

Procedure No.: PS/00231/2019

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: The OFFICIAL COLLEGE OF PHYSICIANS OF MADRID (hereinafter, the claimant) dated 08/14/2019 filed a claim with the Spanish Agency for Data Protection. The claim is directed against ASSOCIATION OF PHYSICIANS DEMOCRATAS with NIF G87735999 (hereinafter, the claimed one). The reasons in that bases the claim are in summary the following: that AMED requested a copy of the collegiate database on 01/17/2017 being rejected; that in the frame of the procedure A/00068/2018 AMED was warned for processing data from members without your consent; despite this, AMED has continued to send to the e-mail accounts of the collegiate electronic communications dealing with illicitly your personal data.

Attached to the claim:

- ICOEM Statutes
- Resolution of 09/13/2016 of the General Director of Labor on the deposit of the Statutes of AMED.
- AMED request dated 01/17/2017 of the data of the members;
- Denial of the request dated 02/14/2017 and attached documentation;
- Appeal dated 03/16/2017 filed by AMED against the denial; Rejecting resolution of the appeal of the Commission of ICOEM Resources dated 05/23/2017.
- Resolution of the Director of the AEPD of 05/11/2018.

- ICOEM statement with a summary of the emails received

of the members who expressed their complaint about the reception.

- Likedin profile.

SECOND: After receiving the complaint, the Subdirectorate General for Inspection

of Data proceeded to carry out preliminary investigation actions for the

clarification of the reported facts, having knowledge of the following

ends:

On 03/15/2019, reiterated on 03/26/2019, the claimant was transferred the

claim submitted for analysis and communication to the complainant of the

decision made in this regard. Similarly, he was required so that within a

month send the Agency certain information:

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- 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 05/07/2019 AMED responded by stating that it was unaware of the interest of ICOEM to be sanctioned since its activity is carried out outside the collegiate activity; that AMED is a trade union association whose purposes, according to with article 2 of its statutes, is the promotion of professional association adapted to the minimum requirements as well as the monitoring of the actions of medical professionals by the Ethics Commission, etc.; That is subject to the Organic Law on Freedom of Association, which recognizes the right to union activity, being in this sense clarifying the STS 281/2005 that recognizes the right of the Union to transmit news of union interest to its affiliates and workers, generally through email; that denial of access to data by ICOMEM and the legitimacy of AMED; that the complainant fails to truth in stating that the AMED has been sending personal email accounts and medical professionals collegiate electronic communications; that in the emails provided by the claimant, it is accredited that there is no lack of information that publicity actions have never been carried out and that as regards the origin of the database of the referees have been provided verbally by the members themselves interested although not expressly collected in some cases if freely and unequivocal.

On 06/05/2019, in accordance with article 65 of the LOPDGDD, the Director of the Spanish Agency for Data Protection agreed to admit the claim for processing filed by the claimant against the respondent.

: On 09/25/2019, the Director of the Spanish Protection Agency

THIRD

of Data agreed to initiate a sanctioning procedure against the defendant, for the alleged infringement of article 6.1.a) of the RGPD, typified in article 83.5.b) of the RGPD.

FOURTH: Once the initiation agreement has been notified, the one claimed at the time of this

The resolution has not presented a written statement of allegations, for which reason the indicated in article 64 of Law 39/2015, of October 1, on the Procedure Common Administrative Law of Public Administrations, which in section f) establishes that in the event of not making allegations within the period established on the content of the initiation agreement, it may be considered a proposal for resolution when it contains a precise statement about the responsibility imputed, reason why a Resolution is issued.

FIFTH: Of the actions carried out in this proceeding, they have been accredited the following:

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PROVEN FACTS

FIRST. On 08/14/2019 the claimant, ICOMEM, filed a written claim before the AEPD; the letter is directed against AMED for the illicit treatment of the data of their collegiate members despite the fact that in the framework of the procedure A/00068/2018 instructed in the AEPD, AMED was warned for processing data from the collegiate without their consent; that AMED has continued to send to the accounts of e-mail, both personal and professional, of members electronic communications, illicitly treating your personal data.

SECOND. On 02/19/2018, the Director of the AEPD agreed to submit the Hearing prior to the warning procedure A/00068/2018 opened to AMED.

In the aforementioned procedure, in its Ground IV it was indicated "... the conduct developed by AMED is typified as a serious infringement in article

44.3 b) of the LOPD, which considers as such "Treat personal data without obtain the consent of the affected persons, when it is necessary in accordance with the provisions of this Law and its development provisions."

And in its foundation VI: "... In congruence with the nature attributed to the warning - as an alternative to the sanction when, attending to the circumstances of the case, the subject of the infraction is not worthy of that- whose object is the imposition of corrective measures, the cited SAN concludes that when the pertinent corrective measures had already been adopted, the proceeding in The right will be to agree on the Archive of the proceedings.

In the present case, and taking into account that AMED has eliminated from its database data those data with respect to which you cannot prove consent, and Therefore, they are measures that would prevent the events from happening again, in harmony with the pronouncement of the National High Court collected in the SAN of 11/29/2013 (Rec. 455/2011) the file of the actions of research carried out.

Through Resolution R/00819/2018 of 05/11/2018, the Director of the AEPD agreed Proceed to file the proceedings.

THIRD. ICOMEM in writing dated 02/14/2019 states that it has received new complaints from collegiate doctors in which they inform the institution collegiate that AMED has continued with the illicit treatment of their personal data staff; that on dates between 05/30/2018 and 06/26/2018, AMED has continued to send massively to the email addresses of the collegiate, at least two new campaigns of electronic communications not requested.

FOURTH. They are provided by ICOMEM Communiqué from the Secretary of the body collegiate in which it is reported, "in relation to the three new waves of emails

emails sent to members by AMED requesting support, they have received

at the email address ***EMAIL.1, communications forwarded by the

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following collegiate and identified in block titled AMED2 (THE NEW COLLEGE); AMED3 (WHICH BENEFITS THE DOCTOR-BUDGET), AMED4 (LAST STEP TO REDUCE THE FEE), AMED5 (REDUCE THE FEE OF THE SCHOOL UP TO €30 IT ONLY DEPENDS ON YOU):

Seventeen e-mails sent to collegiate professionals are provided.

and in which they complain to the collegiate body of having received them from AMED without

that they had provided their data for this and without their consent. Among them is

find those that are part of the AMED4 block (LAST STEP TO REDUCE

THE FEE), AMED5 (REDUCE THE SCHOOL FEE UP TO €30 ONLY

IT DEPENDS ON YOU) sent between 04/27/2018 and 06/01/2018.

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

Law 39/2015, of October 1, on the Common Administrative Procedure of

the Public Administrations, in its article 64 "Agreement of initiation in the

procedures of a sanctioning nature", provides:

"1. The initiation agreement will be communicated to the instructor of the procedure, with transfer of how many actions exist in this regard, and the interested parties will be notified, understanding in any case by such the accused.

Likewise, the initiation will be communicated to the complainant when the rules regulators of the procedure so provide.

2. The initiation agreement must contain at least:

a) Identification of the person or persons allegedly responsible.

b) The facts that motivate the initiation of the procedure, its possible rating and sanctions that may apply, without prejudice to what results of instruction.

c) Identification of the instructor and, where appropriate, Secretary of the procedure, with express indication of the system of recusal of the same.

d) Competent body for the resolution of the procedure and regulation that attributes such competence, indicating the possibility that the alleged perpetrator can voluntarily acknowledge its responsibility, with the effects provided for in the article 85.

e) Provisional measures that have been agreed by the body competent to initiate the sanctioning procedure, without prejudice to those may adopt during the same in accordance with article 56.

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

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not to carry out

allegations within the stipulated period on the content of the agreement

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

precise statement about the imputed responsibility.

3. Exceptionally, when at the time of issuing the initiation agreement

there are not sufficient elements for the initial qualification of the facts that motivate

the initiation of the procedure, the aforementioned qualification may be carried out in a phase

later by drawing up a List of Charges, which must be notified to

interested parties" (the underlined corresponds to the AEPD).

In application of the previous precept and taking into account that no

formulated allegations to the initial agreement, it is appropriate to resolve the initiated procedure.

AMED is attributed the infringement of article 6, Legality of the treatment, of the

RGPD that establishes that:

III

"1. The treatment will only be lawful if at least one of the following is met

conditions:

a) the interested party gave their consent for the processing of their data

personal for one or more specific purposes;

b) the treatment is necessary for the execution of a contract in which the

interested party is a party or for the application at the request of the latter of measures

pre-contractual;

(...)"

Article 4 of the GDPR, Definitions, in section 11, states that:

"11) «consent of the interested party»: any manifestation of free will,

specific, informed and unequivocal by which the interested party accepts, either through

a statement or a clear affirmative action, the processing of personal data that concern him”.

And article 7 of the aforementioned Regulation, Conditions for consent, notes that:

"1. When the treatment is based on the consent of the interested party, the responsible must be able to demonstrate that he consented to the treatment of his personal information.

2. If the data subject's consent is given in the context of a declaration writing that also refers to other matters, the request for consent will be presented in such a way as to be clearly distinguishable from other matters, in a manner intelligible and easily accessible and using clear and simple language. It will not be binding any part of the declaration that constitutes an infringement of these Regulations.

3. The interested party shall have the right to withdraw their consent at any moment. The withdrawal of consent will not affect the legality of the treatment

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based on consent prior to withdrawal. Before giving your consent, the Interested party will be informed of this. It will be as easy to withdraw consent as it is to give it.

4. In assessing whether consent has been freely given, account will be taken to the greatest extent possible whether, among other things, the execution of a contract, including the provision of a service, is subject to the consent of the processing of personal data that is not necessary for the execution of said contract".

Also article 6, Treatment based on the consent of the affected party,
of the new Organic Law 3/2018, of December 5, on Data Protection
Personal and guarantee of digital rights (hereinafter LOPDGDD), indicates
that:

"1. In accordance with the provisions of article 4.11 of the Regulation (EU)
2016/679, consent of the affected party is understood to be any manifestation of will
free, specific, informed and unequivocal by which he accepts, either through a
declaration or a clear affirmative action, the treatment of personal data that
concern.

2. When the data processing is intended to be based on consent
of the affected party for a plurality of purposes, it will be necessary to state
specific and unequivocal that said consent is granted for all of them.

3. The execution of the contract may not be subject to the affected party consenting to the
processing of personal data for purposes unrelated to the
maintenance, development or control of the contractual relationship".

In the present case, the proven facts are specified in the illegality of the
treatment of the personal data of the collegiate by the claimed, AMED, without their
consent or any other legitimating cause thereof, materialized in the
sending emails to the personal and/or professional accounts of the
holders of them.

In accordance with what was stated above, the processing of personal data
requires the existence of a legal basis that legitimizes it, such as the consent of the
interested party validly lent.

IV

From the documentation in the file it appears that AMED
violated article 6.1 of the RGPD, since the aforementioned entity carried out a treatment

illicit of the personal data of the collegiate, since the consent for the treatment of your personal data, materialized in the referral to the addresses of individual and/or professional e-mail addresses of members originating in amded@ma.pdm.es and whose primary concern was to reduce the current college fee to 30 euros per year, for which support for this initiative was needed.

Previously, the respondent had stated that the data had been provided verbally by the interested parties themselves, although not expressly and unequivocal having been treated based on tacit consent and never subject to

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advertising actions, as the AMED is a non-profit entity, and that it is had proceeded to eliminate the data of those professionals with respect to whom they did not obtaining prior consent for the referral of this type could be accredited communication of strictly trade union content.

The GDPR excludes implied consent and requires it to be explicit. With the entry into force of the RGPD and the new LOPDGDD, only the consent will be valid express. The most important novelty regarding the consent incorporated in the GDPR is based is that it must be granted through a clear affirmative act that evidence a declaration of free, specific, informed and unequivocal will of the Interested in admitting the processing of personal data that affect you; that There is not the slightest doubt that there has been a manifest will on the part of the client, giving their express consent to be able to treat their personal data with the specific purposes detailed in the form.

The Contentious-Administrative Chamber of the National High Court, in similar assumptions has considered that when the owner of the data denies the consent bears the burden of proof on the person who asserts its existence the person responsible for the processing of third-party data must collect and keep the documentation necessary to prove the consent of the holder. Thus, the SAN of 05/31/2006 (Rec. 539/2004), Fourth Law Basis.

The claimant has provided, among other documents, a copy of the communications received by the members who expressed their complaint about the receipt of emails sent by AMED, not having authorized said association for the use of your data for said purpose.

It should be noted that respect for the principle of legality of the data requires that accredited evidence that the owner of the data consented to the processing of the data of personal character and display a reasonable diligence essential to prove that end. Failure to act in this way would result in emptying the content of the principle of legality.

In addition, it should be noted that the respondent did not send any response to despite the accredited notification of the start agreement.

v

Article 83.5 a) of the RGPD, considers that the infringement of “the principles basic for the treatment, including the conditions for the consent in accordance with of articles 5, 6, 7 and 9” is punishable, in accordance with section 5 of the mentioned article 83 of the aforementioned Regulation, “with administrative fines of €20,000,000 maximum or, in the case of a company, an equivalent amount at a maximum of 4% of the total global annual turnover of the financial year above, opting for the highest amount.

On the other hand, the LOPDGDD for prescription purposes states in its article 72:

“Infringements considered very serious:

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1. Based on the provisions of article 83.5 of the Regulation (EU)

2016/679 are considered very serious and the infractions that

suppose a substantial violation of the articles mentioned in that and, in

particularly the following:

(...)

b) The treatment of personal personal data without the concurrence of any of the

the conditions of legality of the treatment established in article 6 of the Regulation

(EU) 2016/679.

(...)”

SAW

In order to establish the administrative fine to be imposed,

observe the provisions contained in articles 83.1 and 83.2 of the RGPD, which

point out:

“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.

2. 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 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 have

applied under articles 25 and 32;

e) any previous infraction 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 put

remedying the breach and mitigating the possible adverse effects of the breach;

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, paragraph 2, have been

previously ordered against the person in charge or the person in charge in question in

related to the same matter, compliance with said measures;

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j) adherence to codes of conduct under article 40 or mechanisms

certificates 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 infringement.

In relation to letter k) of article 83.2 of the RGPD, the LOPDGDD, in its

Article 76, "Sanctions and corrective measures", establishes that:

"two. In accordance with the provisions of article 83.2.k) of the Regulation (EU)

2016/679 may also be taken into account:

a) The continuing nature of the offence.

b) The link between the activity of the offender and the performance of treatments

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
of personal data.

commission of the offence.

e) The existence of a merger by absorption process after the commission
of the infringement, which cannot be attributed to the absorbing entity.

f) Affectation of the rights of minors.

g) Have, when it is not mandatory, a delegate for the protection of

h) The submission by the person in charge or person in charge, with
voluntary, to alternative conflict resolution mechanisms, in those

assumptions in which there are controversies between those and any interested party."
data.

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 sanction to be imposed in

the present case for the infringement typified in article 83.5 of the RGPD of which holds AMED responsible, in an initial assessment, the concurrent costs are estimated following factors:

The non-merely local scope of the treatment carried out by the entity claimed.

Numerous members have been affected by the offending conduct.

The defendant has already been warned previously, for similar events.

The respondent entity has not adopted measures to prevent the occurrence of similar incidents avoiding the effects of the infraction, because despite the fact that it was warned by Resolution of the Director of the AEPD of 05/11/2018 due to facts similar, despite the response offered within the aforementioned procedure: "...taking into account that AMED has eliminated from its database those data in respect of which consent cannot be accredited, and therefore they are measures that would prevent the events from happening again...", which proves that the stated by AMED was not true.

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Although there is no evidence that the entity had acted maliciously, his performance reveals a serious lack of diligence.

The link between the activity of the offender and the performance of treatment of personal data, since in its usual activity it processes data both from associates and third parties.

The claimed entity is not considered a large entity.

For all these reasons, in accordance with the established graduation criteria, both adverse and favorable, a penalty of €10,000 (ten thousand euros) is imposed, for violation of article 6.1.a) of the RGPD for which AEMD must respond.

Therefore, as stated,

The Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE the ASSOCIATION OF DEMOCRATIC PHYSICIANS, with NIF G87735999, for an infringement of article 6.1.a) of the RGPD, typified in article 83.5.a) of the RGPD, classified as a very serious infringement in article 72.1.b), a fine of €10,000 (ten thousand euros).

SECOND: NOTIFY this resolution to the MEDICAL ASSOCIATION DEMOCRATS, with NIF G87735999.

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, opened on behalf of the Spanish Agency of Data Protection at Banco CAIXABANK, S.A. Otherwise, it will proceed to its collection in executive period.

Received the notification and once executed, if the date of execution is is between the 1st and 15th of each month, both inclusive, the term to carry out the voluntary payment will be until the 20th day of the following month or immediately after, and if is between the 16th and last day of each month, both inclusive, the term of the

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

In accordance with the provisions of article 50 of the LOPDPGDD, 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 LOPDPGDD, and in accordance with the provisions of article 123 of the

LPACAP, the interested parties may optionally file an appeal for reconsideration

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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 appeal-

administrative. If this is the case, the interested party must formally communicate this

made by writing to the Spanish Agency for Data Protection,

introducing him to

the agency

[<https://sedeagpd.gob.es/sede-electronica-web/>], or through any of the other

records provided for in art. 16.4 of the aforementioned Law 39/2015, of October 1. Also

must transfer to the Agency the documentation that proves the effective filing

of the contentious-administrative appeal. If the Agency were not aware of the

filing of the contentious-administrative appeal within two months from the

day following the notification of this resolution, it would end the

precautionary suspension.

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