

Information and Data Protection Commissioner

[REDACTED]

VS

[REDACTED]

COMPLAINT

1. Reference is made to the complaint dated the 26th January 2021 lodged by [REDACTED] (the “complainant”) against [REDACTED] (the “controller”) with the Spanish Data Protection Agency (the “Spanish SA”).
2. Having identified that the complaint concerned cross-border processing carried out by a controller based in Malta, the Spanish SA launched a voluntary mutual assistance notification under article 61 of the General Data Protection Regulation¹ (the “Regulation”) to the Information and Data Protection Commissioner (the “Commissioner”), which accepted to process the complaint pursuant to article 56(1) of the Regulation in its capacity as the lead supervisory authority.
3. In his complaint, the complainant alleged that the controller unilaterally closed his account without informing him. In addition, he argued that when he requested the controller to erase his personal data, the controller replied that such data could not be erased and that afterwards, he requested the controller to grant him access to his personal data. The complainant concluded that the controller proceeded to comply with his request to exercise his right of access, but did not provide him with any further information about the right of erasure request that he had previously filed.

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).



INVESTIGATION

4. Pursuant to article 58(1)(a) of the Regulation, the Commissioner requested the controller to provide its submissions in relation to the allegations raised by the complainant. In terms of this Office's internal investigation procedure, the controller was provided with a copy of the complaint together with the relevant supporting documents.
5. On the 11th June 2021, the controller submitted the following principal legal arguments for the Commissioner to take into consideration during the legal analysis of the case:
 - i. that the complainant's "*account was initially opened on the 6th of October 2020 with his final activity occurring on the 21st of January 2021*";
 - ii. that the controller "*contacted [the complainant] on 10th of January 2021 to inform him that his account would be closed within fourteen (14) days in accordance with clause 4.2(b) of its Terms and Conditions and Art. 85.4 of Royal Legislative Decree 1/2007 of November 16*";
 - iii. that the controller "*subsequently contacted [the complainant] on the 26th of January 2021, after the fourteen (14) day notice period had elapsed, to inform him that his account had been closed*;
 - iv. that the complainant "*contacted [the controller] on the 26th of January 2021 to request the deletion of his personal data and on the 28th of January 2021 to make a subject access request*";
 - v. that on the 15th February 2021, the controller complied with the complainant's right of access request by providing him with the requested information and personal data by means of an email;
 - vi. that the Commissioner was provided with a copy of the text of the said email and a copy of a screenshot taken after the email was sent, which demonstrates that the email was delivered on the 15th February 2021 at 02:08:55;

- vii. that in relation to the complainant's right of erasure request, the controller held that it operates in Spain and therefore, it is licensed and regulated by the Directorate General for the Regulation of Gambling in Spain, which means that it *"is required to comply with applicable Spanish laws and regulations and the obligations that they impose. One such legal obligation is the requirement to retain relevant data for the minimum period mandated under Law 10/2010, of 28 April, prevention of money laundering and terrorism financing"*.
6. By means of an email dated the 15th June 2021, the Commissioner requested the controller to provide further information in relation to its legal obligation to retain data subjects' personal data. On the 18th June 2021, the controller submitted the following considerations:
- i. that the controller is subject to the legal obligation, specifically *"[a]rticle 25 of Spanish Law 10/2010 of 28 April, prevention of money laundering and terrorism financing...which states that 1) Obligated persons shall keep the documentation gathered for the compliance with the obligations under this Act for a minimum period of ten years. In particular, obliged persons shall keep for its use in any investigation or analyses of possible money laundering or terrorist financing by the Executive Service or by other competent authorities: a) Copy of the documents required under the customer due diligence measures for a minimum period of ten years from the end of the business relationship or the date of the transaction. b) Original or evidentiary copy admissible in court proceedings, of the documents or records duly evidencing the transactions, their participants and the business relationships, for a minimum period of ten years from the date of the transaction or from the end of the business relationship"*;
 - ii. that the controller further provided that *"obliged persons"* is defined as *"[p]ersons responsible for the management, operation and marketing of lotteries or other gambling activities in respect of prize payment transactions"*, and that in this regard, the controller, being a fully licensed and regulated operator of online gambling services in Spain, falls squarely within the meaning of *"obliged persons"*;
 - iii. that the controller also confirmed that *"during [the] retention period, [it] will only process the complainant's data in compliance with [its] legal and regulatory requirements. In accordance with applicable law, [the controller is] obliged to keep*

the complainants' personal data at the disposal of competent authorities for the purpose of enforcing any possible liabilities arising from the processing and only for the period of limitation of such liabilities, which is 10 years";

- iv. that additionally, the controller confirmed that the retained data will be *"blocked [and] not be processed for any purpose other than [the ones] as set out above...Once such period has elapsed, the data be definitively deleted in accordance with article 32 of Organic Act 3/2018, of 5 December, on the Protection of Personal Data and Guarantee of Digital Rights"*.

LEGAL ANALYSIS AND DECISION

The exercise of the right of access

7. Having examined article 15 of the Regulation, which grants the data subject the right to access his or her personal data by stipulating that *"[t]he data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed[...]"* and specifically article 15(3) thereof, which establishes that *"the controller shall provide a copy of the personal data undergoing processing[...]"*;
8. Having noted article 12(3) of the Regulation, which aims at ensuring the efficient exercise of data subjects' rights and obliges the controller to *"provide information on action taken on a request under Articles 15 to 22 to the data subject without undue delay and in any event within one month of receipt of the request."*
9. During the course of the investigation, it transpired that the complainant submitted the request to exercise his right of access on the 28th January 2021 and consequently, the controller complied with the request on the 15th February 2021, by providing the complainant with a copy of his personal data undergoing processing and the supplementary information pursuant to article 15 of the Regulation, within the statutory period as set forth in article 12(3) of the Regulation.

The exercise of the right to erasure

10. Having established that in terms of article 17(1) of the Regulation, “[t]he data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay” where one of the grounds listed in article 17(1)(a) to (f) applies. However, this rule is subject to a number of exceptions, in particular article 17(3)(b) of the Regulation, which states that the right to erasure shall not apply “*for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject*[...]” [emphasis has been added].
11. Having established that on the 26th January 2021, the complainant filed a valid request to erase his personal data with the controller.
12. Having examined the controller’s submissions on this matter, the Commissioner established that indeed, processing by the controller is necessary because the controller is subject to a compelling legal obligation under Member State law which requires such processing.

The provision of information in relation to the right of erasure request

13. Having given due regard to the fact that data protection rights as enshrined in articles 15 to 22 of the Regulation are intrinsically related to the transparency requirement, as held in articles 5(1)(a) and 12 of the Regulation. The rationale behind article 12 is to ascertain that the substantive rights of the data subjects are adequately safeguarded, specifically, by defining the technical and procedural conditions as to how and when the controller shall communicate with the data subjects in relation to their data protection rights.
14. For the purpose of this legal analysis, the Commissioner examined the reply provided by the controller on the 27th January 2021 in relation to the request submitted by the complainant to erase his personal data, wherein the complainant was informed that “[t]o comply with the legal and license requirements of [REDACTED] as well as our own inner risk management procedures, we cannot remove your personal information [...]. We will store your personal data as long as you are [REDACTED] customer, and we will ensure that they are protected appropriately and used just for legitimate purposes. If you are not [REDACTED] customer anymore, we will store your data while it is necessary to comply with the current legal and regulation requirements. If you



wish to obtain information about how we process your personal data, as well as our legitimate interests to do it, please consult the Privacy Policy in our website, which can be accessed clicking on “Privacy Policy” at the bottom of the website²”.

15. The first general obligation laid down in article 12(1) of the Regulation states that the “controller shall take appropriate measures to provide information referred to in Articles 13 and 14 and any communication under Articles 15 to 22 and 34 relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language [...]” [emphasis has been added]. Accordingly, the Guidelines on Transparency under Regulation 2016/679³ provide that the controller shall “comply with the principle of transparency (i.e. relating to the quality of the communications set out in Article 12.1 when communicating with data subjects in relation to their rights under Articles 15 to 22 and 34”. In this respect, the nature of the information provided shall meaningfully position the data subject in such a manner to enable him or her to ascertain the lawfulness of the personal data undergoing processing and, if necessary, challenge the process.
16. Having established that, with specific reference to the exercise of the rights of the data subject under Chapter III of the Regulation, including the right to erasure, the overarching principle of transparency enshrined in the Regulation, as transposed inter alia into its article 12(1), requires that a reply to a data subject’s request which contains the reason for not complying in terms of the exceptions provided by the Regulation should be formulated in a concise, transparent, and easily accessible manner and using clear and plain language.
17. After examining the reply provided by the controller in relation to the right to erasure exercised by the complainant on the 26th January 2021, the Commissioner noted that the controller simply referred the complainant to its Privacy Policy, and merely informed him that the processing of his personal data is necessary to comply with the legal and regulations requirement, without specifying the legal obligation to which the controller is subject.
18. As a consequence, the Commissioner has established that the controller’s reply of the 27th January 2021 contravened the requirements of article 12(1) of the Regulation due to the fact

² The original text of this email was in Spanish. The text reproduced in this legally binding decision is an unofficial English translation provided by the Spanish SA, acting as the concerned supervisory authority.

³ Adopted by the Article 29 Data Protection Working Party on the 29th November 2017, as last revised and adopted on the 11th April 2018.

that the controller failed to communicate with the complainant in a concise, transparent, and easily accessible manner, using clear and plain language in relation to the exercise of the right of erasure by the same complainant.

19. The fact that the controller failed to efficiently and concretely present the information in such a manner to enable the complainant to easily understand the legal obligations which require the controller to continue processing his personal data even after the termination of the business relationship for the period set forth in the applicable law adds to the gravity of the controller's infringement.

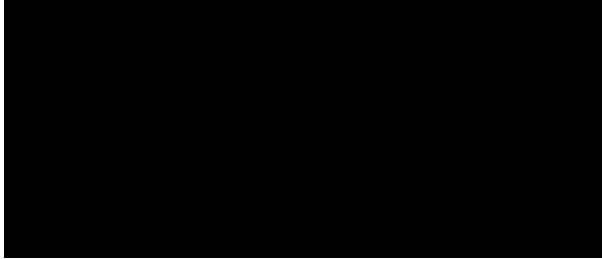
On the basis of the foregoing considerations, the Commissioner hereby decides that:

- i. **on the basis of the evidence gathered during the course of the investigation, the controller complied with the right of access request under article 15 of the Regulation submitted by the complainant on the 28th January 2021, by providing the complainant with a copy of his personal data undergoing processing and the supplementary information pursuant to article 15 of the Regulation and within the stipulated time-frame set forth in article 12(3) of the Regulation;**
- ii. **the exemption of article 17(3)(b) of the Regulation applies in relation to the complainant's request to exercise his right to erasure under article 17 of the Regulation of the 26th January 2021 due to the fact that processing by the controller is necessary for compliance with a legal obligation under Member State law; and**
- iii. **the controller's response to the complainant's request to exercise his right to erasure under article 17 of the Regulation of the 27th January 2021 did not comply with the requirements set forth in article 12(1) of the Regulation.**

In terms of article 58(2)(d) of the Regulation, the controller is hereby being ordered to provide the complainant with a reply to his right to erasure request dated the 26th January 2021, in a concise, transparent and easily accessible manner, using clear and plain language, in particular, by including in the response information relating to the specific legislation which obliges the controller, qua obliged person, to comply with the requirements deriving therefrom and retain personal data for the prescribed timeframes.

This order shall be implemented within ten (10) days from the date of receipt of this legally-binding decision, and the controller is requested to inform the Commissioner with the action taken to comply with such order immediately thereafter.

By virtue of article 83(6) of the Regulation, any failure by the controller to implement the Commissioner's instructions shall be subject to further corrective action, as specified therein.



Decided today, the 25th day of October, 2021