THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, on 30

April

2020

DECISION

ZKE.440.13.2019

Based on Article. 104 § 1 of the Act of June 14, 1960, Code of Administrative Procedure (Journal of Laws of 2020, item 256) in connection with Art. 160 sec. 1 and 2 of the Act of May 10, 2018 on the Protection of Personal Data (Journal of Laws of 2019, item 1781), 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. 5 sec. 1 lit. a) and art. 6 sec. 1 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 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 from LB's complaint, for the processing of his personal data by P. Sp. z o.o., the President of the Personal Data Protection Office

orders P. Sp. z o.o. restoration of lawfulness by removing from the website [...] personal data of Mr. L. B. in the scope of his name and surname, function performed by him, place of residence and signature.

Justification

The Inspector General for Personal Data Protection (currently the President of the Personal Data Protection Office) received a complaint from Mr. L. B. (hereinafter referred to as the "Complainant") about the processing by the company P. Sp. z o.o. (hereinafter referred to as the "Company") of his personal data, without his consent, on the website [...]. The complainant attached to the complaint a copy of his letter addressed to [...] March 2014 to the Company, containing a request to remove his personal data from this portal, and a copy of the Editor-in-Chief of the letter [...], in which he informs the complainant that the quotation: " it is not known to us that we process your data in the log […] ". In his complaint addressed to the Inspector General for Personal Data Protection, the Complainant asked for "causing the deletion" of his personal data processed on the website [...].

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.

The company is the owner of an internet portal with the address […] and the publisher of a daily newspaper (press title) […] operating within that portal (subdomain with the address […]). This title was registered - in accordance with the Act of January 26, 1984 - Press Law (Journal of Laws of 2018, item 1914), hereinafter referred to as the "Press Law" - by the District Court in Gdańsk, Reg. No. Pr. […]. The journal is available free of charge only in electronic form on the website […].

One of the sections of the […] portal is the discussion forum ([…]) where registered users of the portal can discuss […]. A person registering on the portal is required to provide at least the following data about himself: identifier, e-mail address and name and surname. The truthfulness of the data provided is confirmed by the person registering by accepting the appropriate statement. From the data provided, the Company only verifies the e-mail address by sending a message with a link to the address provided, through which the registration process in the portal is finalized.

Entries in the discussion forum of the […] portal are moderated on request; each registered user of the portal may submit the questioned entry for removal. The company assesses the legitimacy of the notification and may refuse to remove the entry, informing the applicant about it, or may delete the entry informing the author and submitting the removal request about it. The company does not receive the entry from its author and does not accept its content before the author publishes it on the discussion forum.

As part of discussions conducted by users of the discussion forum of the portal [...], the Complainant's personal data was published in the form of his name and surname along with the indication - in some cases - of his function of the Border Veterinarian in B. It was established that the data had been used (and remain publicly available as of the date of this decision) in:

User post with nick [...] from [...] October 2012, published in the discussion thread [...],

User post with nick [...] from [...] November 2012, published in the discussion thread [...],

post by the user with the nickname [...] from [...] in March 2013, published in the discussion thread titled [...]

User post with nick [...] from [...] March 2013, published in the discussion thread [...],

User post with nick [...] from [...] April 2013, published in the discussion thread titled [...]

User post with nick [...] from [...] February 2014, published in the discussion thread entitled [...],

User post with nick [...] from [...] January 2015, published in the discussion thread [...],

User post with nick [...] from [...] March 2015, published in the discussion thread [...],

User post with nick [...] from [...] July 2015, posted in the discussion thread [...].

It was also established that to two posts of [...] May 2014 (from 4.15 pm and 4.34 pm), published in the discussion thread entitled [...], a user with the nickname [...] had attached photocopies of two of the complainant's letters to the Inspector General For the Protection of Personal Data, with a legible signature of the complainant and the place of residence of the complainant. Both posts are currently also publicly available on the portal's discussion forum.

By letter of [...] March 2014, the Complainant asked the Company to remove his personal data from the "internet portal [...] ([...]), informing at the same time that his personal data was processed on this portal without his consent. .

In a letter of [...] March 2014, the Editor-in-Chief of the daily [...] (at the same time the President of the Management Board of the Company) informed the Complainant that: "we are not aware that we process your personal data in the journal [...]" "We do not know what data and from where we would delete it".

In the opinion of the Company - expressed in the explanations of the Editor-in-Chief of the daily [...] (at the same time the President of the Management Board of the Company) submitted in the course of the inspection carried out in the Company on [...] September 2015 (reference number of the inspection [...]) - entries posted on the discussion forum of the portal [...], including entries about the Complainant, are letters to the editor, and therefore constitute press material within the meaning of the Press Law. As such - due to the fact that they do not significantly infringe the rights and freedoms of the Complainant - they are not subject to the provisions 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 hereinafter "uodo 1997 ”(pursuant to the wording of Article 3a section 2 thereof).

Currently, the Complainant is not acting as the Border Veterinary Officer in B. Due to the merger of the Border Veterinary Inspectorate in B. with the Border Veterinary Inspectorate in G., on [...] January 2018, Border Veterinarian in G.

After reviewing the entirety of the evidence collected in the case, the President of the Office for Personal Data Protection considered 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 effective date of this Act, are conducted by the President of the Personal Data Protection Office on the basis of u.o.d.o. 1997, in accordance with the principles set out in the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2020, item 256), hereinafter referred to as "the Code of Administrative Procedure". At the same time, pursuant to Art. 160 sec. 3 u.o.d.o. 2018, actions 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).

At the time of the occurrence of the circumstances constituting the subject of the complaint in this case, the 1997. Its articles 2 to 5 define the material, personal and territorial scope of its application. From the general principle of applying its provisions to all personal data processing processes carried out by natural and legal persons, public bodies and entities as well as any other entities having their seat or place of residence in the territory of the Republic of Poland or in a third country, as long as they process personal data using technical means located on the territory of the Republic of Poland, provided for a number of exceptions and limitations, of which the exclusion provided for press journalistic activity was significant for the assessment of

the facts in the present case. Art. 3a sec. 2 u.o.d.o. 1997 stated: “The Act, with the exception of the provisions of Art. 14-19 and art. 36 sec. 1, also does not apply to press journalistic activity within the meaning of the Act of 26 January 1984 - Press Law ", which meant that with regard to the processing of personal data as part of press journalistic activity, inter alia, regulations on the rules for the processing of personal data (Chapter 3 u.o.d.o. 1997), the rights of data subjects (Chapter 4 u.o.d.o. 1997), including the right to request the deletion of their personal data. The exclusion also included the regulations concerning the competences of the Inspector General for Personal Data Protection to adjudicate on violations of the rights of persons whose data were processed in connection with the activities of the broadly understood press and in order to perform its tasks and role in society. Due to the specific nature of this activity, the protection of the rights of people affected by press activity was based on the provisions of the Press Law.

The Regulation 2016/679 currently in force in the field of personal data protection gave the Member States of the European Union the right to adopt national provisions to reconcile the conflicting right to the protection of personal data (defined and protected by the provisions of this regulation) with the freedom of expression and information, including the processing of personal data for journalistic purposes (Article 85 (1) of Regulation 2016/679). In order to implement this power, the European Union Member States were granted the powers, as set out in Art. 85 sec. 2 of Regulation 2016/679, the right to define in its legislation derogations or exceptions from the provisions of Regulation 2016/679 regarding: data processing rules (Chapter II), the rights of the data subject (Chapter III), obligations of the controller and the processor (Chapter IV ), the transfer of personal data to third countries or international organizations (Chapter V), independent supervisory authorities (Chapter VI), cooperation and consistency (Chapter VII) and specific situations related to data processing (Chapter IX).

When exercising the above powers, the national legislator, in Art. 2 clause 1 u.o.d.o. 2018, excluded the application of a number of provisions of Regulation 2016/679, including the rules for the processing of personal data (in particular the principles of lawfulness of processing - Article 5 (1) (a) - and the conditions of admissibility of data processing related to this principle - Article 6) and the provisions on the rights of the data subject (including . the right to request the deletion of your data, i.e. the "right to be forgotten" - Article 17), to "activities consisting in editing, preparing, creating or publishing press materials within the meaning of the Act of January 26, 1984 - Press Law (...) ".

In the present case, the essential circumstance requiring a decision is to determine whether, in the current legal status (as at the date of this decision), the personal data of the Complainant are processed by the Company as part of the activities

consisting in editing, preparing, creating or publishing press materials within the meaning of the Press Law, which would exclude - under Art. 2 clause 1 u.o.d.o. 2018 - application of the provisions of Regulation 2016/679 in the present case and the possibility of the President of the Personal Data Protection Office granting legal protection requested by the Complainant. In the opinion of the Company, the entries posted on the discussion forum of the [...] portal, including those concerning the Complainant, are letters to the editor and therefore constitute press material within the meaning of the Press Law.

In the opinion of the President of the Personal Data Protection Office, entries on the discussion forum of the [...] portal, even if they are considered to be letters to the editor, do not constitute press material within the meaning of the Press Law.

The press material is - pursuant to Art. 7 sec. 2 point 4 of the Press Law - any text or image published or submitted for publication in the press of an informative, journalistic, documentary or other nature, regardless of the means of communication, type, form, purpose or authorship.

As indicated by the Supreme Court in the judgment of 28 September 2000, issued in the case V KKN 171/98 (OSNKW 2001 / 3-4 / 31, LEX No. 45463), "in the light of the Press Law, letters to the editor constitute press material provided that that they were sent to the editorial office for publication. The editor-in-chief is responsible for publishing press materials. Therefore, the publication of a letter to the editor must be preceded by the required art. 12 sec. 1 of the Press Law, especially careful and reliable checking of the information contained in the letter to the editor ". It should be emphasized in the above thesis the necessity to first submit the material to the editorial office of the press title in order to read it and verify it (which is not so much the right as the obligation of the editorial office). Such a procedure is necessary if the editorial office or publisher is to take full responsibility for the published letter or for other material coming from a person who is not a member of the editorial office. As established in the present case, the verification of the materials posted on the […] portal's discussion forum was only subsequent (it concerned already published entries) and fragmentary (it was a reaction to user reports on specific contested entries).

As rightly pointed out in a similar (although considered under civil law) situation, the Court of Appeal in Warsaw in its judgment of October 11, 2012 in case no. VI A Ca 2/12 (LEX 1281135), “it is necessary (...) to distinguish between two online services provided by the defendant: the provision of information free of charge in the form of an electronic journal (...). and the service of free access to a discussion portal (...). The Internet discussion portal is characterized by universal availability and the possibility for network users to post their own opinions or information, without the prior consent of the editor or publisher of the

online journal (...), and without the prior consent of the website administrator. This is due to the specific nature of such a communicator as the Internet. This lack of any influence on the part of the editorial office on the very possibility of publishing comments, not to mention any prior verification of them, means that such free statements of Internet users cannot be treated as press material. In particular, these are not, as the claimant claimed, the letters to the editor of a daily published in electronic form. (...) The users of the internet portal (...) do not send the editorial office of the journal (...) their opinions and comments for publication on the discussion forum on that website, but they decide about such publication. The editor-in-chief of the journal published in the above form cannot therefore be held responsible for publications made by third parties, the publication of which or the content of which he had no influence on ". In the present case, the separation of the service of providing the electronic journal […] with the service of providing users with a discussion forum, as mentioned above, is further strengthened by its placement on a dedicated subdomain of the portal ([…] - e-mail address registered for this press title). The discussion forum ([…]) functions within the main domain of the portal […].

Summarizing the above considerations, it should be stated that the entries on the discussion forum of the portal [...] containing the complainant's personal data do not constitute press material in the light of the definition contained in Art. 7 sec. 2 point 4 of the Press Law. Therefore, the exclusion of the application of the provisions of Regulation 2016/679 referred to in art. 2 clause 1 u.o.d.o. 2018. The Complainant's complaint requires consideration under the provisions of Regulation 2016/679, including, in particular, the determination of the legality (existence of a legal basis) for the processing of the Complainant's personal data by the Company. At the same time, the assessment of the legality of the processing of the complainant's personal data by the Company should be made in accordance with the factual and legal status existing on the date of issuing the decision. As the Supreme Administrative Court stated in the judgment in the case no. Act I OSK 761/07, "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 lawful manner".

In the current legal situation, the processing of personal data, including their sharing, is lawful when the data controller has one of the conditions listed in art. 6 sec. 1 of the Regulation 2016/679. These conditions apply to all forms of data processing listed in art. 4 point 2 of the Regulation 2016/679, including their sharing. These conditions are equal to each other, which means that for the legality of the data processing process, it is sufficient to meet one of them. Pursuant to the aforementioned provision, "processing is lawful only in cases where - and to the extent that - at least one of the following conditions is met:

a) the data subject has consented to the processing of his personal data for one or more specific purposes;

b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

c) processing is necessary to fulfill the legal obligation incumbent on the controller;

d) processing is necessary to protect the vital interests of the data subject or of another natural person;

e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

f) 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 the interests or fundamental rights and freedoms of the data subject, which require protection of personal data, in particular, when the data subject is a child. "

The company did not indicate any premises legalizing the processing of the complainant's personal data by it, nor on the basis of the legal act in force before May 25, 2018. 1997, or on the basis of the Regulation 2016/679 in force after that date. This is a consequence of her (erroneous, as has been shown above) position that the entries on the internet forum containing the complainant's personal data are press material published as part of her press journalistic activity, and as such are not subject to regulations on the protection of personal data.

Referring to the above-mentioned provision of Art. 6 sec. 1 of Regulation 2016/679 to the factual state of the case, it should be stated that it is obvious and undisputed that the Company does not have the grounds specified in point (a). a) -d) of this provision (the Complainant does not have the consent of the Complainant to process his data, the processing is not necessary to perform or conclude a contract, it is not necessary to fulfill the legal obligation incumbent on the Company and is not necessary to protect the vital interests of the Complainant or another person physical).

In the opinion of the President of the Personal Data Protection Office, the processing of the Complainant's personal data by the Company is also not a processing necessary to perform a task carried out in the public interest (Article 6 (1) (e) of Regulation 2016/679. Such a task could be considered as formulated in Art. 1 of the Press Law, the functions and goals of the press consisting in "the implementation of the citizens' right to their reliable information, transparency in public life as well as social control and criticism". However, in order to consider the activities of the Company considered in this case as acting in the public interest, it would have to meet the requirements of the Press Law guaranteeing the proper performance of this task, in

particular the rigors relating to the requirement of special diligence and diligence in collecting and using press materials referred to in Art. . 12 sec. 1 point 1 of the Press Law, the requirement to verify the text submitted for publication, which - pursuant to Art. art. 7 sec. 2 point 4 of the Press Law - the condition for recognizing this text as press material, as well as the liability of the editorial office and publisher of the press title for infringement of the law caused by the publication of the press material, provided for in Art. 38 of the Press Law. In the present case, as it has been shown above, these rigors have not been observed by the Company, therefore the activities of the Company, under which the Complainant's personal data are processed, cannot be considered as the performance of a task carried out in the public interest.

Among the premises legalizing the processing of personal data, listed in art. 6 of Regulation 2016/679, the Company could possibly see a legal basis for the processing of the Complainant's personal data in the last premise, specified in art. 6 sec. 1 letter f) of Regulation 2016/679, that is, in its legitimate interest, which could be running a business consisting in issuing an electronic journal [...] and running an internet portal [...] providing its users, inter alia, the service of providing a discussion platform free of charge. However, it should be emphasized that this premise is not absolute, as it is constructed on the basis of the weighing of interests. "It requires the legitimate interest of the data controller (or a third party) to be placed on one scale, and the fundamental rights and freedoms of the data subject, which require protection, on the other. If the result of this weighing of interests indicates that the data subject's rights that require protection should be considered prevailing, then the controller should not base data processing on the legal basis discussed here "(P. Fajgielski, Commentary to Art. 6 [in:] edited by P. Fajgielski, General Data Protection Regulation. Personal Data Protection Act. Comment. Wolters Kluwer Polska, 2018). In the opinion of the President of the Personal Data Protection Office, it is difficult not to recognize the supremacy of the right of a natural person (not currently performing a public function) to protect their personal data, which is a tool for implementing the constitutional right to protection of private life, honor and good name (Article 47 of the Constitution of the Republic of Poland). Polska of April 2, 1997 (Journal of Laws of 1997, No. 78, item 483), over the economic interest of the Company. In addition, it should be noted that the processing of the Complainant's personal data (who is not currently performing a public function) in the posts of users of the discussion forum from 8-5 years ago (and thus having practically only archival value) is not necessary to achieve the purposes related to the functioning of the journal [...] and the portal internet […]. And only the "necessity" referred to in Art. 6 sec. 1 letter f) of Regulation 2016/679, i.e. the condition on which the implementation of the Company's interests depends, authorizes to refer to this premise legalizing the processing of personal data. In the opinion of

the President of the Personal Data Protection Office, the legitimate interest of the Company would not be prejudiced in any way as a result of ceasing to process the Complainant's personal data.

Summing up, it should be stated that - in the opinion of the President of the Personal Data Protection Office - the Company does not have any of the items indicated in Art. 6 sec. 1 letter f) of Regulation 2016/679, the grounds for processing the complainant's personal data. Thus, the processing of these data by publishing them on the portal [...] (in particular on the discussion forum of this portal) constitutes a breach of Art. 5 sec. 1 lit. a) (principles of lawfulness of processing) in connection with art. 6 (containing a closed catalog of premises legalizing the processing of personal data) of Regulation 2016/679.

Pursuant to Art. 18 sec. 1 point 6 u.o.d.o. 1997, in the event of a breach of the provisions on the protection of personal data, the President of the Personal Data Protection Office, acting ex officio or at the request of the person concerned, is obliged to order, by way of an administrative decision, the restoration of lawful condition by deleting personal data processed without a legal basis.

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 Civil Procedure of the decision, the party has the right to submit an application for reconsideration of the case within 14 days from the date of its delivery to the party. If a party does not want to exercise the right to submit an application for reconsideration, he has the right to bring - through the President of the Office for Personal Data Protection (address: ul. Stawki 2, 00-193 Warsaw) - a complaint against the decision to the Provincial Administrative Court in Warsaw within 30 days from the date of its delivery to the party. 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, counteracting and combating COVID-19, other infectious diseases and crisis situations caused by them (Journal of Laws of 2020, item 374), the course of the above-mentioned the appointments will not currently start; they 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.

2021-02-03