THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, 09

April

2020

DECISION

ZKE.440.47.2019

Based on Article. 138 § 1 point 1 of the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2020, item 256) in connection with joke. 160 sec. 1 and 2 of the Act of 10 May 2018 on the protection of personal data (Journal of Laws of 2019, item 1781) and art. 12 point 2 and art. 22 of the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, as amended), after conducting administrative proceedings regarding the request of Mr. KC, for reconsideration of the case ended with the decision of the Inspector General for Protection Personal Data of May 12, 2017 (reference number DOLiS / DEC-570/17 / 38812,38814) regarding the complaint of Mr. KC regarding the processing of his personal data for marketing purposes by V. Sp. z o.o. Sp. k., President of the Personal Data Protection Office

upholds the contested decision.

Justification

The Inspector General for Personal Data Protection (currently the President of the Personal Data Protection Office) received a complaint from Mr. K. C. (hereinafter referred to as the "Complainant") about the processing of his personal data for marketing purposes by V. Sp. z o.o. Sp. k. (hereinafter referred to as the "Company").

The complainant complained about the unlawful processing of his personal data in the form of his telephone number by or on behalf of the Company. This processing was to consist in the execution or commissioning by the Company of telephone calls to its telephone number which took place on [...] March 2016 at 9.16 and [...] in March 2016 at 10.46. In the Complainant's opinion, these activities were undertaken by the Company or on its behalf because the quotation quoted “the consultant making the telephone call informed me that the health academy was acting on behalf of the company and encouraged me to visit the website [...]. The subscriber to this domain is V. ”.

The complainant asked the Inspector General for Personal Data Protection to quote "controlling the processing of personal data by V., including ordering V. to stop processing my personal data".

In the course of the proceedings with reference number [...], initiated by the Complainant's complaint, the Inspector General for Personal Data Protection made the following findings.

The Complainant was contacted on [...] and [...] March 2016 by a person claiming to be a consultant, as indicated by the Complainant: "(...) the company's health academy and encouraged me to visit the website [...]".

The complainant informed the Inspector General for Personal Data Protection that he had made a finding that the subscriber to the website […] is the Company. He also emphasized that he asked the Company to stop processing his personal data.

The Company, in the explanations of [...] September 2016, informed through its attorney-in-fact, the Inspector General for Personal Data Protection that it did not process the complainant's personal data and did not disclose them to third parties; quotation: "The Complainant's data are not stored and processed in any of my Mandate's files. V. sp. Z o. O. Sp. K. Does not disclose the Complainant's data to any third parties, because - as previously indicated - it does not store the Complainant's data ".

In a letter of [...] September 2016, the Company's attorney stated that the quotation quoted: "(...) none of the Company's employees made any telephone calls to him [the Complainant], and [the Company] did not store or process his [the Complainant] ] data in any set ".

In the explanations of [...] March 2017, the Company reiterates that it does not process or process the complainant's personal data.

The company explains that it does not conduct any marketing activities; quote: "The company does not conduct telemarketing activities (does not call people), does not organize sales meetings".

On the basis of the evidence collected in the case, the General Inspector for Personal Data Protection concluded that the Company did not conduct the marketing activities indicated by the Complainant, and therefore did not process or process the Complainant's personal data in the manner questioned by him. Therefore, by the administrative decision of May 12, 2017 (reference number DOLiS / DEC-570/17/38812, 38814), pursuant to Art. 105 § 1 of the Act of June 14, 1960, Code of Administrative Procedure (Journal of Laws of 2020, item 256), hereinafter referred to as "K.p.a.", the Inspector General for Personal Data Protection discontinued the procedure in its entirety as it was irrelevant. The decision was delivered to the Complainant on [...] May 2017, and to the Company's attorney on [...] May 2017 (return acknowledgments of receipt in the case files).

Within the statutory deadline, the complainant filed a request for reconsideration of the case ended with the above-mentioned decision. In the justification of the request, the complainant alleged that the Inspector General for Personal Data Protection, quoted as follows: “limited himself to accepting the infringer's declarations as true - V. Sp. z o.o. Sp. k. by not even attempting to establish the facts of the case, in particular by making no reference to the Complainant's statements and the evidence presented by the Complainant ”. The complainant attached to the request for reconsideration: 1. a printout from the website [...] containing entries (of [...] April 2017 and [...] May 2017) of an anonymous person claiming to be a former employee of the Company, describing the manner of conducting its activities marketing, 2. a printout from an undetermined website containing entries (from March and April 2016) of anonymous persons informing that the Company's marketing content is presented to them using the telephone number provided by the Complainant from which the calls constituting the subject of the complaint were made. The complainant sustained his motions previously submitted in the proceedings, requesting, moreover, to “inspect the infringer's IT system and hear its president of the management board”.

After re-examining the evidence collected in the case, the President of the Personal Data Protection Office stated the following.

On May 25, 2018, the provisions of the Regulation of the European Parliament and the EU Council 2016/679 of April 27, 2016 on the protection of individuals with regard to the processing of personal data and on the protection of personal data began to apply in the Member States of the European Union. on the free movement of such data and repealing Directive 95/46 / EC (General Data Protection Regulation) (Journal of Laws UE L 119 of 04.05.2016, p. 1, with the amendment announced in the Journal of Laws UE L 127 of on 23/05/2018, p. 2), hereinafter referred to as "Regulation 2016/679". Also on May 25, 2018, the Act of May 10, 2018 on the protection of personal data (Journal of Laws of 2019, item 1781), hereinafter referred to as "u.o.d.o., entered into force on the territory of the Republic of Poland. 2018 ", implementing Regulation 2016/679 on the territory of the Republic of Poland and supplementing the regulations provided for in this legal act.

Pursuant to Art. 160 sec. 1 and 2 u.o.d.o. 2018, 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 of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, as amended), hereinafter referred to as "uodo 1997 ”, in accordance with the principles set out in the Act of June 14, 1960, Code of Administrative Procedure. At the same time, pursuant to Art. 160 sec. 3 u.o.d.o. 2018, activities performed in proceedings initiated and not completed before the date of entry into force of its provisions, remain effective.

Taking into account the above legal regulations, it should be stated that the present proceedings, initiated and not completed before May 25, 2018, are conducted - in the scope covering the provisions governing the procedure - based on the provisions of the Act on 1997 and K.p.a. On the other hand, the substantive assessment of the legality and lawfulness of the processing of personal data should be based on the provisions of Regulation 2016/679. The above statement is consistent 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). As stated by the Supreme Administrative Court in its judgment of May 7, 2008 in case no. Act I OSK 761/07 quoted: "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 the decision on the matter and whether it is done in a legal manner". Determining that the personal data of a person seeking protection of their rights in proceedings before the personal data protection authority are not processed by the controller at the time of issuing the decision, obliges the authority to apply Art. 105 § 1 of the Code of Civil Procedure, i.e. until the procedure is discontinued due to its redundancy. As it was rightly emphasized in the justification of the decision to which the Complainant's request for reconsideration relates, “the redundancy of the administrative procedure, as provided for in Art. 105 § 1 of the Code of Civil Procedure it takes place when any of the elements of the material legal relationship is missing ”. Establishing the absence of such an element (subjective or objective) makes it unjustified to continue the proceedings aimed at assessing the facts that occurred in the past and were not continued at the time of the adjudication. Such an assessment would be contrary to the nature of an administrative decision as an act decisive in an imperative manner about the rights and obligations of the parties to the proceedings in the established and valid at the time of its issuance the factual and legal status. The possibility of making such an assessment in an administrative decision is not provided by Art. 18 (1) of the Act on 1997 (applicable as a procedural provision in the present case pursuant to Art.160 (2) of the Act on Personal Data Protection 2018) giving the Inspector General for Personal Data Protection (currently the President of the Personal Data Protection Office) - in the event of a breach of the provisions on the protection of personal data - only the right to to order the restoration to a lawful state (e.g. deletion of illegally processed personal data). Laws of u.o.d.o. 1997 do not provide the President of the Personal Data Protection Office with the

possibility of assessing past violations, not continued at the time of the ruling, e.g. for repressive purposes - aimed at drawing consequences in connection with such violations.

In the present case, the fundamental circumstance of the facts and the reason for the discontinuation of the proceedings is the fact that the Company, at the time of issuing the administrative decision, did not process the complainant's personal data. The missing element of the legal relationship between the Complainant and the Company, allowing for the resolution of the matter as to its essence (as referred to above), is the fact that the Company processes the complainant's data. The Inspector General for Personal Data Protection determined the lack of this element (the fact of processing the Complainant's personal data) on the basis of repeated, consistent declarations of the Company's representative submitted in the proceedings (in letters of [...] September 2016, [...] September 2016 and [...] ...] March 2017). The General Inspector for Personal Data Protection considered the explanations of the Company's representative in this regard (not processing the personal data of the Complainant at present) as credible, in particular in the light of the fact that the Complainant, neither during the proceedings which ended with the issue of the contested decision (e.g. in his letter, received by the General Office Of the Inspector for Personal Data Protection [...] May 2017), neither in the application for reconsideration of the case, nor in the course of these proceedings, did not indicate any subsequent to [...] March 2016 (i.e. the date of the last of two telephone calls constituting the subject of the complaint), premises indicating the processing of his personal data by the Company. In particular, the Complainant did not submit that the Company had made further telephone calls to his telephone number. It should be noted here that the evidence presented by the Complainant in the proceedings (printouts of entries by anonymous persons on websites, presented in the Complainant's letter, which was received by the Office of the Inspector General for Personal Data Protection [...] May 2017, and the consideration of the case) generally relate to the way the Company operated (not specifically the processing of the Complainant's data) in the past (see the entry of the person claiming to be a former employee of the Company). The recognition that the Company currently (as at the date of the decision) is not engaged in activities that could involve the processing of the Complainant's personal data is also supported by the fact that the Company's website with the address [...] is not currently operational.

Referring to the allegation that the Complainant's evidential requests were not taken into account (the inspection of the Company's IT system and the hearing of the President of the Management Board of the Company), the ineffectiveness indicated in the Company's justification should be considered to provide evidence that the Complainant's personal data is

currently being processed by the Company. It is obvious that the Complainant's personal data, if they were in the Company's IT system, could be removed from it at any time; a statement by the persons representing the Company on the current non-processing of the Complainant's data, submitted in person before the President of the Office for Personal Data Protection, would only confirm the already established circumstance (based on the written statements of the Company's representative). In view of such a declaration, further evidence proceedings aimed at assessing the actual state of the past (examining whether the Complainant's personal data had been processed in the past in the Company's IT system, questioning the persons representing the Company in order to establish the circumstances of an event that took place in the past) would be already unfounded. The limitation of the right of a party to administrative proceedings to submit evidence motions on the grounds of purposefulness is confirmed in the jurisprudence of administrative courts, e.g. in the judgment of the Supreme Administrative Court of 1 July 2016, cited in the justification of the appealed decision, ref. no.II GSK 470/15.

Summing up, it should be stated that in the opinion of the President of the Personal Data Protection Office, the Inspector General for Personal Data Protection in the proceedings initiated by the Complainant's complaint explained the facts to the extent required by the settlement of the case. As a consequence of the correct determination of the facts of the case, the General Inspector of Personal Data issued the correct decision contained in the appealed administrative decision of May 12, 2017, ref. No. DOLiS / DEC-570/17/38812, 38814.

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

The decision is final. Pursuant to Art. 53 § 1 of the Act of August 30, 2002 - Law on proceedings before administrative courts (Journal of Laws of 2019, item 2325, as amended), the party has the right to lodge a complaint against the decision with the Provincial Administrative Court in Warsaw, in within 30 days from the date of its delivery, via the President of the Office for Personal Data Protection (address: ul. Stawki 2, 00-193 Warsaw). However, due to the state of epidemic in force on the date of the decision, pursuant to Art. 15zzr paragraph. 1 point 1 of the Act of March 2, 2020 on special solutions related to the prevention, prevention and combating of COVID-19, other infectious diseases and crisis situations caused by them (Journal of Laws of 2020, item 374), the running of this period currently it will not start; it will start to run on the day following the last day of the epidemic or immediately following any possible epidemic threat.

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.

2021-03-30