

□ Procedure No.: PS/00337/2019

938-051119

RESOLUTION OF PUNISHMENT PROCEDURE

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

FACTS

FIRST: Don A.A.A. (*hereinafter, the claimant) dated April 16, 2019

filed a claim with the Spanish Data Protection Agency. The

claim is directed against the political party SOCIALIST WORKERS PARTY
SPANISH (PSOE according to its acronym).

Specifically, the claimant states "having communicated to them in 2017

to this organization my cancellation and opposition to the use of personal data...the past

On 03/20/19 I request again that they not include me as a recipient of any

communication, nor that my data is used for any campaign. Yesterday 04/15/19

I receive another communication at my address (...) "-folio nº 1--.

Along with the claim, it provides documentary evidence (Doc. No. 1) consisting of
written with the heading "Opposition Parties" sent to the INE (National Institute of
Statistics).

SECOND: In view of the facts denounced in the claim and the documents
data provided by the claimant, the Subdirector General for Data Inspection pro-
vided to the transfer of the claim to the PSOE for the clarification of the facts in
matter, by virtue of the investigative powers granted to the authorities of con-
trol in article 57.1 of Regulation (EU) 2016/679 (General Protection Regulation)
tion of Data, hereinafter RGPD), and in accordance with the provisions of the Title
VII, Chapter I, Second Section, of Organic Law 3/2018, of December 5, of

Protection of Personal Data and guarantee of digital rights (hereinafter LOPDGDD).

It is recorded in the computer system of this body that the transfer of the claim dated 04/24/19.

THIRD: On 05/30/19, this Agency received a response to the complaint- whereby it states the following:

“There are indications to think that the claimant did not carry out the request for exclusion within the period stipulated in art. 39 LOREG, since, if you have received the electoral propaganda is because the information on their address (which is what the Office excludes) of the Electoral Census in these cases) appeared in the copy provided to this form. political mation.

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The legal basis is based on the provisions of art. 41.5 LOREG that literally has (...).

In relation to said documentation, this organization has carried out a Report on Impact Assessment in terms of Data Protection as well as a document that contains the Risk Analysis of the treatment of the electoral census, which, if required, This Agency considers it necessary to contribute, it would be provided as an annex to this writ and complement thereof” (folio nº 1-3).

FOURTH: On November 6, 2019, the Director of the Spanish Agency for Data Protection agreed to initiate a sanctioning procedure against the claimant, for the alleged infringement of Article 21 of the RGPD, typified in Article 83.5 of the RGPD.

FIFTH: On 11/23/19, this Agency received a written statement of allegations from the denounced-PSOE according to its acronym—stating the following:

“In such a way that the political formations are limited to treating the copies of the census delivered by the Electoral Census Office of each process to send the electoral propaganda, in which it has previously had to eliminate, where appropriate, the domicile of the person who has carried out in any of the foreseen ways, within the established term, established, and with the expected effects, the opposition to its inclusion in the census that is delivery to the formations for this purpose.

Needless to say, therefore, it is evident that in the census that was delivered to the representatives of the candidacies did leave their personal data for the sending election propaganda. We insist, in any case, it would also be opportune to require submit to this Electoral Census Office the due verification of the inclusion of the data personal data of the plaintiff's address in the electoral census that was sent to this political formation for the elections of April 28, 2019.

“I REQUEST THE SPANISH DATA PROTECTION AGENCY that, taking this document as presented, please admit it, and by virtue thereof, as evacuated the processing of allegations within the conferred period and of evidence provided and requested, in consequence, after the appropriate processing, adopt the following agreement:

- Proceed to the file or termination of the sanctioning file initiated without sanction. no tion whatsoever, in consideration of the alleged. (...).”

In view of everything that has been done, by the Spanish Protection Agency of Data in this procedure the following are considered proven facts,

FACTS

First. On 04/16/19, this Agency received a letter from the complainant by me- of which he states "having communicated in 2017 to this organization my cancellation and opposition to the use of personal data... last day 03/20/19 I return

to request that I not be included as a recipient of any communication, nor that they be use my data for any campaign. Auer 04/15/19 I receive at my home another communication (...)”-folio nº 1--.

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Second. It is identified as the main data controller

the political party PSOE (according to its acronym).

Third. It is accredited that the complainant exercised his right on the date

03/20/2019 19:52:17 (Peninsular time) before the Electoral Census Office (INE)

providing documentary evidence to that effect (Doc. No. 1).

“Examined your request for exclusion from the copies of the electoral roll that is

delivered to the representatives of the candidacies to make postal shipments of

electoral propaganda, you are informed that it has been estimated and will take effect

permanent as long as it does not manifest itself in the opposite direction”.

FOURTH: The complainant provides a copy of the email exercising the right to the address

cancellation-lopd@psoe.es specifying the request as follows:

“I request you to cancel ALL my personal, contact and identification data.

tive, among other infinite reasons for not keeping the slightest link with

your organization (...)” dated 05/19/15.

FIFTH: Documentary evidence is provided of the envelope with electoral propaganda of the

PSOE political information to the address ***ADDRESS.1

FOUNDATIONS OF LAW

Yo

By virtue of the powers that article 58.2 of the RGPD recognizes to each authority, and according to the provisions of articles 47 and 48 of the LOPDGDD, the Director of the Spanish Agency for Data Protection is competent to initiate and to solve this procedure.

II

In the present case, the claim dated 04/16/19 is examined by me, of which he states "having communicated in 2017 to this organization my cancellation and opposition to the use of personal data... last day 03/20/19 I return to request that I not be included as a recipient of any communication, nor that they be use my data for any campaign. Auer 04/15/19 I receive at my home another communication (...)”-folio nº 1--.

So that the facts are specified in the reception by the complainant of political propaganda of the PSOE formation without just cause, despite having exercised right of opposition to it.

The legal tool that allows citizens to request the right of exclusion that concerns us is found in the recent Organic Law 3/2018, of December 5, Protection of Personal Data and guarantee of digital rights (hereinafter

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LOPDGDD), which introduced in its third final provision two modifications to the Law Organic 5/1985, of June 19, of the General Electoral Regime (hereinafter LOREG). Paragraph 5 of this article 58 bis guarantees that "the recipient is provided with a way simple and free exercise of the right to oppose this sending of propaganda

electoral".

Article 39.3 LOREG (LO 5/1985, of June 19, of the General Electoral Regime)

provides the following:

"Within the above term, any person may file a claim directed given to the Provincial Delegation of the Electoral Census Office about their census data. them, although only those that refer to the rectification of errors in personal data, changes of address within the same circle, enrollment or non-inclusion of the claimant in any Census Tract of the district. conscription despite having the right to it. Requests for voters who oppose their inclusion in the copies of the electoral census that are facilitate the representatives of the candidacies to make postal shipments of pro-election pay. They will not be taken into account for the called election those that reflect a change of residence from one constituency to another, carried out after on the closing date of the census for each election, having to exercise their right in the section corresponding to your previous address.

In the RGPD (as well as in the LOPDGDD) the right of in-interested in objecting -at any time- for reasons related to their situation particular tion, to the fact that the personal data that concerns him or her are subject to treatment based on the provisions of article 6, section 1, letters e) or f) of the RGPD, in-including profiling on the basis of those provisions.

For its part, the LOPDGDD in its article 18 regulates the right of opposition in the following following terms:

"The right of opposition, as well as the rights related to the decisions automated individual operations, including profiling, will be exercised in accordance with the provisions, respectively, of Articles 21 and 22 of the Regulation (EU) 2016/679".

Article 21 GDPR REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of April 27, 2016 provides the following: "The interested party shall have right to object at any time, for reasons related to your situation particular, to personal data concerning him being subject to treatment under based on the provisions of article 6, paragraph 1, letters e) or f), including the preparation profiling on the basis of those provisions.

The data controller will stop processing the personal data, unless it accredits compelling legitimate reasons for the treatment that prevail over the interests ses, the rights and freedoms of the interested party, or for the formulation, exercise or claim defense".

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Agreement 2/2019, of January 23, 2019, of the Central Electoral Board establishes the following about this opposition:

<<1st) In order to facilitate the processing of voters' requests who oppose their inclusion in the copies of the electoral roll that the Office of the Electoral Census must deliver to the representatives of the candidacies to carry out mailings of electoral propaganda, such requests may be made in advance to the call for an electoral process, in Town Halls, Consulates and Delegations Provincial Electoral Census. Likewise, they may be carried out at the electronic office. nica of the National Institute of Statistics, once the Electoral Census Office have enabled this process.

2º) The aforementioned exclusion requests will have permanent effect until

the voter manifests itself in the opposite direction.

3º) The Electoral Census Office will inform the voters of the requested exclusion.

cited.

4º) This exclusion must be compatible with the representatives of candidacies can have the complete list of voters for the purposes of voting and scrutiny, with the essential data for the identification of the voter.>>

In the present case, the complainant exercised his right according to documentary evidence provided by the same on 03/20/2019.

As the exercised right has been proven, it was not done within the term marked in the LOREG, that is, until 03/18/19 inclusive, reason that originated the reception of electoral propaganda from the PSOE political party at his domicile tual.

This is not an obstacle, so that the exercised right - refusal to receive our new goes political propaganda—unfold its effects in the following political campaigns, as long as the affected party “does not state otherwise”.

The lists of the Electoral Census were sent to the political formations, with the personal data updated to the closing date of the same, without stating the opposition exercised by the complainant, having made it outside the stated period marked by the regulations in force.

So that only if in the next elections he receives propaganda from the for-indicated political information, you may file a complaint with this Agency for violation of the right to oppose the processing of your personal data, without prejudice of the protection of their right through the remaining legal channels established for this purpose.

III

In relation to the email provided as documentary evidence (Doc. No. 1) dated

05/19/15 it should be noted that the mail is not a valid means to prove the cancellation request-
given, since it is not a reliable means that allows accrediting the receipt by the complaint-
do, this being the criterion maintained by this body on the date it was exercised
(year 2015).

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The art. 32 RLOPD (RD 1720/2007 in force at that time) provides the following:

following: "The rectification request must indicate what data it refers to and the correctness.

tion to be carried out and must be accompanied by supporting documentation

than requested.

In the cancellation request, the interested party must indicate what data they refer to.

re, providing the documentation that justifies it, where appropriate.

Therefore, the right should have been carried out legally, accompanying the

documentation required according to the legislation in force at that time, which

was not made by the complainant.

IV

Article 25 of Law 40/2015 (October 1) provides the following:

"They can only be sanctioned for acts constituting an administrative infraction.

natural and legal persons, as well as, when a Law recognizes them capable

capacity to act, affected groups, unions and entities without legal personality.

dica and the independent or autonomous estates, which are responsible for the

themselves by way of fraud or negligence".

This principle of culpability also governs administrative infractions.

tive, because to the extent that the sanction of said infraction is one of the festivities of the ius puniendi of the State is inadmissible in our legal system a regime of strict liability or without fault (STC 76/1990 -EDJ 1990/4435-)...".

Moreover, this same ruling requires guilt in the case of administrative infractions.

committed by legal persons, stating that "... Even this Court has quali-

"correct" the principle of personal responsibility for own actions -

principle of the personality of the penalty or sanction- (STC 219/1988 -EDJ 1988/535-).

The jurisprudence of the Supreme Court, in line with that of the Constitutional Court, has

established that the sanctioning power of the Administration, as manifestations

establishment of the "ius puniendi" of the State, is governed by the principles of criminal law, meaning

basic structural principle of guilt, incompatible with a regime of res-

objective responsibility, without fault.

Thus, the SSTs of 12 (rec. 388/1994) and May 19, 1998, Sixth Section, affirm

that in the sanctioning sphere «any attempt to construct a response is prohibited

objective reliability" and that "in the field of administrative responsibility it is not enough

that the conduct is unlawful and typical, but it is also necessary that it be

guilty, that is, as a result of an action or omission attributable to its author by ma-

mischievous or recklessness, negligence or inexcusable ignorance (...) that is, as a requirement

derived from article 25.1 of the Constitution, no one can be convicted or sanctioned

do but for facts that can be imputed to him by way of fraud or guilt (principle of

culpability)".

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In accordance with the foregoing, it should be noted that the complainant exercised his right to Non-receipt of political propaganda from the aforementioned formation, outside the established period in the specific legislation regulating the matter, without appreciating the element subjective of guilt, having proceeded the political formation denounced through tra- collect the data of the same, as they were sent by the Office of the Census elect- ral.

So it is appropriate to order the File of this procedure by not

The violation of the right asserted by the complainant must be proven.

Therefore, based on the foregoing,

By the Director of the Spanish Data Protection Agency,

Therefore, in accordance with the applicable legislation and based on the analysis of the exposed facts,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: ORDER the FILE of this procedure, since it is not accredited all the commission of any administrative infraction.

SECOND: NOTIFY this resolution to the entity denounced PARTY

SPANISH WORKER SOCIALIST and REPORT the result of the actions to the complainant Mr. A.A.A.

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 LPA-

CAP, the interested parties may optionally file an appeal for reconsideration before

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

counting from the day following the notification of this resolution or directly

contentious-administrative case before the Contentious-administrative Chamber of the Au-
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 Jurisdiction
Contentious-administrative diction, within a period of two months from the day following
Following the notification of this act, as provided in article 46.1 of the aforementioned
Law.

Sea Spain Marti

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