

□ Procedure No.: PS/00405/2020

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: On July 31, 2019, he entered this Agency in writing
claim filed by A.A.A. concerning the dissemination of images of his minor son
of four years, without the consent of the parents, by the Cultural Association
***ASOCIACIÓN.1, which the minor attended to receive Chinese classes, in several
Wechat groups (according to the claimant, a service similar to WhatsApp
used by the Chinese community).

The grounds on which the claim is based are the dissemination of images of a minor
four years, without parental consent, by the Cultural Association
***ASOCIACIÓN.1, to which the minor attended Chinese classes, in several groups of
WeChat (according to the claimant, a service similar to WhatsApp used by
the Chinese community).

The claimant states that the images, in which it seems that she hides
partially the minor's face by superimposing a digital sticker, it is
spread from the telephone number of a teacher of the Association to the
groups.

He accredits having addressed the Association so that they eliminate these publications and request
apologize in those same forums, stating that they have neglected these requests.

That according to the complainant took place on the date of: May 31, 2019

And, among other things, attach the following documentation:

□ Various screenshots of photos distributed via WeChat messaging

☐ Letter addressed to the association

The claimant states that the images, in which the face is partially hidden of the minor by superimposing a sticker, would have spread from the telephone number of a teacher of the Association to the groups called:

***GROUP 1,

***GROUP.2 or ***GROUP.3 of said Association, all of them

composed of an average of four hundred people.

Likewise, the claimant accredits having addressed the Association so that they eliminate those publications and apologize in those same forums, stating that they have ignored these requests.

SECOND: On September 3, 2019, after analyzing the documentation that was in the file, a resolution was issued by the Director of the Spanish Agency of Data Protection, agreeing to file the claim, as it was not appreciated elements that would make it possible to investigate a violation of the rights recognized in the scope of competence of the Spanish Data Protection Agency.

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The resolution was notified to the affected party on September 6, 2019, according to notice of receipt that appears in the file.

THIRD: On October 4, 2019 A.A.A. has filed an appeal for reposition -RR/00669/2019-, reiterating the arguments set forth in its written claim and adding that the controversial images were republished from the telephone number ***PHONE.1, contact number of the Association,

along with comments about the minor's misbehavior.

Likewise, the claimant points out that, despite the fact that the face of the minor is hide, continues to be identifiable, especially for the rest of the parents who carry their children to the Association.

FOURTH

O: On November 19, 2019, it is resolved to estimate the appeal of reinstatement filed by the claimant against the resolution of this Agency issued on September 3, 2019, and agree to admit the claim for processing filed against the defendant.

The claimant is notified on December 3, 2019 and a new file with reference number E/08183/2020.

FIFTH: 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), with reference number E/08183/2020, transfer of said claim to the claimed, on September 3, 2020, so that it proceeded to its analysis and inform this Agency within a month of the actions carried out to comply with the requirements set forth in the regulations of Data Protection.

SIXTH: In view of the facts denounced in the claim and the documents provided by the claimant, the General Subdirectorate for Data Inspection proceeded to carry out preliminary investigation actions to clarify 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 established in Title VII, Chapter I, Second Section, of Organic Law 3/2018, of December 5, Protection of Personal Data and guarantee of the rights

(hereinafter LOPDGDD).

As a result of the research actions carried out, the

following ends:

☐ Made a request for information on the facts claimed through

certified postal service to the investigated Association, to the address provided

by the claimant, dated June 26, 2020, is returned by

"Unknown".

☐ It is verified in Google Maps that said Association appears in the aforementioned

postal address.

The complainant indicates that the diffusion took place, in the first instance, on 31

May 2019 at 11:30 from the phone number ***TELÉFONO.2 that

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manifest belongs to a teacher of the Association. Done

requirement regarding the ownership of this telephone number to VODAFONE

ESPAÑA S.A.U., operator of this number, dated October 6,

2020 is received in this Agency, written response to the request

stating that on the date indicated by the claimant the telephone number

was not assigned to any user. This phone number does not appear in

WeChat messages provided but if a few characters in Chinese, in

substitution of the telephone number, which could correspond to the holder of the

the same that the claimant had recorded in the agenda.

If the claimant provides evidence of a second dissemination of videos from a second phone number on May 31, 2019 at 11:45 a.m. corresponds to the contact number of the association. In the pictures provided corresponding to frames of a video of the minor, the face of the minor is totally covered by a digital sticker except for one of them which is partially covered and in which it is possible to identify clearly the minor.

☐

☐ It is verified, by the screenshots of the messages, that this diffusion it was produced to groups containing between 400 and 500 followers.

☐ On October 26, 2020, the request for information on the facts denounced to the investigated Association resulting returned by unknown recipient on October 29, 2020.

☐ Requested the tax identification number of the Cultural Association

***ASSOCIATION.1

the TAX AGENCY SERVICE OF PLANNING AND INSTITUTIONAL RELATIONS, dated December 28, October, the requested information is received in this Agency.

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SEVENTH: On January 12, 2021, the Director of the Spanish Agency for Data Protection agreed to initiate a sanctioning procedure against the claimant, for the alleged infringement of article 6.1.a) of the RGPD, typified in article 83.5 of the GDPR.

EIGHTH: The agreement to initiate this sanctioning procedure was notified to the one claimed on January 26, 2021, but he has not issued any allegation in the deadline given for it.

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

In this proceeding, the following are considered proven facts:

FACTS

FIRST: The dissemination of images of a child under four years of age, without the consent of the parents, by the Cultural Association ***ASOCIACIÓN.1, to which the minor attended Chinese classes.

SECOND: On September 3, 2019, it was agreed to file the claim, as there were no elements that would allow an investigation of a violation of the rights recognized in the field of competence of the Spanish Agency for Data Protection.

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However, on November 19, 2019, it was decided to uphold the appeal for reconsideration filed by the claimant on October 4, 2019 reiterating the arguments exposed in his statement of claim and adding that the controversial images were republished from the phone number ***PHONE.1, number of contact of the Association, and a new file is opened with a reference number E/08183/2020.

THIRD

O: On January 26, 2021, the agreement to start this procedure, becoming the same in resolution proposal in accordance with articles 64.2.f) and 85 of Law 39/2015, of October 1, on Procedure Common Administrative of Public Administrations (LPACAP), by not carrying out the

claimed allegations within the indicated period.

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 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

Article 6.1 of the RGPD establishes the assumptions that allow the legalization of the processing of personal data, specifically in section 1.a) it is indicated that

The processing of personal data will be understood as lawful if they gave their consent.

In this sense, and in application to the present case, where the right to protection of the image of minors, note that article 8 of the RGPD regulates the conditions applicable to the consent of the child in relation to the services of the information society, indicating that:

“1- When article 6, section 1, letter a) is applied in relation to the offer directly to children from services of the information society, the treatment of personal data of a child will be considered lawful when they are at least 16 years old.

If the child is under 16 years of age, such treatment will only be considered lawful if the consent was given or authorized by the holder of parental authority or guardianship over the child, and only to the extent that it was given or authorized.

Member States may establish by law a lower age for such purposes, provided that this is not less than 13 years.

2. The controller will make reasonable efforts to verify in such cases in which the consent was given or authorized by the holder of parental authority or guardianship over the child, taking into account the available technology.

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3. Paragraph 1 shall not affect the general provisions of the Contract Law of Member States, such as the rules relating to the validity, formation or effects of contracts in relation to a child.”

Therefore, for the processing of personal data of minors to be lawful object of this case, the consent of the person who has parental authority will be required. or guardianship

III

In the present case, the claim focuses on the unauthorized use of the image of the minor child of the claimant, without the legal legitimacy required for this purpose. Note that the exceptions of article 2 of the RGPD would not apply, among which that the domestic use of personal data is contemplated since the image object of this claim has been sent to more than 400 people, all of them members of the accused association.

In accordance with the reported facts, we find ourselves before an infraction, attributable to the claimed, for the processing of personal data, regulated in art. 6.1 a) of the RGPD, in relation to article 8.1 of the RGPD when treating the image of a minor, without the consent of the person holding his parental authority.

IV

By virtue of the provisions of article 58.2 of the RGPD, the Spanish Agency for Data Protection, as a control authority, has a set of corrective powers in the event of an infraction of the precepts of the

GDPR.

Article 58.2 of the RGPD provides the following:

“2 Each supervisory authority shall have all of the following corrective powers

listed below:

(...)

b) sanction any person responsible or in charge of the treatment with a warning

when the treatment operations have violated the provisions of this

Regulation;”

(...)

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

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

in a specified manner 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

particular case;”

Article 72.1.b) of the LOPDGDD states that “according to what is established in the

article 83.5 of Regulation (EU) 2016/679 are considered very serious and will prescribe

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after three years the infractions that suppose a substantial violation of the

articles mentioned therein and, in particular, 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 Regulation (EU) 2016/679.

This infraction can be sanctioned with a maximum fine of €20,000,000 or, in the case of a company, an amount equivalent to a maximum of 4% of the global total annual turnover of the previous financial year, opting for the of greater amount, in accordance with article 83.5 of the RGPD.

Likewise, it is considered appropriate to graduate the sanction to be imposed in accordance with the following criteria established by article 83.2 of the RGPD:

As aggravating the following:

In the present case we are dealing with unintentional negligent action, but

□

significant (article 83.2 b)

Basic personal identifiers are affected, in this case the

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image of the minor, according to article 83.2 g).

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 CULTURAL ASSOCIATION ***ASOCIACIÓN.1, with NIF G98925795, for an infringement of article 6.1.a) of the RGPD, typified in article 83.5 of the RGPD, a fine of 3,000 euros (three thousand euros).

SECOND: NOTIFY this resolution to CULTURAL ASSOCIATION

*** ASSOCIATION.1.

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 nº 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

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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

Director of the Spanish Data Protection Agency

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