

Procedure No.: PS/00223/2019

RESOLUTION OF PUNISHMENT PROCEDURE

Of the actions carried out by the Spanish Data Protection Agency before

RND PATINAJE, S.L., by virtue of a claim filed by Ms. A.A.A. (in

hereinafter the claimant) and based on the following:

BACKGROUND

FIRST: The claimant filed a claim with the Spanish Agency for

Data Protection on 10/19/2018. The written claim is directed against RND

PATINAJE, S.L., with NIF B88133236 (hereinafter the claimed). The reasons in which

the claim is based on are, in summary, the following: that he had managed the dismissal at his

daughter in the hockey club in which she was enrolled; however, when reviewing the

club app the real low discovered that there were pictures of her daughter with the rest of the

equipment both in the application and on the web page, without having granted your

express consent. In addition, this week he has discovered a video on the page

facebook of the club, for which it has not given authorization either. the only thing about it

on personal data was at the time of registration in the club through a

link to the general conditions where it says that I authorize the recording of photos and

videos.

SECOND: Upon receipt of the claim, the Subdirector General for

Data Inspection proceeded to carry out the following actions:

On 12/10/2018, reiterated on 01/15/2019, the writ was transferred to the defendant

filed for analysis and communication to the complainant of the decision adopted

about. Likewise, it was required that within a month he send to the

Agency certain information:

- 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.

The respondent has not responded to any of the requirements formulated by the Spanish Agency for Data Protection.

On 05/23/2019, 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 affected party against the defendant.

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THIRD: On 07/05/2019, the Director of the Spanish Protection Agency of Data agreed to initiate a sanctioning procedure against the defendant, for the alleged infringement of Article 5.1.f) of the RGPD, typified in Article 83.5 of the RGPD.

FOURTH: Once the initiation agreement has been notified, the claimant in writing of allegations 09/25/2019 indicated that: the claimant had given her express consent included in the general conditions of the entity; that the claim filed is

of 10/19/2018 being the first of the e-mails requesting the withdrawal of the images

it is later; that all images were removed or edited to be

identification impossible, the request being received on 10/24/2018; that good faith

It must be the way to resolve conflicts, so if there were more images, the

claimant can make as many requests as he deems appropriate and will proceed to his

elimination as it could not be less; that it is impossible for the claimant to base its

claim in images dated after 10/26/2018; that the situation of

defenselessness of the defendant is absolute, violating, among others, his right to

defending; that no notification has been received from the AEPD regarding this

claim on the dates indicated in the initiation agreement.

FIFTH: On 10/08/2019 a period of practice tests began,

remembering the following:

Consider reproduced for evidentiary purposes the claim filed by the

claimant and his documentation, the documents obtained and generated by the

Inspection services that are part of the file.

Consider reproduced for evidentiary purposes, the allegations to the initial agreement

filed by the claimant.

Request from RND Patinaje SL: a copy of the privacy policy, contained in

the General Conditions where it is accepted to be part of the club by

subscribers, through which the data must be treated in accordance with the

criteria and requirements established in the General Regulation for the Protection of

Data from the European Union; documentary, graphic or sound accreditation of the

Consent granted for the publication of the photographs of the daughter of the

claimant and in which each of the

purposes or matters for which that is demanded; copy of emails

crossed with the claimant related to the incident revealed

in the claim.

Request from the claimant the documentation in their possession related to with referral procedure that for whatever reason would not have been provided at the time of the claim.

On 10/16/2019, the respondent responded to the requested evidence, the content of which work on file.

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

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PROVEN FACTS

FIRST. On 10/19/2018 it has entry in this Spanish Agency for the Protection of

Written data of the claimant, stating that she had arranged for her daughter to be discharged in

the hockey club in which she was registered (RND PATINAJE, S.L.), however, when

reviewing the club's website discovered that there were photos of his daughter with the rest of the team, without

that you have given your express consent; In addition, he had also discovered

a video on the club's facebook page, for which he has not given

authorization; that the only time he gave consent was at the

time of registration in the club through a link to the general conditions

where it says that I authorize the recording of photos and videos.

SECOND. There is an email from the claimant dated 10/20/2018, one day

after the claim filed with the AEPD, addressed to the representative of the

claimed containing the following:

“(…)

I have been consulting your computer application, website and Facebook, something that

I had not done so far and I have seen photos and videos published by both the team of

Rollybear like from the hockey school, where my daughter, Almudena Angulo, appears.

As a legal representative, given that she is a minor and does not have

permission to do so, I request you to make the immediate withdrawal of said photos and videos of

the mentioned pages.

(…)”

Respondent's representative's response on the same date:

“Tell us one by one which ones are identifying B.B.B., please, and we will remove them without issue”.

In addition, there is a subsequent exchange of e-mails between the representative of the

claimed and the claimant, caused by the difficulty of identifying the minor in the

marked photographs, being definitively resolved the removal of the images

on 10/26/2018.

THIRD. In the General Conditions of the claimant there is the heading Data

Personal, in which the following is indicated:

“They will be treated in accordance with European data protection laws, the Regulation

General Data Protection of the European Union and these conditions

generals.

Under the GDPR and national laws, you are informed that your personal data

will be collected in the files owned by RND Skating, in order to carry out

your registration and participation. Your data may be used to inform you of future

events organized by RND Skating.

RDN Skating will be able to film and photograph the participants during the development of the

events and activities. In accordance with the provisions of Organic Law 1/1982, of 5

of May, of the right to honor, to personal and family privacy and to one's own image,

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By accepting these conditions, you express your consent to freely transfer to

RND Skating the image rights in relation or recordings that are made to the

competitor.

The participant authorizes RND Skating to use these images and photographs in

advertising elements that can be made (inserts, brochures, posters,

informative publications, catalogs and web pages and in all kinds of social networks and

internet media. As well as, any other means without more limitations than the

derived from the Personal Data Protection Law and the Organic Law of

Right to Honour, Personal and Family Privacy and Own Image.

(...)"

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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Article 89, Proposal for a resolution in procedures of a nature

sanctioning, of Law 39/2015, of October 1, of the Administrative Procedure

Common of the Public Administrations, in its section 1 establishes that:

II

"1. The investigating body will resolve the completion of the procedure, with file of the actions, without it being necessary to formulate the proposal for resolution, when in the instruction procedure it is made clear that any of the following circumstances occur:

- a) The non-existence of the facts that could constitute the infraction.
- b) When the facts are not proven.
- c) When the proven facts do not constitute, in a manifest way, an infringement administrative.
- d) When it does not exist or it has not been possible to identify the person or persons liable or appear exempt from liability.
- e) When it is concluded, at any time, that the infraction has prescribed.

In the present case, the claimed facts refer to the insufficiency of the conditions of consent established in the application for registration in the club for the exercise of activities, not complying with the provisions of the RGPD.

III

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

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conditions:

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

- 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;

(...)"

And article 7, Conditions for consent, of the RGPD states 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 statement 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 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".

On the other hand, article 6, Processing based on the consent of the affected, 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 first place, it is striking that it is the federative body, the Federation Madrileña de Patinaje, whoever fails to comply with the regulations regarding the protection of

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data; It should be noted that the application for processing a license from the Federation Madrileña de Patinaje of 08/04/2018 provided by the defendant in which the personal data of the daughter of the claimant and signed by the father of the minor is referring to the LOPD, a rule that was repealed with the entry into force of the RGPD on 05/25/2018 and, although this is true, it is no less true that in the aforementioned document pointed out that the data provided in any format would be incorporated into the files for which the Madrilenian Skating Federation (FMP) is responsible; that the data would be transferred not only to public administrations, official bodies

national and international sports, but also to companies or entities organizers of sporting events and insurance companies that manage the toppings; Likewise, it authorized that the image, voice and results obtained in the competitions were published on the website and the bulletin board of the Federation, etc, declaring having been informed of the possibility of exercising the ARCO rights according to the current procedure.

Secondly, on the website of the person claimed, the request form registration to the skating club leads to the General Conditions, in which section Personal Data, as stated in the proven facts, it is established that:

“RDN Skating will be able to film and photograph the participants during the development of events and activities. In accordance with the provisions of the Law Organic 1/1982, of May 5, on the right to honor, to personal and family privacy and in the image itself, by accepting these conditions, you express your consent in assign free of charge to RND Skating the image rights in relation to or recordings made to the participant.

The participant authorizes RND Patinaje to use these images and photographs in the advertising elements that can be made (inserts, brochures, posters, informative publications, catalogs and web pages and in all kinds of social networks and internet media. As well as, any other means without more limitations than those derived from the Personal Data Protection Law and the Organic Law on the Right to Honour, Personal and Family Privacy and Own Image".

On the other hand, it is surprising that the date of entry of the complaint 10/19/2018 was prior to the date on which the claimant requested the removal of the photographs from the web and the social network Facebook on 10/20/2018; that is, practically without giving

time to the claimed to fail to comply with what was requested, procuring and providing in this way the necessary elements to ensure the success of your claim.

However, in view of the emails provided by the representative of the claimed once the minor was identified in the supports corresponding, the images were withdrawn acting with a reasonable diligence.

Likewise, the representative of the defendant states that he does not know or figure among the documentation of the club the formulation of any informative requirement by part of the AEPD.

In this order of ideas, it should be taken into account that in the sanctioning administrative are applicable, with some nuance, but without

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exceptions, the inspiring principles of the penal order, having full virtuality the principle of presumption of innocence, which must apply without exception in the sanctioning system and must be respected in the imposition of any sanctions. This, because the exercise of the ius puniendi, in its diverse manifestations, is conditioned to the game of proof and to a contradictory procedure in which can defend their own positions.

In this sense, the Constitutional Court, in Judgment 76/1990, considers that

The right to the presumption of innocence entails “that the sanction be based on acts or means of proof of charge or incriminating the reproached conduct; that the burden of proof corresponds to the person who accuses, without anyone being obliged to prove

his own innocence; and that any insufficiency in the result of the tests practiced, freely valued by the sanctioning body, must be translated into a acquittal pronouncement.

As the Supreme Court has specified in STS of October 26, 1998, the validity of the principle of presumption of innocence "does not preclude the conviction judicial process in a process can be formed on the basis of circumstantial evidence, but In order for this test to invalidate said presumption, it must satisfy the following constitutional requirements: the evidence must be fully proven – not may be mere suspicions – and you have to explain the reasoning under which, based on proven evidence, has reached the conclusion that the accused carried out the infringing conduct, because, otherwise, not even the subsumption would be founded in Law nor would there be a way to determine if the deductive process is arbitrary, irrational or absurd, that is, if the right to presumption has been violated of innocence when estimating that the evidentiary activity can be understood as a charge.”

Therefore, as stated,

The Director of the Spanish Data Protection Agency RESOLVES:

FIRST: FILE RND PATINAJE, S.L., with NIF B88133236, for the alleged infringement of article 6.1.a) of the RGD, sanctioned in accordance with the provisions of the Article 83.5.a) of the aforementioned Regulation.

SECOND: NOTIFY this resolution to RND PATINAJE, S.L. with NIF B88133236.

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. 114.1 c) of the LPACAP, 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

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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-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

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