

□ Procedure No.: PS/00020/2020

938-300320

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: On October 21, 2019, it had entry in this Spanish Agency of Data Protection a document presented by A.A.A. (hereinafter the claimant), and three more people, through which they make a claim against BBB with NIF ***NIF.1 (hereinafter, the claimed one), for the installation of a system video surveillance of the property located at ***ADDRESS.1

- ***LOCATION.1

(VALENCIA) with indications of a possible breach of the provisions of the personal data protection regulations.

The reasons underlying the claim are as follows:

“[...] Said man has placed a surveillance camera focused on our urbanization, from the camera it captures our street, which is a private street (It is a closed urbanization, composed of 3 single-family homes). Control our entrances and exits, to all the neighbors when we walk through the urbanization, to the children when they go from one house to another in a bathing suit, (such as this summer...).

In addition, it also focuses on the room of a child under four years of age. [...]”

They attach a photographic report of the location of the camera and its relationship with respect to the housing situation of one of the complainants.

SECOND: Prior to the acceptance of this claim for processing, it is transferred the same to the claimed, in accordance with the provisions of article 65.4

Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereinafter, LOPDGDD), delivering the notification on 11/26/2019.

There is no record in the electronic file of the reply sent by the respondent on the day November 27, 2019. According to what he stated in the brief of allegations, the response to the transfer was made through an email.

THIRD: The claim was admitted for processing by resolution of January 23 of 2020.

FOURTH: On June 8, 2020, the Director of the Spanish Agency for Data Protection agreed to initiate a sanctioning procedure against the claimant, for the alleged infringement of article 5.1.c) of Regulation (EU) 2016/679 (Regulation C/ Jorge Juan, 6

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General Data Protection, hereinafter RGPD), typified in article 83.5 of the same legal text.

FIFTH: On July 2, 2020, this Spanish Agency for Protection of Data written by the claimant formulating allegations to the agreement of beginning. In them he states the following:

“[...] On November 27, 2019 at 11:23 I sent them an email following the instructions of the data protection agency, [...].

In my phone call I told him that the camera is fictitious, this man told me that I will send the photos, which I did, [...]

The reason for placing this camera is because the neighbors break my fence and

complaints that I have made to the City Council without proof they do not accept these complaints, before this fact I went to the Civil Guard barracks and asked for advice [...] they advised me that the camera be fastened to the fence without recording any person. But I had to hire internet, which was very expensive for me, so I decided to put a dummy camera, since then I have a good result.

[...]
[...] If the camera worked, it would not be possible to record the person who complaint, because he lives a hundred meters away, referring to the fact that the camera focuses on a room of a four-year-old girl, [...], is totally false.

[...]"

Attach the following documents:

1. Text of the brief in response to the transfer sent on November 27, 2019

via email.

2. Photograph of the installed device.

SIXTH: The instructor of the procedure agreed, on August 7, 2020, to open of a period of practice of tests, considering incorporated the claim presented by the claimant and his documentation, the documents obtained by the Subdirector General for Data Inspection and the allegations presented by the reclaimed.

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: In the photographs provided by the claimant in his letter of March 21, October 2019, the placement of a camera-like device is observed located high on a mast on the private property of the respondent,

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located in the direction indicated in the first antecedent, which could capture space unaffiliated.

SECOND: The respondent states in his pleadings brief that the chamber is fictitious In the photograph that accompanies your writing, you can see the device accompanied by an element that looks like packaging where the model of the camera next to the words "Dummy Camera", "Imitation Dome Camera".

FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of the RGD of 2018 recognizes to each authority of control, and as established in arts. 47 and 48.1 of the LOPDGD, the Director of The Spanish Agency for Data Protection is competent to resolve this process.

II

The facts object of the claim filed with the Spanish Protection Agency of Data motivated the beginning of the present sanctioning procedure for assuming a possible violation of article 5.1.c) of the RGD of 2018 that indicates that personal data shall be "adequate, relevant and limited to what is necessary in relation to the purposes for those that are processed ("data minimization")".

These infractions are typified in Article 83.5 of the RGD of 2018, which considers as such:

"The infractions of the following dispositions will be sanctioned, in accordance with the paragraph 2, with administrative fines of a maximum of EUR 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 largest amount:

a) the basic principles for the treatment, including the conditions for the

consent under articles 5, 6, 7 and 9; [...]"

III

The present sanctioning procedure brings its cause in the presumed illegality of the

installation of a camera on a mast within the property located at the address

referred to in the first antecedent of this resolution, which could capture images of

areas outside the property disproportionately.

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As regards the possibility of installing a video surveillance system with the

purpose of guaranteeing the security of the dwelling and of the private space of the claimed

and with respect to the collection of public roads, article 22 of the LOPDGDD, relative to

processing for video surveillance purposes, provides that, in order to guarantee the

security of persons and goods, images of public thoroughfares may be captured "in the

to the extent that it is essential", in accordance with the principle

mentioned data minimization. It is reported that, regarding the recruitment and

images on the road it is reported that the power to capture images on public roads is

attributed, in general, to the Security Forces and Bodies in accordance with

with the provisions of Organic Law 4/1997, which regulates the use of

video cameras by the Security Forces and Bodies in public places and their

development regulations.

Also, the installed cameras cannot obtain images of private space

of third. It is not allowed, therefore, the placement of cameras towards the property

privacy of neighbors with the purpose of intimidating them or affecting their private sphere without

just cause

Notwithstanding what is stated in the preceding paragraphs, taking into account the allegations and

the photographic images presented by the respondent in his answer brief

At the beginning of this procedure, the device is of a simulated nature

with a dissuasive purpose against acts of vandalism suffered on your property.

It is worth remembering, in relation to this type of device, the recent Judgment

of the Supreme Court, Civil Chamber (STS 3505/2019, 11/07/19) which states that

"That fake security cameras also represent an illegitimate intrusion into

intimacy since those affected do not have to endure "uncertainty

permanent" on whether or not the device is operational."

The plaintiff's right to the tranquility of his private life also includes

that of not having to endure permanent uncertainty as to whether the camera

oriented towards his farm is operational or not, since his external appearance prevents him from

verify it and, on the other hand, the defendant would always have the possibility of substituting the

non-operative chamber for another operative.

For the same reasons, the installation of the camera facing the garden of the

plaintiff cannot be considered an exercise of a *ius usus inocui* in the field

of neighborhood relations, because far from being innocuous, it objectively disturbed, and

without necessity, the life of the plaintiff."

This type of conduct may have repercussions in other spheres of law,

affect the privacy of third parties, so it is recommended that they be

exclusively oriented towards your particular property. The deterrent function of

this type of device is limited, therefore, by the proportionality of the

measure, which is fulfilled by avoiding intimidating third parties and being oriented towards the main strategic points of the house (eg orientation towards street, adjoining windows, etc.).

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IV

The principle of the right to the presumption of innocence, recognized as a right fundamental subjective in article 24 of the Spanish Constitution, prevents imposing an administrative sanction when proof of accrediting charge of the facts that motivate the imputation or of the intervention in the themselves of the alleged offender and applying the principle "in dubio pro reo" in case of doubt regarding a concrete and determined fact, which obliges in any case to resolve said doubt in the most favorable way for the interested party.

The aforementioned right to the presumption of innocence is also included in a expressed in article 53.2.b) of Law 39/2015, of October 1, on the Procedure Common Administrative of Public Administrations (hereinafter, LPACAP), which establishes that:

"two. In addition to the rights provided for in the previous section, in the case of administrative procedures of a punitive nature, the alleged responsible will have the following rights:

[...]b) To the presumption of non-existence of administrative responsibility while the contrary is proven."

In relation to this principle, the Constitutional Court in its Judgment 76/1990, of 26

of April, considers that the right to the presumption of innocence entails: “that the sanction is 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 no one is obliged to prove their own innocence; and that any insufficiency in the result of the tests carried out, freely valued by the sanctioning body, must be translated into an acquittal pronouncement.”

v

In accordance with the foregoing, it is not proven that the device in question is endowed with the ability to obtain or record any image, so that by not to be able to determine the existence of an effective treatment of data, it is not possible to speak of infringing conduct within the scope of the regulatory framework of protection data, which is why we proceed to file this procedure.

Therefore, in accordance with the applicable legislation, the Director of the Agency

Spanish Data Protection RESOLVES:

FIRST: ORDER the FILE of this procedure as there is no accredited administrative infraction.

SECOND: NOTIFY this resolution to B.B.B. and inform A.A.A.

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.

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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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