

File identification

Resolution of sanctioning procedure no. PS 2/2021, referring to the Department of the Vice-Presidency and of Economy and Finance

Background

1. On 18/12/2019, the Catalan Data Protection Authority received a letter from a person for which he filed a complaint against the General Directorate of Attention Citizen of the Department of the Vice-Presidency and of Economy and Finance (hereinafter, the Department of VEH), due to an alleged breach of the regulations on the protection of personal data. The reporting person stated that he was registered with the instant messaging system "@gencatbot" managed by the Department of VEH, which functioned as a search engine with which the user could interact through commands and requests online through Telegram. The complainant complained that on 14/11/2019, in front of the message issued by "gencaBOT" of "Hello! I'm the gencatBOT.
It's been a while since we heard from you. Remember that, to receive the messages, you must give your consent. Click the button that says "Yes". I promise I won't misuse it. (..). Do you sign up?", the reporting person replied with "No", and the "gencatBOT" sent him the following message: "OK. I delete the conversation and all personal data from the database. (..)". However, their personal data were not removed from the system because the same conversation reproduced here had been repeated periodically over time (the days (...)). The person making the claim provided documentation relating to the facts complained of.
2. On 21/01/2020, the Authority forwarded the claim to the data protection delegate of the Department of VEH, so that he would respond within one month to the claim made by the person concerned, and communicated to the Authority the answer given, in accordance with the provisions of article 37.2 of Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereinafter, LOPDGDD). This deadline was exceeded by far, without this Authority receiving any communication from the data protection delegate of the VEH Department.
3. The Authority opened a preliminary information phase (no. IP 340/2019), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure of application to the areas of competence of the Generalitat, and article 55.2 of Law 39/2015, of October 1, on the common administrative procedure of public administrations (henceforth, LPAC), to determine whether the facts they were likely to motivate the initiation of a sanctioning procedure, the identification of the person or persons who could be responsible and the relevant circumstances involved.
4. In this information phase, on 09/12/2020 the reported entity was required to report on the legal basis that would legitimize the data processing carried out by

Department of VEH, through the "@gencatbot" instant messaging system, when the affected people have withdrawn their consent to continue receiving messages, and also, about the procedure to unsubscribe from "@gencatbot". In the last one, it was required if the personal data of the person making the complaint had been deleted from the "@gencatbot" database.

5. On 16/12/2020, the Department of VEH responded to the above-mentioned request in writing in which it stated the following:

- That "The legal basis for the treatment of personal data of the treatment called "citizen attention chatbot of the Generalitat de Catalunya", which is the treatment of context in which the instant messaging system operates, is the consent of the person interested. Consequently, when the person withdraws their consent there is no legal basis that legitimizes this treatment."
- That "The normal or usual procedure to cancel the "@gencat.bot" is simply to block the bot or send the message "/stop". Once this simple action has been taken, the Telegram platform that serves as infrastructure for the service deletes the user's personal data."
- That "I am attaching the document signed by the company Chatbots SL (Informe_Charbots_SL.pdf), in charge of providing this service, which sets out the operation of the platform in relation to the service as well as an explanation of the technical error that occurred in the months of November and December 2019 that caused the reiteration of messages requesting consent to process your personal data".
- That "As of today, all the IT services that guarantee the service have been decommissioned (this includes servers and databases) and the data processed on behalf of the Generalitat de Catalunya will be transmitted in the coming weeks by the company in charge. Once sent, we have the signed commitment for its complete deletion. On the other hand, once this data has been received, those of the people who have not withdrawn their consent will be blocked and will not be used for treatment and those of the person who has indicated that they have not given their consent for the treatment will be deleted definitively".

The reported entity attached to the letter the report of the company Chatbots SL, in charge of the instant messaging service, in which, with reference to the "computer error" that would have motivated the sending of instant messaging without having the consent of the person concerned, informed of the following:

"During the month of November, a functionality was activated in order to clarify the situation of those users who had initiated communication with the bot, but who had not accepted the terms of use. They were users who had taken the initiative to communicate with him

bot, but that they had not accepted the conditions and were in a "limbo". The sending of 3 consecutive messages was scheduled, and if the user did not respond affirmatively after the 3 messages, he was deleted from the database. In the event that the user did not accept it, it should have been deleted as well, but in mid-December it was seen that a bug in the code did not give the command to delete the data correctly. This error was not corrected until January 3, 2020, and for this reason the user received the messages on 11/24 and 12/4."

6. On 21/01/2021, the director of the Catalan Data Protection Authority agreed to initiate a disciplinary procedure against the VEH Department for an alleged violation provided for in article 83.5.a) in relation to article 5.1.a); all of them from Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, relating to the protection of natural persons with regard to the processing of personal data and the free movement thereof (hereinafter, RGPD). This initiation agreement was notified to the imputed entity on 01/28/2021.

In the initiation agreement, the accused entity was granted a period of 10 working days, counting from the day after the notification, to formulate allegations and propose the practice of evidence that it considered appropriate to defend its interests.

The deadline has passed and no objections have been submitted.

proven facts

The Department of VEH, during a period between 14/11/2019 and 04/12/2019, sent messages to the person here denouncing, through the instant messaging system "@gencatbot", despite not having the consent of the affected person to receive messages by this means, or with any other legal basis that would protect it.

Fundamentals of law

1. The provisions of the LPAC, and article 15 of Decree 278/1993, according to the provisions of DT 2a of Law 32/2010, of October 1, of the Catalan Data Protection Authority. In accordance with articles 5 and 8 of Law 32/2010, the resolution of the sanctioning procedure corresponds to the director of the Catalan Data Protection Authority.

2. In accordance with article 64.2.f) of the LPAC and in accordance with what is indicated in the agreement initiating this procedure, this resolution should be issued without a previous resolution proposal, given that the accused entity has not made allegations in the initiation agreement. This agreement contained a precise statement of the imputed liability.

3. In relation to the facts described in the proven facts section, it is necessary to refer to article 5.1.a) of the RGPD, which provides that personal data must be treated "lawfully, loyally and transparently in relation to the interested party ("lawfulness, loyalty and transparency").

In this sense, the RGPD provides that all processing of personal data must be lawful (article 5.1.a)) and, in relation to this, establishes a system for legitimizing the processing of data which is based on the need for it to any of the legal bases established in its article 6.1.

In this regard, it should be borne in mind that the sending of instant messaging to the person reporting here, through the "@gencatbot" system, was carried out without the consent of the person receiving the messages, as he declared his will to not to receive any more messages through the "@gencatbot" system, and that this data processing would not be covered by any of the other authorizations provided for in Article 6 of the RGPD, which, in turn, have not been invoked by the reported entity.

This imputed fact is constitutive of the infringement provided for in article 83.5.a) of the RGPD, which typifies as such the violation of "the basic principles for the treatment (...)".

The conduct that is addressed here has been collected as a very serious infringement in article 72.1.a) of the LOPDGDD, in the following form: "The treatment of personal data in violation of the principles and guarantees established in article 5 of Regulation (EU) 2016/679", in relation to the principle of legality established in article 5.1.a) of the same RGPD.

4. Article 77.2 LOPDGDD provides that, in the case of infractions committed by those in charge or in charge listed in art. 77.1 LOPDGDD, the competent data protection authority:

"(...) must issue a resolution that sanctions them with a warning. The resolution must also establish the measures to be adopted so that the conduct ceases or the effects of the offense committed are corrected.

The resolution must be notified to the person in charge or in charge of the treatment, to the body to which it depends hierarchically, if applicable, and to those affected who have the status of interested party, if applicable."

In terms similar to the LOPDGDD, article 21.2 of Law 32/2010, determines the following:

"2. In the case of violations committed in relation to publicly owned files, the director of the Catalan Data Protection Authority must issue a resolution declaring the violation and establishing the measures to be taken to correct its effects . In addition, it can propose, if necessary, the initiation of disciplinary actions in accordance with what is established by the current legislation on the disciplinary regime of personnel in the service of the administrations

public This resolution must be notified to the person responsible for the file or the treatment, to the person in charge of the treatment, if applicable, to the body to which they depend and to the affected persons, if any".

In the present case, it becomes unnecessary to require corrective measures for the effects of the infringement, given that the fact reported is a one-off event which, as indicated by the entity reported, has already been corrected as of today.

For all this, I resolve:

1. Admonish the Department of the Vice-Presidency and of Economy and Finance as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.a), both of the RGPD.

It is not necessary to require corrective measures to correct the effects of the infringement, in accordance with what has been set out in the legal basis 4rt.

2. Notify this resolution to the Department of the Vice Presidency and of Economy and Finance

3. Communicate the resolution to the Ombudsman, in accordance with the provisions of article 77.5 of the LOPDGDD.

4. Order that this resolution be published on the Authority's website (apdcat.gencat.cat), in accordance with article 17 of Law 32/2010, of October 1.

Against this resolution, which puts an end to the administrative process in accordance with articles 26.2 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, and 14.3 of Decree 48/2003, of February 20, by which the Statute of the Catalan Data Protection Agency is approved, the imputed entity can file, with discretion, an appeal for reinstatement before the director of the Catalan Data Protection Authority Data, within one month from the day after its notification, in accordance with what they provide article 123 et seq. of the LPAC. You can also directly file an administrative contentious appeal before the administrative contentious courts, within two months from the day after its notification, in accordance with articles 8, 14 and 46 of Law 29/1998, of July 13, regulating the administrative contentious jurisdiction.

If the imputed entity expresses to the Authority its intention to file an administrative contentious appeal against the final administrative decision, the decision will be provisionally suspended in the terms provided for in article 90.3 of the LPAC.

Likewise, the imputed entity can file any other appeal it deems appropriate to defend its interests.

The director,