

□ Procedure No.: PS/00335/2019

938-051119

RESOLUTION OF PUNISHMENT PROCEDURE

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

FACTS

FIRST: CITY COUNCIL OF ***LOCALITY.1 - LOCAL POLICE (*hereinafter,
the claimant) on July 9, 2019 filed a claim with the Agency

Spanish Data Protection, motivated by the treatment of data carried out to
through cameras of a video surveillance system whose owner is identified as
A.A.A. with NIF ***NIF.1 (*hereinafter the claimed) installed in the claimed Mobile.

The reasons on which the claim is based are "capturing photographs of women in
the beach area near the river ***RÍO.1" for sexual purposes.

Together with the claim, it provides documentary evidence (Annex I) that proves the
capturing the images of bathers without their consent, as they are in the
mobile device hard drive.

The frames provided allow the bathers to be identified, all of them
teenagers, who are enjoying a day at the beach, all of them in swimsuits and
from various angles without at any time being aware of being
being photographed/recorded by a third party unrelated to them.

Photograph nº1. Girl walking on the beach strolling, sharp frontal shot.

Photograph nº2. Girl from behind walking on the beach.

Photograph nº3. Girl sitting on a stool looking at her mobile.

Photograph nº4. Girl running in a swimsuit on the beach.

Photograph nº5. Girl in leisure attitude sitting.

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 de-announced through the cameras 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: On October 4, 2019, the Director of the Spanish Agency for Data Protection agreed to initiate a sanctioning procedure against the defendant, with glo to the provisions of articles 63 and 64 of Law 39/2015, of October 1, of the Pro-Common Administrative Procedure of Public Administrations (hereinafter, LPA-CAP), for the alleged infringement of Article 6.1.a) of the RGPD, typified in Article 83.5 of the GDPR.

C/ Jorge Juan, 6

28001 – Madrid

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2/8

FOURTH: Having been notified of the aforementioned initiation agreement, the respondent submitted a written allegations in which, in summary, it stated that the people photographed were his "cousins" that the State Security Forces and Bodies did not let him be explained in any way.

FIFTH: On 11/28/19 the instructor of the procedure agreed to open a evidence practice period, taking into account the previous actions research, E/08045/2019.

Specifically, they were asked to provide irrefutable evidence proving the relationship of kinship that he used in his defense brief, leaving freedom to the

himself to prove such extreme.

SIXTH: Attached as an annex is a list of documents in the procedure, reminding the accused that if required, he has full access to the administrative file.

SEVENTH: On 01/07/19 a resolution proposal is issued, where they are considered proven the facts transferred to this organism, when being accredited the "data processing" of third parties without the informed consent of their owners, outside the cases permitted by law, proposing a penalty of €4,000 for the infringement of the content of art. 6.1 GDPR.

FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of the RGPD recognizes to each authority control, and according to what is 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 07/09/2019 after lodged by the City Council of Valladolid (Local Police) by means of which it is put to the knowledge of this Agency the "taking of photographs of bathers" without their consent. feeling for a sexual purpose.

Article 6.1 RGPD provides the following: "The treatment will only be lawful if it is meets at least one of the following conditions.

a) The interested party gave their consent for the processing of their personal data- them for one or more specific purposes. (...)"

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The images (personal data) are obtained by the accused surreptitiously, that is, without the consent of those affected, who were outsiders in all moment to the recording of your image.

Article 18 CE provides "The right to honour, personal privacy is guaranteed. sonal and familiar and to the own image".

The Constitutional Court (STC 292/2000, November 30) BOE no. 4 of January 4, 2001) has declared that art. 18.4 CE contains, under the terms of the STC 254/1993, an institute to guarantee the rights to privacy and honor and the full enjoyment of the other rights of citizens which, moreover, is in itself as "a fundamental right or freedom, the right to freedom from potential aggressions to the dignity and freedom of the person from an illegitimate use of mechanized data processing, what the Constitution calls 'informatics'", which that has been called "computer freedom" (FJ 6, later reiterated in the SSTC 143/1994, FJ 7, 11/1998, FJ 4, 94/1998, FJ 6, 202/1999, FJ 2).

"This fundamental right to data protection, unlike the right to privacy of art. 18.1 CE, with whom it shares the objective of offering an efficient pro-constitutional protection of personal and family privacy, attributes to its holder a beam of powers consisting for the most part of the legal power to impose on third parties ros the performance or omission of certain behaviors whose specific regulation tion must establish the Law, the one that according to art. 18.4 EC must limit the use information technology, either by developing the fundamental right to data protection (art. 81.1 CE), or regulating its exercise (art. 53.1 CE). The peculiarity of this right

fundamental right to data protection with respect to that fundamental right so similar as that of intimacy is, lies, then, in its different function, what it brings together, for consequently, that their object and content also differ" (*the underlining belongs to this AEPD).

As the Supreme Court has stated, the right to one's own image is a right of personality, recognized as a fundamental right in art. 18.1 of the Constitution and as an autonomous fundamental right by the Constitutional Court, and that, in its negative or exclusionary facet, grants the power to prevent obtaining, reproduction or publication of your own image by a third party without the consent owner express.

In this sense, the Judgment of the Supreme Court of May 28, 2007 recognizes that: "The protection of the right to image ex art. 7.5 of LO 1/1982 extends to the assumptions in which the photograph is captured on a beach or in another public place, without consent of the person photographed.

The fact that the images are obtained in a public space does not imply the "elimination" of the subjective right and the renunciation of freedom in leisure spaces, as well as well as the activities that are carried out in these spaces according to the nature of the same (eg sunbathing, bathing, walking or even going topless, etc).

It is not unusual in today's times, when virtually all citizens have mobile devices, that images of spaces are obtained

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4/8

public, which are subsequently disseminated either on social networks or are transmitted

between individuals through messaging systems (vgr. whatsapp).

In the present case, the photographs obtained are not the result of chance, but there is an active behavior of the accused in following his potential victims.

but furtively, without their consent to obtain images of them

while carrying out activities in accordance with the nature of this type of space (e.g. pass, sunbathe, shower, etc).

The ease of obtaining a photograph with this type of device is not admits discussion, having assumed in practice that anyone can become in a graphic "reporter" of facts and news in real time.

The foregoing, however, cannot imply an elimination for practical purposes.

of the right to the image, so that we can be recorded by anyone without our consent in public spaces where we go for leisure purposes, rest, enjoyment, recreation, etc.

In most cases, the victims of these attacks on privacy are women or adolescents, who are affected at the core of their intimacy, restricting their freedom, being the subject of photographs in a swimsuit, bikini, etc. with a lewd purpose in some cases or mockery, unjustified criticism, joke etc in others.

Therefore, it is necessary to strengthen the protection of image processing as personal data, to combat the dangers arising from an invasive use of new technologies, which among other things facilitate the taking of images without that the affected person can be aware of it, as well as its dissemination to wide segments of the public.

III

Article 6.1 of the RGPD (Legality of the treatment) establishes the supposed decrees under which the treatment of the personal data of the users is considered lawful. interested.

In this case, from the documentation in the procedure, it is extracted that the defendant has used his mobile device to obtain clear images of the Teenagers in a public area, without the express "consent" of the same with an a priori lascivious purpose.

The images obtained are not accidental, since the documentary evidence provided by the acting force (Annex I) allow verifying a follow-up of the affected, with a clear intention to obtain images of them, to later enjoy these, without cause or apparent reason.

Article 77 section 5 of Law 39/2015 (October 1) provides the following:

"The documents formalized by the officials who are recognized as of authority and in which, observing the corresponding legal requirements, take the facts verified by those will prove them unless it is accredited the opposite."

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5/8

The foregoing supposes a conduct of "treatment" without the consent of the holders.

of the data, which are affected in their right to the image, which is affected caused by this type of behavior, which is carried out furtively, without the same but know that they are being recorded by a third party outside of them.

Furthermore, the images are saved in the memory of the device.

mobile site, which in its case would allow the non-consensual dissemination of the same in re-social rights, hindering the protection of the affected right that could be subject to disclosure on a larger scale, aggravating the unlawfulness of the act.

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

The Supreme Court (Judgments of July 5, 1998 and March 2, 1999) comes understanding that there is recklessness whenever a legal duty is neglected of care, that is, when the offender does not behave with the required diligence. Diligence whose degree of demand will be determined in accordance with the circumstances. concurrent conditions 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 5 June 1998 requires professionals in the sector “a duty to know especially the applicable regulations”.

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 processing processing of such data or transfer to third parties. And this because being the one of the protection of data a fundamental right (Sentence of the Constitutional Court 292/2000), the repositories of these data must be especially diligent and careful when operate with them and must always opt for the interpretation that is most favorable to the protection of the legal rights protected by the norm. In this sense, among others, Sentences of the National High Court dated February 14 and September 20, 2002 and April 13 and May 18, 2005).

The mere commission of an administrative infraction—objective type—is not enough to time to proceed to impose an administrative sanction.

Guilt as reproach to the active subject of the damage to the property legally protected, it is evident when the subject voluntarily performs the

typical conduct intentionally directed to obtain the unlawful result, which

is wanted and loved

There must therefore be willful or negligent conduct, whether gross negligence

or mild or simple, depending on the degree of neglect.

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6/8

v

In accordance with the evidence obtained in this sanctioning procedure-

dor, it is considered proven that the accused has proceeded to record on his device

mobile images of bathers without their consent in a furtive manner, proceeding to

"process personal data" of these without their consent.

The known facts constitute an infraction, attributable to the claimant.

mado, for violation of art. 6.1 GDPR, without any of the circumstances

reflected in it, to "process the data", even less the consent of the

affected who are unaware of the behavior described.

Article 83.5 RGPD provides the following: "Infringements of the provisions

The following will be sanctioned, in accordance with section 2, with administrative fines.

amounts of 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 for the year

previous financial agreement, 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 criteria are taken into account:

- The fact of obtaining images (personal data) without having the consent

of the holders, thereby affecting a constitutionally recognized right

(art. 83.2 a) RGPD).

- the intention to use the images for lewd purposes, making a

inappropriate use of your mobile device where you store them (art. 83.2 b

GDPR).

- the transfer of the facts by the State Security Forces and Corps-

when they are required by the citizens to denounce the presence of a real man

executing "sexual touches" in a public area and obtaining images from third parties without

your consent (art. 83.2h) RGPD).

For all these reasons, a penalty of €4,000 (four

Thousand Euros) for the infringement of the content of art. 6.1 RGPD, when "processing third-party data

ros" by obtaining photographs, without their consent.

mos (as), with a clear intention far from normal uses.

No coherent explanation has been offered for the accused, and even less

still provided objective evidence to corroborate what was stated in his pleadings.

tions.

Therefore, the allegations of the defendant must be rejected,

be verified the concurrence of typicity and culpability in their infringing conduct

ra.

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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 Don A.A.A., with NIF ***NIF.1, for an infraction of article

6.1.a) of the RGPD, typified in article 83.5 of the RGPD, a fine of €4,000 (Four

Thousand Euros), having processed data from third parties without their consent, infringement

typified in article 83.5 a) RGPD, being punishable in accordance with art.

58.2 GDPR.

SECOND: NOTIFY this resolution to Don A.A.A.

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 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 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

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8/8

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.

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Director of the Spanish Data Protection Agency

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