

□ File No.: EXP202207949

RESOLUTION OF SANCTIONING PROCEDURE

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

BACKGROUND

FIRST: Given the lack of communication to this Agency of the protection delegate of data (DPD) by the CITY COUNCIL OF SAN ANDRÉS DEL RABANEDO with NIF P2414500E (hereinafter, the City Council), the General Subdirectorate of Promotion and Authorizations of this Agency sent you two notifications reminding the obligation to designate a DPO and communicate it to the control authority, in accordance with article 37 of Regulation (EU) 2016/679 (RGPD), and granting a period of ten days to make the mandatory communication, without having received response to either notification. In the same letter, it was warned that non-compliance could give rise to the exercise of the powers of investigation and sanctions of this Agency.

SECOND: On June 24, 2022, for the purposes provided in article 47 of Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereinafter LOPDGDD), the General Subdirectorate of Promotion and Authorizations transferred the documentation in that Subdirectorate to the General Subdirectorate of Data Inspection. Specifically, it Attach the following documentation:

- First notification sent by postal mail on February 17, 2022 with number output registration ***REGISTRATION.1 and acknowledgment of receipt from the Post Office dated 22 February.
- Second notification sent by SIR on April 26, 2022 with registration number

of departure ***REGISTRATION.2 and confirmation of receipt on April 27.

THIRD: In view of the facts stated, on July 18, 2022,

query, with negative result, the list of data protection delegates

communicated to the AEPD using the NIF of the

City hall.

FOURTH: On July 20, 2022, the Director of the Spanish Agency for

Data Protection agreed to start a sanctioning procedure against the City Council, for the

alleged violation of Article 37 of the GDPR, typified in Article 83.5 of the GDPR.

FIFTH: Notified of the aforementioned start-up agreement in accordance with the rules established in

Law 39/2015, of October 1, on the Common Administrative Procedure of

Public Administrations (hereinafter, LPACAP) and after the period granted

for the formulation of allegations, it has been verified that no allegation has been received

some by the City Council.

Article 64.2.f) of the LPACAP -provision of which the City Council was informed in

the agreement to open the procedure - establishes that if no allegations are made

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within the period provided for the content of the initiation agreement, when it

contains a precise pronouncement about the imputed responsibility, it may

be considered a motion for a resolution. In the present case, the agreement to initiate the

disciplinary file determined the facts in which the

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

impose. Therefore, taking into consideration that the City Council has not formulated

allegations to the agreement to start the file and in attention to what is established in the Article 64.2.f) of the LPACAP, the aforementioned initiation agreement is considered in the present case proposed resolution.

In view of all the proceedings, by the Spanish Agency for Data Protection

In this proceeding, the following are considered proven facts:

PROVEN FACTS

FIRST: The notifications indicated in the first and second records were collected by the City Council, without receiving any response.

SECOND: The list of delegates of protection of data communicated to the AEPD using as search criteria the NIF of the City Hall.

THIRD: Notification of the agreement to start this procedure disciplinary action was carried out in accordance with the provisions of article 43 of the LPACAP.

FOURTH: The City Council has not presented allegations to the agreement to start this sanctioning procedure within the period indicated for it.

FUNDAMENTALS OF LAW

Yo

Competence

In accordance with the powers that article 58.2 of Regulation (EU) 2016/679 (General Data Protection Regulation, hereinafter GDPR), grants each control authority and as established in articles 47 and 48.1 of the Law Organic 3/2018, of December 5, 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: "Procedures processed by the Spanish Data Protection Agency will be governed by the provisions

in Regulation (EU) 2016/679, in this organic law, by the provisions

regulations dictated in its development and, insofar as they do not contradict them, with character subsidiary, by the general rules on administrative procedures.”

II

breached obligation

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The Public Administrations act as data controllers of

of a personal nature and, sometimes, perform the functions of data processors

for what corresponds to them, following the principle of proactive responsibility,

meet the obligations detailed in the GDPR, including the appointment of

a data protection officer, make their contact details public and

communicate it to the AEPD.

Paragraphs 1 and 7 of article 37 of the GDPR refer to these obligations and

establish, respectively:

"1. The person in charge and the person in charge of the treatment will designate a delegate of data protection provided that:

a) the treatment is carried out by a public authority or body, except those courts acting in the exercise of their judicial function;

(...)

7. The person in charge or the person in charge of treatment will publish the data of contact

of the data protection delegate and will communicate them to the control authority.”

Regarding the appointment of the data protection officer, sections 3 and 5 of the

Article 37 of the GDPR state that:

"3. When the controller or processor is an authority or public body, a single data protection officer may be appointed to several of these authorities or bodies, taking into account their structure organization and size.

(...)

5. The data protection officer may be part of the staff of the controller or processor or perform their duties within the framework of a service contract.

For its part, the LOPDGDD dedicates article 34 to the "Appointment of a delegate of data protection", precept that provides:

"1. Those responsible and in charge of the treatment must designate a data protection officer in the cases provided for in article 37.1 of the Regulation (EU) 2016/679 (...)

3. Those responsible and in charge of the treatment will communicate within the period of ten days to the Spanish Data Protection Agency or, where appropriate, to the regional data protection authorities, designations, appointments and dismissals of the data protection delegates both in the cases in which find themselves bound to their designation as in the case in which it is voluntary".

Classification and classification of the offense

II

Article 83.5 b) of the GDPR considers that the infringement of "the obligations of the responsible and of the person in charge according to articles 8, 11, 25 to 39, 42 and 43", it is punishable, in accordance with section 4 of the aforementioned article 83 of the aforementioned

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Regulation, "with administrative fines of a maximum of 10,000,000 EUR or, in the case of a company, an amount equivalent to a maximum of 2% of the total annual global business volume of the previous financial year, opting for the one with the highest value".

The LOPDGDD in its article 71, Violations, states that:

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

For the purposes of the limitation period for infringements, the alleged infringement prescribes after two years and is classified as serious, in accordance with article 73 of the LOPDGDD that stipulates the following:

"Based on what is established in article 83.4 of Regulation (EU) 2016/679 are considered serious and will prescribe after two years the infractions that suppose a substantial violation of the articles mentioned therein and, in particular, the following:

(...)

v) Failure to comply with the obligation to designate a data protection delegate data when their appointment is required in accordance with article 37 of the Regulation (EU) 2016/679 and article 34 of this organic law."

IV.

sanction imputed

Article 83 "General conditions for the imposition of administrative fines" of the

GDPR, in its section 7, establishes the following:

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

Likewise, 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 applied to the treatments for which they are responsible or in charge:

(...)

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

(...)

2. When the managers or managers listed in section 1 commit any of the offenses referred to in articles 72 to 74 of this organic law, the competent data protection authority will issue resolution sanctioning them with a warning. The resolution will establish likewise, the measures that should be adopted to cease the conduct or to correct it. the effects of the offense committed.

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The resolution will be notified to the person in charge or in charge of the treatment, to the body to which it depends hierarchically, if applicable, and to those affected who have

the condition of interested party, if applicable.

3. Without prejudice to what is established in the previous section, the authority of

data protection will also propose the initiation of disciplinary actions

when there is sufficient evidence to do so. In this case, the procedure and the

The sanctions to be applied will be those established in the legislation on the disciplinary regime.

or sanction that results from application.

Likewise, when the infractions are attributable to authorities and executives,

and the existence of technical reports or recommendations for treatment is accredited

that had not been duly attended to, in the resolution in which the

sanction will include a reprimand with the name of the responsible position and

will order the publication in the Official State or regional Gazette that

corresponds.

4. The data protection authority must be informed of the

resolutions that fall in relation to the measures and actions to which they refer

the previous sections.

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

analogous of the autonomous communities the actions carried out and the

resolutions issued under this article.”

It should be noted that the GDPR, without prejudice to the provisions of its article 83,

contemplates in its article 77 the possibility of resorting to the penalty of warning

to correct the processing of personal data that do not suit their

forecasts, when the managers or managers listed in section 1

commit any of the offenses referred to in articles 72 to 74 of

this organic law.

V

adoption of measures

This Agency agrees to impose on the controller the adoption of appropriate measures to adjust its performance to the regulations mentioned in this act, in accordance with the established in the aforementioned article 58.2 d) of the GDPR, according to which each authority of control may “order the person in charge or person in charge of the treatment that the processing operations comply with the provisions of this Regulation, where appropriate, in a specified manner and within a specified period...”.

It is noted that not meeting the requirements of this body may be considered as an administrative offense in accordance with the provisions of the GDPR, classified as an infraction in its article 83.5 and 83.6, being able to motivate such conduct the opening of a subsequent administrative sanctioning procedure.

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

FIRST: IMPOSE the CITY COUNCIL OF SAN ANDRÉS DEL RABANEDO, with NIF P2414500E, for a violation of Article 37 of the GDPR, typified in Article 83.5 of the GDPR, a warning sanction.

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SECOND: REQUEST the CITY COUNCIL OF SAN ANDRÉS DEL RABANEDO, with NIF P2414500E, so that within a month you can certify before this body the appointment of DPD, in accordance with the provisions of article 37 of the GDPR.

THIRD: NOTIFY this resolution to the CITY COUNCIL OF SAN ANDRÉS OF THE RABANEDO.

ROOM:

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

COMMUNICATE this resolution to the Ombudsman, in

In accordance with the provisions of article 50 of the LOPDGDD, this

Resolution will be made public once the interested parties have been notified.

Against this resolution, which puts an end to the administrative process 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 reversal before the

Director of the Spanish Agency for Data Protection within a period of one month from

count 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 for in article 46.1 of the

referred Law.

Finally, it is noted 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 through

writing addressed to the Spanish Data Protection Agency, presenting it through

of the Electronic Registry of the Agency [[https://sedeagpd.gob.es/sede-electronica-](https://sedeagpd.gob.es/sede-electronica-web/)

web/], or through any of the other registries 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 proceedings within a period of two months from the day following the

Notification of this resolution would terminate the precautionary suspension.

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