

□ Procedure No.: PS/00341/2019

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 May 27, 2019

filed a claim with the Spanish Data Protection Agency. The

claim is directed against the political formation Socialist Party of Catalonia

(PSC-PSOE) with CIF G08564379 (hereinafter, the claimed).

The reasons on which the claim is based are "Attached document of proof of ex-
inclusion of data in copies of the electoral census for delivery to political parties (date
03/06/2019).

On 05/17/2019 an envelope with my

name and address, with PSC party letterhead and inside there were two envelopes

of voting corresponding to the 2019 municipal elections, two ballots belonging to

related to the candidacy of the PSC party of the locality of Vandellòs i l'Hospitalet de

l'Infant and a bulletin called "La Veu" edited by the socialist municipal group co-

corresponding to the month of May.

I do not know what base they have used to obtain my data and send me propa-

electoral gain; if it is not the one on the electoral roll, perhaps there has been some

transfer without respecting the regulations" (folio nº 1).

Along with the claim, provide documentary evidence of the letter and envelope with the

logo of the denounced political formation. (doc. 3 and 4).

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

data provided by the claimant, the Subdirectorate General for Data Inspection pro-
yielded to carry out preliminary investigation actions for the clarification
of the facts in question, by virtue of the powers of investigation granted to the
control authorities in article 57.1 of Regulation (EU) 2016/679 (Regulation
General Data Protection, hereinafter RGPD), and in accordance with the provisions
ed in Title VII, Chapter I, Second Section, of Organic Law 3/2018, of 5
December, of Protection of Personal Data and guarantee of digital rights (in
hereinafter LOPDGDD).

As a result of the research actions carried out, it is confirmed
that the data controller is the claimed party.

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THIRD: On 05/29/19, the claim was TRANSFERRED to the entity
National Statistics Institute (INE) in order to carry out the explanations
opportune, before the exercise of the outlined right of opposition.

FOURTH: On 06/18/19, this Agency received a letter from the Institute entity
National Statistics (INE) that reveals the following.

“From the foregoing, it can be concluded that, being the request of Mr. A.A.A. present-
dated March 6, 2019, would be excluded from the copies of the elect-
that are delivered to representatives of the candidacies to send mailings
electoral propaganda.

In this sense, in the specific case of the Partit dels Socialistes de Catalunya
(PSCPSOE), by the OCE it is reported that on April 2, 2019, a

delivery of the mandatory copy of the Electoral Census to its representative D.B.B.B., to the effects foreseen in the LOREG (doc.1). Together with said copy, a note containing, among other information, an express warning about those elected who have expressed their opposition to their inclusion in the copies of the Electoral Census that are provided to the representatives of the candidatures to make postal deliveries of electoral propaganda.

FIFTH: On October 24, 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 5.1.d) of the RGPD, typified in Article 83.5 of the GDPR.

SIXTH: On 10/28/19, a letter of allegations was received from the entity denounced stating the following:

“That since there are no new facts or a change in the legal classification of the same

In our opinion, it is maintained in everything exposed by this part in the investigation phase and what works in the file. Therefore, it recognizes the facts described and assumes the responsibility responsibility of them.

Therefore, you accept this notification as a proposed resolution insofar as as soon as at the end of the procedure the sanction remains in the WARNING for considering it adequate, fair and proportional.

That conveys that the organization is carrying out all a series of measures aimed at adapting the actions and procedures of the same and in relation to the facts of reference to the prescriptions of the regulation in terms of data protection (review of protocols, training for employees and affiliates, etc...) in order to achieve the highest standards of compliance and prevent Situations like this happen again.

It is for all the above that the Data Protection Agency is interested,

take for granted the statements contained in this document because the Partit dels Socialistes de Catalunya (PSC-PSOE) assumes the description of the facts as well as the legal classification that is made of them, which is reiterated and maintained in everything exposed. for his part in the investigation phase and that he accepts the eventual sanction of procedure as provided for in the motion for a resolution, reserving the possibility to appeal it, if the facts are changed or new ones appear during the investigation phase, the legal classification of the same is modified or another sanction is proposed burdensome than the warning”.

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

PROVEN FACTS

First. On 05/27/19, a claim is received at this Agency through the

which the Complainant conveys the following “facts”:

“An envelope with my name and address appeared in the mailbox of my home, with letterhead of the PSC party and inside it there were two voting envelopes corresponding to teeth to the 2019 municipal elections, two ballots belonging to the candidate ture of the PSC party in the town of Vandellòs i l'Hospitalet de l'Infant and a bulletin called "La Veu" edited by the socialist municipal group corresponding to the month of May” (folio nº 1).

Second. The political formation Partido

Socialist of Catalonia (PSC-PSOE) with CIF G08564379.

Third. It is proven that the complainant exercised the right to oppose the reception of electoral propaganda, with presentation date 03/06/2019 22:51:10 (Peninsular time)-Doc. No. 1--.

Fourth. The receipt of electoral propaganda at the domicile of the deputy is accredited. complainant, this aspect being accredited by the defendant (doc. 2-3), having used The representatives of the formation have created a previous electoral list.

Fifth. The entity denounced PSC (PSOE) recognizes the "error" in the following terms: minos:

“the error, they argued in their defense that, that proceeding was the result, in the first instance, tance of good faith, ignorance and lack of attention to training in ma- data protection matter offered by the organization (...).”.

Sixth. The denounced entity bequeaths in writing 07/05/19 the adoption of the following me-said:

“Note that the organization is currently immersed in a process of im-plantation of the "Criminal Compliance" of which an important part deals with the pro-data protection, so everything related to this matter is being processed. specific treatment provided that, the organization as a whole as well as each and every one of its members, professionals and affiliates, acquire a high degree of sensitivity training, training and knowledge”.

FOUNDATIONS OF LAW

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

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II

In the present case, the claim dated 05/27/19 is examined by me-

gave from which the Complainant transfers the following "facts":

"An envelope with my name and address appeared in the mailbox of my home, with letterhead of the PSC party and inside it there were two voting envelopes corresponding to teeth to the 2019 municipal elections, two ballots belonging to the candidate ture of the PSC party in the town of Vandellòs i l'Hospitalet de l'Infant and a bulletin called "La Veu" edited by the socialist municipal group corresponding to the month of May" (folio nº 1).

Therefore, the facts are specified in the reception of electoral propaganda to despite having exercised the right to oppose receiving any type of mailing electoral.

In support of his claim, he provides a document accrediting the receipt of exercise of the right before the INE (Doc. No. 1) with filing date 03/06/2019 22:51:10 (Peninsular time).

Likewise, it accredits the receipt of electoral propaganda, with the sending of the on the formation that is the subject of a complaint to its management (Doc. No. 2-3).

The legal tool that allows citizens to request the right of exclusion

The position that concerns us is found in the recent Organic Law 3/2018, of 5 December December, Protection of Personal Data and guarantee of digital rights (in hereinafter LOPDPGDD), which introduced in its third final provision two modifications to Organic Law 5/1985, of June 19, on the General Electoral Regime (in addition

before LOREG).

Paragraph 5 of this article 58 bis guarantees that “the recipient

a simple and free way of exercising the right to oppose this sending of pro-electoral pay”.

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.

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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 right of opposition allows the interested party, in the cases provided for in the
RGPD, oppose the processing of your personal data. And the person in charge of the treat-
lie will have to stop treating them

Thus, in accordance with the provisions of article 21 of the Regulation, the controller
will be obliged to stop processing the personal data of the interested party, unless
prove compelling legitimate reasons for the treatment that prevail over the
interests, rights and freedoms of the interested party, or for the formulation, exercise
or the defense of claims.

Notwithstanding the foregoing, for the specific case of exercising the right of opposition
tion to data processing for sending electoral propaganda,

Said right must be exercised in accordance with the provisions of the regulations that
regulates the electoral processes and will have the effects foreseen in it.

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

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

<<1º) In order to facilitate the processing of the requests of the electors who oppose their inclusion in the copies of the electoral roll that the Census Bureau Electoral must deliver to the representatives of the candidacies to send of electoral propaganda, such requests may be made prior to the call for an electoral process, in Town Halls, Consulates and Delegations Provincials of the Electoral Census. Likewise, they may be made in the electronic office

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of the National Institute of Statistics, once the Electoral Census Office has enabled this process.

2º) The aforementioned exclusion requests will have permanent effect until the election or manifests itself in the opposite direction.

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

4º) This exclusion must be compatible with the representatives of the candidates and the electoral roll may have the complete list of electors for the purposes of voting and scrutiny, with the essential data for the identification of the voter.>>

The call for the General Elections of April 28, 2019 took place

on March 5, so the deadline for the presentation of claims was finalized.

from March 11 to 18, 2019.

In the present case, the complainant exercised in a timely manner his right to opposition before the Registry of the Electoral Census Office, stating the date of Official statement 03/06/2019 22:51:10 (Peninsular time).

The entity denounced—PSC (PSOE) states that the appropriate orders not to send electoral propaganda, in cases of lack of domicile, specifically in the following terms:

“As you will see, some voters do not have an address since they accepted the de-right that the law gave them not to receive electoral propaganda. UNDER ANY CONCEPT THEY MAY RECEIVE ANY COMMUNICATION FROM THE PARTY. I don't know if it's left Absolutely clear”

Despite this, the infraction is verified, upon receiving the denounced propoelectoral campaign (electoral mailing) of the political party at home, carrying out a "treatment" of the data of the same outside the cases allowed by the regulations in force.

IV

The Supreme Court (Sentences of April 16 and 22, 1991) considers that of the element of culpability, it follows “that the action or omission, qualified as an infraction sanction administratively, must be, in any case, attributable to its author, by intent or recklessness, negligence or inexcusable ignorance.”

The National Court, in Judgment of June 29, 2001, in matters of protection of personal data, has declared that “simple negligence or in compliance is enough fulfillment of the duties that the Law imposes on the persons responsible for files or of data processing to exercise extreme diligence...”.

The Supreme Court (Judgments of July 5, 1998 and March 2, 1999) comes

understanding that recklessness exists whenever a legal duty of care is disregarded.

given, that is, when the offending subject does not behave with the required diligence. Dili-

agency whose degree of demand will be determined in accordance with the circumstances

current in each case, such as the special value of the protected legal interest or the

professionalism required of the offender. In this sense, the aforementioned Judgment of June 5

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of 1998 requires professionals in the sector "a duty to know especially the

applicable rules".

Applying the previous doctrine, the National High Court requires the entities that operate

special diligence in the data market when carrying out the use or processing

processing of such data or transfer to third parties. And this because being the one of the protection

of data a fundamental right (Sentence of the Constitutional Court 292/2000), the

repositories of these data must be especially diligent and careful when

to operate with them and must always opt for the interpretation that is most favorable to the

protection of the legal rights protected by the norm. In this sense, among others,

Judgments of the National High Court dated February 14 and September 20,

2002 and April 13 and May 18, 2005).

The mere commission of an administrative infraction—objective type—is not enough to

time to proceed to impose an administrative sanction.

Guilt as reproach to the active subject of the injury of the legal interest

protected, is evident when the subject voluntarily performs the typical behavior

intentionally directed to obtaining the unlawful result, which is sought and

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There must therefore be a willful or negligent conduct, either negligence severe or mild or simple, depending on the degree of neglect. And there is no negligence, not even both culpable and punishable infraction, "when the necessary diligence has been put into compliance with the obligations required in terms of LOPDGDD".

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In accordance with the allegations and evidence provided in this proceeding, sanctioning it is considered that the claimed (a) has not attended the right of opposition exercised in a timely manner by the complainant, who received electoral propaganda despite having expressly opposed it.

The known facts constitute an infraction, attributable to the claimant. for violation of article 21 RGPD, by not effectively attending the exercise cycle of the aforementioned right.

On the other hand, the LOPDGDD, in its article 72.1.k), qualifies as a very serious infraction, effects of prescription, "The impediment or the obstruction or the repeated non-attention of the exercise of the rights established in articles 15 to 22 of the Regulation (EU) 2016/679."

The documentation in the file shows that the defendant violated the article Article 21 of the RGPD, since despite the fact that the claimant exercised his right of opposition time and form, so that no postal electoral advertising was sent, the receipt He went to his home.

On the one hand, it is proven that the respondent processed the claimant's personal data. mante - address data, name, surname and postal address- associated with the sending of

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postal election advertising. In the file is a copy of the envelope sent by the PSC-PSOE to your postal address, and of the electoral propaganda received.

On the other hand, the defendant lacked legitimacy for the processing of personal data. claims of the claimant for sending electoral propaganda for having opposed the re-reception of said propaganda in the Electoral Office of the INE.

Article 83.5 RGPD provides the following: "Infringements of the following provisions

The following will be sanctioned, in accordance with section 2, with administrative fines of EUR 20,000,000 maximum or, in the case of a company, an equivalent amount.

to a maximum of 4% of the total global annual turnover of the fiscal year previous financial statement, opting for the highest amount:

b) the rights of the interested parties pursuant to articles 12 to 22 (...)"

SAW

In determining the appropriate administrative sanction to impose, we must read some Recitals of the RGPD, among others, 148, which indicates the following:

<<In order to reinforce the application of the rules of this Regulation, any

Any violation of this must be punished with sanctions, including administrative fines.

additionally to adequate measures imposed by the authority of

control under this Regulation, or in substitution of these. In case of

minor fraction, or if the fine likely to be imposed constituted a burden

disproportionate for a natural person, instead of sanctioning by means of a fine,

impose a warning. However, special attention must be paid to the nature

nature, seriousness and duration of the infraction, its intentional nature, the measures

taken to mitigate the damages and losses suffered, to the degree of responsibility or to

any previous relevant infringement, to the way in which the supervisory authority has

had knowledge of the infraction, to comply with the measures ordered against the responsible or in charge, adherence to codes of conduct and any other cir-
aggravating or mitigating circumstance. The imposition of sanctions, including fines administrative, must be subject to sufficient procedural guarantees in accordance with the general principles of Union law and the Charter, including the right to effective judicial protection and a process with all the guarantees.>>

In the case object of the claim, we must bear in mind that, until recently,
In just a few months, the political parties were authorized to send propaganda to all voters during the election campaign. It was not collected in any rule the possibility of opposing such shipments.

This authorization has been limited by the modification of the LOREG included in the LO-PDGDD. Therefore, political parties have had a very short period of time to adapt to this limitation and there have been few claims for it.

Taking into account the very limited number of those affected, the measures adopted, the little damage produced by the treatment carried out, and that it is the first
The first time this situation occurs, it is agreed to sanction with a warning

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to the PSC-PSOE political formation, having to adopt the necessary measures to avoid subsequently deal with the conduct that is the subject of the complaint.

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 PARTIT DELS SOCIALISTES DE CATALUNYA (PSC-PSOE), for an infringement of the content of art. 21 RGPD, having sent propagand electoral grant to the defendant despite his opposition in legal form, a sanction of WARNING, infringement typified in art.83.5 b) RGPD, being punishable

In accordance with art. 58.2 GDPR.

SECOND: NOTIFY this resolution to PARTIT DELS SOCIALISTES DE CATALUNYA (PSC-PSOE) and REPORT the result of the actions to the defendant Don 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.

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