

☐ Procedure No.: PS/00383/2019

RESOLUTION OF PUNISHMENT PROCEDURE

Of the procedure instructed by the Spanish Agency for Data Protection and

based on the following

BACKGROUND

FIRST: A.A.A. (hereinafter, the claimant) dated September 29, 2018

filed a claim with the Spanish Agency for Data Protection, because it has been

violated article 5 of the RGD, when your personal data is used, specifically your

phone for a different purpose for which it was given, thereby contravening the

principle of purpose limitation in the processing of personal data.

Specifically, the claimant files this claim against technician B.B.B. with NIF

***NIF.1 residing at ***ADDRESS.1 (hereinafter, the respondent), employee of the

company Jaime García e Hijos, which was attended by the insurance of the community of owners

where the claimant resides, because after completing his work, the respondent sent a

WhatsApp message to the claimant's mobile phone, for a purpose other than

resolution of the breakdown, despite this purpose being the only one that caused the treatment of its

personal information.

Therefore, the claimant considers that the principle of finality has been violated in the

treatment of your data.

Along with your written claim, provide the following documentation:

☐ Work part.

☐ Screenshot of the message.

SECOND: In view of the facts denounced in the claim and the documents

provided by the claimant and documents known to this

Agency, the Subdirector General for Data Inspection proceeded to carry out

preliminary investigative actions to clarify the facts in question, in
under the investigative powers granted to the supervisory authorities in article
57.1 of Regulation (EU) 2016/679 (General Data Protection Regulation, in
hereinafter RGPD), and in accordance with the provisions of Title VII, Chapter I, Section
second, of Organic Law 3/2018, of December 5, on Data Protection
Personal and guarantee of digital rights (hereinafter LOPDGDD).

Firstly, the company where the respondent works is informed of the
this claim on November 3, 2018, requiring you to within a period of one
month forward to this Agency, information on the facts denounced, and the measures
adopted.

On November 23, 2018 it is received in this Agency, with registration number
206675/2018, brief of allegations corresponding to the transfer of the claim
from the company that contracted the services of the claimant in which they exhibit,
among others, the following aspects:

a) That the only telephone they have is that of the neighbor on the 1st floor, who is the one
provided by the insurance company

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

2/7

b) That after making an appointment for August 20, 2018, the plumber is notified
freelance B.B.B. (hereinafter, plumber) at his request, not making the
claimant any work.

c) That the company has not provided any phone number to the plumber, since in the notices
only the address and the fault to be located are reported.

d) That the company does not know who has been able to provide the claimant's telephone number to the plumber since they didn't have one.

And attach the following documentation:

☐ Self-employment registration.

☐

Invoice for the work done by the plumber.

In addition, the following extremes have been observed:

☐ From the analysis of the documentation presented by the claimant, it is observed that the claimant's phone number is handwritten by the plumber himself on

the bottom of the working part with the comment in parentheses "Moroccan".

The fact that this telephone number appears written by hand and with the comment added, gives the certainty that the telephone was provided by the claimed in the time of the visit in order to facilitate the repair actions.

☐ Made a request for information to the operator VODAFONE ESPAÑA, S.A.U. on the ownership of the telephone number of origin of the message provided by the claimant, dated July 12, 2019 and July 30, 2019, received in this Agency, with registration numbers 035374/2019 and 038396/2019 successively, pleadings stating that the holder of the number of telephone is:

BBB

***ADDRESS 1

Therefore, the self-employed plumber used the telephone provided by the claimant to the resolution of the fault, for the sending of a personal text message with a different purpose, as can be deduced from reading it.

Thus, as a result of the research actions carried out, it is verified that the data controller is the claimed party.

THIRD: On November 22, 2019, the Director of the Spanish Agency of Data Protection agreed to initiate a sanctioning procedure against the claimed, for the alleged infringement of Article 5.1.b) of the RGD, typified in Article 83.5 of the GDPR.

FOURTH: Having been notified of the aforementioned initiation agreement, the respondent submitted a written allegations in which, in summary, the respondent states, on the one hand, that violated the principle of presumption of innocence held by all accused persons of an infraction until his guilt has been legally declared, requesting testimonial evidence, and on the other that since the duration of the procedure, the resolution must be issued and notified within three months in under article 21 of Law 39/2015, counting from the registration of the complaint in the

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

3/7

AEPD, so that in this sanctioning procedure there has been the expiration of this

FIFTH: On January 28, 2020, the instructor of the procedure agreed to the opening of a period of practice tests, considering incorporated the previous investigation actions, E/00927/2019.

SIXTH: On January 29, 2020, a resolution proposal is sent to the claimant, proposing that the defendant be sanctioned with a fine of €2,000.00 (TWO THOUSAND euros), for incurring in an infringement of article 5.1.b) of the RGD, typified in article 83.5 of the RGD, according to article 72.1.a) of the LOPDGDD.

Of the actions carried out in this procedure and the documentation

in the file, the following have been accredited:

PROVEN FACTS

FIRST: The defendant, after doing his job as a plumber, remitted on August 20

2018 at 09:48 a WhatsApp message to the claimant's mobile phone, whose

content is as follows:

"Hello, I'm the fonta that was just in your

House. Joe Amandita the truth that I

you were putting mu malito but with that

boxing t-shirt I said uff let's see if I

it's going to hit :) :) and I said pir if anything better

I don't say it na jijjjs. You are a pretty daughter ;-)"

After reading this message, the claimant submits the corresponding claim to the

understand that your mobile phone number has been used by the claimed party for a

different purpose for which it was given, which was none other than the resolution of a breakdown.

SECOND: The respondent is a self-employed worker of the Jaime García e Hijos company,

which was attended by the insurance of the community of owners where the claimant resides.

The company that contracted the services of the defendant, states that it does not know who has

been able to provide the claimant's telephone number to the plumber since they did not have it, and only

He informed the respondent of the address and the fault that had to be repaired.

THIRD: This Agency requested information from the operator VODAFONE

SPAIN, S.A.U. about the ownership of the telephone number of origin of the received message

by the claimant, and of which he provides a copy, verifying that the holder of the number of

phone is the one claimed:

BBB

***ADDRESS 1

C/ Jorge Juan, 6

FOUNDATIONS OF LAW

Yo

By virtue of the powers that article 58.2 of the RGDPR recognizes to each control authority, and as established in arts. 47 and 48.1 of the LOPDGDD, the Director of the Spanish Data Protection Agency is competent to resolve this procedure.

II

Article 6.1 of the RGDPR, establishes that "in accordance with the provisions of the

Article 4.11 of Regulation (EU) 2016/679, means consent of the affected party

Any manifestation of free, specific, informed and unequivocal will by which this you accept, either by means of a declaration or a clear affirmative action, the treatment of personal data concerning you".

For its part, article 5 of the RGDPR establishes that personal data will be:

"a) processed in a lawful, loyal and transparent manner in relation to the interested party ("legality, loyalty and transparency");

b) collected for specific, explicit and legitimate purposes, and will not be processed subsequently in a manner incompatible with those purposes; according to article 89, section 1, further processing of personal data for archiving purposes in the interest public, scientific and historical research purposes or statistical purposes shall not be considered incompatible with the original purposes ("purpose limitation");

c) adequate, pertinent and limited to what is necessary in relation to the purposes for those that are processed ("data minimization");

d) accurate and, if necessary, updated; all measures will be taken

reasonable for the erasure or rectification without delay of the personal data that is inaccurate with respect to the purposes for which they are processed ("accuracy");

e) maintained in a way that allows the identification of the interested parties during

no longer than is necessary for the purposes of processing the personal data; the

personal data may be kept for longer periods as long as they are processed

exclusively for archival purposes in the public interest, scientific research purposes or

historical or statistical purposes, in accordance with article 89, paragraph 1, without prejudice to

the application of the appropriate technical and organizational measures imposed by this

Regulation in order to protect the rights and freedoms of the interested party ("limitation of the term of conservation");

f) processed in such a way as to ensure adequate security of the data

including protection against unauthorized or unlawful processing and against their

accidental loss, destruction or damage, through the application of technical measures or

appropriate organizational measures ("integrity and confidentiality").

The controller will be responsible for compliance with the provisions

in section 1 and able to demonstrate it ("proactive responsibility")."

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

5/7

III

It is considered proven that the aforementioned WhatsApp was sent from the mobile phone

ownership of the claimed and that the content of the message is not related to the

professional activity of the respondent, but on the contrary, uses the telephone number

provided by the claimant to send a personal text message, that is, with a different purpose for which said data was given, which is none other than the strictly relationship between client and claimed.

These facts are accredited on the one hand when the claimant contributes together with her letter of claim, the work part of the claimant and the screenshot of the message, and by another upon verifying the ownership of the telephone number sent by said WhatsApp, to through the letter sent by VODAFONE, in response to the request for information of the AEPD.

In relation to the testimonial evidence requested by the respondent, it should be noted that in accordance with article 77.3 of the LPACAP, it is considered inadmissible or unnecessary, given the documents that are already in the file, a screenshot with the content of the message object of this claim and the report issued by VODAFONE about the ownership of the mobile number that sent said message.

Therefore, the defendant is imputed the commission of an infraction for violation of article 5.1.b) of the RGPD, which regulates the principle of purpose limitation, establishing that personal data will be collected for specific, explicit purposes and legitimate, and will not be further processed in a manner incompatible with said purposes, as well The same also establishes the proactive responsibility of the data controller to demonstrate compliance.

IV

In response to the allegations presented, regarding the presumption of innocence, it should be noted that it is proven that the WhatsApp object of the present case, is sent from the mobile phone number owned by the claimant and that from the reading it follows from the text that it was used for a purpose other than that for which it was given by the claimant, which is none other than the strictly professional relationship between client and reclaimed.

Regarding the expiration and prescription of the facts, it should be noted that the law Organic 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereinafter LOPDGDD), in its article 64 regulates the form of initiation of the procedure and duration, specifically in its section 2 establishes what

Next:

“When the purpose of the procedure is to determine the possible existence of an infringement of the provisions of Regulation (EU) 2016/679 and in the this organic law, will be initiated by means of an initial agreement adopted by its own initiative or as a consequence of a claim.

(...)

The procedure will have a maximum duration of nine months from the the date of the start-up agreement or, where applicable, of the draft start-up agreement.

www.aepd.es

C/ Jorge Juan, 6

28001 – Madrid

sedeagpd.gob.es

6/7

Once this period has elapsed, it will expire and, consequently, the file of performances.”

On the other hand, article 72.1.a) of the LOPDGDD states that “according to what established in article 83.5 of Regulation (EU) 2016/679 are considered very serious and

The infractions that suppose a substantial violation of the the articles mentioned therein and, in particular, the following:

a) The processing of personal data violating the principles and guarantees established in article 5 of Regulation (EU) 2016/679.”

v

Thus, the defendant is imputed the commission of an infraction by

Violation of article 5.1.b) of the RGPD, indicated in the foundation of law II. The

infringement is typified in article 83.5 of the RGPD and is qualified as Serious in the

Article 72.1 a) of the LOPDGDD.

SAW

This infraction can be sanctioned with a fine of €20,000,000 maximum or,

in the case of a company, an amount equivalent to a maximum of 4% of the volume

of total annual global business of the previous financial year, opting for the one with the highest

amount, in accordance with article 83.5 of the RGPD.

Likewise, it is considered appropriate to graduate the sanction to be imposed in accordance with

the following criteria established by article 83.2 of the RGPD:

As aggravating the following:

☐ In the present case we are dealing with unintentional, but significant, negligent action.

goes (article 83.2 b)

☐ Basic personal identifiers are affected (name, surnames,

address, telephone), according to article 83.2 g)

Therefore, in accordance with the applicable legislation and having assessed the criteria for

graduation of sanctions whose existence has been proven,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE B.B.B., with NIF ***NIF.1, for an infraction of article 5.1.b)

of the RGPD, typified in article 83.5 of the RGPD, a fine of €2,000 (two thousand euros).

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

THIRD: Warn the sanctioned party that he must make the imposed sanction effective once

Once this resolution is enforceable, in accordance with the provisions of the

art. 98.1.b) of Law 39/2015, of October 1, on Administrative Procedure

Common Public Administrations (hereinafter LPACAP), within the payment term
voluntary established in art. 68 of the General Collection Regulations, approved
C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

7/7

by Royal Decree 939/2005, of July 29, in relation to art. 62 of Law 58/2003,
of December 17, through its entry, indicating the NIF of the sanctioned and the number
of procedure that appears in the heading of this document, in the account
restricted number ES00 0000 0000 0000 0000 0000, opened on behalf of the Agency
Spanish Data Protection at Banco CAIXABANK, S.A. Otherwise,
it will be collected during the executive period.

Received the notification and once executed, if the date of execution is
is between the 1st and 15th of each month, both inclusive, the term to carry out the
voluntary payment will be until the 20th day of the following month or immediately after, and if
is between the 16th and last day of each month, both inclusive, the term of the
payment will be until the 5th of the second following month or immediately after.

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
C/ Jorge Juan, 6
28001 – Madrid
www.aepd.es

