

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 against a city council for denying access to information on the merits presented in a selection process in progress

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 complaint filed against a city council for denying access to information on merits presented in a pending selection process.

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 March 30, 2023, a person working in a town hall addresses a request to the local body in which he requests access to public information in the following terms:

"As an interested party in file XXX/2022 and with full rights I want to access part of the information contained in this file. I request access to the Excel document and the merits presented by the following people: (...)."

2. On May 11, 2023, the City Council decides to reject the aforementioned request for access to public information due to the following reason:

"The documentation concerned is information contained in work documents without relevance or public interest, and which as of today do not form part of any administrative resolution since it has not been evaluated by the Selection Court, in accordance with what is established article 29.1 a) of Law 19/2014, of December 29, on transparency, access to public information and good governance."

3. On May 11, 2023, the applicant filed a claim with the GAIP against the City Council for denying access to the requested public information.

4. On May 24, 2023, the GAIP sent 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.

5. On June 19, 2023, 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 on the City Council's position in this regard, which is based on a prior consultation with its Data Protection Officer, a copy of which is also attached.

In this report, the City Council bases the inadmissibility of the request for access on the fact that the requested documentation has not yet been evaluated by the Qualifying Court of the selection process, so it cannot be considered as a request carried out for the exercise of the applicant's right of defence.

It is also understood that a total of 38 people have submitted to the stabilization process, although the request for access only refers to 5 people, who, like the applicant, are City Council employees .

6. On July 5, 2023, 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 claim is lodged against the denial of access to the calculation document and the documentation proving the merits alleged by 5 of the 38 applicants in a selection process for two/two administrative officers of the City Council and the creation of a job board for temporary contracts, vacancies or replacements.

Article 4.2) of the RGPD considers *"treatment": 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, deletion 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 (hereafter, LTC), aims to regulate and guarantee the transparency of public activity.

The first additional provision of the LTC states that *"the access of the interested parties to the documents of the administrative procedures in progress is governed by what is determined by the legislation on legal regime and administrative procedure"*.

In accordance with this provision, when the access request is made by a person interested in an administrative procedure that is pending, the administrative procedure regulations will apply.

In this regard, article 53.1.a) of Law 39/2015, of October 1, on the common administrative procedure of public administrations (LPAC), recognizes the persons interested in an administrative procedure the right to access and obtain a copy of the documents contained in the procedures in which they have this condition.

And, in the same sense, article 26 of Law 26/2010, of August 3, on the legal regime and procedure of the public administrations of Catalonia, recognizes that citizens who have the status of persons interested in a administrative procedure in progress have the right to access the file and obtain a copy of the documents that are part of it.

According to the information available, the person requesting access to information linked to the merits alleged by 5 participants in the selective process indicated above is another person participating in the same process, who, according to what is established article 4 of the LPAC, would have the status of an interested person, to the extent that it may be affected by the result of this administrative procedure.

Also, according to the information available, the aforementioned selection process for which access is requested has not ended at the time the access request is submitted.

Therefore, it can be concluded that the access request subject to report, to the extent that the person making it would hold the status of a person interested in the procedure and that it is a procedure not completed in the at the time of the request, it must be governed by the right of access that regulates the administrative procedure regulations.

It should be noted that this right of access is directly linked to the right of defense of the person concerned and, as we have seen, is formulated in quite broad terms. However, this does not mean that it is an absolute right but that, when it conflicts with other rights, such as the fundamental right to the protection of personal data (Article 18 CE), it will be necessary to weigh the different rights at stake, in order to decide which should prevail and to what extent.

In fact, the LPAC itself establishes that it is necessary to apply the limitations provided for in the transparency legislation when it regulates the obtaining of copies or access to the file of the persons interested in the hearing procedure provided for in article 82.1, or when it regulates the right of interested persons to request the issuance of authentic copies of public administrative documents issued by the public administrations provided for in article 27.4.

These provisions must also be understood as applying with respect to the right of access provided for in article 53.1.a) of the LPAC and, consequently, what is established in articles 23 and 24 of I 'LTC.

III

The bases for the call for the selection process, attached to the file sent, state, in its sixth base, section 5, that the request to participate in the process must necessarily be accompanied by, among other documentation, of the *"documents attesting to the merits that the applicant wishes to state in order to be evaluated by the qualifying tribunal in accordance with the provisions of the ninth base"* and, he adds, *"it will be an indispensable requirement that the merits are properly related in the calculation sheet, specific for that purpose, which will be available within the electronic procedure and which must be attached to the application"*.

The ninth basis to which this provision refers provides that the qualifying Court will assess the following duly accredited merits:

- Professional experience, either at the City Council itself and/or other public administrations.

In this sense, it is indicated that *"it will be an indispensable requirement that the merits are properly related in the spreadsheet and the professional experience accredited through the Work Life Report issued by the General Treasury of the Social Security (mandatory) and copy of the employment contract and/or of the appointment or any other means that accredits the nature of the services provided, and/or functions performed and job category or group, with indication of the beginning and end of the provision of services."*

- Training and professional development: qualifications related to the field of work that is the subject of the call other than the one provided as an access requirement; training, retraining and improvement courses, conferences and seminars; and, digital skills certificates.

In view of the documentation that the participants must present for the accreditation of the merits that they relate in the spreadsheet, including, where appropriate, a copy of the employment contract, it must be taken into consideration that this type of document may include personal information of various natures (identifying data, personal characteristics, occupational, remuneration, etc.), which could also include special categories of data (article 9 RGPD), for example, in the case of referring to working people with some type of disability and/or have any specific clauses in relation to this condition or to be in a situation of social exclusion, victims of gender violence, terrorism or any other situation that deserves special protection.

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."

Taking this into account, in the event that among the documents certifying the merits provided by the aspirants referred to in the access request are employment contracts and these include any data of a special category or specially protected by the article 23 of the LTC, it would be necessary to exclude it from access, unless the express consent of the affected persons had been provided with the request or if some other of the enabling circumstances provided for in article 15.1 of the LT, cited, of which there is no record.

This would not prevent eventual access to the rest of the data that is not affected by the application of this limit, if it is considered that access to this information should prevail once the prior weighting required by the article has been done 24.2 of the LTC and which is mentioned in the following legal basis of this report.

Point out that partial access to public information is expressly provided for in article 25.1 of the LTC, as well as in article 68.2 of the RLTC.

IV

Given the above, the claimant's access to the requested documentation on the accreditation of merits requires a reasoned weighting between the public interest in the disclosure of this 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.*

(...)."

According to article 24.2.b) of the LTC, one of the circumstances that must be taken into account is the purpose of the access. In this sense, although article 18.2 of the LTC provides that the exercise of the right of access *"is not conditional on the concurrence of a personal interest, it is not subject to motivation and does not require the invocation of any rule"*, knowing the motivation for which the person making the claim wishes to obtain the information, when it includes personal data, can be a relevant element to take into account.

In the particular case, the person making the claim states in his letter of claim that he has *"applied in this competition and as the merits will be decisive I requested to be able to see what had been presented by other people who, like me, work at the town hall of (...)."*

Regarding the access to information linked to selective processes by the participating people, this is a criterion supported by this Authority (among others, reports IAI 44/2017, IAI 49/2918 or IAI 32/2019, available on the website [of Authority](#)) that their status as interested parties, due to the fact that they participate or have participated in the selection process, grants them a reinforced or privileged right of access, unlike other potential information requesters who have not participated , which may justify access to certain personal data of the other participants.

As stated in the said reports, in these cases it is of particular importance that the information to which access is sought is part of competitive competition procedures, which must necessarily be governed by the principles of merit, capacity, equality, publicity and transparency (article 78 EBEP), and that, in the weighing between these principles of publicity and transparency and the right to the protection of the personal data of the persons affected, it must be considered that the principle of publicity and transparency must prevail.

In this sense, and as an example, we can cite Judgment 623/2018 of the Superior Court of Justice of Madrid, which includes the following criteria:

"(...) it is affirmed that in the processes of competitive competition, the principle of publicity and transparency becomes essential, as a guarantor of the principle of equality. Thus, the National Court has weighed the principle of publicity with the protection of personal data, reaching the conclusion that during the processing of the selective process the former must prevail, because one of the exceptions to the requirement of consent for the treatment of data is that of the collision with general interests or with other rights of higher value that cause data protection to decline due to the preference that must be granted to that other interest. As it is a competitive competition procedure, the National Court considered that in accordance with Article 103 of the EC, the guarantees required by the processing of personal data cannot be used to obscure or nullify these general requirements that oblige the processes to be conducted in compliance minimal requirements for transparency and publicity. The superiority of these other values advises that in this case it is understood that the consent of those people who participate in a competitive competition procedure was not required for the treatment of the qualifications obtained in said procedure and it as a guarantee and requirement of the other participants to ensure the cleanliness and impartiality of the procedure in which they participate.

Therefore, the Defender concludes that the Administration must provide the applicant with access to that information relevant to the selection process that allows him to verify the cleanliness and impartiality of the procedure in which he participated, including the personal data of third parties also participating in the same processes selective with which the applicant competed for the same places."

The Authority considers that in the evaluation of the tests carried out and the merits accredited by the participants, which must be done in the selective process in question, there is undoubtedly a margin of technical discretion that corresponds to the qualifying body and that the control of this margin of discretion, to avoid arbitrariness, can only be carried out if the subject harmed by the administrative decision (this is the participating person who has not been selected) has the possibility of know the factual elements from which the assessment carried out in this regard by the selection body is based.

In this sense, it is considered that, in the exercise of the right of defense and for the purposes of being able to verify any arbitrary actions of the qualifying body contrary to the principles of equality, merit, capacity and transparency that must govern in any procedure of this type, it would be justified that said person could have information on the different aspects that could have been assessed in the selection process, such as knowledge and abilities (through access to the exams and/or tests carried out), the merits (both academic and experience) and the score obtained.

However, as noted in said reports, by application of the principle of data minimization (Article 5.1.c) RGPD), in these cases access would only be justified with respect to the information of the participants finally selected and/or who have obtained a better score than the applicant (who has not been selected), but not the information of the participating people who have obtained a worse score than theirs, nor personal data unnecessary for the your right of defense, such as address, telephone number, email, etc.

It would not be justified to have the information referring to participants who obtain a worse score, or who do not pass the selection process, given that their position with respect to the person requesting access would not prejudice their rights and interests .

Having said that, in the specific case examined, special consideration must be given to the fact that, due to the information available, at the time when the supporting documentation of the related merits is requested in the spreadsheet by the participating people (and also this same sheet) the evaluation phase of these merits by the selection body has not yet taken place, nor is there any administrative act adopted in this regard.

Therefore, although the claimant has the status of a person interested in the selection process, given his participation in it, we are not faced with a scenario in which he could have been harmed by the hasty decision by the selection body, since there is no such action.

The information requested about the participants, consequently, cannot be understood as necessary for the exercise of their right of defense, for the purposes of verifying any

arbitrary actions of the court that may be contrary to the principles of equality, merit, capacity and transparency that must govern said selection process.

From the perspective of the people affected, it is clear that handing over this documentation would have a significant impact on their personal and professional sphere with irreversible consequences, given that it would mean disclosing the academic curriculum and working life of these people to a person who could not be legitimate to have knowledge of it (for example, if the person making the claim was ultimately selected but not the people affected by the access and/or they obtained a worse score, access to said information would not be justified).

Consequently, it is considered that at this time the right to the protection of the data of the participants referred to in the access request must prevail over the public interest of the requested information.

This, without prejudice to the fact that the right of the person requesting to access the requested information could be recognized once the qualifying body has carried out the corresponding assessment of the merits alleged by the group of participating people.

In this sense, it should be taken into account that the application for access refers to 5 specific people whose results obtained by each of them in the merit competition are obviously unknown at this time and, therefore, in what position they might be in relation to the applicant.

The rules refer to two fixed administrative staff positions and provide that the non-selected participants who pass the selection process will be part of a job board sorted by score. Therefore, it should be taken into account that only those people who, if applicable, obtain a better position in the selection process, would be justified in accessing the supporting documentation of the alleged merits (and the relationship they have made) with respect to the applicant, either because they have finally been selected to occupy the two administrative positions or because, despite not being selected, they have obtained a higher score than theirs and occupy a position above her in the labor market.

All of this, with the prior elimination, if applicable, of those personal data that may appear in said documentation certifying the merits that are unnecessary for the right of defense and for the control of the performance of the selection body (for example, DNI or NIE number, address, etc.) and/or, as noted above, of those data that deserve special protection (article 23 LTC).

conclusion

Taking into account the circumstances of the particular case, it would not be justified for the claimant to have access to the documentation proving the merits alleged by the participants referred to in their request (or to the spreadsheet where they are related), without prejudice to the fact that, once their assessment has been carried out by the selection body, access may be recognized with respect, if applicable, to those participants who have finally been selected or who have obtained a better position than theirs in the job board.

Barcelona, July 20, 2023

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