

□ File No.: EXP202102008

## 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 July 21, 2021  
filed a claim with the Spanish Data Protection Agency. The  
claim is directed against MARRATXÍ CITY COUNCIL with NIF P0703600G  
(hereinafter, TOWN HALL). The grounds on which the claim is based are  
following:

The CITY COUNCIL has published in its electronic headquarters, in the  
"Personal", which is accessible to anyone who wants to consult it, the relationship of the  
productivity complement corresponding to public employees, with  
express indication of the circumstances by which, in the case of the party  
claimant, the report in relation to said supplement had been unfavourable,  
without your consent.

Together with the notification, various screenshots are provided in which it is observed that,  
Indeed, in addition to the name and surnames, there is a "comments" section in  
which, with respect to the complaining party, states:  
"(...)".

A letter addressed to the CITY COUNCIL by the complaining party is also provided in the  
which, among other issues, shows that such information about your person,  
which you do not also consider to be true, should not have been published in such a way that  
anyone has access to it.

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 CITY COUNCIL, 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.

The transfer, which was carried out in accordance with the regulations established in Law 39/2015, of October 1, of the Common Administrative Procedure of the Administrations Public (hereinafter, LPACAP), was collected on 09/20/2021 as recorded in the acknowledgment of receipt that works in the file.

On 10/20/2021, this Agency received a written response indicating:

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1. The complaining party is an administrative officer of general administration, an official of career of the CITY COUNCIL, from the date \*\*\* DATE.1, and as such receives the remuneration corresponding to his job, among which he can receive semi-annually a productivity supplement for special performance, activity extraordinary and initiative with which the public employee develops his activity labor.

2. The productivity supplement originating from the claim is regulated in article 5 of Royal Decree 861/1986, of April 25, which establishes in section 4 that  
“[...]

The amounts received by each official for this concept will be public knowledge, both of the other officers of the Corporation and

of union representatives. [...]”

3. The specific operation of the aforementioned productivity supplement is included in Article 4.2 of the Regulation regulating the criteria for granting the Productivity supplement for staff at the service of the Marratxí City Council published in the Official Gazette of the Balearic Islands no. 83 of June 30, 2016 that verbatim provides:

“Article 4.2. Remuneration for special performance, extraordinary activity and initiative with which the public employee develops his work activity.

A maximum of sixty percent of the amount corresponding to the generic productivity will have as purpose the remuneration of the special performance, extraordinary activity and initiative with which the public employee develop your work activity.

The productivity for this concept will be paid every six months, paying preferably in the monthly payments of August and February of each year. For receive this complement the Councilor responsible for each Department municipality in which the respective public employee renders his services, prior issuance of the reports it deems appropriate from those responsible for the negotiated, will issue a proposal through which the special performance, extraordinary activity and the interest and initiative of each public employee, globally and with the following qualifications:

- N – That would be equivalent to a remarkable productivity and that will mean the full payment of the amount of this part of the complement. ·

- S – Which would be equivalent to sufficient productivity, and which will graduate in three levels: S1 (Which will mean the payment of 45% of the amount of this part of the complement), S2 (Which will mean the payment of 30% of the amount of this part of the complement) and S3 (which will mean the payment

15% of the amount of this part of the complement).

· I – Which would be equivalent to insufficient productivity and will entail the loss of all of this part of the complement.

The N and S qualification reports will require a succinct motivation

while the qualification reports I will require a motivation

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express and extensive. By default, the productivity to be received by each employee

public will be assumed initially in the S3 qualification, modifying the same

based on the reports and proposals issued by those responsible for the

corresponding negotiations. The qualification reports will be sent to the

negotiated human resources during the first 10 days after the

end of the semester, remaining for 10 days at the disposal of the

Staff Board and Staff Delegates, and being able to be examined

individually for each public employee affected during the same

period. In this sense, within the aforementioned term, the public employee

You can only examine the report referring to your person and carry out the

allegations and proposal to modify the rating (duly

motivated) that it deems appropriate. At the end of the aforementioned term, and at sight

of the reports and allegations made in your case, the Department of Resources

will raise the proposal for the payment of the productivity supplement to the

Mayor's Office, which will issue a resolution ordering the payment of the amounts

proceed. Resolution, a copy of which will be sent to the Personnel Board and to the

Staff delegates for your knowledge and purposes or you will be informed of the inadmissibility of the payment thereof. The semester amount of the productivity to be received for this concept will be fixed every six months by Decree of the Mayor's Office depending on the civil servant/labour group or subgroup to which to which the public employee belongs and, if applicable, depending on the business where you provide your services. Every public employee at the service of the Marratxí City Council will not be able to receive annually for this type of productivity an amount greater than 20% of the annual specific complement of the assigned job position."

4. In application of the applicable regulations collected in the previous sections, proceeded within the open administrative file to determine the complement of productivity to be received by public employees at the service of the City Council corresponding to the first semester of fiscal year 2021, once the proposed qualification reports of the different departments of the City Council, to the publication of the same in the electronic bulletin board of the electronic office (<https://seuelectronica.marratxi.es>), within the Personal subsection.

In the aforementioned qualification proposal reports, only the name and surnames of the public employee, his position, the complement qualification proposal of productivity to receive (N, S1, S2, S3 or I) and a brief section of observations), data, all of them of a public nature based on both the transparency regulations of public administrations as by application of article 5.4 of RD 861/1986.

However, in the productivity report issued by the Department to which it is ascribed to the complaining party and initially published, was collected by mistake in the observations section not a mere mention of the existence of a report unfavorable for the perception of the productivity complement but rather a summary explanation of the circumstances giving rise to the unfavorable report.

Once the publication is produced in the Personnel subsection of the Notice Board email from the City Council on July 9, 2021, a complaint was received, both from the interested person as well as the union representatives of the CCOO and UGT, that the complainant's observations included a detailed summary of the reasons for which the qualification of insufficient productivity was proposed,

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proceeding to claim from the affected Department the issuance of a new report proposal for assigning the productivity complement in which only figure the existence of an unfavorable report without influencing the details of it.

Once the new proposed report for the assignment of the complement of productivity by the corresponding Department proceeded to exclude from publication of the report initially inserted and to publish the final report on the date of July 16, 2021 in the Personnel subsection of the Bulletin Board email from the electronic office of the City Council of Marratxí.

THIRD: On October 21, 2021, in accordance with article 65 of the LOPDGDD, the claim filed by the claimant was admitted for processing.

FOURTH: On May 6, 2022, the Director of the Spanish Agency for Data Protection agreed to initiate a sanctioning procedure against the claimed party, for the alleged infringement of Article 6.1 of the RGPD, typified in Article 83.5 of the GDPR.

FIFTH: On 05/11/2022, the aforementioned initial agreement is notified, as to the rules established in Law 39/2015, of October 1, on the Procedure

Common Administrative of Public Administrations (hereinafter, LPACAP) and

Once the period granted for the formulation of allegations has elapsed, it has been verified that no allegation has been received by the respondent.

Article 64.2.f) of the LPACAP - provision of which the respondent was informed

in the agreement to open the procedure - establishes that if no

allegations within the stipulated period on the content of the initiation agreement, when

it contains a precise statement about the imputed responsibility,

may be considered a resolution proposal. In the present case, the agreement

beginning of the sanctioning file determined the facts in which the

imputation, the infraction of the RGPD attributed to the claimed and the sanction that could

prevail. Therefore, taking into consideration that the respondent has not

formulated allegations to the agreement to initiate the file and in attention to what

established in article 64.2.f) of the LPACAP, the aforementioned initial agreement is

considered in this case proposed resolution.

In view of everything that has been done, by the Spanish Data Protection Agency

In this proceeding, the following are considered proven facts:

#### PROVEN FACTS

FIRST: It is accredited that the claimant is a career official of the

CITY COUNCIL, and as such, receives the remuneration corresponding to his position

of work, including a semi-annual productivity supplement in case of meeting the

conditions established for its accrual.

SECOND: It is accredited that the CITY COUNCIL published at its headquarters

electronically, in the "Personal" section, the relationship of the complement of

productivity corresponding to public employees, individually with

name and surnames, and expressly indicating the circumstances by which, in the

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In the case of the complaining party, the report in relation to said supplement had unfavorable result.

THIRD: It is accredited that the electronic headquarters of the CITY COUNCIL is public access for any person, since article 5.4 of the Royal Decree 861/1986, of April 25, which regulates the productivity supplement, limits the knowledge of the same to the rest of the officers of the corporation and the union representatives.

#### 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 and 48.1 of the Law Organic 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 Data Protection Agency.

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 in Regulation (EU) 2016/679, in this organic law, by the provisions regulations issued in its development and, as long as they do not contradict them, with a subsidiary, by the general rules on administrative procedures."

II

The CITY COUNCIL is accused of committing an infringement of article 6.1 of the RGPD:



## Legality of the treatment

"1. The treatment will only be lawful if at least one of the following is met conditions:

- a) the interested party gave their consent for the processing of their data personal for one or more specific purposes;
- b) 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 measures pre-contractual;
- c) the treatment is necessary for the fulfillment of a legal obligation applicable to the data controller;
- d) the processing is necessary to protect the vital interests of the data subject or of another natural person;
- e) the treatment is necessary for the fulfillment of a mission carried out in public interest or in the exercise of public powers vested in the controller of the treatment;
- f) the treatment is necessary for the satisfaction of legitimate interests pursued by the data controller or by a third party, provided that over said interests do not prevail the interests or the rights and freedoms

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fundamental data of the interested party that require the protection of personal data, in particular when the interested party is a child.

The provisions of letter f) of the first paragraph shall not apply to

treatment carried out by public authorities in the exercise of their functions.”

On the other hand, article 4 of the RGPD, Definitions, in its sections 1, 2 and 11, notes that:

“1) «personal data»: any information about an identified natural person or identifiable ("the interested party"); An identifiable natural person shall be considered any person whose identity can be determined, directly or indirectly, in by means of an identifier, such as a name, a number identification, location data, an online identifier, or one or more elements of the physical, physiological, genetic, psychic, economic, cultural or social of said person; “

2) "processing": any operation or set of operations carried out about personal data or sets of personal data, whether by automated procedures or not, such as the collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, broadcast or any other form of authorization of access, collation or interconnection, limitation, suppression or destruction; “

11) «consent of the interested party»: any manifestation of free will, specific, informed and unequivocal by which the interested party accepts, either by means of a declaration or a clear affirmative action, the processing of data personal matters that concern him”.

In the present case, the data processing carried out, that is, the publication in electronic headquarters of a series of data related to the complaining party has been made without legitimate cause, since art. 5.4 of Royal Decree 861/1986, dated 25 April, to which the CITY COUNCIL itself alludes to justify the publication of the

productivity of officials, limits the knowledge of the same to the rest of the officials of the corporation and the union representatives, not resulting in Therefore, adjusted to law, its publication on a publicly accessible web page does not restricted

III

Article 83.5 of the RGPD, under the heading "General conditions for the imposition of administrative fines" provides:

"The infractions of the following dispositions will be sanctioned, in accordance with the paragraph 2, with administrative fines of a maximum of EUR 20,000,000 or, in the case of a company, an amount equivalent to a maximum of 4% of the

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global total annual turnover of the previous financial year, opting for the largest amount:

a) the basic principles for the treatment, including the conditions for the consent under articles 5, 6, 7 and 9; (...)"

In this regard, the LOPDGDD, in its article 71 "Infringements" establishes 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.

For the purposes of the limitation period, article 72 "Infringements considered very serious" of the LOPDGDD indicates:

"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:

b) The processing of personal data without the concurrence of any of the conditions of legitimacy established in article 6 of Regulation (EU) 2016/679. (...)"

IV

Without prejudice to the provisions of article 83.5 of the RGPD, the aforementioned article provides in its section 7 the following:

"7. Without prejudice to the corrective powers of the control authorities under the Article 58(2), each Member State may lay down rules on whether can, and to what extent, impose administrative fines on authorities and organizations public authorities established in that Member State.

For its part, article 77 "Regime applicable to certain categories of responsible or in charge of the treatment" of the LOPDGDD provides the following:

"1. The regime established in this article will be applicable to the treatment of who are responsible or in charge:

(...)

c) The General Administration of the State, the Administrations of the autonomous communities and the entities that make up the Local Administration.

(...)

2. When those responsible or in charge listed in section 1 committed any of the infractions referred to in articles 72 to 74 of this law organic, the data protection authority that is competent will dictate resolution sanctioning them with a warning. The resolution will establish

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also the measures that should be adopted to stop the behavior or correct it.

the effects of the infraction that had been committed.

(...)

5. They will be communicated to the Ombudsman or, where appropriate, to similar institutions

of the autonomous communities the actions carried out and the resolutions issued

under this article. (...)"

Therefore, if the aforementioned infringement of article 6.1 of the RGPD is confirmed,

it would be appropriate to sanction the CITY COUNCIL with a warning.

FIRST: IMPOSE MARRATXÍ CITY COUNCIL, with NIF P0703600G, by

an infringement of Article 6.1 of the RGPD, typified in Article 83.5 of the RGPD, a

warning sanction.

SECOND: NOTIFY this resolution to MARRATXÍ 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, 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 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 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.

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