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Procedure No.: PS/00046/2019

938-0419

RESOLUTION OF PUNISHMENT PROCEDURE

Of the procedure instructed by the Spanish Agency for Data Protection and in

based on the following

BACKGROUND

FIRST: On 05/18/2018, a claim from A.A.A. (claimant)

stating that after enrolling her daughter B.B.B. (date of birth ***DATE.1) in the

C.C.C. dance school, the school captured images of the minor and the

published on 01/06/2018 on its official FACEBOOK page, in order to attract

new student business He states that he found out about the publication on 05/09/2018,

contacting the school to have the image removed.

The claimant indicates that the school relied on the authorization document for

images of the enrollment of the students so as not to remove the image, for which he exercised with

date 05/09/2018 your right of opposition and cancellation of personal data and

of the image rights of the minor.

It states that after this, the school keeps the image of the minor on its website.

FACEBOOK:

***URL.1

Provides the claimant:

a) Copy of registration form, (1 page) (data not filled in, model sheet), no

indicating to which year it corresponds, with the sections of personal data of the student and

parents. There is a data collection information clause of the content:

-"The School is authorized to incorporate the information into its databases and to send

publicity of the activities carried out

- -"In the same way, to the capturing of images of the students for their use with educational and informative and non-profit purposes, with the possibility of executing the rights of access, rectification and cancellation of the same."
- -"Having read the regulations to enroll in the dance school and accepting the conditions that are exposed, I make my enrollment for the 2017/2018 course."
- -The copy of the registration form has a section at the bottom to be signed and the date.

Normative sheet, academic year 2017-2018, (points 1 to 6) of the Directorate, in which

b)

contains information about courses, registrations and withdrawals, payments, etc.

c)

Print of 06/18/2018, School of Dance C.C.C. - official website

FACEBOOK in which C.C.C. Dance School appears. official page-6 January. "we started

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January and we open free places" accompanied by a photograph in which six minors accompanied by the title "As of two years".

d) Written with the seal of the school in which the claimant requests the opposition to the use of the image of his daughter, and also urges the request for removal in the course of the minor for the month of June 2018.

SECOND: On 06/25/2018, a letter is sent together with the full transfer of the complaint to the one claimed, indicating:

"In accordance with the functions provided for in Regulation (EU) 2016/679, of 04/27/2016, General Data Protection (RGPD), particularly those that respond to the

respect, by the data controller, of the principles of transparency and proactive responsibility, transfer of the claim filed by the claimant, requiring that, within a maximum period of one month from receipt, they send to this Agency the relevant documentation regarding the procedures carried out in relation to the facts set forth in the claim, including in particular the following information:

Clear specification of the causes that have motivated the incident that has given rise to

1.

to the claim.

Detail of the measures adopted by the person in charge to solve the incident and

two.

to avoid the occurrence of new incidents such as the one exposed.

Documentation proving that, in accordance with the provisions of article 12 of the

3.

RGPD, the appropriate measures have been taken to facilitate the exercise of their rights by the affected party. rights under articles 15 to 22, including full copy of communications sent in response to requests made.

Documentation proving that the claimant's right to be

Four.

informed about the course and outcome of this claim."

An attempt to deliver was made on two occasions, and not being possible, a notice was left in the Post Office, with the result of surplus by not going to its withdrawal.

The letter is reiterated again being delivered on 08/22/2018.

On 11/14/2018, a letter is sent to the respondent requesting:

"Copy of the enrollment contract of the girl B.B.B., and if applicable, document of authorization for the publication of images of the minor in social networks, channels of images and/or video, and in general, public access media."

The brief was notified on 11/23/2018.

On 11/28/2018, the respondent provided the partial enrollment sheet for 2017/2018, from normative section, points 1 to 6, in which the data collection sheet does not appear where the reference to the informative clause or the data is contained

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personal images of students or sending advertising. The normative sheet appears signed in the section. "The address" by "A.A.A.", name of the mother-claimant, signature similar to that of the DNI that you provide in your claim, and also provides the document that you submitted exercising the right to oppose the use of the image of the minor by the school.

On 12/13/2018, the petition to the respondent is reiterated, indicating that no received the authorization of the publication by the claimant, granting a new term, without answering.

THIRD: In view of the facts denounced in the claim and the documents provided by the claimant and of the facts and documents of which he has had knowledge of this Agency, the Subdirectorate General for Data Inspection proceeded to carrying out preliminary investigative actions to clarify the facts in issue, by virtue of the investigative powers granted to the supervisory authorities in Article 57.1 of Regulation (EU) 2016/679 (General Regulation for the Protection of Data, hereinafter RGPD), and in accordance with the provisions of Title VII, Chapter I, Second section, of Organic Law 3/2018, of 5/12, on the Protection of Personal Data and guarantee of digital rights (hereinafter LOPDGDD).

As a result of the investigative actions carried out, in the report of

investigation actions figure:

"On 05/09/2018 the complainant exercised the right of opposition and cancellation. The day

11/12/2018, when the investigation file was opened, the image had been

withdrawal from the social network."

FOURTH: On 03/21/2019 it is agreed by the Director of the AEPD to initiate

sanctioning procedure to C.C.C., -SCHOOL OF DANCE- for the presumed infraction of

Articles 7 and 17 of the RGPD typified in article 83.5.a) and b) of the RGPD.

FIFTH: On 04/25/2019, the claim indicates:

The claimant accepted the rules and rights of publication of images for use

1)

promotional by the school.

two)

He admits that on 05/09 they received a request to suppress the image of his daughter from

FACEBOOK, but it remained in the history, which they did not know how to remove and which was removed after receiving the first letter from the AEPD.

SIXTH: On 05/10/2019 the testing period begins, agreeing to practice the

following:

"1. The claim filed by and its

documentation, the documents obtained and generated, and the Report of actions prior inspections that are part of file E/07382/2014.

- 2. Likewise, it is considered reproduced for evidentiary purposes, the allegations to the agreement of home filed by the respondent.
- 3. The page ***URL.2 is accessed, and it is observed that there are photos and videos of minors and of legal age, which allow to fully identify who it is.

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As an example, in videos, the most recent of 05/2/2019, and the option appears show more, which opens new and additional videos, some with a certain age,

Turning the page you reach the last one, appearing the title: "Theory class now it's time to memorize !!!!!, from 07/11/2014" or Escuela de Danza C.C.C. - official page of 12/29/2014 which are frames that come close in which it is recognized perfectly to people.

According to the claim, in the copy of the registration form provided, together with to the personal data sections of the student and the parents, there is a clause of data collection information of the tenor:

- -"The School is authorized to incorporate the information into its databases and to send publicity of the activities carried out
- -"In the same way, to the capturing of images of the students for their use with educational and informative and non-profit purposes, with the possibility of executing the rights of access, rectification and cancellation of the same. "
- -"Having read the regulations to enroll in the dance school and accepting the conditions that are exposed, I make my enrollment for the 2017/2018 course."
- -The copy of the registration form has a section at the bottom to be signed and the date.

 Since there is no possibility to deny consent for treatment

 of the images and/or to receive publicity, it is considered that the consent is not

a)

Current legal basis for the processing of data from photographs and videos of minors and adults for which that school exposes photographs and

freely grants, you are requested to provide:

videos.

b)

Copy of forms or forms used (only one copy is needed) in which that the treatment of photographs and videos on the page was requested or reported FACEBOOK of the School, before 05/25/2018, entry into force of the regulation, and after that date.

You are reminded that processing that does not comply with the requirements of the GDPR (possibly photos or videos from the years 2014, 2015, etc.) should not continue to be treated. On 05/24/2019, a letter was received indicating "in response to the request PS00046/2019 we make the following allegations:"

1) The incident is initiated by a claim by the claimant for a photograph published on the social network FACEBOOK uploaded on 01/06/2018. Removal is requested on C/ Jorge Juan, 6

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day 05/09/2018 and that same day it is deleted. The social network FACEBOOK has a program of "memories" which republishes the previously deleted photo, and that one is deleted again "memory" dated 11/12/2018.

two)

"On 05/20/2018 a specific model is created for express consent both for images that are taken for educational purposes as well as for those that can be use for advertising purposes.

3) On 05/24/2019 "the LOPD and RGPD are renewed" that "we include in this Registration". The document "Measures and procedures, 05/24/2019" is attached, to "provide

of security to actions related to the processing of personal data carried out by" the claimed "in the development of its activity". The document has been Prepared by OUTSOURCING BUSINESS PARTNERS SL on 05/24/2019. Provides relationship of treatment operations in which, among others, that of "images and photographs" is broken down into educational purposes on the one hand and advertising on the other, with recipients "networks social" with a "deletion period" of "three years", and category of interested parties "students".

An informative form is provided "for consent to the recording of images

for social networks" in which it refers to the LOPD, (norm that is no longer in force) indicating that "express consent is sought for the use of videos and photographs made in the dance school in social networks" stating as purpose "Realization of commercial and marketing actions and communications on FACEBOOK and INSTAGRAM", legitimation basis "consent of the interested party, legitimate interest of the person in charge". There is not any reference to parents, or to children under 14, or the withdrawal of the consent or the period of conservation of the images. In the same form there a section to mark yes or no, expressly about carrying out actions and commercial and marketing communications to inform and retain customers.

He mentions that he is the owner of a website, although he does not identify the specific page, he informs about the conditions of use, the legal notice. In the data protection section of personal character refers again to the LOPD, and its Development Regulation, no longer in force since the approval of Organic Law 3/2018, of 5/12, on the Protection of Personal Data and guarantee of digital rights (hereinafter LOPDGDD). In the politics section of privacy, the operations foreseen to carry out the treatment are explained, such as the remission of commercial communications, the general principle of conservation of the data and the rights to be exercised by the interested parties.

The document does not mention any aspect of the courses, or enrollment, or the minors and the way to grant consent in those cases.

4) Provide the document prepared by OUTSOURCING BUSINESS PARTNERS SL
RGPD/LOPD, 05/24/2019 "Impact Assessment", 44 pages, "version of the assessment
of impact 05/24/2019". The same means: which is listed as Protection Delegate
data of the aforementioned company. In customer data, no reference is made to the data
of the minors, indicates that "they have a presence on several social networks and a person who
keep up to date." It contains questions and answers of the organization to the
same in point 4.1 on different aspects, some related to the treatments
and groups of people whose data is processed, without specific mention of minors.
In the section on risks associated with the legitimacy of the treatments, there is no
specifies any aspect of data on minors.

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Mention is made of the "security document" and the sanction of not having it, when said obligation is not enforceable with the regulations of the LOPDGDD or the RGPD. In the section on legal clauses inserted in documents, it appears as a measure to adopt that "when the processing of personal data is legitimized by a relationship contractual, always offer the possibility of separate consent to process data with purposes that are not necessary for the fulfillment or perfection of the same, avoiding including them indissolubly in the clauses of the contract".

In conclusions, it means that of "differentiating the images of the students according to their purpose and pixelate said images for use in social networks".

On the questions that were raised in tests, nothing is indicated, so that

You do not know how the data is used for photographs on FACEBOOK or for sending

advertising.

SEVENTH: The Instructor issued a resolution proposal with the literal:

"That by the Director of the Spanish Agency for Data Protection, a sanction is made for C.C.C.-SCHOOL OF DANCE for an infringement of article 7 of the RGPD, typified in the article 83.5 of the RGPD, with a warning (58.2 RGPD).

That the Director of the Spanish Data Protection Agency sanction

C.C.C.-SCHOOL OF DANCE for an infringement of article 17 of the RGPD, typified in the article 83.5 of the RGPD, with a warning (58.2 RGPD)."

Notified, no allegations were received.

PROVEN FACTS

- 1) The claimant filled out the registration form for the 2017/2018 academic year for her youngest daughter in the dance school of the claimed. The form is made up of two sides, one with the school logo, literal "ENROLLMENT" "course" contains the data sections to collect from the student and parents, the activity and the signature. The back of the page bears the name of "normative".
- 2) Claimant and claimed have a document dated 05/09/2018 with the seal of the dance school in which the first urges its right to oppose the cessation of data personal rights and image rights of her daughter at school and informs that she will be dropped from the school for the month of June.

The claimant provides a printed sheet of 06/18/2018 from the FACEBOOK page"

C.C.C. Dance School with the literal "We start January and open FREE PLACES

for our BABY DANCE group, from 2 years old...INFORMATE at: SCHOOL

DANCE PROFESSIONAL C.C.C.". Below is a photograph with six minor children

under the title "BABY DANCE" "we start on January 10", one of the girls is the daughter of the claimant.

3) The respondent states that the photographs that appear on her FACEBOOK page,

such as that of the claimant's daughter, are exposed because in the registration form of the course signed by the students/parents/guardian, it was indicated that: "The School is authorized to capturing images of students for use with educational purposes and

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informative and non-profit, with the possibility of executing access rights,

rectification and cancellation of the same", although it does not indicate the address or mode of exercise.

form signed by the student/parent/guardian

There is no possibility of not giving consent for it because it goes in the same , making it dependent on enrollment.

Also in the same registration form it is informed about the collection of data that "The School is authorized to incorporate the information into its databases and send publicity of the activities that are carried out" without the possibility of not granting the

consent.

For neither of the two processing operations does the information expressly appear. opt-out information that is purportedly collected.

In the same form it is indicated that the signatory accepts the exposed conditions.

4) Once this procedure has been initiated, it is unknown how it will implement the claimed the image of the students, including minors for the treatment of data of the photographs and videos on their FACEBOOK page, also not knowing if all the The images now on display come from having filled out the enrollment sheet for each

course, since in said sheet, at least from 2017-2018, there was no option not to consent to the processing of images by the school for its FACEBOOK page.

- 5) Once this procedure has been initiated, it is unknown how it will implement the claimed the collection of student data to proceed with advertising mailings on the activities carried out.
- 6) The Inspection Service notes in its report that on the school's FACEBOOK, the On 11/12/2018, the image object of the exercise of the right of opposition was not displayed of the claimant.

FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of the RGPD recognizes to each authority of control, and according to what is established in articles 47 and 48 of the LOPDGDD, the director of the Spanish Agency for Data Protection is competent to initiate and resolve this process.

Ш

The content of the data collection clauses and their use in the enrollment sheet 2017/2018 supposes a first infraction of article 7 that establishes the "conditions for consent", specifying:

- "1. When the treatment is based on the consent of the interested party, the person in charge You must be able to demonstrate that you consented to the processing of your personal data.
- 2. If the data subject's consent is given in the context of a written statement that also refers to other matters, the request for consent will be presented in such a way clearly distinguishable from other matters, in an intelligible and easily accessible manner and C/ Jorge Juan, 6

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using clear and simple language. No part of the declaration will be binding. that constitutes an infringement of this Regulation.

- 3. The interested party shall have the right to withdraw their consent at any time. The Withdrawal of consent will not affect the legality of the treatment based on the consent prior to withdrawal. Before giving their consent, the interested party will be informed of it. It will be as easy to withdraw consent as it is to give it.
- 4. When assessing whether consent has been freely given, it will be taken into account to the greatest extent possible whether, among other things, the performance of a contract, including the provision of a service, is subject to consent to the processing of personal data that are not necessary for the execution of said contract."

Regarding the treatment of the data collected by the claimed party, in this case, the delivery data of students and parents, for the provision of a service, it must be indicated that when obey a contractual relationship, the data necessary for this would not require the Obtaining consent for their treatment as they are understood to be implicit and necessary for the subscription and reception of the contracted service, payment of classes, identification of students etc. Therefore, its legality (article 6 of the RGPD) comes from article 6.1.b) of the RGPD: "the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of the latter of pre-contractual measures"

However, neither the sending of publicity, nor the treatment of the images of the minors seems to be necessary for the execution of the aforementioned contract, so if considers it possible to obtain the data for these purposes, it would be necessary to go to another legal basis that would allow the treatment adjusted to the current norm. In this sense the GDPR, consider:

article 4.11 «consent of the interested party»: any expression of free will,

specific, informed and unequivocal by which the interested party accepts, either through a declaration or a clear affirmative action, the treatment of personal data that concern;

The circumstance of mandatory inclusion for parents/students in the registration form the transfer of the image for the purposes that are contained or that of the shipment advertising do not comply with the RGPD or the legitimizing basis of consent, by including and be mixed with the contractual legitimizing base and having to accept it. That is, you have to give acceptance to the block, so it cannot be considered consent as manifestation of free will.

If the consequences of consent undermine the freedom of choice of the person, consent is not free. The fact of signing the document does not validate your clauses, which would violate data protection regulations.

The RGPD indicates in its article 6.1.

- 1. The treatment will only be lawful if at least one of the following conditions is met:
- a) the interested party gave their consent for the processing of their personal data for one or more specific purposes;

When assessing whether consent has been freely given, they should be considered also the specific situations in which the consent is subject to the execution of

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contracts or the provision of a service as described in article 7, paragraph 4.

Article 7(4) has been drafted in a non-exhaustive manner by using the expression "among other things", which means that there may be other circumstances that

fall within the scope of this provision. Generally speaking, the consent will be invalidated by any improper influence or pressure exerted on the interested party (which can manifest itself in very different ways) that prevents this exercise your free will.

Link the consent to the acceptance of the terms and conditions or subordinate the performance of a contract or the provision of a service at the request of consent to the processing of personal data that is not necessary for the performance of said contract or service, is highly inappropriate. If consent has been given in these circumstances, it is presumed that it has not been given freely (recital 43). In addition, it must be taken into account that for a validly collected consent prior correct information is required, and in this sense, the information on the treatments for sending advertising and collecting images are different and there must be the possibility in the same document of not consenting for each of them without suffering any negative damage in the provision of the service. On the other hand, consent unambiguous would not fit well with procedures to derive the same from the inaction or silence, since this is intrinsically equivocal. The situation is wrong people are considered to have given their consent if they have not responded to a letter when they were informed that failure to respond was equivalent to consent. In this type of situations, individual behavior (or rather, lack of action), raises serious doubts about the person's willingness to agree. The fact that the person does not take a positive action does not lead to the conclusion that you have given your consent. therefore not meets the unequivocal consent requirement.

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The second infraction charged is that of the data deletion time

(images and video on FACEBOOK of the school). Article 17.1.a) and b) of the RGPD indicates:

"1. The interested party shall have the right to obtain, without undue delay, from the person responsible for the

treatment the deletion of personal data that concerns you, which will be obliged to Delete personal data without undue delay when any of the following circumstances:

- a) the personal data is no longer necessary in relation to the purposes for which were collected or otherwise treated;
- b) the interested party withdraws the consent on which the treatment is based in accordance with Article 6(1)(a) or Article 9(2)(a) and it is not based on other legal basis;

IV

Article 72.1.c) of the LOPDGDD considers: "Infringements considered very serious

"1. Based on the provisions of article 83.5 of Regulation (EU) 2016/679, considered very serious and will prescribe after three years the infractions that suppose a substantial violation of the articles mentioned therein and, in particular, the following:

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c) Failure to comply with the requirements of Article 7 of the Regulation (EU)2016/679 for the validity of consent.

Article 74 of the same norm considers minor, "and the remaining infringements of a merely formal nature of the articles mentioned in sections 4 and 5 of article 83 of Regulation (EU) 2016/679 and, in particular, the following:

c) Failure to respond to requests to exercise the rights established in articles 15 to 22 of Regulation (EU) 2016/679, unless the provisions of the

article 72.1.k) of this organic law."

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Regulation;

Article 58.2 of the RGPD provides: "Each control authority will have all the following corrective powers indicated below:

- b) sanction any person responsible or in charge of the treatment with a warning when the treatment operations have violated the provisions of this
- d) order the person in charge or in charge of the treatment that the operations of treatment comply with the provisions of this Regulation, where appropriate, in accordance with a specified manner and within a specified time.

Article 28 of the RGPD indicates "General obligations of the person in charge and in charge of the treatment"

- "1. Those responsible and in charge, taking into account the elements listed in the

 Articles 24 and 25 of Regulation (EU) 2016/679, will determine the technical and

 appropriate organizational measures that must be applied in order to guarantee and certify that the treatment

 is in accordance with the aforementioned regulation, with this organic law, its rules of

 development and applicable sectoral legislation. In particular, they will assess whether it is appropriate to carry out

 of the impact assessment on data protection and the prior consultation referred to in the

 Section 3 of Chapter IV of the aforementioned regulation.
- 2. For the adoption of the measures referred to in the previous section, those responsible and processors shall take into account, in particular, the increased risks that could occur in the following cases:
- e) When the data processing of groups of affected people is carried out in a situation of special vulnerability and, in particular, of minors and people with disabilities."
 Letter d) of article 58.2 of the RGPD indicates as the power of the AEPD: "order the 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"

In addition, the LOPDDG considers non-compliance with the adjustment to the measures derived from the resolution, article 72.1.m):

"1. Based on the provisions of article 83.5 of Regulation (EU) 2016/679,

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

m) Failure to comply with the resolutions issued by the data protection authority competent in the exercise of the powers conferred by article 58.2 of the Regulation (EU) 2016/679."

In the testing period, in order to guide compliance with the regulations, the respondent was literally requested:

"Current legitimizing basis for the data processing of photographs and videos of minors and adults for whom that school exposes photographs and videos."

"Copy of forms or used forms (only one copy is needed) in which
the treatment of photographs and videos on the page was requested or reported
FACEBOOK of the School, before 05/25/2018, entry into force of the regulation, and
after that date."

"You are reminded that the treatment that does not comply with the requirements of the RGPD (possibly photos or videos from the years 2014, 2015, etc.) should no longer be treated."

The claimed party must prove how the registration sheet has changed in terms of the inclusion of the clauses for obtaining consent and information on the use of photographs and for the use of sending advertising, if you have created new documents for these purposes.

In addition, you must provide a copy of the documents related to the measures and organizational/technical actions taken upon learning of the claim.

Therefore, in accordance with the applicable legislation, the Director of the Agency Spanish Data Protection RESOLVES:

FIRST: IMPOSE C.C.C.-ESCUELA DE DANZA -, with NIF ***NIF.1, for an infraction of article 7 of the RGPD, typified in article 83.5 of the RGPD, a sanction of warning (article 58.2 b) RGPD.

SECOND: IMPOSE C.C.C.-SCHOOL OF DANCE -, with NIF ***NIF.1, for a infringement of article 17 of the RGPD, typified in article 83.5 of the RGPD, a sanction of warning (article 58.2 b) RGPD.

THIRD: ORDER in accordance with article 58.2.d) the sending of the documentation that is used for the provision of consent for the use of photographs and the sending of advertising, and information associated with both.

FOURTH: NOTIFY this resolution to C.C.C.-SCHOOL OF DANCE -.

FIFTH: In accordance with the provisions of article 50 of the LOPDPGDD, this

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

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Against this resolution, which puts an end to the administrative procedure in accordance with art. 48.6 of the

LOPDPGDD, 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 one month from the day following the notification of this resolution or directly contentious appeal before the Contentious-Administrative Chamber of the National High Court, with in accordance with the provisions of article 25 and section 5 of the fourth additional provision of Law 29/1998, of 13/07, regulating the Contentious-administrative Jurisdiction, in the period of two months from the day following the notification of this act, as provided for 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, it may be precautionary suspension of the firm decision in administrative proceedings if the interested party expresses its intention to file a contentious-administrative appeal. If this is the case, the

The interested party must formally communicate this fact in writing addressed to the Agency

Spanish Data Protection, presenting it through the Electronic Registry of the

Agency [https://sedeagpd.gob.es/sede-electronica-web/], or through one of the

remaining records provided for in art. 16.4 of the aforementioned Law 39/2015, of 1/10. Also

must transfer to the Agency the documentation that accredits the effective filing of the

Sponsored links. If the Agency was not aware of the filing

contentious-administrative appeal within two months from the day following the

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notification of this resolution would end the precautionary suspension.

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