

☐ Procedure No.: PS/00001/2020

938-090320

RESOLUTION OF PUNISHMENT PROCEDURE

Of the procedure instructed by the Spanish Agency for Data Protection and
based on the following

BACKGROUND

FIRST: Don A.A.A. (hereinafter, the claimant), dated November 17,
2018, filed a claim with the Spanish Data Protection Agency. The
claim is directed against the CITY COUNCIL OF HUERCAL (ALMERIA), with NIF
P0405200G (hereinafter the claimed one). The grounds on which the claim is based are
that said City Council lacks a Data Protection Officer (DPD). Also-
m, affirms that the councilors of the government team can freely access the
register data and that people who do not have any type of employment relationship with the
council have access to information regarding sensitive data (such as
users of social services or people who are in a situation of exclusion
social sion or at risk of being so).

On February 7, 2019, this Agency received a new letter sent
by the complainant that upon receiving the agreement for admission to processing of his claim-
tion states that, to his surprise, the town hall of Huércal de Almería exhibits
on social networks and in the press a letter from the AEPD of the same date with a
exit record 5807/2019 where you are informed just the opposite, that it has not been ad-
submitted for processing.

Along with the claim, provide:

☐ Acceptance agreement for processing sent to the claimant.

☐

Screen printout of the agreement sent to the CITY COUNCIL where indicated

that the claim has not been admitted for processing.

SECOND: In view of the facts denounced in the claim and the documents data provided by the claimant of the facts and documents of which he has had co-knowledge of this Agency, the Subdirector General for Data Inspection proceeded to carrying out preliminary investigation actions to clarify the facts in question, by virtue of the powers of investigation granted to the authorities des control in article 57.1 of Regulation (EU) 2016/679 (General Regulation Data Protection, hereinafter RGPD), and in accordance with the provisions of the Title VII, Chapter I, Second Section, of Organic Law 3/2018, of December 5, Protection of Personal Data and guarantee of digital rights (hereinafter LOPDGDD).

As a result of the research actions carried out, it is confirmed that the data controller is the claimed party.

On December 12, 2018, the claim was transferred to AYUN-PROCESSING requesting the following information: (i) Copy of the communications, of the www.aepd.es

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adopted decision that has been sent to the claimant regarding the transfer of this re-claim, and proof that the claimant has received the communication of that declaration. decision, (ii) Report on the causes that have motivated the incidence that has originated the claim, (iii) Report on the measures adopted to prevent the occurrence of similar incidents and (iv) Any other that it considers relevant.

On January 11, 2019, this Agency received a written allegation- statements sent by the CITY COUNCIL stating, among other things, that the claimante is the one who was mayor from June 13, 2015 to October 19, 2018, the date on which it was submitted to a motion of censure, and that the two volunteers present in the social services of the CITY COUNCIL do not intervene in the processing municipal administrative function, limiting its work, one of them (B.B.B.) to collaborate with the Department in the distribution of food to people in need prior processing of the corresponding requests by the administrative services, and the other person (C.C.C.) collaborates in the collection and material distribution of food, also as well as an altruistic collaborator. All this action, in collaboration willful and altruistic, is and was well known by the claimant during his time as mayor. And in any case, any intervention of these two people was and is supervised by (...) Mr. D.D.D..

On January 24, 2019, the claimant was notified of the settlement agreement admit for processing the claim filed by the claimant against the HUERCAL CITY COUNCIL the agreement not to be admitted for processing.

With notification date of February 12, 2019, it is sent in writing to the CITY COUNCIL indicating that in the previous communication made to that CITY COUNCIL an error had occurred, meaning at all times that the claim presented by the claimant was admitted for processing.

THIRD: Since the claimant had not been informed about the error that occurred and transmitted to the CITY COUNCIL, with a notification date of March 8, 2019, The claimant is informed of the correction of the error and a copy of the writ of correction sent to the town hall.

On March 20, 2019, this Agency received a letter sent by the CITY COUNCIL expressing its disagreement that this Agency "appreciates a

Error in the notification of agreement because it seems more like a change of criteria, without that it be stated in the document received what the error is due to".

Required information on the existence of a document containing the policy of confidentiality to which volunteers with access to data and social networks must submit. on the existence of DPD, dated October 10, 2019, is received in this Agency various writings sent by the CITY COUNCIL in three independent batches with registration numbers 049527/2019, 049529/2019 and 049615/2019, stating between other aspects:

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They are still in the process of adapting to Regulation (EU) 2016/679 of Protection of Personal Data since they had been excluded from your Adherence to the "Provincial Plan of Adaptation to the General Regulation of Protection of Data" of the deputation as they are not adhered to the Provincial Network of Co-

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Communications and Remote Administration Services. They add that it has been opened, with dated November 3, 2019, record of minor contracting of services (exp. 3078/2019) called "Support service for the adaptation process to the General Regulation of Data Protection and Organic Law Protection of Personal Rights and Guarantee of Digital Rights (LOPDGDD). support service reporting to the adequacy of the National Security Scheme (ENS)"; proceedings, that to date, has not completed its processing.

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That they are not aware that there is any document that must be signed by the

volunteers agreeing to a confidentiality policy for the meal plan.

cough of help to the most disadvantaged for the distribution of food.

THIRD: On January 13, 2020, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against the claimant, for the

alleged infringement of articles 28 and 37 of the RGPD, typified in Article 83.4

of the GDPR.

FOURTH: The initiation agreement was electronically notified to the defendant. so what

required by article 14.2 of Law 39/2015 of Common Administrative Procedure of the

Public Administrations (LPACAP) according to which "In any case, they will be obliged

two to relate through electronic means with the Public Administrations

to carry out any procedure of an administrative procedure, at least,

the following subjects: a) Legal persons".

The Certificate issued by the Electronic Notification Service is in the file.

tronics and Electronic Address Enabled of the FNMT-RCM, which records

of the sending of the initiation agreement, notification of the AEPD addressed to the claimed, through

of that means being the date of availability in the electronic headquarters of the organ-

nismo on 01/13/2020 and the date of acceptance on 01/14/2020.

FIFTH: In accordance with article 73.1 of the LPCAP, the term to formulate

allegations to the Home Agreement is ten days computed from the day following the

of the notification.

Article 64.2. LPACAP, indicates that the defendant will be informed of the right to form

formulate allegations, of the "right to a hearing in the procedure and of the deadlines

for its exercise, as well as the indication that in case of not making allegations in

the term established on the content of the initiation agreement, it may be considered

proposed resolution proposal when it contains a precise pronouncement about

the imputed responsibility". (The underlining is from the AEPD)

The agreement to initiate the sanctioning file that concerns us contained a precise statement on the responsibility of the claimed entity: in the aforementioned agreement specified what was infringing conduct, the sanctioning type in which it was subsumable, the circumstances of the responsibility described and the sanction that in the judgment of the AEPD proceeded to impose.

In consideration of the foregoing and in accordance with the provisions of article 64.2.f) of the LPACAP, the initiation agreement of PS/00001/2020 is considered Pro-Resolution setting.

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In view of everything that has been done, by the Spanish Agency for the Protection of Data in this procedure are considered proven facts the following,

FACTS

FIRST: The HUERCAL CITY COUNCIL (ALMERIA) has not appointed a Delegate Data Protection Act (DPD).

SECOND: Two volunteers who work in the social services of the TOWN HALL

TO carry out the following tasks: one of them, (B.B.B.), collaborates with the Department in the distribution of food to people in need after processing the co-corresponding requests by the administrative services. The other person, (C.C.C.), collaborates in the collection and material distribution of food, also as a collaborator altruistically.

FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of the RGD recognizes to each authority, and as established in arts. 47 and 48.1 of the LOPDGDD, the Directorate of the Spanish Agency for Data Protection is competent to resolve this process.

II

Article 37 of the RGD, establishes about the Data Protection Delegate through the following:

<<1. The person in charge and the person in charge of the treatment will designate a delegate of data protection provided that:

- a) the treatment is carried out by a public authority or body, except those courts acting in the exercise of their judicial function;
- b) the principal activities of the controller or processor consist of processing operations that, due to their nature, scope and/or purposes, require regular and systematic observation of data subjects on a large scale, or
- c) the main activities of the controller or processor consist of large-scale processing of special categories of personal data under the article 9 and data related to convictions and criminal offenses referred to in article article 10.

2. A business group may appoint a single data protection delegate data as long as it is easily accessible from each establishment.

3. When the person in charge or the person in charge of the treatment is an authority or public body, a single data protection delegate may be appointed to several of these authorities or bodies, taking into account their structure organization and size.

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4. In cases other than those referred to in section 1, the person in charge or the in charge of the treatment or the associations and other organisms that represent categories of managers or managers may designate a protection delegate of data or they must designate it if so required by the Law of the Union or of the States members. The data protection delegate may act on behalf of these associations and other organizations that represent managers or managers.

5. The data protection delegate will be appointed according to their professional qualities and, in particular, their specialized knowledge of the Data protection law and practice and your ability to perform the functions indicated in article 39.

6. The data protection delegate may form part of the staff of the responsible or in charge of the treatment or perform their functions within the framework of a service contract.

7. The person in charge or the person in charge of the treatment will publish the data of contact of the delegate of data protection and will communicate them to the authority of control.

In this sense, the LOPDGDD determines in its article 34.1 and 3: "Designation of a data protection delegate"

1. "Those responsible and in charge of processing must designate a delegate data protection law in the cases provided for in article 37.1 of the Regulation ment (EU) 2016/679

3. Those responsible and in charge of the treatment will communicate within the period of

ten days to the Spanish Agency for Data Protection or, where appropriate, to the authorities regional laws on data protection, appointments, appointments and dismissals of the data protection delegates both in the cases in which they are obliged to their designation as in the case in which it is voluntary.”

Article 83.4 of the RGPD establishes:

"4. Violations of the following provisions will be sanctioned, in accordance with paragraph 2, with administrative fines of a maximum of EUR 10,000,000 or, alternatively, being from a company, of an amount equivalent to a maximum of 2% of the volume overall annual total turnover of the previous financial year, opting for the greater amount:

a) the obligations of the person in charge and the person in charge pursuant to articles 8, 11, 25 to 39, 42 and 43;...”

Article 73 of the LOPDGDD determines the following:

<<According to the provisions of article 83.4 of the Regulation (EU) 2016/679 are considered serious and the infractions that occur will prescribe after two years. place a substantial violation of the articles mentioned therein and, in particular, cular, the following:

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... v) Failure to comply with the obligation to appoint a protection delegate of data when their appointment is required in accordance with article 37 of the Regulation (EU) 2016/679 and article 34 of this organic law.>>

The Huerca City Council is obliged to appoint a DPD since the

treatment is carried out by a public authority or body. The modality of your hiring, appointment and employment relationship is very broad, you can choose the most suitable for your specific situation. The City Council alleges that in the month of November 2019 began the processing of a contracting file for less than services (exp. 3078/2019) called "Support service for the adaptation process tion to the General Data Protection Regulation and Organic Data Protection Law Personal and Guarantee of Digital Rights (LOPDGDD). Support service for adequacy of the National Security Scheme (ENS)"; file that has not been finalized ted its processing.

The RGPD entered into force on May 25, 2016, although it was not applicable until two years later. This period of time was necessary to adapt the treatments ments to the new regulations. But the Huerca City Council, a year and a half after After that adaptation period, he had not yet appointed a DPD.

Consequently, the Huerca City Council has failed to comply with the statutory established in article 37 of the RGPD and sanctioned in article 83.4.a) of the same.

III

The second part of the claim, sent by the previous Mayor of the municipality pio de Huerca, refers to the fact that there are two volunteers who collaborate with the consistory to facilitate aid to needy people in the municipality. This situation that occurs in many organizations, public and private, it does not need to be regulated. given in a contract for the provision of services, although it is recommended that you inform volunteers, if they are going to access personal data, of the security measures that they must take into consideration and apply, as well as the obligation to maintain the confidentiality of the personal data they know and use.

IV

The LOPDGDD in its article 77, Regime applicable to certain categories

responsible or in charge of the treatment, establishes the following:

"1. The regime established in this article will be applicable to treatments

of which they are responsible or entrusted:

a) The constitutional bodies or those with constitutional relevance and the institutions

tions of the autonomous communities analogous to them.

b) The jurisdictional bodies.

c) The General State Administration, the Administrations of the communities

autonomous entities and the entities that make up the Local Administration.

d) Public bodies and public law entities linked to or de-

pending from the Public Administrations.

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e) The independent administrative authorities.

f) The Bank of Spain.

g) Public law corporations when the purposes of the treatment

related to the exercise of powers of public law.

h) Public sector foundations.

i) Public Universities.

j) The consortiums.

k) The parliamentary groups of the Cortes Generales and the Legislative Assemblies

autonomous communities, as well as the political groups of the Local Corporations.

2. When the persons in charge or persons in charge listed in section 1

had any of the infractions referred to in articles 72 to 74 of this law

organic, the data protection authority that is competent will issue resolutions sanctioning them with a warning. The resolution will also establish as the measures that should be adopted to stop the behavior or correct the effects of the infraction that had been committed.

The resolution will be notified to the person in charge or in charge of the treatment, to the person of which it depends hierarchically, in his case, and to those affected who had the Interested party status, if any.

3. Without prejudice to the provisions of the preceding section, the protection authority of data will also propose the initiation of disciplinary actions when there are sufficient indications for it. In this case, the procedure and the sanctions to apply will be those established in the legislation on the disciplinary or sanctioning system. or that results from application.

Likewise, when the infractions are attributable to authorities and managers, and the existence of technical reports or recommendations for treatment is proven that had not been duly attended to, in the resolution imposing the sanction. The sanction will include a reprimand with the name of the responsible position and will order the publication in the corresponding Official State or Autonomous Gazette. gives.

4. The resolutions must be communicated to the data protection authority. tions that fall in relation to the measures and actions referred to in the previous sections.

5. They will be communicated to the Ombudsman or, where appropriate, to the institutions analogous of the autonomous communities the actions carried out and the resolutions tions issued under this article.

6. When the competent authority is the Spanish Agency for the Protection of Data, it will publish on its website with due separation the resolutions

ferred to the entities of section 1 of this article, with express indication of the identity of the person in charge or in charge of the treatment that had committed the infringement
tion.

When the competence corresponds to a regional protection authority
of data will be, in terms of the publicity of these resolutions, to what is available

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its specific regulations.

v

Among the corrective powers contemplated in article 58 of the RGPD, in its section 2 d) establishes that each control authority may “order the person in charge responsible or in charge of the treatment that the treatment operations comply with the provisions of this Regulation, where appropriate, in a certain way and within a specified period...”. The imposition of this measure is compatible with the penalty, as provided in art. 83.2 of the GDPR.

Therefore, in accordance with the applicable legislation and having assessed the criteria for graduation of the sanctions whose existence has been accredited

The Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE HUERCAL DE ALMERIA CITY COUNCIL, with NIF

P0405200G, for the infringement of article 37 of the RGPD, typified in article 83.4.a) of the RGPD, the sanction of WARNING.

SECOND: REQUEST the CITY COUNCIL OF HUERCAL DE ALMERIA, with NIF

P0405200G:

1. The appointment of the Data Protection Delegate.

You must inform this Agency within a month from the notification
of this Resolution.

THIRD

ALMERIA.

: NOTIFY this resolution to the HUERCAL DE CITY COUNCIL

FOURTH

in accordance with the provisions of article 77.5 of the LOPDGDD.

: COMMUNICATE this resolution to the Ombudsman,

In accordance with the provisions of article 50 of the LOPDGDD, the

This Resolution will be made public once it has been notified to the interested parties.

Against this resolution, which puts an end to the administrative procedure in accordance with art.

48.6 of the LOPDGDD, and in accordance with the provisions of article 123 of the LPA-

CAP, the interested parties may optionally file an appeal for reconsideration before

the Director of the Spanish Agency for Data Protection within a period of one month

counting from the day following the notification of this resolution or directly

contentious-administrative case before the Contentious-administrative Chamber of the Au-

National Court, in accordance with the provisions of article 25 and section 5 of the

fourth additional provision of Law 29/1998, of July 13, regulating the Jurisdiction

Contentious-administrative diction, within a period of two months from the day following

Following the notification of this act, as provided in article 46.1 of the aforementioned

Law.

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Finally, it is pointed out that in accordance with the provisions of art. 90.3 a) of the LPA-CAP, the firm resolution may be provisionally suspended in administrative proceedings if the interested party expresses his intention to file a contentious-administrative appeal. If this is the case, the interested party must formally communicate this fact by writing addressed to the Spanish Agency for Data Protection, presenting it through Electronic Register of the Agency [<https://sedeagpd.gob.es/sede-electronica-web/>], or through any of the other registers provided for in art. 16.4 of the city of Madrid Law 39/2015, of October 1. You must also transfer to the Agency the documentation certifying the effective filing of the contentious-administrative appeal. Yes, the Agency was not aware of the filing of the contentious-administrative appeal within two months from the day following the notification of the precautionary suspension. This resolution would end the precautionary suspension.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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