

□ File No.: EXP202102832

## RESOLUTION OF PUNISHMENT PROCEDURE

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

### BACKGROUND

FIRST: PONTEAREAS CITY COUNCIL (hereinafter, the claimant)

on 09/24/2021 filed a claim with the Spanish Protection Agency

of data. The claim is directed against Ms. A.A.A. with NIF \*\*\*NIF.1 (hereinafter,

the claimed party). The grounds on which the claim is based are as follows:

claimant provides Minutes Complaints of 07/30/2021 and 08/01/2021 issued by the

PONTEAREAS Local Police in which it shows that the claimed

took pictures with his mobile phone, without consent, of a group of minors

who were on public roads and the agents of the Local Police, and uploaded part of

said images to your personal account of the social network FACEBOOK.

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), said claim was transferred to the claimed party,

subsequently reiterated, so that it proceeded to its analysis and inform this

Agency within a month, of the actions carried out to adapt to the

requirements set forth in the data protection regulations.

No response has been received to the submitted briefs.

THIRD: On 12/15/2021 the Director of the Spanish Protection Agency

Data agreed to admit the claim filed by the claimant for processing.

FOURTH: On 07/10/2020, the Director of the Spanish Protection Agency

of Data agreed to initiate a sanctioning procedure against the defendant, for the alleged

infringement of article 6.1 of the RGPD, typified in article 83.5.a) of the RGPD.

FIFTH: 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.

SIXTH: Of the actions carried out in this proceeding, they have been

accredited the following:

#### PROVEN FACTS

FIRST: On 09/24/2021 the claimant filed with the Spanish Agency for

Data Protection, provides Reports Complaints of 07/30/2021 and 08/01/2021 issued by

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the Local Police indicating that the defendant took photographs with her mobile phone,

without consent, both to a group of minors who were on public roads and to

the agents of the Local Police, and uploaded part of said images to his personal account

of the social network FACEBOOK

SECOND: Records-Complaints and request to start the procedure are provided

sanctioning number XXX and YYY in which the facts that motivate the

claim.

THIRD: It is stated that an amplifying photographic report of the Act-complaint has been provided in the images published by the claimant on her Facebook account appear.

## 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.

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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:

II

"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 regulatory norms 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 result of the 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 attribute such competence, indicating the possibility that the presumed

responsible can voluntarily acknowledge their responsibility, with the

effects provided for in article 85.

e) Provisional measures that have been agreed by the body

competent to initiate the sanctioning procedure, without prejudice to those that

may be adopted 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

case of not doing

allegations within the stipulated period on the content of the

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initiation agreement, this may be considered a resolution proposal

when it contains a precise statement about the responsibility

imputed.

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.

III

The facts denounced materialize in the taking of photographs, without

consent, both to a group of minors and to police officers of the entity

affected premises that were on public roads to later upload them to your

personal account in the social network Facebook.

It should be noted that the physical image of a person, pursuant to article 4.1

of the RGPD, it is a personal data and its protection, therefore, is the object of said

Regulation. Article 4.2 of the RGPD defines the concept of "treatment" of

personal information.

It is, therefore, pertinent to analyze whether the processing of personal data (image

natural persons) carried out through the filming of a video and its

Downloading on social networks is in accordance with the provisions of the RGPD.

Article 6, Legality of the treatment, of the RGPD establishes:

"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;

c) the treatment is necessary for the fulfillment of a legal obligation

applicable to the data controller;

d) the processing is necessary to protect the vital interests of the data subject or

of another natural person;

e) the treatment is necessary for the fulfillment of a mission carried out in

public interest or in the exercise of public powers vested in the controller

of the treatment;

f) the treatment is necessary for the satisfaction of legitimate interests

pursued by the data controller or by a third party, provided that over said interests do not prevail the interests or the rights and freedoms fundamental data of the interested party that require the protection of personal data, in particular when the interested party is a child.

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The provisions of letter f) of the first paragraph shall not apply to treatment carried out by public authorities in the exercise of their functions.

(...)"

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”.

On this question of the legality of the treatment, it also affects the Recital 40 of the aforementioned RGPD, when it states that "For the processing is lawful, personal data must be processed with the consent of the interested party or on any other legitimate basis established in accordance with Law, either either in this Regulation or by virtue of other law of the Union or of the Member States covered by this Regulation, including the need to comply with the legal obligation applicable to the data controller or the need to to execute a contract to which the interested party is a party or in order to take measures at the request of the interested party prior to the conclusion of a contract.»

On the other hand, article 4 of the RGPD, Definitions, in its sections 1, 2 and 11, notes that:

“1) «personal data»: any information about an identified natural person or identifiable ("the interested party"); An identifiable natural person shall be considered any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a name, an identification number, location data, an online identifier or one or more elements of the physical, physiological, genetic, mental, economic, cultural or social identity 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,

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communication by transmission, broadcast or any other form of enabling of access, collation or interconnection, limitation, suppression or destruction;

“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”.

In relation to the claimed facts, it is considered that there is evidence of that the data processing carried out by the claimed party and that is the subject of this procedure has been carried out without cause that justifies it, which could suppose the

Violation of article 6.1 of the RGPD:

IV

The documentation in the file shows that the claimed violated article 6.1 of the RGPD, since I treat the personal data group of minors as well as police officers from the affected local entity who were on public roads to later upload them to the social network Facebook, without legal basis that legitimize it.

It should be noted that in accordance with the provisions of article 6.1.a) of the RGPD one of those legal bases that would allow the treatment of the data of personal character is the consent of the interested party, which in the present case does not is accredited.

Therefore, respect for the principle of legality of the data requires that it be stated accredited 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.

v

The infraction that is attributed to the claimed one is typified in the article 83.5 a) of the RGPD, which considers that the infringement of “the basic principles for processing, including the conditions for consent under the articles 5, 6, 7 and 9” is punishable, in accordance with section 5 of the aforementioned Article 83 of the aforementioned Regulation, “with administrative fines of €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.

The LOPDGDD in its article 71, Violations, states that: “They constitute infractions the acts and behaviors referred to in sections 4, 5 and 6 of the Article 83 of Regulation (EU) 2016/679, as well as those that are contrary to the present organic law”.

And in its article 72, it considers for prescription purposes, which are: “Infringements considered very serious:

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

2016/679 are considered very serious and the infractions that

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

(...)

b) The processing of personal data without the concurrence of any of the conditions of legality of the treatment established in article 6 of the Regulation (EU) 2016/679.

(...)”

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:

SAW

"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 as the number of stakeholders affected and the level of damage and

damages they 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 if the person in charge or the person in charge notified the infringement and, in such case, what extent;

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 relation to the same matter, compliance with said measures;

j) adherence to codes of conduct under article 40 or mechanisms 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 realized or losses avoided, direct or indirectly, through infringement.

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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 of personal data.
  - 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 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."
- data.

In accordance with the precepts transcribed, in order to set the amount of the sanction of a fine to be imposed in the present case for the infraction of article 6.1 of the RGD typified in article 83.5.a) of the RGD for which the user is responsible.

claimed, the following factors are considered concurrent:

Aggravating circumstances are:

The nature and seriousness of the infringement as well as the scope of the treatment carried out because we must not forget that the captured images were uploaded to a social network whose diffusion is large and instantaneous, having been affected numerous people.

The activity of the defendant implies intentionality detaching from the same voluntariness and the purpose of causing damage.

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 Ms. A.A.A., with NIF \*\*\*NIF.1, for a violation of Article

6.1 of the RGPD, typified in article 83.5 of the RGPD, a fine of €2,000 (two thousand euros).

SECOND: NOTIFY this resolution to A.A.A.

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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

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 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.

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.

Electronic Registration of  
through the

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