 File No.: PS/00324/2021

- RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: A.A.A. (hereinafter, the complaining party) dated February 16, 2021 filed a claim with the Spanish Data Protection Agency.

The claim is directed against IZA OBRAS Y PROMOCIONES, S.A. with NIF A48820229 (hereinafter, the claimed part).

The ground on which the claim is based is that the respondent entity has disclosed claimant's health data to another company, as well as their email address personal, and all without the consent of the claimant.

SECOND : In accordance with article 65.4 of Organic Law 3/2018, of 5 December, of Protection of Personal Data and guarantee of digital rights (in hereinafter LOPDGDD), on March 16, 2021, said claim was transferred to the party claimed, so that it proceeded to its analysis and inform this Agency in the period of one month, of the actions carried out to adapt to the requirements provided for in the data protection regulations.

On April 13, 2021, this Agency received a written response indicating the following:

1.- On November 14, 2018, the Public Housing Business Entity-Donostiako Etxegintza, awarded IZA a contract for construction works in Intxaurrondo.

2.- The claimant, an employee of IZA, acts in said work performing

temporarily the role of site manager.

3.- The claimant, maintaining his status as an employee, reported IZA to the Housing Public Business Entity-Donostiako Etxegintza on July 14 and September 2020 due to lack of assignment of human and material resources, among others.

4.- In compliance with its power of control, the Public Business Entity of Housing-Donostiako Etxegintza required IZA, in accordance with article 55 of the Law 39/2015 of the Common Administrative Procedure of Public Administrations, information regarding the complaints filed.

5.- IZA receiving said communication, and in compliance with the obligation to collaboration with the Administration, stated the relevant facts that would explain the lack of ascription of material and human resources of the work, answering the claimant's claims. This information included information on the claimant, justifying its referral in compliance with the legal obligation (Law

39/2015) as well as in the prerogatives of Law 9/2017 on contracts in the sector public.

6.- The submission of said information was considered confidential, following the channels of Electronic Registration of Entry, in accordance with the Law. Finding that information held by the Donostiako Housing Public Business Entity Etxegintza, and outside IZA's protection channels, it reached the claimant, as stated in his complaint.

7.- As a result of this, the breach protocol was activated, no data leak was detected from IZA, requesting clarification in this regard from the Public Business Entity of Housing-Donostiako Etxegintza, request that has not received a response.

8.- Regarding the information indicated by the claimant, IZA exclusively provided it to the administrative procedure, in the exercise of the competence and control of the Entity Public.

9.- Regarding the use of the complainant's personal email, it is informs that its use derives from the previous referral by the same for 2 years as means of communication with the company. Message headers are attached and matters to corroborate it, and that in case of needing the contents they would be sent to the Control Authority.

THIRD: On June 18, 2021, the Director of the Spanish Agency for Data Protection agreed to admit for processing the claim presented by the party claimant.

FOURTH: On October 13, 2021, 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.c) of the RGPD, typified in the article 83.5 of the RGPD.

FIFTH: Once the aforementioned initiation agreement was notified, on October 25, 2021, the respondent presented a pleadings brief in which, in summary, it states that it has not disclosed personal information of the claimant to the Public Business Entity of Housing-Donostiako Etxegintza.

He also expresses his confusion and asks this Agency to tell him what especially sensitive information has been processed.

And finally, it requests that the City Council of Donostia/San Sebastián be required to

recording of the session incorporated into the session diary of the Development Commission

and Territory Planning dated December 9, 2020, where presumably

the data of the claimant were poured and manifested.

SIXTH: On October 27, 2021, the instructor of the procedure agreed to the

opening of a period of practice tests, considering incorporated the

previous investigative actions, E/02987/2021, as well as the documents

provided by the claimant.

SEVENTH: On October 31, 2021, a resolution proposal is issued

proposing that the Director of the Spanish Data Protection Agency sanction

to IZA OBRAS Y PROMOCIONES, S.A., with NIF A48820229, for an infraction of the

article 5.1.c) of the RGPD, typified in article 83.5 of the RGPD, with a fine of

€50,000 (fifty thousand euros).

EIGHTH: On November 15, 2021, allegations are presented to said

motion for a resolution, reiterating the allegations made above throughout

of the procedure and specifically states the following:

“He has not given the claimant's personal email data, which is also

was legitimized for the transfer of data - even if there were categories of data

specially protected -, and that this whole procedure is unleashed by the escape of

information produced by the Donostiako-Donostiako Housing Public Business Entity

Etxegintza, its Board of Directors as well as the Development and

Planning of the Territory of the City Council of Donostia/San Sebastián."

Of the actions carried out in this procedure and the documentation

in the file, the following have been accredited:

PROVEN FACTS

FIRST: The claimant states that the entity claimed has disclosed data of

claimant's health (specifically dates of medical leave, reasons, and leaves) to

another company, as well as your personal email address, and all without your

consent.

The entity claimed provided not only the absences, but also the dates of the

casualties and permits with their respective causes, including COVID.

This is confirmed in the letter sent by the claimed entity to the Public Entity

Housing Business-Donostiako Etxegintza, on November 18, 2020, file

in this file together with the documentation provided by the claimant in his written

Of claim.

SECOND: The claimed entity was required by the Public Business Entity of

Housing-Donostiako Etxegintza, to provide them with information regarding the

complaints filed by the claimant on July 14 and September 9, 2020 by

lack of allocation of human and material resources.

The respondent entity responded to such request by providing information

personal (personal email of the claimant, as well as dates of withdrawals

medical, the causes of these, and permits) which came to the knowledge of the latter and

caused this claim.

FOUNDATIONS OF LAW

Yo

By virtue of the powers that article 58.2 of the RGPD recognizes to each authority of control, 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 resolve this procedure.

II

The RGPD in its article 5, "Principles related to the treatment" says that "The data personal will be:

a) processed in a lawful, loyal and transparent manner in relation to the interested party ("lawfulness, loyalty and transparency»);

b) collected for specific, explicit and legitimate purposes, and will not be processed subsequently in a manner incompatible with those purposes; according to article 89, paragraph 1, the further processing of personal data for archiving purposes in public interest, scientific and historical research purposes or statistical purposes are not deemed incompatible with the original purposes ("purpose limitation");

c) adequate, pertinent and limited to what is necessary in relation to the purposes for which that are processed ("data minimization");

d) accurate and, if necessary, updated; all measures will be taken reasonable to eliminate or rectify without delay the personal data that are inaccurate with respect to the purposes for which they are processed (“accuracy”);

e) kept in a way that allows the identification of the interested parties during longer than necessary for the purposes of the processing of personal data; the Personal data may be kept for longer periods provided that it is processed exclusively for archival purposes in the public interest, research purposes

scientific or historical or statistical purposes, in accordance with Article 89, paragraph 1,

without prejudice to the application of the appropriate technical and organizational measures that

This Regulation is imposed in order to protect the rights and freedoms of the

interested party (“limitation of the retention period”);

f) processed in such a way as to ensure adequate security of the data

including protection against unauthorized or unlawful processing and against

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

or appropriate organizational ("integrity and confidentiality").

2. The controller will be responsible for compliance with the provisions

in section 1 and able to demonstrate it (“proactive responsibility”).”

The infraction for which the defendant is held responsible is provided for in article 83.5

of the RGPD that establishes:

“The infractions of the following dispositions will be sanctioned, in accordance with the

section 2, with administrative fines of a maximum of 20,000,000 Eur or, in the case of

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

Total annual global business of the previous financial year, opting for the one with the highest

amount:

The basic principles for the treatment, including the conditions for the

a)

consent under articles 5,6,7 and 9.”

In turn, the LOPDGDD in its article 72.1.a) qualifies as a very serious infraction,

purposes of prescription, “a) The processing of personal data violating the

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

III

In the present case, personal data of the claimant has been revealed, such as the

personal email address and health data to the Public Entity

Empresa de Vivienda-Donostiako Etxegintza, without the consent of the

claimant.

Although the claimed party is recognized as entitled to submit the data

necessary to defend against a sanctioning procedure or the penalties

that could be imposed derived from the breach of a contract

administrative, it should not be forgotten that the RGPD includes health as a category of

specially protected personal data, in accordance with article 9.1 of the

RGPD, where the following is indicated:

“The processing of personal data that reveals ethnic origin or

racial, political, religious or philosophical convictions, or affiliation

union, and the processing of genetic data, biometric data aimed at identifying

unambiguously to a natural person, data relating to health or data relating to

sexual life or sexual orientation of a natural person”.

In this sense, the entity claimed submits a written statement of allegations to the proposal

of resolution indicating that in accordance with article 9.2 f) of the RGPD the data

personal property of the claimant were transferred for his defense against a claim.

It should be noted that the literal tenor of said precept is as follows:

“Section 1 shall not apply when one of the circumstances

following:

f) the treatment is necessary for the formulation, exercise or defense of

claims or when the courts act in the exercise of their judicial function;”

In this regard, it should be noted that although recital 52 of the

RGPD in fine establishes with respect to that exception that “it must also be authorized to

exceptional title the treatment of said personal data when it is necessary

for the formulation, exercise or defense of claims, whether by a

judicial proceeding or an administrative or extrajudicial proceeding”; nevertheless,

It must be taken into account that the use of health data, even when this information is

exception, it is not covered if it violates article 5.1.c) of the RGPD and the data

transferred are excessive in relation to the purpose, since the

the need to specify all vacations, permits and, especially since they are data

of health, casualties with their causes to ensure their defense.

On the other hand, the respondent entity also alleges in its pleadings to the

motion for a resolution that evidence has been rejected by this Body.

In this regard, it should be noted that this Agency has not rejected any evidence

filed by the respondent party, it has only been considered that with the

evidence in this procedure, it is not necessary to require the City Council of

Donostia/San Sebastián the recording of the session included in the session diary of

the Development and Planning Commission of the Territory dated December 9,

2020.

This is so because it has been proven that they have been assigned by the entity

claimed, health data of the claimant, specifically dates of sick leave,

reasons for them and permissions, and therefore, the claimed entity has been

exceeding in the treatment of the personal data of the claimed, even if it has

legitimacy for its internal use in its relations with the worker or claimant, but

you do not have the legitimacy to use them beyond your employment relationship with the claimant,

without your express consent.

In another order of things, it has also been confirmed that in response to the

requirement of the Public Business Housing Entity-Donostiako Etxegintza,

as a result of the complaints filed by the claimant on July 14 and 9

September 2020 due to lack of assignment of human and material resources, the

entity claimed provided the claimant's email address without their

consent.

In this sense, the defendant entity claims to know the email address of the

claimant, because it was the form of company-worker communication, so at

provide the personal email of the claimant, to a third entity, has

exceeded the purpose for which said personal data was provided, thereby violating the

principle of limitation of the purpose, regulated in article 5.1 b) of the RGPD,

indicated in the foundation of law II.

Therefore, when the claimant's health data is transferred (dates of sick leave,

reasons for them and permits with their respective causes, including COVID) and the

claimant's personal email, this Agency considers, on the one hand, that

are processing specially protected data, in accordance with article 9 of the

RGPD (health data), and on the other that personal data is being processed

(personal email) for a purpose other than mere communication between

the worker and the company, in accordance with article 5.1 b) of the RGPD.

All this results in an excessive use of personal data by the

claimed entity, since despite the fact that the data protection regulations require that

the processing of personal data is adequate, pertinent and limited to what is

strictly necessary in relation to the purposes for which they are processed, such as

consequence of the complaint filed by the claimant against the entity

claimed before the Public Housing Business Entity-Donostiako Etxegintza for

lack of ascription of human and material resources, the claimed entity has

violated the principle of data minimization, by providing said public entity

business for your defense, health data and the personal email of the

claimant, which makes us find ourselves before an alleged violation of the

article 5.1 c) of the RGPD, indicated in the legal basis II.

Therefore, it is considered appropriate to reiterate that it is not considered necessary to require the

City Council of Donostia/San Sebastián the contribution of the recording of the session

incorporated into the journal of sessions of the Development and Planning Commission of the

Territory dated December 9, 2020, as suggested by the respondent entity,

since with the documentation in this file the

facts reported, which are ultimately, an excess of personal data provided

by the entity claimed to justify its action, to the detriment of the

claimant, when dealing with especially sensitive data, and therefore especially

protected, such as health data, in accordance with the provisions of the

article 9 of the RGPD.

IV

Article 58.2 of the RGPD provides the following: "Each control authority will have

of all the following corrective powers indicated below:

b) send a warning to any person responsible or in charge of the treatment when the

treatment operations have violated the provisions of this Regulation;

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

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

in a certain way and within a specified period;

i) impose an administrative fine under article 83, in addition to or instead of the

measures mentioned in this section, according to the circumstances of each case

particular;

v

In order to determine the administrative fine to be imposed, the

provisions of articles 83.1 and 83.2 of the RGPD, precepts that indicate:

“Each control authority will guarantee that the imposition of administrative fines

under this Article for infringements of this Regulation

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

proportionate and dissuasive.”

“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 the

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

such as the number of interested parties affected and the level of damages that

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 they have applied under

of articles 25 and 32;

e) any previous infringement 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 remedy the

infringement and mitigate the possible adverse effects of the infringement;

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 whether the person in charge or the person in charge notified the infringement and, if so, in what

measure;

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

previously 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 of

certification 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 obtained or losses avoided, directly or

indirectly, through the infringement."

Regarding section k) of article 83.2 of the RGPD, the LOPDGDD, article 76, "Sanctions and

corrective measures", provides:

"two. In accordance with the provisions of article 83.2.k) of Regulation (EU) 2016/679, also

may be taken into account:

a) The continuing nature of the offence.

b) The link between the activity of the offender and the performance of data processing

personal.

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 crime.

infringement.

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

infringement, which cannot be attributed to the absorbing entity.

f) Affectation of the rights of minors.

g) Have, when not mandatory, a data protection delegate.

h) Submission by the person in charge or person in charge, on a voluntary basis, to

alternative conflict resolution mechanisms, in those cases in which

there are controversies between them and any interested party."

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 fine sanction to be imposed on IZA

WORKS AND PROMOTIONS, S.A. with NIF A48820229 as responsible for an infraction

typified in article 83.5.a) of the RGPD, in an initial assessment, concurrent

in the present case, as aggravating factors, the following factors:

- The processing of a special category of personal data has occurred, such as

health data, in accordance with article 9 of the RGPD.

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 IZA OBRAS Y PROMOCIONES, S.A., with NIF A48820229,

for an infringement of article 5.1.c) of the RGPD, typified in article 83.5 of the RGPD,

a fine of €50,000 (fifty thousand euros).

SECOND: NOTIFY this resolution to IZA OBRAS Y PROMOCIONES,

S.A.

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

between the 1st and 15th of each month, both inclusive, the term to make the payment

voluntary will be until the 20th day of the following month or immediately after, and if

between the 16th and last day of each month, both inclusive, the payment term

It will be until the 5th of the second following month or immediately after.

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

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