

File identification

Resolution of sanctioning procedure no. PS 18/2020, referring to Barcelona City Council.

Background

1. En data 20/06/2019, per trasllat de l'Agència Espanyola de Protecció de Dades (AEPD), va tenir entrada a l'Autoritat Catalana de Protecció de Dades un escrit d'una persona (d'ara en endavant, complainant1) for which he filed a complaint against Barcelona City Council, on the grounds of an alleged breach of the regulations on personal data protection.

Specifically, the complainant1 complained that in the course of the selection process to provide 29 places in the category of senior architect in Barcelona City Council, the provisional list of admitted and excluded applicants had been published, list that included a column entitled "*reserved shift*" that appeared marked with an asterisk in relation to those applicants who had applied to participate in the process in this shift, reserved for people with some disability, among whom was included. The person reporting here1 considers that with this system, anyone can know "*totally private data such as the disability condition, when there is no need*". The complainant1 accompanied his letter with a copy of the list that was the subject of his complaint.

This complaint was assigned IP number 188/2019.

2. The Authority opened a preliminary information phase, in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure applied to the areas of competence of the Generalitat, and article 55.2 of Law 39/2015, of October 1, of the common administrative procedure of public administrations (from now on, LPAC), to determine if the facts 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. On 06/26/2019, as part of this preliminary information phase, the Authority's Inspection Area carried out a series of checks via the Internet on the facts subject to the complaint. Thus, the following was established:

a) That, by accessing the electronic headquarters of the Barcelona City Council, and clicking on "*public employment offer*" > "*Architectural Technician*" > "*Provisional list*" (in the section "*list of persons admitted and excluded*"), the document provided by the complainant1, titled "*29 positions in the category of senior architect in Barcelona City Council, through open competition*", was available in the open - without any restrictions. *Provisional list of admitted and excluded applicants*", dated 03/13/2019 (hereinafter, DOC1), corresponding to the selection process to fill said places (call published in DOGC No. 7794 of 01/23/2019; correction of errors DOGC No. 7804 of 06/02/2019). This

document contains a list that includes, among others, two columns: "surname and first name" and "Reservation turn", the latter marked with a "(*)" in relation to certain people. In addition, this document explains the following:

"IMPORTANT: Applicants who appear with a () in the RESERVED SHIFT column are reminded that in order to be included in this shift they must provide the opinion issued by the Labor Assessment and Orientation Team (EVO) of the Department of Social Welfare and Family. Said opinion must be presented up to 10 working days after the date of publication of the provisional list.*

They are also informed that, in case they do not provide this opinion within the established period, they will go on to integrate the FREE SHIFT"

b) Likewise, it was found that, among other documents relating to the same selective process that is the subject of the complaint, the document entitled "29 places in the category of senior technician in architecture of the City Council could be accessed openly of Barcelona, through open competition. Definitive list of admitted and excluded applicants", dated 04/12/2019 (hereinafter DOC2). This list includes the column "Reservation round", which appears marked with an "X" in relation to those applicants -identified by first and last name- who, as explained, have provided the "opinion issued by the Team of Evaluation and Labor Orientation (EVO) of the Department of Social Welfare and Family within the established period".

4. In this information phase, on 09/07/2019 Barcelona City Council was required to report on the following issues:

- Indicate whether the system used in the call to which the complaint refers obeys a usual practice that is followed in the City Council's selective processes.
- Specify the legal basis that would enable publication of the identification of the people who they participate in the reservation shift, through their first and last names.

5. On 12/07/2019 the complainant1 provided additional documentation in relation to the facts that had been the subject of the complaint.

6. On 07/19/2019, the Barcelona City Council responded to this Authority's request in writing in which it set out the following:

- That "applicants who participate in the selective processes of Barcelona City Council are identified, as a general rule, by their first and last name. Both those who are accepted on the free shift and on the reserve shift".
- That in accordance with the rules of the call that is the subject of the complaint, it should be noted that "in the event that a person presented for the reserve shift does not obtain a place in the said shift, he may obtain it for the free shift in the case that his score is higher than that obtained by the last applicant of this turn.

From this double option, provided for the purpose of increasing the possibilities of access for disabled people, derives the need for the rest of the participants in the process to know the identity of the participating people who present themselves in turn of reservation

We understand that this treatment would comply with Article 8 of Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights, as it is based on the fulfillment of a legal obligation payable to the person in charge".

- That *"it must be taken into account that the bases of the selective access processes foresee that the lists of admitted and excluded applicants will be published on the Barcelona City Council website (www.barcelona.cat). In any case, it should be noted that these publications are in no way indexed by search engines. Therefore, the applicants, by participating in the respective processes, know and accept the publicity regime of the process, which is incorporated in the bases of the call which constitute process law".*
- That *"beyond the provisions relating to the obligation to reserve places, disabled people who participate in selection processes are subject to the same rules governing the aforementioned procedures".*
- That articles 55 of Legislative Decree 5/2015, of October 30, approving the revised text of the Law on the Basic Statute of the Public Employee, 45 of Law 39/2015, of 1 October, of the common administrative procedure of the public administrations and 58 of Law 26/2010, of 3 August, of the legal regime and procedure of the public administrations of Catalonia, establish *"the principle of publicity of calls and its bases and that of transparency".*
- That *"beyond the aforementioned precepts (...), it is necessary to take into account the provisions of Law 19/2014, of December 29, on transparency, access to public information and good governance. Specifically, article 9.1 section e)", which stipulates that, among other information, "the calls for proposals and the results of the selective processes for the provision and promotion of staff" must be published.*
- That *"in the last place, and deepening the satisfaction of the demands of publicity and transparency of the selective processes, we understand that the identification of the applicants by means of names and surnames - including those who are accepted on the reserve shift, is also the identification formula more guarantor of the rights of the participants. In this sense, it should be borne in mind that it is not enough for the applicants to be identifiable by the body that manages the selective processes - a matter that could be achieved with the no. of ID or other codes - but it is necessary that, at the same time, they are identifiable for the other participants".*

Finally, the City Council, in defense of its action, invoked report no. 0358/2015 of the Spanish Data Protection Agency, the judgment of the National Court of 26/04/2012; the Prior Information Archive Resolution no. 221/2016 and Opinion 5/2019 issued by this Authority.

7. On 02/03/2020, the Authority received a letter from a person (henceforth, complainant2) in which he made a complaint also against Barcelona City Council, for an alleged breach of the regulations on personal data protection.

This second complainant stated that *"in the Barcelona City Council's opposition processes, the names and surnames of each and every candidate for the reserve round are being given in each of the open processes"*; and as an example, he mentioned the following publications, which he accompanied with his complaint:

- In relation to the selection process to provide 300 general administration positions, the publication of the document entitled *"Correction of the definitive list of admitted and excluded applicants"*, in which a person, identified by name and surname, is recognized, the accreditation of his disability with retroactive effects.
- In relation to the selection process to provide 17 senior information technician positions, the publication of the document *"Provisional results of the second test"*.

This second complaint was assigned the number IP 79/2020 and was incorporated into the previous information initiated following complaint no. IP 188/2019 (1st case), given the identity of the facts reported.

8. On 03/09/2020, the Authority's Inspection Area carried out a series of checks via the Internet on the facts that are the subject of this second complaint. Thus, the following was established:

a) That, by accessing the electronic headquarters of the Barcelona City Council, and clicking on *"public job offer" > "General Administration Assistant" > "Correction of the definitive list" (in the section "List of persons admitted and excluded")*, the document provided by the second complainant, entitled *"300 places in the general administration assistant category of Barcelona City Council, through open competition"*, was available in the open - without any restrictions . *Rectification of the definitive list of admitted and excluded applicants"*, dated 28/11/2019 (hereinafter, DOC3), corresponding to the selection process to fill said places (call published in DOGC No. 7794 of 23/01/2019 ; rectification of errors DOGC No. 7804 of 06/02/2019). This document contains the following text:

"Having published the final list on June 27, 2019 to participate in the selection process for 300 General Administration Assistant positions at Barcelona City Council, the Human Resources and Organization Manager, using the powers and the powers it has attributed by delegation of the Mayor, and what is provided in article 109 of Law 39/2015 of Common Administrative Procedure of Public Administrations, has approved the rectification of the definitive list by decree of 2 d 'August, in the sense of including in the reserve shift instead of the free shift to Mrs. (person identified with first and last name) given the retroactive accreditation of the condition required by the same".

b) That, by clicking on the section corresponding to the selection process *"Senior Information Technician" > "Provisional results second test (Practical test)" (in the section "Result of the tests")*, it was available in open -without any restriction- the document provided by the second complainant, titled *"17 positions in the category of senior information technician of Barcelona City Council, through open competition. Provisional results of the second test (test"*

practice)" dated 02/21/2020 (hereafter, DOC4), corresponding to the selection process for said positions (call published in DOGC No. 7794 of 01/23/2019; correction of errors DOGC No. 7804 of 06/02 /2019). In this list, apart from the column in which the qualification obtained by the applicants is reflected, there are two more columns: "*last name, first name*" and "*Reservation turn*", which is marked with an "(X)" in relationship with certain people.

9. On 03/27/2020, the Authority's Inspection Area made a series of checks via the Internet on the facts subject to investigation in the context of the previous information. Thus, the following was established:

- a) By accessing the electronic headquarters of the Barcelona City Council, and clicking on "*public job offer*" > "*Architectural Technician*" > "*Provisional list*"/"*Definitive list*" (in the section "*List of admitted and excluded persons*"), the same documents specified in the 3rd antecedent (DOC1 and DOC2) are available in the open - without any restrictions.
- b) That in the section "*Result of the tests*" > "*First exercise of the first test*" of the same selective process indicated in letter a) above, a document entitled "*29 places in the technician category/ a superior in architecture from the Barcelona City Council, through an open competition. Results of the first exercise of the first test (test of knowledge of the general syllabus)*", dated 05/29/2019 (hereinafter, DOC5). In this list, in which the participating people are identified by their first and last names, there is the column "*Reservation turn*", which appears marked with an "X" together with the first and last names of certain applicants.
- c) That by accessing the electronic headquarters of the Barcelona City Council, and clicking on "*public employment offer*" > "*General Administration Assistant*" > "*Correction of the definitive list*" (in the section "*List of admitted persons and excluded*"), the same document as specified in letter a) of the 8th precedent (DOC3) is available in the open - without any restrictions.
- d) That by accessing the electronic headquarters of the Barcelona City Council, and clicking on "*Senior Information Technician*" > "*Provisional results second test (Practical test)*" (in the "*Results of the tests*" section) you will find available in open - without any restrictions - the same document specified in letter b) of the 8th antecedent (DOC4).

10. On 02/06/2020, the director of the Catalan Data Protection Authority agreed to initiate disciplinary proceedings against the Barcelona City Council for an alleged infringement provided for in article 83.5.a), in relation to article 5.1.c); both of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27 (hereinafter, RGPD), relating to the protection of natural persons with regard to the processing of personal data and the free movement of these (hereinafter, RGPD). This initiation agreement was notified to the imputed entity on 06/12/2020.

11. In the initiation agreement, the accused entity was granted a period of 10 working days, counting from the day after the notification, to formulate allegations and propose the practice of evidence that it considered appropriate to defend their interests.

12. On 06/22/2020 the complainant¹ brought to this Authority the letter that the Ombudsman had addressed to him in which he transcribed the "reflections" (*sic*) that this institution had sent to Barcelona City Council in relation to the publication of data relating to the disability of people participating in a selective process.

13. On 06/29/2020, Barcelona City Council made objections to the initiation agreement.

14. On 21/10/2020, the instructor of this procedure formulated a proposed resolution, by which she proposed that the director of the Catalan Data Protection Authority admonish Barcelona City Council as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.e), both of the RGPD.

In this proposal, in view of the allegations made by the City Council in the initiation agreement, it was decided not to maintain the imputation made in the aforementioned agreement consisting of having been kept accessible in an open way - without any restrictions - in the electronic headquarters of the City Council, certain documents related to different selective public employment processes carried out by the Council, in which certain people - identified by their first and last names - are linked to the condition of a person with a disability, already that it is indicated that they have been submitted for the reserve round of the respective call. Next, reference is made to the most relevant considerations of the proposal that have been taken into account to withdraw this imputation and that may have a doctrinal interest.

"2.2.- On the publication of the data relating to the disability, together with the name and surname of the affected persons.

(...)

In accordance with the provisions of articles 59 of the EBEP and 27 of Legislative Decree 1/1997, of October 31, which approves the recasting in a Single Text of the precepts of certain legal texts in force in Catalonia in civil service matter, the vacancies offered in the reserve shift must be filled by people with disabilities, considering as such those people who present long-term physical, mental, intellectual or sensory impairments and have been recognized a degree of disability equal to or greater than 33 percent. Therefore, it is clear that the people who participate in the reservation shift of a selective process of personnel in the Administration

Public are people who have some type of disability, be it mental, physical, intellectual or sensory.

Article 4.15) RGPD defines "data relating to health" as those personal data "relating to the physical or mental health of a natural person, including the provision of health care services, which reveal information about their state of health".

Recital 35 of the RGPD determines that "Personal data relating to health must include all data relating to the state of health of the interested party that provide information on your past, present or future state of physical or mental health. It includes the information about the natural person collected on the occasion of his registration for health care purposes, or on the occasion of the provision of such assistance, in accordance with Directive 2011/24/EU of

European Parliament and Council (1); any number, symbol or data assigned to a natural person that uniquely identifies him for health purposes; the information obtained from tests or examinations of a part of the body or a body substance, including that from genetic data and biological samples, and any information related, for example, to an illness, a disability, the risk of suffering from diseases, the medical history, the clinical treatment or the physiological or biomedical state of the interested party, regardless of its source, for example a doctor or other health professional, a hospital, a medical device, or an in vitro diagnostic test".

In view of the previous precepts, it is clear that data relating to disability is health data, data, therefore, of what the RGPD calls "special category of data" (art. 9 RGPD), subject to a special regime regarding its treatment.

The legal basis that, as explained in the previous section, enables the processing consisting in the publication of lists with personal data in the context of a selective process (art. 6.1 c/ ie/ RGPD), would therefore not be sufficient to carry out the publication of special categories of data (disability data) and therefore, it would also be necessary to meet one of the exceptions provided for in article 9 of the RGPD.

As has been progressed, the City Council argued, in order to justify the open publication of the data of the applicants for the reserve shift, that these people had accepted the basis of the call.

In this regard it must be said that, just as it happened with the publication of data that did not have a special category, the legal basis was not in the provision of the consent of the affected persons for having accepted the basis of the call but, as we have seen, in article 5.1 letters c) and e) of the RGPD; it does not seem that the legitimacy for the treatment of disability data can come from the provision of the explicit consent of the affected persons (letter a/ of article 9 RGPD).

Article 4.11) defines "consent of the interested party" as "any manifestation of free will, specific, informed and unequivocal by which the interested party accepts, either through a statement or a clear affirmative action, the treatment of personal data that they concern him".

Recital 42 RGPD provides that "Consent must not be considered freely given when the interested party does not enjoy true or free choice or cannot refuse or withdraw his consent without suffering any prejudice", and c.43 adds that "To guarantee that the consent has been given freely, this should not constitute a valid legal basis for the treatment of personal data in a concrete case in which there is a clear imbalance between the interested party and the person responsible for the treatment, in particular when said person responsible is an authority public and it is therefore improbable that consent was freely given in all the circumstances of that particular situation (...)".

In view of these precepts, it cannot be said, in general terms, that in cases such as the one we are dealing with here of selective processes convened by the public administration, the qualities that would allow the issuance of consent to be considered valid, and in particular with regard to the freedom in its provision. Indeed, if the affected persons cannot refuse the publication of the data and the consequence of not giving consent would be not being able to participate in the call, it can hardly be considered that giving consent would have been "free".

To the above, it should be added that the basis of the calls that are the subject of this procedure do not collect or specify in detail how and in what form the data relating to disability will be treated, bearing in mind that they are clearly data from a different nature from the rest. This circumstance would confirm what has been advanced: that the publication of this data cannot be based on the eventual concurrence of an explicit consent to have accepted the basis of the call.

Having said that, however, in view of the context in which the controversial publication is made, and in line with the City Council's allegations to justify the publication of this data, it is considered that the exception that could be understood would enable this treatment of data would be that provided for in letter b) of article 9.2 of the RGPD ("the treatment is necessary for the fulfillment of obligations and the exercise of specific rights of the person responsible for the treatment or of the interested party in the field of labor law and of social security and protection, to the extent that this is authorized by the Law of the Union of the Member States or a collective agreement in accordance with the Law of the Member States that establishes adequate guarantees of respect for fundamental rights and interests of the interested party"), in connection with the application regulations on civil service, specifically, in what refers to the transparency and publicity of the selective processes and the accessibility status of people with disabilities, invoked by the City Council. In the case analyzed, the concurrence of "an essential public interest" referred to in the legal basis established in letter g) of the same article 9.2 of the RGPD ("the treatment is necessary for of an essential public interest, on the basis of the Law of the Union or of the Member States, which must be proportional to the objective pursued, essentially respect the right to data protection and establish adequate and specific measures to protect the interests and fundamental rights of the interested party"); so it can be understood that the guarantee of transparency and publicity required in the selective processes of the civil service towards the general public constitutes an 'essential public interest', a requirement of transparency that in this case would play with particular intensity in relation to the people who they participate, since they are interested in the procedure and can be directly affected by the decisions that are taken and the acts that are dictated within the process. In this sense, it should be noted that the basis of the calls for the selective processes stipulated that "in the event that any of the disabled applicants who had presented themselves for the reserve shift for the social integration of disabled persons and did not obtain place in said turn, since his score is higher than that obtained by other applicants of the general access system, he will be included in his score order in the general access system", so that, as rightly emphasized by City Council in its statement of objections, "it is clear that participation in the respective processes through the reserve shift can have an impact, not

only in relation to the rest of the participants presented at the same shift, but also for the free shift. In this regard, it should be borne in mind that, in view of the transcribed base, in the event that a person presented in the reserve round does not get a place in the aforementioned round, he could get it for the free round in the event that he obtains a score enough".

Having said that, and dealing with health data, this Authority always recommends using a publication system that reconciles this guarantee of transparency towards the people who compete in a selective process in the public service, with the right to privacy. In this sense, there would be no inconvenience in the fact that the City Council published the controversial lists in the open, identifying the people who participate in the reservation shift in a pseudo-anonymized way (by means of a code)."

15. This resolution proposal, in which a single infringement was charged for breach of the principle of limitation of the data retention period, was notified on 10/21/2020 and a period of 10 days was granted to formulate allegations

16. On 03/11/2020, the accused entity presented a statement of objections to the proposed resolution.

proven facts

Barcelona City Council has kept accessible - without any restrictions - at its electronic headquarters, at least until 27/03/2020, the documents indicated in the 3rd and 9th antecedents, linked to the selective process of 29 places in the category of senior technician in architecture of the Barcelona City Council, through open competition (call published in DOGC No. 7794 of 23/01/2019; rectification of errors DOGC No. 7804 of 02/06/2019) :

- "Provisional list of admitted and excluded applicants", dated 03/13/2019 (DOC1).
- "Definitive list of admitted and excluded applicants", dated 04/12/2019 (DOC2)
- "Results of the first exercise of the first test (knowledge test of the general syllabus)", of 29/05/2019 (DOC5).

It also kept accessible at its electronic headquarters, open and without any restrictions, at least until 27/03/2020, the document indicated in letter a) of the 8th precedent, linked to the selective process of 300 places of the general administration assistant category (DOGC No. 7794 of 23/01/2019; rectification of errors DOGC No. 7804 of 06/02/2019): "Correction of the definitive list" dated 28/11/2019 (DOC3).

Fundamentals of law

1. The provisions of the LPAC, and article 15 of Decree 278/1993, according to the provisions of DT 2a of Law 32/2010, of October 1, of the Catalan Data Protection Authority. In accordance with articles 5 and 8 of Law 32/2010, the resolution of the sanctioning procedure corresponds to the director of the Catalan Data Protection Authority.

2. The accused entity has made allegations both in the initiation agreement and in the resolution proposal, which are analyzed below.

2.1.- On the legal basis enabling the publication of the information

The City Council, in its statement of objections to the initiation agreement, first of all, invoked several *"legal precepts enabling the publication of data carried out in the framework of selective processes"*:

- Article 55 of Legislative Decree 5/2015, of October 30, approving the revised text of the Law on the Basic Statute of Public Employees (hereafter, EBEP), which establishes the principle of publicity of the calls and their bases and that of transparency, in their sections a) and b) respectively.

- Article 45.1 of Law 39/2015, of October 1, on the common administrative procedure of Public Administrations (hereafter, LPAC), which provides that *"Administrative acts will be subject to publication when they are integral acts of a selective or competitive procedure of any kind. In this case, the call for the procedure must indicate the medium in which successive publications will be carried out, and those carried out in different places are not valid."*, in the same terms as article 58 of Law 26/2010, of August 3, on the legal regime and procedure of the public administrations of Catalonia. In this case the publication will have notification effects.

- Article 9.1 section e) of Law 19/2014, of December 29, on transparency, access to public information and good governance (hereafter, LTC), which with the rubric *"Transparency in the institutional organization and administrative structure"*, foresees the publication on the transparency portal of *"the calls for proposals and the results of the selective processes for the provision and promotion of staff"*.

- What is provided for in the bases for the calls for the selective processes referred to in this sanctioning procedure, bases that, according to the City Council, have not been contested, and which stipulated the following: *"The list of admitted and excluded applicants, as well like the successive announcements of the call, will be published on the website of Barcelona City Council"*. In this regard, the City Council indicates that *"as the jurisprudence has repeatedly reiterated, the bases for calling a competition or selective tests constitute the law to which the procedure and resolution of the same must be subject, of such so that once they are firm and consented to, they are equally binding on the participants and the Administration, as well as on the Courts in charge of the assessment"*, citing, among others, the judgment of the Supreme Court of

05/27/2010. These bases are accepted by the people who decide to participate in the selective process in question.

And, secondly, the City Council asserted in its defense that *"if the current health crisis situation due to the COVID-19 pandemic had not occurred, these processes would have already been completed and, consequently, unpublished from the headquarters electronics In this regard, it should be remembered that until June 1, 2020, the deadlines for the processing of administrative procedures have been suspended by virtue of the third additional provision of Royal Decree 463/2020, of March 14, whereby declare the state of alarm"*.

As the instructor explained in the proposal, as a starting point, it must be made clear that the publication of personal data in the context of a selective process has not been questioned at all in this procedure. Indeed, the treatment consisting of the publication within a competitive competition process will be lawful to the extent that the legal basis provided for in article 6.1.c) (*"the treatment is necessary for the fulfillment of an obligation"*) applies applicable law to the person responsible for the treatment") ie) (*"the treatment is necessary for the fulfillment of a mission realized in public interest or in the exercise of public powers"*), in connection with article 8 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD), which determines, on the one hand, that the processing of personal data can only be considered based on the fulfillment of an enforceable legal obligation to the person in charge in the terms provided for in article 6.1.c) of the RGPD when provided for by a rule of law of the European Union or a rule with the status of law; and, on the other hand, that the treatment based on the fulfillment of a mission of public interest or in the exercise of public powers conferred on the person in charge in the terms described in article 6.1.e) of the RGPD, when derivation of a competence attributed by a norm with the rank of law. Thus, the rules cited by the City Council, apart from others specifically applicable in the field of local administration (art. 91 of Law 7/1985, of April 2, Regulating the Basics of the Local Regime, art. 287.2 of Legislative Decree 2/2003, of April 28, by which the revised Text of the Municipal and Local Government Law of Catalonia is approved), would legitimize the publication of the various administrative acts issued within a competitive competition process and that contain personal data.

And it must be said that this publication, in the processes of access to the civil service -among others-, is not only intended to replace the notification in the terms provided for in article 45.1.b) LPAC, but also the to guarantee the transparency of the process. This principle of publicity in personnel selection processes, as indicated by this Authority in its opinion 10/2020 *"imposes on the body in charge of its implementation to publicize the process and its regulatory bases, of the lists of the people admitted to the selection process, the score obtained in the different phases of the process, the final qualification of all the participants and the final result of the process, among others"*.

Having established the above, it is necessary to analyze below the time in which these lists must be kept published since precisely the conduct imputed in this procedure is the maintenance of their publication in the open when it would no longer be necessary in view of its purpose. Article 5.1.e) of the RGPD relating to the principle of limitation of the conservation period, stipulates that the data must

be *"maintained in a way that allows the identification of the interested parties for no more time than is necessary for the purposes of the treatment of personal data; personal data may be kept for longer periods as long as they are treated exclusively for archival purposes in the public interest, scientific or historical research purposes or statistical purposes, in accordance with article 89, section 1, without prejudice to the application of the measures appropriate technical and organizational techniques imposed by this Regulation in order to protect the rights and freedoms of the interested party"*.

For its part, recital 39 RGPD determines that: *"(...) Personal data must be adequate, relevant and limited to what is necessary for the purposes for which they are processed. This requires, in particular, to guarantee that its conservation period is limited to a strict minimum"*.

Given the purpose of publishing detailed lists of proven facts, linked to personnel selection processes -provisional and final list of admitted people, qualifications of the various tests, etc.-, these should have been maintained during the time necessary for the formulation of the corresponding allegations or resources, so that at the end of this term they should no longer have been accessible. This is the criterion of this Authority contained in the report of *"Audit 1/2018, on the portals of transparency"*, which states, with regard to the time of publication of the various acts dictated within a selective process, which: *"In accordance with the principle of limitation of the data retention period, the exposure of the lists of admitted and the results of the successive tests must be limited to the period in which they can be formulated pleadings or appeals; therefore, they must be withdrawn once this term has passed"*

In the case at hand, and as indicated in the proven facts, on 03/27/2020 it was found that the City Council kept the following lists publicly published on its institutional website:

a) In relation to the selection process for 29 places in the senior architecture technician category:

- *"Provisional list of admitted and excluded applicants"*, dated 03/13/2019 (DOC1).
- *"Definitive list of admitted and excluded applicants"*, dated 04/12/2019 (DOC2)
- *"Results of the first exercise of the first test (knowledge test of the general syllabus)"*, dated 05/29/2019 (DOC5).

b) In relation to the selection process for 300 places in the general administration assistant category:

- Document entitled *"Correction of the definitive list"* dated 11/28/2019 (DOC3).

Regarding the time in which the publication had been maintained, as has been said, the City Council argued in its defense that *"if the current health crisis situation due to the COVID-19 pandemic had not occurred, these processes would already be completed and, consequently, unpublished from the electronic headquarters"* since the suspension of administrative deadlines decreed by the state of alarm was maintained until 01/06/2020.

In this regard, it must be made clear that, certainly and as the City Council says, Royal Decree 463/2020, of March 14, which declares a state of alarm for the management of the health crisis situation caused by due to COVID-19, it provided for the suspension of the terms and the interruption of the terms for the processing of administrative procedures; suspension that was not lifted until 06/01/2020, in accordance with the provisions of Royal Decree 537/2020 of May 22, which extended the state of alarm. The issue that is of interest here is that the controversial lists should no longer have been available at the City Council's electronic headquarters on the date the state of alarm was declared (14/03/2020).

If the City Council had taken into account the purpose that justified the publication of each list specifically, the *"Provisional List of Admitted and Excluded Applicants"* (DOC1), should have remained published until the date on which the *"Definitive List of Admitted and Excluded Applicants"* was published; and with regard to the definitive list (DOC2), the *"Results of the first exercise of the first test"* (DOC5) and the document *"Correcting the definitive list"* (DOC6), that taking into account the dates in that were dictated (12/04/2019, 29/05/2019 and 28/11/2019, respectively), the deadlines for filing any appeals would have already expired, so they should no longer have been accessible on 27/03/2020.

2.2.- "On data conservation".

In its statement of objections to the proposal, the City Council asserts that article 5.1.e) of the RGPD, which regulates the principle of limitation of the retention period, *"refers to the period in which the data of a personal nature must be maintained or preserved by the person responsible for the treatment. This maintenance or conservation must be differentiated from the time in which certain publications must be exposed within the framework of a certain procedure. The assimilation of both concepts would mean that the depublication of certain information would lead, simultaneously, to its elimination, a conclusion that in no case is supported by personnel selection procedures in particular, nor with administrative procedures in general"*. In this regard, the City Council indicates that according to the documentary evaluation tables established by the National Commission for Documentary Access, Evaluation and Selection (CNAATD), *"within the scope of the Barcelona City Council, the conservation and access calendar establishes a period of 5 years for the partial elimination of documentation for competition procedures. In turn, this term is calculated from the end of the proceedings or, in case of interposition of contentious administrative appeals, from the finality of the judgments or resolutions that put an end to the judicial proceedings"*. In accordance with this, the City Council concludes *"that no breach has occurred from the perspective of the limitation of the data retention period, since in no case has the planned documentation retention period been exceeded to the Barcelona City Council's conservation and access calendar"*.

This Authority disagrees with the conclusion reached by the City Council, regarding the consequence of complying with the beginning of the conservation period in the case at hand here (the de-publication of the lists on the institutional website), which would, according to its analysis, the deletion of data from all files (or databases) of the City Council.

Article 5.1.e) of the RGPD, relating to the principle of limiting the retention period, determines that the data controller must keep the data *"in a way that allows the identification of the interested parties for no longer than is necessary to the purposes of the treatment of personal data (...), provision that must be supplemented with the provisions of recital 39: "(...)*

Personal data must be adequate, relevant and limited to what is necessary for the purposes for which they are processed. This requires, in particular, to guarantee that its conservation period is limited to a strict minimum". From reading the article and the transcribed recital, it is clearly inferred that the conservation or not of the data must be linked to the specific treatment that is given to them; data processing which, in turn, must be limited to the time necessary to fulfill its purpose. It has already been analyzed in the previous section 2.1 what was the purpose pursued with the processing of the data consisting in the publication of the lists; therefore, once this purpose has been fulfilled, its consequence cannot be other than to stop identifying the persons affected in relation to that specific treatment (publication of personal data in the lists), which is achieved by proceeding to the deletion of personal information published on the institutional website. Therefore, this deletion of data linked to a specific and determined treatment (the publication), would not at all prevent the City Council from continuing to process in other databases or files the data of all those people who have participated in a selection process of staff. So things are, to the extent that the City Council maintained the treatment consisting in the publication of the lists when its purpose no longer justified it, the aforementioned principle of limitation of the conservation period was violated (in relation to this specific treatment).

2.3.- *"About the maintenance of the publications on the website of Barcelona City Council".*

The Barcelona City Council, also in its statement of objections to the proposal, defends that the maintenance of the documents related to the facts proven, *"is adequate to the purpose of the processing of the data".* The City Council argues that the maintenance of said publication, once the deadline for formulating the corresponding allegations and appeals has expired (at which point, as indicated in the proposal, it would be removed from the institutional website), would be necessary in order to safeguard *"other interests or actions that the administrative procedure regulations recognize for interested persons",* specifically:

a) *"Right of access and obtaining copies" (art. 53.1.a/ LPAC): "through the publication of the acts of the Qualifying Courts in the spaces of the corresponding selective processes at the electronic headquarters (website of the City Council of Barcelona) the obligation to provide copies of the documents of the aforementioned procedures is fulfilled".*

b) *"Right to make allegations, urge the rectification of errors and file appeals":* b.1) Article 76.2 LPAC recognizes the right of interested persons to be able to allege processing defects at any time during the procedure, a possibility that *"is very limited otherwise the announcements relating to the agreements adopted by the qualifying tribunals are displayed, while the procedure is alive";* b.2) Article 109 LPAC provides that interested parties, at any time, can urge the administration to rectify material, factual or arithmetic errors existing in its acts. To be able to exercise this right, the interested parties must have at their disposal *"the acts in which the errors to be rectified may have occurred";* and b.3) In *"any appeals that may be brought against the resolution that puts an end to the procedure [art. 112.1 LPAC] can*

raise aspects related to any phase of the process, which again justifies the maintenance of the publications in the spaces of the corresponding selective processes".

c) "Principles of effectiveness and agility of the procedure: In the event that the publications exposed in the spaces of the selective processes were not maintained, the access of interested persons to the unpublished documentation should also be attended to, although it should be conveyed through the individual delivery of the requested information.(...) It cannot be overlooked that in mass participation processes (...) the individualized attention to requests for documentation that is of interest to participants and which, at the same time, is necessary for them to exercise certain rights and actions, clearly hinders the swift processing of the procedure which, in turn, is a detriment to all applicants". d) "Principles of publicity and transparency", in this sense, "the publications made during the selection process are of interest to the participating people beyond the deadline for formulating allegations or interposing resources. By way of example, the results of the rest of the aspirants in the various tests of the process are intimately linked to the chances of success of each of the opposing persons".

Regarding these allegations, the following should be noted:

- With regard to the rights of the interested persons invoked in letters a) and) preceding, suffice it to say that it would be totally disproportionate to keep the lists with personal data accessible simply to speed up administrative action.
- Regarding the right cited in letter b.1), it should be noted that nothing prevents the City Council from keeping published on its institutional website a detailed relationship (without personal data) with the procedures carried out within the procedure, which would allow the interested parties to have complete and up-to-date information on said procedures so that any possible defect in the processing of the procedure could be detected.
- With regard to the right cited in section b.2), it must be said that, taken to the extreme of the City Council's reasoning, the lists would have to be kept published *ad eternum*, because, of course, you can always urge error correction. And, taking this reasoning to the limit, any administration should keep all acts and administrative resolutions handed down - whether or not they contain personal data - publicly accessible on the internet, since, following the arguments made by the City Council, only thus this right could be made effective. It is therefore clear that in order to make effective this right invoked by the City Council, it would be totally disproportionate to keep the publication beyond the deadline defended by this Authority.
- With regard to the right cited in section b.3), first of all, it must be remembered that acts issued in the context of a selective procedure, as an administrative procedure that it is, are not appealable administratively if they have won firmness for not having been traveled in time and form; situation that would occur in relation to the documents that are specified in the proven facts. And, secondly, it must be said, just as it happened in the previous section, that if the argument of the imputed entity is followed, the publication should also be maintained *ad eternum*, since, for example, the deadlines for presenting an eventual extraordinary review appeal can be very broad.
- And, finally, with regard to the principle of publicity and transparency, it should be noted that from the moment the entity has exposed the information during the necessary period (until the period for presenting allegations and appeals has passed), it can be said that it has been fulfilled

effective form of this right. Beyond this period, this principle of publicity and transparency collides with the right to data protection of the people whose data appears in these lists, a right that must be understood as prevailing once the aforementioned period has passed. Apart from the above, it must also be said that interested persons have other ways to access the information once the indicated period has passed, first, because these people have had the possibility to download the published information and, therefore, keep it indefinitely individually; and, secondly, because they can always request access to the information contained in the procedure from the City Council.

But in addition to what has been said so far, rebutting the City Council's argument in which it defended the need to maintain the publication of the lists in order to protect certain rights of the people interested in the procedure, it is necessary to put highlight that the controversial documents are published in the open, without any restrictions, so that anyone whether or not she is interested in the procedure, she can access the personal data that these documents include. And having reached this point, it is necessary to focus again on what was evidenced by the instructor in the proposal, that is, that this publication, maintained over time without any legitimacy, is particularly harmful when, as in this case, the lists are accessible open and contain special protection data (health data) linked to people who have participated in said selection process through the reserve shift, who are identified by name and surname.

It is for all the above that the allegations made in the course of this procedure in relation to the declared proven fact cannot succeed.

3. During the processing of this procedure, the conduct described in the proven facts section has been duly accredited, consisting of the open publication on the website of the Barcelona City Council of lists in which the persons were identified who participated in a selective process of access to the civil service, beyond the time necessary in relation to the purpose that justified it. This behavior is considered constitutive of the violation provided for in article 83.5.a) of the RGPD, which typifies as such the violation of *"the basic principles for treatment"*, among which the principle of limitation of the data retention period.

In turn, this behavior has been recorded as a very serious infringement in article 72.1.a) of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD), in the following form:

"a) The processing of personal data that violates the principles and guarantees established by Article 5 of Regulation (EU) 2016/679"

4. Article 77.2 LOPDGDD provides that, in the case of infractions committed by those in charge or in charge listed in art. 77.1 LOPDGDD, the competent data protection authority:

"(...) must issue a resolution that sanctions them with a warning. The resolution must also establish the measures to be adopted so that the conduct ceases or the effects of the offense committed are corrected.

The resolution must be notified to the person in charge or in charge of the treatment, to the body to which it depends hierarchically, if applicable, and to those affected who have the status of interested party, if applicable."

In terms similar to the LOPDGDD, article 21.2 of Law 32/2010, determines the following:

"2. In the case of violations committed in relation to publicly owned files, the director of the Catalan Data Protection Authority must issue a resolution declaring the violation and establishing the measures to be taken to correct its effects. (...)"

By virtue of this power, the Barcelona City Council should be required to carry out the following action:

- Remove from your institutional website the lists referred to in the proven facts section.

Once the corrective measure described has been adopted, within the period indicated, the Barcelona City Council must inform the Authority within the following 10 days, without prejudice to the authority's inspection powers to carry out the corresponding checks.

Also, as indicated by the instructor in the proposal, the City Council is recommended that in future selective processes in which people participate in the reserve shift, adopt certain measures that could prevent the dissemination of data relating to disability, without thereby neglecting the principle of publicity which, as has been said before, must govern the processes of access to the public service. Thus, for example, the lists containing the names and surnames of all the people participating in the selection process (those participating in the free shift and reserve shift) could be published in an environment with restricted access by these people; and publicly publish the same lists but identifying the people who participate in the reservation shift in a pseudo-anonymized form. This form of identification by means of a code - which could be, for example, a registration number - could also be used for the purposes of notification of administrative acts within the selection process in relation to the people who participate in this round of reservation (instead of the DNI), thus avoiding any possible identification in the event that the lists of the results of the selective process were made using the first and last name and four digits of the DNI, as provided for in DA 17a of the LOPDGDD.

resolution

For all this, I resolve:

1. Admonish the Barcelona City Council as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.e), both of the RGPD.
2. To require the Barcelona City Council to adopt the corrective measures indicated in the 4th legal basis and to accredit before this Authority the actions carried out to comply with them.
3. Notify this resolution to Barcelona City Council and the complainant¹.
4. Communicate this resolution to the Ombudsman, in accordance with the provisions of article 77.5 of the LOPDGDD.
5. Order that this resolution be published 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 articles 26.2 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, and 14.3 of Decree 48/2003, of February 20, by which the Statute of the Catalan Data Protection Agency is approved, the interested parties can file, on an optional basis, an appeal for reinstatement before the director of the Catalan Data Protection Authority, within one month from the day after its notification, in accordance with the provisions of article 123 et seq. of the LPAC. They can also directly file an administrative contentious appeal 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, regulating administrative contentious jurisdiction.

If the interested parties express to the Authority their intention to file an administrative contentious appeal against the final administrative decision, the decision will be provisionally suspended under the terms provided for in article 90.3 of the LPAC.

Likewise, interested parties can file any other appeal they consider convenient to defend their interests.

The director,