 Procedure No.: PS/00211/2019

938-051119

RESOLUTION OF PUNISHMENT PROCEDURE

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

based on the following

BACKGROUND

FIRST: On December 19, 2018, Ms. AAA, (hereinafter, the

claimant) filed a claim with the Spanish Data Protection Agency

against INFOFREAK for having shown his email address to the rest of

email recipients who, like him, were listed as recipients of the

shipment that was sent to you by that company.

The claimant attaches a copy of an email sent, dated March 24,

April 2018, from the email address soporte@infofreak.es to a total

of 38 recipients whose email accounts,- among which is

the email address ***EMAIL.1 of the claimant-, appear visible to all

they. Apologies are requested in the shipment for the delay in the service of an order,

confirming a new delivery date.

SECOND: Upon receipt of the claim, dated January 15, 2019

from the Subdirectorate General for Data Inspection, the website was accessed

***URL.1 proving that B.B.B., (hereinafter, the claimed), appears as

owner of the infobreak.es domain.

On January 28, 2019, said claim was transferred to the respondent

by means of a shipment sent through the Sociedad Estatal Correos y Telégrafos, S.A. to

*** ADDRESS.1, being returned by "Surplus" (Not picked up at the office) on 13

February 2019, after having attempted delivery on January 30 and 5

February 2019 at that known address and be “Absent” on both occasions

On May 21, 2019, the Director of the Spanish Agency for

Data Protection agreed to admit for processing the claim presented by the

claimant, in accordance with the provisions of article 65.5 of the Organic Law

3/2018, of December 5, on the Protection of Personal Data and guarantee of the

digital rights (hereinafter LOPDGDD), and for the purposes provided in article

64.2 of the same standard.

THIRD: On June 27, 2019, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against the claimant, with

in accordance with the provisions of articles 63 and 64 of Law 39/2015, of October 1, of the

Common Administrative Procedure of Public Administrations (hereinafter,

LPACAP), for the alleged infringement of Article 5.1.f) of the RGPD, typified in the

article 83.5.a) of the RGPD.

In said initial agreement it was agreed that, if the existence of the

described infringement, and for the purposes provided in article 58.2.d) of the RGPD, in the

resolution that, in his case, could fall, the claimed person would be ordered to carry out

of certain corrective measures, the details of which were specified in the aforementioned

start agreement. Likewise, the deadline for accrediting before this Agency was indicated.

its adoption once the sanctioning resolution has been notified.

FOURTH: Attempted to notify the respondent of the aforementioned initiation agreement through the

Post and Telegraph State Society, S.A. at ***ADDRESS.2 was returned to

origin on July 3, 2019 due to an incorrect address, which is why an attempt was made

practice said notification at ***ADDRESS.1, resulting in being returned to origin with

date July 11, 2019 by unknown in the same.

Therefore, in accordance with the provisions of articles 44, 45 and 46 of the

Law 39/2015, of October 1, of the Common Procedure of the Administrations

Public, proceeded to publish an announcement of notification of the aforementioned start-up agreement in

the Official State Gazette No. XXX, dated ***DATE.1. In the announcement published in

Said Bulletin indicates that the notification will be understood to have been produced for all purposes

legal from the day following the expiration of the period of 10 business days set

to appear, counted from the day following the publication of the announcement.

There is no evidence that the defendant has appeared within the period indicated in the

outlined announcement nor that produced the notification of said act, has exercised its

right to defense by formulating a written statement or presenting evidence in the

period granted for such purposes.

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 April 24, 2018, the claimant received an email

from the email address support@infofreak.es addressed to a total of 38

recipients whose email accounts, including the

email address ***EMAIL.1 of the claimant, were visible to

the rest of the recipients of the shipment.

Second: In the e-mail outlined in the previous proven fact, they request

apologies from the InfoFreak firm for the delay in the service of an order, to

the pair that a new delivery date is confirmed.

Third: On January 15, 2019, it is verified that on the website ***URL.1 the

claimed appears as the owner of the domain infofreak.es

FOUNDATIONS OF LAW

Yo

By virtue of the powers that article 55.1, 56.2 and 58.2 of the Regulation (EU)

2016/679 of the European Parliament and of the Council of April 27, 2016, regarding the

protection of natural persons with regard to data processing

personal information and the free circulation of these data (General Protection Regulation

of Data, hereinafter RGPD) recognizes each control authority, and according to what

established in articles 47 and 48.1 of Organic Law 3/2018, of December 5, of

Protection of Personal Data and guarantee of digital rights (hereinafter

LOPDGDD), the Director of the Spanish Data Protection Agency is

competent to resolve this procedure.

II

Article 64.2.f) of Law 39/2015, of October 1, on the Procedure

Common Administrative Law of Public Administrations, of October 2, 2015, in

hereinafter LPACAP, provides that:

“The initiation agreement must contain at least: (…)

f) Indication of the right to formulate allegations and to the hearing in the

procedure and the deadlines for its exercise, as well as an indication that, in the event

of not making allegations within the stipulated period on the content of the resolution of

initiation, it may be considered a resolution proposal when it contains a

precise pronouncement about the imputed responsibility.”

In the present case, the content of the agreement to initiate the procedure

observed the prescription detailed in article 64.2.f) of the LPACAP, which is why

which, in accordance with the provisions of the aforementioned precept, the initial agreement

of this sanctioning procedure is considered a Resolution Proposal,

since it contained a precise pronouncement about the responsibility

imputed, and, after notification in the manner described in the factual record

fourth of this resolution, the respondent has not made allegations to the same in the

period granted for such purposes.

III

Article 4 of the GDPR, under the heading "Definitions", provides that:

“For the purposes of this Regulation, the following shall be understood as:

1) "personal data": any information about an identified natural person or

identifiable ("the interested party"); An identifiable natural person shall be deemed to be any person

whose identity can be determined, directly or indirectly, in particular by

an identifier, such as a name, an identification number,

location, an online identifier or one or more elements of the identity

physical, physiological, genetic, psychic, economic, cultural or social of said person;

2) "processing": any operation or set of operations carried out

about personal data or sets of personal data, either by procedures

automated or not, such as the collection, registration, organization, structuring,

conservation, adaptation or modification, extraction, consultation, use,

communication by transmission, broadcast or any other form of enabling of

access, collation or interconnection, limitation, suppression or destruction;”

7) «responsible for the treatment>> or <<responsible>>: the natural person or

legal entity, public authority, service or other body which, alone or jointly with others,

determine the purposes and means of the treatment; if the law of the Union or of the

Member States determines the purposes and means of processing, the data controller

treatment or the specific criteria for their appointment may be established by the

Law of the Union or of the Member States; >>

10) <<third party>>: natural or legal person, public authority, service or

body other than the interested party, the data controller, the person in charge of

treatment and of the persons authorized to treat personal data under the

direct authority of the person in charge or the person in charge;

In accordance with these definitions, the treatment of email addresses

e-mail of the recipients of the shipment under study constitutes a

processing of personal data, in respect of which the person responsible for the

treatment, in this case, the claimed that in its capacity as sender of the shipment

has used the email addresses of the recipients of the same, you must

comply with the principles related to treatment, among which is the

principle of confidentiality contained in article 5.1.f) of the RGPD.

Please note that the email addresses used for the

remission of the aforementioned shipment provide information on natural persons

identified or identifiable.

IV

In the present case, the defendant is charged with a breach of article 5.1. of

RGPD, precept that under the heading "Principles related to treatment", establishes in

its section f) that:

“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

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

appropriate technical or organizational (<<integrity and confidentiality>>)”

In relation to said precept, article 32.1.b) and 2 of the RGPD, regarding the

“Security of treatment”, establishes:

"1. Taking into account the state of the art, the application costs, and the

nature, scope, context and purposes of the treatment, as well as risks of

variable probability and severity for the rights and freedoms of individuals

physical, the person in charge and the person in charge of the treatment will apply technical measures and

appropriate organizational measures to guarantee a level of security appropriate to the risk,

which in your case includes, among others:

(…)

b) the ability to ensure the confidentiality, integrity, availability and

permanent resilience of treatment systems and services;

(…)

2. When evaluating the adequacy of the security level, particular account shall be taken of

takes into account the risks presented by the processing of data, in particular as

consequence of the accidental or unlawful destruction, loss or alteration of data

data transmitted, stored or otherwise processed, or the communication or

unauthorized access to said data. “

For its part, under the heading "Duty of confidentiality", article 5 of the

LOPDGDD provides 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, the claimant has provided a copy of an email

sent by the respondent, dated April 24, 2018, to a total of thirty-eight

recipients, including the claimant, without hiding from each of them

the email addresses of the rest of the recipients of the shipment, since the

claimed did not use blind copy option when sending from email

support@infofreak.es.

Said conduct constitutes, on the part of the claimed party, owner of the domain

infobreak.es and responsible for the aforementioned processing of personal data, a

violation of the principle of confidentiality contained in article 5.1.f) of the RGPD,

since by being visible the email addresses of all the

recipients of the shipment disseminated that personal information among all of them.

v

Sections b), d) and i) of article 58.2 of the RGPD provide the following:

“2 Each supervisory authority shall have all of the following powers

corrections listed below:

(…)

b) sanction any person responsible or in charge of the treatment with

warning when the processing operations have violated the provisions of

this Regulation;”

(...)

“d) order the person responsible or in charge of the treatment that the operations of

treatment comply with the provisions of this Regulation, where appropriate,

in a specified manner and within a specified period;”

“i) impose an administrative fine in accordance with article 83, in addition to or in

instead of the measures mentioned in this paragraph, depending on the circumstances

of each particular case;

Article 83 of the RGPD, under the heading “General conditions for the

imposition of administrative fines”, in sections 1 and 5.a) states that:

""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.”

"5. Violations of the following provisions will be sanctioned,

according to paragraph 2, with administrative fines of EUR 20,000,000 as

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:

“a) the basic principles for the treatment, including the conditions for the

consent under articles 5, 6, 7 and 9”

At the same time, article 72.1.a) of the LOPDGDD typifies the infringement of

principle of confidentiality as very serious for prescription purposes in

following terms: “1. Based on the provisions of article 83.5 of the Regulation

(EU) 2016/679 are considered very serious and will prescribe after three years the

infractions that suppose a substantial violation of the mentioned articles

in that and, in particular, the following:

a) The processing of personal data violating the principles and guarantees

established in article 5 of Regulation (EU) 2016/679.”

In accordance with the facts that have been proven, and in view of the

reasoned on the basis of the previous law, the defendant is responsible for

a violation of the principle of confidentiality contained in article 5.1.f) of the

RGPD, infringement typified in article 83.5.a) of the aforementioned Regulation and qualified

as a very serious infringement for prescription purposes in article 72.1.a) of the

LOPDGDD.

Without prejudice to the provisions of article 83 of the RGPD, the aforementioned Regulation

has in its art. 58.2 b) the possibility of sanctioning with a warning, in relation

with what is stated in Considering 148:

“In the event of a minor offence, or if the fine likely to be imposed

would constitute a disproportionate burden for a natural person, rather than

sanction by means of a fine, a warning may be imposed. must however

Special attention should be paid to the nature, seriousness and duration of the infringement, its

intentional nature, to the measures taken to alleviate the damages suffered,

the degree of liability or any relevant prior violation, the manner in which

that the control authority has been aware of the infraction, compliance

of measures ordered against the person responsible or in charge, adherence to codes of

conduct and any other aggravating or mitigating circumstance."

In the present case, it is considered appropriate to impose the sanction of warning

provided for in article 58.2.b) of the RGPD in view of the following circumstances: the

The main activity of the respondent is not linked to the usual treatment of

Personal data; that the recipients of the shipment were affected by the

same matter on which they were informed; consider that the administrative fine

that could be imposed in accordance with the provisions of article 83.5.a) of the RGPD

would constitute a disproportionate burden for the respondent, who is not aware of the

Commission of any previous infringement in terms of data protection.

Confirmed the infraction described, it is not accredited in the procedure

that the respondent has implemented technical and organizational measures aimed at

to guarantee the security and confidentiality of the data in treatments that,

like the one studied, affect a group of holders of e-mail addresses

email that are going to be recipients of the same shipment, so as to prevent the

improper access of each of them to the email addresses of the

other recipients. Based on the foregoing, it is considered appropriate to apply the provisions of

the aforementioned article 58.2.d) of the RGPD in order for the claimed party to take

carry out the necessary actions (technical and organizational measures) to adapt the

data processing operations similar to the one studied at the beginning of

confidentiality contained in article 5.1.f) of the RGPD, in order to avoid the dissemination of

the emails of the recipients of a shipment among the rest

recipients of the message when said data communication is not

legitimized.

It is noted that section 6 of article 83 of the RGPD, establishes that “6. The

Failure to comply with the resolutions of the supervisory authority pursuant to article 58,

paragraph 2, will be sanctioned in accordance with paragraph 2 of this article with

administrative fines of a maximum of EUR 20,000,000 or, in the case of a

company, of an amount equivalent to a maximum of 4% of the turnover

global annual total of the previous financial year, opting for the highest amount.”

Article 72.1.m) provides that: “1. According to what the article establishes

83.5 of Regulation (EU) 2016/679 are considered very serious and will prescribe to

three years the infractions that suppose a substantial violation of the articles

mentioned therein and, in particular, the following: (...)

m) Failure to comply with the resolutions issued by the authority of

competent data protection in exercise of the powers conferred by article

58.2 of Regulation (EU) 2016/679.”

Therefore, in accordance with the applicable legislation and valued the

concurrent circumstances in the facts that have been proven,

The Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE B.B.B., with NIF ***NIF.1, a sanction of WARNING

in accordance with the provisions of article 58.2.b) of the RGPD, as responsible for

an infringement of the provisions of article 5.1.f) of the RGPD, typified in article

83.5.a) of the GDPR.

SECOND: ORDER to B.B.B., with NIF ***NIF.1, in accordance with the provisions

in article 58.2.d) of the RGPD, the adoption and implementation of technical measures

and organizational measures to guarantee the confidentiality of the data

concerning the email addresses of a set of recipients

of the same shipment when there is no legitimacy for its communication or dissemination to

third parties, using the option of sending with a blind copy in order not to reveal the

email addresses of the same to the remaining recipients. sayings

The measures must be adopted within a period of one month, counting from the day after

the one in which the defendant is notified of the sanctioning resolution, and must provide

the means of proof accrediting its compliance.

THIRD: NOTIFY this resolution to B.B.B., with NIF ***NIF.1.

In accordance with the provisions of article 50 of the LOPDPGDD, 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

LOPDPGDD, 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 month from

counting 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,

may provisionally suspend the firm resolution in administrative proceedings if the

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.

Sea Spain Marti

Director of the Spanish Data Protection Agency

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es