 Procedure No.: PS/00442/2019

RESOLUTION OF PUNISHMENT PROCEDURE

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

based on the following

BACKGROUND

FIRST: D.A.A.A. (hereinafter, the claimant) on 07/08/2019 filed

claim before the Spanish Data Protection Agency. The claim is

directs against POLYTECHNIC UNIVERSITY OF VALENCIA (UPV) with NIF

Q4618002B (hereinafter, UPV or the claimed one). The reasons on which the

claim are in summary: the claimant is a doctoral student of the aforementioned

University whose thesis director is D. B.B.B. (hereinafter XX) and research

carried out is linked to a project directed by D. C.C.C. (hereinafter YY),

also professor of the same; for the development of the thesis signed with the UPV two

research contracts; that XX confiscated the CPU that he had been using, without prior

notice, in his absence and having it in his possession until an undetermined date; that in the

computer was, in addition to the work of the Doctoral Thesis, a folder

OneDrive linked to your Microsoft email account where you saved

personal data (bank account number, TFM, etc), having proceeded to the

cloning of the CPU hard disk, according to an email sent by YY,

extracting all the information from the computer; that at no time signed any

protocol for the use of ICTs, which as a consequence of these facts has opened

a proceeding in the Investigating Court No. ***NUMBER of ***LOCATION.1,

in which both XX and YY have provided the contracts with their personal data

signed by the claimant and UPV, so that at no time do the aforementioned

Teachers should have those contracts since they are not the employers.

The claimant provides:

Copy of your ID

Complaint before the General Directorate of the Police, dependency of Valencia-

Exposition.

Extension of the previous complaint.

Statements before the Court of Instruction No.

***Number of

***LOCATION.1 of YY and XX.

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

Data Inspection proceeded to carry out the following actions:



On 11/08/2018, the claim presented was transferred to the entity for its analysis and

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

required so that within a month it would send to the Agency determined

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 claimant was informed of the receipt of the claim and

its transfer to the claimed entity.

On 11/06/2018 UPV sent a letter stating that on the matter to which

reference, Preliminary Proceedings 787/2017 are being instructed before the Court of

Instruction nº ***NUMBER of ***LOCATION.1, so it is understood that this phase

administrative must be suspended as long as the completion of the

criminal procedure since they understand that the object of the criminal complaint and the

claim presented in this Agency is the same sharing both the same

cause. The letter ends by stating that if the Agency considers that it is not obliged to

the suspension of the administrative procedure, the extremes

interested in that university.

THIRD: On 03/06/2019, 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 12/03/2019, the Director of the Spanish Protection Agency

of Data agreed to initiate a sanctioning procedure against the person claimed for the alleged

infringement of article 5.1.f) of the RGPD, typified in article 83.5.a) of the aforementioned

Regulation.

FIFTH: Having been notified of the aforementioned initiation agreement, the respondent submitted a written

allegations on 12/30/2019 stating, in summary: that the contribution of the

contracts entered into by the claimant and UPV by XX and YY are covered

for the fundamental right of defense and effective judicial protection, for which

consider lawful the processing of the personal data of the claimant carried out

and therefore, it is not considered that the duty of confidentiality to which

referenced in the startup agreement.

SIXTH: On 02/04/2020, the instructor of the procedure agreed to open

a period of practical tests, agreeing on the following:



- Consider reproduced for evidentiary purposes the claims filed by

the claimants and their 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 agreement of

start presented by UPV and the accompanying documentation.

- 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 manifestation

in relation to the reported facts.

On 02/11/2020, the claimant responded to the required evidence, whose

content work in the file.

SEVENTH: On 06/02/2020, a Resolution Proposal was issued in the sense of

that the Director of the Spanish Data Protection Agency sanctioned

UPV, for an infringement of article 5.1.f) of the RGPD, typified in article 83.5.a) of the

RGPD, with a warning in accordance with article 77.2 of the LOPDGDD.

The representation of UPV, in a letter dated 06/18/2020, submitted a letter

showing their disagreement with the facts considered proven and that it be officiated

to the Jury of Valencia to report on the status of the proceedings carried out

out or request the information to the claimant; which considers that in accordance

with article 6.f) of the RGPD, the processing of the claimant's data has been lawful

because it has been necessary for the satisfaction of legitimate interests

pursued by third parties; that teachers cannot be considered as

third parties unrelated to any employment/professional/research relationship because the

claimant was a doctoral student being his thesis director XX and the

collaborator with the project directed by YY, and these cannot be separated from the

contracts signed between the university and the claimant as their relationship is pertinent and

adequate.

EIGHTH: Of the actions carried out in this proceeding, they have been

accredited the following

PROVEN FACTS



FIRST. On 01/25/2019 there is an entry in the AEPD written by the claimant

manifesting is a doctoral student at the aforementioned University whose director of

thesis XX and the research carried out linked to a project directed by YY; for him

development of the thesis signed two research contracts with the UPV; that XX you

confiscated the CPU it had been using, without prior notice; that on the computer

found, in addition to the work of the Doctoral Thesis, a OneDrive folder linked

to your Microsoft email account where you stored personal data

having proceeded to the cloning of the hard disk of the CPU, extracting all the

team information; that as a consequence of these facts has opened a

proceeding in the Investigating Court No. ***NUMBER of ***LOCATION.1, in

which both XX and YY have provided the contracts with their personal data

signed by the claimant and UPV.

SECOND. There is a copy of the claimant's DNI nº ***NIF.1

THIRD. There is a complaint dated 04/28/2017 filed by the claimant before the

National Police, in the offices of ***LOCATION.1-Exhibition-office of

complaints, as well as the extension of the same dated 05/05/2017, made in the

same dependencies and in relation to the facts claimed in the first point.

FOURTH. Copies of the employment contracts entered into between the

claimant and UPV: Predoctoral Contract (predoctoral research staff in

training), from 02/01/2016 and 09/20/2016.

FIFTH. It consists provided by the claimant of an expert report on evidence in

cloned hard drives

SIXTH. In preliminary proceedings 000787/2017 before the Court of Instruction No.

***NUMBER of ***LOCATION.1, on 06/06/2017 XX as YY contribute documentary

consisting of two predoctoral contracts dated 02/01/2016 and 09/20/2016

arranged between the claimant and UPV.

SEVENTH. UPV in writing of 12/23/2019 has stated that “In the same way

This University understands that the duty of confidentiality to which

refers to the BASIS OF LAW II of the Agreement to initiate the

sanctioning procedure, by providing third parties with the data of Mr. A.A.A.

included in the contracts concluded between the same and the UPV and which were provided

to criminal proceedings as has already been alleged.”

FOUNDATIONS OF LAW

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.

Yo

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

II

5/12

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 processing or

against its loss, destruction or accidental damage, through the application

of appropriate technical or organizational measures ("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".



In the present case, it should be noted that teachers cannot be

considered as third parties outside the university institution; are and are part of

the same contributing to reinforce the research activity configuring a model

that the University is obliged to lead.

III

Therefore, the determination of whether the treatment made by the respondent, UPV, of

the personal data of the claimant, providing the contracts

celebrated with the same to professors XX and YY and where their data is recorded to be

provided as evidence in court, is or is not adjusted to law, it must be reiterated that the

professors, cannot be considered as third parties outside the university, but

as part of the institution in which they teach their work, linked to it

nor can they be separated from the employment contracts signed between the UPV

and the claimant since the relationship between them is necessary - the claimant was

doctoral student, being his XX thesis director and collaborator with a project

directed by YY to carry out the proposed purposes.

In this sense, article 24 of the Spanish Constitution, in its sections 1

and 2, provides the following:

"1. All persons have the right to obtain effective protection from judges

and courts in the exercise of their rights and legitimate interests, without in any

case, helplessness may occur.

2. Likewise, everyone has the right to the ordinary Judge predetermined by law,

to the defense and the assistance of a lawyer, to be informed of the accusation made

against them, to a public process without undue delay and with all the guarantees, to

use the pertinent means of evidence for their defense, not to testify against themselves

themselves, not to confess guilt and the presumption of innocence."

Thus, the right of citizens to guardianship is constitutionally enshrined.

effective judicial process and the right to use the evidence they deem appropriate

to support your claim. However, from this forecast, a

collision between the right to the protection of personal data and the right to

the effective judicial protection of judges and courts referred to, given to legal goods

affected in your application.

Therefore, in such situations, the legislator has created a system in which the

right to the protection of personal data yields in those cases in which

that the legislator himself (constitutional or ordinary) has considered the existence of

reasoned and well-founded reasons that justify the need to treat the

data, incorporating said assumptions to standards of at least the same range as the

that regulates the protected matter.



Indeed, the enforceability of the consent of the owner of the data that

could be subject to treatment in a judicial proceeding, for said

processing of your data would mean leaving the storage of

information necessary for a person to be able to fully exercise their right

to effective judicial protection. Thus, the lack of these data or the dependence on their

application to whoever handled the ownership of the data would imply, logically, a decrease

in the possibility of contribution by the interested party of "the relevant means of proof

for their defense", violating another of the guarantees derived from the aforementioned right to

effective protection and limiting the possibility of obtaining the full development of

This right.

As the reiterated jurisprudence of the Constitutional Court maintains (for

all, STC 186/2000, of July 10, citing many others) "the right to

privacy is not absolute, as is none of the fundamental rights,

being able to yield to constitutionally relevant interests, provided that the cut

that he has to experience is revealed as necessary to achieve the legitimate aim

planned, proportionate to achieve it and, in any case, be respectful of the

essential content of the law.

Consequently, in the present case there has been a collision between the

right of the claimed to see satisfied the effective judicial protection, enshrined by the

article 24 of the Constitution, and of the claimant to the protection of their data from

personal character. Prevailing the right to effective judicial protection.

Also the AEPD in the Legal Report 0456/2015 indicated that:

"(…)

In the present case, the legitimate interest invoked seems to refer

especially the fundamental right to effective judicial protection (art. 24 CE), in the

insofar as the recorded images will only be used to obtain

tests in order to determine the responsibilities associated with the

production of an event, that is, obtaining photographs or recordings of images

"as evidence to report violations of traffic regulations."

The scope of the right to judicial protection in relation to evidence has been addressed, among others, in the STC 212/2013, of December 16, in which it is made reference, citing the STC 88/2014, of May 28 to "the intimate relations of the right to proof with other rights guaranteed in art. 24 CE.

Specifically, in our constitutional doctrine we have emphasized the connection of this specific constitutional right with the right to judicial protection effective (art. 24.1 CE), the scope of which includes questions relating to evidence (SSTC 89/1986, of July 1, FJ 2; 50/1988, of March 22, FJ 3; 110/1995, of March 4 July, FJ 4; 189/1996, of November 25, FJ 3; and 221/1998, of November 24, FJ 3), and with the right of defense (art. 24.2 CE), from which it is inseparable (SSTC 131/1995, of September 11, FJ 2; 1/1996, of January 15, FJ 2; and 26/2000, of 31 of January, FJ 2)'' (STC 19/2001, of January 29, FJ 4; and, in the same sense, STC 133/2003, of June 30, FJ 3)». In the reviewed SSTC 19/2001 and 133/2003 the Constitutional Court pointed out that "it has been precisely this inseparable connection (with the other fundamental rights mentioned, in particular the right to obtain effective judicial protection), which has made it possible to affirm that the content essential part of the right to use the pertinent means of proof is integrated by the power law that recognizes whoever intervenes as a litigant in a process of provoking the procedural activity necessary to achieve the conviction of the judicial body on the existence or non-existence of the relevant facts for the decision of the object conflict of the process (for all, STC 37/2000, of February 14, FJ 3)".

The relationship between the rights to personal data protection and guardianship

has also been analyzed in Report 469/2011 of December 30,

2011, in which the following is indicated:

“At this point, it must be remembered that this Agency has already had occasion to

analyze the possible concurrence in a certain case of data processing

of the fundamental rights to the protection of personal data and to the

effective judicial protection of the data controller. Thus, it has been considered

example that the treatment by a lawyer of the data of the opposing party of your

client finds its protection in the recognition of the latter by article 24.1 of

the Constitution of their right to effective judicial protection, which implies, according to the

section 2, the legal defense and the use of the relevant evidence for the

defense of his right. In this sense, the report of February 21, 2001

pointed out the following:

“In this case, as was said, the treatment by the lawyers and attorneys of

the data referring to the counterparty of its clients in litigation in which those

exercise the procedural application brings its cause, directly, from the right of all

citizens to legal assistance, enshrined in article 24.2 of the Text

Constitutional.



Indeed, the enforceability of the consent of the opponent for the treatment

of your data by the lawyer or solicitor would mean leaving the

storage of the necessary information so that your client can exercise, in

fullness, their right to effective judicial protection. Thus, the lack of these data may imply, logically, a decrease in the possibility of contribution by the interested party of "the means of evidence pertinent to his defense", violating another of the guarantees derived from the aforementioned right to effective protection and limiting the possibility to obtain the full development of this right.

For all these reasons, although no provision with the force of Law establishes expressly the possibility of treatment by lawyers and data attorneys referred to the opponent of his client within a certain judicial process, it is evident that said possibility brings direct cause of a norm of rank constitutional, regulatory as well as one of the fundamental rights and freedoms enshrined in the Constitution, and developed by the regulatory laws of each of the Jurisdictional Orders, in the precepts referred to the Representation and defense of the parties.

For all these reasons, there is, from our point of view, a legal authorization to the processing of the data, which is covered by article 24 of the Constitution and its implementing regulations."

Thus, we understand that there is a lawful treatment of the data of the claimant understanding that his particular situation allows the same, and this for several reasons: in the first place, because the data that it denounces has been violated, provided by the employer (UPV) to "any third party", but to the figures of Thesis Director of the claimant himself and Principal Investigator of the Project of the National Plan in which the claimant collaborated and these two professors are part of the university itself.

Because the respondent herself has indicated her interest in the work activity, teacher and researcher can achieve the proposed goals; in this sense, the treatment of the data, even without the express consent of the claimant, have had

a beneficial purpose for the same in other circumstances, since their data were

used for his assistance in 2017 to a Congress, in which Professor PA paid

registration fees to which the claimant was going to attend, requiring for this the

type of contract signed to be able to make the payment, or, the carrying out of procedures

carried out by the two professors to register the claimant in the Project

of the State Research Plan for which the aforementioned employment contract was required, if

well finally it was not possible to discharge him.

Although the claimant was not part of the project, in order to pay a

congress to someone external to the project, it was necessary to demonstrate that the claimant

he had a contract with the UPV, and so it was done, providing the contract.

The predoctoral contract was requested from the UPV and provided by it to the

professors with the sole purpose of paying the registration fee for a conference to which I was going

assist the claimant to complete a procedure of interest to the claimant

complainant, said Congress being prior to the complaint made.



Lastly, the claimant has also raised in his brief dated

09/02/2018 that one of the teachers on 04/26/2017 confiscated the CPU that

had been using, without prior notice, in his absence and without authorization from the

UPV, keeping it in its possession until an undetermined date; that in the same

found, in addition to the work of the Doctoral Thesis, a OneDrive folder linked

to your Microsoft email account, in which you stored personal data

(bank account number, TFM, etc) and that the disk was cloned

CPU hard drive, extracting all information from the computer and forcing two passwords

security (computer access and OneDrive access), so that it has been accessed

illicitly accessed the TFM computer file and the access restriction to the TFM has been violated.

same and that after the facts he denounced them on 04/28/2017.

In light of the facts stated, on the date on which the same occurred

the previous Organic Law 15/1999, of December 13, on Protection

of Personal Data (LOPD) and in accordance with the same the cloning of

CPD without the authorization of the complainant may be considered a violation of the

principle of consent established in article 6.1 of the previous LOPD,

infraction considered as serious and typified in article 44.3.b) of the same Law.

Therefore, the facts that constitute the factual assumption of the imputation

directed against the defendant were framed, at the time of their commission, in the type

sanction established in article 44.3.b) of the LOPD, a serious infraction for which the

Article 45.2 of the LOPD provided for a sanction with a fine of €40,001 to €300,000.

The LOPD, in its article 47.1, 2 and 3, stated that:

"1. Very serious infractions will prescribe after three years, serious ones after

2. The statute of limitations will begin to run from the day on which the

two years and mild ones a year.

offense had been committed.

3. The prescription shall be interrupted by initiation, with the knowledge of the interested party,

sanctioning procedure, resuming the statute of limitations if the file

sanctioning party is paralyzed for more than six months for reasons not

attributable to the alleged offender.

In general, it should be noted that serious offenses prescribe

effectively after two years, article 47.1 of the LOPD. The aforementioned limitation period

will begin to count from the day on which the infraction was committed (article

47.2 of the LOPD) and when the infraction consists of a commission that deploys its

effects for a more or less long period of time, depending on the time

elapses improperly processing data, the "dies a quo" is maintained until the

infringing activity ceases.

In the present case, there is no evidence that the imputed infringement was

constituting a continuing offence, that is, characterized in that the conduct

deserving of administrative reproach was maintained for a period of time

dragged on.



Therefore, given that the violation of the principle of consent is

considered a serious infringement, which, therefore, prescribes after two years, has

It was proven that it had prescribed on 12/07/2019, when the

opening of this sanctioning procedure, with the knowledge of the interested party.

Based on the foregoing, it must be concluded that on the date of adoption of the resolution of

initiation of this sanctioning procedure, with the knowledge of the claimant

the two years of prescription indicated for infractions had elapsed

serious, counting from the interruption of the offending conduct.

Therefore, in accordance with the applicable legislation,

The Director of the Spanish Data Protection Agency RESOLVES:

FIRST: FILE to the POLYTECHNIC UNIVERSITY OF VALENCIA (UPV), with

NIF Q4618002B, for the alleged infringement of article 5.1.f) of the RGPD, typified in the

article 83.5 of the RGPD.

SECOND: NOTIFY this resolution to UNIVERSIDAD POLITECNICA DE

VALENCIA (UPV), with NIF E

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-administrative appeal.

If this is the case, the interested party must formally communicate this fact by

writing addressed to the Spanish Agency for Data Protection, presenting it through

Electronic Register of the Agency [https://sedeagpd.gob.es/sede-electronica-

web/], or through any of the other registers provided for in art. 16.4 of the

aforementioned Law 39/2015, of October 1. You must also transfer to the Agency the

documentation proving the effective filing of the contentious appeal-

administrative. If the Agency was not aware of the filing of the appeal

contentious-administrative within a period of two months from the day following the

notification of this resolution would end the precautionary suspension.

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es



Sea Spain Marti

Director of the Spanish Data Protection Agency

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es