates have the right to be informed of all the sanctions imposed for very serious offences. Consequently, if, as a result of the case of workplace harassment, a penalty for a very serious offense was imposed on the person responsible for this behavior, it would be necessary to inform the personnel representatives of this fact.

However, beyond the aforementioned precepts, there is no other specific provision that is directly related to access by staff delegates or works council members, in general, to workplace harassment files.

For this reason, apart from the provisions of the specific access regime mentioned (EBEP and ET), it would be 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.

#### IV

At the outset it can be said that from the point of view of data protection regulations, it does not pose any problem to provide the person requesting the copy of the "Labour Harassment Protocol" approved by the City Council if it does not incorporate personal data.

Regarding the rest of the documentation that makes up the application file of the Labor Harassment Protocol as a result of the complaint submitted by the claimant, although this file is not available since the city council did not has sent to the GAIP, it can be expected to contain personal data both of the person making the claim and of other people from the City Council who have intervened in the procedure.

Article 23 of the LTC establishes:

*"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 sexual 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 by means of a written which must accompany the application."*

Given that the documentation refers to a file for a situation of workplace harassment, it can be expected that it will contain health data of the person making the claim (information referring to possible absences from work, psychological evaluations, etc.).

With regard to the health data or other special categories of data of the person claiming, as this Authority has repeatedly highlighted, the limit of article 23 of LTC would not be applicable with respect to access to the own data of the claimant person. In fact, as explained in the following rationale, under Article 15 RGPD the claimant has the right to access her own data, including those that are part of special categories of data, with the limitations that may derive from the existence of rights of third parties (art. 15.4 RGPD) and, eventually, from the exceptions that may derive from rules with the rank of law in accordance with article 23 RGPD, which are not given in the case of the claim.

It cannot be ruled out that the file contains special categories of data from third parties, such as the person or persons investigated for the alleged harassment, if this were the case access to this information would have to be denied unless the affected person had expressly consented to in writing accompanying the request.

#### v

With regard to the information about the employees or public officials in charge of the processing and resolution of the file, which may be included in the requested documentation, article 24.1 of Law 19/2014 provides that *"It must give access to public information 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 the protection must prevail of personal data or other constitutionally protected rights"*.

Article 70.2 of Decree 8/2021, of February 9, on transparency and the right of access to public information, specifies that pursuant to the provisions of Article 24.1 of Law 19/2014, of 29 December, "are merely *identifying personal data consisting of the name and surname, the position or position held, body and scale, the functions performed and the telephone and addresses, postal and electronic, of professional contact, referred to the staff at the service of public administrations, senior officials and managerial staff of the public sector of public administrations*".

Therefore, facilitate the access of the person claiming to the merely identifying data (name and surname and position) of the public employees who, in the exercise of their functions, have participated in the requested file, in the terms indicated, in principle would not be contrary to the right to the protection of personal data.

## VI

With regard to the rest of the personal data that may be contained in the claimed file, it is necessary to take into account the provisions of article 24.2 of the LTC which establishes:

*"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.*
- [...]."*

In accordance with the provisions of article 18.2 of the LTC, the exercise of the right of access to public information is not conditioned on the fact that a personal interest is involved, as well as not being subject to the motivation or invocation of any rule, however, knowing the motivation of the request can be a relevant element to have in the weighting that needs to be done between the right of the applicant to access the information and the right to data protection of the affected persons for that access.

The first issue that must be taken into consideration in the weighting of rights is that the information requested contains personal data of the person making the claim. Article 15 of the RGPD provides for the following:

*"1. The interested party will have the right to obtain from the controller confirmation of whether or not personal data concerning him or her are being processed and, in such case, the right to access personal data and the following information:*

- a) the purposes of the treatment;*
- b) the categories of personal data in question;*
- c) the recipients or the categories of recipients to whom the personal data was communicated or will be communicated, in particular recipients in third parties or international organizations;*
- d) if possible, the expected period of personal data conservation or, if not possible, the criteria used to determine this period;*
- e) the existence of the right to request from the person in charge the rectification or suppression of personal data or the limitation of the treatment of personal data relating to the interested party, or to oppose said treatment;*
- f) the right to present a claim before a control authority;*
- g) when the personal data has not been obtained from the interested party, any available information about its origin;*
- h) the existence of automated decisions, including profiling, referred to in article 22, sections 1 and 4, and, at least in such cases, significant information about the logic applied, as well as the importance and expected consequences of said treatment for the interested party.*

2. [...]



*3. The person responsible for the treatment will provide a copy of the personal data subject to treatment. The person in charge may charge a reasonable fee based on administrative costs for any other copy requested by the interested party. When the interested party presents the request by electronic means, and unless he requests that it be provided in another way, the information will be provided in a commonly used electronic format.*

*4. The right to obtain a copy mentioned in section 3 will not negatively affect the rights and freedoms of others.”*

In accordance with this article, the claimant has the right to access the information about her that appears in the claimed documentation. In addition, taking into consideration that the information contained therein may also originate from the statements of other persons who may have intervened in the procedure as witnesses, the right of access recognized by article 15 of the RGPD would cover also know the identity of the people who have provided the information, to the extent that it would form part of their right to know the origin of the data.

Therefore, the existence of the right of access recognized by the data protection regulations, (Article 15 RGPD) will favor the weighting referred to in Article 24.2 of the LTC in favor of access to the own data contained in the complaint.

All of this, except that with respect to the identification of these third parties there is some element that, depending on the personal situation of these people, must lead to a limitation of this access. In this sense, revealing information about the identity of these third parties who have been able to provide information about the claimant acting as witnesses, may involve some affectation to the extent that they are people who share the work environment, and that their statements may have contributed to the conclusions of the application of the protocol. The disclosure of what they may have said or not said regarding the person making the claim and the facts reported could end up negatively affecting the working relationships of these people.

For this reason, in order to find out if there are personal circumstances or reasons that would justify preserving your identity, the Authority has noted the special relevance of complying with the hearing procedure provided for in article 31 of the LTC , which establishes:

*"1. If the request for public information may affect the rights or interests of third parties, in accordance with the provisions of this law, in the event that the potential affected are identified or are easily identifiable, they must be transferred from the request, and they have a period of ten days to present allegations if these may be decisive for the meaning of the resolution.*

*2. The claims procedure referred to in section 1 suspends the deadline for resolution.*

*3. The transfer of the request must indicate the reasons for the request, if they have been expressed, but it is not mandatory to reveal the identity of the applicant.*

*4. The applicant must be informed of the transfer of the application to third parties and of the suspension of the deadline for issuing a resolution until the allegations have been received or the deadline for presenting them.”*

As this authority has previously highlighted, knowing the position of the affected third parties and the circumstances or reasons they may have for opposing access is always an element that could be relevant when deciding to enforce the right of access or the right to privacy of these third parties. But, in any case, the mere opposition is not enough to limit access, since in order for the allegations made to be taken into consideration in the weighting of rights, they must be based on specific personal circumstances that demonstrate that access to the requested information may cause real harm to their rights or interests.

In any case, it must be taken into account that, in accordance with the principle of minimization, the data subject to treatment must be adequate, relevant and limited to what is necessary for the purposes for which they are treated (Article 5.1.c RGPD ).

It cannot be ruled out that in addition to information about the claimant herself, the reporting persons have provided information about themselves or other municipal workers. With respect to these statements that may have been made by the witnesses who are not related to the person making the claim (for example aspects of their own personal or work life, or with respect to other situations in the work or personal life of other workers) the result of the weighting of rights will be different.

In this case, it does not seem necessary to access this information from third parties who do not have a direct relationship with the person making the claim and the complaint for harassment that they submitted. Thus, the right to data protection of these third parties should prevail over the claimant's right of access to information. And, therefore, this third-party information should be deleted from the requested documentation.

Therefore, in the case at hand, and at the expense of the outcome of the hearing procedure of article 31 of LTC, in principle it is possible to identify the third parties who have provided information about the claimant, but it will be necessary to exclude contact details or other excessive data (for example, the ID number) of these people

## **Conclusions**

The data protection regulations do not prevent access and copying of the Labor Harassment Protocol by the person making the claim.

With regard to the claimant's access to the claimed file, access could be given to their own personal data and, in principle, to the identity of the witnesses who have intervened by providing information about the claimant contained in the documentation, unless specific circumstances arise with respect to these third parties that justify the limitation, in the terms set out in legal basis IV.

Likewise , the data protection regulations do not prevent access to the identity of employees or public officials in charge of the processing and resolution of the file, since these are actions carried out in the exercise of their functions.

Finally, it should be borne in mind that information that contains special categories of data from third parties should be omitted as well as other information from third parties that may be included in the file and that does not have a direct relationship with the person making the claim and the complaint for harassment that he presented.

Barcelona, March 3, 2023

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