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File identification

Archive resolution of the previous information no. IP 177/2020, referring to Ferrocarril Metropolità de Barcelona, SA and Transports de Barcelona, SA.

Background

1. On 25/06/2020, the Catalan Data Protection Authority received a letter from a union for which it filed a complaint against Ferrocarril Metropolità de Barcelona, SA (FMB) and Transports de Barcelona, SA (TB), due to an alleged breach of the regulations on the protection of personal data. Specifically, the reporting entity stated that on 20/02/2020 the human resources department of Transports Metropolitans de Barcelona (TMB) communicated to the trade union sections that made up the Company Committee, the response that had been given to a request for access to public information. As reported by TMB to the union section of the UGT on the same 20/02/2020, what was requested by the person who exercised the right of access to public information was the following: "employees who have family members who have entered between 2011 and 2019".

In the response to this access request, a table was provided of "Employees who have family members who have joined between 2011-2019", detailing which company (FMB or TB) the new employee had joined, the year of incorporation and the category with which it was entered, the category of the family member who already provided services to the company and whether he was a member of the Company Committee, as well as the kinship between these people.

No person was identified in this table by their first and last name or code.

The reporting entity considered that the indication of being a member of the Works Committee revealed "a certain trade union affiliation". In turn, he provided various documentation relating to the events reported, including the aforementioned table.

2. The Authority opened a preliminary information phase (no. IP 177/2020), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure of application to the areas of competence of the Generalitat, and article 55.2 of Law 39/2015, of October 1, on the common administrative procedure of public administrations (henceforth, LPAC), to determine whether the facts they were likely to motivate the initiation of a sanctioning procedure, the identification of the person or persons who could be responsible and the relevant circumstances involved.

3. In this information phase, on 07/20/2020, FMB and TB were required to report, among others, on whether they were jointly responsible for the treatment consisting of responding to the access request that is the subject of a complaint; the reasons why it was not sufficient to specify in the response to access the number of employees who had family members who had entered TB and FMB between the years 2011 and 2019; the reasons why in the

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the response specified whether the affected person was a member of the Company Committee and the relationship between the employee entering and the family member already providing services to the company; if with the information contained in the box that was facilitated it was possible to identify the affected persons. And in the event that it was considered that identification was not possible, taking into account that in the table there were only 6 members of the Company Committee who had family members who entered TB between the years 2015 and 2019, they were required to point out, for in each case, the number of people in whom the same circumstances would occur, while identifying the people affected.

4. On 07/31/2020, FMB and TB responded to the aforementioned request through a letter in which they stated, among others, the following:

- That FMB and TB were co-responsible for the treatment consisting of responding to the access request that is the subject of the complaint, since the request referred to information about workers of the two companies.
- That the requested information involved providing a breakdown of the categories, according to the content of the request for access to public information dated 11/29/2019: "we want to know of all the people who have entered the company since 2011 until now [how many] are their children or marriage other employees, know the category of the new employee and the category of his father, mother, spouse."
- That on 02/12/2019 the person requesting access asked for the following information to be specified:
 - "(...) From which TMB Society is the request made
 - If it indicates "people who have entered the company since 2011 until now are the children or marriage of other employees", it refers to the total number of people or numbers of those people. (...)."
- That on 03/01/2020 the applicant requested the following: "from the list that they send, we need the amounts, per each year, of the incomes that are family members of employees with categories group A in buses, technical command operations or superior in metro, said or has been a member of some bus or metro company committee, separated into these four groups".
- That given the above, the aforementioned information was added to the table sent in response to the access request.
- That by not providing the names and surnames of the people who held the positions indicated in the excel table that was included in the response to the request for access to public information, the affected people could not be identified.
- That of the 6 incomes of workers in the TB company who had relatives in said company who were members of the Company Committee, it is considered that they are not identifiable by their category or group.
- That in Group B, level 6, there were approximately 3,800 employees, among whom it was stated that there were 3 employees who were relatives of members of the Works Committee.
- That in Group A, level 8, there were approximately 100 employees, among whom it was stated that there was 1 employee who was a relative of a member of the Works Committee.

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- That in Group A, level 9, there were approximately 150 employees, among whom it was stated that there were 2 employees who were relatives of members of the Company Committee.

The reported entity attached various documentation to the letter.

5. Given that the reported entities invoked that it was not possible to identify the employees who were members of the Company Committee through the information contained in the table accompanying the report, on 02/10/2020 and still within the framework of this preliminary information phase, the reporting entity was requested to identify the 6 people who were relatives of TB Company Committee members in accordance with the aforementioned table. Likewise, it was requested to specify, regarding the members of the TB Company Committee, which corresponded to that union.

6. On 19/10/2020 the reporting entity responded to the request for information by means of a letter stating, among others, the following:

- That in the TB Company Committee there are only 29 members, of which 5 are from the "technical and administrative college. They are the employees who belong to Grupo A LEVELS 8, 9 and 10, Managers and Euro staff."
- That in the table provided with the complaint it can be verified that there is only one that appears with the following characteristics: member of the Company Committee and Group A, level 8 (whom the entity identifies, specifying that is a representative member of that union).
- That this person has a daughter in the company.
- That of the 6 members of the TB Company Committee, only the person identified he was a representative member of that union.
- That "it is not up to us to identify members of other unions, when these have not made any complaint, although in the same way that we have identified Mr. (...) and his daughter, TB workers can identify the rest of the members of the Company Committee who appear on the list and their relatives who are working in the company."
- That "as we expressed in the complaint, the company sends all these specially protected data without having been required in the question that originates this situation."

Fundamentals of law

1. In accordance with the provisions of articles 90.1 of the LPAC and 2 of Decree 278/1993, in relation to article 5 of Law 32/2010, of October 1, of the Authority Catalan Data Protection Agency, and article 15 of Decree 48/2003, of February 20, which approves the Statute of the Catalan Data Protection Agency, the director of the Catalan Data Protection Authority.

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2. Based on the account of facts that has been set out in the background section, it is necessary to analyze the reported facts that are the subject of this file resolution.

In the present case, the information provided by FMB and TB in response to a request for access to public information was reported.

As indicated in the antecedents, the person who exercised the right of access to public information requested on 11/29/2019 that the reported entities report on "all persons who have joined the company since 2011 until now [how many] are the children or marriages of other employees, to know the category of the new employee and the category of his father, mother, spouse."

Subsequently, on 02/12/2019, the applicant asked FMB and TB to specify the affected TMB group company and whether the new additions were children or spouses of other employees.

Once this response was received, on 03/01/2020, the person requesting access again asked FMB and TB to specify the following: "from the list they send, we need the quantities, per each year, of the incomes that are family members of employees with categories group A in buses, technical manager of operations or higher in metro, dicho or have been a member of some bus or metro company committee, separated into these four groups".

In response to this new request, FMB and TB provided the table under complaint.

In accordance with what had been requested of them, the reported entities specified in that table, in relation to employees who had family members who had joined FMB or TB, which of the two companies (FMB or TB) had joined the worker, the year of incorporation and the category with which he entered.

Regarding the family member who already provided services in these companies, their category and whether they were members of the Company Committee (yes or no) were indicated. At the same time, the table also specified the relationship of the new addition to the worker who was already providing services to the said company (if he was a spouse, colleague or child).

At this point, we should refer to the concept of personal data. Article 4.1 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 and the free circulation thereof (in hereinafter, RGPD) defines personal data as "all information about an identified or identifiable natural person (the "data subject"); 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 a

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or various elements of the physical, physiological, genetic, psychological, economic, cultural or social identity of said person".

Regarding the concept of personal data, recital 26 of the RGPD specifies that:

"The principles of data protection must be applied to all information relating to an identified or identifiable natural person. Pseudonymized personal data, which could be attributed to a natural person through the use of additional information, must be considered information about an identifiable natural person. To determine whether a natural person is identifiable, all means, such as identification, that can reasonably be used by the data controller or any other person to directly or indirectly identify the natural person must be taken into account. To determine whether there is a reasonable probability that means will be used to identify a natural person, all objective factors must be taken into account, such as the costs and time required for identification, taking into account both the technology available at the time of the treatment as technological advances. Therefore, the principles of data protection should not be applied to anonymous information, that is, information that is not related to an identified or identifiable natural person, nor to data converted into anonymous data in such a way that the interested party is not identifiable, or to be. Consequently, this Regulation does not affect the treatment of said anonymous information, including for statistical or research purposes."

Therefore, according to the GDPR, personal data is any information about an identified or identifiable natural person. In this respect, as indicated by this Authority in opinion CNS 35/2020, an identifiable natural person must be considered any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as, for example, their first and last name, a number identification, location data, an online identifier or one or more elements of the physical, physiological, genetic, psychological, economic, cultural or social identity of that person.

Thus, both the data that directly identify a person (name and surname, ID, etc.), as well as those other data that allow them to be identified indirectly (information that, although it is not directly linked to a specific person if it is associated with other data would allow it to be identified without disproportionate effort), are personal data and are protected by data protection regulations.

In the table subject to complaint that was provided to the person who exercised the right of access to public information, no employee was directly identified.

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This is why it is necessary to decide whether the affected people could be identified based on the information provided.

In the present case, it is considered that based on the information contained in the disputed table, it was not possible to identify the people who were not members of the Works Committee, without disproportionate efforts, given the extensive staff of FMB and TB (according to TMB's transparency portal, in 2019 FMB had an average workforce of 3,471 employees and TB of 4,372).

Despite the above, the same respect cannot be affirmed for those people who appear in said table and who are members of TB's Company Committee (there was no member of FMB's Company Committee in the table), since it is made up of 29 members, as reported by the complainant union.

Although the identification of the members of the Company Committee would not be possible, without requiring disproportionate efforts, by a person unrelated to TB, the same cannot be said for the workers of this company, who could reach to identify the affected persons from among the 29 members who made up the TB Company Committee based on the information provided to the person requesting access.

That being the case, it is appropriate to address whether this treatment, as regards the members of the TB Company Committee and their relatives, is lawful.

Before that, however, given that the reporting entity invokes that special categories of data would have been disclosed (art. 9 RGPD), and in particular data relating to trade union membership, it is necessary to resolve this issue.

In the present case, TB included in the table subject to the complaint the indication of whether the relatives of the new workers were members of the Works Committee or not. Therefore, it is not considered that information was revealed about the union affiliation of the people who were members of the TB Works Committee, to the extent that it was not specified whether they represented a specific union. At this point, it is necessary to emphasize that the members of the Company Committee do not necessarily have to be representatives of unions, but can also present themselves in the elections "the workers who endorse their candidacy with a number of signatures of voters from their same center and school, if applicable, equivalent to at least three times the number of positions to be filled", as established in article 69.3 of Royal Legislative Decree 2/2015, of October 23, which approves the revised text of the Workers' Statute Law (hereinafter, ET).

In any case, the members of the TB Works Committee made public their trade union affiliation when they stood for election to be a member of that body representing the workers. Therefore, even in the negated assumption that the information that

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contained in said table could be qualified as a special category of data, we would be dealing with data (trade union membership) that the affected persons would have made manifestly public previously among the persons who could precisely come to identify them (the staff of TB, as recognized by the reporting entity in its letter of 10/19/2020), so the circumstance provided for in article 9.2.e) of the RGPD that allows special categories to be treated would be applicable of data:

"2. Section 1 will not apply when one of the following circumstances occurs: (...) e) the treatment refers to personal data that the interested party has made manifestly public".

In addition to the above, it must also be added that the result of the votes for company committees must be made public on the company notice board (art. 75.5 ET).

In terms similar to article 9.2.e) of the RGPD, it should be noted that the basic legislation on transparency, which is determined by Law 19/2013, of December 9, on transparency, access to information and good governance, provides in article 15.1 that if "the information requested contains personal data that reveal the ideology, trade union affiliation, religion or beliefs, access can only be authorized if the express and written consent of the affected person is obtained, to unless said affected party had made the data manifestly public before access was requested."

Having established the above, it is appropriate to rule on the legality of the treatment. Article 6.1 of the RGPD determines the legal bases that can legitimize the processing of personal data. Specifically, article 6.1.c) of the RGPD determines that a treatment is lawful if it is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment.

In this sense, the transparency regulations (Law 19/2013 and Law 19/2014, of December 29, on transparency, access to public information and good governance - henceforth, LTC-) impose on the obliged subjects (between which are FMB and TB) the obligation to attend to the right of access to public information.

As provided in article 20.1 of the LTC, the "right of access to public information can only be denied or restricted for the reasons expressly established by law." Among the restrictions provided for by the LTC itself, there is the limit relating to the protection of personal data, which is regulated in articles 23 and 24.

The data provided by TB to the person who exercised the right of access to public information did not have the condition of being specially protected under the terms provided for in article 23 of the LTC. It is also not considered that the information provided refers solely to merely identifying data of employees related to the organization,

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the operation or the public activity of the obliged entities, so the provision in article 24.1 of the LTC would not apply either.

Therefore, it is appropriate to go to article 24.2 of the LTC which determines that "access to information may be given, with prior weighting of the public interest in disclosure and the rights of the affected persons." And adds this same precept that 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."

The person requesting access did not justify the specific reason for which they were interested in accessing that public information. According to article 18.2 of the LTC, the right of access does not require the citizen to state the specific reasons that would justify access to certain information, but these may be relevant when deciding on the prevalence between certain rights. In fact, the purpose is one of the weighting criteria indicated by the Law itself (art. 24.2. b LTC).

It should be noted that the purpose of the transparency law is "to establish a system of relations between people and the public administration and other obliged subjects, based on knowledge of public activity, the encouragement of citizen participation, the improvement of the quality of public information and administrative management and the guarantee of accountability and responsibility in public management" (art. 1.2 LTC). In the absence of greater concreteness on the part of the applicant, the purpose of the access must be placed in this context.

For the purposes of transparency, there does not seem to be any doubt as to the relevance it may have for the citizen, to have the information that allows them to know if there has been any favorable treatment in the hiring of FMB and TB workers. Specifically, whether those people who already had a family member providing services in these companies or, specifically, who was a member of the Company Committee, could have been favored in hiring.

Therefore, taking into account the purpose of transparency, it must be concluded that the information provided to the applicant, in which it was specified that 6 new additions to TB had family members who were members of the Company Committee, was necessary to achieve the purpose of transparency.

In addition, it should be noted that FMB and TB provided the information in such a way that the identification of members who were not members of the Works Committee was not possible, without

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require disproportionate efforts. And, in the specific case of the members of the TB Company Committee, their identification would only be possible by the workers of said company.

3. In accordance with everything that has been set out in the 2nd legal basis, and given that during the actions carried out in the framework of the previous information it has not been accredited, in relation to the facts that have been addressed in this resolution, no fact that could be constitutive of any of the violations provided for in the legislation on data protection, should be archived.

Therefore, I resolve:

1. File the previous information actions number IP 177/2020, relating to Ferrocarril Metropolità de Barcelona, SA and Transports de Barcelona, SA.
2. Notify this resolution to FMB and TB and communicate it to the reporting entity.
3. Order the publication of the resolution on the Authority's website (apdcat.gencat.cat), in accordance with article 17 of Law 32/2010, of October 1.

Against this resolution, which puts an end to the administrative process in accordance with article 14.3 of Decree 48/2003, of 20 February, which approves the Statute of the Catalan Data Protection Agency, the entities denounced parties may file, as an option, an appeal for reinstatement before the director of the Catalan Data Protection Authority, within a period of one month from the day after their notification, in accordance with what provided for in article 123 et seq. of Law 39/2015. An administrative contentious appeal can also be filed directly before the administrative contentious courts, within two months from the day after its notification, in accordance with articles 8, 14 and 46 of Law 29/1998, of July 13, governing the contentious administrative jurisdiction.

Equally, the reported entities can file any other appeal they deem appropriate to defend their interests.

The director,