

## File identification

Resolution of sanctioning procedure no. PS 6/2022, referring to SUMAR Public services of social action of Catalonia, SL

## Background

1. On 04/11/2021, the Catalan Data Protection Authority received a letter from a person for which he made a complaint against SUMAR Serveis públics d'acció social de Catalunya, SL (henceforth, SUMAR), due to an alleged breach of the regulations on the protection of personal data. Specifically, the complainant (through his representative) complained that in February 2021 his late mother (Mrs. (...)) had contracted with the company SUMAR, Public Services of Social Action de Catalunya (hereinafter, SUMAR) a private home help service, and that his right to information had not been exercised.

In order to substantiate the facts subject to the complaint, a document titled "*Private service budget*" -with the SUMAR logo-, issued on 02/25/2021, was provided, which included the data of the mother of the complainant (name, surname, DNI, contact telephone number and address). This document does not contain any informative clause referring to the processing of your personal data.

2. The Authority opened a preliminary information phase (no. IP 446A/2021), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure of application to the areas of competence of the Generalitat, and article 55.2 of Law 39/2015, of October 1, on the common administrative procedure of public administrations (henceforth, LPAC), to determine whether the facts were capable of motivating the initiation of a sanctioning procedure.

In this information phase, on 01/28/2022 the reported entity was required to report whether it had complied with Ms. (...) provided for in article 13 of the RGPD, when collecting your data in the framework of contracting the home help service; and, if so, provide documentary evidence.

3. On the dates 31/01/2022 and 07/02/2022 SUMAR responded to the aforementioned request in which it explained that, of the company's relationship with the user, only the budget provided to him at the time is available, "*not constant any other documentation or complementary text*" through which it can be proven that this person's right to information has been made effective.

4. On 09/02/2022, the director of the Catalan Data Protection Authority agreed to initiate a sanctioning procedure against SUMAR for an alleged infringement provided for in article 83.5.b), in relation to article 13; both of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, relating to the protection of natural persons with regard to the processing of personal data and the free movement thereof (hereinafter, RGPD). This initiation agreement was notified to the imputed entity on 09/02/2022.

5. On 02/15/2022, the accused entity submitted a letter in which it did not question the facts imputed, nor their legal qualification. On the contrary, SUMAR admitted that *"the lack of information to the user of the service was found to be a breach of Article 13 of the Data Protection Regulation; and, internally, of the "Instruction on information to be provided on data processing at the time of obtaining it" approved by the SUMAR Board of Directors at its meeting of January 23, 2019"* . Likewise, they voluntarily acknowledged responsibility for the imputed facts that motivated the initiation of the sanctioning procedure.

6. On 18/03/2022, the instructor of this procedure formulated a resolution proposal, by which she proposed that the director of the Catalan Data Protection Authority admonish SUMAR as responsible for an infringement provided for in article 83.5.b) in relation to article 13; both of the RGPD.

This resolution proposal was notified on 03/22/2022 and a period of 10 days was granted to formulate allegations.

7. On 03/28/2022, the accused entity submitted a letter in which it acknowledges its responsibility for the alleged acts, and certifies that on 03/25/2022 it paid in advance the 1,200 euros (one thousand two hundred euros), corresponding to the pecuniary penalty proposed by the instructor in the proposed resolution, once the reductions provided for in article 85 of Law 39/2015 have been applied.

### **proven facts**

On 25/02/2021, the company SUMAR Serveis públics d'acció social de Catalunya, SL, on the occasion of the hiring of a home help service by Mrs. (...), collected your data without exercising your right to information provided for in article 13 of the RPGD.

### **Fundamentals of law**

1. The provisions of the LPAC , and article 15 of Decree 278/1993, according to the provisions of DT 2a of Law 32/2010, of October 1, of Catalan Data Protection Authority. In accordance with articles 5 and 8 of Law 32/2010, the resolution of the sanctioning procedure corresponds to the director of the Catalan Data Protection Authority.

2. In accordance with article 85.3 of the LPAC, both the recognition of responsibility and the voluntary advanced payment of the proposed monetary penalty lead to the application of reductions. The effectiveness of these reductions is conditioned on the withdrawal or renunciation of any action or appeal through the administrative route against the sanction. For

both cases, sections 1 and 2 of article 85 of the LPAC provide for the termination of the procedure.

As has been advanced in the antecedents, the imputed entity did not formulate allegations in the initiation agreement nor has it done so in front of the resolution proposal, and it has been accepted to the two options to reduce the amount of the penalty, acknowledging his responsibility for the alleged facts and paying in advance the amount of the penalty proposed by the instructor in the resolution proposal (with the corresponding reduction of 40%).

**3.** In relation to the facts described in the proven facts section, it is necessary to go to sections 1 and 2 of article 13 of the RGPD, which establish the information that must be provided when personal data is obtained of the person concerned:

*"1. When personal data relating to an interested party is obtained, the data controller, at the time it is 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 officer, if applicable;*
- c) the purposes of the treatment for which the personal data is intended and the legal basis of the treatment;*
- d) when the treatment is based on article 6, section 1, letter f), the legitimate interests of the person in charge or of a third party;*
- e) the recipients or the categories of recipients of the personal data, as the case may be;*
- f) in its case, the intention of the person in charge to transfer personal data to a third country or international organization and the existence or absence of an adequacy decision by the Commission, or, in the case of the transfers indicated in articles 46 or 47 or article 49, section 1, second paragraph, refers to the adequate or appropriate guarantees and the means to obtain a copy of these or the fact that they have been provided.*

*2. In addition to the information mentioned in section 1, the controller will provide the interested party, at the time the personal data is obtained, the following information necessary to guarantee a fair and transparent data processing:*

- a) the period during which personal data will be kept or, when not possible, the criteria used to determine this period;*
- b) the existence of the right to request from the person responsible for the treatment 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 the portability of the data ;*
- c) when the treatment is based on article 6, section 1, letter a), or article 9, section 2, letter a), the existence of the right to withdraw consent at any time, without it affecting the legality treatment based on consent prior to its withdrawal;*
- d) the right to present a claim before a control 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 providing such data;
- f) the existence of automated decisions, including the creation of profiles, referred to in article 22, sections 1 and 4, and, at least in such cases, significant information on the logic applied, as well as the importance and expected consequences of said treatment for the person concerned."

For its part, sections 1 and 2 of article 11 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD) , referring to transparency and information to the affected person, provide that:

"1. When the personal data is obtained from the affected person, the controller can comply with the duty of information established by Article 13 of Regulation (EU) 2016/679 by providing the affected person with the basic information referred to in section below and indicating an electronic address or other means that allows you to access the rest of the information in a simple and immediate way.

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

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

If the data obtained from the affected person must be processed for profiling, the basic information must also include this circumstance. In this case, the affected person must be informed of his right to object to the adoption of automated individual decisions that produce legal effects on him or significantly affect him in a similar way, when this right is given in accordance with the provisions of article 22 of Regulation (EU) 2016/679."

During the processing of this procedure, the fact described in the proven facts section, which is considered constitutive of the violation provided for in article 83.5.b) of the RGPD, which typifies the violation of " the rights of the interested parties pursuant to articles 12 to 22" , including the right to information provided for in article 13 of the RGPD.

The conduct addressed here has been included as a very serious infraction in article 72.1.h) of the LOPDGDD, in the following form:

"h) The omission of the duty to inform the affected person about the processing of their personal data in accordance with the provisions of articles 13 and 14 of Regulation (EU) 016/679 and 12 of this Organic Law."

4. As SUMAR is a private law entity, which does not fit into the categories of managers related to article 77 of the LOPDGDD, it results the general sanctioning regime provided for in article 83 of the RGPD applies.

Article 83.5 of the RGPD provides for the infractions provided for there, to be sanctioned with an administrative fine of 20,000,000 euros at most, or in the case of a company, an amount equivalent to 4% as a maximum of the global total annual business volume of the previous financial year, opting for the higher amount. This, without prejudice to the fact that, as an additional or substitute, the measures provided for in clauses a) ah) ij) of Article 58.2 RGPD may be applied.

In the present case, as explained by the instructor in the resolution proposal, the possibility of replacing the administrative fine with the reprimand provided for in Article 58.2.b) RGPD should be ruled out, since, given the nature of the services provided by SUMAR and of the entities that make it up, should properly manage how to comply with one of the basic rights of people regarding the processing of their personal data, such as the right to information.

Once it has been ruled out that the penalty of an administrative fine should be replaced by a warning, the amount of the administrative fine to be imposed must be determined. According to the provisions of article 83.2 of the RGPD, and also in accordance with the principle of proportionality enshrined in article 29 of Law 40/2015, as indicated by the instructor in the resolution proposal, the sanction should be imposed of two thousand euros (two thousand euros). This quantification of the fine is based on the weighting between the aggravating and mitigating criteria indicated below.

As mitigating criteria, the concurrence of the following causes is observed:

- The facts constituting the infringement have affected a single person (art. 83.2.a/ RGPD)
- There is no evidence that SUMAR has obtained benefits following the commission of the infringement (art. 76.2.c/ LOPDGDD)

On the contrary, as aggravating criteria, the following elements must be taken into account :

- Linking the activity of the offender with the practice of processing personal data (art. 83.2.k/ of the RGPD and 76.2.b/ of the LOPDGDD)

5. On the other hand, in accordance with article 85.3 of the LPAC and as advanced in the initiation agreement and also in the resolution proposal, if before the resolution of the sanctioning procedure the entity accused acknowledges his responsibility or makes voluntary payment of the pecuniary penalty, a 20% reduction should be applied on the amount of the provisionally quantified penalty. If the two aforementioned cases occur, the reduction is applied cumulatively (40%).

As has been advanced, the effectiveness of the aforementioned reductions is conditional on the withdrawal or renunciation of any action or appeal through the administrative route against the sanction (art. 85.3 of the LPAC, *in fine* ).

Well, as indicated in the antecedents, by means of a letter dated 03/28/2022, the accused entity has acknowledged its responsibility. Likewise, on 03/25/2022 date has paid 1,200 euros (one thousand two hundred euros) in advance, corresponding to the amount of the penalty resulting once the cumulative reduction of 40% has been applied.

6. Given the findings of the violations provided for in art. 83 of the RGPD in relation to privately owned files or treatments, article 21.3 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, empowers the director of the Authority for the resolution declaring the infringement to establish the appropriate measures so that its effects cease or are corrected. As explained by the instructor in the proposal, given the concurrent circumstances in this case, which make it impossible to exercise the right of the affected person at the present time, this Authority does not consider it necessary to require any corrective measures. In this regard, it should also be noted that, as explained in the 5th precedent, the entity has an internal instruction on how to comply with users' right to information.

**For all this, I resolve:**

1. To impose on SUMAR Serveis públics d'acció social de Catalunya, SL the sanction consisting of a fine of 2,000 euros (two thousand euros), as responsible for an infringement provided for in article 83.5.b) in relation to the article 13, both of the RGPD.
2. Declare that SUMAR Serveis públics d'acció social de Catalunya, SL has made the advanced payment of 1,200 euros (one thousand two hundred euros), which corresponds to the amount of the penalty imposed, once the deduction percentage of 40 has been applied % corresponding to the reductions provided for in article 85 of the LPAC.
3. Notify this resolution to SUMAR Public Services of Social Action of Catalonia, SL.
4. Order that this resolution be published on the Authority's website (apdcat.gencat.cat) , in accordance with article 17 of Law 32/2010, of October 1.

Against this resolution, which puts an end to the administrative process in accordance with articles 26.2 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, and 14.3 of Decree 48/2003 , of February 20, by which the Statute of the Catalan Data Protection Agency is approved, the imputed entity can file, with discretion, an appeal for reinstatement before the director of the Catalan Data Protection Authority Data, within one month from the day after its notification, in accordance with the provisions of article 123 et seq. of the LPAC. You can also directly file an administrative contentious appeal before the administrative contentious courts,

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within two months from the day after its notification, in accordance with articles 8, 14 and 46 of Law 29/1998, of July 13, regulating the administrative contentious jurisdiction.

If the imputed entity expresses to the Authority its intention to file an administrative contentious appeal against the final administrative decision, the decision will be provisionally suspended in the terms provided for in article 90.3 of the LPAC.

Likewise, the imputed entity can file any other appeal it deems appropriate to defend its interests.

The director,

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