THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, on 30

of December

2019

DECISION

ZKE.440.15.2019

Based on Article. 105 § 1 of the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2018, item 2096, as amended) 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) in connection with joke. 12 point 2, art. 22 of the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, as amended) and Art. 57 sec. 1 lit. a) and h) 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 (general regulation on data protection) (Journal of Laws UE L 119 of 4 May 2016, p. 1 and Journal of processing by R. Sp. z o.o. personal data of the minor A. S., President of the Personal Data Protection Office

discontinues the proceedings

Justification

The Office of the Inspector General for Personal Data Protection (currently: the Office for Personal Data Protection) received a complaint from Mr. K. S. (hereinafter also: the Complainant) about the processing by R. Sp. z o.o. (hereinafter also referred to as the "Company" or R.) personal data of minor A. S. consisting in rectifying her personal data in the field of date of birth.

In connection with the above, the Complainant requested:

1. Correction of personal data of minor A. S. with regard to her date of birth.

2. If it is found that the child's personal data are no longer processed by the Company due to the card's expiry date, they will be made available (processed) again in order to continue participation in the program […].

3. The amendment to § 5 sec. 2 lit. g) the rules of the program [...], according to which the update of the child's personal data with regard to his date of birth could take place only within 7 days from the date of registration of the participant in the program, which, according to the Complainant, limited the right to rectify the data referred to in Art. 32 sec. 1 point 6 of the Act of August

29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, as amended), hereinafter also: the Personal Data Protection Act of 1997.

The President of the Personal Data Protection Office, after conducting explanatory proceedings in this case, established the following facts:

1. In R. there are rules of the loyalty program [...], which are addressed to parents or legal guardians of children aged 0-3 years and to people awaiting the birth of their child.

2. The program participant […] accepting the regulations is bound by its provisions, which are used to verify whether a given person meets the participation conditions. One of the conditions is the status of a parent or legal guardian of children from 1 day of age to 36 months of age or of the expected birth of a child. The status is verified on the basis of the date of birth of the child provided by the participant or the planned date of birth, because people who expect the birth of a child can also join the program.

3. The date of expiry of the participant's card is determined on the basis of the date of birth of the child declared in the […] registration process. In the case of the Complainant, joining the scheme took place on [...] March 2012. For approximately 24 months, the Complainant exercised his rights, but at the end of February 2014, he noticed that he had entered the child's date of birth wrongly in the registration system, and instead of the month of December, the system entered the system of the month of March (the date and year of birth were correct).

4. Due to the fact that the date of birth affects the period of participation in the program, the Complainant contacted the Company with a request to correct the child's date of birth incorrectly entered in the IT system. The company, however, did not accept the complainant's request, referring to the provisions of the program [...], which did not provide for the possibility of changing the date of birth after 7 days from the date of registration in the system, which the complainant knew about by accepting these regulations before introducing both his and his child to the system personal data.

5. By letter of [...] September 2019, the Company informed the President of the Personal Data Protection Office that it is currently not processing the personal data of the Complainant and the minor A. S. because participation in the program was terminated, which resulted in the automatic expiry of the privileges assigned to the card. Therefore, the fulfillment of the complainant's demands regarding the rectification by R. of the data concerning the date of birth of minor A. S. was redundant as early as [...] September 2014.

6. Currently, the regulations of the loyalty program […] provide the possibility for the program participant to change the child's date of birth (and the adequately planned date of birth) previously entered into the IT system of the program. Pursuant to § 3 sec. 3 of the Regulations, the organizer stipulates that in order to ensure the safe operation of the program and prevent abuse, updating the child's personal data with regard to his date of birth after 7 days from the date of registration or the participant's change of status in the program may take place after the participant sends the application in this regard . The application should be sent via the contact form on the website [...].

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 Act of May 10, 2018 on the Protection of Personal Data (Journal of Laws of 2019, item 1781) entered into force, hereinafter also referred to as the "Act on the Protection of Personal Data of 2018. ".

Pursuant to Art. 160 sec. 1-3 of the Act on the Protection of Personal Data of 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 also referred to as the "Personal Data Protection Act of 1997", in accordance with the principles set out in the Code of Administrative Procedure. At the same time, the activities performed in the proceedings initiated and not completed before the date of entry into force of the provisions of the Act on the Protection of Personal Data of 2018 remain effective.

From May 25, 2018, Regulation 2016/679 also applies. Taking into account the above, it should be stated that the present proceedings, initiated and not completed before May 25, 2018, are conducted on the basis of the Personal Data Protection Act of 1997 (with regard to the provisions governing the administrative procedure) and on the basis of Regulation 2016/679 (to the extent decisive about the legality of the processing of personal data).

The President of the Personal Data Protection Office is the competent authority for the protection of personal data and the supervisory authority within the meaning of Regulation 2016/679 (Article 34 (1) and (2) of the Act on the Protection of Personal Data of 2018). The President of the Personal Data Protection Office conducts proceedings regarding infringement of the provisions on the protection of personal data (Article 60 of the Personal Data Protection Act of 2018), and in matters not covered by the Personal Data Protection Act of 2018, administrative proceedings before the President of the Personal Data

Protection Office, in particular, the provisions of the Code of Administrative Procedure (Article 7 (1) of the Act on the Protection of Personal Data of 2018) regulated in Chapter 7 of the Act - proceedings on infringement of provisions on the protection of personal data. Pursuant to Art. 57 sec. 1 of Regulation 2016/679, without prejudice to other tasks set out under this Regulation, each supervisory authority on its territory monitors and enforces the application of this Regulation (point a) and conducts investigations on the application of this Regulation, including on the basis of information received from other supervisory authority or other public authority (point h). The instruments for the implementation of the tasks provided for in Art. 57 sec. 1 of Regulation 2016/679 are in particular specified in art. 58 sec. 2 of Regulation 2016/679, corrective powers, including the possibility of: issuing warnings to the administrator or processor regarding the possibility of violating the provisions of this Regulation through planned processing operations (point a), issuing reminders to the administrator or processor in the event of a breach of the provisions of this Regulation by processing operations (point b), order the controller or processor to adapt the processing operation to the provisions of this Regulation, and, where applicable, an indication of the method and deadline (point d).

The fact that, as at the date of this decision, there are no irregularities in the processing of personal data by the Company, about which the Complainant informed and on the basis of which the President of the Office for Personal Data Protection initiated proceedings in this case, is of decisive importance from the point of view of its decisions. In this situation, the present proceedings are subject to obligatory discontinuation pursuant to Art. 105 § 1 of the Code of Administrative Procedure - in view of its redundancy. In accordance with the above-mentioned a provision, when the proceedings for any reason have become redundant, the public administration authority issues a decision to discontinue the proceedings. The wording of the above-mentioned regulation leaves no doubt that in the event that the procedure is deemed groundless, the authority conducting the procedure will obligatorily discontinue it. At the same time, the literature on the subject indicates that the pointlessness of the administrative procedure, as provided for in Art. 105 § 1 of the Code of Administrative Proceedings means that there is no element of the material legal relationship, and therefore it is not possible to issue a decision settling the matter by resolving its essence (B. Adamiak, J. Borkowski "Code of Administrative Procedure. Comment" 7th edition Publisher CH Beck, Warsaw 2005, p. 485). The literature and jurisprudence also emphasize the following quotation: "(...) The irrelevance of the proceedings may be (...) the result of a change in the facts of the case. The proceedings must be considered redundant as a result of the cessation of the facts to be regulated by the administrative authority by way of a decision (...) "(see: MP

Przybysz" Code of Administrative Procedure. Updated Comment "Published: LEX / el. 2019 and the judgment of the Supreme Administrative Court cited therein of September 29, 1987, file reference: IV SA 220/87, published: ONSA of 1987, No. 2, item 67).

An important attribute of the administrative decision is the so-called double specificity, meaning that the decision specifies the consequences of applying a legal norm in an individual case of a specific addressee (party) (cf. Wróbel Andrzej, Jaśkowska Małgorzata, Wilbrandt-Gotowicz Martyna "Updated commentary of the Code of Administrative Procedure" LEX / el. 2018 - commentary, legal status: December 13, 2018, other editions (25)). Changes in the factual or legal status of the case that took place after the initiation of the proceedings must be taken into account when adjudicating the case - otherwise, this decision would be grossly contrary to the principle of substantive truth (see above in W. Siedlecki, Civil Procedure, 1972, p. 371). Consequently, as it is emphasized in the literature on the subject, the public administration body assesses the facts of the case according to the moment of issuing the administrative decision. The above rule also applies to the assessment of the legal status of the case, therefore the public administration authority issues an administrative decision based on the provisions of law in force at the time of its issuance (see above). Also the Supreme Administrative Court in Warsaw, in its judgment of October 4, 2000, file ref. act: V SA 283/00) underlined that the quotation: “(…) It should be pointed out (…) the need to apply the norms of substantive law in force on the date of the decision. It should be clearly emphasized that the provisions of the Code of Administrative Procedure do not bind the date of initiation of the proceedings on the factual and legal grounds for examining the case. The decisive factor in this respect is the state in force on the date of the decision (see B. Adamiak, Commentary, Warsaw 1998, p. 363) (...) ”.

Taking into account the comments made so far, it should be noted that the impulse to initiate the procedure in the case in question was the complaint brought by Mr. K. S. about possible irregularities in the processing of personal data made by the Company. The proceedings initiated in this connection served to verify the truthfulness of the above-mentioned reports and eliminating the deficiencies in the area of personal data processing - if it is confirmed that they actually take place as of the date of the decision. In other words, the confirmation of the alleged irregularities would constitute the basis for the President of the Personal Data Protection Office to assess them in law and use - in order to eliminate them - the legal instruments of a remedial nature provided for in Art. 58 sec. 2 of the Regulation 2016/679. Meanwhile, bearing in mind that the irregularity in the processing of personal data by the Company notified to the President of the Personal Data Protection Office does not take

place as of the date of the decision, there are no grounds for their legal assessment, in the context of the possible use of the instruments provided for in Art. 58 sec. 2 of the Regulation 2016/679 - i.e. instruments to eliminate them.

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

Based on Article. 127 § 3 of the Code of Administrative Procedure, the party has the right to submit an application for reconsideration of the case within 14 days from the date of delivery of the decision to the party. If a party does not want to exercise the right to submit an application for reconsideration of the case, he has the right to lodge a complaint against the decision with the Provincial Administrative Court in Warsaw within 30 days from the date of its delivery to the party. The complaint is lodged through the President of the Personal Data Protection Office (address: ul. Stawki 2, 00-193 Warsaw). The fee for the complaint is PLN 200. The party has the right to apply for the right to assistance, including exemption from court costs.

2021-02-19