

□ Procedure No.: PS/00042/2020

## 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 claimant) dated September 18, 2019

filed a claim with the Spanish Data Protection Agency. The

claim is directed against JESCATH CONTRATAS S.L. with CIF B76330364 (in

hereinafter, the claimed) and address in \*\*\*ADDRESS.1.

The reasons on which the claim is based are that the company would have collected data  
claims of the claimant within the provision of services without having  
provided the information provided for in the data protection regulations and without  
respond to the request made by the claimant in the aforementioned sense of request for  
information.

Along with the claim, provide a copy of the presumed contract signed with the  
claimed on February 27, 2019, stating therein the signature and seal of  
the company, as well as the budget presented to the client.

SECOND: Prior to the acceptance of this claim for processing, it is  
transferred the claimed, in accordance with the provisions of article 65.4 of the Law  
Organic 3/2018, of December 5, on the Protection of Personal Data and guarantee of  
digital rights (hereinafter, LOPDGDD), being notified on October 18  
of 2019.

No response has been received from the respondent.

THIRD: On February 19, 2019, the information is obtained from the Mercantile Registry  
Central in which the address indicated in the antecedent appears as the registered office

first.

FOURTH: On February 24, 2020, the Director of the Spanish Agency for Data Protection agreed to initiate a sanctioning procedure against the claimant, for the alleged infringement of article 13 of Regulation (EU) 2016/679 (Regulation General Data Protection, hereinafter RGPD), typified in article 83.5 of the aforementioned standard.

FIFTH: Attempted notification of the start agreement, it was returned by "unknown" on March 2, 2020, so it was reiterated, being again returned by "unknown" on March 10.

As the notification of the initiation agreement was unsuccessful, we proceeded to publish an announcement of notification in the Single Edictal Board of the Official Gazette of the [www.aepd.es](http://www.aepd.es)

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State on June 5, 2020, in accordance with the provisions of article 44 of Law 39/2015, of October 1, on the Common Administrative Procedure of the Public Administrations (hereinafter, LPACAP).

SIXTH: The State Tax Administration Agency is requested to provide the fiscal domicile of the claimed, being provided on July 31, 2020 and coinciding with that at that the notification has been addressed.

SEVENTH: On August 3, 2020, the instructor of the procedure directed a collaboration request to the City Council of \*\*\*LOCALIDAD.1 to inform about the current situation of said entity in the aforementioned domicile, as well as that Provide any contact information you may have.

Before the expiration of the electronic communication of the aforementioned request for collaboration, on August 31, 2020 a reiteration of this is sent by mail Postcard.

On November 13, 2020, a response was received from the City Council of

\*\*\*LOCATION.1 where the following is reported:

“[...]

Having consulted the files of this City Council, the entity appears registered, in the Tax file, with address at \*\*\*ADDRESS.1 street without any reference phone number, email or fax.

In a local police report, dated October 27, 2020, it is stated that appeared in the place, several neighbors state that in said property there was a family that was dedicated to the reform and cleaning of buildings, but that for more than a year they left the place.”

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

In this proceeding, the following are considered proven facts:

#### FACTS

FIRST: The claimant directs a claim to this Agency informing about that, in contracting a provision of services, the respondent has collected your personal data without having provided the information provided for in the regulations of data protection and without having responded to a request for information in this regard.

SECOND: The claimant provides two documents:

1. Contract dated February 27, 2019 with the stamp and signature of the company (although without filling in the space of customer agreement): it contains some data personal information of the claimant (name and surnames and address)

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2- Budget with a supposedly provisional date (01/01/1900) and that lacks of some economic concepts, which also has the stamp and signature of the business. This document contains the claimant's first name and address.

THIRD: In view of the information provided by the City Council of Las Palmas In his letter of November 13, 2020, the respondent has ceased his activity in the registered address in the official databases without a change of East.

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 as established in arts. 47 and 48.1 of the LOPDGDD, the Director of The Spanish Agency for Data Protection is competent to resolve this process.

II

The defendant is imputed the commission of an infraction for violation of article 13 of the RGPD, regarding the information that must be provided when the data is obtained from the interested party, which establishes that:

"1. When personal data relating to him is obtained from an interested party, the responsible for the treatment, at the time these are obtained, will provide all the information indicated below:

a) the identity and contact details of the person in charge and, where appropriate, of their representative;

b) the contact details of the data protection delegate, if applicable;

c) the purposes of the treatment to which the personal data is destined and the legal basis

of the treatment;

d) when the treatment is based on article 6, paragraph 1, letter f), the interests

legitimate of the person in charge or of a third party;

e) the recipients or the categories of recipients of the personal data, in their

case;

f) where appropriate, the intention of the controller to transfer personal data to a third party

country or international organization and the existence or absence of a decision to

adequacy of the Commission, or, in the case of transfers indicated in the

Articles 46 or 47 or Article 49, paragraph 1, second paragraph, reference to the

adequate or appropriate warranties and the means to obtain a copy of these or

to the fact that they have been borrowed.

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2. In addition to the information mentioned in section 1, the person responsible for the

treatment will facilitate the interested party, at the moment in which the data is obtained

personal, the following information necessary to guarantee data processing

fair and transparent

a) the period during which the personal data will be kept or, when it is not

possible, the criteria used to determine this period;

b) the existence of the right to request from the data controller access to the

personal data relating to the interested party, and its rectification or deletion, or the limitation

of its treatment, or to oppose the treatment, as well as the right to portability

of the data;

c) when the treatment is based on article 6, paragraph 1, letter a), or article

9, paragraph 2, letter a), the existence of the right to withdraw consent in

any time, without affecting the legality of the treatment based on the

consent prior to its withdrawal;

d) the right to file a claim with a supervisory authority;

e) if the communication of personal data is a legal or contractual requirement, or a

necessary requirement to sign a contract, and if the interested party is obliged to provide

personal data and is informed of the possible consequences of not

provide such data;

f) the existence of automated decisions, including profiling, to which

referred to in article 22, sections 1 and 4, and, at least in such cases, information

about applied logic, as well as the importance and consequences

provisions of said treatment for the interested party.

3. When the controller plans the further processing of data

personal data for a purpose other than that for which they were collected, you will provide the

interested party, prior to such further processing, information on that other purpose

and any additional information relevant under paragraph 2.

4. The provisions of sections 1, 2 and 3 shall not apply when and in the

to the extent that the interested party already has the information.”

The violation of this article is typified as an infringement in article 83.5 of the RGPD,

which he considers as such:

“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

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

the largest amount:

[...] b) the rights of the interested parties under articles 12 to 22; [...].”

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For the purposes of the limitation period of the infraction, article 72.1 of the LOPDGDD establishes:

“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:

[...] h) The omission of the duty to inform the affected party about the treatment of their personal data in accordance with the provisions of articles 13 and 14 of the Regulation (EU) 2016/679. [...]”.

III

The present sanctioning procedure has its origin in the presumed absence of information regarding the processing of personal data that the claimed party, such as controller should have provided the claimant within the framework of a contractual relationship established between the two.

Article 5.1.a) of the RGPD sets forth the principle of “lawfulness, fairness and transparency”, principle in which Recital 39 affects: "All processing of personal data

It must be lawful and fair. For natural persons, it should be made absolutely clear that are collecting, using, consulting or otherwise processing personal data that concern them, as well as the extent to which said data is or will be processed. The

The principle of transparency requires that all information and communication regarding the treatment of said data is easily accessible and easy to understand, and that it is use simple and clear language. This principle refers in particular to the information of the interested parties about the identity of the person in charge of the treatment and the purposes of the same and to the added information to guarantee a fair treatment and transparent with respect to the affected natural persons and their right to obtain confirmation and communication of personal data concerning them that are treatment object. Individuals must be aware of the risks, the rules, safeguards and rights relating to data processing as well as the way to assert their rights in relation to the treatment. In particular, the specific purposes of the processing of personal data they must be explicit and legitimate, and must be determined at the time of collection. [...]"

For its part, Recital 60 links the duty of information with the principle of transparency, by establishing that "The principles of fair and transparent treatment require that the interested party be informed of the existence of the treatment operation and their ends. The data controller must provide the interested party with supplementary information is necessary to ensure fair treatment and transparent, taking into account the specific circumstances and context in which process personal data. The interested party must also be informed of the preparation of profiles and the consequences of said elaboration. If personal data is they obtain from the interested parties, they must also be informed if they are obliged to facilitate them and the consequences if they did not [...]" In this order,

Article 12.1 of the RGPD regulates the conditions to ensure its effectiveness

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materialization and article 13 specifies what information must be provided when data is obtained from the interested party.

And in the Spanish regulations, in turn, article 11 LOPDGDD introduces the rule of layered information when you have:

"1. When the personal data is obtained from the affected party, the person responsible for the treatment may comply with the duty of information established in article 13 of Regulation (EU) 2016/679, providing the affected party with the basic information to referred to in the following section and indicating an electronic address or other medium that allows easy and immediate access to the rest of the information.

2. The basic information referred to in the previous section must contain, at less:

- a) The identity of the data controller and his representative, if any.
- b) The purpose of the treatment.
- c) The possibility of exercising the rights established in articles 15 to 22 of the Regulation (EU) 2016/679. [...]"

Analyzing, in relation to the foregoing, the facts proven in the proceeding sanctioning, it is observed that these suppose well-founded indications of the provision of data by the claimant to the claimed party in order to proceed to the conclusion of a service contract as well as in the documents provided by the claimant (contract and budget) there is no section related to the information that the respondent, as responsible, should have provided by virtue of of the application of article 13 of the RGPD.

However, notwithstanding what is stated in the previous paragraph, it must be pointed out that the

obligation to provide the information provided in article 13 of the RGPD does not must appear, in an essential way, in the documents provided by the claimant, and may be provided by other means, an extreme that has not been able to be checked in this procedure. Also, regarding the lack of response to the claimant's request for information, the absence of contradiction in the procedural processing has prevented obtaining proof of charge in relation to this aspect.

#### IV

The principle of the right to the presumption of innocence, recognized as a right fundamental subjective in article 24 of the Spanish Constitution, prevents imposing an administrative sanction when proof of accrediting charge of the facts that motivate the imputation or of the intervention in the themselves of the alleged offender and applying the principle "in dubio pro reo" in case of doubt regarding a concrete and determined fact, which obliges in any case to resolve said doubt in the most favorable way for the interested party.

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The aforementioned right to the presumption of innocence is also included in a expressed in article 53.2.b) of Law 39/2015, of October 1, on the Procedure Common Administrative of Public Administrations (hereinafter, LPACAP), which establishes that:

"two. In addition to the rights provided for in the previous section, in the case of administrative procedures of a punitive nature, the alleged

responsible will have the following rights:

[...]b) To the presumption of non-existence of administrative responsibility while the contrary is proven.”

The presumption of innocence must govern without exceptions in the legal system sanctioning and must be respected in the imposition of any sanctions, since the exercise of the *ius puniendi* in its diverse manifestations is conditioned to the game of evidence and a contradictory procedure in which they can defend themselves own positions. In this sense, the Constitutional Court in its Judgment 76/1990, of April 26, considers that the right to the presumption of innocence entails: “that the sanction is based on acts or means of proof of charge or incriminators of the alleged conduct; that the burden of proof corresponds to who accuses, without anyone being obliged to prove their own innocence; and that any insufficiency in the result of the tests carried out, freely valued by the sanctioning body, must be translated into an acquittal pronouncement.”

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In accordance with the above, since it was not possible to conclude the existence of infringement, there is sufficient reason to proceed with the filing of this process.

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

FIRST: ORDER the FILE of this procedure as there is no accredited administrative infraction.

SECOND: NOTIFY this resolution to JESCATH CONTRATAS S.L. with CIF B76330364 and inform A.A.A.

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

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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.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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