

ACCESS TO PUBLIC INFORMATION IN SPANISH TRANSPARENCY LAW: THE CHRONICLE OF A PARADIGM SHIFT*

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Abstract

This paper describes the historical development and basic characteristics of current Spanish legislation on the right of access to public information and the true scope of this right in its practical application. It uses the example of the legal doctrine established during its first two years of operation by the Comissió de Garantia del Dret d'Accés a la Informació Pública (Committee for Guaranteeing the Right of Access to Public Information, GAIP), the independent authority that oversees compliance with the right of access in Catalonia. In recent years, one can see in Spain how there has been a real paradigm shift on this matter from a purely nominal right with little practical application to a thorough and effective right of access with enormous future potential, equal to or broader than that recognised in other legal systems that were previously viewed with envy. It will also be seen how the current blast wave from the general right of access is affecting institutions dating from much earlier, with a supposedly different nature, such as the traditional right of access of interested parties to their files. And, how its current legal configuration paradoxically gives it much greater scope than if it were to be recognised as a fundamental right under the terms established by the European Court of Human Rights.

Key words: Transparency; right of access; fundamental rights; independent authorities; GAIP.

L'ACCÉS A LA INFORMACIÓ PÚBLICA EN LA LEGISLACIÓ ESPANYOLA DE TRANSPARÈNCIA: CRÒNICA D'UN CANVI DE PARADIGMA

Resum

En aquest treball s'exposen l'evolució històrica i els trets bàsics de la vigent regulació espanyola del dret d'accés a la informació pública, així com l'abast real que aquest dret presenta en la seva aplicació pràctica, posant com a exemple la doctrina establerta en els seus dos primers anys de funcionament per la Comissió de Garantia del Dret d'Accés a la Informació Pública (GAIP), l'autoritat independent que vetlla pel compliment del dret d'accés a Catalunya. Es podrà constatar com s'ha produït, a Espanya, en els últims anys, un autèntic canvi de paradigma en aquesta matèria, passant-se d'un dret purament nominal i d'escassa aplicació pràctica a un dret d'accés vigorós, efectiu i dotat d'un enorme potencial de futur, tant o més ampli que el reconegut per altres ordenaments que abans es contemplaven amb enveja. Es comprovarà també com l'actual força expansiva del dret general d'accés està repercutint en institucions sorgides molt abans en el temps, i d'una naturalesa suposadament diferent, com el tradicional dret d'accés dels interessats a l'expedient. I com la seva actual configuració legal comporta, paradoxalment, que posseeixi un abast major del que li correspondria si se li reconegués la naturalesa de dret fonamental, en els termes establerts pel Tribunal Europeu de Drets Humans.

Paraules clau: Transparència; dret d'accés; drets fonamentals; autoritats independents; GAIP.

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1 Introduction

This paper describes the basic characteristics of current Spanish legislation on the right of access to public information and the true scope of this right in its practical application.

As will be seen, although this regulation has a firm basis in the Constitution (see section 2), it has exhibited major deficiencies for many years (see section 3) and only recently, after the passage of Law 19/2013, of 9 December, on transparency, access to public information and good governance (LTE) and the autonomous community laws implementing it, have international standards on the subject been met (see section 4).

The paper also highlights the key role played by the independent authorities for guaranteeing the right of access in applying the new transparency regulation and the broad way in which the right is being interpreted. The legal doctrine established by the Catalan authority, the *Comissió de Garantia del Dret d'Accés a la Informació Pública* (Committee for Guaranteeing the Right of Access to Public Information, GAIP), of which I was vice-chairman during its first two years of operation (see section 5), is used as an example.

One can see in Spain how there has been a real paradigm shift on this matter in recent years, from a purely nominal right with little practical application to a thorough and effective right of access with enormous future potential, equal to or broader than that recognised in other legal systems that were previously viewed with envy.

2 Constitutional basis

2.1 The early constitutional recognition of the right of access

The Spanish Constitution of 1978 (CE) represented a decisive break with the tradition of secrecy characteristic of the preceding Franco dictatorship by expressly establishing, in article 105.b, that: ‘The law shall regulate: [...] the access of citizens to administrative files and records, except as they may concern the security and defence of the State, the investigation of crimes and the privacy of individuals’.

This provision, innovative for its time, gave a solid constitutional basis to the citizens’ right of access as an important and characteristic element of the new democratic state established by the Constitution. Significantly, the principle places the right of access at the same level as the right to a hearing in the procedure for drawing up administrative acts and regulations, the right to a hearing being contained in paragraphs a) and c) of article 105 CE.

2.2 The problem of the lack of recognition as a fundamental right and the relative importance of this in practice

Paradoxically, however, this explicit constitutional provision has hindered recognition of the right of access as a fundamental right, unlike in other countries. Because article 105 is in a different part of the Constitution to the one containing fundamental rights (articles 14 to 29 CE) and expressly refers to legislative development, the right of access has traditionally been considered a constitutional right requiring legal configuration. Thus it does not benefit from the reinforced protection of fundamental rights (such protection basically consisting of regulation through an organic law, which must be passed by an absolute majority in the Congress of Deputies, and legal safeguarding through a preferential and summary judicial procedure and the possibility of an appeal being lodged before the Constitutional Court “*recurso de amparo*”).¹

In particular, the express constitutional provision of the right of access to public information has impeded this right from being linked to and inferred from that of freedom of information, which is expressly considered a fundamental right in article 20.1.d CE.

¹ See the Ruling of the Constitutional Court 161/1988, of 20 September (ECLI:ES:TC:1988:161), Legal Grounds 4 and Rulings of Courtroom 3 of the Supreme Court of 30 March 1999 (ECLI:ES:TS:1999:2206), Legal Grounds 3, and 19, of May 2003 (ECLI:ES:TS:2003:3359), Legal Grounds 4. Based on this premise, subsequent laws regulating the right of access in Spain have been processed as common laws and not as organic laws.

This contrasts with the specific right allowing elected officials (of central and autonomous community parliaments and local councils) to access information they require in exercising their representative functions, a right that goes further than article 105.b CE for all citizens and which Spanish case law has developed from the fundamental right of political participation in article 23.2 CE.²

Although the lack of definition of the general right of access as a fundamental right has received much criticism in recent literature³ and makes it largely incompatible with the European Court of Human Rights current case law⁴ (which should be considered when interpreting the fundamental rights of the CE, by virtue of article 10.2), this does not seem to have had particularly serious repercussions in the practical application of new transparency legislation.

Specifically, the right of access and the (fundamental) right to personal data protection are on the same level in the legally required balancing test when deciding which right should prevail in the event of conflict. The fact that only the latter is established as a fundamental right has not had any noticeable consequences on the legal doctrine of the independent authorities responsible for guaranteeing the right of access. In addition, as will be seen, the breadth and speed of protection that authorities guaranteeing the right of access are providing lessens the potential problem posed by the lack of a right to appeal to the Constitutional Court. Indeed, the fact it is not considered a fundamental right and thus is not regulated solely by organic law passed by the central parliament has enabled the autonomous communities to develop provisions to the basic state transparency law through their own legislation, which often aims to reinforce the regulation of the right of access. Here, different autonomous laws have aimed to 'improve' on state law and previous autonomous laws in a sort of 'race to the top' regulatory competition. The Catalan Law of Transparency (Law 19/2014, of 29 December, on transparency, access to public information and good governance, LTC) is a particularly clear example. Autonomous communities laws have also significantly increased the obligation of actively informing,⁵ which specifically considers online publication of a large amount of personal information (e.g. on remuneration, contracts and subsidies)⁶ which is thus also accessible when exercising the right of access, even though it is not considered a fundamental right and thus theoretically has a lower 'rank' than the fundamental right of personal data protection. Finally, the fact that the right of access is established as an

2 Among many others, the aforementioned Ruling of the Constitutional Court 161/1988 (Legal Grounds 7 and 9), Ruling of the Constitutional Court 57/2011 of 3 May (ECLI:ES:TC:2011:57), Legal Grounds 2 et. seq. and the Ruling of Courtroom 3 of the Supreme Court of 15 June 2015 (ECLI:ES:TS:2015:2870), Legal Grounds 7, with later references.

3 See, among others, Guichot, Emilio, 'Chapter II', in id. (coord.), *Transparencia, Acceso a la Información Pública y Buen Gobierno. Estudio de la Ley 19/2013, de 9 de diciembre*, Madrid, Tecnos, 2014, p. 35-47; Fernández Ramos, Severiano; Pérez Monguió, José María, *Transparencia, Acceso a la Información Pública y Buen Gobierno. Ley 19/2013, de 9 de diciembre*, Cizur Menor: Thomson Reuters Aranzadi, 2014, p. 25-28; Fernández Ramos, Severiano, 'El derecho de acceso a la información pública: naturaleza, sujetos activos y ordenación', in Troncoso Reigada, Antonio (dir.), *Comentario a la Ley de Transparencia, Acceso a la Información Pública y Buen Gobierno*, Cizur Menor: Thomson Reuters Civitas, 2017, p. 694-713; De la Nuez Sánchez-Cascado, Elisa; Tarín Quirós, Carlota (coord.), *Transparencia y buen gobierno. Comentarios a la Ley 19/2013, de 9 de diciembre, de Transparencia, Acceso a la Información Pública y Buen Gobierno*, Madrid: La Ley, 2014, p. 224-233; Blanes Climent, Miguel Ángel, *La transparencia informativa de las Administraciones públicas*, Cizur Menor: Thomson Reuters Aranzadi, 2014, p. 199-210; Cotino Hueso, Lorenzo, 'El derecho fundamental de acceso a la información, la transparencia de los poderes públicos y el Gobierno Abierto. Retos y oportunidades', in Valero Torrijos, Julián; Fernández Salmerón, Manuel (coord.), *Régimen jurídico de la transparencia del sector público. Del derecho de acceso a la reutilización de la información*, Cizur Menor: Thomson Reuters Aranzadi, 2014, p. 43-55; Piñar Mañas, José Luis, 'Derecho de acceso a la información pública. Régimen general', in Wences, Isabel; Kölling, Mario; Ragone, Sabrina (coord.), *La Ley de Transparencia, Acceso a la Información Pública y Buen Gobierno. Una perspectiva académica*, Madrid: CEPC, 2014, p. 35-42; Piñar Mañas, José Luis, 'El fortalecimiento de la transparencia y el derecho de acceso a la información pública como objeto de la Ley 19/2013', in Troncoso Reigada, Antonio (dir.), *Comentario a la Ley de Transparencia...*, op. cit., p. 116-125.

4 See the recent important Ruling by plenary court of the ECHR in the case *Magyar Helsinki Bizottság v. Hungary*, no. 18030/11, of 8 November 2016, sections 149 et. seq., with a preamble summarising the legal precedent and further background from international and comparative law, which affirms the violation of article 10 of the European Convention on Human Rights (freedom of expression, in particular the right to receive and impart information) by denying access to public information (names and appointments of police-appointed lawyers) to a Hungarian human rights NGO. The requirements demanded by the court for the denial of the right to access to constitute a violation of article 10 of the European Convention on Human Rights are developed in section 157 ff. In short, the request must be for access to information of public interest that is prepared and available and formulated by journalists, NGOs, researchers, bloggers or users with a large social media following (in general, persons acting as public watchdogs) with the aim of contributing to public debate.

5 In other words, information that government bodies are required to make routinely available, without the necessity of a prior request by the public.

6 E.g., see articles 11.1.b, 13.1.d, 14.2.a and 15.1.c LTC.

autonomous right and not as a specific manifestation of the fundamental right to freedom of information facilitates its expansion and recognition for all types of people and all types of purposes and information held by government bodies. As shown below, current Spanish regulation on exercising the right of access is not subject to ECHR requirements in terms of violation of the freedom to receive and impart information in article 10 of the European Convention on Human Rights.⁷

3 Previous regulation and its deficiencies

Despite the early constitutional recognition of the right of access to information, the right was not generally regulated in Spain until 1992, when the first law on administrative procedure was passed in the democratic period, Law 30/1992, of 26 November, on the legal framework of public administrations and common administrative procedure (LRJPAC), which included just one article on the issue, article 37.

Furthermore, this regulation was very restrictive and received broad legal academic criticism. It is safe to say that article 37 of LRJPAC did not provide a true practical application of the right of access in Spain. Significantly, when the current LTE was passed, most news coverage appeared completely unaware of the existence of article 37 LRJPAC and considered the LTE to be the first time the citizens' right of access to public information had been considered in Spain.

The many deficiencies in article 37 LRJPAC include:

The *object* of the right of access was highly restricted. It only recognised the right of access to administrative records and documents included in finalised administrative files (article 37.1 LRJPAC), documents which, furthermore, had to be identified in the request (article 37.7 LRJPAC).

With regard to obliged subjects, it only covered the public administration and no other public sector bodies (such as companies with public capital and public sector foundations), associated private subjects or public powers other than the executive (the monarchy, central and autonomous community parliaments, the judiciary, the Constitutional Court, the Ombudsman Agency, etc.) (article 2 LRJPAC).

The *exceptions* to the right of access were very broad and vague. In particular, the right of access to non-intimate personal data was only possible for parties proving their 'legitimate and direct interest' (article 37.3 LRJPAC; intimate data were only accessible to the affected parties, by virtue of article 37.2 LRJPAC). The list of subsequent exceptions to the right of access, other than the right to the protection of personal data, were formulated in imperative and vague terms, with no reference to the damage test, the balancing test or the proportionality principle (article 37.5 LRJPAC) and an extremely broad residual and open clause of exception to the right of access 'when reasons of public interest prevail, due to interests of third parties more worthy of protection or as stated by law' was included (article 37.4 LRJPAC). Access could also be denied if it affected the efficacy of the government (article 37.7 LRJPAC), with no further precision provided.

Furthermore, article 37 LRJPAC did not include specific *procedural guarantees* for the right of access, which meant that, among other things, a general term of three months for resolution of requests established in article 42 LRJPAC was applicable, an excessively long time for access to public information.

Nor were *specific authorities guaranteeing* the right of access considered, hence denials of access could only be contested through ordinary administrative appeal procedures (which are completely ineffective in Spain)⁸ and through appeals with the contentious-administrative courts, which members of the public rarely used due to their slowness and cost.

⁷ See note 4 above.

⁸ As shown in general terms in the studies included in López Ramón, Fernando (coord.), *Las vías administrativas de recurso a debate. Actas del XI Congreso de la Asociación Española de Profesores de Derecho Administrativo*, Madrid: INAP, 2016. See also Comisión General de Codificación, *Informe explicativo y propuesta de anteproyecto de ley de eficiencia de la Jurisdicción Contencioso-Administrativa*, Madrid: Ministerio de Justicia, 2013, p. 14-30.

Finally, there were no specific *sanctions* for failing to comply with the right of access nor any specific obligations of *actively informing*, going beyond those traditionally established by sector-based legislation (on public sector contracts, subsidies, public employees, etc.).⁹

4 The paradigm shift and convergence with international standards through the LTE and its implementation in the autonomous communities

4.1 Reasons for the passage of the LTE and autonomous community legislation implementing it

Despite repeated legal academic criticism and the transformational boost provided, in this context as well, by European law (in particular, by directives on the right of access to environmental information and the reuse of public sector information),¹⁰ the modernisation of the right of access did not take centre stage in the political agenda until the onset of the severe economic crisis in 2010 and the revelation of the major corruption scandals in recent years.

The recession and the resulting severe cuts along with a proliferation of corruption scandals have led to an enormous loss of trust in institutions among the Spanish public (much greater than in most OECD countries, exceeded only by Greece and Italy¹¹) and the passage of a modern administrative transparency regulation has been seen as a basic mechanism for attempting to re-establish this trust. Transparency, demanded by civil society, has become something of a mantra and political parties do not dare (at the moment) to question it.

This peculiar context, which some authors have referred to as the ‘perfect storm’,¹² led to the passage of a specific transparency law, in accordance with international standards: the LTE, which came into effect for the general state administration in December 2014¹³ and was then developed and improved by the different autonomous community legislators.

Despite its imperfections and improvable aspects, the LTE and the autonomous laws implementing it have produced a real paradigm shift in this field, which, as shown below, is becoming clear in their initial years of practical application.

4.2 Main characteristics of the new right of access regulation

The fundamental aspects of the new regulation, which contrast with the deficiencies in the preceding regulation, are the following.

The *object* of the right of access is much broader than before. This object is now ‘public information’ understood as all information held by parties subject to the law (article 13 LTE). Thus it is no longer limited to documents, let alone documents in administrative files that are finalised at the time of the access request. Coherently, nor does it require the specific document to be identified. All it requires, logically, is for the

9 On regulation and the many deficiencies of the right of access prior to the current LTE, see, Pomed Sánchez, Luis Alberto, *El derecho de acceso de los ciudadanos a los archivos y registros administrativos*, Madrid: INAP, 1989; Embid Irujo, Antonio, *El ciudadano y la Administración*, Madrid: MAP, 1994; Fernández Ramos, Severiano, *El derecho de acceso a los documentos administrativos*, Madrid: Marcial Pons, 1997; Mestre Delgado, Juan Francisco, *El derecho de acceso a archivos y registros administrativos*, 2a ed., Madrid: Civitas, 1998; Guichot, Emilio, *Publicidad y Privacidad de la Información Administrativa*, Madrid: Civitas, 2009; and Rams Ramos, Leonor, *El derecho de acceso a archivos y registros administrativos*, Madrid: Reus, 2009, among others.

10 Directive 2003/4/EC of the European Parliament and of the Council, of 28 January 2003, on public access to environmental information and repealing Council Directive 90/313/EEC, and Directive 2003/98/EC of the European Parliament and of the Council, of 17 November 2003 on the re-use of public sector information (amended by Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013), transposed to Spanish legislation by Law 27/2006, of 18 July, regulating the rights of access to information, public participation and access to justice in environmental issues (LAIA) and Law 37/2007, of 16 November, on the re-use of public sector information (amended by Law 18/2015, of 9 July), respectively.

11 OECD, *Spain: From Administrative Reform to Continuous Improvement*, GOV/PGC(2014)4/ANN1, 2014, p. 203-205.

12 Guichot, Emilio, ‘Capítulo II’, *op. cit.*, p. 20.

13 The autonomous communities and local authorities were given a further year, until December 2015, to comply with the new LTE right of access regulation. Some autonomous communities did not wait until the end of the period and passed LTE implementation legislation that came into effect before the deadline (such as the LTC in Catalonia, whose section on the right of access came into effect on 1 July 2015).

requested information to be indicated (articles 17.2.b and 19.2 LTE; article 28 LTC even requires the administration to provide advice to the requesting party to help make imprecise requests more specific).

With regard to obliged subjects, the right of access no longer covers only the public administration, but also all other public sector bodies (such as companies with public capital and public sector foundations), other public powers other than the executive (where their actions are subject to administrative law: contracting; personnel, etc.) and even private subjects associated with them (articles 2 and 4 LTE). In the latter case, the right of access is exercised through the associated government or public body which is, in short, the object of control.

The access *requests*, although they cannot be anonymous as in other countries, are subject to very few formal requirements and do not require justification or legitimate interest to be stated (article 17 LTE). They can be presented online, although emails are not accepted and in many cases available online channels are still excessively complex and unwieldy.

Exercising the right of access is *free*, notwithstanding possible fees for issuing copies or transferring the information to a different format from the original (article 22.4 LTE).

Access requests are subject to established *inadmissibility* causes (article 18 LTE and, with greater precision and a smaller scope, article 29 LTC).

Limits (*exceptions*) to the right of access are now regulated in line with international standards. This regulation is based on a list of established limits very similar to those stated in Council of Europe Convention no. 205 on Access to Official Documents (CAOD).¹⁴ Although this convention has not yet come into effect or even been signed by Spain, it was very closely considered in drafting the LTE and, in particular, in establishing the catalogue of potential limits to the right of access listed in articles 14 and 15. The LTE also expressly states four major criteria for restrictive and case-by-case application of such limits, which are usual in comparative law (articles 14, 15, 16 and 20.2 LTE): access can only be denied when it could effectively and not just hypothetically damage the legal asset protected by the limit in question (damage test); this damage must in all cases be weighed against possible concurrent public or private interests favourable to access and which could require it to be given (balancing test); if the limit prevails in the balancing test, its application must be proportionate and not impede access to the part of the information not affected by the relevant limit (proportionality principle and partial access); and the obligation of the administration to give sufficient reasons for applying the limit in the specific case (duty to give reasons). The LTE also establishes the application of these criteria to the access to personal data, which is subject to weighting and only completely excludes specially protected personal data, such as racial origin, health, sex life, ideology, union membership, religion and beliefs, and records of criminal and administrative violations (article 15 LTE). Unlike other regulations, none of the limits to access in the LTE is considered an absolute limit (with the sole exception of the aforementioned specially protected personal data); they are all relative limits, subject to weighting and which can be overcome by a higher public or private interest favoured by access.

LTE includes a series of specific *procedural guarantees* both for the party requesting access and for third parties that could be affected by access (with the right to be heard, article 19.3 LTE), establishing a limit of one month to pass resolution on the procedure (article 20.1 LTE).

Current legislation also covers the establishment of *independent, specialist authorities to guarantee* the right of access, at both state level (the Council of Transparency and Good Governance) and in the autonomous communities and local government (such as the GAIP in Catalonia). These authorities hear claims that members of the public can voluntarily and freely make before turning to the contentious-administrative courts, resolving them much more rapidly than the latter (three months in the case of the state council and two months in the case of the GAIP). Their decisions are binding for the government body the claim is made against and can be challenged in the contentious-administrative courts (articles 23, 24, 36 to 40 and the

¹⁴ Held in Tromsø (Norway) on 18 June 2009, it requires ratification by 10 states for it to come into effect. By 31 July 2017 it had been ratified by nine states.

fourth additional stipulation of the LTE and the respective articles of the autonomous community laws on transparency, e.g. articles 39 to 44 LTC).¹⁵

The autonomous community laws also include specific *sanctions* for failure to comply with the obligations of transparency (e.g. articles 76 ff LTC, although it attributes the powers of sanction to the government bodies that have failed to meet them).

Finally, as with the latest transparency laws in other countries, it establishes a wide range of specific obligations for *actively informing*, i.e. types of information different government bodies and other obliged subjects must routinely publish on their respective websites and centralised transparency portals to facilitate public knowledge and thus avoid having to use the right of access to access it: institutional information, information on budgets, personnel, remuneration, awarded contracts and subsidies, etc. (articles 5 to 11 LTE and different autonomous community laws significantly extending it).¹⁶

5 Application of the new transparency regulation and the key role of independent authorities for guaranteeing the right of access. The GAIP example

The first years of application of the new transparency regulations (two and a half years in the case of the LTE and two years in the case of the first autonomous community laws to come into effect) confirm the paradigm shift they have brought about and the key role played by the various independent authorities for guaranteeing the right of access. The example of the GAIP is illustrative, as will be shown below.

5.1 Some figures on the first two years of operation of the GAIP¹⁷

In its first two years of activity, the GAIP received 878 claims (after receiving only 37 claims in its first six months of operation) This is a very high volume, given the public and media's still limited knowledge of the right of access and of the existence of the GAIP. It confirms how useful interested parties consider a free, fast-track system for claims prior to the courts, via a specialist organisation that is completely independent from the government body denying access to the requested information.¹⁸ Notable in this context is the high rate of repetition among claimants, who do not hesitate to use the GAIP repeatedly, each time the administration denies them access to information.

Of these claims the GAIP has resolved 771, the vast majority within the two-month deadline (the period is extended to three months when the claimant requires the claim to be processed through the mediation procedure. Such mediation is a new element in the LTC, article 42, imported from experiences such as those

15 I compare the different guarantee authorities established to date by the different autonomous communities, indicating, in my opinion, the deficiencies (some of them considerable) in their institutional design, in Mir Puigpelat, Oriol, 'Las autoridades autonómicas de garantía del derecho de acceso. Una aproximación crítica a su diseño institucional', in Troncoso Reigada, Antonio (dir.), *Comentario a la Ley de Transparencia...*, op. cit., p. 1823-1847. On the state council, see Martín Delgado, Isaac, 'La reclamación ante el Consejo de Transparencia y Buen Gobierno: un instrumento necesario, útil y ¿eficaz?', in López Ramón, Fernando (coord.), *Las vías administrativas de recurso a debate...*, op. cit., p. 377 ff., and the corresponding part of the commentaries on the LTE quoted in notes 3 and 16 to this study.

16 There is extensive literature on LTE and autonomous community laws developing it. As well as the commentaries referred to in note 3, see also Cerrillo, Agustí; Ponce, Juli, *Transparència, accés a la informació pública i bon govern a Catalunya. Comentaris de la Llei 19/2014, de 29 de desembre*, Barcelona: EAPC/UOC, 2015; Rodríguez-Arana Muñoz, Jaime; Sendín García, Miguel Ángel, *Transparencia, acceso a la información y buen gobierno*, Granada: Comares, 2014; Razquin Lizarraga, Martín María, *El derecho de acceso a la información pública*, Oñati: IVAP, 2015; Fernández Ramos, Severiano; Pérez Monguió, José María, *El derecho de acceso a la información pública en España*, Cizur Menor: Thomson Reuters Aranzadi, 2017, and later references, among others.

17 The following figures cover the period 1 July 2015 to 30 June 2017, the date on which I had to leave the GAIP to join the Pompeu Fabra University. All the resolutions issued by GAIP in this period are available on its website (www.gaip.cat), which includes a search engine and a specific section containing key resolutions, the Activity Reports for 2015 and 2016 and the opinions, reports and general criteria drawn up by the institution.

18 In accordance with article 39 et. seq. LTC and Decree 111/2017, of 18 July, approving the Regulation of the Committee for Guaranteeing the Right of Access to Public Information, the GAIP consists of three to five members appointed by a three fifths majority of the Parliament of Catalonia. These members must be experts of renowned competence and prestige and have over 10 years' professional experience (as lawyers specialising in public law or qualified archivists), working exclusively with full independence. They may only be removed from their position for the objective reasons established in the aforementioned decree.

of Quebec, the USA and Switzerland)¹⁹. This period is in contrast to the average length of the contentious-administrative judicial process in Spain (12 months, in the court of first instance in 2016)²⁰.

Of the claims declared admissible (the inadmissibility rate for claims by GAIP is around 15%), around 90 per cent received a favourable result for the claimant, either because the GAIP wholly or partly accepted the claim or because the government body provided the information during the process, on hearing the claim. Such late release of information occurs very often in numerous cases where the claim is lodged against the lack of a resolution on the request by the government body and shows that the most effective remedy for administrative silence is a rapid claim mechanism through an independent authority.

Also of note is the high degree of compliance with GAIP resolutions, despite the lack of mechanisms to enforce its resolutions (the GAIP is limited to reminding government bodies that their failure to comply with GAIP resolutions could represent a very serious infringement²¹ and publishing non-compliant government bodies on its website), and the very small number of court cases arising from its resolutions. To date, its resolutions have only led to three administrative-contentious cases, as yet unresolved, instigated by the obliged government bodies or affected third parties and not parties requesting the information.²² This high degree of acceptance of its resolutions is undoubtedly partly explained by the fact that it requests reports from the Autoritat Catalana de Protecció de Dades (Catalan Data Protection Authority, APDCAT) in cases where the government body bases denial of access to the requested information on the protection of personal data. In these cases, the Catalan law, unlike the LTE and other autonomous community laws, requires the aforementioned report to be requested (article 42.8 LTC) and although not binding, the GAIP puts great weight on it as it is issued by the authority specifically responsible for overseeing public sector compliance with data protection laws. This procedural cooperation between the two principal Catalan authorities in this field is extremely positive and generates a dynamic of mutual understanding and consideration of the interests they respectively protect.

It is also revealing that it is the least funded government bodies (in particular small local councils) that are the target for most claims with the GAIP. Better funded government bodies with better legal services already know the scope of the right of access in current legislation and legal doctrine established by the GAIP and thus tend to facilitate the requested information within the legally established period, except in legally more complex cases, where they consider there to be a legal limit on access.

5.2 Significant aspects of the legal doctrine established by the GAIP

This is not the place to examine in detail the legal doctrine established by the Spanish authorities guaranteeing the right of access. However it is worth pointing out some significant aspects of these legal principles, as it helps demonstrate the enormous potential of this new Spanish transparency and provide examples of how it is already being applied in practice. The GAIP is once again used as an example, although not an exhaustive one.

5.2.1 Object: access to ongoing procedures and all types of information held by public administrations and other obliged subjects

The enormous scope of the object of the right of access, consisting of all ‘public information’, defined as ‘the contents or documents, in whatsoever format or medium, in possession of one of the parties included within

19 On this mediation and existing precedents in comparative law, see Cerrillo i Martínez, Agustí; Velasco Rico, Clara-Isabel, ‘La mediación en la resolución de conflictos en materia de acceso a la información pública’, in López Ramón, Fernando (coord.), *Las vías administrativas de recurso a debate...*, op. cit., p. 573-583.

20 Consejo General del Poder Judicial, *La Justicia Dato a Dato. Año 2016*, Madrid: CGPJ, 2017, p. 115. In Catalonia in 2016 the mean length of a case was 10.5 months in the unipersonal contentious-administrative courts and 28.5 months in the Contentious Administrative Chamber of the High Court of Justice of Catalonia in a single instance.

21 This is established in article 77.2.b LTC. Article 49.2 of Decree 111/2017 now also enables the GAIP to inform the competent authorities of non-compliance to order the initiation of the corresponding sanction procedure.

22 Contentious-administrative appeals nos. 334/2016, 420/2016 and 428/2016 lodged with the High Court of Justice of Catalonia Contentious-Administrative Chamber against GAIP resolutions on claims 22/2016 to 45/2016 (Girona Provincial Council), 19/2016 (TMB) and 58/2016 (Hospital Plató), respectively.

the scope of application of this Title, and which have been created or acquired in the course of exercising their responsibilities' (article 13 LTE and, in similar terms, articles 2.b and 19.1 LTC) has enabled the GAIP to admit access not just to documents (whether or not they are in an administrative file) but also to all kinds of information in the power of government bodies and other obliged parties, including the content of databases,²³ mathematical algorithms²⁴ and source code for computer programmes used by the government bodies in carrying out their functions.²⁵

On several occasions, the GAIP has also accepted access to information from *ongoing procedures* which are still not finalised.²⁶ This conclusion arises from the condition no longer required in either the LTE or LTC, unlike the previous article 37.1 LRJPAC, that the administrative procedure in question must have been concluded for members of the public to demand access to the documents included in it, on the undeniable fact that documents from ongoing procedures constitute public information as per the aforementioned articles 13 LTE and 2.b LTC and thus are susceptible to consultation in exercising the general right of access recognised in both laws. This interpretation is confirmed by the Preamble of the LTE which states, in section II, that one of the deficiencies of the preceding right of access regulation that the new law aims to correct is, precisely, that this right was limited to documents contained in administrative procedures that have already concluded.²⁷ Such access must naturally be applied without prejudicing any limits that might be applicable in each case and which might acquire special relevance when the procedure is still open. Access to ongoing procedures obviously does not imply recognition of the condition of interested party of those requesting access, not does it permit the party to participate in or challenge the final resolution on the procedure. It could, however, be important for ensuring media and public control of administrative activity before it is too late and a decision harmful to the public interest is adopted, especially in complex administrative procedures that require lengthy processes (e.g. the awarding of large contracts for the construction and operation of infrastructure, such as the failed Castor project). To date, accepting this possibility of access has not led to a flood of claims with the GAIP.

The broad object of the right of access established in the LTE and LTC and the suppression of the requirement of identifying the specific documents for which access is desired (previous article 37.7 LRJPAC), has also led the GAIP to accept as natural requests formulated through *questions*,²⁸ as long as they are sufficiently precise (article 19.2 LTE and articles 26.1.b and 28 LTC) and can be answered with information held by the public administration.

This latter case represents precisely the main limit the GAIP has identified with regard to the object of the right of access: the right of access only enables *existing* information to be obtained rather than obliging the public administration (or another obliged party) to produce new information, even though this information should have been generated at some point. Thus the right of access cannot demand, for instance, *a posteriori* processes that were not carried out during a given procedure, the justifications for previous decisions, the adoption of administrative acts, the production of studies, reports, inspections or analyses, or reports on

23 E.g. see the Resolution of 11 February 2016 on Claim 36/2015, the Resolution of 11 May 2016 on Claim 13/2016 and the Resolution of 28 September 2016 on Claim 119/2016. The GAIP has accepted the right of access to information in databases in many other Resolutions.

24 Resolution of 21 September 2016 on Claims 123/2016 and 124/2016 (cumulative).

25 Resolution 200/2017 of 21 June. That the right of access can include computer programmes used by the public administration is also defended by Muñoz Soro, José Félix; Bermejo Latre, José Luis, 'La redefinición del ámbito objetivo de la transparencia y el derecho de acceso a la información del sector público', in Valero Torrijos, Julián; Fernández Salmerón, Manuel (coord.), *Régimen jurídico de la transparencia...*, *op. cit.*, p. 204-207.

26 See, among others, the Resolution of 23 December 2015 for Claim 17/2015, Resolution 21/2017, of 1 February, Resolution 49/2017, of 15 February, Resolution 62/2017, of 22 February and Resolution 162/2017, of 26 May.

27 See also, Fernández Ramos, Severiano, 'El objeto del derecho de acceso a la información pública', in Troncoso Reigada, Antonio (dir.), *Comentario a la Ley de Transparencia...*, *op. cit.*, p. 755-757.

28 This is expressly indicated in the Resolution of 28 September 2016 on Claim 142/2016. The GAIP has accepted requests for access to a great deal of information requested through questions. The only exception, in matters of access by local elected officials, arose when the request was formally made through the specific 'requests and queries' channel established by local legislation, which is covered by different legislation from the right of access due to its differing purpose (the first occasion in Resolution 66/2017 of 22 February, later followed by others).

actions that are being considered in the future on a given issue (unless the future actions are described in an existing document), etc. In such situations, the GAIP only requires that the claimant is informed in writing that the requested information does not exist so that he or she may act accordingly, reporting it or demanding accountability (political, legal or otherwise) for the possible consequences arising from the failure to generate such information.²⁹ In a few cases, when there were serious indications that the information in question had been destroyed or improperly removed, thereby violating regulations on archiving,³⁰ the GAIP has informed the competent office to exercise the powers of inspection and sanction recognised in these regulations.³¹

The GAIP has also noted that, at least in Catalonia, obliged subjects receiving a request for the right of access to public information that they hold are required to process and resolve the request, even if it refers to information drawn up or produced wholly or in part by another obliged subject. This is based on the fact that the LTC only stipulates the obligation to refer the request to another obliged subject if the party receiving the request does not hold the information (articles 27.3 and 30 LTC) and does not include a provision like the controversial article 19.4 LTE, which seems to give preference to the government body that is the *author* of the information when processing and resolving the access requests. This approach in the Catalan law is coherent with the broad concept aforementioned of public information and is ultimately based on the convenience of facilitating parallel or successive requests for the same information to different obliged subjects (with the aim of completing or comparing it), thus guaranteeing greater public control of government activity. It also simplifies the formulation of information requests by the public and processing by the government bodies that receive them, as the requested information often comes from different sources and is not easy or reasonable to separate on the basis of the source.³²

5.2.2 Purpose: the huge expansion of the right of access by not requiring a justification for the request and by admitting 'selfish' requests

A second crucial aspect of current Spanish right of access legislation, which has not been sufficiently stressed and which goes a long way to explaining the breadth of the GAIP legal doctrine, is the fact that it expressly exempts applicants from the obligation to justify their request (articles 17.3 LTE and 26.2 LTC). This, along with the fact that the laws expressly accept that merely private, and not just public interests, may be invoked and that such interests may even prevail in the balancing test and justify access despite possible damages to some of the assets protected by legally established limits,³³ means that the right of access can be legitimately exercised for both the 'altruistic' purposes, which justified the historic development of this right (as a right linked to the freedom of the press), and for purely 'selfish' purposes. In other words, the right may not only be exercised with the aim of providing democratic control on public powers and contributing to public debate (the aim of access requests formulated by the media and other public watchdogs referred to by the ECHR,³⁴ the results of which are widely disseminated, after being properly drafted, in the media, Internet and specialist publications), but also to access information solely or mainly of interest to the requesting party.

29 This has been indicated in numerous Resolutions, such as the Resolution of 11 May 2016 on Claim 9/2016, the Resolution of 14 September 2016 on Claim 51/2016, the Resolution of 28 September 2016 on Claim 144/2016, the Resolution of 4 October 2016 on Claim 158/2016 and the Resolution of 14 December 2016 on Claim 265/2016. In some cases the GAIP has also invoked the inadmissibility cause specifically stipulated in article 29.2 LTC (requests that consist of legal consultations or requests for reports or opinions).

30 In Catalonia, this is Law 10/2001, of 13 July, on archives and document management (LAGD), developed by Decree 13/2008, of 22 January, on the access, assessment and selection of documents (the latter pending adaptation to the LTC), which impose specific obligations on administrative archives and document storage and only permit their destruction under the terms and conditions specified in the tables of document access and assessment approved by the Order of the Minister for Culture at the proposal of the National Document Access, Assessment and Selection Committee. The GAIP has made some general remarks on the meaning and scope of these tables, after the passage of the LTE and LTC, in its Report 1/2016, of 28 January on the Draft Order CLT // 2016 which approves, amends and revokes document assessment and access tables.

31 Resolution of 1 March 2016 on Claim 1/2016, Resolution of 11 May 2016 on Claim 13/2016 and Resolution 22/2017, of 1 February.

32 This was stated by the GAIP in its Opinion 3/2016, of 29 June.

33 According to article 14.2 LTE, 'the application of the limits must be justified and proportionate to its object and purpose of protection and consider the specific circumstances of the case, especially that of a concurrent higher public or *private* interest that justifies access'. Article 22.1 LTC contains a similar formulation.

34 See note 4 above.

The GAIP has received many claims of this latter type,³⁵ which it cannot dismiss as it has no legal basis for doing so, in light of the aforementioned articles. Unlike the ECHR, which is limited by the wording of article 10 of the European Convention on Human Rights and the scope and configuration corresponding to a fundamental right such as freedom of information, Spanish government bodies, guarantee authorities and judges hearing requests for access to public information cannot reject them on the basis of their purpose and their altruistic or selfish nature. Indeed the purpose does not even have to appear in the request. They may only assess possible concurrent limits to access as stipulated in articles 14 and 15 LTE and, if relevant, take into account the purpose (when stated) and nature of the requested information (whether or not it is in the public interest) when carrying out their balancing test and deciding whether access or the legal asset that could be damaged by access should prevail. However, as stated above, this weighting can and should also consider higher *private* interests such as, notably, the right of defence of the party requesting the information in an administrative action related to the requested information.

As well as the positive legal arguments discussed here, it should also be noted that access to public information not affected by legal limits based on selfish reasons is not necessarily negative. Public information, it is often said, belongs to the public, and citizens must be able to access it for whatever purpose they consider opportune without prior censorship. This lack of teleological constraints enables the right of access to fulfil many other functions, as well as the original and main function of democratic control of public powers. In addition, such selfish and casuistic access by many individual members of the public facilitates a very healthy indirect, disseminated control of administrative action, which can bring to light numerous illegalities and areas of improvement, thus complementing the direct and necessarily selective control by public watchdogs who have historically used the right of access. In my opinion, the potential main problem with such openness in the right of access to all kinds of requests for public information is the volume of requests it could lead to, although this remains hypothetical (the overall volume of access requests from the public in Catalonia is still very low and manageable, notwithstanding occasional problems in a specific government body, in particular small local councils). Should it arise, it would have to be dealt with reasonably and proportionately, based on solutions from comparative law.

In both theoretical and practical terms, the most important effect of broadening the scope of action of the general law of access is probably the disappearance of differences separating it from the *traditional right of interested parties to access a file*, a much earlier right, closely linked to the right of hearing and the right to defence in the context of administrative procedures. Indeed, Spanish legislation on administrative procedure is based on (and, in turn, feeds) this progressive approach as it increasingly and more intensively refers to transparency legislation in its limited (and clearly insufficient) regulation of the right of access to files of interested parties, especially in the central aspect of limits to access.³⁶

35 E.g. coming from interested parties in ongoing, finalised or shortly forthcoming procedures (e.g. the Resolution of 23 December 2015 on Claim 17/2015, Resolution 21/2017, of 1 February, the Resolution of 21 September 2016 on Claims 123/2016 and 124/2016, cumulative, Resolution 49/2017, of 15 February), from civil servants wanting information on their work positions (e.g. the Resolution of 1 March 2016 on Claim 34/2015, Resolution 9/2017, of 18 January, Resolution 17/2017, of 23 January), from private parties wanting to know the criteria used by a government body in cases similar to those that concern them (e.g. the Resolution of 4 October 2016 on Claim 143/2016, Resolution 1/2017, of 10 January), from complainants wanting to know the actions of the government body regarding their complaint (Resolution of 21 July 2016 on Claim 70/2016), from neighbours wanting to access information on business licences and noise from a bar in the same building (the Resolution of 22 April 2016 on Claim 12/2016), from business owners wanting to check that a government body is not improperly favouring their competitors (e.g. the Resolution of 17 March 2016 on Claim 7/2016, Resolution 64/2017, of 22 February), etc.

Conversely, the GAIP has received relatively few claims from journalists or NGOs, although their numbers have recently started growing and their claims have produced some of the institution's most notable Resolutions, such as the Resolution of 7 July 2016 on Claim 19/2016 (remuneration of executives and personnel outside the TMB (Barcelona Metropolitan Transport) collective bargaining agreement), the Resolution of 28 of September 2016 on Claim 119/2016 (results of inspections performed on bars and restaurants in Barcelona), Resolution 33/2017 of 8 February (amounts paid by certain companies as tax on large commercial establishments), Resolution 87/2017 of 16 March (sanctions imposed on supply companies with regard to energy poverty), Resolution 99/2017 of 28 March (demand for places in infant and primary schools in Barcelona), Resolution 100/2017 of 28 March (arms acquired by the Catalan police) and Resolution 181/2017 of 7 June (audit reports on the Palau de la Música produced by the Catalan Government). However, a large number of claims have come from trade unions and, above all, local elected officials, covered by specific local authority legislation.

36 See articles 35.a, 37 and 84.1 LRJPAC and, currently, 13.d, 27.4, 53.1.a and 82.1 of Law 39/2015, of 1 October, on the common administrative procedure of public administrations (LPAC). Also clear is the connection between article 70.4 LPAC and article 18.1.b LTE (although the latter should also specifically permit interested parties access to information contained in 'computer applications,

Given this development, the right of interested parties to access the file should increasingly be seen as a specific instance of citizens' general right of access to public information, an instance characterised, in the balancing test with the legal assets opposing access, by additional favourable weight for access due to the right of defence for interested parties. This is the approach taken by the GAIP and which helps explain why it has been considered competent to hear claims presented by interested parties even in ongoing procedures, as will be more fully discussed below.

5.2.3 Exceptions: restrictive interpretation of reasons for inadmissibility of requests and limits to access

As stated above, a key aspect of the new Spanish transparency legislation is the much more limited scope of exceptions to the right of access, in line with international recommendations in this field. In many of the resolutions issued to date, the GAIP has been able to define more precisely these exceptions on a case-by-case basis and in accordance with the restrictive interpretation imposed by the LTE and underlined by the LTC.

After noting, in one of its first resolutions, the four major criteria for restrictive application of the *limits* stipulated in the LTE and LTC (damage test, balancing test, proportionality and duty to give reasons)³⁷ and offering a general characterisation of the scope of these limits and of the existing differences between the two laws,³⁸ it provided access to data that, according to the government body, were affected by the limit of *public safety* (such as partial access to the multimillion euro contract, declared reserved, for the management of the RESCAT radio communications network used by several police forces, fire brigades and emergency services in Catalonia³⁹ and basic information on contracts for procuring arms and defence material by the Mossos d'Esquadra police force)⁴⁰. It also rejected that a journalist's access to information in a major ongoing criminal case, after court confidentiality had been lifted and the oral proceedings had begun, was damaging to the *investigation or punishment of criminal offences*.⁴¹ In line with the CAOD explanatory report, it considered that the limit on the *equality of the parties in court proceedings and effective judicial protection*, which is frequently invoked by the public administration, can only exclude access when the requested information has been specifically produced for the court proceedings in question.⁴² It considered that the limit of *economic and commercial interests* is also applicable in Catalonia, even though it is not expressly stipulated in the LTC⁴³ (a limit valid for denying access to offers presented by other bidders in a major public tender process that objectively merit classification as business secrets,⁴⁴ while rejecting that this limit could prevent a journalist's access to the results of inspections of bars and restaurants in Barcelona⁴⁵ or sanctions imposed by the Catalan government on supply companies due to violations of energy poverty regulations)⁴⁶. It restrictively interpreted the *limit of confidentiality and secrecy in procedures processed by the administration*, judging it to be applicable only when one or other are established by a parliamentary law, as expressly stated in the LTC (article 21.1.c) and article 13.2.a LAIA, which key authors consider implicit in the formulation of article 14.1.k LTE.⁴⁷ It considered that the limit of the rights of *minors*, established

files and databases', even if they are not part of the administrative file).

37 The Resolution of 17 December 2015 on Claim 15/2015.

38 Opinion 1/2016 of 11 May.

39 The Resolution of 27 April 2016 on Claim 37/2015.

40 Resolution 100/2017, of 28 March and Resolution 175/2017, of 31 May.

41 Resolution 181/2017, of 7 June.

42 The Resolution of 2 February 2016 on Claim 31/2015, Opinion 5/2016 of 13 October, Resolution 84/2017 of 8 March (rejecting for the first time a claim by virtue of this limit) and Resolution 113/2017 of 20 April.

43 Opinion 1/2016 of 11 May.

44 Resolution 21/2017 of 1 February.

45 The Resolution of 28 September 2016 on Claim 119/2016.

46 Resolution 87/2017 of 16 March.

47 Opinion 5/2016 of 13 October, the Resolution of 21 September 2016 on Claims 123/2016 and 124/2016 (cumulative), Resolution 17/2017 of 23 January and Resolution 162/2017 of 26 May (basing the partial denial of a trade union to information on an ongoing

in article 21.1.e LTC, does not prevent access to information on average grades in a number of vocational training schools⁴⁸ or on demand for places at infant and primary schools in Barcelona.⁴⁹ And, with regards to limits in sector-based laws, it stated that a reform of article 95 of Law 58/2003, of 17 December, on general taxation would be desirable to permit access to tax information on the amount of tax paid by large companies.⁵⁰

In particular relation to the limit of *protection of personal data*, the limit most frequently invoked by government bodies and other affected parties, the weighting exercise required by articles 15 LTE and 24 LTC has led the GAIP to recognise access (with a favourable report by the APDCAT, as stated above) to a large amount of personal information, such as remuneration (also of staff of publicly-owned companies⁵¹ and executives of private companies awarded government contracts)⁵², bank card transactions,⁵³ invoices,⁵⁴ public employee selection and appointment processes,⁵⁵ the fair price paid for the expropriation of specific lands⁵⁶ and sensitive information on victims of the Franco dictatorship contained in historic archives.⁵⁷ It has also considered that information on administrative violations and sanctions relating to physical persons, despite being classified as specially protected data in the express wording of articles 15.1 LTE and 23 LTC and therefore excluded from public access, does not always merit classification as intimate information and thus may become accessible to local elected officials.⁵⁸

The GAIP has also provided a notably restrictive interpretation of the *causes of inadmissibility* of requests for access, based in this case on the more restrictive regulation in article 29 LTC, which does not raise problems of competencies to the extent that the inadmissibility causes are intended mainly to protect the interests of the public administration (not third parties) and place no obstacle on autonomous community legislators deciding to reduce the inadmissibility causes and thus expose the public administration in their jurisdiction to greater transparency.⁵⁹ In particular, it considered that the inadmissibility cause of *supplementary or supporting information* (articles 18.1.b LTE and 29.1.a LTC) does not include, in Catalonia, internal reports and it provided a more precise definition of the notion of drafts, as non-definitive or inconclusive documents, and the material reasons that justify their exclusion from access.⁶⁰ It also restrictively interpreted the

personnel selection process on this limit), among many others.

48 The Resolution of 13 July 2016 on Claim 68/2016.

49 Resolution 99/2017 of 28 March.

50 Resolution 33/2017 of 8 February.

51 Among others, the Resolution of 7 July 2016 on Claim 19/2016 and Resolution 2/2017 of 10 January.

52 Among others, the Resolution of 13 July 2016 on Claim 58/2016, the Resolution of 14 December, 2016 on Claims 299/2016 and others (cumulative) and the Resolution of 21 December 2016 on Claims 339/2016 and 380/2016 (cumulative). Resolution 3/2017 of 10 January rejects a similar claim because the turnover of the company (Hospital General de Catalunya) associated with activities performed on behalf of government bodies did not represent 25 percent of the general turnover as required by article 3.2 LTC in order to access the remuneration of its executives.

53 Among others, the Resolution of 7 July 2016 on Claim 34/2016 and Resolution 46/2017 of 15 February.

54 Among many others, the Resolution of 17 March 2016 on Claim 7/2016, the Resolution of 18 May 2016 on Claim 18/2016 and the Resolution of 18 August 2016 on Claim 134/2016.

55 Among many others, the Resolution of 2 February 2016 on Claim 28/2015, the Resolution of 14 September 2016 on Claim 51/2016 (the only GAIP Resolution with a dissenting vote so far) and Resolution 95/2017 of 28 March. In these resolutions, based on the circumstances of the case, the GAIP did not consider giving access to the identity of the persons who had not passed the selection process was justified. After the period examined in this study, in Resolution 254/2017 of 26 July, for the first time the GAIP recognised access (solely in person and without a copy) of a trade union to the identity of all the participants in the selection process.

56 Resolution 1/2017 of 10 January.

57 The Resolution of 28 July 2016 on Claim 69/2016, which interprets the terms of validity for the limits to right of access established in article 36.1 LAGD (similar provision to article 57.1.c of Law 16/1985, of 25 June, on Spanish historical heritage) and places on the public administration the burden of checking the date of death of people in the historical archive.

58 The Resolution of 14 September 2016 on Claims 78/2016, 116/2016, 117/2016 and 118/2016 (cumulative). Article 164.3.a of Legislative Decree 2/2003, of 28 April, approving the reworded text of the municipal and local government law of Catalonia (TRLMRLC) only limits local elected officials' access to intimate personal data.

59 This has been affirmed by the GAIP on many occasions, such as the Resolution of 11 February 2016 on Claim 36/2015.

60 Resolution 49/2017, of 15 February, denying access to a series of drafts. See also two Resolutions of 19 November 2015 on

inadmissibility cause of *complexity of production or reworking of the requested information* (articles 18.1.c LTE and 29.1.b LTC), based on the broad concept of public information in current legislation,⁶¹ offering parameters that can justify its use and requiring the public administration to adequately explain the alleged complexity.⁶² On the numerous occasions that this inadmissibility cause has been invoked, the GAIP has only twice considered it sufficient to deny access.⁶³ Finally, it has maintained that, although Catalan law does not include the inadmissibility cause of a *repetitive or abusive nature* (article 18.1.e LTE), which, therefore, cannot be invoked in Catalonia, this does not prevent a request being considered inadmissible or rejected, when properly justified, when the right has not been abused, in application of the general principles of good faith and prohibition of the abuse of rights stated in article 111-7 of the Civil Code of Catalonia and article 7 of the Spanish Civil Code.⁶⁴ To date, no abuse of rights has been identified.

Reading the GAIP resolutions over a significant period of time clearly shows the very broad scope of the right of access in Spanish legislation: there are very few cases in which a minimally serious access request can be deemed inadmissible or rejected by the government. Except in cases where no real access to public information was requested, the GAIP has granted the requested access in almost all claims it has heard, with very few exceptions.

5.2.4 Broad interpretation of the competency of the GAIP

Given this broad legally recognised right of access and the usefulness to the public of an independent guarantee authority that supports their right and freely and quickly obtains the requested information, the GAIP has adopted a broad interpretation of its own competencies and the supplementarity established in the first additional stipulation in the LTE and LTC.

Going further than other Spanish guarantee authorities, and despite the notable increase in workload this represents, the GAIP has affirmed, in particular, its competence to hear claims from parties trying to access environmental information,⁶⁵ from local elected officials⁶⁶ and also from interested parties in ongoing administrative procedures.⁶⁷ In these cases, it applies specific regulations for these claims: the LAIA, local government regulations (in Catalonia, especially article 164 TRLMRLC) and the few provisions in Spanish legislation on administrative procedures relating to the right of interested parties to access files (LPAC and Law 26/2010, of 3 August, on the legal framework of public administrations and procedures in Catalonia), respectively. The arguments leading to the GAIP extending its competence to these areas, which are extensively developed in the resolutions that underpin it, can be summarised in a key idea: it does not make sense that subjects (such as parties requesting environmental information, elected officials and interested parties) who benefit from a privileged system of access, recognised long before the LTE and LTC were approved and which in theory continues to be broader than these two laws, do not have a basic guarantee mechanism such as the voluntary and free claims channel through an independent authority available to all members of the public. Consequently, they are required to go directly to the courts when the public administration denies them access or, even worse, they have to reformulate their request and cleverly channel it through the LTE and LTC (hiding the reality of the situation and waiving the reinforced access system available to them) in order to make a claim with the GAIP.

In the case of access to environmental information, denying a right to a claim through bodies such as the GAIP and submitting its safeguarding to a more expensive system than that stipulated for public information

Claims 12/2015 and 14/2015.

61 See section 5.2.1 above.

62 Among others, the Resolution of 11 February 2016 on Claim 36/2015, the Resolution of 5 May 2016 on Claim 15/2016, the Resolution of 28 July 2016 on Claim 77/2016, Opinion 6/2016 of 26 October and Resolution 78/2017 of 1 March.

63 The Resolution of 28 July 2016 on Claim 77/2016 and Resolution 78/2017 of 1 March.

64 Resolution of 11 February 2016 on Claim 36/2015 and the Resolution of 17 March 2016 on Claim 7/2016, among others.

65 From Resolution 211/2017, of 27 June, the first occasion on which the postulation arose.

66 From the Resolution of 11 February 2016 on Claim 4/2016.

67 From the Resolution of 23 December 2015 on Claim 17/2015.

not harmonised by the EU law could even be considered a violation of the principle of equivalence asserted by the Court of Justice. It would also make the LAIA completely useless (bearing in mind the breadth of the right of access guaranteed by the LTE and LTC, no-one would request access to environmental information under the LAIA if this meant losing the opportunity of lodging a free claim with the independent guarantee authorities stipulated in these laws).

In the case of local elected officials, the GAIP's interpretation has been enthusiastically welcomed by municipal, county and provincial opposition groups, who see claims lodged with this institution as the solution to the serious difficulties they frequently have in exercising the fundamental right granted to them, as stated above, in article 23.2 CE.⁶⁸ Their claims represent a quantitatively large part of the issues heard by the GAIP.⁶⁹ The Regulations of the Catalan Parliament seem to support this interpretation, as article 8.6 states that Members of Parliament can lodge claims with the GAIP to exercise the reinforced right stipulated in articles 6 et. seq. There is no need to stress the importance of the right of access so that local elected officials can exercise democratic control of local governments. It will be the responsibility of the Catalan High Court of Justice to confirm whether the GAIP is competent in this matter, when it passes resolution on the contentious-administrative appeal lodged by Girona Provincial Council some months ago, which solely questions this competence.⁷⁰

Finally, in the case of interested parties, undoubtedly the most controversial issue due to its possible procedural implications, the GAIP's interpretation, as discussed above,⁷¹ is based on the fact that transparency legislation enables any citizen (not just interested parties) to request access to an ongoing procedure and does not prevent the interested parties from using the general right of access. If all citizens can request access to public information on an ongoing procedure and, if access is denied, lodge a claim with the GAIP, then there is even more reason for the interested parties to do so, given that they have a reinforced right of access to their file due to the requirements of their right to defence. Furthermore, if the interested parties can use the LTE and LTC general right of access both while the procedure is ongoing and after it is completed and then lodge a claim with the GAIP, it would seem reasonable that they should also be able to lodge a claim with the authority after unsuccessfully requesting access to the file in exercising the right recognised in procedural legislation. It should also be borne in mind that it is not always easy to distinguish whether an administrative procedure is open or closed, as shown when the old article 37.1 LRJPAC was in force. Nor should it be forgotten that a claim with the GAIP does not halt the procedure in question or affect the stipulated period for challenging its proceedings or closing resolution; its only purpose is to determine whether the claimant has the right of access to the requested information or file, with GAIP having no competence to decide on issues that represent the main object of the procedure, as stated in its resolutions on this type of case.⁷² This is probably why few claims have been presented to date by the interested parties in ongoing procedures. In any event, the resolutions by GAIP, as an independent authority specialising in access to public information, could help establish guidelines for officials processing administrative files and who have to decide whether providing access to all the documents contained therein is admissible.⁷³

68 See section 2.2 above.

69 Resolutions that have forged an already healthy body of legal doctrine on the reinforced system of access for local elected officials in article 164 TRLMRLC, also in conjunction with the APDCAT, which will not be discussed in this study on the general system of access to public information in the LTE and LTC.

70 See note 22 above.

71 See sections 5.2.1 and 5.2.2 above.

72 Thus, for example, Resolution 21/2017, of 1 February.

73 Such as on the complex issue of access to offers presented by other bidders in a tender procedure and the notion of business secrecy (Resolution 21/2017, 1 February).

6 Bibliography

Blanes Climent, Miguel Ángel. *La transparencia informativa de las Administraciones públicas*. Cizur Menor: Thomson Reuters Aranzadi, 2014.

Cerrillo, Agustí; Ponce, Juli. *Transparència, accés a la informació pública i bon govern a Catalunya. Comentaris de la Llei 19/2014, de 29 de desembre*. Barcelona: EAPC/UOC, 2015.

Cerrillo i Martínez, Agustí; Velasco Rico, Clara-Isabel. 'La mediación en la resolución de conflictos en materia de acceso a la información pública', in López Ramón, Fernando (coord.). *Las vías administrativas de recurso a debate. Actas del XI Congreso de la Asociación Española de Profesores de Derecho Administrativo*. Madrid: INAP, 2016.

Comisión General de Codificación. *Informe explicativo y propuesta de anteproyecto de ley de eficiencia de la Jurisdicción Contencioso-Administrativa*. Madrid: Ministerio de Justicia, 2013.

Consejo General del Poder Judicial. *La Justicia Dato a Dato. Año 2016*. Madrid: CGPJ, 2017.

Cotino Hueso, Lorenzo. 'El derecho fundamental de acceso a la información, la transparencia de los poderes públicos y el Gobierno Abierto. Retos y oportunidades', in Valero Torrijos, Julián; Fernández Salmerón, Manuel (coord.). *Régimen jurídico de la transparencia del sector público. Del derecho de acceso a la reutilización de la información*. Cizur Menor: Thomson Reuters Aranzadi, 2014.

De la Nuez Sánchez-Cascado, Elisa; Tarín Quirós, Carlota (coord.). *Transparencia y buen gobierno. Comentarios a la Ley 19/2013, de 9 de diciembre, de Transparencia, Acceso a la Información Pública y Buen Gobierno*. Madrid: La Ley, 2014.

Embid Irujo, Antonio. *El ciudadano y la Administración*. Madrid: MAP, 1994.

Fernández Ramos, Severiano. *El derecho de acceso a los documentos administrativos*. Madrid: Marcial Pons, 1997.

Fernández Ramos, Severiano. 'El derecho de acceso a la información pública: naturaleza, sujetos activos y ordenación', in Troncoso Reigada, Antonio (dir.). *Comentario a la Ley de Transparencia, Acceso a la Información Pública y Buen Gobierno*. Cizur Menor: Thomson Reuters Civitas, 2017.

Fernández Ramos, Severiano. 'El objeto del derecho de acceso a la información pública', in Troncoso Reigada, Antonio (dir.). *Comentario a la Ley de Transparencia, Acceso a la Información Pública y Buen Gobierno*. Cizur Menor: Thomson Reuters Civitas, 2017.

Fernández Ramos, Severiano; Pérez Monguió, José María. *Transparencia, Acceso a la Información Pública y Buen Gobierno. Ley 19/2013, de 9 de diciembre*. Cizur Menor: Thomson Reuters Aranzadi, 2014.

Fernández Ramos, Severiano; Pérez Monguió, José María. *El derecho de acceso a la información pública en España*. Cizur Menor: Thomson Reuters Aranzadi, 2017.

Guichot, Emilio. *Publicidad y Privacidad de la Información Administrativa*. Madrid: Civitas, 2009.

Guichot, Emilio. 'Capítulo II', in id. (coord.). *Transparencia, Acceso a la Información Pública y Buen Gobierno. Estudio de la Ley 19/2013, de 9 de diciembre*. Madrid: Tecnos, 2014.

López Ramón, Fernando (coord.). *Las vías administrativas de recurso a debate. Actas del XI Congreso de la Asociación Española de Profesores de Derecho Administrativo*. Madrid: INAP, 2016.

Martín Delgado, Isaac. 'La reclamación ante el Consejo de Transparencia y Buen Gobierno: un instrumento necesario, útil y ¿eficaz?', in López Ramón, Fernando (coord.). *Las vías administrativas de recurso a debate. Actas del XI Congreso de la Asociación Española de Profesores de Derecho Administrativo*. Madrid: INAP, 2016.

- Mestre Delgado, Juan Francisco. *El derecho de acceso a archivos y registros administrativos*, 2a ed. Madrid: Civitas, 1998.
- Mir Puigpelat, Oriol. 'Las autoridades autonómicas de garantía del derecho de acceso. Una aproximación crítica a su diseño institucional', in Troncoso Reigada, Antonio (dir.). *Comentario a la Ley de Transparencia, Acceso a la Información Pública y Buen Gobierno*. Cizur Menor: Thomson Reuters Civitas, 2017.
- Muñoz Soro, José Félix; Bermejo Latre, José Luis. 'La redefinición del ámbito objetivo de la transparencia y el derecho de acceso a la información del sector público', in Valero Torrijos, Julián; Fernández Salmerón, Manuel (coord.). *Régimen jurídico de la transparencia del sector público. Del derecho de acceso a la reutilización de la información*. Cizur Menor: Thomson Reuters Aranzadi, 2014.
- OECD. *Spain: From Administrative Reform to Continuous Improvement*. GOV/PGC(2014)4/ANN1, 2014.
- Piñar Mañas, José Luis. 'Derecho de acceso a la información pública. Régimen general', in Wences, Isabel; Kölling, Mario; Ragone, Sabrina (coord.). *La Ley de Transparencia, Acceso a la Información Pública y Buen Gobierno. Una perspectiva académica*. Madrid: CEPC, 2014.
- Piñar Mañas, José Luis. 'El fortalecimiento de la transparencia y el derecho de acceso a la información pública como objeto de la Ley 19/2013', in Troncoso Reigada, Antonio (dir.). *Comentario a la Ley de Transparencia, Acceso a la Información Pública y Buen Gobierno*. Cizur Menor: Thomson Reuters Civitas, 2017.
- Pomed Sánchez, Luis Alberto. *El derecho de acceso de los ciudadanos a los archivos y registros administrativos*. Madrid: INAP, 1989.
- Rams Ramos, Leonor. *El derecho de acceso a archivos y registros administrativos*. Madrid: Reus, 2009.
- Razquin Lizarraga, Martín María. *El derecho de acceso a la información pública*. Oñati: IVAP, 2015.
- Rodríguez-Arana Muñoz, Jaime; Sendín García, Miguel Ángel. *Transparencia, acceso a la información y buen gobierno*. Granada: Comares, 2014.