

APPLICATION FORM FOR ACCREDITATION AS A DATA PROTECTION AUTHORITY

Application to the Credentials Committee for accreditation as a data protection authority pursuant to the resolutions adopted at the 23rd International Conference of Data Protection and Privacy Commissioners at Paris on 25th September 2001.

Notes:

- (a) Please complete application in French or English.
- (b) Please keep answers brief and to the point.
- (c) Please ensure that all 33 questions are answered
- (d) If you retype the form, please include the numbered questions with your answers. It is possible to avoid such retyping by getting the electronic application form in French or in English upon request by e mail at credentials@privacy.org.nz.

Details of applicant

1. Name and postal address of authority

Agencia de Protección de Datos
C/ Sagasta, 22
E-28048 MADRID
SPAIN

2. Contact person for this application:

(a) Name

Emilio Aced Fález

(b) Email address

~~emilio.aced@agencia-proteccion-datos.org~~

(c) Direct telephone number

~~34 91 420 92 265~~

(d) Fax contact

~~34 91 420 47 190 265~~

Type of application

3. The application is for accreditation as:

(a) national Authority YES

(b) sub-national Authority NO

(c) Authority within an international, if yes which one... ..NO

Description of applicant

4. Description of Authority (e.g. commissioner, commission, board etc)

Data Protection Commissioner

5. Is the Authority a public body? YES

5. Geographical jurisdiction

National all over Spain.

7. Sectoral coverage (i.e. does the applicant's jurisdiction cover the entire public and private sectors? If only part of a sector or if there are significant activities not covered, please specify) YES

It covers the entire private and public sectors. It also exists the possibility for the Autonomous Communities to set up data protection authorities with competence for the public sector of the specific Autonomous Community. When no such a authority exists, the Agencia de Protección de Datos remains competent for the public sector of the Autonomous Community.

8. Is the role of the Authority mainly concerned with data protection and privacy? YES

Legal basis

9. Title of law under which the Authority is constituted

The Agencia de Protección de Datos was created by the Ley Orgánica 5/1992, de 29 de octubre, de Regulación del Tratamiento Automatizado de los Datos de Carácter Personal (Data Protection Act). In 1999 a new Data Protection Act was enacted to complete de transposition of Directive 95/46/EC into the Spanish Law. This Act, the Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal, repealed the former one but contained the same provisions regarding the status, functions and powers of the Spanish Data Protection Authority, the Agencia de Protección de Datos. So that, the Agencia de Protección de Datos has been existing as an independent data protection supervisory authority since 1992.

10. Is this principally a data protection law? YES

11. Status of the law (e.g. statute, regulation, executive order)

The Ley Orgánica 15/1999 is an Act which develops constitutional principles and, apart from the Constitution, has the highest status in the Spanish legal system and must be passed in Parliament by absolute majority.

12. Which body made the law?

It was drafted by the Government and passed by the Parliament by absolute majority.

13. What body has the power to amend or revoke the law?

The Government can present a Bill to the Parliament for amending the law and the Parliament can do it by absolute majority. There is also possible for the Parliament to take the initiative and introduce a legislative initiative to amend the law.

Autonomy and independence

14. Who appoints member(s) of the Authority? (Please explain if a different process applies to the presiding member from other Authority members in this question and in subsequent questions.)

The Ley Orgánica 15/1999 establishes a Consultative Council as one of the composing bodies of the Agencia de Protección de Datos. The Consultative Council consists of two representatives from the two chambers of the Spanish Parliament (one member of the Senate and one member of the Congress), a representative of the Central Administration appointed by the Government, a representative of the Local Administration, a member of the Royal Academy of History, an expert in the field of data protection appointed by the High Council of Universities, a representative of the consumers, a representative from the private sector and a representative of each Autonomous Community which had set up a data protection authority in its territory.

Once the Consultative Council has been set up, the Government appoints, by means of a Royal Decree, one of its members as the Director of the Agencia de Protección de Datos (Data Protection Commissioner).

15. What process is followed?

As explained before, after all the relevant institutions and organisations have appointed its representatives in the Consultative Committee, the Government appoints one of its members as the Director of the Agencia de Protección de Datos by means of a Royal Decree which is published in the Spanish Official Journal.

16. For what term are appointments made?

The appointment of the Director of the Agencia de Protección de Datos is made for four years.

17. Does the law under which the Authority operates explicitly state that it acts independently? YES.

18. May the member(s) be removed before expiry of their term? YES, but only in a few very specific cases stated in the Data Protection Act.

19. If yes, who may remove members of the Authority before expiry of their term?

The Government, after an investigation in which the other members of the Consultative Council must be consulted, for serious infringement of his obligations, incapacity to exercise his functions, incompatibility or conviction for a criminal offence.

20. Are there limited reasons specified in the statute, or in another law, providing the permitted grounds for removal? YES

As explained before, in the Data Protection Act (Article 36).

21. What are the grounds for removal?

Serious infringement of his obligations, incapacity to exercise his functions, incompatibility or conviction for a criminal offence (See Question 19).

22. Does the Authority possess the following powers (briefly describe and give statutory references)

(e) to initiate an investigation with seeking provision YES

The Agencia de Protección de Datos can initiate an investigation on its own willingness or after receiving a complaint from a citizen. It has broad investigative, supervisory and sanctioning powers and it can, of course, seek for any documentation or evidence it deems necessary for its investigation. Failing to comply with these request is considered a serious infringement of the Data Protection Act.

Regarding the statutory provisions, see answers to questions 29 a) to 29 e) below.

(f) to report to the head of State, head of Government or legislature YES

The Director of the Agencia de Protección de Datos reports to the Parliament and can ask to be heard by the Congress. There is also possible to send an official report to the Government through the Minister of Justice.

(g) make public statements YES

Yes. There is no an specific provision for this in the Data Protection Act but nothing prevents (and it has been done lots of times) the Director to issue a press release or to convene a press conference to inform the public on relevant issues. Apart from that, all the hearings in the Parliament are published in the Parliament Official Journal.

23. Does the Authority (and its staff) have immunity from legal suit for actions performed in the course of their duties? NO

As any other public institution in Spain, all the actions carried out by the Authority or its staff must stick to the legal grounds and provisions. If somebody thinks some member of the Agencia de Protección de Datos has failed to perform his/her duties according to these legal provisions, he/she has the right to complaint through the established administrative procedures or, even, to suit the person in the Courts. If that happens, the members of the Authority have the right to be represented in Court by an Attorney of the State with no costs for them.

24. Applicants may list any other measures set out in the statute or in other laws which guarantee the Authority's independence (for example if the law provides specifically that the Authority's finances are protected).

The Data Protection Agency is a body under public law, with its own legal personality and unlimited public and private legal capacity, which acts fully independently of the public administrations in the performance of its tasks. Its acquisitions of assets and contracts shall be governed by private law.

The posts in the bodies and services belonging to the Data Protection Agency shall be filled by officials of the public administrations and by staff recruited to this end, in accordance with the functions assigned to each post. The staff is obliged to keep secret any personal data of which they acquire knowledge in the performance of their task. For the performance of its tasks, the Data Protection Agency shall have the following assets and resources:

- a) The annual appropriations from the General Government Budget.
- b) The goods and assets making up its resources, and any interest from them.
- c) Any other resources legally assigned to it.

Each year the Data Protection Agency shall draw up and approve the corresponding preliminary draft budget and send it to the Government for incorporation, with due regard to its independence, into the General Government Budget.

Article 35 of the Ley Orgánica 15/1999.

Consistency with international instruments

25. Does the Authority explicitly implement any international instrument (for example if the law under which the Authority operates specifies that it implements such international instrument)?
- YES

If "yes", which of the following does it principally implement?

- | | | |
|-----|--|-----|
| (a) | OECD Guidelines (1980) | NO |
| (b) | (i) Council of Europe Convention No 108 (1981) | YES |
| | (ii) Council of Europe Additional Protocol (8 November 2001) | NO |
| (c) | UN Guidelines (1990) | NO |

(d) EU Directive (1995)

YES

26. Does the law instead, or additionally, implement any general or specific international instrument? (If so, list the international body and the instrument) NO
27. Have significant questions been raised about the extent to which the law is consistent with the international instruments which are claimed to be implement in answer to questions 25 and 26? (Applicants should supply further information to assist the Committee including a description of any measures under way to address these inconsistencies.) NO

Appropriate functions

(*) Without prejudice of mentioning the relevant articles in the following sections and as a general remark, the structure, functions and powers of the Agencia de Protección de Datos, its Director and its different bodies or units can be found in Articles 35 to 42 of the Ley Orgánica 15/1999 (Data Protection Act) and in the Royal Decree 428/1993.

28. Does the Authority possess functions in any of the following areas (briefly describe and give statutory references):

(a) compliance (e.g. audit, inspection) YES

The Agencia de Protección de Datos has full power of audit and inspection for the private and public sectors. This powers can be found in Article 40 of the Ley Orgánica 15/1999 and in Articles 27 and 28 of the Royal Decree 428/1993, Statute of the Agencia de Protección de Datos (approved after the enactment of the first Data Protection Act and not repealed by the new one)

(b) approvals (e.g. prior-checking, notification) YES

In Spain, all personal data processing must be notified to the Agencia de Protección de Datos, which keeps a Public Register of all the notified files and processing. Before registering the notification, the Agencia de Protección de Datos can require all the information it deems necessary to verify the lawfulness of the processing and even carry out an inspection to check compliance. The legal references can be found in Articles 20, 25, 26, 39 and 40 of the Ley Orgánica 15/1999; Articles 23, 24, 25 and 26 of the Royal Decree 428/1993 and Articles 5, 6, 7, 8 and 10 of the Royal Decree 1332/1994, which develops some aspects of the Data Protection Act and it is also in force for the same reason explained before regarding Royal Decree 428/1993.

There is also a procedure for approval of Codes of Conduct the industry or the public administration can submit to the Agencia de Protección de Datos laying down the organisation conditions, operating rules, applicable procedures, the security standards for data, programs and equipment, the obligations of those involved in the processing and use of personal information, as well as the guarantees for exercising the rights of the individual in full compliance with the principles and provisions of the Law. The Agencia de Protección de Datos can refuse approval if the codes do not fulfil the legal requirements on data protection. Provisions on Codes of Conduct and the powers of the Agencia de Protección de Datos regarding them can be found in Articles 32 and 49 of the Ley Orgánica 15/1999; and Articles 25 and 26 of Royal Decree 428/1993; Articles 9 and 10 of the Royal Decree 1332/1994.

The Agencia de Protección de Datos has also the power of authorising international transfers of personal data to third countries which do not afford adequate protection. The Director is the only national authority who can grant the authorisation and the requirements for granting the authorisations are also laid down in the Data Protection Act and different Secondary legislation. In fact, you can find the functions and powers of the Agencia de Protección de Datos on this

matter in Articles 33, 34 and 37 of the Ley Orgánica 15/1999; Articles 12, 25 and 26 of Royal Decree 428/1993; Articles 3 and 4 of the Royal Decree 1332/1994 and Instruction 1/2000 of the Agencia de Protección de Datos on the Rules Governing International Data Transfers.

- (c) redress for individuals (e.g. complaints, conciliation enforcement) YES

Any citizen to whom the rights of access, rectification, cancellation or opposition have been denied either by a private company or the public administration can submit its case to the Agencia de Protección de Datos which will deal with the complaint and decide whether the refusal to satisfy his/her request is lawful or not. Its decision is binding by the data controller which must grant the request made by the citizen in the case the Agencia de Protección de Datos resolves the citizen was right. The Decision of the Agencia de Protección de Datos can only be challenged in the Courts.

Besides, the Agencia de Protección de Datos has investigating powers to deal with any complaint lodged by any citizen or organization or even got to know by the Agencia de Protección de Datos by any other mean (for instance, press news). After the investigation have been carried out, the Director of the Agencia de Protección de Datos can decide to open a sanctioning procedure (quite similar to a criminal procedure regarding the procedural guarantees and possibility of defence, but in the administrative field) if there is evidence enough of a possible breach of the data protection legislation. After the instruction of the case, the Director can decide to declare that an infraction has been committed and sanction to the offender. The Decision can only be challenged in the Courts.

In addition, if the possibility of a very serious breach, which could affect fundamental rights of the citizens, is detected, the Director of the Agencia de Protección de Datos can decide to temporary block the involved personal data processing until the end of the sanctioning procedure. This decision can be challenged in Court. The blocking can be confirmed as permanent at the end of the procedure when the final Decision is issued or, if no infraction is declared, the blocking is lifted.

This functions and powers can be found in Articles 18, 37 and 43 to 49 of the Ley Orgánica 15/1999; Articles 3, 4, 12, 28 and 29 of Royal Decree 428/1993 and Articles 11 to 19 of the Royal Decree 1332/1994.

- (d) sanctions available to Authority (for example, prosecution and enforcement)
YES

As explained before, the Agencia de Protección de Datos has broad investigative and sanctioning powers, so that, after finding a data controller has processed personal data in breach of the data protection legislation, the Director of the Agencia de Protección de Datos can fine an offender from the private sector with a sanction ranging from 600€ to 600.000€ depending on the seriousness of the infraction.

If the offender is a public administration, the Director of the Data Protection Agency shall issue a decision setting out the measures to be adopted to terminate or correct the effects of the infringement. This decision shall be notified to the data controller, the body to which it is responsible, to the data subjects and to the Ombudsman. The Director of the Agency may also propose that disciplinary proceedings be initiated against the civil servant(s) responsible of the infringement. Besides, the Public Administration involved shall notify to the Agencia de Protección de Datos the measures and proceedings taken to comply with its Decision. Furthermore, referred to in the preceding paragraphs shall be communicated to the Agency

In cases where possible criminal responsibilities are found, the file is also sent to the Public Prosecutor.

The legal bases for the aforementioned functions and powers can be found in Articles 37 and 43 to 47 of the Ley Orgánica 15/1999; Articles 3, 12 and 29 of the Royal Decree 428/1993 and Articles 16, 18 and 19 of the Royal Decree 1332/1994.

- (e) guidance (e.g. compliance advice) YES

The Agencia de Protección de Datos can address to data controllers any instructions it deems adequate to promote compliance with the data protection legislation and request them to adopt, after hearing them, the necessary measures to comply with their legal obligations. Apart from that, the Agencia de Protección de Datos gives advice to data controllers which seek its opinion regarding specific situations and when they intend to put in place new personal data processing.

Furthermore, the Agencia de Protección de Datos has a specific unit which deals with request of information made by the citizens. These request of information can be made personally, by writing, by phone or through the Internet using the Agencia de Protección de Datos webserver.

There is also the possibility to organise conferences and seminars to raise awareness and promote a better knowledge of both general and specific data protection issues.

Specific articles to mention are Article 37 of the Ley Orgánica 15/1999 and Articles 4 and 31 of the Royal Decree 428/1993.

- (f) public education YES

The legislation on data protection establishes as a function of the Agencia de Protección de Datos to provide information to persons on their rights as regards the processing of personal data and this is achieved in a number of ways, ranging from the public offer of information through our website and different publications and brochures to individual attention to people who request different kinds of information. In between, we can find the organization of conferences and seminars and the continuous participation of members of the Agencia de Protección de Datos in similar events, the publication and freely distribution of

the Annual Report, the drawing up and distribution of Recommendations on different issues of data protection and, of course, through the contact with the media.

In addition, it is also mandatory to make publicly available the information contained in the General Register of Data Protection regarding the notified personal data processing and this is done through the Internet (continuously updated) and publishing the whole Register yearly in electronic format (CD-ROM) which it is distributed freely. It is also worth to mention the CD-ROM contains a lot of additional information regarding data protection (legislation, handbooks for citizens, the winner books of the annual Data Protection Award, all the annual reports of the Agencia de Protección de Datos, papers from seminars and conferences, etc.).

Specific articles to mention are Article 37 of the Ley Orgánica 15/1999 and Articles 4 and 31 of Royal Decree 428/1993

- (g) policy advice for government YES

The Agencia de Protección de Datos advises the government in different ways, from the discussion of relevant issues through informal meetings in which it makes its observations to the formal opinions given when a Public Body ask the advice of the Agencia de Protección de Datos regarding the introduction of new systems for processing personal data or regarding the application of data protection legislation to specific cases.

But apart from that, the main instrument to give advice and to influence the legislative process is the obligation, set up in the Data Protection Act, for the government to mandatory ask for the opinion of the Agencia de Protección de Datos when drafting any new piece of legislation which can affect the fundamental right of data protection.

The relevant legal grounds for this point are Article 37 and Articles 5 and 6 of the Royal Decree 428/1993.

- (h) studies or research (e.g. into developing technologies, privacy issues) YES

As it is been said before, the Agencia de Protección de Datos convenes yearly two awards. One of them for the best non-published book dealing with data protection issues of those presented to the award. There is also a similar prize for the best journalistic work published or broadcasted through the radio or the television. See Article 37 of the Ley Orgánica 15/1999 and 31 of Royal Decree 428/1993

Additional comments

29. Applicants are invited to offer any further comments that they wish.

Other materials

30. List any attachments which will accompany the application as an electronic attachment or to follow by post.

You can access all the Spanish and some European legislation on data protection through our website (see address below). In addition to that, you'll receive by mail the last CD-ROM edited and released by the Agencia de Protección de Datos this very week with a lot of useful information.

31. If law under which the Authority operates is accessible on the Internet, please give the reference

URL: <https://www.agenciaprotecciondatos.org>

32. If a recent annual report of the Authority (or a similar recent publication outlining typical activities) is available on the Internet, please give the reference

URL:

Research use

33. With the consent of applicants, the Committee proposes to make copies of the applications available to appropriate researchers approved by the Committee to facilitate a study on data protection. Please indicate whether you agree to this use:

- I agree to this application being released to a researcher YES

Making the application

The application should be emailed to the credentials committee at credentials@privacy.org.nz

If sent as an email attachment it should be in M/S Word.

If unable to email the application, it should be posted to:

Credentials Committee
C/- Privacy Commissioner
P O Box 466
Auckland
New Zealand

The Committee needs access to a copy of the law under which the Authority is constituted. This need not be supplied in hard copy if it is available on the Internet and listed at question 31. If the law itself is not in English or French, it will be useful to supply an English or French summary or translation if one exists.

Use of information

The information in this form will be used for processing the application and will be disclosed to members of the committee and their staff (being the commissioners from New Zealand, France and the United Kingdom) and future committees. It may be also disclosed also to the Data Protection Authorities which participate to the international conference and approved researchers. Any personal data contained in the form is available for access and correction in accordance with the applicable data protection laws of current and future committees. In the first instance it is subject to the New Zealand Privacy Act 1993.

ACCREDITATION OF DATA PROTECTION AUTHORITY
CHECKLIST FOR THE CREDENTIALS SUB-GROUP

1 Name of Authority

Agencia de Protección de Datos, Spain

2 Does the authority have clear and wide ranging data protection functions covering a broad area of economic activity (eg not just an advising body or a body operating in a narrow field such as medical privacy)?

Yes

Notes

3 Legal Basis.

Is the authority a public body established on an appropriate legal basis (eg by statute or regulation)?

Yes

Notes

4 Autonomy and Independence?

Is the authority guaranteed an appropriate degree of autonomy and independence to perform its functions (eg the power to make public statements and protection from removal from office)?

Yes

Notes

5 Consistency with International Instruments.

Is the law under which the authority operates compatible with at least one of the international instruments dealing with data protection and privacy (eg EU Directive, OECD Guidelines, Council of Europe Convention)?

Yes

Notes

EU Directive
CoE Convention

6 Appropriate Functions.
Does the authority have an appropriate range of functions with the legal powers necessary to perform those functions (eg the power to receive and investigate complaints from individuals without seeking permission)?

Yes

Notes

7 Does the Sub-group recommend accreditation?

Yes

Notes

8 If accreditation is recommended what is the accreditation as?

National authority (within the UN criteria)

Notes

9 If accreditation is as an authority within an international/supranational body does the recommendation include voting rights?

Not applicable

Notes

10 If accreditation is not recommended does the Sub Group recommend that accreditation is refused or is more information needed before a decision can be made?

Not applicable

Notes

11 If accreditation is not recommended and the application is from an authority with narrow functions does the Sub Group recommend that, at the discretion of the conference host, observer status is granted?

Not applicable

Notes

If more information is required what is this:

Signed on behalf of the Sub-group:

Blair Stewart

Date: **24 May 2002**

Marie Georges

Date: 9 juillet 2002

Date:

Note: 2 signatures required for recommendations for accreditation.
3 signatures required for recommendations for refusal