

Procedure No.: PS/00355/2018

938-0319

RESOLUTION OF PUNISHMENT PROCEDURE

Of the procedure instructed by the Spanish Agency for Data Protection before Mr.

A.A.A., by virtue of a claim filed by Don B.B.B. and based on the

following:

BACKGROUND

FIRST: On July 13, 2018, entry is registered in this Agency

written by Don B.B.B. (hereinafter, the claimant), in which he communicates that his neighbor

of ***CALLE.1, nº 6 that identifies as Mr. A.A.A. , (hereinafter, the claimed),

has installed a video surveillance camera in a tree that focuses and records the area

of the swimming pool of his house, a place frequently used for his games by his

three minor children.

The claimant attaches the following documentation:

-Copy of a general request filed on July 13, 2018 in the

OAC ***DISTRITO.1 Registry Office of the Madrid City Council, in which the

The claimant states that "There are cameras installed in trees that record us and

observe without our permission", requesting "That urgently, given the insecurity

that we believe the fact that my family and minor children are being observed is opened

disciplinary record."

- Printing of four photographs showing a video surveillance camera

placed in it.

SECOND: Dated August 2, 2018, by the Inspection Services

of this Agency, information is requested from the respondent on a series of points in order to

to assess, in the reference file E/04837/2018, that the data processing

linked to the installation of the video surveillance camera was in accordance with the regulations of data protection.

On August 29, 2018, a written response is registered

of the complainant stating the following:

“- The person in charge of the installation is myself.

- In the detail of the cadastre below you can see the location of the cameras on the plot and where they point.

The images are only seen by me, on devices encrypted for my use exclusive. The images are deleted as soon as I see that there is nothing of interest.

The cameras are two Arlo Pro 2. I enclose the manuals of the same.

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- I attach the photos of what is seen from the cameras and photos of the location from the same. They only point to the interior of my dwelling/plot as you can see

- From what I have read on your website, when capturing images is limited exclusively to the interior of the dwelling is considered to be carried out in the exercise of a personal or domestic activity, to which it is not this regulation applies.”

The respondent attaches two photographs in which the places of

installation of two video surveillance cameras, one of them anchored on top of a exterior wall of a building and another on a pole located at an angle of a fenced land adjoining another plot. He also provides two other photos. taken from the places where the cameras are placed, which are not show no pool. These are approximate images that do not reveal the real scope of the video-monitored area by said cameras by not showing "the images captured by the cameras, as displayed on the monitor or system equivalent".

THIRD: On December 13, 2018, the Director of the Spanish Agency of Data Protection agreed to initiate sanctioning procedure of warning to Mr. A.A.A., (hereinafter, the respondent), 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 the Article 5.1.c) of Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016, regarding the protection of natural persons in what regarding the processing of personal data and the free circulation of these data, (in hereinafter RGPD), in accordance with the provisions of article 58.2.b) of the aforementioned RGPD, typified in article 83.5.a) of the RGPD.

FOURTH: Notification of the aforementioned initiation agreement, dated December 24, 2018, a written statement of allegations of the claimed party is registered in that Agency in the which, in summary, alleges the following extremes:

- Provides details of the cadastre in which it indicates the location of the plots located at numbers 2, 4 and 6 of ***CALLE.1, also setting the location of the two cameras installed on your plot and the areas of it to which they point these devices.

- That the camera that the claimant referred to as installed in a tree, and

that the respondent identifies as camera 2, was moved prior to receipt of the information request, relocating to the post in the which is currently installed at a height similar to that which was placed on the tree, which was about two meters high. He denies that there was more cameras installed in trees.

It also notes that “the photos provided by the claimant are taken from above. Since my camera 2 was attached to the wall bordering the claimant. Said wall is 2.5 high and my camera was placed less than 2 high and the edge of your pool is 3 meters from the border fence. Otherwise They have entered my plot to take the photos.”

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Also, attach photograph No. 2 to indicate the location of camera 2, to the side of the previous position in the tree, which allows us to appreciate that it is installed by below the height of the boundary wall with ***CALLE.1, nº 2.

- The respondent presents four photographs to prove the position of the cameras with respect to the claimant's plot/swimming pool, with the help of the map with the detail of the cadastre. Under photograph no. 5, he reports: “Chamber 1 is attached to the border with ***CALLE.1 nº 4. The border with ***CALLE.1 nº 4 and ***CALLE.1 nº 2 form a straight line, so camera 1, due to its position, cannot focus toward the claimant's pool area.” Under photograph no. 6, it indicates “As you can see in this photo the location of the camera below the boundary wall prevents viewing the pool area of the claimant.”

- States that due to the position of the cameras, the pool of the claimant is

outside the capture field of said devices, noting for these purposes that:

“In order to have a view of the pool, camera 1 should be located where the

three borders (**STREET.1 nº 2, 4 and 6), that is, on the edge of the brick wall

***STREET.1 nº 4 and camera 2 should be located above 2.5 m of

height of the boundary wall with ***CALLE.1 nº 2. Which they are not, nor have they been.

Since my interest is not to observe the claimant's plot but the accesses to my

parcel from that boundary.”

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It presents capture of the images collected by both cameras, which

clarifies coincide with those provided in your previous answer as there is no option to

see more field of vision. He adds that his equipment does not allow displaying date and time

superimposed on the captured area, so it presents an image of the list of

photos and an individual photo of each camera in which the day and time appear on the screen

of your device. What he justifies by referring to the manual provided at the time.

PROVEN FACTS:

FIRST: On July 13, 2018, Don B.B.B., (the claimant), filed with

the AEPD claim against Mr. A.A.A., (the defendant), for installing a security camera

video surveillance on the parcel of his property, which, according to the claimant, focused on the

pool area of his property, a place frequented by his three children under the age of

age.

SECOND: The claimant attached, among other documentation, a printout of four

photographs showing a video surveillance camera perched on a tree.

THIRD: It is accredited in the file that the respondent is responsible for

the installation of two video surveillance cameras, model Arlo Pro 2, in the plot of

his property, located at ***CALLE.1 nº 6 of ***LOCALIDAD.1, partially

adjoining the claimant's parcel.

FOURTH:

The graphic documentation provided by the respondent, together with the information provided by the cadastral plan in which the location has been marked and orientation of the two video surveillance cameras, shows that the aforementioned devices

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security are oriented towards your plot, not pointing towards the pool of your neighbour.

FOUNDATIONS OF LAW

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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 Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of the digital rights (hereinafter LOPDGDD), the Director of the Spanish Agency for Data Protection is competent to resolve this procedure.

II

The use of video surveillance cameras allows capturing images, so that its use affects identified or identifiable natural persons captured through through said devices, and constitutes, therefore, a treatment of personal data. personal character.

One of the requirements that image processing must meet through a video surveillance system to be in accordance with current regulations is that of

respect the principle of proportionality.

Camcorders will not be able to capture images of people

are outside the private space, since the treatment of images in places

public can only be carried out, where appropriate, by the Forces and Bodies of

Security. Nor may spaces owned by third parties be captured or recorded without

the consent of their owners, or, where appropriate, of the natural persons affected by

said treatment.

III

In the present case it is elucidated if the claimed person carries out a treatment of

images for video surveillance purposes that could exceed the exclusive scope of their

plot, since it could also capture images of the pool area of the plot

neighbor and, consequently, of the members of the claimant's family and of

any third party found in that space outside their private property.

Such conduct could violate article 5.1.c) of the RGPD, which establishes,

Regarding the "Principles related to treatment", the following:

"1. The personal data will be:

c) adequate, relevant and limited to what is necessary in relation to the purposes

for which they are processed ("data minimization");

For its part, Organic Law 3/2018, of December 5, on the Protection of

Personal Data and Guarantee of Digital Rights (LOPDGDD), in its article 22,

regarding "Processing for video surveillance purposes", in sections 1, 2 and 5,

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establishes that:

"1. Natural or legal persons, public or private, may carry out the processing of images through camera systems or video cameras with the purpose of preserving the safety of people and property, as well as their installations.

2. Images of public roads may only be captured to the extent that is essential for the purpose mentioned in the previous section.

However, it will be possible to capture the public road in an extension superior when necessary to guarantee the security of goods or

strategic installations or infrastructures linked to transport, without

In no case may it involve capturing images of the interior of a home private.

(...)

5. Under article 2.2.c) of Regulation (EU) 2016/679, it is considered excluded from its scope of application the treatment by a natural person of images that only captures the interior of their own home.

This exclusion does not cover processing carried out by a security entity private that had been contracted for the surveillance of a home and had access to the images”

IV

For the purposes of determining the sanction that could entail the mentioned infraction, the following precepts must be taken into account:

Sections b), d) and i) of article 58.2 of the RGPD provide 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 83 of the RGPD, under the heading "General conditions for the imposition of administrative fines", in sections 2 and 5.a), states that:

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"two. 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). (...)

5. Violations of the following provisions will be sanctioned, in accordance with 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)

basic principles for treatment, including conditions for

consent under articles 5, 6, 7 and 9; “.

For its part, article 72.1.a) of the LOPDGDD establishes that:

“1. Based on the provisions of article 83.5 of the Regulation (EU)

2016/679, are considered very serious and infringements will expire after three years.

that suppose a substantial violation of the articles mentioned in that and, in

particularly the following:

a)

The processing of personal data violating the principles and guarantees

established in article 5 of Regulation (EU) 2016/679.”

In turn, Recital 148 of Regulation 2016/679, which establishes the

following: “In the event of a minor offence, or if the fine likely to be imposed

would constitute a disproportionate burden for a natural person, rather than

sanction by means of a fine, a warning may be imposed. must however

Special attention should be paid to the nature, seriousness and duration of the infringement, its

intentional nature, to the measures taken to alleviate the damages suffered,

the degree of liability or any relevant prior violation, the manner in which

that the control authority has been aware of the infraction, compliance

of measures ordered against the person responsible or in charge, adherence to codes of

conduct and any other aggravating or mitigating circumstance.”

The violation of the principle of data minimization could constitute

of the claimed, in its capacity as responsible for the treatment of video surveillance,

infringement of the provisions of article 5.1.c) of the RGPD in its relationship with the provisions of

article 22.5 of the LOPDGDD, typified in article 83.5.a) of the RGPD and qualified

as very serious for prescription purposes in article 72.1.a) of the LOPDGDD.

In the case that concerns us, and in view of the evidence available in that

procedural moment, it was considered appropriate to initiate a sanctioning procedure of warning in accordance with the provisions of article 58.2.b) of the RGPD. For

It was taken into account that the person responsible for the video surveillance treatment was a natural person and the absence of intentionality in his conduct, since the

Image processing responds to security purposes of goods and people in a private environment, also considering that the administrative fine that could fall in accordance with the provisions of article 83.5.b) of the RGPD would constitute a burden disproportionate to that person.

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In the present case, of the evidence provided by the defendant,

especially the photographic report attached to his allegations, through which shows the exact location of the cameras installed inside your plot and the images corresponding to the video-monitored area captured by each of the two cameras that make up the video surveillance device installed on your property,

It follows that there is no processing of images of the swimming pool area of the parcel owned by the claimant. The photographs that correspond to the area captured by each of the video surveillance cameras show images of the interior of the plot of the claimed, without collecting images of any pool.

In addition to these images of the captured area, the defendant justifies in his allegations that given the position in which camera 1 is located it cannot focus towards the pool area of the claimant, adding that since camera 2

located below the boundary wall it is not possible to see through the
the claimant's pool area itself, which is also supported by the
photographic report presented and the detail of the plan of the cadastre that allows to locate
the location of the cameras in relation to the claimant's swimming pool.

Consequently, since it is not accredited in the procedure that the chambers
are oriented towards the pool area of the claimant's plot, there is no
irrefutable proof of the affectation of the private space of others as a consequence
of the processing of images for video surveillance purposes carried out by the claimed party,
responsible for the installation in question and the treatment resulting from it.

SAW

Based on the foregoing, the principle of presumption of innocence prevents imputing a
administrative infraction when proof of
accrediting charge of the facts that motivate the imputation or of the intervention in the
of the alleged offender. Applying the principle "in dubio pro reo" in case of doubt
with respect to a concrete and determined fact, which obliges in any case to resolve
said doubt in the most favorable way for the interested party.

The presumption of innocence must govern without exceptions in the legal system
sanctioning and must be respected in the imposition of any sanctions, since
the exercise of the *ius puniendi* in its diverse manifestations is conditioned to the
game of evidence and a contradictory procedure in which they can defend themselves
own positions.

In this sense, the Constitutional Court in its Judgment 76/1990, of 26/04,
considers that the right to the presumption of innocence entails: "that the sanction be
based on acts or means of proof of charge or incriminating the conduct
reproached; that the burden of proof corresponds to the one who accuses, without anyone being
forced to prove his own innocence; and that any insufficiency in the result of

the tests carried out, freely assessed by the sanctioning body, must result in an acquittal statement.

Said principle governs without exceptions in the sanctioning system and must be respected in the imposition of any sanction, whether criminal or administrative (TCo 13/1981), since the exercise of the sanctioning right in any of its manifestations, is conditioned to the test game and to a procedure contradictory environment in which their own positions can be defended.

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Therefore, according to the same, no sanction can be imposed on the basis of of the guilt of the accused if there is no activity to prove the charge, which in the appreciation of the authorities or bodies called to resolve, destroy this presumption (TCo Auto 3-12-81).

In accordance with the foregoing, the violation of the principle of minimization of data by the claimed party and, consequently, the commission of the administrative infraction described, obeying the installation of the system of video surveillance for reasons of security of persons and property, without evidence accredited that the image processing carried out affects the pool area of the claimant's adjoining parcel.

Therefore, it is appropriate to file the actions carried out in this administrative Procedure.

According to what was stated,

The Director of the Spanish Data Protection Agency RESOLVES:

FIRST: FILE the actions carried out in this procedure

penalty of warning PS / 00355/2018.

SECOND: NOTIFY this resolution to Don A.A.A. and, according to art. 77.2

of the RGPD, INFORM the claimant about the result of the claim.

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.

114.1 c) of the LPACAP, 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-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/], 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.

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