

Procedure No.: PS/00334/2019

## RESOLUTION OF PUNISHMENT PROCEDURE

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

### BACKGROUND

FIRST: Ms. A.A.A. (hereinafter, the claimant) on 07/30/2019 filed  
claim before the Spanish Data Protection Agency. The claim is  
directs against D. B.B.B., with NIF \*\*\*NIF.1 (hereinafter, the claimed). The reasons in  
that bases the claim are, in summary, the following: that on 06/21/2019 he had  
knowledge through third parties that the defendant has proceeded to publish in his  
WhatsApp status intimate photographs and conversation captures of who  
subscribes and a third person from the same workplace, belonging to your  
privacy being published without your knowledge or consent after having been  
stolen from a pendrive that has disappeared.

Provides copies of the photographs that the respondent has made public through  
of your WhatsApp account being known by third parties, attaching to some of  
them denigrating and vexatious comments

SECOND: On 09/09/2019, in accordance with article 65 of the LOPDGDD, the  
Director of the Spanish Agency for Data Protection agreed to admit for processing the  
claim filed against the defendant.

THIRD: On 10/04/2019, the Director of the Spanish Protection Agency  
of Data agreed to initiate a sanctioning procedure against the defendant, for the alleged  
infringement of article 6.1.a) of the RGPD, typified in Article 83.5.b) of the RGPD.

FOURTH: Once the initiation agreement has been notified, the one claimed at the time of this  
The resolution has not presented a written statement of allegations, for which reason the

indicated in article 64 of Law 39/2015, of October 1, on the Procedure

Common Administrative Law of Public Administrations, which in section f)

establishes that in the event of not making allegations within the period established on the

content of the initiation agreement, it may be considered a proposal for

resolution when it contains a precise statement about the responsibility

imputed, reason why a Resolution is issued.

FIFTH: Of the actions carried out in this proceeding, they have been

accredited the following:

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## PROVEN FACTS

FIRST: On 07/30/2019 the claimant files a letter with the AEPD, stating

that on 06/21/2019 he had learned through third parties that the

claimed had proceeded to publish on his WhatsApp account intimate photographs and

captures of conversations of the undersigned and a third party from the same center of

work, being published without your knowledge or consent after being

stolen from a flash drive that had disappeared.

SECOND: Contained photographs published in the WhatsApp account of the

claimed in which the claimant appears together with third parties, accompanied by

hurtful and demeaning comments.

## 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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Law 39/2015, of October 1, on the Common Administrative Procedure of the Public Administrations, in its article 64 "Agreement of initiation in the procedures of a sanctioning nature", provides:

II

"1. The initiation agreement will be communicated to the instructor of the procedure, with transfer of how many actions exist in this regard, and the interested parties will be notified, understanding in any case by such the accused.

Likewise, the initiation will be communicated to the complainant when the rules regulators of the procedure so provide.

2. The initiation agreement must contain at least:

- a) Identification of the person or persons allegedly responsible.
- b) The facts that motivate the initiation of the procedure, its possible rating and sanctions that may apply, without prejudice to what result of the instruction.
- c) Identification of the instructor and, where appropriate, Secretary of the procedure, with express indication of the system of recusal of the same.
- d) Competent body for the resolution of the procedure and regulation that attribute such competence, indicating the possibility that the presumed

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responsible can voluntarily acknowledge their responsibility, with the

effects provided for in article 85.

e) Provisional measures that have been agreed by the body

competent to initiate the sanctioning procedure, without prejudice to those that

may be adopted during the same in accordance with article 56.

f) Indication of the right to formulate allegations and to the hearing in the

procedure and the deadlines for its exercise, as well as an indication that, in

case of not doing

allegations within the stipulated period on the content of the

initiation agreement, this may be considered a resolution proposal

when it contains a precise statement about the responsibility

imputed.

3. Exceptionally, when at the time of issuing the initiation agreement

there are not sufficient elements for the initial qualification of the facts that motivate

the initiation of the procedure, the aforementioned qualification may be carried out in a phase

later by drawing up a List of Charges, which must be notified to

interested parties" (the underlined corresponds to the AEPD).

In application of the previous precept and taking into account that no

formulated allegations to the initial agreement, it is appropriate to resolve the initiated procedure.

In the present case, the defendant is accused of violating article 6, Lawfulness

of the treatment, of the RGPD that establishes:

III

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

conditions:

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;

(...)"

On the other hand, article 4 of the RGPD, Definitions, in its section 11, indicates that:

"11) «consent of the interested party»: any manifestation of free will, specific, informed and unequivocal by which the interested party accepts, either through a statement or a clear affirmative action, the processing of personal data that concern him".

Also article 6, Treatment based on the consent of the affected party, of the new Organic Law 3/2018, of December 5, on Data Protection Personal and guarantee of digital rights (hereinafter LOPDGDD), indicates that:

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"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”.

The facts denounced are specified in the use without consent or authorization of photographs and conversations contained in a flash drive stolen from the claimant, having been published in the WhatsApp account of the claimed being known by third parties, attaching to some of them comments demeaning and humiliating.

The infraction attributed to the defendant is typified in the article 83.5 a) of the RGPD, which considers that the infringement of “the basic principles for processing, including the conditions for consent under the articles 5, 6, 7 and 9” is punishable, in accordance with section 5 of the aforementioned Article 83 of the aforementioned Regulation, "with administrative fines of €20,000,000 as maximum or, in the case of a company, an amount equivalent to 4% as maximum of the overall annual total turnover of the previous financial year, opting for the highest amount.

The LOPDGDD in its article 71, Violations, states that: "They constitute infractions the acts and behaviors referred to in sections 4, 5 and 6 of the Article 83 of Regulation (EU) 2016/679, as well as those that are contrary to the present organic law”.

And in its article 72, it considers for prescription purposes, which are: "Infringements considered very serious:

1. Based on the provisions of article 83.5 of the Regulation (EU) 2016/679 are considered very serious and the infractions that suppose a substantial violation of the articles mentioned in that and, in

particularly the following:

(...)

b) The treatment 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.

(...)”

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IV

It should be noted that data processing requires the existence of a database legal that legitimizes it, such as the consent of the interested party for the treatment of their personal information.

From the documentation provided, it is evident that the respondent has violated the article 6.1 of the RGPD, since it has carried out an illicit treatment by making known to third party personal data of the claimant contained in a flash drive, which was stolen according to their statements, without their consent or authorization and with the aggravating circumstance that comments are made at the bottom of some of the photographs humiliating and degrading for the claimant.

The Contentious-Administrative Chamber of the National High Court, in similar assumptions has considered that when the owner of the data denies the consent in the processing of your data corresponds the burden of proof to who affirms its existence, and the data controller must collect and keep the necessary documentation to prove the consent of the holder. A) Yes,

the SAN of 05/31/2006 (Rec. 539/2004), Fourth Law Basis.

It should be noted that respect for the principle of legality of the data requires that accredited evidence that the owner of the data consented to the processing of the data of personal character and display a reasonable diligence essential to prove that end. Failure to act in this way would result in emptying the content of the principle of legality.

In order to establish the administrative fine to be imposed, observe the provisions contained in articles 83.1 and 83.2 of the RGPD, which point out:

v

"1. Each control authority will guarantee that the imposition of fines administrative actions under this article for violations of this

Regulation indicated in sections 4, 5 and 6 are in each individual case effective, proportionate and dissuasive.

2. Administrative fines will be imposed, depending on the circumstances of each individual case, in addition to or as a substitute for the measures contemplated in article 58, paragraph 2, letters a) to h) and j). When deciding to impose a fine administration and its amount in each individual case will be duly taken into account:

a) the nature, seriousness and duration of the offence, taking into account the nature, scope or purpose of the processing operation in question as well as the number of stakeholders affected and the level of damage and damages they have suffered;

b) intentionality or negligence in the infringement;

c) any measure taken by the controller or processor

to alleviate the damages suffered by the interested parties;

d) the degree of responsibility of the person in charge or of the person in charge of the



treatment, taking into account the technical or organizational measures that have applied under articles 25 and 32;

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e) any previous infraction committed by the person in charge or the person in charge of the treatment;

f) the degree of cooperation with the supervisory authority in order to put remedying the breach and mitigating the possible adverse effects of the breach;

g) the categories of personal data affected by the infringement;

h) the way in which the supervisory authority became aware of the infringement, in particular if the person in charge or the person in charge notified the infringement and, in such case, what extent;

i) when the measures indicated in article 58, paragraph 2, have been previously ordered against the person in charge or the person in charge in question in relation to the same matter, compliance with said measures;

j) adherence to codes of conduct under article 40 or mechanisms certificates approved in accordance with article 42, and

k) any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits realized or losses avoided, direct or indirectly, through infringement.

In relation to letter k) of article 83.2 of the RGPD, the LOPDGDD, in its Article 76, "Sanctions and corrective measures", establishes that:

"two. In accordance with the provisions of article 83.2.k) of the Regulation (EU)

2016/679 may also be taken into account:

- a) The continuing nature of the offence.
  - b) The link between the activity of the offender and the performance of treatments of personal data.
  - c) The profits obtained as a result of committing the offence.
  - d) The possibility that the conduct of the affected party could have induced the commission of the offence.
  - e) The existence of a merger by absorption process after the commission of the infringement, which cannot be attributed to the absorbing entity.
  - f) Affectation of the rights of minors.
  - g) Have, when it is not mandatory, a delegate for the protection of
  - h) The submission by the person in charge or person in charge, with voluntary, to alternative conflict resolution mechanisms, in those assumptions in which there are controversies between those and any interested."
- data.

In accordance with the transcribed precepts, and without prejudice to what results from the instruction of the procedure, in order to set the amount of the sanction of fine to impose in the present case for the infringement typified in article 83.5 of the RGPD of which the defendant is held responsible, in an initial assessment, are estimated concurrent the following factors:

The merely local scope of the treatment carried out by the claimed party.

Only one person has been affected by the offending conduct.

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The way in which the supervisory authority became aware of the infringement, in the extent to which this has been through the claim of the affected party.

Although there is no evidence that the defendant has acted maliciously, intentionality and gross negligence are observed in his actions, as evidenced by the attached comments containing some of the photographs.

The absence of a link between the offender's activity and the performance of processing of personal data.

The respondent is a natural person.

For all these reasons, an amount of the penalty is established for violation of the article 6.1.a) of the RGPD of 10,000 euros.

Therefore, as stated,

The Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE D. B.B.B., with NIF \*\*\*NIF.1, for an infraction of article 6.1.a) of the RGPD, typified in article 83.5.a) of the same Regulation and qualified as a very serious infringement for prescription purposes in article 72.1.b) of the LOPDGDD, a fine of €10,000 (ten thousand euros).

SECOND: NOTIFY this resolution to D.B.B.B..

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 LOPDPGDD, 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 LOPDPGDD, and in accordance with the provisions of article 123 of the

LPACAP, the interested parties may optionally file an appeal for reconsideration

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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,

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.

Electronic Registration of

through the

Sea Spain Marti

Director of the Spanish Data Protection Agency

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