

□ Procedure No.: PS/00076/2021

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: Mr. A.A.A., on behalf of Mr. B.B.B. (hereinafter, the claimant) dated November 10, 2020 filed a claim with the Spanish Data Protection Agency. The claim is directed against CLINIC VIVANTA S.L with CIF B82809492 (hereinafter, Vivanta or claimed).

The reasons on which the claim is based are that the claimant has been providing his services as a maxillofacial surgeon at the Vivanta Clinic, since September of the year 2009.

Well, the entity claimed Vivanta, at the beginning of the year 2020 decided to use personal image of the claimant for advertising purposes of the clinic by putting in the window of this a large poster with his image without being consulted him about it, nor did he consent to said action.

Likewise, on numerous occasions he has required those in charge of the clinic to proceed to remove the poster with the image of the claimant, both verbally or by means of a notarial requirement, without the claimed party having proceeded to its withdrawal.

Thus, the image without consent has been exposed to the public since the beginning of the year 2020, approximately one year, without the claimed attending the requirements for withdrawal.

Together with the claim, it provides the notarial requirement made. In the quoted requirement, various photographs are produced that certify the exhibition of the poster that

motivates the filing of the claim.

SECOND: In accordance with article 65.4 of the LOPGDD, which has provided for a mechanism prior to the admission to processing of the claims that are formulated before the AEPD, consisting of transferring them to the Data Protection Delegates designated by those responsible or in charge of the treatment, for the purposes foreseen in article 37 of the aforementioned rule, or to these when they were not designated, it was given transfer of the claim to the claimed entity so that it proceeded to its analysis and respond to the complaining party and to this Agency within a month.

THIRD: On December 4, 2020, the respondent was requested to

Provide this Agency with the following information:

1. The decision made regarding this claim.

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2. In the event of exercising the rights regulated in articles 15 to 22 of the RGPD, accreditation of the response provided to the claimant.

Report on the causes that have motivated the incidence that has originated the claim.

Report on the measures adopted to prevent the occurrence of similar incidents, dates of implementation and controls carried out to check its effectiveness.

3.

Four.

5. Any other that you consider relevant.

The writing was notified to the claimed party electronically, being the date of acceptance of the notification on December 4, 2020, as evidenced by the certificate issued by the FNMT that is in the file.

After the period granted to the respondent without having responded to the request for information, in accordance with the provisions of article 65.2 of the LOPDGDD, the agreement for admission to processing is signed on February 10, 2021 of this claim.

THIRD: On March 16, 2021, the Director of the Spanish Agency for Data Protection agreed to initiate a sanctioning procedure against the claimed, for the alleged infringement of Article 6 of the RGPD, typified in Article 83.5 b) of the RGPD.

SIXTH: Once the initiation agreement has been notified, the entity claimed, by means of a letter of dated March 29 of this year, made, in summary, the following allegations:

a)

"D. BBB On January 22, 2019, he signed a Contract for the Assignment of Rights of Image with CLINICS VIVANTA in which he gave his consent, ceding do your image to it for a period of 24 months. Also, it is noted that the image may only be used through advertising media (television sion, press, graphic and outdoor, web, mailing, brochures or any type of support. size or format. In addition to teaching aids (presentations, manuals and protocols among others). The contract signed between the parties is attached as documentation ment No. ONE.

b) Dated October 16, 2020, notified by certified mail

VIVANTA CLINICS, specifically, the one located at C/ ***DIRIMIENTO.1 DE

***LOCATION.1, notarial requirement by the representation of D.

BBB requesting the withdrawal of the image alleging the non-existence of express consent for the use of the same for said purpose,

extreme that is not true since, as mentioned in the previous point, D.

BBB signed an Image Cession contract on January 22, 2019, with a validity of 24 months.

c) CLINICAS VIVANTA, once the request was received, proceeded to give the internal instructions for the withdrawal of the images in which the complainant.

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d) Currently there is no public image of the complainant in CLINICS VIVANTA, the photos are provided as documents No. TWO, THREE and FOUR, of the facades of the three Clinics mentioned by D. B.B.B..

VIVANTA CLINICS, considers that it has taken the diligence measures sufficient, and at no time has it committed any infraction in terms of the legality of the treatment of the data of D. B.B.B., specifically of its image, since Your express consent was requested for the purposes mentioned in the this document with the signing of the Image Assignment contract that is attached.

Likewise, once the notarial request was made, the the images that, currently, are not shown on any of the facades of LIVING CLINICS.

On the other hand, and already mentioned in the first allegation of this document, The information requested in the AEPD notification of dated December 4, 2020 due to an internal procedural error, already resolved, and

therefore, this party provides said information in this document.”

PROVEN FACTS

1st. On November 10, 2020, the AEPD received a letter from the claimant that the entity claimed at the beginning of the year 2020 made use of its personal image for advertising purposes of the clinic, placing a large poster with his image, without consulting the respect, or consent to such action.

2nd. It is proven that the claimant required the claimed entity to proceed to remove the poster with his image, by means of a notarial request.

Various photographs of the claimant appear in the aforementioned request.

3rd. The respondent provides, on March 29, 2021, the contract signed by the claimant of Assignment of Image Rights with CLÍNICAS VIVANTA in which gave his consent, giving his image to it for a period of 24 months. Likewise, it is pointed out that the image can only be used through advertising media (television, press, print and outdoor, web, mailing, brochures or any type of support or format. In addition to, pedagogical means (presentations, manuals and protocols among others).

The contract signed between the parties is dated January 22, 2019, where

The name of the claimant with his DNI and his signature are recorded.

4th. It is accredited by the claimed party that she received a notarial request from the claimant on October 16, 2020, for the withdrawal of the images, proceeding to his withdrawal.

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5th. Currently there is no public image of the claimant in Clinics

Vivanta, the photos are provided as documents number two, three and four, of the facades of the three Clinics mentioned by the claimant.

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 LOPDPGDD, the Director of The Spanish Agency for Data Protection is competent to resolve this process.

II

Law 39/2015, of Common Administrative Procedure of the Administrations (LPACAP) establishes in its article 89.1 that "the termination of the procedure, with filing of the actions, without the need to formulate of the proposed resolution, when in the instruction of the procedure it is stated

I declare that any of the following circumstances exist:

a) The non-existence of the facts that could constitute the infraction".

III

The defendant is accused of committing an infraction for violation of Article 6 of the RGPD, "Legality of the treatment", which indicates in its section 1 the assumptions in which that the processing of third party data is considered lawful:

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

a) the interested party gave their consent for the processing of their data personal for one or more specific purposes;

b) the treatment is necessary for the execution of a contract in which the

interested party is a party or for the application at the request of the latter of measures

pre-contractual;

(...)"

The infringement is typified in Article 83.5 of the RGPD, which considers as such:

"5. Violations of the following provisions will be sanctioned, in accordance with section 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:

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a) The basic principles for the treatment, including the conditions for the consent under articles 5,6,7 and 9."

The Organic Law 3/2018, on the Protection of Personal Data and Guarantee of the Digital Rights (LOPDGDD) in its article 72, under the heading "Infringements considered very serious" provides:

"1. Based on the provisions of article 83.5 of the Regulation (U.E.)

2016/679 are considered very serious and the infractions that suppose a substantial violation of the articles mentioned in it and, in particularly the following:

(...)

b) The processing of personal data without the concurrence of any of the conditions of legality of the treatment established in article 6 of the

Regulation (EU) 2016/679.”

IV

In the case at hand, after a detailed study of the documents arising in this proceeding, and the allegations of the claimed entity,

We must point out that the contract for the Assignment of Rights of Image with the claim dated January 22, 2019, with the name of the claimant, his ID and signed by his signature,

On the other hand, it is clear that once the petitioner received the notarial requirement requesting the withdrawal of the images of the claimant proceeded to withdraw the themselves.

Likewise, it should be noted that there is currently no public image of the claimant in Clinicas Vivanta.

Therefore, the file of this sanctioning procedure proceeds.

In view of the aforementioned precepts and others of general application, the Director of the Agency Spanish Data Protection RESOLVES:

FIRST: FILE sanctioning procedure PS/00076/2021, instructed to

CLÍNICA VIVANTA S.L with NIF B82809492, for having proven that the claimant I formalize an Image Rights Assignment contract.

SECOND: NOTIFY this resolution to CLÍNICA VIVANTA S.L with CIF B82809492.

In accordance with the provisions of article 50 of the LOPDPGDD, this

Resolution will be made public once it has been notified to the interested parties.

Against this resolution, which puts an end to the administrative procedure in accordance with art. 48.6 of the LOPDPGDD, and in accordance with the provisions of article 123 of the LPACAP, the

Interested parties may optionally file an appeal for reconsideration 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

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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.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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