

□ Procedure No.: PS/00114/2020

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: Dated September 10, 2019, had entry in this Agency

Spanish Data Protection a document presented by COMMUNITY

OWNERS ***URBANIZACIÓN.1 (hereinafter, the claimant), through the

which makes a claim against A.A.A. with NIF ***NIF.1 (hereinafter, the claimed one),

for the installation of a video surveillance system in a house located in

***URBANIZATION.1 ***ADDRESS.1 – ***LOCATION.1 (MÁLAGA), existing

indications of a possible breach of the provisions of the data protection regulations.

personal information.

The reasons underlying the claim are as follows:

"This lady has installed in her home number 25 within the closed complex of 32

dwellings called ***URBANIZACIÓN.1 on street ***ADDRESS.1 two chambers of

surveillance, which focus on common areas and private areas, such as the patio of your

neighbor (house 24). We have asked you for the installation certificate and you have refused to

deliver. We have contacted the installation company [...] and they have not

responded to our request. We believe that rights are being infringed

of the affected neighbor and of any other neighbor who passes through the area."

Attach photographic report of the location of the cameras in question, as well as the

emails sent to the claimant and the installation company requesting them

the installation certificates that could prove that the recording of the cameras

it does not extend to common areas or other homes.

SECOND: Prior to the acceptance of this claim for processing, it is transferred the claimed, in accordance with the provisions of 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). The aforementioned transfer was returned by “Surplus (Not withdrawn in office)” on 11/7/2019.

On 02/17/2020, a reiteration of the transfer of the claim was made, resulting in returned again by “Surplus (Not picked up at the office)” on 03/04/2020.

THIRD: The claim was admitted for processing by resolution of March 12 of 2020.

FOURTH: On June 16, 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

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General Data Protection, hereinafter RGPD), typified in article 83.5 of the GDPR.

FIFTH: Since the notification of the initiation agreement was unsuccessful, proceeded to publish an announcement of notification in the Single Edictal Board of the Bulletin State Official on July 9, 2020, in accordance with the provisions of the Article 44 of Law 39/2015, of October 1, on Administrative Procedure Common Public Administrations (hereinafter, LPACAP).

SIXTH: On September 1, 2020, the instructor of the procedure agreed and proceeded to notify the opening of a period of practical tests, requesting the

Marbella Town Hall so that, within 30 days and prior transfer to the property of the Local Police, issued the corresponding report stating:

- ☐ Effective address of the claimed party at the indicated address.
- ☐ Existence of a video surveillance device in the referred property.
- ☐ Orientation of the installed cameras and their capture area. To allow it claimed, it is requested that they be observed and informed about the images displayed on the monitor.
- ☐ Any other aspect considered appropriate to review.

SEVENTH: The State Tax Administration Agency provides the address tax of the claimed on October 8, 2020, being this STREET ***ADDRESS.2 ***LOCATION.2 (BARCELONA).

EIGHTH: The instructor of the procedure agrees, on October 8, 2020, in the framework of the testing period, request the installation company, TRABLISA MULTISERVICIOS S.L. the next information:

- a) Existence of a video surveillance device installed by that company in the home located in ***URBANIZACIÓN.1, ***ADDRESS.1, ***LOCATION.1 (MALAGA).
- b) Number of cameras that make up said installation that are oriented to the outside and their location.
- c) Type of contract signed with the owner
- d) In the event that the company manages the images captured by the cameras oriented towards the outside, certify the capture angle by means of frames in which includes the date and time of what was viewed on the monitor.

NINTH: On October 8, 2020, the instructor of the procedure sends a new communication to the tax domicile of the claimed party informing him of the evidence agreed at the same time that a copy of the start-up agreement is sent.

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This notification was returned by “Surplus (Not picked up at the office) on the 30th of October 2020.

TENTH: On October 13, this Agency received the written response from the of the Local Police of ***LOCALIDAD.1 in reference to the collaboration request agree as proof. This letter states the following:

“[...] work in these dependencies report issued by the agents of this Police with C.P. XXXX and XXXX in which they tell me that, "Being 09:49 a.m. on the day 09/09/2020, they appeared at ***ADDRESS.1, ***URBANIZATION.1 of *** LOCATION.1, in order to verify the reported facts, verifying how there was no one in the house.

That through a neighbor, the telephone number of the owner of the housing, and put in contact with it through the Command and Control Room of this Headquarters, claims to be and be called Ms. A.A.A., D.N.I. ***NIF.1, born on [...], with address at C/ ***DIRIMIENTO.2, ***LOCALIDAD.2, Barcelona, which is informed about the procedure that is under way in that Spanish Agency of Data Protection for the installation of the cameras, informing that "They are dissuasive and have no recording system.

Attached hereto, I am sending you a copy of the photographs obtained by the interveners during the home inspection [...]”.

ELEVENTH: Given the information provided in the letter from the Local Police of ***LOCATION.1 about the address of the claimed in a new address, the

instructor of the procedure sends a new communication to the communicated address by the defendant in which he is informed of the tests agreed upon at the same time that he is sends a copy of the start agreement on October 16, 2020 informing you of the tests carried out at the same time that a copy of the initiation agreement and a copy of the report issued by the Local Police of ***LOCATION.1.

Despite corresponding to the address provided by the respondent himself, this notice was returned for "Wrong Address" on October 28, 2020.

TWELFTH: On October 20, 2020, the security company

TRABLISA MULTISERVICIOS S.L. submits a written response to the request for test formulated in the following terms:

"[...] 1. TRABLISA MULTISERVICIOS, nor any other company of the TRABLISA group, does not have any service contract, does not manage the captured images, nor has installation of any video surveillance equipment in the house located in ***URBANIZATION.1, ***ADDRESS.1, ***LOCATION.1 (MÁLAGA).

2. Persons in the indicated direction are observed on the facade of the house a plate corresponding to the TRABLISA Alarm Center, as well as a video surveillance camera. Two supporting photographs are included in the annex.

3. Photograph 1 shows a plate typical of TRABLISA, although it has not been provided by the company and its origin is unknown.

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4. In photograph 2, the camera that is observed does not correspond to the models installed by the company.

[...]"

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: The defendant has installed some cameras on the main facade and on the terrace of the property located at the address indicated in the first antecedent of this resolution. In both locations there are signs with reference to the TRABLISA company. This installation is confirmed by the photographs provided by the claimant and the photographs taken by the Local Police of ***LOCATION.1 in his displacement of September 9, 2020.

SECOND: The respondent informs the Local Police of ***LOCATION.1 that the nature of the cameras is dissuasive, without them being in operation.

THIRD: The company TRABLISA MULTISERVICIOS S.L. inform this body that no device has been installed in the aforementioned property, that the models of the cameras do not correspond to those installed by the company and that the posters have not been provided by her.

FOURTH: The respondent declares that his domicile is in C/ ***DIRECTORY.1, ***LOCATION.1 (BARCELONA).

FOUNDATIONS OF LAW

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

II

The defendant is charged with the commission of an infraction for violation of article

5.1.c) of the RGPD, which states that personal data will be “adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (“data minimization”).”

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This infringement is typified in article 83.5 of the RGPD:

“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;
- b) the rights of the interested parties according to articles 12 to 22; [...]”

For the purposes of the limitation period of the infraction, it is considered very serious and prescribes after three years, in accordance with article 72.1 of the LOPDGDD, which establishes that:

“Based on the provisions of article 83.5 of Regulation (EU) 2016/679, considered very serious and will prescribe after three years the infractions that suppose a substantial violation of the articles mentioned therein and, in particular, the following:

- a) The processing of personal data violating the principles and guarantees established in article 5 of Regulation (EU) 2016/679. [...]”

The present procedure has its origin in the installation of two devices of video surveillance in the property located at the address indicated in the antecedent first of this resolution, which could be oriented and capture images of areas common and even from a neighboring house.

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 —related to processing for video surveillance purposes—provides that, in order to guarantee the safety of people and property, 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 the ability to grasp images on public roads is attributed, in general, to the Forces and Corps of Security in accordance with the provisions of Organic Law 4/1997 by which the use of video cameras by the Security Forces and Bodies in public places and their implementing regulations.

In the same way, the installed cameras cannot obtain images of space proprietary third party. It is not allowed, therefore, the placement of cameras towards the private property of neighbors in order to intimidate them or affect their environment deprived without just cause

Likewise, it is necessary to point out that article 13 of the RGPD —in compliance with the

duty of information collected in the preceding article 12 of the same legal text—

regulates the information to be provided when personal data is

obtained from the interested party, a situation that occurs in the cases in which they are captured

images by a video surveillance system. In this sense, article 22.4 of the

LOPDGDD establishes that "The duty of information provided for in article 12 of the

Regulation (EU) 2016/679 will be understood to be fulfilled by placing a

informative device in a sufficiently visible place identifying, at least, the

existence of the treatment, the identity of the person in charge and the possibility of exercising the

rights provided for in articles 15 to 22 of Regulation (EU) 2016/679. Also

A connection code or email address may be included in the information device.

internet to this information.

And on the other hand, individuals who use this type of device are responsible

that these comply with current legislation, and must comply, when the property

is under the regime of community of owners, with the requirements

established in Law 49/1960, of July 21, on horizontal property (LPH). A) Yes,

The installation of a video surveillance system by an individual will require

authorization of the board of the community of owners both when its

location in a common area as when, even installed in an area of use

exclusive, is oriented to surrounding common areas and captures —respecting in any case

the principle of data minimization—tangentially common areas.

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In relation to the foregoing, the facts proven in this proceeding

It is clear that both devices, due to their location, and particularly in the case of the camera installed on the terrace, would be capable of capturing images of common elements as well as even neighboring houses.

However, notwithstanding what is indicated in the previous paragraph, in accordance with the manifested by the claimed to the Local Police of ***LOCALIDAD.1, the cameras they would be of a dissuasive nature and would not have a recording system. This statement would come to be corroborated by what was stated by the company TRABLISA MULTISERVICIOS S.L. which, in its letter dated October 20, 2020, indicates that has not carried out any installation in the referred property and that both the models of cameras observed as the informative posters do not correspond to those that installs or facilitates the company.

It is convenient to bring up, with respect to dissuasive devices, what has been said highlighted by the Judgment of the Supreme Court, Civil Chamber (STS 3505/2019, 11/07/19) regarding fictitious cameras, which states that "that the cameras of false security also represent an illegitimate intrusion on privacy given that those affected do not have to endure "permanent uncertainty" about 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.).

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 of the alleged offender.

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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 capturing or recording any image, so that by not being able to determine the existence of effective data processing, it is not possible to speak of infringing conduct within the scope of the regulatory framework of data protection, reason why which proceeds 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 A.A.A. and inform COMMUNITY OWNERS ***URBANIZATION.1 OF ***LOCATION.1.

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.

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

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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-](https://sedeagpd.gob.es/sede-electronica-web/)

[web/](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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