

□ File No.: EXP202202129

## RESOLUTION OF PUNISHMENT PROCEDURE

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

### BACKGROUND

FIRST: D.A.A.A. (hereinafter, the claimant) on 01/11/2022 filed  
claim before the Spanish Data Protection Agency. The claim is  
directed against the CITY COUNCIL OF CRÉMENES with NIF P2406200B (hereinafter,  
the claimed). The grounds on which the claim is based are as follows:  
claimant states that he has tried to contact the DPD of the claimed but that  
this is not notified to the AEPD.

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), on 2/25/22 said claim was transferred to the respondent,  
in accordance with the provisions of the LPACAP, so that it proceeded to its analysis and  
inform this Agency within a month of the actions carried out to  
comply with the requirements set forth in the data protection regulations.  
There is no response from the respondent.

THIRD: On 04/11/2022, in accordance with article 65 of the LOPDGDD,  
the claim filed by the claimant was admitted for processing.

FOURTH: The respondent sent a letter on 05/31/2022 indicating that by Resolution of  
date 05/14/2020, the DPD had been appointed; that once done  
pertinent verification, it was verified that the processing of the discharge in  
the body of said DPD and that the communication has been carried out  
discharge, having already been communicated to the AEPD.

FIFTH: On 06/22/2022, the Director of the Spanish Agency for the Protection of Data agreed to initiate a sanctioning procedure against the defendant, for the alleged infringement of article 37.1 of the RGPD, typified in article 83.4.a) of the aforementioned Regulation. The receipt by the claimed party of the initiation agreement is recorded.

SIXTH: 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.

SEVENTH: Of the actions carried out in this procedure, they have been accredited the following:

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#### PROVEN FACTS

FIRST: On 01/11/2022 it has entry in the Spanish Agency for the Protection of Written data of the claimant, stating that he has tried to contact the DPD of the claimed but that it is not notified to the AEPD

SECOND: The respondent in writing dated 05/31/2022 has stated that:

“- By Resolution dated May 14, 2020, the appointment as

Data Protection Delegate of the City Council of Crémenes to D. ...

- Once the pertinent check was made, it was verified that the processing of the registration in your body of said Data Protection Delegate.
- The discharge communication has been carried out, having already been reported to your body.

## FOUNDATIONS OF LAW

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In accordance with the powers that article 58.2 of Regulation (EU) 2016/679 (General Data Protection Regulation, hereinafter RGPD), grants each control authority and as established in articles 47, 48.1, 64.2 and 68.1 of the Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereinafter, LOPDGDD), is competent to initiate and resolve this procedure the Director of the Spanish Protection Agency of data.

Likewise, article 63.2 of the LOPDGDD determines that:

"The

procedures processed by the Spanish Agency for Data Protection will be governed by the provisions of Regulation (EU) 2016/679, in this organic law, by the regulatory provisions issued in its development and, insofar as they are not contradict, in the alternative, by the general rules on the administrative procedures."

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

"1. 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 regulatory norms 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.

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- 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.

- 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.

Article 37 of the RGPD, Appointment of the data protection delegate,

III

establishes that:

"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,

either

c) the main activities of the controller or processor consist of

large-scale processing of special categories of data under the

article 9 or personal data relating to convictions and criminal offenses to

referred to in 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.

Likewise, articles 38 and 39 of the RGPD regulate in some detail both

the position of the DPD and its functions, respectively.

#### IV

The documentation in the file offers clear indications that the claimed, violated article 37.1 of the RGPD, Designation of the protection delegate of data, since at the headquarters of the AEPD there was no designated DPO according to the claimant has revealed, there is no notification of his appointment; without stating, at least from 05/25/2018 until the date of receipt of the claim, appointment or notification of appointment of DPO.

The RGPD provides that those responsible and in charge of treatment must appoint a Data Protection Delegate in the cases that the RGPD itself establishes, as well as in other cases in which the legislation of the Member States also consider mandatory.

Among the cases in which a DPO must be appointed is that of that "the treatment is carried out by a public authority or body", both as of responsible as in functions of treatment manager.

The violation of article 37.1 of the RGPD is typified in the article 83.4.a) of the aforementioned Regulation in the following terms:

v

"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, 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:

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

(...)"

For its part, the LOPDGDD in its article 71, Violations, states that:

"The acts and behaviors referred to in sections 4, 5 and 6 of article 83 of Regulation (EU) 2016/679, as well as those that result contrary to this organic law.

And in its article 73, for the purposes of prescription, it qualifies as "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.

(...)"

The LOPDGDD in its article 77, Regime applicable to certain categories responsible or in charge of the treatment, establishes the following:

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"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 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.

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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.

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.

In the case at hand, the opening of this proceeding came  
motivated because the respondent, on the date of admission of the claim, had not  
designated DPD nor communicated his appointment to the AEPD, having a  
required.

In this regard, article 34.3 of the LOPDGDD establishes the following: “3. The  
responsible and in charge of the treatment will communicate within ten days to the  
Spanish Agency for Data Protection or, where appropriate, to the authorities  
regional authorities for data protection, appointments, appointments and dismissals of  
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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.”

In accordance with the proven facts, such conduct constitutes, on the part  
of the claimed infringement of the provisions of article 37.1 of the RGPD.

It should be noted that the RGPD, without prejudice to the provisions of 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.

However, it should be noted that the one claimed untimely

responded to the request of the AEPD on 05/31/2022 stating that: "For

Resolution dated May 14, 2020, the appointment as

Data Protection Delegate of the City Council of Crémènes to D. ...

- Once the pertinent check was made, it was verified that it was

pending the processing of registration in your body of said Protection Delegate of

Data.

-The discharge communication has been carried out, having already been

reported to your body.

Therefore, in light of the foregoing, it is not appropriate to urge the adoption of

measures, having proceeded to the appointment of the DPO and the communication of his

appointment to the supervisory authority in accordance with the regulations on

Data Protection.

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

graduation of sanctions whose existence has been proven,

The Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE the CITY COUNCIL OF CRÉMENES, with NIF P2406200B, by

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

warning sanction.

SECOND: NOTIFY this resolution to the CRÉMENES CITY COUNCIL.

THIRD: COMMUNICATE this resolution to the Ombudsman,

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

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

LPACAP, the interested parties may optionally file an appeal for reconsideration before the Director of the Spanish Agency for Data Protection within a period of month from the day following the notification of this resolution or directly contentious-administrative appeal before the Contentious-Administrative Chamber of the [www.aepd.es](http://www.aepd.es)

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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, the firm resolution may be provisionally suspended in administrative proceedings if the interested party expresses his intention to file a contentious appeal-administrative. If this is the case, the interested party must formally communicate this made by writing to the Spanish Agency for Data Protection, introducing him to the agency

[<https://sedeagpd.gob.es/sede-electronica-web/>], or through any of the other records provided for in art. 16.4 of the aforementioned Law 39/2015, of October 1. Also must transfer to the Agency the documentation that proves the effective filing of the contentious-administrative appeal. If the Agency were not aware of the filing of the contentious-administrative appeal within two months from the

day following the notification of this resolution, it would end the  
precautionary suspension.

Electronic Registration of

through the

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