

□ File No.: EXP202207270

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: Don A.A.A. (hereinafter, the complaining party) dated June 9,

2022 filed a claim with the Spanish Data Protection Agency. the re-

The claim is directed against DIGIMAN ALICANTE, S.L. with NIF B53246906 (hereinafter
te, the party claimed).

The grounds on which the claim is based are as follows:

“I ATTACH THE RESOLUTION OF THE SPANISH PROTECTION AGENCY

OF DATA WHERE THE COMPANY SERVICES AND INTERVENTIONS IN BUILDINGS-

CION DEL MEDITERRÁNEO, S.L. CONFIRMS THAT DIGIMAN ALICANTE SL GAVE ITS

CONSENT FOR THE IMAGE TO BE PUBLISHED WITHOUT MY AUTHORIZATION.

I ALSO ATTACH THE STS_5073_2004 WHERE JURISPRUDENCE IS CREATED

ABOUT THE RECOGNITION OF A PERSON AND THEREFORE THEIR DATA

STAFF.

IT IS EVIDENT THAT ANY PERSON IN THE COMPANY AND ANY PERSON

SONA FROM MY ENVIRONMENT KNOWS WHO IS THE PERSON WHO APPEARS SITTING

ON A COUCH BEHIND VINYL-COVERED GLASS.”

SECOND: On April 8, 2022, the claimant filed a claim

against the company SERVICES AND INTERVENTIONS IN MEDICAL BUILDING

TERRANEEO, S.L., because it had exercised the right of access as established in article

Article 15 of the EU Regulation 2016/679, General Data Protection (RGPD), by

the publication in his day of an image where he was recognizable and had not answered him-

do.

THIRD: When the previous claim was transferred to SERVICIOS E INTER-VENCIONES EN EDIFICACION DEL MEDITERRANEO, S.L., alleged that it had do construction works in a ship of the claimed party and in order to publish in his web page images of the result of the work carried out, he took images of the page website of the claimed party the photographs where they were seen, with the knowledge of said company.

FOURTH: On July 6, 2022, the Director of the Spanish Agency for Pro-Data Protection agreed to initiate sanctioning proceedings against the claimed party, with 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 violation of Article 19.1 of the LOPDGDD, typified in the Article 83.5 of the RGPD.

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FIFTH: Notification of the aforementioned start-up agreement in accordance with the rules established in Law 39/2015, of October 1, on the Common Administrative Procedure of the Administrations Public Administrations (hereinafter, LPACAP), the respondent filed a written pleadings in which, in summary, it stated the following:

“This party understands that there is a basic error in the approach of the re-claim made by Mr. D. A.A.A., since:

a) there is no processing of personal data of the claimant on the occasion of the publication of the photograph in question.

b) my represented in no case authorized the use of the object photograph

of this procedure, nor communicated any personal data of the claimant to the company

dam SERVICES AND INTERVENTIONS IN BUILDING OF THE MEDITERRANEAN,

SL

(...)

We must categorically deny that my client authorized SERVI-

CIOS E INTERVENCIONES EN EDIFICACIÓN DEL MEDITERRÁNEO, S.L. uses it-

tion of said photograph or any other of those published on the DIGITAL website.

MAN ALICANTE, S.L.

SERVICES AND INTERVENTIONS IN BUILDING OF THE MEDITERRANEAN,

SL downloaded these photographs from the website of my client, without authorization from the latter.

ta, obviously when the claimant had not yet asked my client for the

removal of them.

It should also be made clear that my client never sent any file

to said merchant with the photograph object of this procedure (or any other

other) or expressly communicated SERVICES AND INTERVENTIONS IN BUILDINGS

CACIÓN DEL MEDITERRÁNEO, S.L. that he could use such a photograph (or any

other)."

He adds that the image does not identify the person.

SIXTH: On August 1, 2022, the instructor of the procedure agreed to practice

carry the following tests:

1. Consider reproduced for evidentiary purposes the claim filed by Mr. A.A.A.

and its documentation, the documents obtained and generated during the administration phase

sion to process the claim.

2. Likewise, it is considered reproduced for evidentiary purposes, the allegations to the agreement of

start of the referenced sanctioning procedure, presented by DIGIMAN ALICAN-

TE, S.L.

SEVENTH: On August 1, 2022, a resolution proposal was formulated, pro-considering that the Director of the Spanish Data Protection Agency proceeded order the ARCHIVE of the procedure when not verifying the commission of infraction administrative action in the framework of data protection.

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Notified of the proposed resolution on August 2, 2022, no reports have been received.

make allegations to it.

Of the actions carried out in this procedure and the documentation

in the file, the following have been accredited:

PROVEN FACTS

FIRST: SERVICES AND INTERVENTIONS IN MEDITERRANEAN BUILDING

NEO, S.L., carried out construction works on a warehouse of the claimed party and, in order to publish on its website images of the result of the work carried out, it took images of the web page of the claimed party; Specifically, he used some photographs where the result of the work could be seen, with the knowledge of said company. In a of these photographs three people can be seen, one of them the claimed party day, behind a glass door with colored squares glued on it.

SECOND: The entity SERVICES AND INTERVENTIONS IN BUILDING OF THE

MEDITERRANEO, S.L., has never claimed that it had the consent of the party complained against for the publication of the photograph in which the complaining party appears ce sitting behind glass with colored squares glued on it hiding part of her

face and body; nor that the claimed party had provided that image.

THIRD: The respondent denies that he authorized SERVICES AND INTERVENTION-
NES EN EDIFICACIÓN DEL MEDITERRÁNEO, S.L. the use of said photograph
nor of any other of those published on the website of DIGIMAN ALICANTE, S.L. Ana-
that he did not send any file to said company with the photograph object of this
procedure (or any other).

FOUNDATIONS OF LAW

Yo

Competition

In accordance with the powers that article 58.2 of Regulation (EU) 2016/679 (Re-
General Data Protection Regulation, hereinafter RGPD), grants each authori-
control 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), is competent to initiate and resolve
this procedure the Director of the Spanish Data Protection Agency.
Likewise, article 63.2 of the LOPDGDD determines that: "The formal procedures
ted by the Spanish Agency for Data Protection will be governed by the provisions of
Regulation (EU) 2016/679, in this organic law, by the regulatory provisions
dictated in its development and, as long as they do not contradict them, with a sub-
sidiario, by the general rules on administrative procedures."

II

The image as personal data

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The image of a person, in accordance with article 4.1 of the RGPD, is personal data.

make it identifiable, and its protection, therefore, is the subject of said RGPD:

“«personal data»: any information about an identified natural person or

identifiable ("the interested party"); An identifiable natural person shall be deemed to be any person

whose identity can be determined, directly or indirectly, in particular by

an identifier, such as a name, an identification number,

location, an online identifier or one or more elements of the identity

physical, physiological, genetic, psychic, economic, cultural or social of said person;”

The image is a personal and individual attribute of each physical person that is

defined by their height, complexion, way of sitting, dressing. Endowed with distinctive features

unique and singular elements that individualize it directly, associating it with an in-

concrete individual, being able to know, through it, the age, the sex, the color of the

skin, their way of being by the way they sit... which facilitates the identification of the in-

divide

For this reason, report 139/2017 of the Legal Office of this Agency states that "the

image, just as the voice of a person is a personal data, just as it will be any-

any information that allows to determine, directly or indirectly, their identity (...)"

Article 4.2 of the RGPD defines "treatment" as: "any operation or set

of operations carried out on personal data or sets of personal data,

whether by automated procedures or not, such as the collection, registration, organization

tion, structuring, conservation, adaptation or modification, extraction, consultation,

use, communication by transmission, diffusion or any other form of authorization

tion of access, collation or interconnection, limitation, suppression or destruction.”

The inclusion of the image of a person in web pages, forums, publications, which

identifies or makes a person identifiable, supposes a treatment of personal data-

them and, therefore, the person in charge of the treatment that carries out the same is obliged to comply with the obligations that for the data controller are provided in the RGPD and in the LOPDGDD.

III

Right to data protection

This proceeding is initiated because the respondent party published, on its website website the image of the complaining party, presumably authorizing the entity SERVICES AND INTERVENTIONS IN BUILDING OF MEDITERRÁNEO, S.L., to its use The image does not allow to see the person completely, but it is seen in part. This, together with the fact that it appears linked to the embroidered part, where lowered, which is additional information, make that person identifiable. All this, constitutes a treatment of personal data of the complaining party.

Individuals have the power to dispose of their personal data, including its image, as well as its dissemination, resulting, without a doubt, worthy of protection of the person whose personal data is disseminated in violation of the legal legal.

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Thus, the STC 292/2000, of November 30, provides that "the content of the fundamental right fundamental to data protection consists of a power of disposition and social control on the personal data that empowers the person to decide which of these data provide to a third party, be it the State or an individual, or what this third party can collect, and that also allows the individual to know who owns that personal data

and for what, being able to oppose that possession or use. These powers of disposal and control over personal data, which constitute part of the content of the right fundamental to data protection are legally specified in the power to control the collection, obtaining and access to personal data, its subsequent storage and treatment, as well as its possible use or uses, by a third party, be it the State or an individual. And that right to consent to knowledge and treatment, informed or not, of personal data, requires as essential complements,

On the one hand, the ability to know at all times who has these personal data. and to what use it is subjecting them, and, on the other hand, the power to oppose that possession and uses”.

The Judgment of the Supreme Court, Civil Chamber, dated July 12, 2004, no. resource number 1702/200, indicates the following in relation to the image:

<<The judgment under appeal bases its acquittal on not being identical the plaintiff in the photograph can be confirmed, reasoning that <as observed in the reference In the photograph, the "face" of the person who appears nude is not "visible"; of other On the other hand, the "silhouette" does not offer special, singular, specific signs, which in the normal coexistence and citizen public relations allow its attribution to a concrete and defined person...

In the present case, the conclusion to which the Court of appeal arrives if the plaintiff in the aforementioned photograph is not identifiable, so that the witnesses who testified in the instance, all of whom knew the Mrs. Lina for several years, they identified the photograph as a reproduction of the figure of the same, being indifferent that the circle of acquaintances of that lady is major or minor.

Therefore, the estimation of the motive is imposed, with the consequence of having as a proven fact that the photograph of the woman that appears in the published photograph

each on the cover of the June 28, 1998 issue reproduces the image of the de-principal...

Declared proven that the published photograph corresponds to the plaintiff appellant and there is no controversy about the circumstance of having been all med and published without the consent of the photograph, not being this public figure public, such publication constituted an illegitimate interference in the right to one's own image. gene, provided for in art. 7.5 of the Organic Law 1/1982, not concurring in the case none Some of the circumstances of justification included in art. 8.2 of the Law itself. >>

Obligation to communicate the deletion of data to other entities

IV

The RGPD establishes an obligation related to the right of suppression in its article 19, which indicates the following:

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“Obligation of notification regarding the rectification or deletion of personal data or the limitation of the treatment

“The person responsible for the treatment will communicate any rectification or deletion of personal data or limitation of the treatment carried out in accordance with article 16, to the article 17, paragraph 1, and article 18 to each of the recipients to whom have communicated the personal data, unless it is impossible or requires an effort disproportionate. The person in charge will inform the interested party about said recipients. rivers, if he so requests.”

In accordance with the evidence provided to the present procedure and those collected

tions of prior Rights procedures (deletion of images of the re-
claimed on the web pages of the claimed party), it has not been possible to prove that the
claimed party provided to SERVICES AND INTERVENTIONS IN BUILDING
DEL MEDITERRANEO, S.L., the images of the complaining party object of dispute
sia nor that he consented to its publication.

Given that it has not been proven that the defendant communicated the data of the party,
the claimant to the entity SERVICES AND INTERVENTIONS IN BUILDING OF THE
MEDITERRANEO, S.L., the infraction of what is established in the art-
article 19 of the RGPD.

v

conclusion

The principle of presumption of innocence prevents imputing an administrative offense
when proof of charge accrediting the criminals has not been obtained and verified.

facts that motivate the imputation or the intervention in them of the presumed infraction
thor. Applying the principle "in dubio pro reo" in case of doubt regarding a fact
concrete and determined, which obliges in any case to resolve said doubt in the most
favorable to the interested party.

The presumption of innocence must govern without exceptions in the sanctioning system.

and must be respected in the imposition of any sanctions, since the exerciser

ius puniendi in its various manifestations is conditioned to the game of

evidence and a contradictory procedure in which they can defend their 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

tion is based on acts or means of proof of charge or incriminating the con-

reproached conduct; that the burden of proof corresponds to the one who accuses, without anyone

is obliged to prove his own innocence; and that any insufficiency in the result

of the tests carried out, freely assessed by the sanctioning body, must

translate into an acquittal pronouncement.”

The presumption of innocence governs without exceptions in the sanctioning system and has

to 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

festivities is conditioned to the game of evidence and to a contradictory procedure

river in which their own positions can be defended. According to this principle, no

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no sanction may be imposed by reason of the defendant's guilt if there is no

an 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).

Based on the foregoing, it has not been proven that the respondent party provided the

images of the claimant party to the entity SERVICES AND INTERVENTIONS IN

BUILDING OF THE MEDITERRANEAN, S.L. The latter indicated that the party claimed

knew its use, but does not credit the means or the way in which it was done, reason

that is considered sufficient to propose the File of the present procedure, since

that by not accrediting that communication of the data of the complaining party, neither

There is an obligation of the party complained against to communicate its deletion.

Therefore, in accordance with the applicable legislation and after assessing the graduation criteria

tion of the sanctions whose existence has been proven,

The Director of the Spanish Data Protection Agency RESOLVES:

FIRST: ORDER the FILE of this procedure as there is no evidence

gives the commission of the administrative infraction object of claim.

SECOND: NOTIFY this resolution to DIGIMAN ALICANTE, S.L.

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

resorts may optionally file an appeal for reconsideration before the Director

of the Spanish Agency for Data Protection within a month from the date of

the day following the notification of this resolution or directly contentious appeal

before the Contentious-Administrative Chamber of the National High Court,

in accordance with the provisions of article 25 and section 5 of the additional provision

Final fourth of Law 29/1998, of July 13, regulating the Contentious Jurisdiction-

administrative, within a period of two months from the day following the notification

tion of this act, as provided for 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 interested party

do states its intention to file a contentious-administrative appeal. If it is-

In this case, the interested party must formally communicate this fact in writing

addressed to the Spanish Agency for Data Protection, presenting it through the Re-

Electronic registry of the Agency [<https://sedeagpd.gob.es/sede-electronica-web/>], or to

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

that proves the effective filing of the contentious-administrative appeal. If the

Agency was not aware of the filing of the contentious-administrative appeal

tive within two months from the day following the notification of this

resolution, would end the precautionary suspension.

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Sea Spain Marti

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