

□ Procedure No.: PS/00178/2020

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: On January 28, 2019, you entered this Agency in writing claim, filed by A.A.A., regarding the unauthorized use of the image of your minor child for commercial purposes.

According to the account of events, his son was enrolled in the FOOTBALL CLUB DENIA BASE (hereinafter, the claimed party) entity with which it signed a document consenting to the taking of photos in which he could appear, with a purpose concrete: its publication on the website or municipal bulletin, social networks or the press. Later, he realizes that they were using the image of the minor for without proper authorization, stamping his image on some stickers that they were exposed for sale in envelopes at the price of one euro. contacted by phone with the vice president of the Club, requested the removal of the images and data from the company that printed the stickers domiciled in ***COUNTRY.1. In addition, he submitted a request for information by email.

SECOND: In accordance with the mechanism prior to the admission for processing of the claims made before the AEPD, provided for in article 65.4 of the Law Organic 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereinafter, LOPDGDD), which consists of transferring the same to the Data Protection Delegates designated by those responsible or in charge of the treatment, or to these when they have not been designated, and with the purpose indicated in the aforementioned article, his claim was transferred to the

requested to proceed to its analysis and respond within a month.

In response to said request for information, on March 26, 2019, the claimed stated that the consent given for the treatment of the image of your child in order to create the cards is in accordance with Considering (32) of the RGPD, since this has been given through a clear affirmative act of a verbal nature, informed and unequivocal.

He alleges that the School is a non-profit entity. Now, taking into Note that the City Council of ***LOCALIDAD.1 does not subsidize 100% of its activity, is obliged to provide a series of services that allow raising funds that cover the payment of sports materials not covered by the grant. One of these services was the creation of a sticker album, as well as cards with the image of the equipment components. He adds that at the beginning of season, the School informed all parents, including the claimant, of the

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creation of a sticker album, as well as stickers with the image of the components of the team, in order to obtain additional funds.

THIRD: On July 11, 2019, after analyzing the documentation that was in the file, a resolution was issued by the director of the AEPD, agreeing to file of the claim. The resolution was notified to the appellant on July 14, 2019, through the Citizen Folder, according to confirmation of receipt that appears in the file.

FOURTH: On July 11, 2019, the claimant files an optional appeal for

replacement through the Electronic Registry of the AEPD, against the resolution passed in file E/02227/2019, in which it shows its disagreement with the resolution challenged, stating that the claimed entity had parental consent to take photos in which your child may appear for publication in the website or municipal bulletin, social networks or press, but not reserved for another purpose. Likewise, it is verified that the informative clause on data protection did not inform the transfer to third parties of the personal data of the students, and although confirms the reception of a WhatsApp so that the minors were in a uniform particular for taking pictures of photo album and Christmas calendars, denies that it was commented that said photographs were to commercialize the image of minors in an album or on stickers.

Likewise, it alleges, that the license plate did not authorize the transfer of the images and data of his son to a foreign company that is the one that has printed the cards.

FIFTH

O: On June 11, 2020, a resolution of the appeal for reconsideration is issued RR/00538/2019, filed by the claimant against the resolution of this Agency issued on July 11, 2019, after the new documentation provided, agrees on the estimation of said appeal for reconsideration and the admission for processing of the claim filed against the defendant.

SIXTH: On June 23, 2020, the Director of the Spanish Agency for Data Protection agreed to initiate a sanctioning procedure against the claimant, with in accordance with the provisions of articles 63 and 64 of Law 39/2015, of October 1, of the Common Administrative Procedure of Public Administrations (hereinafter, LPACAP), for the alleged infringement of article 6.1 a) in relation to article 8.1 of the RGPD, typified in article 83.5 of the RGPD.

SEVENTH: Having notified the aforementioned initiation agreement, the respondent presented on July 9,

2020, brief of allegations in which, in summary, it stated the lack of legitimacy active claimant because the personal data protection regulations do not recognizes the condition of interested party in the sanctioning procedure, since the power punitive corresponds only to the Administration, since it is the one that has entrusted with the sanctioning power, and therefore, only this has an interest protected by the legal system in which the offender can be sanctioned.

The respondent also states that the complaint filed suffers from a lack of Thus, it does not indicate the date of the commission of the acts that could constitute a breach of data protection.

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Therefore, it considers that there is not sufficient legal reasoning to agree on the beginning of the sanctioning procedure given that in the first instance the The procedure was archived and there is no evidence of new evidence and/or facts provided. Consequently, not having provided by the claimant new indications of possible acts constituting an infraction, the resolution agreed upon in first instance, that is, there are not enough elements to undermine the principle of presumption of innocence, and consequently the file of the present performances.

He concludes his allegations by stating that the consent given by the claimant, is in accordance with recital (32) of the RGPD, that is, through an act clear affirmative that reflects a manifestation of free will, specific, informed and unequivocal consent of the interested party to accept the processing of their personal data, such as a

statement in writing, including by electronic means, or an oral statement, or any other statement or conduct that clearly indicates that the data subject accepts the proposed treatment.

EIGHTH: On August 5, 2020, the instructor of the procedure agreed to the opening of a period of practice tests, considering incorporated the previous investigation actions, E/04933/2020, as well as the documents provided by the claimant.

NINTH: On August 10, 2020, a resolution proposal was formulated, proposing that the Director of the Spanish Data Protection Agency, impose on CLUB FÚTBOL BASE DENIA, with NIF G53492013, for an infraction of the article 6.1 a) in relation to article 8.1 of the RGPD, typified in article 83.5 of the RGPD, a sanction of warning.

In view of everything that has been done, by the Spanish Protection Agency of Data in this procedure the following are considered proven facts,

FACTS

FIRST: DÉNIA BASE FOOTBALL CLUB entity in which the minor plays claimant's son, signed a document with the parent, now claimant, consenting to the taking of photos of his son in which he could appear, with a specific purpose: its publication on the website or municipal bulletin, social networks or press.

SECOND: CLUB FOOTBALL BASE DÉNIA has used the image of the minor, son of the claimant, for commercial purposes, stamping his image on some stickers which were exposed for sale in envelopes at the price of one euro.

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THIRD: CLUB FOOTBALL BASE DÉNIA stated that the consent given for the treatment of the image of your child in order to create the object stickers of this procedure, is in accordance with Recital (32) of the RGD, since this has been given through a clear affirmative act of a verbal, informed and unequivocal nature.

FOUNDATIONS OF LAW

Yo

The Director of the Agency is competent to resolve this procedure.

Spanish Data Protection, in accordance with the provisions of art. 58.2 of the RGD and in the art. 47 and 48.1 of LOPDGDD.

II

Article 6.1 of the RGD 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.

Likewise, article 7.1 of the RGD, regulates the conditions for the consent stating the following:

"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."

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 RGD 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 of services of the information society, the processing of data

personal property of a child shall be considered lawful when he or she is at least 16 years old. If the child

is under 16 years of age, such treatment will only be considered lawful if the consent

It was given or authorized by the holder of parental authority or guardianship over the child, and only to the extent that 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.

3. Paragraph 1 shall not affect the general provisions of contract law

of the Member States, such as the rules relating to the validity, formation or effects of

contracts in relation to a child.”

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Therefore, for the processing of the personal data of the

minors who are the object of this case, the consent of the person who holds their country will be required.

power or guardianship.

Recital 32 of the RGD establishes that "consent must be given

through a clear affirmative act that reflects a manifestation of free will,

specific, informed, and unequivocal of the interested party to accept the processing of data

of a personal nature concerning you, such as a written statement, including

by electronic means, or a verbal statement. This could include marking a

box of a website on the internet, choose technical parameters for the use of

information society services, or any other statement or conduct that clearly indicate in this context that the data subject accepts the proposed treatment of your personal data. Therefore, silence, boxes already checked or inaction should not constitute consent. Consent must be given for all treatment activities carried out for the same or the same purposes.

When the treatment has several purposes, consent must be given for all they. If the data subject's consent is to be given following a request by electronic means, the request must be clear, concise and not disturb unnecessarily the use of the service for which it is provided.”

III

In the present case, the claim focuses on the unauthorized use of the image of the minor child of the claimant, for commercial purposes.

The respondent states that the consent given by the claimant is in accordance with recital (32) of the RGPD, which allows this to be done through a clear affirmative act that reflects a manifestation of free will, specific, informed, and unequivocal consent of the interested party to accept the treatment of personal data may be in writing, by electronic means, or a statement verbal.

However, it has been verified that the informative clause of the entity claimed in terms of data protection did not report the transfer to third parties of the personal data of the students, and although the claimant confirms the reception of a WhatsApp so that minors could wear a specific uniform for taking pictures of the photo album and Christmas calendars, denies that informed him that these photographs were to market the image of the minors in an album or on stickers.

Thus, it is considered that the known facts are constitutive of a

infraction, attributable to the claimed, for the processing of personal data, regulated in the art. 6.1 a) of the RGD, in relation to article 8.1 of the RGD when treating the image of the minors, without the consent of the person holding their parental authority, consent that must be specified for each purpose, in this specific case, it must be requested consent both for the taking of photos for Christmas calendars and for market the image of minors in a sticker album.

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By virtue of the provisions of article 58.2 of the RGD, the Spanish Agency of 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 RGD provides the following:

“2 Each supervisory authority shall have all of the following powers corrections listed below:

(...)

b) sanction any person responsible or in charge of the treatment with warning when the processing 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 in accordance with article 83, in addition to or in
instead of the measures mentioned in this paragraph, depending on the circumstances
of each particular case;

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

Article 83.5 of Regulation (EU) 2016/679 are considered very serious and
Infractions that suppose a substantial violation will prescribe after three years.
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 the Regulation
(EU) 2016/679.

v

The exposed facts constitute, on the part of the defendant, an infraction to the
provided in article 6.1 a) in relation to article 8.1 of the RGPD.

This infraction is sanctioned with a fine of warning, in accordance with the
article 58.2.b) of the RGPD, when collecting through said form basic data of
users and consider that the administrative fine that could be levied in accordance with
the provisions of article 83.5.b) of the RGPD would constitute a disproportionate burden
for the claimed, whose main activity is not directly linked to the
processing of personal data, since there is no record of the commission of any infringement
above regarding data protection.

Likewise, when confirming the existence of an infraction, in accordance with the
established in the aforementioned article 58.2.d) of the RGPD, the resolution orders the
claimed, as data controller, the adoption of the necessary measures
to ensure that no photographs are taken or disseminated to minors of said
educational center, as long as the claimed entity does not have the consent

of the parents, or of those who hold parental authority over the minors who are the object of said

photographs, in accordance with the provisions of article 6.1 a) in relation to the

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article 8.1 of the RGPD, as well as the provision of means of proof accrediting the compliance with what is required.

On the other hand, article 83.7 of the RGPD provides that, without prejudice to the corrective powers of the control authorities under art. 58, paragraph 2, each Member State may lay down rules on whether and to what extent impose administrative fines on authorities and public bodies established in that Member State.

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 DENIA BASE FOOTBALL CLUB, with NIF G53492013, for a infringement of article 6.1 a) in relation to article 8.1 of the RGPD, typified in the article 83.5 of the RGPD, a sanction of warning.

SECOND: TO REQUIRE the claimed party so that within one month they certify before this body the compliance that proceeds to:

☐ the adoption of the necessary measures that guarantee that they are not carried out or distribute photographs to the minors of said educational center, as long as when the claimed entity does not have parental consent, or of those who hold parental authority over the minors who are the object of said

photographs, in accordance with the provisions of art. 6.1 a) of the RGPD in relation with art. 8.1 of the GDPR.

THIRD: NOTIFY this resolution to CLUB BASE FOOTBALL DENIA.

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,

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through the

Electronic Registration of

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

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