

□ Procedure No.: PS/00013/2019

938-051119

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: Dated 08/07/2018 has entry in the Spanish Protection Agency
of Data (AEPD), sent by the Catalan Authority for Data Protection, a
claim of Ms. A.A.A. (hereinafter, the claimant).

The claim is directed against Ms. B.B.B., with NIF ***NIF.1 (hereinafter, the
claimed), Real Estate Agent that operates with the commercial name of "ROYLA
HABITATGE", and is based on the communication of the personal data of the
claimant, made by the respondent without her consent or knowledge, to a
third person.

The claimant states that the claimed party has processed their data for a specific purpose.
that exceeds the object of the contract entered into between the two on 12/10/2017 -
exclusive mediation in the sale of a home he owns - and has transferred them to
a third person to whom he commissioned, without his consent or knowledge, the
Certificate of Energy Efficiency of the house. The personal data that would
transferred are the name and two surnames, the DNI, the email address
and the addresses of your home and of the house you have for sale.

Attach to your letter a copy of the DNI and the following documents:

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Mediation contract -"Document acknowledging mediation and
exclusive fees"- which is signed on 12/10/2017 by claimant and

claimed and in which the claimant and D. C.C.C., identified by their DNI and domicile, "recognize and accept the exclusive intermediation for 6 months in the sale of the property located on street ***ADDRESS.1" The document, which collects all property data, both from the Cadastre and the Registry of the Property, grants the intermediation in favor of "Doña B.B.B. known commercially as "ROYLA HABITATGE". Catalonia real estate agent ***REGISTRATION.1, with registered office at Av.

with aicat registration:

***ADDRESS.2 and with Fiscal Identification Code NIF: ***NIF.1 or any natural or legal person designated by them."

The document adds: "Therefore, if there is a sale operation to favor of the person or persons designated by the intermediary or any company related to the same or the same, or presented by it, is will accrue the commission on the part of the property of the farm and the house already pointed out in favor of B.B.B."

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Minutes of fees of the architect D.D.D., S.L.P., with CIF B43723477, which

It is dated 01/24/2018. It contains the name, two surnames, NIF and

domicile of the claimant, against whom the invoice is issued for the concept of

certificate of energy efficiency and certificate of occupancy of the house

located on *** DIRECTION.1 avenue, in the municipality of

***LOCATION.1

Email sent from the address ***EMAIL.1 addressed to the

claimant, dated 01/24/2018, in which he informs him that, following the

indications of the architect D.D.D., I enclose the invoice of the fees for the

"CEE" and the ID.

In the written complaint filed with the Catalan Protection Authority

of Data, the claimant requests that the claimed party be urged to return all the

documentation regarding your personal data; the documents that were

ceded to be able to advertise the house, such as deed, certificate of occupancy and mail

several

SECOND: In view of the facts set forth in the claim, the AEPD, in

in accordance with article 9.4 of Royal Decree-Law 5/2018, on urgent measures

for the adaptation of Spanish law to data protection regulations, in the

framework of file E/06510/2018, through a document signed on 09/27/2018, gave

transfer of it to the respondent and requested that within a month provide this

Agency an explanation of the facts set forth in the claim, detailing the

measures adopted to prevent situations from occurring in the future

similar and also proceed to communicate its decision to the claimant.

The petitioner was notified electronically of this writing. The certificate

issued by the FNMT that is in the file proves that the document was put to

disposition in the electronic headquarters on 09/27/2018, producing the automatic rejection

of the notification on 10/08/2018.

Likewise, the AEPD, in a letter signed on 09/27/2018, addressed the claimant

communicating the transfer of the claim to the claimed. The letter, sent

by certified mail, was returned to origin by unknown

10/08/2018, as stated in the certificate issued by S.E. post office and

Telégrafos, S.A., which appears in the file.

After the period of one month granted to the claimed party without

responded to the information request of the AEPD, on 10/24/2018 the request is reiterated

of information to the claimed one through certified mail, which was returned to

origin on 11/21/2018. Extreme that is accredited by the certificate issued by the

I KNOW. Post Office and Telegraph that works in the file.

On 01/11/2019, in accordance with article 65.5 of Organic Law 3/2018,

Protection of Data and Guarantee of Digital Rights (LOPDGDD) is admitted to

process the claim.

The agreement to admit the claim for processing was notified to the

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claimed by certified mail on 01/15/2019 and was delivered to the addressee on

01/28/2019. This is stated in the delivery certificate issued by the S.E. post office and

Telegraphs, S.A.

THIRD: On 01/29/2019, the Director of the Spanish Protection Agency

of Data agreed to initiate a sanctioning procedure against the person claimed for the alleged

infringement of article 5 of Regulation (EU) 2016/679, General Protection of

Data (RGPD), typified in article 83.5.a) of the aforementioned standard.

FOURTH: On 02/21/2019, the allegations of the defendant have been entered in the AEPD

to the initiation agreement in which it requests that the procedure be archived

sanctioning

In defense of his claim to archive the file, he wields these

arguments:

- Denies that the claimant's data have been processed for a specific purpose.

that exceeds the object of the contract signed between both, the mediation with

exclusive nature in the sale of the claimant's home.

- Affirms that there was no unauthorized transfer of the claimant's data to

the architect who managed the house's energy efficiency certificate.

It alleges, on the one hand, that the communication of the data to the architect was

necessary for the execution of the contract of exclusive mediation of sale of the

housing and, on the other, that the communication of your data to the architect was

known to the claimant.

- Regarding the need to have the energy efficiency certificate

for the execution of the exclusive mediation contract in the sale of the home

makes the following statements that we transcribe: "the Royal Decree

235/2013 for the certification of energy efficiency of buildings establishes

that "this document (the Certificate of Energy Efficiency of the home) is

essential whenever buildings or parts thereof are sold or rented

themselves, such as flats, apartments or commercial premises." And he continues: "In

Specifically, Law 8/2013 on urban rehabilitation, regeneration and renewal

collects penalties of 300 to 600 euros for those who break the law, so,

Before announcing the sale or rental of any property, you must have

with the aforementioned document in force.

- Regarding the second argument, it affirms that "the claimant was aware of the

the need for said certificate and its commission to the architect D.^a D.D.D." Y

who had direct contact with the aforementioned architect via email

during January 2018.

The respondent provides a copy of various emails that, in her opinion, evidence that the respondent did not show "disagreement or ignorance any regarding the commission made to the architect" D.D.D.

a. Sent from the address ***EMAIL.1 on 01/24/2018 to the address of the claimant with the following text: "According to the indications of the architect D.D.D., attached invoice of fees from the CEE and the Certificate". at the foot of written figure: "Arquitectura E. R. S.L.". The mail has two files annexes.

b. Sent by the claimant on 01/25/2018, at 8:56, to the email of the claimed (***EMAIL.2) with a copy to the address ***EMAIL.1 in which says: "I have received an invoice from the architect D.D.D. and it's not clear to me fee. The certificate of occupancy only had to be renewed (I attach the www.aepd.es

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document that I sent you) Please, clarify the concepts for me".

c. Sent from the electronic address of the claimed party (***EMAIL.2), signed by E.E.E., to the claimant's email on 01/25/2018 at 11:19 a.m.: "Okay, it's €150 each, if the ID had to be new it would be €300 only the ID, in total it would be €450 + VAT. your lawyer has called but was not. I call her or I wait for her to call again".

d. Sent by the claimant (***EMAIL.3) to the email address of the claimed on 01/25/2018 at 11:29 a.m.: "Good morning, E.E.E.. Thank you for the clarification. Regarding the Lawyer, try calling her, since we

I am very interested in talking to her. We need to know your opinion about the house sale”

FIFTH: The initiation agreement of PS/0013/2019, in point 3 of its operative part incorporates into the disciplinary file, for evidentiary purposes, the claim filed by the claimant and its documentation and the documents obtained and generated by the Data inspection during the admission process phase.

SIXTH: The LPACAP establishes in its article 89, "Proposal for a resolution in the sanctioning procedures”:

"1. The investigating body will resolve the completion of the procedure, with file of the actions, without it being necessary to formulate the proposal for resolution, when in the instruction of the procedure it is made clear that any of the following circumstances occur:

- a) The non-existence of the facts that could constitute the infraction
- b) When the facts are not proven
- c) When the proven facts do not manifestly constitute an infringement administrative.
- d) When it does not exist or it has not been possible to identify the person or persons liable or appear exempt from liability.
- e) When it is concluded, at any time, that the infraction has prescribed”

In view of what has been done in this proceeding, they are considered proven the following

FACTS

1.- Ms. A.A.A., with NIF ***NIF.2 and D. C.C.C., signed with B.B.B., with NIF ***NIF.1, a mediation contract exclusively for the sale of a home located in the town of ***LOCALIDAD.1, on 12/10/2017.

2.- Work in the file a document with the anagram of Inmobiliaria Royle

Habitatge, signed by claimant and claimed in *** LOCATION.1 on 12/10/2017,

which is headed "Document of recognition of intermediation and fees

in exclusive".

In it, the owners acknowledge and accept the exclusive intermediation of the

claimed, for six months, for the sale of the property whose characteristics are

detail -address; cadastral reference and registration data-; commit to payment

of the sales commission to that claimed and set the sale price. Not in the document

No mention is made of the Energy Efficiency Certificate.

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3.- In the file is a copy of a fee schedule, dated 01/24/2018,

of "Arquitectura E. R., S.L.P.", signed by D.D.D., architect, addressed to the claimant and

in which your name and surnames, the NIF, and your address appear. The amount of the minute

is €363, VAT included, for the concepts of "Certificate of energy efficiency and

certificate of occupancy, of the house located at ***ADDRESS.1, in the term

municipality of ***LOCATION.1".

4.- Work in the file an email dated 01/24/2018 sent to the

electronic address of the claimant from ***EMAIL.1, signed by F.F.F. with the

following text: "Good morning, According to the indications of the architect D.D.D. attached

invoice of fees of the CEE and of the identity card."

5.- The respondent has provided with the allegations to the initiation agreement a copy of the

following emails exchanged with the claimant that, in her opinion, do not

denote "neither disagreement nor any ignorance" of the claimant in relation to

to the commission made to the architect:

a) Sent by the claimant to the email address of the claimed party with a copy to

***EMAIL.1. Dated 01/25/2018 at 8:56 am:

"I have received the invoice from the architect D.D.D. and the fees are not clear to me.

The certificate of occupancy only had to be renewed (I enclose the document that

I sent). Please, clarify the concepts for me".

b) Sent by the claimed party to the claimant's email address. Of date

01/25/2018 at 11:19 am:

"Okay, it's 150 euros each, if the ID had to be new it would be

300 euros nothing more than the ID, in total it would be 450 euros.

Your lawyer called, but I wasn't there; I call her or wait for her to call me

she"

c) Sent from the electronic address of the claimant to the claimed address. Of date

01/25/2018 at 11:29 am:

"Regarding the Lawyer, try calling her, since I am very interested in

talk to her. We need to know your opinion on the sale of the house. Cheers

cordial."

d) Sent from the electronic address of the claimed party to that of the claimant. It is

Date 01/25/2018 at 11:49 a.m.:

Hello A.A.A. OK, we get in touch with her. Cheers."

FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of the RGPD recognizes to each

control authority, and according to the provisions of articles 47 and 48.1 of the Law

Organic 3/2018, on Data Protection and Guarantee of Digital Rights

(LOPDGDD) the Director of the Spanish Data Protection Agency is

competent to resolve this procedure.

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The RGPD deals in its article 5 with the principles that must govern the treatment of personal data and mentions among them that of "Legality, loyalty and transparency" precept that states:

II

"1. The personal data will be:

a) processed in a lawful, loyal and transparent manner in relation to the interested party (...).

Article 4 of the RGPD, "Definitions", considers treatment "any operation or set of operations carried out on personal data or set 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, diffusion or any another form of authorization of access, collation, interconnection, limitation, suppression or destruction".

Article 6.1 of the RGPD specifies the assumptions that allow the legalization of the processing of personal data and, under the heading "Legality of processing", indicates:

"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 personal data for one or more specific purposes;

- b) the treatment is necessary for the execution of a contract in which the interested party is part or for the application to a request of the latter of pre-contractual measures (...)
- c) the treatment is necessary for the fulfillment of a legal obligation applicable to the data controller;
- d) the treatment is necessary to protect the vital interests of the interested party or another Physical person;
- e) the treatment is necessary for the fulfillment of a mission carried out in the interest public or in the exercise of public powers vested in the data controller;
- f) the treatment is necessary for the satisfaction of legitimate interests pursued by the person in charge of the treatment or by a third party, provided that on said interests do not override the interests or fundamental rights and freedoms of the interested party that require the protection of personal data, in particular when the interested is a child.

The provisions of letter f of the first paragraph shall not apply to the treatment carried out by public authorities in the exercise of their functions.

III

A. The claimant maintains that the respondent has violated her right to protection of personal data because you have provided your data to a third person, without their consent or knowledge, in order for it to manage the certificate of energy efficiency for a home you own on which you had agreed with it the exclusive mediation in the sale. He claims that the treatment made exceeds the object of the contract signed with the claimed party, which operates in the mercantile traffic with the commercial name of real estate ROYLA HABITATGE.

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Indeed, as reflected in the proven facts of this resolution, the mediation contract in the sale of the home owned by the claimant does not mention to an assignment to obtain the certificate of efficiency on your behalf housing energy. However, it is equally true that under such a contract the claimant accepted the “exclusive mediation for 6 months in the sale” of her property in favor of the claimed.

The question that arises is therefore to determine whether - as argued by the claimed- the treatment of the data of the claimant carried out in order to obtain the certificate of efficiency of the dwelling on which he had received a order to mediate the sale has been lawful or not; that is, adjusted or not to the regulations protection of personal data.

Article 6.1. of the RGPD contemplates among the conditions that must be met to that the processing of third-party data is lawful that the processing is necessary for the execution of a contract in which the interested party is a party (section b)

The mediation contract for the sale of a house that they concluded in December 2017 the claimant and the respondent entails, as an activity inherent to its execution, that are provided to third parties, potential buyers, the characteristics of the house object of the sale and among it, its level of energy efficiency.

Thus, it must be taken into account in order to know if the behavior that is submitted to the assessment of this Agency was or was not in accordance with the protection regulations of personal data, what is established in Royal Decree 235/2013, of 5 April, approving the basic procedure for efficiency certification energy of buildings.

B.- Royal Decree 235/2013, which transposed into the internal legal system the

Directive 2010/31/EU, of the European Parliament and of the Council, of 05/19/2010, relative

to the energy efficiency of buildings, in its single article, point 2 says:

“When buildings or units thereof are built, sold or rented, the certificate
energy efficiency certificate or a copy of it must be shown to the purchaser or
new potential tenant and will be delivered to the buyer or new tenant, in the
terms established in the Basic Procedure.” (The underlining is from the AEPD)

Royal Decree 235/2013 approved the Basic Procedure for the certification of
the energy efficiency of buildings. In its article 1.3. offers definitions of
“energy efficiency rating”, “energy efficiency certification” and
“energy efficiency label”:

- “a) Rating of the energy efficiency of a building or part thereof: expression
of the energy efficiency of a building or part thereof that is determined
according to the calculation methodology established in the recognized document
corresponding to the Basic Procedure and is expressed with energy indicators
through the energy efficiency label.”;

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- “d) Certification of energy efficiency of the existing building or part of it.
mo: process by which the compliance of the energy efficiency rating is verified.
obtained with the calculated or measured data of the existing building or part of the
itself, and which leads to the issuance of the building's energy efficiency certificate.
cio existing.”

- “m) Energy efficiency label: distinctive that indicates the level of qualification of

energy efficiency obtained by the building or building unit.”

The basic procedure for the certification of the energy efficiency of the buildings refers in its article 14 to the "Information on the efficiency certificate Energy", which provides in its sections 2 and 3:

"two. When the existing building is the object of a contract for the sale of the entire whole or part of the building, as appropriate, the energy efficiency certificate obtained will be made available to the purchaser. When the object of the contract is the lease of all or part of the building, as appropriate, will suffice with the simple display and making available to the lessee a copy of the aforementioned certified.

3. The competent body of the Autonomous Community will determine the mode of inclusion of the energy efficiency certificate of the buildings, in the information that the The seller must supply the buyer, in accordance with the provisions on trans-reference and information to consumers in article 83 of Law 2/2011, of 4 March, Sustainable Economy.” (The underlining is from the AEPD)

In turn, article 12 of the Basic Procedure for the certification of the efficiency energy science of buildings deals with the “Energy Efficiency Label” precept that provides:

"1. Obtaining the energy efficiency certificate will grant the right to use, during its validity period, of the energy efficiency label gética, whose contents are collected in the recognized document corresponding to the energy efficiency label, available in the General Registry referred to in the article 3.

2. The label will be included in all offers, promotions and advertising aimed at selling rent or lease of the building or unit of the building. It must always appear on the label. queta, clearly and unequivocally, if it refers to the energy efficiency certificate

of the project or that of the completed building.

3.(...)" (The underlining is from the AEPD)

In addition to what has been stated so far, article 18 of the Approved Procedure by Royal Decree 235/2013 considers infringement in terms of certification of the energy efficiency of buildings "Failure to comply with the precepts contained in this basic procedure" and provides that it be sanctioned "in accordance with the provisions of www.aepd.es

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the rules of legal rank that result from application". It adds that "the breach of the precepts contained in this basic procedure that constitute infractions in matters of defense of consumers and users in accordance with the provisions in sections k) and n) of article 49.1 of the consolidated text of the General Law of Defense of Consumers and Users, approved by Royal Legislative Decree 1/2007, of November 16, will be sanctioned in accordance with the provisions of chapter Title II of Title IV of the aforementioned consolidated text."

C.- The transcribed provisions show that the defendant -as agent estate agent who professionally assumed the commitment to mediate in the sale of the claimant's home - should inform possible buyers the characteristics of the house for sale; activity that is implicit in their work professional and, in this sense, was obliged to report on the energy efficiency of housing through the energy efficiency label and also the certificate of energy efficiency.

As indicated by the aforementioned legal regulations in "all" "offer, promotion or

publicity directed to the sale” of a unit of the building it is obligatory to include the label of energy efficiency (article 12). In turn, according to article 14, you can only hold the right to obtain the aforementioned label if the certificate has not previously been obtained. energy efficiency certificate. Article 14 of the Procedure regulated by the Royal Decree 235/2013 says verbatim that obtaining the efficiency certificate energy "will grant the right of use, during the validity period of the same, of the energy efficiency label

The scope to be attributed to the obligations imposed by those provisions This is clearly explained in the Explanatory Memorandum of Royal Decree 235/2013 when do says that "it establishes the obligation to make available to the buyers-residents or users of the buildings a certificate of energy efficiency that must include objective information on the energy efficiency of a building and reference values such as minimum energy efficiency requirements in order for property owners to tenants or tenants of the building or a unit thereof can compare and evaluate its energy efficiency. The minimum energy efficiency requirements for buildings departments or units of this are not included in this royal decree, since they are established in the Technical Building Code. In this way, assessing and comparing the efficiency energy efficiency of buildings, the promotion of high-efficiency buildings will be favoured. energy efficiency and investments in energy saving." (The underlining is from the AEPD)

The breach by the Real Estate Agent of the aforementioned obligations das -that when a building or unit is offered, it has the label of energy efficiency and displayed together with the housing information, as well as show the potential buyer the certificate of efficiency and deliver the document payment to the buyer - may constitute an infringement of the rights of the consumers and users, in accordance with the provisions of article 49.1. n) and k) of Consolidated Text of the General Law for the Defense of Consumers and Users, approved

by Royal Legislative Decree 1/2007.

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In addition, the breach of those obligations by a Property Agent

collegiate real estate -condition that meets the claimed- can be translated into liability

disciplinary liability for the Agent. In this sense we must remember, on the one hand,

te, that Royal Decree 1294/2007, of September 28, which approves the

General Statutes of the Official Colleges of Real Estate Agents

and its General Council, when referring to the obligations of the members (article 9),

mentions, among others, “b) Respect and ensure full compliance with the legal

legal act that affects their professional functions, especially ensuring the application

cation of the regulations governing the guarantees legally established for the

receipt of amounts on account for homes under construction. c) Observe the

legal provisions on consumer protection in matters of sale and purchase

real estate leases, insofar as it affects their professional activity”. And by

another, that the General Statutes of the Official Colleges of Property Agents

Real Estate, approved by Royal Decree 1294/2007, consider serious infringement

(article 41.2.c) “The inexcusable negligence or willful misconduct in the performance of their

collegiate activities or duties, which have not caused damage to third parties.” And as a violation

very serious offense (article 41.3. d) “Inexcusable negligence or willful misconduct in the de-

performance of their activities or collegial duties, which has caused damage to a third party.”

D. The previous reflections show that, since the treatment of

the data of the claimant, carried out by the claimed party in its capacity as Agent In-

furniture that had contracted with her in December 2017 the exclusive mediation in the sale of a home owned by him, consisted of communicating his personal data to a professional legally authorized to obtain the certificate of efficiency of the claimant's home (in the present case, the architect D.- D.D.), and since we consider that this treatment, in the matter analyzed, was dispensable to fulfill the obligation to mediate in the sale of the home, which derives of the contract signed between both, the treatment carried out was lawful, being its basis for legitimacy 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".

IV

In the written claim submitted to the Catalan Authority for Data Protection the claimant requested that the respondent be urged to return all the documentation and objects related to his home that he had ceded to the claimed to be able to advertise the house.

In this regard, it should be noted that the competence of this Agency is limited to determining whether legal and regulatory requirements have been met established by the regulations governing the right to data protection personal for the treatment of the data of third parties, so that the Agency lacks jurisdiction to rule on whether or not such conduct is in accordance with Law. All this, without prejudice to the fact that, in order for the competent body to rule on the legality of these facts, can assert its right before the competent administrative or judicial body.

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Thus, given that, in the present case, the processing of personal data of the claimant object of the claim is deemed lawful under article 6.1.b) of the GDPR,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: AGREE to FILE the actions followed against Ms. B.B.B., with NIF ***NIF.1, considering that the data processing carried out was lawful and It was covered by article 6.1. of the GDPR.

SECOND: NOTIFY this resolution to B.B.B.

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

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

Sea Spain Marti

Director of the Spanish Data Protection Agency

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