

# THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, on 26

June

2019

## DECISION

ZSPR. 440.1026.2018

Based on Article. 104 § 1 of the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2018, item 2096, as amended) and pursuant to Art. 160 sec. 1 and 2 of the Act of May 10, 2018 on the protection of personal data (Journal of Laws of 2018, item 1000, as amended), art. 18 sec. 1 of the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, as amended) and Art. 6 sec. 1 letter f) of 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 regulation on data protection) (Journal of Laws UE L 119 of 04.05.2016, p. 1 and Journal of Laws UE L 127 of 23.05.2018, p. 2), after conducting administrative proceedings regarding the complaint of Mr. RG, . in Cz., to Mr. K. Ch., running a business under the name of [...] with its registered office in O. at ul. concerning the refusal to disclose the IP address of a person who on [...] January 2017 at [...], using the pseudonym "[...]", posted an entry on the website www. [...] .pl with the following text: "(... ) ", President of the Personal Data Protection Office

orders Mr. K.Ch., running a business under the name of [...] based in O., to provide Mr. R.G., residing in in Cz. , personal data regarding the IP number of the user's computer, which on [...] January 2017 at [...] posted, using the pseudonym "[...]", a comment on the website www. [...] pl with the following content: "(...)"

### Justification

On May 23, 2018, the Office of the Inspector General for Personal Data Protection (currently the Office for Personal Data Protection) received a complaint from Mr. in Cz. (hereinafter referred to as: the "Complainant"), to Mr. K.Ch, running a business under the name of [...]. [...] on January 2017 at [...] using the pseudonym "[...]", she posted an entry on the website www. [...] .pl with the following text: "(...)".

In the content of his application, the complainant indicated that he is seeking an order for the data controller, i.e. the

Entrepreneur, to restore the legal state by providing personal data in the form of the full IP address of the person who, on January 28, 2017, at [...], using a pseudonym "[...]" was published on the pages of the portal www. [...]. PI in the abovementioned entry. The complainant emphasized that the author of the entry had committed defamation, accusing the complainant of conduct and properties that could humiliate him in the eyes of the public and risk losing the trust needed to hold the office [...]. For this reason, the applicant decided to file a private indictment and informed the Police about the suspicion of a crime committed by the author of the entry. For an effective filing of a private indictment, it is necessary to have an IP address, hence the Complainant requested that the IP address of the author of the entry in question, using the nickname "[...]", be made available.

In the course of the investigation conducted in this case, the President of the Personal Data Protection Office established the following facts:

1. By letter of [...] January 2017, the Complainant requested the Entrepreneur to provide the full IP address of the person using the nickname "[...]". The Entrepreneur refused to accept the application in a letter of [...] February 2017. In addition, in a letter of [...] April 2018, the Complainant called on the Entrepreneur to provide the full IP address of a person using the nickname "[...]", who provided the entry in question of [...] January 2017. On [...] May 2018, the entrepreneur refused to issue the IP address, without providing any justification for his decision.
2. The entrepreneur indicated that he refused to provide the IP address, stressing that the above-mentioned the comment of the person using the nickname "[...]" was not vulgar or offensive.
3. The applicant brought a private indictment against the person using the nickname "[...]" for the crime of defamation [Art. 212 of the Act of 6 June 1997 - Penal Code (Journal of Laws of 2018, 1600, ie; hereinafter: "the Penal Code")] to the District Court in [...]. The indictment was returned due to the lack of personal data of the perpetrator. The District Court in [...] upheld the position of the District Court. The complainant also submitted to the above-mentioned Court application for ordering the Police to take evidence to establish the first name, surname and correspondence address of the author of the comment. The court refused to issue such a decision.
4. The complainant indicated that he would provide the law enforcement authorities with the personal data of a person using the nickname "[...]" who had posted the questioned entry on the portal [...] pl.
5. The entrepreneur has informed that he has the IP address of the computer from which the cited entry was sent.

In this factual state, the President of the Personal Data Protection Office considered the following.

On the date of entry into force of the Act of May 10, 2018 on the protection of personal data (Journal of Laws 2018, item 1000, as amended), i.e. on May 25, 2018, the Office of the Inspector General for Personal Data Protection became the Data Protection Office Personal. Proceedings conducted by the Inspector General for Personal Data Protection, initiated and not completed before May 25, 2018, are conducted by the President of the Personal Data Protection Office, pursuant to the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, as amended) in accordance with the principles set out in the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2018, item 2096, as amended), hereinafter referred to as: Kpa. All activities undertaken by the Inspector General for Personal Data Protection before May 25, 2018 remain effective.

As of May 25, 2018, the provisions of 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 began to apply in the national legal order and repealing Directive 95/46 / EC (General Data Protection Regulation) (Journal of Laws UE L 119 of 04/05/2016, p. 1 and Journal of Laws UE L 127 of 23/05/2018, p. 2; hereinafter referred to as : "Regulation 2016/679"), the provisions of which regulate issues related to the processing of personal data of natural persons. From that date, the President of the Office is obliged to apply the provisions of Regulation 2016/679 to all administrative proceedings he conducts. When issuing a decision in a given case, the President of the Office takes into account the legal status in force at the time of issuing the decision. However, due to the fact that this case was received by the Personal Data Protection Office on May 23, 2018, i.e. before the entry into force of Regulation 2016/679, the provisions of Regulation 2016/679 should be procedural. Pursuant to Art. 18 sec. 1 point 2 of the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, as amended; hereinafter: "the Act") in the event of violation of the provisions on the protection of personal data, the Inspector General 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 the supplementation, update, correction, disclosure or non-disclosure of personal data.

Pursuant to Art. 6 sec. 1 lit. f of Regulation 2016/679, processing is lawful only in cases where the processing is necessary for the purposes of the legitimate interests pursued by the administrator or by a third party, except where these interests are overridden by interests or fundamental rights and the freedoms of the data subject requiring the protection of personal data, in

particular where the data subject is a child. As established by the President of the Personal Data Protection Office in the course of the administrative procedure, the Complainant has grounds to obtain data on the IP number of the user's computer using the nickname "[...]". In the present case, such a basis is the protection of the applicant's rights, including in particular his good name, which he intends to pursue before the court. The applicant acted in this case by bringing a private bill of indictment in the case of a crime under Art. 212 of the Penal Code

Pursuant to the wording of Art. 18 sec. 6 of the Act of 18 July 2002 on the provision of electronic services (Journal of Laws of 2019, item 123, i.e.), the service provider provides information on the data referred to in para. 1-5, to state authorities for the purposes of their proceedings. The above provision significantly shapes the obligation on the part of the service provider providing services by electronic means to disclose personal data of persons using these services to state authorities for the purposes of their proceedings. Thus, Art. 18 sec. 6 of the Act on the provision of electronic services is a legal provision referred to in art. 23 sec. 1 point 2 of the Act (currently Article 6 (1) (c) of Regulation 2016/679), directly imposing certain rights and obligations on certain entities in the field of personal data processing of recipients of services provided electronically. The authorities of the state referring to the purposes of the proceedings, are therefore entitled to obtain the personal data of persons using electronic services necessary for these purposes, and processed by entities providing these services - they have the condition that allows such processing, specified in Art. 23 sec. 1 point 2 of the Act (currently Article 6 (c) of Regulation 2016/679). The existence of the discussed Art. 18 sec. 6 of the Act on the provision of electronic services, however, does not in any way exclude the processing of personal data of users of services provided electronically in a situation where other conditions for the processing of such data specified in the provisions of the Act are met, independent and independent of the premises of Art. 23 sec. 1 point 2 of the Act (currently Art. 6 (c) of Regulation 2016/679 - e.g. the premise from Art. 23 sec. 1 point 5 of the Act (currently the equivalent of the above-mentioned condition is Article 6 (1) (f) of Regulation 2016/679).

Referring the above to the circumstances of the case under consideration, it should be noted that, in the opinion of the President of the Personal Data Protection Office, the Complainant's request for disclosure of the user's personal data with the nickname "[...]", including the number of his IP address, was legally justified in Art. 23 sec. 1 point 5 of the Act, and is currently justified in Art. 6 lit. f of the Regulation 2016/679, and as such should be taken into account by the Entrepreneur. The complainant justified the application with the intention to take legal action against the author of this entry and the necessity of the requested data from the point of view of the possibility of pursuing claims against this person in court for defamation.

Pursuant to Art. 212 § 1 of the Act of 6 June 1997 - Penal Code (Journal of Laws of 2018, 1600, i.e., hereinafter referred to as: "the Penal Code") who slanders another person, group of persons, institution, legal person or organizational unit without legal personality for such conduct or properties that may degrade it in public opinion or expose it to the loss of trust needed for a given position, profession or type of activity, shall be subject to a fine or the penalty of restriction of liberty. Pursuant to § 2 of the above-mentioned Art. 212 of the Penal Code, if the perpetrator commits the act specified in § 1 by means of mass communication, he or she is subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year. Moreover, the applicant had already taken legal steps aimed at realizing his rights - he had filed a motion with the [...] District Court to order the Police to perform evidentiary activities consisting in establishing the name, surname and address of the author of the entry in question. The District Court found that the applicant should, on his own, determine the personal data necessary to bring a private bill of indictment against the author of the comment. The complainant also made a statement that he would provide law enforcement authorities with the personal data of the author of the above-mentioned an entry posted on the pages of the website www. [...]. pl.

Individualizing the author of the questioned entry is a necessary condition for pursuing a private indictment against him.

According to Art. 332 § 2 point 1 of the Act of June 6, 1997 - Code of Criminal Procedure (Journal of Laws of 2018, item 1987, as amended; hereinafter: "CCP"): "The indictment should contain: 1) the name and surname of the accused, other data about him, data on the application of a preventive measure and property security ".

Referring to what the IP address is and whether it is personal data within the meaning of Regulation 2016/679, it should be stated that, in accordance with art. 4 pts 1 of Regulation 2016/679 "personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable natural person is a person who can be directly or indirectly identified, in particular on the basis of an identifier such as name and surname, identification number, location data, internet identifier or one or more specific physical, physiological, genetic, mental factors, the economic, cultural or social identity of a natural person.

Information that is associated with a specific person - even indirectly - carries a certain message about him. Therefore, information about a person is both information relating directly to him, and one that relates directly to objects or devices, but due to the possibility of linking these objects or devices with a specific person, it also indirectly constitutes information about himself. An IP address (Internet Protocol Address) is a unique number assigned to devices in computer networks. It is

therefore information about a computer and not a specific natural person, especially when it is possible to share one IP address by many users within a local network. Therefore, the IP address may not always be treated as personal data within the meaning of Regulation 2016/679. However, where the IP address is for a longer period of time or permanently assigned to a specific device, and the device is assigned to a specific user, it should be considered that it constitutes personal data, because it is information that allows the identification of a specific natural person [judgment of the Supreme Administrative Court of on May 19, 2011, file ref. no. I OSK 1079/10].

Considering the above, there is no doubt that the Complainant must have information identifying the person against whom he intends to bring a private bill of indictment. In a situation where the Complainant has essentially no information about the person who, using the username "[...]", posted on the website www. [...]. resulted from their publication (i.e. - apart from the date, time, content of the publication), which was used by this person to conceal his identity, it is reasonable to assume that the actions taken by the Complainant serve to establish the identity of that person in order to bring him / her to criminal liability in connection with the content of the publication and fall within the concept of a legally justified purpose. It is obvious that the acquisition (processing) of personal data in the above-mentioned purpose, in each case, will be considered by the data subject to be contrary to his or her interests. This circumstance - especially taking into account the legal guarantees of defense against the claims of the opposing party - does not, however, prove that its rights and freedoms have been violated. Adopting the opposite position would result in unjustified protection of those who may have unlawfully interfered with the sphere of legally protected interests of another person (especially those convinced of the anonymity guaranteed by the Internet) against possible liability for their actions.

In the opinion of the President of the Personal Data Protection Office, the Entrepreneur unjustifiably refused to provide the Complainant with the disclosure of the requested data regarding the IP number of the device with which the entry was made, despite the Complainant's repeated requests, thus preventing him from pursuing his rights before the court. To confirm the correctness of the position presented in this case, it is worth reiterating the judgment of the Provincial Administrative Court in Warsaw of February 3, 2010 (file reference number II SA / Wa 1598/09), in which in particular the quotation was indicated: "(.. .) the right to free, anonymous expression cannot protect people who infringe the rights of others from responsibility for the words they say. Nobody is and cannot be anonymous on the web. Although it may be difficult to determine the identity of a given person, due to the fact that every computer leaves a trace on the Internet - the IP address by means of which the

computer from which the alert was made can be determined, it makes it possible to indirectly establish the identity of the person who made the alert (...) a participant in the proceedings has information about the login date, nicknames of persons performing this activity and the content of entries. In the opinion of the Court, the above information, combined with the IP numbers, make it possible to unequivocally identify the persons who violated the personal rights of the participant in the proceedings. (...) the IP addresses requested by the participant in the proceedings constitute personal data in this case within the meaning of Art. 6 sec. 1 of the Act on the Protection of Personal Data, and ordering them to be made available constitutes the implementation of the instructions of para. 2 of this provision, i.e. it will enable the identification of a person or persons whose identity can be indirectly determined. (...) the IP address of the computer itself is not enough to indicate the person who used it, but in combination with other information it allows to assume that its identity can be established. In the opinion of the Court, the identification of this person does not have to be associated with excessive costs, time or activities (...).

Moreover, the Supreme Administrative Court in the judgment of 21 August 2013 emphasized that "(...) the person committing these violations must be aware that he cannot abuse his rights by violating the rights of others. This has nothing to do with restricting the principle of freedom of speech. The freedom to express one's views is related to taking responsibility for those views. Anyone who speaks in public, apart from the Internet, is aware of the possible consequences of statements that violate the fundamental, statutorily protected rights of others. However, it is unjustified to say that someone speaking anonymously, in a way that violates the interests of other entities, is to be subject to special protection and that his personal data is a good that the legislator intended to protect in the first place".

It should be noted that it is not the publisher of the Internet journal, such as the Entrepreneur, or the personal data protection authority that assesses whether the entry in question was defamatory. The assessment in this respect is made by the competent court, and the complainant has the right to benefit from protection before the court, if he feels defamed.

The circumstances of the case suggest that disclosure to the Complainant of the personal data of a person using the nickname "[...]" is necessary in order to refer a bill of indictment to a private court pursuant to Art. 212 of the Penal Code. For this purpose, the Complainant undertook a number of activities, including asking the Entrepreneur to disclose his personal data. persons who, however, failed to meet the applicant's demands.

To sum up, the President of the Personal Data Protection Office is of the opinion that the Entrepreneur unjustifiably refused to provide the Complainant with the IP number of the author of the entry with the nickname "[...]", thus preventing the

Complainant from taking further actions that would allow for the effective initiation of court proceedings against that person - effective referral to the District Court in [...] of a private bill of indictment.

Pursuant to Art. 18 sec. 1 point 2 of the Act, in the event of violation of the provisions on the protection of personal data, the President of the Personal Data Protection Office ex officio or at the request of the person concerned, by way of an administrative decision, orders the disclosure of the requested personal data. Taking into account the circumstances of the case, the President of the Personal Data Protection Office is authorized to order the Entrepreneur to disclose to the Complainant the personal data of the authors of the questioned entries to the extent to which the entity has these data - i.e. information about the IP number of the device from which the person with the nickname "[...]" sent the questioned comment. 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 file an application for reconsideration of the case within 14 days from the date of its delivery to the party. The party has the right to waive the right to request a retrial. The waiver of the right to submit an application for reconsideration makes the decision final and binding. 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 Office (address: ul. Stawki 2, 00-193 Warsaw). The entry fee for the complaint is PLN 200. The party has the right to apply for the right to assistance, including exemption from court costs.

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