

Procedure No.: PS/00049/2019

RESOLUTION: R/00490/2019

In procedure PS/00049/2019, instructed by the Spanish Agency for Data Protection to the entity TODO POR EL 431, S.L. (MALONEY), seen the complaint filed by the MUNICIPAL POLICE OF MADRID and by virtue of the following,

FACTS

FIRST: MADRID MUNICIPAL POLICE (hereinafter, the claimant) dated December 5, 2018 filed a claim with the Spanish Protection Agency of Data, motivated by the treatment of data carried out through cameras of a video surveillance system whose owner is TODO POR EL 431, S.L. (MALONEY) with NIF B83812370 (*hereinafter the claimed) installed in Calle Bretón de los Blacksmiths 61-Local-Madrid.

The reasons on which the claim is based are "installation of a camera in establishment oriented towards a public thoroughfare without just cause. Along with the claim, provide a copy of the Act (Complaint) issued by the patrol of the acting Local Police.

SECOND: In view of the reported facts, in accordance with the evidence that is available, the Data Inspection of this Spanish Agency for the Protection of Data considers that the treatment of personal data that is carried out by the denounced through the chambers to which the complaint refers, does not meet the conditions imposed by the regulations on data protection, for which reason the opening of this sanctioning procedure.

THIRD: After consulting the database of this Agency, there is a previous File E/01826/18 where a Complaint for the installation of a video-camera of the

aforementioned establishment that obtained images of public space without just cause.

FOURTH: On September 2, 2019, the Director of the Spanish Agency for

Data Protection agreed to submit this

warning procedure PS/00049/2019. This agreement was notified to

denounced.

PROVEN FACTS

First. On 12/05/18, this Agency received a letter of Complaint sent

by the Local Police (Madrid) by means of which it transfers the following fact:

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28001 – Madrid

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2/7

“Installation of a camera in an establishment oriented towards a public road without cause justified”. (Folio nº 1).

Second. The establishment Todo por

431, SL (Maloney).

Third. There is no record that the establishment has the mandatory sign(s)

informative indicating that it is a video-monitored area, informing you

properly about your rights under the GDPR.

Although examining the outside of the premises from the Google Maps application in

date 09/27/19 if an informative sign is visibly observed on the door of

access.

Fourth. There is no evidence that the reported establishment has

informative form (s) available to the clients of the same, which in its case

they might require it.

The accused party has not provided a printed copy of it for purposes of its examination and verification by this Agency.

Fifth. According to the Local Police (Madrid) who were dispatched to the scene of the events, the system allows to obtain images of the sidewalk located in front of the establishment, exercising excessive control over the area without just cause.

FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of the RGPD recognizes to each authority of control, and as established in art. 47 of the Organic Law 3/2018, of 5 December, of Protection of Personal Data and guarantee of digital rights (in hereinafter LOPDGDD), the Director of the Spanish Agency for Data Protection is competent to initiate and resolve this procedure.

II

In the present case, we proceed to examine the claim dated 12/05/18 by means of which the installation of a video-surveillance camera with alleged orientation towards public space.

The facts described above may affect the content of art. 5.1 c) RGPD, by having a video-surveillance device oriented towards public thoroughfares, intimidating pedestrians who feel they are being watched By himself.

Cameras installed by individuals have to be oriented preferably towards their private space, even if the camera is fake, because it can file complaints with public bodies.

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28001 – Madrid

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The treatment of images in public places can only be carried out -if applicable and prior compliance with the legally enforceable requirements-, by the Forces and Security Forces, unless the exception established in article 4.3 operates of Instruction 1/2006, of November 8, of this Agency, which establishes: "the cameras and video cameras installed in private spaces will not be able to obtain images of public spaces unless it is essential for the purpose of surveillance that is intended, or is impossible to avoid because of the location of those. In any case, any unnecessary data processing should be avoided. for the intended purpose"

III

For informational purposes only, it is worth remembering some of the requirements that must be comply with the processing of images through a video surveillance system to be in accordance with current regulations:

- Respect the principle of proportionality.
- When the system is connected to an alarm center, you can only be installed by a private security company that meets the requirements contemplated in article 5 of Law 5/2014 on Private Security, of April 4.
- The video cameras will not be able to capture images of the people who are outside the private space since the treatment of images in places public can only be carried out, where appropriate, by the Forces and Bodies of Security. Nor can spaces owned by third parties be captured or recorded without the consent of their owners, or, as the case may be, of the persons who are find.
- The duty to inform those affected provided for in article

12 of the RGPD 2016/679, of April 27, 2016, in the terms referred to both in the cited article, as in articles 13 and 14 of said rule, resulting from the application -by not contradicting the provisions of the aforementioned Regulation-, the manner provided in the Article 3 of Instruction 1/2006, of November 8, of the Spanish Agency for Data Protection, on the Processing of Personal Data for the Purpose of Surveillance through Camera Systems or Video Cameras (Instruction 1/2006, of 8 of November, of the Spanish Data Protection Agency).

Specifically, it must:

Place in the video-monitored areas, at least one badge

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informative located in a sufficiently visible place, both in spaces open as closed.

In accordance with the provisions of articles 13 and 14 of the Regulation (EU) 2016/679, of April 27, 2016, in the informative sign above mentioned must identify, at least, the existence of a treatment, the identity of the person in charge and the possibility of exercising the rights provided in these precepts.

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4/7

Keep available to those affected the information to which two.

refers to the aforementioned Regulation (EU) 2016/679, of April 27, 2016.

IV

The Supreme Court (Judgments of April 16 and 22, 1991) considers that element of culpability, it follows “that the action or omission, qualified as infraction punishable administratively, must be, in any case, attributable to its author, by intent or recklessness, negligence or inexcusable ignorance.”

The National Court, in Judgment of June 29, 2001, in matters of protection of personal data, has declared that "simple negligence or Failure to comply with the duties that the Law imposes on the persons responsible for files or the processing of data to exercise extreme diligence...".

The Supreme Court (Judgments of July 5, 1998 and March 2, 1999) comes understanding that recklessness exists whenever a legal duty of care is disregarded. care, that is, when the offending subject does not behave with the required diligence. Diligence whose degree of demand will be determined in accordance with the circumstances concurrent in each case, such as the special value of the protected legal interest or the professionalism required of the offender. In this sense, the aforementioned Judgment of June 5 of 1998 requires professionals in the sector "a duty to know especially the applicable rules".

Applying the previous doctrine, the National High Court requires the entities that operate special diligence in the data market when carrying out the use or treatment of such data or transfer to third parties. And this because being the one of the data protection a fundamental right (Judgment of the Constitutional Court 292/2000), the repositories of these data must be especially diligent and careful when operating with them and should always opt for the interpretation more favorable to the protection of the legal rights protected by the norm. In this sense, among others, Judgments of the National High Court dated February 14 and 20 September 2002 and April 13 and May 18, 2005).

With this type of video-surveillance systems, as has been indicated, it is not

can obtain images from public space, by affecting the rights of third parties

who are intimidated with these types of devices without just cause.

Despite the requirements of this Agency, a passivity is shown in the

compliance with the required measures, the Forces and Bodies of

Security, that they have been fully briefed on how to proceed, so

It is possible to speak of gross negligence on the part of the accused.

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In accordance with the evidence available in this

sanctioning procedure, it is considered that the defendant has a device

that is oriented towards public space without just cause.

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5/7

The Local Police (Madrid) moved to the place of the "events" found that the

camera located in the door, about which I had already warned him, allows a

excessive uptake of the public sidewalk, affecting the right of third parties without cause

justified.

The art. 77 section 5 of Law 39/2015 (October 1) provides the following: "The

documents formalized by the officials who are recognized as

authority and in which, observing the corresponding legal requirements,

collect the facts verified by those will prove them unless it is

prove the contrary".

The known facts constitute an infraction, attributable to the

claimed, for violation of the content of art. 5.1 c) GDPR, cited above.

The art. 83.5 RGPD provides the following: "Infringements of the provisions following will be sanctioned, in accordance with section 2, with administrative fines EUR 20,000,000 maximum or, in the case of a company, an amount equivalent to a maximum of 4% of the total global annual 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;

When motivating the sanction, the following is taken into account:

-That the camera obtains images of public space, without just cause, affecting the right of pedestrians (art. 83.2^a) RGPD).

-That this body had previously warned the establishment denounced, informing him of the requirements that the installed system had to meet, for what is possible to speak of gross negligence (art. 83.2 b) RGPD).

Therefore, it is considered correct to impose a sanction encrypted in the amount of €4,000 (Four Thousand Euros), taking into account that the volume of annual billing of the establishment, all without prejudice to having to accredit before this Agency that the system complies with current legislation.

The accused party must provide a screen print (date and time) of what is captured, as well as proving that the system complies with the regulations in force (eg informative poster in a visible area, form available to customers, etc.).

According to what was stated,

By the Director of the Spanish Data Protection Agency,

HE REMEMBERS:

FIRST: IMPOSE a sanction on the entity TODO POR EL 431, S.L. (MALONEY) encrypted in the amount of €4,000 (Four Thousand Euros) for the installation of a

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6/7

video-surveillance, which allows you to record public roads, being the conduct contrary to article 5.1 c) RGPD, typified as an infringement in article 83.5. a) RGPD, being punishable based on the provisions of article 58.2 RGPD.

SECOND: REQUIRE the accused to adopt the necessary measures, to correct the illegalities described, contributing within ONE MONTH from the notification of this act, reliable evidence of compliance with the measures required, based on the provisions of art. 58.2 d) GDPR.

THIRD: NOTIFY this Agreement to TODO POR EL 431, S.L. (MALONEY) and REPORT the result of the proceedings to the complaining party LOCAL POLICE (MADRID).

FOURTH: 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 Data Protection at Banco CAIXABANK, S.A. Otherwise, it will be collected during 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 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

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

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through the

Electronic Registration of

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.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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