 File No.: PS/00204/2021

- RESOLUTION OF PUNISHMENT PROCEDURE

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

to the following:

BACKGROUND

FIRST: On July 9, 2020, the Director of the Spanish Agency for

Data Protection agrees to initiate investigative actions in relation to the

facts described below:

On July 8, 2020, this Agency became aware of the dissemination, through

of social networks, of a video showing images of an assault by

part of a man to a woman, which could constitute a crime of domestic violence.

gender. The video also shows images of a young male minor, who

intervenes in the scene trying to avoid the aggression that was taking place.

This video is accessible, at least, through the following URLs:

***URL.1

***URL.2

The second of them is a re-tweet of the first. In the first, the accompanying message

ña the dissemination of the video is as follows:

(…)

The video reviewed has also been disseminated by the media, although

This disclosure has been made prior to pixelation that prevents the identification of the

physical sounds that appear in it.

SECOND: In view of the facts of which this Agency has become aware,

The Subdirectorate General for Data Inspection proceeded to carry out actions

preliminary investigations to clarify the facts in question, in virtue of

tude of the powers of investigation granted to the control authorities in the article

57.1 of Regulation (EU) 2016/679 (General Data Protection Regulation,

hereinafter RGPD), and in accordance with the provisions of Title VII, Chapter I,

Second section, of Organic Law 3/2018, of December 5, on the Protection of

Personal data and guarantee of digital rights (hereinafter LOPDGDD).

The following extremes are noted:

- On July 23, 2020, the events were transferred to the Attorney General's Office

of the State for its knowledge and opportune effects.

- It is verified that at the beginning of these investigative actions the tweets continue to

showing the videos. In them it is verified that in certain frames

could identify the minor and his mother.

- On July 27, 2020, Ms. A.A.A. is requested, through the City Council,

of Palma de Mallorca, to report on the origin of the published video and the reason

for which the faces of the minor and the victim had not been pixelated. With date of

On July 29, 2020, a reply is received to the request presented by its representative.

indicating that the origin of the video is a tweet from Don B.B.B., at the address:

***URL.3

It adds that no manipulation of the video images was previously made

already published since he understood he was limited to sharing an image already published with

anteriority. It ends by indicating that, after reviewing the images, they are not considered to be

have the appropriate quality and perspective to be able to identify the participants of

better way than in the case of pixelated partial faces appearing in it.

supper

- Examining the profile of the owner of the origin of the video on the social network TWITTER, it was observed

Please note that it works as ***POST.1. Request for identification of

this holder to that Diputación, a response to the request is received, providing the data

of the same.

- On January 27, 2021, a precautionary measure is issued to withdraw the twee-

ts outlined below, sent by international certified mail to TWI-

TTER INTERNATIONAL COMPANY (hereinafter TWITTER, headquartered in Ireland). I don't know

is certain that the precautionary measure has been delivered at destination.

- ***URL.4

- ***URL.1

- ***URL.2.

At the same time, the same day that the aforementioned precautionary measure was sent

in the previous paragraph, the withdrawal was requested through the established web form

for this Agency by those responsible for the TWITTER platform.

- Dated March 1, 2021, it is verified that the tweets of Doña A.A.A. and of

Don B.B.B. now appear as sensitive content, disabling their automatic display.

matic, being necessary to manually select its visualization.

- Dated March 23, 2021, a letter sent by TWITTER is received manifests-

While the Tweets seem to have shared the video to raise awareness about

violence perpetrated against women. As such, Twitter believes that Tweets are

align with Twitter's mission to serve the public conversation, share information

tion instantly and without barriers. This includes sharing information that may be of interest to you.

public interest. When people share information of public interest on Twitter

tter, the general public benefits, as it offers them access to information that

can be difficult to obtain or learn. It also allows for public discussion around

to topics and issues of public interest such as violence against women. After

Upon review, Twitter determined that the content does not violate Twitter's Terms of Service.

Twitter, the Twitter Privacy Policy, or the Twitter Rules, and will not be removed

of the platform.

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

THIRD: On June 17, 2021, 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 of the RGPD, typified in Article

83.5 of the GDPR.

FOURTH: Having been notified of the aforementioned initiation agreement, the respondent submitted a written

requesting a copy of the file to be able to make the pertinent allegations;

sending the same

The representative of the defendant presented arguments in which he stated that the video

is no longer available on the ***URL.4 page.

That of the description of the video that is made in the agreement to initiate the procedure

sanctioning party, this party understands that he is referring to the video that the

journalist C.C.C. at: ***URL.5 If it is the same video, they do not have the quality or the

sufficient perspective to be able to identify the people shown in it.

since they appear from behind and with such low video resolution that it is impor-

possible to identify the people who appear in it, thus coinciding with the appraisals

made by Doña A.A.A.. This same video was published in the news of

Telecinco on July 7.

That, on the other hand, if it is this video that is being referred to, its dissemination would be

protected by article 20 of the Spanish Constitution; it is also an information

mation of public interest in an issue as relevant and of social interest as violence

cia against women. In the initial agreement, it is stated that the Twitter platform itself

tter refuses to withdraw the videos after the request of this Agency for these same

We have reasons.

That the activities carried out by natural persons in social networks without connection with

commercial or professional activities are expressly excluded from the scope of

application of the General Data Protection Regulation, as set out in

its Recital 18, for which the regulations for the protection of personal data would not apply.

data to the publication of that video on social networks.

That in the event that this Agency decides to continue the sanctioning procedure,

we consider disproportionate the proposed sanction of 10,000 euros to an individual

for the alleged publication of a video that was previously broadcast by other

people and media, being appropriate, in this case, the sanction of

warning, since in addition said video no longer exists and that the claimed one does not

has been penalized before.

FIFTH: On August 17, 2021, the instructor of the procedure agreed to the

opening of a period of practice tests, in which:

1. The documentation collected by the

SPANISH DATA PROTECTION AGENCY, the documents obtained and

generated by the Inspection Services, and the Report on previous actions of the Inspection

section that are part of file E/05793/2020.

2. Likewise, it is considered reproduced for evidentiary purposes, the allegations to the agreement of initiation PS/00204/2021 presented by the legal representative of Don B.B.B..

3. (…)

SIXTH: On September 28, 2021, a resolution proposal was formulated, stating that the Director of the Spanish Data Protection Agency sanctioned mention Don B.B.B., for an infringement of article 6.1 of the RGPD, typified in the Ar- article 83.5 of the RGPD, a fine of €6,000 (six thousand euros).

On October 18, 2021, arguments are received to the proposed resolution tion, in which, in summary, the following is indicated:

That the RGPD has been improperly applied to the acts subject to sanction, since Recital 18 of the RGPD establishes that it will not apply to the treatment of data made by a natural person in the course of an activity exclusively personal without any connection with a professional or commercial activity. Plus, cites as an example this same Recital 18 that, among the personal activities they should include activity in social networks.

There are reports from the Legal Office of the AEPD in which they determine that in order to respond to whether the activity followed in a Twitter account falls within the scope application of the data protection regulations, it will be necessary to attend to: the number number of followers, the purpose of your Twitter account, and the consideration that make the owner of your Twitter account (in the case of the aforementioned report, the owner of that Twitter account referred to himself as "network influencer").

In the same sense, Opinion 5/2009 on social networks of the time is pronounced.

ces Working Group of article 29, where it is stated that: “However, in some

cases, users may acquire a large number of third-party contacts and do not know

see some of them. A large number of contacts may indicate that the

domestic exception and the user could then be considered as a responsible

ble of data processing. “

It is not accredited that the claimed person carries out a professional or commercial activity

through his Twitter profile, and it cannot be otherwise because the claimed old

ne performing an exclusively personal activity on your Twitter profile. Either

The number of followers of your account does not appear in the file, nor the characteristics

of your profile. All these extremes are unknown. In short, the very test that is

Agency indicates that it must be carried out in order to determine the application or not of the

Data protection requirement to a profile on a social network has not been carried out.

It is worth mentioning in the first place that this Agency does not initiate its investigative action

against the defendant for having denounced the alleged affected persons, but rather

he does it ex officio. Of these investigative actions, he ends up being charged with a

infringement of article 6 of the RGPD to the claimed for the alleged publication of a video

deo on his Twitter profile. Both in the pleadings brief after the opening of the

sanctioning procedure, as well as in the trial practice period, this part has

requested a copy of said video from this Agency, since, as stated, said video

was not available when you tried to access it. The only graphic element

that this part has to defend itself against the content of said video is a unique

screenshot of a certain moment of the video.

This Agency speaks of “identifying data”, but it is unknown what it can refer to.

reference because there is no data in the file to identify anyone who could

would appear in the image. All there is is a blurry image of a child

it is impossible to identify. It is unknown what could appear in that video or in the au-

He said that it could be an "identifying data" as mentioned by the Agency. Indicated-

Ban names and surnames at some point in the video?

The source tweet cannot be the one allegedly posted by Mr. B.B.B. (which-

whatever its contents) because the Department of Government Security itself

The Basque government informed the media that the video was originally published

finally by the person who accompanied the person attacked and who was close to

the victim (not a mere passerby passing by). This person originally posted-

posted the video on the Internet, and had to do so with the consent of the assaulted woman.

because it would not be explained that as his companion he would publish it without prior consent.

sultar him, and that is when, apparently, the media spread it and post-

It recently went viral on social media.

From the foregoing it is concluded, following a coherent account of what happened, that the vi-

deo had to be published with the consent of the woman who appears in it

pray, surely with the intention of raising awareness about violence against women or

so that the aggressor could be pursued and located, since in fact, according to reports

News from Gipuzkoa on July 9, 2020, the aggressor: "had been identified previously-

thanks to a video that a witness of the beating recorded and that was posted in the re-

social des.”, so the dissemination of the video seems to have helped to identify the aggressor

and his subsequent arrest. In fact, this is consistent with the fact that women

has not denounced the dissemination of the video, but it has been the Spanish Agency itself

of Data Protection which has understood that this video should be prosecuted ex officio

without previously consulting the eventual victim, who would be the wife and mother of the

north If the assaulted woman did not want that video to appear on the Internet, she would have already arti-

culated the appropriate measures for its withdrawal, such as having filed a complaint

before this Agency, but this is not the case.

The principle of culpability also applies to administrative offenses

(see Constitutional Court Judgment 246/1991 of December 19 and

76/1990 of April 26); therefore, to the extent that the penalty for the infraction is

one of the manifestations of the ius puniendi of the state, there is a constitutional requirement

tional, consisting in the fact that it cannot be imposed, as in the case before us.

pa, "an objective responsibility". That requirement of culpability in the realm of

administrative offenses is reiterated ad nauseam by the jurisprudence of the Court

Supreme. In short, and in the words of the Supreme Court, guilt must be

as demonstrated as the active or omissive behavior that is sanctioned.

Following the jurisprudential doctrine, it must be reflected in the sanctioning file.

dor not only the typical and unlawful act, but also the guilt of the subject, this

is, that it is accredited that the subject acted conscientiously and voluntarily, lacking

to an enforceable duty of care. Well, in this case, not only has it not been

such extreme, but also the conduct of the defendant, consisting of su-

purposely broadcast a video in which a sexist aggression is seen, he did it not

only from the full knowledge of being working within the law but to help

raise awareness of the problem of violence against women.

The AEPD itself has published a guide on its website entitled “Delete photos and videos de Internet” available at this address: https://www.aepd.es/es/areas-de-actuacion/internet-and-social-networks/delete-photos-and-videos-from-the-internet. This guide is focused on explain what to do when there is content in the form of images or videos published on the Internet and that the owner of that image or video has not given their consent. fear of publication. This guide informs first of all that: “The Agencia Es-
The Data Protection Office will protect your right of deletion if, after having-
addressed to the responsible person by a means that allows it to be accredited, said res-
responsible for data processing has not responded to you within the established period or if you consider that the answer has not been adequate, so that you can present a complaint in this regard." Citizens are informed that the first thing to do is to ask the person who posted the content to remove it. And only when not a response has been obtained or when it has not responded, that is when the AEPD can tuar

It appears in the file that the Agency addressed Twitter Inc., to request the withdrawal day of the tweets posted by Mr. B.B.B. and Mrs. A.A.A. and D.D.D.. Given this request character, it also appears in the file that a response was received from the department legal document of Twitter, specifically its Office of Data Protection, stating that after analyzing the reported tweets, they seem to have been shared to create con-
science about violence perpetrated against women, and as such, Twitter considers that those tweets align with the mission of serving the public conversation and sharing information instantly, also considering said information of public interest, so Twitter indicates that these tweets do not violate its terms and will not remove them from your platform.

The defendant acted in good faith, with the understanding that he was helping to conscientiously

ciate on the problem of violence against women. The defendant is a person

anonymous person who makes personal use of his Twitter profile, he was not burdened with dili-

concrete agency capable of enervating the absence of guilt. I had seen the posted video

that same night on the Telecinco news as indicated in his tweet.

Of the actions carried out in this procedure and the documentation

in the file, the following have been accredited:

PROVEN FACTS

FIRST: On July 8, 2020, this Agency became aware of the dissemination

sion, through social networks, of a video in which images of a

assault by a man on a woman, which could constitute a crime of

gender violence.

The video also shows images of a young minor, male, who intervenes

ne on the scene trying to avoid the aggression that was taking place.

The next day, investigative actions are started to determine the

responsibility for the dissemination of these images on social networks.

SECOND: Mrs. A.A.A., person whom the Agency has sanctioned for the dissemination

of the video that has motivated this procedure, answered the request for information

made on it, indicating that the origin of the video he had published is a

tweet from Don B.B.B., at the address:

***URL.3

THIRD: On January 27, 2021, a precautionary withdrawal measure is issued

from the tweet ***URL.4.

FOURTH: Dated March 1, 2021, the tweets of Doña A.A.A. and Don B.-

B.B. appear as sensitive content by disabling their automatic display,

being necessary to manually select its visualization.

FIFTH: Dated March 23, 2021, a letter sent by TWITTER is received

stating that tweeters appear to have shared the video to raise awareness

on violence perpetrated against women. As such, Twitter believes that Tweets

align with Twitter's mission to serve the public conversation, share information

mation instantly and without barriers. This includes sharing information that may be of

public interest. Twitter determined that the content does not violate Twitter's Terms of Service.

Twitter, the Twitter Privacy Policy, or the Twitter Rules, and will not be removed

of the platform.

SIXTH: The video is not available at this address:

***URL.3

FOUNDATIONS OF LAW

Yo

By virtue of the powers that article 58.2 of Regulation (EU) 2016/679 (Regulation-

General Data Protection Regulation, hereinafter RGPD), recognizes each Authori-

Control Authority, and as established in articles 47, 48.1, 64.2 and 68.1 of the Law

Organic 3/2018, of December 5, on the Protection of Personal Data and guarantee of

digital rights (hereinafter, LOPDGDD), the Director of the Spanish Agency

Data Protection is competent to initiate and resolve this procedure.

Article 63.2 of the LOPDGDD determines that: «The procedures processed by the

Spanish Agency for Data Protection will be governed by the provisions of the

Regulation (EU) 2016/679, in this organic law, by the provisions

regulations issued in its development and, as long as they do not contradict them, with a

subsidiary, by the general rules on administrative procedures."

II

The physical image of a person, in accordance with article 4.1 of the RGPD, is a personnel and their protection, therefore, is the subject of said Regulation. In article 4.2 of the RGPD defines the concept of "treatment" of personal data.

It is, therefore, pertinent to analyze whether the processing of personal data (image of the natural persons) carried out through the dissemination of the video object of this procedure is in accordance with the provisions of the RGPD.

III

In the first place and referring to the publication by Don B.B.B. of the indicated video in the background, article 6.1 of the RGPD, establishes the assumptions that allow consider the processing of personal data lawful:

"1. The treatment will only be lawful if it meets at least one of the following conditions:

a) the interested party gave his consent for the treatment of his personal data- them for one or more specific purposes;

b) the treatment is necessary for the execution of a contract in which the resado is part or for the application at its request of pre-contractual measures;

c) the treatment is necessary for the fulfillment of an applicable legal obligation. cable to the data controller;

d) the treatment is necessary to protect the vital interests of the interested party or of

another natural person.

e) the treatment is necessary for the fulfillment of a mission carried out in

public interest or in the exercise of public powers vested in the person responsible for the

treatment;

f) the treatment is necessary for the satisfaction of legitimate interests per-

guided by the person in charge of the treatment or by a third party, provided that on said

interests do not override the interests or fundamental rights and freedoms of the

interested party that require the protection of personal data, in particular when the

teresa be a child.

The provisions of letter f) of the first paragraph shall not apply to the treatment

carried out by public authorities in the exercise of their functions."

On this issue of the legality of the treatment, Recital 40 also affects

of the aforementioned RGPD, when it states that "In order for the treatment to be lawful, the

Personal data must be processed with the consent of the interested party or on some

any other legitimate basis established in accordance with Law, either in this Regulation-

instrument or by virtue of another Law of the Union or of the Member States to which

subject to this Regulation, including the need to comply with the legal obligation applicable

cable to the person in charge of the treatment or to the need to execute a contract with the

that the interested party is a party or in order to take measures at the request of the interested party

prior to the conclusion of a contract.

In relation to the above, it is considered that there is evidence that the treatment

of data of the people that appears in the images object of this procedure,

a minor and his mother, has been carried out without legitimizing cause of those collected in the

article 6 of the RGPD.

The GDPR applies to personal data, which is defined as “personal data”:

any information about an identified or identifiable natural person ("the data subject");

an identifiable natural person shall be considered any person whose identity can be determined

be identified, directly or indirectly, in particular by means of an identifier, such as

example a name, an identification number, location data, an identifier

online or one or more elements of the physical, physiological, genetic,

psychological, economic, cultural or social of said person.

Both the minor and his mother, whose data has been processed by Don B.B.B., are identifiable

since your identity can be determined, directly or indirectly.

The defendant alleges that in the video it is not possible to identify the people who in the

appear. From the mere observation of the video, it is verified that in some of its images

genes are fully identifiable mother and child that appear. Thus,

The data protection regulations are applicable to the treatment.

IV

In relation to the allegations presented, the respondent indicates that the Considering

18 of the GDPR states the following:

“This Regulation does not apply to the processing of personal data by

a natural person in the course of an exclusively personal or domestic activity

and, therefore, without any connection with a professional or commercial activity. Between the

personal or household activities may include correspondence and carrying

an address book, or social media activity and online activity

carried out in the context of the aforementioned activities. However, this regulation

This applies to those responsible or in charge of the treatment that provide the

means to process personal data related to such personal activities or

domestic.”

The activity that entails data processing cannot be considered domestic.

personal in order to facilitate the opinion of the one who includes the video (in this case)

and that it be seen by the largest number of followers who, in turn, are going to put their opinions

children.

The claimant himself indicates that "... its dissemination would be protected by article 20 of

the Spanish Constitution; It is also information of public interest in a

topic as relevant and of social interest as violence against women”. This is, I don't know

It is not about a domestic activity, but about disseminating information of interest to the greatest

possible number of people.

Request the claimed video that was published on TWITTER, at the address ***URL.4.

Upon accessing the copy of the file, Diligence of the Responsible Inspector was provided

of the previous investigation actions, dated September 2, 2020, in the

which is indicated:

“To record that on this date the page ***URL.4de is printed

the social network TWITTER in which it is observed that the original tweet from which the con-

been the subject of these preliminary investigative actions remains public and with the

non-anonymized faces. This impression has been obtained through the Internet after

having cleared the cache of the web browser and its cookies, and after having

forced the browser to download the latest version of the web page hosted on the server.

remote viewer, by pressing the key combination Control + F5. It joins

xa to this diligence the printing of the referred web page".

Article 77, section 5 of Law 39/2015, of October 1, on Administrative Procedure

Common nistrative of Public Administrations, establishes the following:

"5. The documents formalized by the officials who are recognized as

authority and in which, observing the corresponding legal requirements

the facts verified by those are collected will prove them unless they are

prove the contrary."

On the other hand, article 51.4 of the LOPDGDD indicates:

"4. Officials who carry out investigative activities will have the consideration

tion of agents of the authority in the exercise of their functions, and they will be obliged to

keep secret about the information they know on the occasion of said exercise,

even after having ceased in it."

Consequently, even if the video posted on TWITTER by

the claimed, if there is proof of its publication, carried out by an official

with the consideration of agent of the authority.

Likewise, it is a fact that has not been denied by the respondent.

Regarding the number of followers, in the capture of the tweet made by the Inspector

of data responsible for previous research actions, there are 190 re-

tweet; 207 quoted tweets and 209 likes. That is, the number of Twitter followers

tter of the claimed is quite broad.

v

The claimant alleges that the dissemination of the video is protected by the Constitution.

Spanish regulation in its article 20, since it is information of public interest and

cial. Even the social network TWITTER has responded in the same way.

Reference must be made to the judgment of April 16, 2007 (STC 72/2007) of the Court

Constitutional Law, referring to the right to one's own image in relation to its dissemination by means of communication or by third parties, in which it says:

“This Court has had occasion to rule on complaints about violations of rations of the right to the own image (art. 18.1 CE) in the SSTC 231/1988, of 2 of December, 99/1994, of April 11, 117/1994, of April 17, 81/2001, of March 26, 139/2001, of June 18, 156/2001, of July 2, 83/2002, of April 22, 14/2003, of January 28, and 300/2006, of October 23.

In what is interesting to highlight here, from this doctrine it turns out that, in its cons- institutional right, the right to one's own image (art. 18.1 CE) is configured as a right personality, which attributes to its holder the power to dispose of the representation tion of their physical appearance that allows their identification, which entails both the right cho to determine the graphic information generated by the physical traits that make it recognizable that can be captured or have public dissemination, such as the right to prevent Obtaining, reproducing or publishing your own image by an unauthorized third party zed (STC 81/2001, of March 26, FJ 2.

However, what cannot be deduced from art. 18.1 CE is that the right to own image, as a limit of the work of others, includes the unconditional right and without reservations to prevent the physical features that identify the person from being captured or spread. The right to one's own image, like any other right, is not a right absolute right, and therefore its content is delimited by that of other rights and constitutional assets (SSTC 99/1994, of April 11, FJ 5; 81/2001, of March 26-

zo, FJ 2; 156/2001, of July 2, FJ 6; and 14/2003, of January 28, FJ 4), indicated-

mind the freedoms of expression or information [art. 20.1, a) and d), CE].

The determination of these limits must be made taking into account the di-

teleological dimension of the right to one's own image, and for this reason we have considered

considered that the interest of the person must be safeguarded in avoiding the collection or dissemination

of his image without his authorization or without the existence of circumstances that legitimize that information.

interference. That is why we have argued that "the capture and dissemination of the image of the

subject will only be admissible when his own —and previous— conduct or the circumstances

circumstances in which it is immersed, justify the lowering of the barriers

of reserve so that the interest of others or the public prevails, which may collide with

that one" (STC 99/1994, of April 11, FJ 5).

It turns out, therefore, that the right to one's own image (art. 18.1 CE) is delinquent.

mediated by the own will of the owner of the right who is, in principle, the one who co-

It is up to you to decide whether or not to allow the capture or dissemination of your image by a third party.

However, as has already been pointed out, there are circumstances that may lead to

that the stated rule gives way, which will happen in cases where there is an interest

public in capturing or disseminating the image and this public interest is considered

constitutionally prevailing to the interest of the person in avoiding the recruitment or dissemination

sion of your image. Therefore, when this fundamental right comes into conflict with

other constitutionally protected assets or rights, the dis- posals

different conflicting interests and, taking into account the specific circumstances of each

case, decide which interest deserves greater protection, if the interest of the right holder

to the image in which their physical features are not captured or disseminated without their consent or

the public interest in capturing or disseminating their image (STC 156/2001, of July 2)

lio, FJ 6)".

On the other hand, the Judgment of the National High Court of July 9, 2009, appeal

325/2008, resolved the estimation of a resource motivated by the publication of a news

in a newspaper accompanied by images (although the LOPD of the year was applied

1999, the rationale is applicable to current regulations), noting the following in

the Legal Foundations:

“SECOND: Section 1.d) of Article 20.1 of the Constitution recognizes the right

right to freely communicate or receive truthful information by any means of dissemination.

Zion. The law will regulate the right to the clause of conscience and professional secrecy in

the exercise of these freedoms. Paragraph 2 recognizes that the exercise of these rights

chos cannot be restricted by any type of prior censorship. Can't forget-

I know that the right to freedom of information contained in article 20.d) of

the Constitution has been analyzed by a detailed jurisprudence of the Constitutional Court

valuing its prevalence over the right to honour, privacy and protection.

pia image (see on this issue recent sentences such as the number

72/2007). Therefore, the action of the company acting as co-defendant is

would be protected by the freedom of information to which the treatment should yield.

processing of data that could have occurred as long as the rights are respected.

chos derived from the Organic Law 15/99. It is also relevant what was said by the T.C. in

sentences such as number 53/2006 when it speaks of "The pre-value is not deducted

ferent or prevalent of this right (to freedom of information) when it is affirmed

against other fundamental rights (SSTC 42/1995, of February 13, FJ 2;

11/2000, of January 17, FJ 7). That is why we have conditioned the cons-

constitutional freedom of information, that it refers to facts with relevance

public, in the sense of being newsworthy, and that said information is truthful" (SSTC

138/1996, of September 16, FJ 3; 144/98, FJ 2; 21/2000, of January 31, FJ 4;

112/2000, of May 5, FJ 6; 76/2002, of April 8, FJ 3; 158/2003, of September 15

fever, FJ 3; 54/2004, of April 15, FJ 3; 61/2004, of April 19, FJ 3).

that in this case the newsworthy nature is accredited on the basis that it is pro-

produced the publication on the occasion of the anniversary of the 11-M attack and, furthermore, it was not

has denied the veracity of the published content. It is important to point out how

affirm that much of the information in relation to which the complaint is filed

comes from data provided by relatives of the complainants and that refer to

to Enma's age, work or personal life circumstances. Therefore, it

that it is not possible is to provide information to the journalist and, subsequently, consider

that personal data has been improperly processed. The recovered part

Torrent has not stated that it is uncertain that the journalist who prepared the information

had the collaboration of Enma's brother and mother and, as it appears in the fo-

lio 28 of the file, it turns out that the mother met in her own home with the

journalist who signed the article for what he clearly authorized, the disclosure of the data

cough on his daughter. It turns out that regardless of the newsworthiness of the information

facilitated information, it turns out that the disclosure occurred with the consent of the users.

holders of the right to privacy of the affected person and his family and the concu-

The absence of said consent makes it possible to understand the action carried out as legitimate.

effect. THIRD: It is also necessary to point out how the file is justified, also

well, on the following arguments:

- No evidence has been provided that the San Jose Institute Foundation had

carried out any action that would contradict their duty of secrecy (article

10 LOPD) and this because from its sources only statistical and func- tional data have been obtained.

center parking. (folio 56 of the file)

- The publishing company of the newspaper takes advantage of its right not to reveal its sources

(folio 66 of the file) and it is also not possible to impute any conduct contrary to

the requirements of data protection since their conduct has been limited to ele-

Prepare a journalistic text with data obtained from their own sources.

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FOURTH: The judgment of this Chamber issued in appeal 303/2005, citing the

Judgment of resource 400/2001 in relation to the consideration of the image as data

staff established that "As if the forceful legal definition were not enough, and its

regulatory complement, the Constitutional Court has declared, for all STC

14/2003, of January 30, regarding the infringement of the right to one's own image

of article 18.1 of the CE, placed in relation to the fundamental right foreseen in

article 18.4 CE -and making allusions in the aforementioned STC both to LO5/1992 and to

the current LO15/1999 - which now interests us, which <(...) ultimately, has to configure

The questioned photograph should be considered as a personal data of the plaintiff of

protection, obtained and captured

The image, then, is a datum that finds protection in the Organic Law 15/99 but re-

It turns out that a detailed examination of the file allows us to understand that, although the images

genes are not of good quality, it can be understood that the treatment of the data of the

image has been excessive taking into consideration that it is not covered

by the consent of those affected (there is no evidence that they were aware of the publication of the

images) and is not protected by freedom of information and, in all

In this case, it seems that there has been an excessive use of the image as personal data.

sonal since the newsworthiness of the information was fulfilled sufficiently

without the need to include direct images of the patients. Therefore, you must continue

I know the instruction in relation to the possible use of the image data without justification."

People, therefore, have the power to decide on the dissemination of their own image.

generated as personal data, without a doubt, and deserving of protection, but a right

fact that is not absolute, that, if necessary, must yield to the prevalence of other

rights and freedoms also constitutionally recognized and protected, such as

An example is that of freedom of information, considering it case by case.

In the present case, it must be considered that the treatment carried out by the claimant

mado was not only unconsented (there is also no other legitimizing cause of the treatment)

but it was excessive and disproportionate, as there was no public interest in capturing

tion or dissemination of the image and its identifying data prevailing against the interest of the

person to avoid the collection or dissemination of their personal data, as well as not to provide

added value to the information under the pretext of which it was intended to divulge those

the data. When weighing the conflicting interests and, taking into account the circumstances

of this case, the interest of the holder of the right to

the protection of your personal data and that they are not captured or disseminated without your consent.

against the alleged public interest in its dissemination.

And even more so considering that the same result can be obtained: spreading

images to reflect on gender violence, without the need to

identify the people who are suffering from it, through, for example, the pixelation of

Their images.

The Judgment of the National High Court, of May 9, 2019, appeal 491/2017, incident

on the collision of fundamental rights and their necessary weighting, pointing out

do in its FOURTH Basis of Law the following:

<<As we have declared in cases similar to the present one (STS of May 15,

2017 (R. 30/16); ST. of June 19, 2017, (R.1842/15) and ST. from July 18

2017, (R. 114/16), for the correct approach to the issues raised in the

present appeal, it should be underlined that the Constitutional Court, in the judgment

39/2016, of March 3, recalling what was already reasoned in judgment 292/2000, declaring

that: "[...] the right to data protection is not unlimited, and although the Constitution

tion does not expressly impose specific limits, nor does it refer to public authorities

for its determination as it has done with other fundamental rights, there is no

doubt that they have to find them in the remaining fundamental rights and goods

constitutionally protected legal rights, since this is required by the principle of unity of the

Constitution [...]". Based on the foregoing, and in view of the approach of the parties,

The issue raised in this proceeding is circumscribed to the judgment of

defense of rights and interests in confrontation. To this end, it is considered necessary

First, to define the object and content of the fundamental rights at stake.

go, just as this Chamber has done on previous occasions in which it has arisen,

identical legal controversy.

Following the STC just cited, it must be stated that the fundamental right to

protection of data enshrined in article 18.4 of the Spanish Constitution, to di-

reference to the right to privacy of art. 18.1 CE, with whom he shares the goal of

offer effective constitutional protection of private personal and family life, ex-

excluding the knowledge of others and the interference of third parties against their

will, seeks to guarantee that person a power of control over their personal data

rights, on its use and destination, with the purpose of preventing its illicit and harmful traffic to

the dignity and rights of the affected. The right to data protection has, therefore,

this, a broader object than that of the right to privacy, since the fundamental right

protection of data extends its guarantee not only to privacy in its di-

constitutionally protected by art. 18.1 CE, but to the sphere of

assets of the personality that belong to the sphere of private life, inseparable

mind linked to respect for personal dignity, such as the right to honor, and full

exercise of personal rights. The fundamental right to protection of data

tos extends the constitutional guarantee to those of those data that are relevant or

have an impact on the exercise of any rights of the person, whether or not

constitutional rights and whether or not they are related to honor, ideology, personal privacy,

personal and family property to any other constitutionally protected property. In this way, the

object of the fundamental right to data protection is not reduced only to data

of the person, but to any type of personal data, whether intimate or not, whose co-

knowledge or use by third parties may affect their rights, whether or not they are fundamental.

such -such as those that identify or allow the identification of the person,

tending to serve for the preparation of their ideological, racial, sexual, economic or

any other nature, or that serve for any other use than in certain circumstances

circumstances constitutes a threat to the individual - because its object is not only the

individual privacy, already protected by art. 18.1 CE, but the personal data

nal. Consequently, it also reaches those public personal data that, for

the fact of being so, of being accessible to anyone's knowledge, does not escape the

right of disposition of the affected party because this is guaranteed by his right to the protection of

data. As regards the right to freedom of expression, in light of the doctrine of

Constitutional Court (SSTC 23/2010, of April 27, and 9/2007, of January 15)

enshrined in article 20 of the Constitution, includes, together with the mere expression

of thoughts, beliefs, ideas, opinions and value judgments, criticism of the behavior

another's, even when it is bland and may annoy, disturb or annoy

to whom it is addressed, as this is required by pluralism, tolerance and the spirit of openness.

without which there is no democratic society.

Freedom of expression is broader than freedom of information as it does not operate in

the exercise of the former the internal limit of veracity that is applicable to it, which is

justified in that it is intended to present subjective ideas, opinions, or value judgments

that do not lend themselves to a demonstration of their accuracy, nor because of their abstract nature

they are capable of proof, and not to establish facts or affirm objective data. No ob-

However, such difference does not prevent affirming that both constitute individual rights

held by all natural persons and that can be exercised through the

style, writing or any other means of reproduction, notwithstanding that when

Such freedoms are exercised by information professionals through a

institutionalized vehicle for the formation of public opinion, its degree of protection

reaches its maximum level (STC 165/1987, of October 27). Ultimately, the recognition

protection of freedom of expression guarantees the development of public communication

that allows the free circulation of ideas and value judgments inherent to the principle of

democratic legitimacy. In this sense, it deserves special constitutional protection

dissemination of ideas that collaborate in the formation of public opinion and facilitate the

citizen can freely form their opinions and participate responsibly

in public affairs. However, as is the case with other rights

rights, the exercise of the right to freedom of expression is subject to limitations

constitutional questions that the Constitutional Court has progressively outlined.

Thus, it does not cover the presence of insulting, outrageous and offensive phrases and expressions

unrelated to the ideas or opinions that are exposed and, therefore, unnecessary to

this purpose, nor does it protect the disclosure of facts that are nothing more than rumours,

unsubstantiated inventions or insinuations, nor does it support insinuations

days or insults, because it does not recognize an alleged right to insult. Along with this, the

expansive tendency of freedom of expression also finds its limit in the respect

to the normative content guaranteed by other fundamental rights, whose affectation

is not necessary for the constitutional realization of the right. delimitation that

It is only possible to do it through the adequate weighting of the constitutional values.

between them, among which the guarantee of the existence of public opinion stands out.

ca, indissolubly linked to political pluralism, it should be remembered that, just as

recognizes section 4 of art. 20 CE, all the freedoms recognized in the

precept have their limit in the right to honour, to privacy, to one's own image and to

the protection of youth and children, which play a "limiting function" in

relation to these freedoms. Therefore, the protection of these other

constitutional rights recognized by article 20.4 CE against the freedoms of

expression and information, when exercised in connection with matters that are of interest

general interest, for the matters to which they refer and for the people who intervene in them.

come and contribute, consequently, to the formation of public opinion, as

occurs when they affect public persons, who exercise public functions or are

involved in matters of public relevance, thus forced to bear a certain

risk that their subjective rights of personality will be affected by opi-

information or information of general interest (SSTC 107/1988, of June 8, 20/2002,

of January 28, 160/2003, of September 15, 151/2004, of September 20, and

9/2007, of January 15).>>

In the case analyzed, there is a collision between the right to information and the

right to protection of the personal data of the mother and her minor child,

victims of a serious crime and whose dissemination is more than justified. Attending to the

specific circumstances, nothing is said about the manifestations of the defendant, which

Give your opinion about what happened. But weighing the interests of the young and

your minor child, we must determine that your right to the protection of your

personal information. It was not necessary to publish the images that identify them.

This procedure does not question, at all, the freedom of information; I know

circumscribes the collision that occurred when publishing identifying data of the young

victim and her son. For the publication of your personal identification data of

both, which collides with the right to data protection, would have required the

consent of the affected party or other legitimizing cause of said treatment.

SAW

The party claimed in the proposed resolution alleges that the investigation of the

publication of the video of the mother and the child was made without directing the claimed party

no investigative action.

The Spanish Agency for Data Protection can initiate actions of

investigation prior claim or ex officio. In this case, actions of

investigation, on July 8, 2020, when this Agency became aware of

the dissemination through social networks of a video in which images of

an assault by a man on a woman, which could constitute a

crime of gender violence. The video also shows images of a minor

young male, who intervenes in the scene trying to avoid the aggression that

was producing.

As a result of the investigations carried out, it was found that

three people had included it on their Twitter, initiating a sanctioning procedure

against two of them, since on the third she withdrew the video without the AEPD contacting her.

The respondent indicates that the video has been published with the consent of the woman

which appears in it. This consent should comply with the provisions of the

GDPR articles 7; and 6 and 7 of the LOPDGDD, which has not been accredited.

Finally, the fact that Twitter has not removed it does not legitimize the treatment of

images of mother and child.

7th

The corrective powers available to the Spanish Data Protection Agency

These, as a control authority, are established in article 58.2 of the RGPD. Among them

are the power to issue a warning -article 58.2 b)-, the power to

impose an administrative fine in accordance with article 83 of the RGPD -article 58.2 i)-,

or the power to order the person in charge or in charge of the treatment that the operations

ns of treatment comply with the provisions of the RGPD, where appropriate, of a

certain manner and within a specified period -article 58. 2 d)-.

In accordance with the evidence available at the present time,

considers that the exposed facts fail to comply with the provisions of article 6.1. of

RGPD, for which it could suppose the commission of an infraction typified in the article

83.5 of the RGPD, which provides the following:

""Infringements of the following provisions shall be sanctioned, in accordance

with paragraph 2, with administrative fines of a maximum of EUR 20,000,000 or, alternatively,

being from a company, of an amount equivalent to a maximum of 4% of the volume

overall annual total turnover of the previous financial year, opting for the

greater amount:

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

consent under articles 5, 6, 7 and 9;"

For the purposes of the limitation period for infractions, the infraction indicated on the

previous paragraph 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

are 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:

b) The processing of personal data without the concurrence of any of the conditions

legality of the treatment established in article 6 of the Regulation (EU)

2016/679."

In order to determine the administrative fine to be imposed, the forecasts must be observed.

tions of articles 83.1 and 83.2 of the RGPD, precepts that indicate:

"Each control authority will guarantee that the imposition of the administrative fines

proceedings under this Article for infringements of this Regulation

indicated in sections 4, 9 and 6 are in each individual case effective, proportionate

nothing and dissuasive."

"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 the

Article 58, paragraph 2, letters a) to h) and j).

In the present case, without prejudice to what results from the investigation, they have taken into account

It includes, in particular, the following elements:

- That it is about the dissemination of data of the image of a woman who is being hit-

peada and her youngest son who comes to help her.

- That it is an individual whose main activity is not linked to the treatment

all personal data.

- That there is no recidivism, because there is no record of the commission of any infraction of

the same nature.

To determine the amount of the proposed fine, we must take into consideration

tion the documentation provided by the claimed. For all these reasons, it is proposed that the

The penalty that should be directed is €6,000 (six thousand euros).

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 B.B.B., with NIF ***NIF.1, for a violation of Article 6.1

of the RGPD, typified in Article 83.5 of the RGPD, a fine of a fine of €6,000

(six thousand euros).

SECOND: NOTIFY this resolution to 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 Department of Data Protection in the banking entity CAIXABANK, S.A.. In case
Otherwise, it will be collected in the executive period.

Received the notification and once executed, if the date of execution is
between the 1st and 15th of each month, both inclusive, the term to make the payment
voluntary will be until the 20th day of the following month or immediately after, and if
between the 16th and last day of each month, both inclusive, the payment term
It will be until the 5th of the second following month or immediately after.

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

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

938-26102021

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

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