OFFICE FOR PERSONAL DATA PROTECTION

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* UOOUX00CT01T *

Ref. UOOU-05185 / 14-44

DECISION

Chairwoman of the Office for Personal Data Protection as an appellate body competent pursuant to § 2, § 29

and Section 32 of Act No. 101/2000 Coll., on the Protection of Personal Data and on the Amendment of Certain Acts,

and pursuant to § 10 and § 152 para. 2 of Act No. 500/2004 Coll., the Administrative Procedure Code, decided on 19 October

2018

according to the provisions of § 152 par. 6 let. a), § 152 par. 5 and § 90 par. 1 let. b) of the Act

No. 500/2004 Coll., Administrative Procedure Code, as follows:

Decision of the Office for Personal Data Protection ref. UOOU-05185 / 14-38 of 18 July

2018 is annulled and the case is returned to the administrative body of the first instance for a new hearing.

Justification

Administrative proceedings on suspicion of committing an administrative offense pursuant to Section 45a (1) and (3) of the Act

No. 101/2000 Coll. was initiated on 28 May 2014 by the delivery of the notice of initiation

party to the proceedings, the company

, based

('the party to the proceedings'), at the initiative of the then President of the Office

for Personal Data Protection (hereinafter referred to as the “Office”) RNDr. Igor Němec.

Subsequently, on the basis of the performed evidence and the collected file material, he issued

administrative body of the first instance on 30 July 2014 decision no. UOOU-05185 / 14-13,

according to which the party to the proceedings has committed an administrative offense referred to in the provisions of

Section 45a

paragraphs 1, 3 of Act No. 101/2000 Coll., by the fact that in connection with the publication of information

on wiretapping and recording of telecommunications traffic and information obtained from wiretapping

and a record of the telecommunications traffic carried out

and

published in the newspaper

and through intelligence

data specified in the decision in question.

portal

By doing so, according to the administrative body of the first instance, the party to the proceedings violated the obligation

stipulated in § 8c of Act No. 141/1961 Coll., on Criminal Procedure (Criminal Procedure Code), according to

which no one may disclose information without the consent of the person to whom such information relates

on ordering or interception and recording

telecommunications traffic according to

§ 88 of the Criminal Procedure Code or information obtained from it, data on telecommunications traffic

ascertained on the basis of an order pursuant to Section 88a of the Criminal Procedure Code, or information obtained by

surveillance

persons and things pursuant to Section 158d Paragraphs 2 and 3 of the Criminal Procedure Code, if they allow the

identification of this person

and if they have not been used as evidence in court proceedings. She was a participant for this administrative offense

fined CZK 240,000.

The party filed an appeal against this decision, which was a decision of the chairman

Office ref. UOOU-05185 / 14-20 of 26 September 2014 rejected.

The said decision of the President of the Office was subsequently challenged by a party in an administrative action, which

The Municipal Court in Prague (hereinafter referred to as the “Municipal Court”) in its judgment no.

of

Rejected on August 9, 2017.

However, the party to the proceedings filed a cassation appeal against this judgment of the Municipal Court

of 3 May 2018

on the basis of the Supreme Administrative Court in its judgment no.

annulled both the judgment of the Municipal Court in Prague of 9 August 2017, Ref.

so

Decision of the President of the Office Ref. UOOU-05185 / 14-20 of 26 September 2014 and returned the case to the Office

for further proceedings.

The Supreme Administrative Court justified its decision mainly by the fact that both the Office and the City Court

the court did not sufficiently classify the information contained in the articles with regard to the scope of publication

admissible within the meaning of Section 8d of the Criminal Procedure Code, which would in turn lead to a modification of the

scope

tortious conduct of a party to the proceedings.

The Supreme Administrative Court gave instructions for this modification in paragraph 42 of the relevant judgment, stating that

it is

in particular, it is necessary to protect the privacy of the persons covered by the surveillance ordered

so madam

Mr.

and Mrs.

against whom the content of the information was, according to the Supreme Administrative Court, even derogatory

(This is part of the content of the article specified by the Supreme Administrative Court under paragraph 39

letter (b) of its judgment).

The Supreme Administrative Court then sees a clear predominance of privacy over the public interest

for the article specified in point 39 (a) f) of his judgment, because in his opinion

it is a communication of private content.

On the whole, the Supreme Administrative Court concluded that “the dominance of the public cannot be denied

interest in publishing information where that information informs the public that

that the Prime Minister was relevantly influenced by a person in his decision-making,

that such conduct did not formally take place and that that person communicated with the staff

intelligence services in matters of their private interest to the Prime Minister. Completely

the publication of wiretaps and telecommunication traffic records was thus problematic and was

the scope of the information should be limited, but if this did not happen, it was up to the defendant and his

the President to classify this information and deal responsibly with the extent to which it was

disclosure of such information is permissible within the meaning of Section 8d of the Criminal Procedure Code. He should have

done the same

and the city court. The complainant can thus be substantially accused of making the wrong statement

legal assessment of the matter in the sense of § 103 par. 1 let. a) s. ř. s. "

Following the judgment of the Supreme Administrative Court in question, the appellate body issued

Office decision no. UOOU-05185 / 14-31 of 14 June 2018 laying down the decision

administrative body of the first instance ref. UOOU-05185 / 14-13 of 30 July 2014 repealed

and returned the matter for reconsideration.

in the diary

and through

. A fine was imposed on the party for this offense

On 18 July 2018, the administrative body of the first instance issued a decision no. UOOU-05185 / 14-

38, by which the party to the proceedings is found guilty of committing an offense pursuant to § 45a par. 1, 3

Act No. 101/2000 Coll., as he violated the ban on publishing personal data, both in the press and in public

accessible computer network. He did this by publishing the information obtained

from wiretapping and recording of telecommunication traffic performed

and

news portal

in the amount of CZK 180,000.

This decision was subsequently challenged by a party in due process.

The party to the proceedings in the appeal proposes to annul the contested decision and to stop the proceedings, if necessary

annul the decision and remit the case to the administrative authority of the first instance.

In support of its claim, the party alleges an error of law

things. He challenges the decision in full - ie in all his statements for its contradiction

with the law and inaccuracy.

The party further considers that the decision in question was issued in violation of the basic ones

principles of administrative punishment and general principles of criminal procedure

punishment, in particular the "ultima ratio". The party to the proceedings in this connection

stressed that none of the persons whose personal data had been disclosed contacted him

with any request for the protection of her right to privacy. From this fact

then the party infers the absence of social harm of its own

negotiations and therefore

non-fulfillment of the material side of the relevant administrative tort. The party further pointed out

to the fact that the administrative proceedings were not initiated on the initiative of any person concerned but on the initiative

of the then President of the Office, and it is apparent from the file kept in the present case that the Office

did not even contact these persons concerned.

The party to the proceedings also referred to the Constitutional Court's ruling in connection with the ultima ratio principle

sp. I. ÚS 4035/14, specifically its points 47 to 50, where to apply this principle Constitutional

the court expresses. The finding concerned a violation of the right to freedom of expression

The Broadcasting Council was

imposed in administrative proceedings

a fine of CZK 200,000 for non-compliance with Section 31, Paragraph 3 of Act No. 231/2001 Coll.,

on the operation of radio and television broadcasting and on the amendment of other laws, as biased

conceived report on

In paragraph 50 of the present Constitutional Judgment

The court states that “the application of correct criminal repression to protect the values that the entities concerned themselves and whose need for protection (due to the nature of the concern) does not go beyond their own interest concerned, is not necessary. In such a situation, there is no sanction to the complainant legitimate in the protection of the rights and freedoms of others under Article 17 (4) of the Charter. "

Furthermore, the party takes the view that information obtained from wiretapping and recording telecommunications traffic which are the subject of this administrative procedure have been published in accordance with the provisions of Section 8d of the Criminal Procedure Code, as their publication is justified by the public an interest which, in a particular case, outweighs the right to privacy of the persons concerned persons. In this context, the party also challenged the administrative proportionality test authority of first instance in the contested decision. Specifically for the test proportionality, as set out by the administrative authority of the first instance, the party contends that in relation to the statement of I. letter (a), (b) and (c) of the contested decision, that test was carried out

superficially, without stating which of the information is private. If This is information about , so this was published earlier, in an article in the newspaper on 15 June 2013. The administrative body of the first Thus, in the view of the party, it did not take into account the fact that this information was known to the public and their private character was thus considerably weakened.

On the statement of I. letter d) of the contested decision, the party to the proceedings then states that parts of the SMS messages are taken out of the context of the article. From its entire text, it is clear from the party 's view that the communication was not about private matters, but the exercise of influence and

to the Prime Minister of the Czech Republic to fill a high state position. The same arguments
then the party to the proceedings states to the statement of I. letter (e) of the contested decision.
To the person
the party stated that none
private information was not mentioned in the articles. The fact that she watched during working hours
colleagues is information the publication of which is in the public interest. He is also a party to the proceedings
Believes that in the case of the article referred to in the operative part I. (a) of the contested decision is
public interest in view of the abuse of intelligence services by a senior civil servant.
Finally, the party argued that the administrative authority of the first instance in determining the amount of the sanction
did not take into account the fact that the published information was already known to the public. As a circumstance
the increasing seriousness of the tortious conduct of the party to the proceedings was assessed by the administrative body of
the first instance
also the fact that personal data were disclosed by the conduct of a party to the proceedings
unlimited circle of people. However, in the opinion of the party to the proceedings, this was not the case
for which there was a circle of people who could
to identify, very narrow.
On the basis of the appeal lodged, the appellate body examined the contested decision in its entirety
scope, including the process that preceded its release, and reached the following conclusions.
In particular, the Appellate Body found that the party was repeating the arguments that had already been made
settled both in administrative proceedings and in court proceedings. This is especially true
on the application of the ultima ratio principle and the fact that the motion to initiate administrative proceedings did not arise
from persons whose privacy has been infringed according to the administrative authority of the first instance.
As regards the objection of non-application of the ultima ratio principle, namely the subsidiarity of criminal repression,
expressing the fact that only the most serious are to be the subject of criminal repression
unlawful acts, the administrative authority of the first instance applying this principle within the
did not contradict the proceedings in any way. However, it is necessary to take into account the fact that administrative law

punishes actions that are less socially harmful than criminal law.

Regarding the party's reference to paragraphs 47 to 50 of the Constitutional Court's judgment in file no. I. ÚS

4035/14 of 30 January 2018, in connection with the principle of ultima ratio appeal body

notes that the finding relates to a materially different case. The subject of the report

"Of 24 August 2012,

TV

was an information leaflet

broadcast on the show

(in the report called

handbook), which informed which clothes should be worn to the church and which they could

on the contrary, to provoke outrage and even nausea in the priests, with somewhat absurd

the concept of the brochure, as well as the presentation of its contents by a reporter who could (especially the faithful)

with name "

they are

information

telecommunications traffic acquired in

to the audience to sound like a mockery of the demand for decent and dignified clothing, which is at

visiting the church, according to general customs in our territory, suitable. It is quite obvious that

the content of the report by which

is downplaying the issue of the suitability of decent clothing

to the church, is not as serious in nature as the disclosure of wiretapping information

obtained by journalists from unspecified sources. Even with this fact, the Supreme has matured

of 3 May 2018 in the assessment

the administrative court in its judgment no.

the possibility of applying the principle of "ultima ratio" to a different opinion than the Constitutional Court in its judgment

sp. I. ÚS 4035/14 of 30 January 2018.

The party's argument that the administrative authority at first instance failed to take account of the fact that

that the information published was made known to the public, thereby weakening its private character,

the appellate body refers to the statement of the Supreme Administrative Court in paragraph 43 of the judgment

Ref.

".. the term" disclosure "is usually associated with each statement of information

to the public, while the possibility of a different interpretation cannot be traced from the text of the law. ”Opinion

the party to the proceedings on previous public knowledge of the information published by him

is not based on the truth, because the public could not have

information obtained from wiretaps

and from records

regime envisaged

in § 8c of the Criminal Procedure Code, before their publication. As stated in paragraph 30 above

of the judgment: “The Supreme Administrative Court considers it sufficiently proven that the complainant

published

information obtained from wiretaps and records

telecommunications traffic acquired in the regime provided for in Section 8c of the Criminal Procedure Code,

none of the persons concerned consented to the publication and it was not information

already used in court proceedings. The fact that these persons oppose it cannot be considered as consent

the publication of the information in any way. "

Objection of the party that due to the fact that the administrative proceedings were not initiated on the initiative

concerned and they did not even oppose the disclosure of the information, it can be concluded that his actions

lacked social harm, the appellate body in agreement with the administrative body of the first

degree and the Supreme Administrative Court refuses. As stated by the Supreme Administrative Court in its

judgment no.

on May 3, 2018, initiating administrative proceedings on suspicion

from a misdemeanor pursuant to Section 45a, Paragraph 1.3 of Act No. 101/2000 Coll. is not bound by the proposal of the person concerned,

the court explicitly states here: “Administrative tort according to § 45a par. 1 of the Personal Protection Act není “Arguments

submitted by a party to the proceedings is thus in conflict with the legal conclusion of the Supreme Administrative Court court and the appellate body cannot accept it.

The party 's objection that

the information has been published in accordance with the provision

§ 8d of the Criminal Procedure Code, as their publication justifies the public interest, the appellate body

that such a statement of the party to the proceedings is not in accordance with the opinion of the Supreme Administrative Court,

which in paragraph 30 of the judgment no.

stated that: “Prohibition imposed

in § 8c of the Criminal Procedure Code was violated and the information was published through the press

and publicly accessible computer networks. This fulfilled the formal features of the administrative offense according to

§ 45a paragraph 1 of the Personal Data Protection Act. However, this is not a tort, if it is

the conditions of § 8d of the Criminal Procedure Code are met, in this case the conditions of public interest

to disclose information if it outweighs the right to privacy of the person concerned, each

from them. This is where the proportionality between the right to information and the law takes place

to protect the privacy of those affected by the disclosure. ”As the Supreme Administrative Court further stated

"It certainly cannot be considered a mere public interest

in paragraph 41 of the judgment no.

interesting to the public, but it needs to be seen in a narrower sense - that information is

necessary for public life, that they are useful for shaping political views and for perceptions

and assessing the activities of government agencies, politicians or the public life of society

officials. "

In that regard, the party challenged the administrative proportionality test

first instance authority. The Supreme Administrative Court has explicitly identified some information

exclusively private, the publication of which does not outweigh the public interest. For such information

indicated by the Supreme Administrative Court in paragraph 42 of the judgment no.

and communication, Mrs.

. Due to the fact that

was not a public official, they are

naturally, the demands on the protection of her personal data are higher.

Following the decision of the Supreme Administrative Court, the administrative body carried out the first

degree re-proportionality test in relation to the information published in each

and came to the conclusion that, of the seven articles covered by the operative part of the

first instance body ref. UOOU-05185 / 14-13 of July 30, 2014, the predominance of privacy

cannot be inferred in two and only partially. The titles of these articles are listed in the third

paragraphs on page 7 of Decision no. UOOU-05185 / 14-38 of 18 July 2018. For these

articles, according to the first-instance administrative body, the public interest in publishing prevailed

information, as it largely demonstrates the impact it has had

the Prime Minister, his political decisions and the filling of politically important positions,

such as the chairman of the National Audit Office. For other individual articles it is not possible, according to

administrative authority of the first instance, to conclude that the public interest prevails over the right to protection

privacy of the persons to whom the information in the articles relates, as they are part of the text against them

disparaging persons.

The Supreme Administrative Court in paragraph 41 of its judgment no.

of 3 May 2018

explicitly states the following: “It is therefore not sufficient to state the names of all persons to whom the information is provided

and a summary of all the information with an exemplary list of the parts for which

in the opinion of the administrative body, the public interest does not prevail. ”The appellate body therefore does so

opinion that the administrative body of the first instance, which is in its decision-making under § 78 para. 5

Act No. 150/2002 Coll., the Code of Administrative Procedure, bound by the legal opinion of the Supreme Administrative

court expressed in its judgment, the above views of the Supreme Administrative Court

in its decision, it did not state sufficient reasons and its proportionality test did not meet

requirements laid down in the grounds of the judgment, in paragraphs 41 and 42. It is from those

For these reasons, the Appellate Body ruled as stated in the operative part of this decision. Appellate body

then dealt with the application of the proportionality test to the individual articles mentioned in the statement

of the contested decision and notes the following.

Regarding the statement of I. letter (a) of the contested decision, concerning the article entitled 'Nagy

triggers the Darwin action ", of 20 May 2014, the first instance administration stated that

contains information that concerns not only

and the then Prime Minister

but they also affect other people, specifically

. The text of part of this article is against these

sometimes disadvantageous to persons, therefore it is not possible to infer the predominance of the public interest over the law

to protect the privacy of these persons. The administrative body of the first instance therefore penalizes the participant

procedure for the publication of the whole article, without taking into account the fact that the actors of this

article

and "rapporteurs" in management positions

it is at least contentious, as the Supreme Administrative Court states in paragraph 42 of its judgment

and

,

Ref.

The article talks about the role of intelligence services, specifically

of 3 May 2018. The Appellate Body is of the opinion that in part where

and

the public interest outweighs the protection of the privacy of these persons. That fact should have happened

reflected not only in the reasoning of the administrative body of the first instance, but also in the amount of the sanction

imposed.

The administrative body of the first instance also did not point out at all that the party to the proceedings in

publishing wiretaps instead of objective ones

informing the public through

presentation of facts that

is worthy of a serious news newspaper that he should

respect the right to dignity and privacy of the persons concerned, which have been the subject of

illegal surveillance, chose the tabloid form, regardless of the impact on privacy

and the dignity of these persons.

Regarding the statement of I. letter (b) of the contested decision, which contains a transcript of part of the article

called "

"Of

May 21, 2014, which relates exclusively to communication

with her

stated administrative

authority of the first instance that the opinion of the party to the proceedings cannot be attributed to the overriding public

interest

in obtaining this information, as the person concerned in this case is not only

and monitored persons when interested in

protection of their privacy clearly prevails. This proportionality test also fails

requirements of the Supreme Administrative Court, which found that in the part of the article that concerns

just communication

describing the monitoring process

but also hers

with the leader

and

, the public interest can be found to be predominant as it concerns the surveillance of persons. Administrative authority

the first instance should therefore have taken this fact into account and stated in its decision-making process

in the reasons for its decision why and for which information on the entities concerned prevails

the right to privacy and for which, on the contrary, the public interest prevails. This reality

should then be reflected in the amount of the sanction.

Regarding the statement of I. letter (c) of the contested decision, which concerns part of the article of

May 21, 2014

,

only that part which significantly interferes with the privacy of others (

“, The administrative body of the first instance stated that, as in the statement of I. letter b) contains

,

). Therefore, he also evaluated the publication of this part of the article

administrative authority of the first instance as a breach of the prohibition on publication, to which it cannot be applied

exception under § 8d paragraph 1 of the Criminal Procedure Code. However, the Supreme Administrative Court contains the

content of this article

evaluated similarly to the content of the article mentioned in the statement I. letter. (b) a decision. Administrative

the first instance authority should therefore have acted in the same way and specifically in the statement of reasons

its decision as to why and for which information on the entities concerned the law prevails

for the protection of privacy and for which, on the contrary, the public interest prevails. In this context

the appellate body states that the person

, is sufficiently identifiable

by simply stating the job classification, it is irrelevant how large a range of people are

he could identify her. Due to the fact that in the opinion of the Supreme Administrative Court in part

of this Article, the public interest outweighs the private interest, as is the case

Article I (I) (b) of the operative part of the contested decision should be proportionate

the amount of the sanction is also reduced.

Regarding the statement of I. letter (d) and (e) of the contested decision, the administrative authority of first instance

stated that part of the SMS messages they had exchanged had been published

and

and whose character is entirely private. Disclosure of these

7/8

on

information was not necessary to illustrate the impact

as prime minister, and therefore occurred

political decisions

to invade the privacy of these two persons as well. Although they are persons of public interest, it is not

their right to privacy should also be denied here. However, the Supreme Administrative Court is in favor

interest in privacy only for point I (a). (d) the operative part of the contested decision, that is to say,

for an article entitled "

“Of 22 May 2014. For the statement of I. letter (e) of the contested decision concerning

", Dated

with the article "

May 22, 2014, in the opinion of the Supreme Administrative Court, the influence is more pronounced

political decisions

. Administrative body of the first

degree, the opinion of the Supreme Administrative Court respected, as on page 15 of its decision

(in the third paragraph above) stated that the preponderance of privacy could not be inferred from part of this article,

however, in the summary of the statement of reasons for statement I. (d) and (e) of the contested decision

the first instance body wrongly stated that the nature of the SMS was entirely private, as in the case

Article referred to in the operative part I. e) the decision is not true because the information was

only partially private.

In the light of the above, the Appellate Body is of the opinion that the sanction should

be reduced more significantly to match the proportionality as well as the level of intervention

privacy of the data subjects concerned after the necessary reassessment of the content

individual articles with regard to the application of the principle of proportionality. Sanction imposed

in the contested decision, it was, unlike in the main proceedings, an administrative authority of first instance

reduced by CZK 60,000, ie by 25%. However, this narrowing does not correspond to a proportional ratio,

because of the original seven articles, the administrative body of the first instance punished the party to the proceedings

for publishing four and a half articles.

As can be concluded, in the following proceedings, the administrative body of the first instance should

first re-perform the proportionality test as defined above, taking into account

at the request of the Supreme Administrative Court specified in paragraph 41 of the judgment no.

of 3 May 2018: 'The proportionality test must be carried out specifically by the administration

to all the persons concerned and to all the information. "and subsequently decide on the sanction.

Lessons learned:

Pursuant to the provisions of Section 91 (1) of the Act, this decision shall be challenged

No. 500/2004 Coll., Administrative Procedure Code, cannot be revoked.

Prague, October 19, 2018

For correctness of execution:

official stamp imprint

JUDr. Ivana Janů, v. R.

chairwoman