

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 denial of access to each worker's information regarding the working day in face-to-face and telework mode and restaurant tickets of the workforce of a municipal public company.

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 municipal public company to request for access to each worker's information regarding the working day in face-to-face or telework mode and restaurant tickets of their staff.

After analyzing 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, the following report is issued:

Background

1. On December 12, 2022, the claimant, as a representative of the workers of the Works Committee, presents an instance before a City Council in which he requests, among other issues:

"List of working people from January 1, 2020 and up to the present day who have worked morning and afternoon shifts in person or remotely, specifying for each year and up to the present day:

- Names and surnames, place of work and equipment where you carry out your activity.*
- Number of weeks that they have completed morning and afternoon shifts in person or with distance work.*
- Number of days they have completed in the morning and afternoon in person or with distance work.*
- Number of days spent in the morning and afternoon with paid restaurant tickets*
- Number of days they have worked in the morning and afternoon with remote work and without payment by the business side of the restaurant ticket."*

2. On December 14, 2022, the City Council refers the request for access to the municipal public society, because it considers that it is responsible for its processing.

3. On January 13, 2023, the Manager of Economy, Resources and Economic Promotion of the City Council decides to deny the request because *"it is observed that the substantial identity of the information that is claimed may be the subject of evidence in the defense in the trial in the judicial procedure indicated above, and that it remains open, being applicable in "article 21.1.d) LTAIPBG".*

4 . On January 19, 2023, the claimant presented a claim to the GAIP in which he pointed out that the City Council had denied his request "claiming that it is the subject of a judicial procedure" *and* only request access to the information again.

On the same date, the trade union section attached the documentation relating to representativeness, from which it appears that the request made before the City Council and the subsequent claim before the GAIP was addressed by the person who holds the position of secretary of organization of the trade union section and authorized to act on behalf of the Trade Union Section since February 2019, and as a representative of the workers forming part of the Works Committee since April 2019.

5. On January 31, 2023, the GAIP will send the claim to the City Council, requesting a report setting out the factual background and the basis for 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.

6. On February 21, 2023, the municipal public company sends a report that confirms the report dated January 13, 2023 and considers that the requested information should be denied.

7. On February 27, 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 information public 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.

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 protection regulations, in accordance with what is established in articles 2.1 and 4.1) of the RGPD, apply to the treatments that are carried out on any information " *on an identified or identifiable natural person ("the interested party »); Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person "*

The data available to the municipal public company, which identify and refer directly to the 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 worker specific, and which therefore identify it, are personal data and are protected by the principles and guarantees established by the RGPD.

In accordance with the provisions of article 5.1.a), any processing of personal data must be lawful, loyal and transparent in relation to the interested party. In this sense, the RGPD establishes the need for one of the legal bases of article 6.1, among which section c) foresees the assumption that the treatment "is necessary for the fulfillment of a legal obligation applicable to the *responsible of the treatment "*

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

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

The regulation and guarantee of public access to documents held by public authorities or public bodies is regulated in our legal system in Law 19/2014, of December 29, on transparency, access to public information and good governance (hereinafter, LTC), which recognizes people's right of access to public information, understood as such " *the information prepared by the Administration and that which it has in its power as a result of*

the its activity or the exercise of its functions, including that supplied by the other obliged subjects in accordance with the provisions of this law " (article 2.b) and 18 LTC). State Law 19/2013, of December 9, on transparency, access to public information and good governance (hereafter, LT), is pronounced in similar terms, in its articles 12 (right of access to public information) and 13 (public information).

In the case at hand, in which a representative of the workers requests access to information relating to the list of workers identified with names and surnames, workplace and equipment where the activity is carried out, specifying the working day, type of working day and restaurant tickets from each of them, it can be concluded that it must be considered public information for the purposes of article 2.b) of the LTC, and subject to the right of access (article 18 of the LTC), being information in their power as a result of the exercise of their powers.

III

The claimant requests access to information on the list of workers, from January 1, 2020 to the present, who have worked morning and afternoon shifts in person or remotely, specifying by year:

- "- Names and surnames, place of work and equipment where you carry out your activity.*
- Number of weeks that they have completed morning and afternoon shifts in person or with distance work.*
- Number of days they have completed in the morning and afternoon in person or with distance work.*
- Number of days spent in the morning and afternoon with paid restaurant tickets*
- Number of days they have worked in the morning and afternoon with remote work and without payment by the business side of the restaurant ticket."*

At first, the person who exercises the right of access to public information submits the request to the City Council of (...) and subsequently the claim to the GAIP, as Secretary of Organization of the Trade Union Section and as representative of the workers of the Company Committee since April 2019. In this case, the case raised is considered to be analyzed from the point of view of the possibility to access the requested information to the extent that it is the Works Council and not the union itself.

In this way, the first additional provision of the LTC, provides in section 2 that *"Access to public information in subjects that have established a special access regime is regulated by their specific regulations and, additionally, by this law."*

According to labor regulations, it is the Works Committee (art. 63 of the Workers' Statute, Royal Legislative Decree 5/2015, of October 30, ET), the specific body for public workers with employment contracts, respectively, and as such they exercise the functions granted to them by the corresponding regulations (art. 64 ET), among others, the function of monitoring compliance with the regulations, which grants them the right to obtain certain information

The specific regulations provide that the representatives of the workers must be able to access information for the development of their functions of negotiation and defense of the rights of the workers.

Thus, article 64.1 of the ET, provides, among others:

" 1. The company committee will have the right to be informed and consulted by the employer 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. Information is understood as the transmission of data by the employer to the works council, so that it is aware of a certain issue and can proceed with its examination. (...)"

Indirectly, article 64.5.f) of the ET when it establishes that the works council has right to issue a report, before the employer executes a decision, on *" the implementation and review of work organization and control systems, studies of times, establishment of bonus and incentive systems and job evaluation de trabajo"*, recognizes the right to receive information about the working day to the extent that it is included in the control of work or time studies. And in order to issue this report, it can collect from the employer the information it requires in the terms established in article 64.1 and 6 of the ET.

With regard to the powers of the works council, article 64.7 includes, among others, the following:

"c) Collaborate with the management of the company to achieve the establishment of how many measures seek to maintain and increase productivity, as well as the environmental sustainability of the company, if this is agreed in the collective agreements."

From the above, it follows that the legal representatives of the workers are recognized with a right of access to the information they need in order to negotiate the working conditions of the workers. This right is framed or derived from the right of employees to collective bargaining, representation and institutional participation in the determination of their working conditions.

All this for the purposes of exercising, among others, the function of *"monitoring compliance with the current labor, social security and employment standards, as well as the rest of the agreements, conditions and company practices in force, formulating, as the case may be, the appropriate legal actions before the employer and the competent bodies or courts"* (article 64.7.1.a) ET).

At the same time, it is also necessary to take into account in the case we are dealing with Royal Decree-Law 8/2019, of March 8, on urgent protection measures and the fight against labor insecurity during the working day which, among others, states that its aims are to guarantee compliance with the limits on working hours, to create a framework of legal security for workers and companies to facilitate the resolution of discrepancies regarding working hours and, consequently, on wages, establishing the bases to end an element of precariousness in labor relations, recognizing the role of collective bargaining.

Specifically, article 10 of the Royal Decree-Law introduces section 9 to article 34 of the ET, which recognizes the workers' representatives the possibility of accessing the daily records of the workers' day, when it establishes what:

"The company will guarantee the daily work register, which must include the specific start and end time of each worker's work day, without prejudice to the flexible hours established in this article.

Through collective bargaining or company agreement or, failing that, the employer's decision prior to consultation with the legal representatives of the workers in the company, this day record will be organized and documented.

The company will keep the records referred to in this provision for four years and they will remain at the disposal of the workers, their legal representatives and the Labor and Social Security Inspectorate."

In accordance with this forecast, from May 12, 2019, which is the date on which it entered into force, the representatives of workers subject to the ET can have access to the daily record of the working day of each working person. In this sense, this Authority has pronounced in relation to access to this information in IAI 57/2021.

Thus, the regulations provide that the representatives of the workers can access the information relating to the daily working hours performed by the workers, and that they correspond to the records drawn up from the date of May 12, 2019, in accordance with the forecast of article 34.9 of the ET.

In accordance with the above, nothing prevents the claimant from accessing, in this way, the list of workers identified with names and surnames and the number of daily shifts performed in the morning and afternoon hours of the requested period.

IV

However, the claimant requests, in particular, individualized lists of each worker, specifying whether the number of days worked in person or remotely, indicating the days on which restaurant tickets were granted and those that were not.

In this sense, to analyze the possibility of communicating the information in the terms requested by the person making the claim, it will be necessary to take into account the provisions of the transparency legislation. At this point, it is necessary to assess whether the right to data protection of these people can justify or not the limitation of the right of access to public information recognized in article 18 of the LTC.

Given the nature of the information requested, there is no particularly protected data in the terms provided for in article 23 of the LTC. Beyond the specially protected data referred to in article 23 of the LTC, and in accordance with article 24.2 LTC, a weighting must be done between the public interest in the disclosure of information and the right to data protection of the affected persons:

"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."*

Thus, access to the personal information to which we previously referred must go through a prior, reasoned weighting between the public interest in disclosure and the right to data protection of the persons affected who, in this case, it would be the staff of the municipal public society.

In this weighting it is necessary to take into account all the circumstances that affect each specific case with the aim of determining whether the claimant's right of access or the data protection right of the affected persons should prevail, taking as based on the different elements listed in the aforementioned article.

To make this weighting, the purpose of the access must be taken into account. In this sense, although article 18.2 of the LTC provides that the right of access is not conditional on the concurrence of a personal interest, it is not subject to motivation and does not require the invocation of any rule, knowing the motivation for which the claimant wishes to obtain the information to be a relevant element to be taken into account.

The private or particular dimension of the right of access to public information is specified by allowing people to access information that may be of interest to their sphere of particular interests and in this sense, the purpose of access play an essential role when weighing between the two rights at stake.

In this specific case, the person requesting access, who does so as a representative of the workers, does not specify the purpose of access to the claim. However, in the file brought before the GAIP, there is an agreement, dated July 23, 1998, signed by the Works Committee and the municipal public society, which recognized, among others, that *"the staff hired for (...) SPM and who perform their functions in the facilities of (...) SPM, as long as and when they perform morning and afternoon shifts, they will be entitled, on the days they perform this shift, to the perception of "a restaurant ticket", the amount of which will be, for the year 1998, 490 pesetas per day, increasing for the years 1999 and 2000 with the corresponding percentage of the CPI"*.

With reference to this agreement, the claimant says that *" Despite this (with reference to the 1998 Agreement previously reviewed) since the confinement started on April 14, 2020, it has not been paid to the workers who they work part-time under the modality of remote work"*.

From this it follows that the purpose is to check whether restaurant tickets have been granted when working remotely.

In view of the above, in order to comply with the functions provided for in article 64.7.1 of the ET and in accordance with Royal Decree-Law 8/2019, the person making the claim as a representative of the workers can have the list of record of each worker's working hours, and therefore, in this way, you can count the number of weeks and morning and afternoon days worked by each worker.

On the other hand, with regard to the restaurant ticket, according to the agreement of July 23, 1998, referred to above, the awarding of the restaurant ticket responds to an objective

assessment, namely, " *that they exercise their functions in the facilities locations of (...) SPM, as long as and when it performs morning and afternoon work*". Thus, as it is an objective data, put in relation to the hourly work record, it is possible to deduce the number of days that have given each worker a restaurant ticket.

In addition, the person making the claim requests that it be specified whether the day was done face-to-face or remotely. The establishment of the remote work modality is subject to an individual telework agreement between the worker and the municipal company. These agreements must respect the principles of voluntariness and reversibility. Therefore, from the point of view of the people affected, access to this information may lead to knowing information that is linked not to the workplace but to the physical person who occupies it.

However, article 6.2 of Law 10/2021, of July 9, on remote work provides:

"The company must deliver to the legal representation of the employees a copy of all remote work agreements that are made and their updates, excluding data that, in accordance with Organic Law 1/1982, of May 5, of civil protection of the right to honor, personal and family privacy and one's own image, could affect personal privacy, in accordance with the provisions of article 8.4 of the Workers' Statute. The treatment of the information provided will be subject to the principles and guarantees provided for in the applicable regulations on data protection. This copy will be delivered by the company, within a period not exceeding ten days from its formalization, to the legal representation of the employees, who will sign it in order to certify that the delivery has taken place."

Therefore, in accordance with current regulations, the legal representative has access to a copy of the remote work agreements that are made as well as their updates. However, the processing of this information is subject to the principles and guarantees provided for in the data protection regulations.

In this sense, the fact that, facilitate the list with names and surnames of the working people, the workplaces and equipment where they carry out their activities, it may be relevant with the modality of the day carried out specifying whether or not a restaurant ticket has been paid if what you want to check is the degree of compliance with the rules or agreements established in this regard, and detect any irregular actions that may have occurred when assigning restaurant tickets. Indeed, the control of the type of working day and the delivery of the individualized restaurant ticket for each worker would make it possible to check which remote working day workers have or not been given the corresponding restaurant tickets. All this corresponds to information directly related to the management of human resources and control of public expenditure, in short, in the knowledge of public activity and administrative management and the guarantee of the retention of accounts and responsibility in the public management or, in other terms, establish the possibility of offering tools for the control of the performance of the municipal public society.

Even so, for the purposes of transparency what the transparency legislation pursues is to be able to evaluate the management carried out, in this case, by the body responsible for the private municipal company as well as any arbitrary actions produced and, this evaluation, can do without needing to sacrifice the privacy of the affected workers.

It should be remembered that in accordance with the principle of minimization provided for in article 5.1 b) of the RGPD *"the data will be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ("minimization of data")* .

Therefore, in this case, the purpose of transparency can also be achieved through the pseudonymization of the information, that is to say : *"the treatment of personal data in such a way that they can no longer be attributed to an interested party without using additional information, provided that said additional information appears separately and is subject to technical and organizational measures aimed at ensuring that personal data are not attributed to an identified or identifiable natural person;"* (article 4.5 RGPD).

To this end, this Authority considers that the information requested by the claimant could be provided, on the number of weeks, morning and afternoon sessions in person and remotely and with or without tickets perceived by each worker, without indicating the workplace and equipment where the activity is carried out and replacing their first and last name with a code assigned to each of them.

In this sense, it must be remembered that in order for pseudonymization to be carried out, it is necessary to deal with jobs that have a sufficiently large number of workers to prevent their re-identification .

Thus, in order for these codes to be effective from the perspective of data protection, it is necessary to ensure that the identity of the worker is known only to the person who attributes the code, so that the worker is not identifiable by any other person, among d others, by the person representing the workers who will receive this information. So, for example, use the no. ID or another code that could be known by third parties would not be a viable option, given that the person representing the workers will have been able to access, in the terms indicated, a list with the identity and numbers of the workers' ID.

The code should be kept in the communication made in this regard to the person making the claim, for the purposes of being able to see the number of weeks and days in morning and afternoon hours, classified by face-to-face and distance modality with an indication of whether the corresponding restaurant ticket has been received, in each case, and not for any other information other than this communication, since, if it were to be used in a general way for all actions carried out in the worker's work area, it would be easy for the crossing of various data that could be obtained by the representative of the workers, making their identification possible and would end up having the same result as that which can have the identification of working people with their ID number.

Of all the above, it is considered that the option of providing a list with the requested information, without identifying the workplace and equipment where the activity is carried out and with a numerical code in place of the identity of the workers would be the most suitable, in order to find in this case the right balance between the right to the protection of personal data of the affected workers and the right of access to public information of the applicant.

Conclusions

With regard to the request for access to information on the list of workers, from January 1, 2020 to the present, by years, indicating first and last names, place of work and equipment

where they work the activity, number of morning and afternoon sessions done face-to-face and remotely, and whether or not a restaurant ticket has been paid, is justified only if this information is provided without being identified by workplace and equipment where the activity is carried out and replacing the first and last names of the workers by a code that does not allow them to be identified.

Barcelona on April 13, 2023

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