THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, 23

of December

2019

DECISION

ZKE.440.56.2019

Based on Article. 104 § 1 of the Act of June 14, 1960 Code of Administrative Procedure (Journal of Laws of 2018, item 2096, as amended), art. 160 sec. 1 and 2 of the Personal Data Protection Act of May 10, 2018 (Journal of Laws of 2019, item 1781) and art. 12 point 2, art. 22, art. 23 sec. 1 of the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, as amended), in connection with Art. 6 sec. 1 lit. c and lit. f, 57 sec. 1 lit. a and f of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 / EC (Journal EU L 119 of 04/05/2016, p. 1 and EU Official Journal L 127 of 23/05/2018, p. 2), after conducting administrative proceedings regarding the complaint of Ms JL, against the processing of her personal data by P. spółka z oo , President of the Personal Data Protection Office

refuses to accept the request.

JUSTIFICATION

The President of the Personal Data Protection Office (formerly the Inspector General for Personal Data Protection) received a complaint from Ms J. L., (hereinafter referred to as: the Complainant), about the processing of her personal data by P. Spółka z o.o. (hereinafter referred to as: the Company).

The complainant applied for the quotation:

"Examining the legality of data processing in the scope of the submitted complaint, i.e. receiving a text message with marketing content" by the Company and the fulfillment of the information obligation

providing information when the operator notified GIODO of a breach of security of the client's personal data (...)

information when the operator fulfilled the information obligation ”.

In the course of the administrative procedure conducted in this case, the President of the Personal Data Protection Office (hereinafter: "the President of the Personal Data Protection Office") determined the following.

1. The evidence attached to the explanations of the Company of [...] May 2017 shows that it obtained the complainant's personal data in connection with the conclusion of the contract for the provision of telecommunications services no. [...] on [...] June 2014 (hereinafter referred to as the "contract"). The complainant did not consent to the processing of her personal data for marketing purposes in the contract. The agreement was terminated by the Complainant and terminated on [...] December 2016.

2. The company explained that on [...] January 2015, the complainant objected to communication for marketing purposes via telephone and letter channels. The company fulfilled the complainant's instruction on [...] January 2015. The complainant raised another objection on [...] February 2015. The Company then informed the Complainant about the status of the consents, which had not changed since the first objection was raised.

3. On […] July 2016, the complainant received a text message from the Company saying “on July 2016 […] your tariff plan has been changed to […] details at www. […]. The company explained in a letter dated [...] August 2016 that the message was not sent as part of the marketing activities and only contained information about changes to the service. In addition, the text message was sent by mistake, because the pre-paid offer was not entered for the number within the indicated deadline. The applicant was apologized for this situation.

4. The explanations of the Company from [...] May 2017 show that the complainant did not ask for the fulfillment of the information obligation pursuant to Art. 33 of the Act of August 29, 1997 on the Protection of Personal Data, hereinafter referred to as: "the Act of 1997".

5. The Company's explanations of [...] May 2017 also show that the Company is currently processing the complainant's personal data pursuant to Art. 6 sec. 1 lit. c of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 / EC (Journal EU L 119 of 04/05/2016, p. 1, as amended), hereinafter referred to as "Regulation 2016/679" in connection with the provisions of the Act of August 29, 1997 Tax Ordinance (Journal of Laws of 2019, item 2200), hereinafter: "Tax Ordinance" and pursuant to Art. 6 sec. 1 lit. f of the Regulation 2016/679 in connection with art. 118 of the Act of 23 April 1964 of the Civil Code (Journal of Laws of 2019, item 1495), hereinafter referred to as the "Civil Code", for purposes related to the pursuit of claims and defense against possible claims related to the performance of the contract concluded with the Complainant.

In these facts, the President of the Personal Data Protection Office considered the following.

On May 25, 2018, the provisions of the Act of May 10, 2018 on the protection of personal data (Journal of Laws 2019, item 1781), hereinafter referred to as "u.o.d.o.", entered into force.

Pursuant to Art. 160 sec. 1-3 of the Act, proceedings conducted by the Inspector General for Personal Data Protection, initiated and not completed before the date of entry into force of this Act, are conducted by the President of the Personal Data Protection Office on the basis of the Act, in accordance with the principles set out in the Act of June 14, 1960. Code of Administrative Procedure (Journal of Laws of 2018, item 2096, as amended), hereinafter referred to as "the Code of Administrative Procedure". At the same time, the activities performed in the proceedings initiated and not completed before the effective date of the provisions of the Act on

From May 25, 2018, also Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95 / 46 / WE (Journal of Laws UE L 119 of 04.05.2016, p. 1 as amended), hereinafter referred to as "Regulation 2016/679".

Taking into account the above, it should be stated that the present proceedings, initiated and not completed before May 25, 2018, are conducted on the basis of the Act of 1997 (with regard to the provisions governing the administrative procedure) and on the basis of Regulation 2016/679 (as regards the legality of the processing of personal data). The manner of conducting proceedings under the provisions of law within the framework of the commenced and not completed before the date of entry into force of the new regulations on the protection of personal data correlates with the well-established position of the doctrine, according to which “the public administration body assesses the facts of the case according to the moment of issuing the administrative decision. This rule also applies to the assessment of the legal status of the case, which means that the public administration authority issues an administrative decision on the basis of the provisions of law in force at the time of its issuance ”(Commentary to the Act of June 14, 1960, Code of Administrative Procedure (Journal of Laws No. 00.98.1071) M. Jaśkowska, A. Wróbel, Lex., El / 2012).

In the judgment of May 7, 2008 in the case file ref. Act I OSK 761/07 The Supreme Administrative Court stated that "when examining [...] the legality of the processing of personal data, GIODO is obliged to determine whether the data of a specific entity are processed on the date of issuing the decision on the matter and whether it is done in a lawful manner" .

At the time the event described by the applicants took place, the 1997 Act was in force. The provision of fundamental importance for the assessment of the legality of the processing of personal data was Art. 23 sec. 1 of the 1997 Act (currently Article 6 (1) of Regulation 2016/679), according to which the processing of personal data is lawful when the data controller meets one of the conditions listed in this article, i.e. when:

the data subject has consented to it, unless it concerns the deletion of data relating to him (Article 6 (1) (a) of Regulation 2016/679, respectively), it is necessary to exercise the right or fulfill the obligation resulting from a legal provision (Article 6 (1) (c) of Regulation 2016/679, respectively),

it is necessary for the performance of the contract when the data subject is a party to it or when it is necessary to take action before concluding the contract for

request of the data subject (Article 6 (1) (b) of Regulation 2016/679, respectively),

it is necessary to perform tasks specified by law for the public good (Article 6 (1) (e) of Regulation 2016/679, respectively),

it is necessary to fulfill legally justified purposes pursued by data controllers or data recipients, and the processing does not violate the rights and freedoms of the data subject (Article 6 (1) (f) of the Regulation 2016/679, respectively).

It should be added that these conditions apply to all forms of data processing listed in art. 7 sec. 2 of the 1997 Act, including making them available. These conditions are also equal to each other, which means that for the legality of the data processing process, it is sufficient to meet one of them.

Referring to the allegation of unlawful processing of the complainant's personal data for marketing purposes, one should agree with the Company that the information provided in the text message was not of a marketing nature, and it was information about a change in the terms of the contract.

Regardless of the above, it should be noted that the Company processed the complainant's personal data on the basis of a contract for the provision of telecommunications services. The information sent by the Company in the text message did not concern the services provided to the Complainant, therefore it was not authorized in the contract between the Company and the Complainant. This, in turn, means that the processing of the complainant's data in connection with the provision of incorrect information in the text message took place without any legal basis. However, it should be emphasized that this event was the result of a mistake and was of a one-off nature, therefore the state of violation of the provisions on the protection of personal data does not exist at present.

Taking into account the complainant's request to "provide information when the operator notified GIODO of a breach of the security of personal data, the client ...", it should be stated that pursuant to Art. 174a paragraph. 1 of the Telecommunications Law of July 16, 2004 (Journal of Laws of 2018, item 2354, of 2019, item 2294), hereinafter referred to as the "Telecommunications Law", the provider of publicly available telecommunications services notifies the President of the Personal Data Protection Office (previously Inspector General for the Protection of Personal Data) about a personal data breach. Pursuant to Art. 174a (2) of the Act, breach of personal data shall mean accidental or unlawful destruction, loss, alteration, unauthorized disclosure or access to personal data processed by a telecommunications undertaking in connection with the provision of publicly available telecommunications services. The event described in the complaint, consisting in the erroneous sending of an SMS message, in which no personal data was disclosed, does not fall into the catalog of violations listed exhaustively in Art. 174a paragraph. 2 of the Telecommunications Law, therefore, the Company was not obliged to report this incident to GIODO.

Referring to the Complainant's request for information when the Company has fulfilled the information obligation towards it, it should be indicated that, in accordance with Art. 33 of the Act of 1997, such an obligation is required by the data controller to fulfill at the request of the data subject. In its explanations, the company indicated that the complainant did not ask for the fulfillment of the information obligation, and therefore the complainant's request should be considered unfounded.

It should be noted that the proceedings conducted by the President of the Office are aimed at issuing an administrative decision pursuant to Art. 18 sec. 1 of the 1997 Act. According to this provision, in the event of a breach of the provisions on the protection of personal data, the President of the Office ex officio or at the request of the person concerned, by way of an administrative decision, orders the restoration of the legal status, in particular: 1) removal of the deficiencies, 2) supplementing, updating, rectifying, or failure to provide personal data, 3) application of additional security measures to secure the collected personal data, 4) suspension of the transfer of personal data to the state.

Considering that there is no violation at present, it should be concluded that there was no basis for issuing a decision ordering the restoration of legal status by the President of the Personal Data Protection Office, referred to in Art. 18 of the 1997 Act. It is justified to issue a decision refusing to meet the data subject's request.

In this factual and legal state, the President of the Personal Data Protection Office resolved as in the sentence.

Based on Article. 127 § 3 of the Code of Administrative Procedure, the party has the right to submit an application for

reconsideration of the case within 14 days from the date of delivery of the decision to the party. If a party does not want to exercise the right to submit an application for reconsideration of the case, he has the right to lodge a complaint against the decision with the Provincial Administrative Court in Warsaw within 30 days from the date of its delivery to the party. The complaint is lodged through the President of the Personal Data Protection Office (address: ul. Stawki 2, 00-193 Warsaw). The fee for the complaint is PLN 200. The party has the right to apply for the right to assistance, including exemption from court costs.

2021-04-20