

□ Procedure No.: PS/00274/2019

RESOLUTION OF PUNISHMENT PROCEDURE

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

based on the following

BACKGROUND

FIRST: Ms. A.A.A. (hereinafter, the claimant) on 04/04/2019 filed

claim before the Spanish Data Protection Agency. The claim is

directs against INDEPENDENT TRADE UNION CENTRAL AND OFFICIALS CSI-

CSIF, with NIF G79514378 (hereinafter, the claimed). The reasons on which the

claim are, in summary, the following:

The CSIF union delegate has published in an open WhatsApp group in which

almost all the workers of the Central Unit of Radiodiagnosis of

the Community of Madrid, a list of the electoral census that was for exclusive advertising

for the unions and in said list there are data such as the DNI of all the voters

that form the statutory staff.

SECOND: Upon receipt of the claim, the Subdirector General for

Data Inspection proceeded to carry out the following actions:

On 05/07/2019, the claim submitted was transferred to the defendant for analysis

and communication to the complainant of the decision adopted in this regard. Likewise, it

required him to send to the determined Agency within a period of one month

information:

- Copy of the communications, of the adopted decision that has been sent to the

claimant regarding the transfer of this claim, and proof that

the claimant has received communication of that decision.

- Report on the causes that have motivated the incidence that has originated the

claim.

- Report on the measures adopted to prevent the occurrence of similar incidents.

- Any other that you consider relevant.

On the same date, the claimants were informed of the receipt of their claims and their transfer to the claimed entity.

On 05/24/2019, the DPD of the CSIF sent a letter in which it stated that based on the provisions of articles 14 and 18 of RD 1846/1994, which approves the Regulation of elections of the personnel at the service of the Public Administrations, and since the aforementioned census data are accessible by all the personnel of the Central Unit of Radiodiagnosis of the Community of Madrid through its

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intranet, the claim is dismissed because the incident caused is covered in the current legislation.

THIRD: On 06/17/2019, in accordance with article 65 of the LOPDGDD, the Director of the Spanish Agency for Data Protection agreed to admit for processing the claim filed by the claimant against the respondent.

FOURTH: On 11/22/2019, the Director of the Spanish Protection Agency of Data agreed to initiate a sanctioning procedure against the defendant, for the alleged infringement of article 5.1.f) of the RGPD, sanctioned in accordance with the provisions of the article 58.2.a) of the aforementioned RGPD.

FIFTH: Notification of the aforementioned start-up agreement, in writing dated 12/05/2019, the claimant

presented a pleadings brief in which, in summary, it stated the following: that considered that there is legal protection for the publication of the data and in the form carried out and that the argument that the list of the electoral census is publicity exclusive to unions is inaccurate; that the communication was made by whatsapp within the framework of a process of union elections protected by article 28 of the Constitution, at the request of several members of the whatsapp group who had difficulties in accessing the intranet where the data of the census and that each and every one of the members of the group in which the census consented voluntarily including complainant who are both members of said census and that the real reason for the claim is inserted in a election period since the claimant belongs to a union other than CSIF that ran with the elections.

SIXTH: On 02/12/2020, the opening of a practice period of tests, remembering the following:

Consider reproduced for evidentiary purposes the claim filed by the claimant and his documentation, the documents obtained and generated by the Inspection services that are part of the file.

Consider reproduced for evidentiary purposes, the allegations to the initial agreement presented by the claimed party and the documentation that accompanies them.

Ask the claimant for a copy of the documentation in their possession related to the sanctioning procedure that for any reason had not been provided at the time of the complaint or any other statement in relation with the reported facts.

SEVENTH: On 07/08/2020, the claimant submitted a brief of allegations in which pointed out, in summary, the following: that the proposal omits the due weighting between the right to freedom of association and the right to data protection in matters

that affects both rights; the concurrence of public interest and legitimate interest in the treatment of the data since the information provided was of public relevance or of general interest to workers; that there has been no lack of diligence in the performance of the union delegate; that the members of the whatsapp group in the that the census was communicated, they voluntarily agreed to it, including the complainant, and they are members of that same census; that the one that the scope of communication of the personal data that is reported is inferior to the other means of publication of the electoral census; that the union is concerned with adequate data protection of citizens and for that reason signed a contract with the cabinet

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legal ***GABINETE.1, a company specialized in the protection of data, which implemented in it the necessary channels for the fulfillment of the provided in the LOPD, appointment of Data Protection Delegate, etc., which The complainant eluded the complaint channels and other means that CSIF offers; the record of proceedings.

EIGHTH: Of the actions carried out, the following have been accredited,

PROVEN FACTS

FIRST. On 04/04/2019 it has a written entry in the AEPD indicating that the CSIF union delegate had published in an open WhatsApp group in which almost all the workers of the Central Unit of Radiodiagnosis of the Community of Madrid, a list of the electoral census of exclusive advertising for the unions, including data such as the DNI of all the voters that make up the

statutory staff; than the census that is published on the boards and to which they have access workers do not include the DNI.

SECOND. A copy of the whatsapp application has been provided in which the list of the electoral census, appearing next to the names and surnames, the DNI number.

THIRD. The respondent in writing dated 05/24/2019 has stated that: "there is legal protection for the publication of the data and in the way in which it has been carried out, more so when neither of the two precepts mentioned differentiates between census for publish on the boards, and census to communicate to the unions, or what is the same that in the census that is published on the boards the same data does not come as in the census that are communicated to the unions. At the same time that it enables making it public between the functionaries".

FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of the RGPD recognizes to each control 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

The claimed facts are specified in the publication through a group open whatsapp that contains the majority of the Unit's workers Central Radiodiagnosis of the Community of Madrid, from the census list electoral in which the data of the DNI number of those appears.

Such treatment could constitute an infringement of article 5, Principles related to the treatment, of the RGPD that establishes that:

"1. The personal data will be:

(...)

f) treated in such a way as to ensure adequate security of the personal data, including protection against unauthorized or unlawful processing and

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against its loss, destruction or accidental damage, through the application of measures appropriate technical or organizational ("integrity and confidentiality").

(...)"

Article 5, Duty of confidentiality, of the new Organic Law 3/2018, of 5 December, Protection of Personal Data and guarantee of digital rights (hereinafter LOPDGDD), states that:

"1. Those responsible and in charge of data processing as well as all people who intervene in any phase of this will be subject to the duty of confidentiality referred to in article 5.1.f) of Regulation (EU) 2016/679.

2. The general obligation indicated in the previous section will be complementary of the duties of professional secrecy in accordance with its applicable regulations.

3. The obligations established in the previous sections will remain even when the relationship of the obligor with the person in charge or person in charge had ended of the treatment".

III

The documentation in the file shows that the defendant violated article 5 of the RGPD, principles related to the treatment, in relation to the Article 5 of the LOPDGDD, duty of confidentiality, in relation to the incidence produced: sending to an open whatsapp group of the electoral census list

including the voter ID number data.

This duty of confidentiality must be understood to have the purpose of avoiding that leaks of the data are carried out without the consent of the holders of the same.

Therefore, this duty of confidentiality is an obligation that falls not only to the person in charge and in charge of the treatment but to everyone who intervenes in any phase of the treatment and complementary to the duty of professional secrecy.

In the case examined, the processing of personal data that the delegate CSIF union carried out through the publication, through an open group in the whatsapp social network aimed at the majority of the Unit's workers Central Radiodiagnosis of the Community of Madrid, from the census list electoral in which it appeared in addition to the name and surnames, the data of the DNI number of the voters would be lawful as long as the premises of article 6.1 of the RGPD are met.

In light of what is indicated in the aforementioned article, only personal data may be processed.

when they have the consent of the persons in question, in the exercise of a contractual obligation, to comply with a legal obligation, when the treatment is necessary for the fulfillment of a mission carried out in the public interest, to protect the vital interests of the data subject or to satisfy the legitimate interests of Her organization.

In short, the processing of the claimant's personal data carried out out would only be lawful as long as any of the premises of the aforementioned article 6.1 of the RGPD.

Thus, there would be no legal basis to legitimize the processing of personal data of the claimant for the purpose pursued based on the consent, which in the

This case does not occur since the claimant opposes it.

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There will also be no legal protection for the publication of the data in the form in that has been made, through an open whatsapp group.

The Workers' Statute in its article 74, Functions of the Board, indicates that "In the case of elections to members of the works council, constituted the The electoral table will request the employer the labor census and will draw up, with the means that will be provided by this, the list of voters. This will be made public in bulletin boards through their exposure for a time not less than seventy-seven two hours".

On the other hand, article 6.2 of Royal Decree 1844/1994, of September 9, which approves the Regulations for elections to Representative Bodies of Workers in the Company provides that: "In the elections for Delegates of Staff and members of the Company Committee, communicated to the company the purpose to hold elections for its promoters, it, within seven days, will give transfer of said communication to the workers who must constitute the table and in the same term will send to the components of the electoral table the labor census, indicating the workers who meet the age and seniority requirements, in the terms of article 69.2 of the Workers' Statute, necessary to hold the condition of voters and eligible.

The electoral table will make public, among the workers, the labor census with indication of who are voters and eligible in accordance with article 69.2 of the Workers' Statute, which will be considered for voting purposes as a list of voters.

In the case of elections for Company Committees, the list of voters and

eligible will be made public on bulletin boards for a period of time not less than seventy-two hours

Also the Regulation of elections of the personnel to the service of the Public Administrations approved by Royal Decree 1846/1994, of 9 September in its article 14, Electoral Census, establishes:

"1. The Administration will send the officials who must constitute the table electoral coordinator or, where appropriate, to the single electoral table the census of officials adjusted to the normalized model, within twelve business days from the reception of the letter of promotion of elections.

In the aforementioned census, the name, two surnames, sex, date of birth, national identity document and seniority recognized in the public function, of all officials of the electoral unit.

2. The coordinating electoral table will draw up the list of voters, in accordance with article 16 of Law 9/1987, with the means that will facilitate the Management.

In the event of elections to Personnel Boards, the list will be made public in the bulletin boards through their exposure for a time not less than seventy-seven two hours.

Once the claims to the provisional list have been received, submitted until twenty-four hours after the expiry of the period of exposure mentioned in the previous section, the coordinating electoral table will resolve them and publish the list final number of voters within twenty-four hours following the end of the procedure described above. In the same period, it will determine the number of

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representatives to be elected in the electoral unit, in accordance with

Articles 5 and 8 of Law 9/1987.

(...)

And in its article 18 "Elections to Personnel Delegates", it states that:

"1. In the case of elections to Personnel Delegates, the managing body

personnel, within the same period of article 7 of this Regulation, will send to the

components of the electoral table census of officials, which will be adjusted, to these

effects, to normalized model.

2. The electoral table will fulfill the following functions:

a) Will make the census public among officials indicating who they are

voters.

b) Will set the number of representatives and the deadline for the presentation of

applications.

(...)"

In view of the transcribed precepts there is no legal basis for publication

of the data in the form in which it has been made, names and surnames together with the number of

DNI, through an open whatsapp group in which the majority of

the workers of the Central Unit of Radiodiagnosis of the Community of

Madrid.

Who has the responsibility to publish the census data is the Table

Electoral and the aforementioned publication must be made on the bulletin board so that

can be endorsed by the voters in order to rectify possible errors.

And this publication on the board does not violate the legislation on the protection

of personal data. Finally, it must be said that the GDPR does not

express mention of this particular particular, therefore, does not modify the legislation

had to date.

The respondent considers that the basis that legitimizes the treatment of the data of the

claimant is in the legitimate interest, that is, that the treatment of the

personal data made through the publication on the social network whatsapp

sought to satisfy the exercise of the right to freedom of association.

However, this requires that the interests pursued do not prevail over those

interests or the fundamental rights and freedoms of the interested party that require the

protection of personal data, that is, it requires weighing the interests at stake

to conclude whether or not the right to freedom of association should prevail over the right

of the claimant to his privacy.

Regarding legitimate interest as a legal basis for data processing

of third parties, Recital 47 of the RGPD says:

<<The legitimate interest of a data controller, including that of a

responsible to which personal data may be communicated, or of a third party, may

constitute a legal basis for the treatment, provided that the

interests or the rights and freedoms of the interested party, taking into account the

reasonable expectations of data subjects based on their relationship with the

responsible. Such legitimate interest could occur, for example, when there is a relationship

relevant and appropriate relationship between the data subject and the controller, such as in situations where

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which the interested party is a client or is at the service of the person in charge. In any case,

the existence of a legitimate interest would require careful assessment, even if a data subject can reasonably foresee, at the time and in the context of the collection of personal data, which may be processed for this purpose. In particular, the interests and fundamental rights of the data subject could prevail over the interests of the data controller when proceeding to the processing of personal data in circumstances in which the interested party does not reasonably expect further treatment to take place. Since it corresponds to the legislator to establish by law the legal basis for the processing of personal data by public authorities, this legal basis should not apply to treatment carried out by public authorities in the exercise of their functions. The processing of personal data strictly necessary for the prevention of fraud also constitutes a legitimate interest of the data controller. that it is Processing of personal data for direct marketing purposes can be considered carried out for legitimate interest.>>

In accordance with the facts at hand, it must be concluded that the treatment carried out by the CSIF union delegate, through the publication in a whatsapp group containing the majority of the Unit's workers

Central Radiodiagnosis of the Community of Madrid, I provide information that does not was pertinent for the purposes of exercising the aforementioned freedom of association, quite the opposite since the data provided, census list that included the personal data of the DNI, must be classified as excessive.

The processing of data concerning the workers included in the list of the census released is not lawful because it did not find protection in the article 6.1.f) of the RGPD.

In consideration of the foregoing, taking into account that the union delegate of the CSIF illicitly processed certain personal data that were unrelated to the interests

trade unions at stake revealing the ID number of the people who are members of the whatsapp group, it is concluded that the claimed party is responsible for an infraction of the article 5.1.f), in relation to article 6.1 of the RGPD.

The violation of article 5.1.f) of the RGPD is typified in article 83.5.a) of the GDPR. The LOPDGDD, for prescription purposes, in its article 72.1.a) qualifies this very serious offense.

IV

The respondent has argued that the weighting between the exercise of the right to freedom of association and the right to data protection personal, and freedom of association must prevail in the event that the union has acted in legitimate exercise of his right to freedom of association in the aspect of his right to report on matters of interest to workers.

With regard to the right to freedom of association, it should be noted that the Trade union organizations have recognized a series of competencies for the exercise of their trade union functions of representation and that are protected by the right to freedom of association recognized in article 28.1 of the Constitution, developed through Organic Law 11/1985, of August 2, on Trade Union Freedom.

Union activity includes the right to promote elections and present candidatures for the election of works councils and personnel delegates, which it implies the realization of an electoral campaign and the publication of an electoral census.

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Well, in the present case and as evidenced by the proven facts and

points out in previous foundations the incidence produced refers to the publication to through an open whatsapp group of the electoral census list in which it appears the DNI number data.

The freedom of association law recognizes in its article 8.1.c) the right to receive the information sent by your union and in the same article, section 2.a) recognizes the right that in order to facilitate the dissemination of those notices that may be of interest to union members and workers in general, the

The company will put at your disposal a bulletin board that must be placed in the work center and in a place where adequate access to it is guaranteed for employees. workers.

In the case we are examining, the right to freedom of association materialized in the information provided through the social network is fully satisfied without the need to go to said media, so nothing bears the right to freedom of association.

It is essential to take into consideration that no obligation had the union to make public the electoral census with the inclusion of personal data of the workers and this because the regulation of union elections is nothing imposes in this regard as stated above.

Based on the foregoing, it must be concluded that the action of the appellant Union has notably exceeded the limits in which its action was protected for the legitimate performance of their freedom of association and for having omitted publicity carried out through the social network would not have entailed any kind of impairment in relation to the exercise of freedom of association and, on the contrary, would have safeguarded the right of the claimant in relation to personal data as relevant as the DNI.

v

Article 83.5 a) of the RGPD, considers that the infringement of “the principles

basic for the treatment, including the conditions for the consent in accordance with of articles 5, 6, 7 and 9” is punishable, in accordance with section 5 of the mentioned article 83 of the aforementioned GDPR, “with administrative fines of €20,000,000 maximum or, in the case of a company, an amount equivalent to 4% as maximum of the overall annual total turnover of the previous financial year, opting for the highest amount.

And the LOPDGDD in its article 72 indicates for prescription purposes: "Infringements considered very serious:

1. Based on the provisions of article 83.5 of the Regulation (EU)

2016/679 are considered very serious and the infractions that suppose a substantial violation of the articles mentioned in that and, in particularly the following:

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

(...)”

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In order to establish the administrative fine to be imposed, observe the provisions contained in articles 83.1 and 83.2 of the RGPD, which point out:

"1. Each control authority will guarantee that the imposition of fines administrative actions under this article for violations of this

Regulation indicated in sections 4, 5 and 6 are in each individual case

effective, proportionate and dissuasive.

2. Administrative fines will be imposed, depending on the circumstances

of each individual case, in addition to or as a substitute for the measures contemplated

in article 58, paragraph 2, letters a) to h) and j). When deciding to impose a fine

administration and its amount in each individual case will be duly taken into account:

a) the nature, seriousness and duration of the offence, taking into account the

nature, scope or purpose of the processing operation in question

as well as the number of stakeholders affected and the level of damage and

damages they have suffered;

b) intentionality or negligence in the infringement;

c) any measure taken by the controller or processor

to alleviate the damages suffered by the interested parties;

d) the degree of responsibility of the person in charge or of the person in charge of the

treatment, taking into account the technical or organizational measures that have

applied under articles 25 and 32;

e) any previous infraction committed by the person in charge or the person in charge of the

treatment;

f) the degree of cooperation with the supervisory authority in order to put

remedying the breach and mitigating the possible adverse effects of the breach;

g) the categories of personal data affected by the infringement;

h) the way in which the supervisory authority became aware of the infringement, in

particular if the person in charge or the person in charge notified the infringement and, in such case,

what extent;

i) when the measures indicated in article 58, paragraph 2, have been

previously ordered against the person in charge or the person in charge in question

in relation to the same matter, compliance with said measures;

j) adherence to codes of conduct under article 40 or mechanisms

certificates approved in accordance with article 42, and

k) any other aggravating or mitigating factor applicable to the circumstances of the

case, such as financial benefits realized or losses avoided, direct

or indirectly, through infringement.

In relation to letter k) of article 83.2 of the RGPD, the LOPDGDD, in its

Article 76, "Sanctions and corrective measures", establishes that:

"two. In accordance with the provisions of article 83.2.k) of the Regulation (EU)

2016/679 may also be taken into account:

a) The continuing nature of the offence.

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b) The link between the activity of the offender and the performance of treatments

of personal data.

c) The profits obtained as a result of committing the offence.

d) The possibility that the conduct of the affected party could have induced the

commission of the offence.

e) The existence of a merger by absorption process after the commission

of the infringement, which cannot be attributed to the absorbing entity.

f) Affectation of the rights of minors.

g) Have, when it is not mandatory, a delegate for the protection of

data.

h) The submission by the person in charge or person in charge, with voluntary, to alternative conflict resolution mechanisms, in those assumptions in which there are controversies between those and any interested."

In accordance with the transcribed precepts, and without prejudice to what results from the instruction of the procedure, in order to set the amount of the sanction of fine to impose in the present case for the infringement typified in article 83.5.a) of the RGPD for which CSI-CESIF is responsible, in an initial assessment, it is estimated concurrent the following factors:

The merely local scope of the treatment carried out by the entity claimed.

The number of treatment and people affected by the offending conduct, all of them members of the Central Unit of Radiodiagnosis of the Community of Madrid.

There is no evidence that the respondent entity has adopted measures to prevent the produce similar incidents.

There is no evidence that the defendant had acted maliciously, although the performance reveals a lack of diligence.

The link between the activity of the offender and the performance of treatment of Personal data.

The entity claimed is not considered a large company, although represents a large number of affiliates among the workers and employees of the country.

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 THE INDEPENDENT TRADE UNION CENTRAL AND

CSI-CSIF OFFICIALS, with NIF G79514378, for an infraction of article

5.1.f) of the RGD, typified in article 83.5.a) of the RGD, and considered for the purposes of prescription as very serious in article 72.1.a) of the LOPDGD, a sanction of €3,000 (three thousand euros).

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SECOND: NOTIFY this resolution to CENTRAL SINDICAL

INDEPENDENT AND OFFICIALS CSI-CSIF, with NIF G79514378.

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

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 Department of Data Protection in the banking entity CAIXABANK, S.A.. In case

Otherwise, it will be collected in 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.

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