

□ Procedure No.: PS/00314/2021

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: A.A.A. (hereinafter, the complaining party) dated December 21,
2020 filed a claim with the Spanish Data Protection Agency. The
claim is directed against CITY COUNCIL OF MOLINA DE SEGURA with NIF
P3002700G (hereinafter the claimed party). The reasons on which the
claim are the following: that currently said Administration lacks
Data Protection Delegate as required by data protection regulations.

The person who exercised the position and functions of DPD were attributed to him in a
temporary and for more than a year these functions have not been carried out
resulting in violation of rights.

SECOND: In accordance with article 65.4 of Organic Law 3/2018, of 5
December, of Protection of Personal Data and guarantee of digital rights (in
hereinafter LOPDGDD), said claim was transferred to the claimed party, to
to proceed with its analysis and inform this Agency within a month of the
actions carried out to adapt to the requirements set forth in the regulations of
Data Protection.

There is no response from the requested entity.

THIRD: On 06/17/2021 the Director of the Spanish Protection Agency
Data agreed to admit the claim filed by the claimant for processing.

FOURTH: On 09/22/2021, the Director of the Spanish Protection Agency
of Data agreed to initiate a sanctioning procedure against the defendant, for the alleged

infringement of article 37 of the RGPD, typified in article 83.4.a) RGPD,

considering that the sanction that could correspond would be a WARNING.

FIFTH: Once the initiation agreement has been notified, the one claimed at the time of this

The resolution has not presented a written statement of allegations, for which reason the

indicated in article 64 of Law 39/2015, of October 1, on the Procedure

Common Administrative Law of Public Administrations, which in section f)

establishes that in the event of not making allegations within the period established on the

content of the initiation agreement, it may be considered a proposal for

resolution when it contains a precise statement about the responsibility

imputed, reason why a Resolution is issued.

SIXTH: Of the actions carried out in this proceeding, they have been

accredited the following:

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PROVEN FACTS

FIRST: On 12/21/2020 there is an entry in the AEPD written by the claimant

stating that the respondent lacks a Data Protection Delegate and that the

person who exercised the position and functions of DPD were attributed in a

temporary and that for more than a year the functions of the

charge producing violation of rights.

SECOND: Evidence provided by the respondent Resolution No. 2018002623 issued by

the one claimed on 06/04/2018, on temporary attribution of functions, for a maximum term

of one year extendable for another, corresponding to the data protection delegate

established in art. 39 of the General Data Protection Regulation, (...), by
have the requirements, knowledge and skills necessary for the good
performance of these functions.

THIRD: There is evidence of retirement resolution of 11/26/2019 of the person
which temporarily held the functions of DPD.

FOUNDATIONS OF LAW

I

By virtue of the powers that article 58.2 of the RGPD recognizes to each
control authority, and as established in art. 47 of the Organic Law 3/2018, of
December 5, Protection of Personal Data and guarantee of rights
(hereinafter LOPDGDD), the Director of the Spanish Agency for
Data Protection is competent to resolve this procedure.

Law 39/2015, of October 1, on the Common Administrative Procedure of
the Public Administrations, in its article 64 "Agreement of initiation in the
procedures of a sanctioning nature", provides:

II

"one. The initiation agreement will be communicated to the instructor of the procedure, with
transfer of how many actions exist in this regard, and the interested parties will be notified,
understanding in any case by such the accused.

Likewise, the initiation will be communicated to the complainant when the rules
regulators of the procedure so provide.

2. The initiation agreement must contain at least:

- a) Identification of the person or persons allegedly responsible.
- b) The facts that motivate the initiation of the procedure, its possible
rating and sanctions that may apply, without prejudice to what
result of the instruction.

c) Identification of the instructor and, where appropriate, Secretary of the procedure, with express indication of the system of recusal of the same.

d) Competent body for the resolution of the procedure and regulation that attribute such competence, indicating the possibility that the presumed responsible can voluntarily acknowledge their responsibility, with the effects provided for in article 85.

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e) Provisional measures that have been agreed by the body competent to initiate the sanctioning procedure, without prejudice to those that may be adopted during the same in accordance with article 56.

f) Indication of the right to formulate allegations and to the hearing in the procedure and the deadlines for its exercise, as well as an indication that, in If you do not make allegations within the stipulated period on the content of the initiation agreement, this may be considered a resolution proposal when it contains a precise statement about the responsibility imputed.

3. Exceptionally, when at the time of issuing the initiation agreement there are not sufficient elements for the initial qualification of the facts that motivate the initiation of the procedure, the aforementioned qualification may be carried out in a phase later by drawing up a List of Charges, which must be notified to the interested".

In application of the previous precept and taking into account that no

formulated allegations to the initial agreement, it is appropriate to resolve the initiated procedure.

The facts denounced materialize in the fact that the defendant lacks DPD

in contradiction with what is indicated and required by the data protection regulations.

III

Article 58.2 of the RGPD establishes that "Each control authority will have

of all the following corrective powers indicated below:

warning

(...)

b) sanction any person responsible or in charge of treatment with

when the treatment operations have infringed the provisions of the

this Regulation;

(...)

d) order the person in charge or in charge of the treatment that the operations of

treatment comply with the provisions of this Regulation, when

proceed, in a certain way and within a specified period;

(...)

It should be noted that the Public Administrations act as responsible

of the processing of personal data and, on occasion, perform functions of

in charge of the treatment, therefore, following the principle of responsibility

proactively, it is up to them to meet the obligations that the RGPD details, among which

includes that of appointing a data protection delegate, making your data public

of contact and communicate them to the AEPD (article 37 RGPD).

Article 37 GDPR, sections 1 and 7 refer to these obligations and

establish, respectively:

"one. The person in charge and the person in charge of the treatment will designate a delegate of

data protection provided that:

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a) the treatment is carried out by a public authority or body, except those

courts acting in the exercise of their judicial function;

(...)

"7. The person in charge or the person in charge of treatment will publish the data of

Contact

of the data protection delegate and will communicate them to the control authority."

On the appointment of the data protection delegate, sections 3 and 5

of article 37 of the RGPD indicate that:

"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.

"5. 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.

For its part, the LOPDGDD dedicates article 34 to the "Designation of a

data protection delegate", precept that provides:

"one. Those responsible and in charge of the treatment must designate a

data protection delegate in the cases provided for in article 37.1 of the

Regulation (EU) 2016/679 and (...)"

(...)

"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 regional data protection authorities, designations, appointments and cessation of the data protection delegates both in the cases in which are obliged to their designation as in the case in which it is voluntary".

The bodies and agencies of the Public Sector have the obligation to designate a DPD that has the proper qualification, to guarantee the necessary means for the exercise of their functions and to notify the designation to the AEPD for its inclusion in the public registry of DPD.

IV

The DPO will carry out his functions paying due attention to the risks associated with treatment operations, taking into account the nature, scope, context and purposes of the treatment.

The DPO bears no personal responsibility, by this mere fact, for the possible infractions in terms of data protection committed by your organization.

The DPO of the body or agency of the Public Sector must receive the claims addressed to them by the companies, when they opt for this route before

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file a claim with the AEPD, and will communicate the decision adopted to the administered within a maximum period of two months.

Likewise, the DPD must receive the claims that the AEPD decides

transfer him prior to the start of a disciplinary proceeding. The delegate must communicate the decision adopted to the company and to the AEPD within the maximum term of one month.

In this way, in general, if the DPO manages to get the controller to resolve the claim by either of these two ways, and notwithstanding that the If the interested party subsequently addresses the AEPD, a file of declaration of infraction to that Public Administration.

v

Article 83.5 b) of the RGPD considers that the infringement of “the obligations of the person in charge and of the person in charge in accordance with articles 8, 11, 25 to 39, 42 and 43”, is punishable, in accordance with section 4 of the aforementioned article 83 of the aforementioned Regulation, “with administrative fines of EUR 10,000,000 maximum or, in the case of a company, an amount equivalent to a maximum of 2% of the global total annual turnover of the previous financial year, opting for the largest amount”.

The LOPDGDD in its article 71, Violations, states that:

“The acts and behaviors referred to in the regulations constitute infractions.

sections 4, 5 and 6 of article 83 of Regulation (EU) 2016/679, as well as those that are contrary to this organic law.

The LOPDGDD indicates in article 73, “Infringements considered serious”:

“Based on the provisions of article 83.4 of Regulation (EU) 2016/679

are considered serious and will prescribe after two years the infractions that suppose a substantial violation of the articles mentioned therein and, in particular, the following:

(...)

v) Failure to comply with the obligation to appoint a data protection delegate

data when their appointment is required in accordance with article 37 of the Regulation (EU) 2016/679 and article 34 of this organic law.”

SAW

On the other hand, article 83.7 of the RGPD, which indicates that "Without prejudice to the corrective powers of supervisory authorities under Article 58(2) each Member State may establish rules on whether and to what extent, impose administrative fines on authorities and public bodies established in that Member State”.

In accordance with this authorization granted by the RGPD, the LOPDGDD has provided in article 77, “Regime applicable to certain categories of responsible or in charge of treatment”, the following:

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"one. 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 of the autonomous communities analogous to them.
- b) The jurisdictional bodies.
- c) The General Administration of the State, the Administrations of the autonomous communities and the entities that make up the Local Administration.
- d) Public bodies and public law entities linked or dependent on the Public Administrations.
- 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 Assemblies Autonomous Legislative, as well as the political groups of the Corporations Local.

2. When the managers or managers listed in section 1

committed any of the offenses referred to in articles 72 to 74 of this organic law, the data protection authority that is competent will dictate resolution sanctioning them with a warning. The resolution will establish also the measures that should be adopted to stop the behavior or correct it. 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 body on which it reports hierarchically, where appropriate, and those affected who have the condition of interested party, if any.

3. Without prejudice to what is established in the previous section, the

data protection will also propose the initiation of disciplinary actions when there is sufficient evidence to do so. In this case, the procedure and sanctions to apply will be those established in the legislation on disciplinary regime or sanction 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

The sanction will include a reprimand with the name of the responsible position and will order the publication in the Official State or Autonomous Gazette that correspond.

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

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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 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 referred 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 would have committed the infringement.

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 its specific regulations” (the underlined corresponds to the AEPD).

According to the available evidence, the conduct of the claimed constitutes an infringement of the provisions of article 37 of the RGPD.

It should be noted that the RGPD and without prejudice to the provisions of its article 83, contemplates in its article 77 the possibility of resorting to the sanction of warning

to correct the processing of personal data that is not in accordance with your forecasts, when those responsible or in charge listed in section 1 committed any of the offenses referred to in articles 72 to 74 of this organic law.

Likewise, it is contemplated that the resolution issued will establish the measures that it is appropriate to adopt so that the conduct ceases, the effects of the infraction are corrected that had been committed and its adaptation to the requirements contemplated in the articles 37 of the RGPD, as well as the provision of accrediting means of the compliance with what is required.

In this same sense, article 58.2 d) of the RGPD, states that each control authority may “order the controller or processor to processing operations comply with the provisions of this Regulation, where appropriate, in a certain way and within a certain period specified [...]”.

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The respondent is obliged in accordance with the provisions of article 37 of the RGPD to appoint a DPD since the treatment is carried out by an authority or public organization. The modality of their hiring, appointment and employment relationship is very wide, you can choose the most appropriate for your specific situation.

Consequently, the defendant fails to comply with the obligation established in article 37 of the RGPD and sanctioned in article 83.4.a) of the same.

Therefore, in accordance with the applicable legislation and having assessed the criteria for

graduation of sanctions whose existence has been proven,

The Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE the CITY COUNCIL OF MOLINA DE SEGURA, with NIF P3002700G, for an infringement of Article 37 of the RGPD, typified in Article 83.4 of the RGPD, a sanction of warning.

SECOND: REQUEST the CITY COUNCIL OF MOLINA DE SEGURA, with NIF P3002700G.

1. The appointment of the Data Protection Delegate.

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

THIRD: NOTIFY this resolution to the CITY COUNCIL OF MOLINA DE SAFE, with NIF P3002700G.

BEDROOM:

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, 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 LPACAP, the

Interested parties may optionally file an appeal for reconsideration before the

Director of the Spanish Agency for Data Protection within a month from

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

contentious-administrative appeal before the Contentious-Administrative Chamber of the

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

Contentious-administrative jurisdiction, within a period of two months from the

day following the notification of this act, as provided in article 46.1 of the
aforementioned Law.

Finally, it is pointed out that in accordance with the provisions of art. 90.3 a) of the LPACAP,
may provisionally suspend the firm resolution in administrative proceedings if the

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

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writing addressed to the Spanish Agency for Data Protection, presenting it through

Electronic Register of the Agency [[https://sedeagpd.gob.es/sede-electronica-](https://sedeagpd.gob.es/sede-electronica-web/)

[web/](https://sedeagpd.gob.es/sede-electronica-web/)], or through any of the other registers provided for in art. 16.4 of the

aforementioned Law 39/2015, of October 1. You must also transfer to the Agency the

documentation proving the effective filing of the contentious appeal-

administrative. If the Agency was not aware of the filing of the appeal

contentious-administrative within a period of two months from the day following the

notification of this resolution would end the precautionary suspension.

Sea Spain Marti

Director of the AEPD,

PO the Deputy Director General of Data Inspection, Olga Pérez Sanjuan, Resolution

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