

□ Procedure No.: PS/00338/2019

938-051119

## RESOLUTION OF PUNISHMENT PROCEDURE

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

### FACTS

FIRST: Mrs. A.A.A. (\*hereinafter, the claimant) dated April 22, 2019

filed a claim with the Spanish Data Protection Agency.

The claim is directed against the political formation CITIZENS PARTY OF THE  
CITIZENSHIP with NIF G64283310 (hereinafter, the claimed). The reasons in which  
the claim is based on are as follows:

"I am sending you this complaint because, having requested the National Institute of State  
(INE) the exclusion of my personal data to be transferred to the political parties  
ticos for not being able to send electoral propaganda, I have received two postal items in-  
traveled by political formations. I enclose a copy of the justification issued by the INE and photo-  
graphs of the shipments received" (folio nº 1).

Along with the claim, provide documentary evidence (Doc. 1 and 2) of an envelope with the logo  
of political formation and related information.

Likewise, it provides a copy of the electronic receipt presented at the INE in  
date 04/06/19 confirming the Estimate of the request.

SECOND: In view of the facts denounced in the claim and the documents  
data provided by the claimant, the Subdirector 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).

THIRD: On 04/24/19 the claim is transferred to the INE (National Institute of  
Statistical Office) to confirm the marking of the claimant's data, without  
that any allegation has been made to date.

FOURTH: On 11/14/19, this Agency receives a written statement of allegations from the  
reported stating the following:

“The claimant submitted a request for exclusion from the Electoral Census sent to

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political parties to free themselves from sending electoral propaganda. To this end the  
INE confirmed estimate of the request, which justifies the claimant by supporting document  
email dated 04/06/19.

At no time did the INE inform after the submission of the Census,  
of its modification for the purposes of addressing the exclusion requested by the claimant.  
It is materially and legally impossible for the claimant to be able to know  
requested its exclusion from the Census, especially when, as is evident, it does not manage  
the Census nor are opt-out requests addressed to it.

Ciudadanos-Citizenship Party only uses this information, that of the  
Electoral census, to carry out the distribution of its electoral propaganda; none  
legal reproach may be required when you have managed some data provided exclusively

directly by the Public Administration and by virtue of the authorization contained in the Law electoral

As the AEPD to whom we are addressing is aware, the representatives candidates have access to the Census because it is provided to them by virtue of what provided in the electoral legislation, by the Electoral Census Office in execution of the provisions of the LOREG and by instruction of the Electoral Board.

If the Census incurred in some error or illegality, as we have said, it would not be impute any type of responsibility to this part. Illegalities are not transmitted like diseases, it is not a virus that can be spread.

For all of the above: requests that they be admitted, in accordance with Law, the presentations You have allegations. (...)"

In view of everything that has been done, by the Spanish Data Protection Agency

In this proceeding, the following are considered proven facts:

#### PROVEN FACTS

First. On 04/22/19 a claim was filed by the complainant before this Agency in the following terms:

"I am sending you this complaint because, having requested the National Institute of State (INE) the exclusion of my personal data to be transferred to the political parties ticos for not being able to send electoral propaganda, I have received two postal items in-traveled by political formations. I enclose a copy of the justification issued by the INE and photo-graphs of the shipments received" (folio nº 1).

Second. The complainant provides documentary evidence (Doc. No. 1) justifying submitted to the INE on 04/06/19, by electronic appearance, with the rubric "opposition to Parties".

Third. Provide documentary evidence (Doc. No. 2) that proves the receipt of the letter with the Compromis logo, containing the personal data of the same and its address in

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\*\*\*ADDRESS 1.

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

on March 5, so the deadline for submitting claims was

set from March 11 to 18, 2019.

These same deadlines apply to requests for exclusion. It is

this way because the electoral census delivered to the political parties cannot be modified

for specific elections, once the claim period has closed

of the census for said elections.

It is accredited that the presentation of the request for non-receipt of propa-

electoral propaganda is produced by the complainant on 04/06/2019 12:46:47 (Schedule

peninsular).

## 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.

II

In the present case, the claim dated 04/22/19 is examined by me-

from which the complainant claims to have received political propaganda, despite

have exercised the right of opposition to it.

Likewise, it provides a copy of the electronic receipt presented at the INE in

date 04/06/19 confirming the Estimate of the request.

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 is provided with a way

simple and free exercise of the right to oppose this sending of propaganda

electoral".

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 make a claim addressed to the

Provincial Delegation of the Electoral Census Office about their census data, if

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either only those that refer to the rectification of errors can be taken into account

in personal data, to changes of address within the same circumscription

non-inclusion or non-inclusion of the claimant in any Section of the Census of the circumscription

tion despite being entitled to it. Elected requests will also be attended to.

who oppose their inclusion in the copies of the electoral census that are provided to

the representatives of the candidacies to carry out postal mailings of propaganda

electoral. 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 the census closing form for each election, having to exercise their right in the section corresponding to his previous address.

In the RGPD (as well as in the LOPDGDD) the right of 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, 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 individual decisions automated visual activities, including profiling, will be exercised in accordance with what is established, respectively, in 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 data controller will stop processing the personal data, unless it accredits compelling legitimate reasons for the treatment that prevail over the interests ses, the rights and freedoms of the interested party, or for the formulation, exercise 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 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 tor manifests itself in the opposite direction.

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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 daturas may have the complete list of electors for the purposes of voting and crutiny, with the essential data for the identification of the voter.>>

In the present case, we find two organic laws (art. 81 CE)

that regulate the matter that occupies us, understanding that based on the criterion of specialization ity, that the matter that occupies us is that of the General Electoral Regime, and it is in this framework where the affected exercised her right not to receive electoral propaganda.

As the exercised right has been proven, it was not done within the term

marked in the LOREG, that is, until 03/18/19 inclusive, reason that originated the

reception of electoral propaganda of the political formation -Citizens-- in their do-  
usual milieu.

This is not an obstacle, so that the exercised right - refusal to receive our new  
goes political propaganda—unfold its effects in the following political campaigns,  
as long as the affected party “does not state otherwise”.

The lists of the Electoral Census were sent to the political formations, with  
the personal data updated to the closing date of the same, without stating  
the opposition exercised by the complainant, having made it outside the stated period  
marked by the regulations in force.

### III

Article 25 of Law 40/2015 (October 1) provides the following:

”They can only be sanctioned for acts constituting an administrative infraction.

natural and legal persons, as well as, when a Law recognizes them capable  
capacity to act, affected groups, unions and entities without legal personality.

dica and the independent or autonomous estates, which are responsible for the  
themselves by way of fraud or negligence”.

This principle of culpability also applies to administrative offences,  
because to the extent that the sanction of said infraction is one of the manifestations  
of the ius puniendi of the State is inadmissible in our legal system a regime of  
strict liability or no fault (STC 76/1990 -EDJ 1990/4435-)...”.

Moreover, this same ruling requires guilt in the case of administrative infractions.

committed by legal persons, stating that “.... Even this Court has quali-

”correct” the principle of personal responsibility for own actions -

principle of the personality of the penalty or sanction- (STC 219/1988 -EDJ 1988/535-).

The jurisprudence of the Supreme Court, in line with that of the Constitutional Court, has  
established that the sanctioning power of the Administration, as manifestations



establishment of the "ius puniendi" of the State, is governed by the principles of criminal law, meaning basic structural principle of guilt, incompatible with a regime of res-objective responsibility, without fault.

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Thus, the SSTS of 12 (rec. 388/1994) and May 19, 1998, Sixth Section, affirm that in the sanctioning sphere «any attempt to construct a response is prohibited objective reliability" and that "in the field of administrative responsibility it is not enough that the conduct is unlawful and typical, but it is also necessary that it be guilty, that is, as a result of an action or omission attributable to its author by mischief or recklessness, negligence or inexcusable ignorance (...) that is, as a requirement derived from article 25.1 of the Constitution, no one can be convicted or sanctioned do but for facts that can be imputed to him by way of fraud or guilt (principle of culpability)".

IV

Based on the foregoing, it should be noted that the complainant exercised her right to Non-receipt of political propaganda from the aforementioned formation, outside the established period in the specific legislation regulating the matter, without appreciating the element subjective of guilt, having proceeded the political formation denounced through tra-collect the data of the same, as they were sent by the Office of the Census electoral.

So it is appropriate to order the File of this procedure by not

The violation of the right asserted by the complainant must be proven.

Therefore, in accordance with the applicable legislation, in accordance with the foregoing

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: ORDER the FILE of this procedure as there is no

accredited the commission of any administrative infraction in the framework of the protection of personal data.

SECOND: NOTIFY this resolution to the denounced entity

CITIZENS PARTY OF THE CITIZENSHIP and REPORT THE RESULT OF

THE PERFORMANCES to Doña 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

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.

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Sea Spain Marti

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