

THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, on 16

October

2019

DECISION

ZKE.440.76.2019

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 10 May 2018 on the protection of personal data (Journal of Laws of 2018, item 1000, as amended) in connection with joke. 18 and art. 33 paragraph 1 of the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, as amended) and with Art. 12 in connection with joke. 15 of the Regulation of the European Parliament and of the EU Council 2016/679 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 (Journal of Laws UE L 119 of 04/05/2016, p. 1) and Journal of Laws UE L 127 of 23/05/2018, p. 1, as amended), after conducting administrative proceedings regarding the complaint of Mr. DK, about the failure to fulfill the information obligation towards him by A. Sp. z o.o., President of the Personal Data Protection Office:

orders A. Sp. z o.o., fulfillment of the information obligation towards Mr. D. K. by providing him in writing with information about:

- the content of his personal data
- the purpose, scope and method of processing his personal data
- the source from which its data comes
- the method of sharing his data, in particular information about the recipients or categories of recipients to whom the data is made available.

JUSTIFICATION

The Office of the Inspector General for Personal Data Protection (currently the Office for Personal Data Protection) received a complaint from Mr. D. K., (hereinafter also referred to as the Complainant), about the processing of his personal data by A. Sp. z o.o., hereinafter also referred to as the Company.

Mr. DK indicated that the Company did not in any way refer to the cessation of processing his data for marketing purposes, nor

did he provide him with information about what data is contained in the set, how the data was collected, for what purpose and scope the data is processed and to what extent and to whom the data has been made available ". In the wording of the request addressed to the President of the Office, the complainant indicated that due to the failure by the Company to reply to the responses submitted by him pursuant to Art. 33 paragraph 1 of the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, as amended), requests for:

taking actions aimed at removing irregularities in the processing of his personal data,
punishing the Company under Art. 54 above the law.

Based on the evidence gathered in the case at hand, the following facts were established.

1. As indicated by the Company in a letter of [...] September 2017, the object of its activity is the provision of services, inter alia, via the [...] website. Thanks to the above-mentioned On the website, the customer can order products (meals) in two ways. The customer may place an order through a registered account on the website (after completing the registration form and activating the account) or without the need to register (after completing the order form). The condition for placing an order in both cases is accepting the regulations, ie [...]. The complainant placed the order on [...] March 2017 without registering on the website (he did not create a user account). The scope of the Complainant's personal data obtained during the ordering process was specified in the order form and included: name and surname, e-mail address, telephone number, delivery address. The purpose of processing the Complainant's personal data was to provide the service consisting in the implementation of the order for the delivery of food placed via the above-mentioned service. The source of the obtained personal data of the Complainant was himself, because as a user of the Internet platform [...] he provided his data to the extent necessary to provide the service by electronic means.

2. As indicated by the Complainant in the complaint - [...] July 2017, the Company sent unsolicited commercial information to his private mobile phone number within the meaning of the Act of 18 July 2002 on the provision of electronic services (Journal of Laws 2019, item 123). as amended). In reply, the Complainant, on the same day, objected to the processing of his personal data for marketing purposes and a request for information pursuant to Art. 33 paragraph 1 of the Personal Data Protection Act. In the request, he requested the following information: "what data is contained in the set, how the data was collected, for what purpose and scope the data are processed and to what extent and to whom the data was made available". The Company did not provide the Complainant with a reply to the above-mentioned conclusions. On [...] July 2017, as a result of repeated receipt

of unsolicited commercial information from the Company, the Complainant repeated the request indicated in the e-mail of [...] July 2017. In response, the Company on [...] July 2017 informed the Complainant that "the marketing message has been sent to the telephone number assigned to the account on which the consent to send marketing information is marked". As a result of the repeated request made by Mr. D. K. to stop processing personal data for marketing purposes and to provide information pursuant to art. 33, the Company [...] on August 2017 sent another e-mail to the Complainant, in which it informed him that: "(...) in the system, two other persons are assigned to the telephone number indicated by you. These people have consented to receive marketing messages. We can reserve this number, but we need verification that the number indicated by you belongs to you. Could we have such information from you? ". From that moment on, the Company stopped sending unsolicited commercial information to the complainant's telephone number. Nevertheless, due to the lack of response of the Company to the notified under Art. 33 paragraph 1 of the Act of August 29, 1997 on the Protection of Personal Data, the request, on [...] August 2017, Mr. D. K. submitted to the President of the Personal Data Protection Office a complaint about the processing of his personal data by A. Sp. z o.o., in which he applied for:

taking actions aimed at removing irregularities in the processing of his personal data,
punishing the Company under Art. 54 above the law.

3. The Company, in a letter of [...] September 2017, explained that the Complainant filed an objection on [...] July 2017 and [...] July 2017 to the processing of personal data for marketing purposes, together with a request for information pursuant to Art. 33 paragraph 1 of the Data Protection Act. The company undertook verification activities to verify the issues raised by the Complainant - on [...] July 2017 it informed the Complainant that the marketing message was sent to the telephone number assigned to the user's account, which indicated consent to the processing of personal data in marketing purposes, and on [...] August 2017, it informed that two other users were assigned to the telephone number indicated by him, therefore the Complainant had to provide additional information in order to verify him as the owner of the telephone number. In the explanations, the Company indicated that on [...] August 2017 it deleted the data of Mr. DK obtained during the ordering process and stated that his data is currently being processed in order to "(...) consider objections, requests and reply to the complainant. Inspector General for Personal Data Protection ", currently the President of the Office for Personal Data Protection," (...) in connection with the submitted complaint ". As indicated by the Company - the Complainant's data in the following scope: name and surname, address, telephone number, e-mail address are processed in the file "R.", and the source

of their acquisition is the Complainant himself, because he objected to the Company against the processing of his data personal data for marketing purposes together with a request for information pursuant to art. 33 paragraph 1 of the Act of August 29, 1997 on the Protection of Personal Data.

After reviewing the entirety of the evidence collected in the case, the President of the Office for Personal Data Protection considered the following.

At the outset, it should be noted that on May 25, 2018, with the entry into force of the Act of May 10, 2018 on the protection of personal data (Journal of Laws of 2018, item 1000, as amended), the Office The Inspector General for Personal Data Protection has become the Office for Personal Data Protection. 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 rules set out in the Code of Administrative Procedure (Journal of Laws of 2017, item 1257, as amended), hereinafter referred to as the Code of Administrative Procedure. All actions taken by the Inspector General for Personal Data Protection before May 25, 2018 remain effective (Article 160 (1) and (2) of the Act of May 10, 2018 on the protection of personal data).

At the time when the event described by the Complainant took place, the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, amended), hereinafter also referred to as the Act, was in force. Above the act defined the rules of conduct in the processing of personal data and the rights of natural persons whose data is or may be processed in data files (Article 2 (1) of the Act). The provision of fundamental importance for the assessment of the legality of the processing of personal data was Art. 23 of the Act.

Pursuant to Art. 33 paragraph 1 of the Act, at the request of the data subject, the data controller was obliged, within 30 days, to inform about his / her rights and to provide, regarding his personal data, the information referred to in art. 32 sec. 1 points 1 - 5a of the Act, and in particular provide in an intelligible form: what personal data was contained in the set, how the data was collected, for what purpose and scope the data was processed, to what extent and to whom the data was made available. The commented provision was related to Art. 32 of the Act, which provided that the data subject could request the data controller to provide him with certain information. In accordance with paragraph 1 of this provision, each person had the right to control the processing of data concerning him, contained in data files, in particular the right to: obtain exhaustive information whether such

a set exists, and to determine the data controller, the address of his seat and full name, and if the data controller is a natural person - his place of residence and first and last name (point 1), obtain information about the purpose, scope and method of processing data contained in such a set (point 2), obtain information from when the data is processed in the set concerning it, and providing in an intelligible form the content of these data (point 3), obtaining information about the source from which the data concerning it originate, unless the data controller is obliged to maintain state, professional or professional secrecy in this respect (point 4), obtain information on how to share data, in particular information about recipients or categories of recipients, which These data are made available (point 5), to obtain information about the premises for taking the decision referred to in art. 26a paragraph. 2 (point 5a) of the Act.

There is no doubt that in the case at hand, the Complainant submitted to the Company a request that meets the requirements of the application under Art. 33 of the Act. In the course of the proceedings, the collected evidence showed that the Company did not fulfill the information obligation towards the Complainant. The e-mails sent to the Complainant on [...] July 2017 and on [...] August 2017 did not contain the replies' what data is contained in the data set, how the data was collected, for what purpose and to what extent the data is processed and to what extent and to whom the data has been made available ”.

In the case in question - with regard to the Complainant's complaint about the Company's failure to provide information - it should be noted at the outset that although the Complainant applied for compliance with the information obligation in 2017, i.e. based on the provisions of the Act, the public administration authority issues an administrative decision on on the basis of legal provisions in force at the time of its issuance, i.e. after May 25, 2018 pursuant to 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 free movement of such data and repealing Directive 95/46 / EC (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, as amended), hereinafter referred to as hereinafter GDPR. Currently, it should be stated that the fulfillment of the information obligation at the request of the data subject is reflected in Art. 15 sec. 1 GDPR. This provision provides that the data subject is entitled to obtain from the controller confirmation as to whether personal data concerning him or her are being processed, and if so, to obtain access to it.

In the first place, for the correct interpretation of the provisions relating to the above-mentioned obligation, Recital 63 of the GDPR Preamble is of major importance, which states that "Every natural person should have the right to access the collected data concerning him and should be able to easily exercise this right at reasonable intervals, so that be aware of the processing

and be able to verify the lawfulness of the processing (...)”.

Art. 15 sec. 1 GDPR aims to provide persons whose personal data are processed with access to information about the circumstances of their processing. Correct and reliable fulfillment of this obligation by the data controller is necessary to ensure that the data subject controls the correctness of the processing of personal data. Submitting the application, depending on its content, obliges the data controller to provide full information about the data processing process in the scope not narrower than provided for by the provision of Art. 15 GDPR. This provision specifies the minimum information that the data controller must provide to the applicant, but it is important that the information requested by the Complainant under this provision refers to his / her person and corresponds to the definition of personal data defined in the GDPR.

At the same time, it should be noted that pursuant to Art. 12 GDPR, the controller shall take appropriate measures to provide the data subject with all the information referred to in Art. 13 and 14, and conduct any communication with her pursuant to Art. 15-22 and 34 on processing. Information shall be provided in writing or otherwise, including, where appropriate, by electronic means. If the data subject so requests, the information may be provided orally, provided the identity of the data subject is confirmed by other means.

The information obligation provided for in Art. 33 of the Act was aimed at providing persons whose personal data are processed with access to information about the circumstances of their processing. Correct and reliable fulfillment of this obligation by the data controller was necessary to ensure that the data subject can control the correctness of the processing of personal data. As pointed out by the Supreme Administrative Court in the judgment of 30 July 2009 (file reference number I OSK 1049/08): "There should be no doubt that failure to comply with this [information obligation specified in Art. 33 of the Act] is a breach of the provisions of this Act [on the protection of personal data] within the meaning of Art. 18, entitling and obliging the Inspector General for Personal Data Protection to issue an administrative decision on ordering the restoration to legal status, i.e. in the situation specified in Art. 33 paragraph 1 and 2 of this Act - in the matter of ordering the administrator of personal data to fulfill the information obligation referred to in this article”.

On the other hand, referring to the applicant's application for the application of criminal sanctions provided for in Art. 54 of the Act, it should be noted that a party to an administrative procedure may request the President of the Personal Data Protection Office to issue an administrative decision only, and not a notification of a crime, which the President of the Personal Data Protection Office decides ex officio on the need to submit it. The above position of the President of the Personal Data

Protection Office was confirmed by the Supreme Administrative Court, which in its judgment of November 21, 2002 (file no. II SA 1682/01) stated that "in the light of the Act, violation of its provisions becomes a source of administrative liability leading to in fact, only to the obligation to restore legal status (Article 18) and criminal liability (Articles 19, 49-54). However, only the first type of responsibility is exercised in the form of an administrative decision. " The Supreme Administrative Court also stated that "if the results of the control activities indicate that the action or omission of the head of an organizational unit, its employee or another natural person being the data controller bears the features of a crime, GIODO is obliged to submit a notification of the crime to the body appointed to prosecute crimes. (...). However, it does not do this, as in the case of Art. 18 by way of an administrative decision, but by way of an application, which is the exercise of its competence in this case. This is indicated both by the explicit definition of the form of the decision in Art. 18 of the Act, and the lack of this definition in Art. 19, as well as the essence and importance of the administrative decision. It imposes on the party certain rights or obligations or refuses to grant them. Meanwhile, an application to the prosecutor's office with information about a suspected crime is not of this nature. As a rule, it cannot be settled in the form of a decision. " Also in the judgment of November 19, 2001 (file no. II SA 2702/00), the Supreme Administrative Court in Warsaw indicated that "a person seeking protection of his cases under the above-mentioned Act on the Protection of Personal Data is not the subject of proceedings calculated on issuing a decision to notify a relevant authority about an offense in the scope of personal data processing and may not be demanded by GIODO in the administrative and legal forms of this procedure. (...) GIODO may act only on the basis and in the forms provided for by the Act. The manner of settling the matter on the merits is regulated by the above-mentioned Art. 18 of the Act, granting GIODO the power to order the administrator in breach of law to restore the lawful state. "

The company indicated that the complainant's personal data are currently processed as part of the "R." and were obtained from the Complainant on [...] July 2017. Since the Complainant filed an application pursuant to Art. 33 of the Act, the Company, as the data controller, should provide him with information on the processing of his data, which it has not done in this case to date. Currently, the violation of the provisions on the protection of personal data by the Company still exists, therefore it is justified to issue an order under Art. 18 sec. 1 point 1 of the Act.

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 entry fee for the complaint is PLN 200.00. The party has the right to apply for the right to assistance, including exemption from court costs.

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