

# THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, 05

June

2020

## DECISION

ZKE.440.52.2019

Based on Article. 104 § 1 of the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2020, item 256), 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) in connection with art. 12 point 2 and art. 22 of the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, as amended) in connection with Art. 6 sec. 1 lit. c) and lit. f) and art. 57 sec. 1 lit. a) and lit. f) 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 regarding the complaint of Mr. MW, against the processing of his personal data by ASA, the President of the Office Personal Data Protection refuses to accept the request.

## JUSTIFICATION

The President of the Personal Data Protection Office (formerly: the Inspector General for Personal Data Protection) received a complaint from Mr. M. W., hereinafter referred to as "the Complainant", about the processing of his personal data by A. S.A., hereinafter referred to as: "the Bank".

In the content of the complaint, the Complainant indicated that the Bank, with which the above-mentioned bank is bound by an account maintenance agreement [...], fulfilling its obligations under the Act of 9 October 2015 on the performance of the Agreement between the Government of the Republic of Poland and the Government of the United States of America on improvement of compliance with international tax obligations and implementation of FATCA legislation, called on the Complainant to complete a written declaration by indicating: what is the main country of the Complainant's tax residence (item 1), whether he has tax resident status also in other countries (item 2) and whether he has the status of the United States taxpayer (point 3 of the statement). The complainant questioned the legitimacy of obtaining by the Bank the information

requested in points 1 and 2 of the said statement. As indicated by the Complainant, despite the complaint submitted by him, the Bank did not provide him with information on the legal basis legalizing the actions described in the complaint.

In connection with the allegations, the Complainant requested the President of the Personal Data Protection Office to investigate the legality of the processing of his personal data by the Bank, in particular as regards the Bank's obtaining information about the Complainant's tax residence other than in the Republic of Poland or the United States of America.

In order to establish the circumstances relevant to the resolution of this case, the President of the Office for Personal Data Protection initiated administrative proceedings. On the basis of the evidence collected in the case, he established the following facts:

The Bank obtained the Complainant's personal data on [...] August 2015 in connection with the conclusion of the account agreement [...] number [...], and also concluded on the same date for the maintenance contracts:

an account [...] kept in the currency of [...];

an account [...] kept in the currency of [...];

debit card [...] number [...], assigned to the account [...] number [...] (the card was activated on [...] August 2015).

The legal basis for obtaining and processing the Complainant's personal data by the Bank was art. 23 sec. 1 point 3 of the Act of August 29, 1997 on the protection of personal data, because the data was collected in order to take the necessary actions related to the conclusion and service of the above-mentioned contracts.

The scope of the complainant's personal data processed by the Bank included: name, surname, PESEL number, date of birth, country of birth, place of birth, series and number of ID card, citizenship, marital status, registered address, address of residence, correspondence address, country of residence, foreign exchange status , mobile phone number, mother's maiden name and parents' names.

In connection with the entry into force of the provisions of the Act of October 9, 2015 on the implementation of the Agreement between the Government of the Republic of Poland and the Government of the United States of America on the improvement of compliance with international tax obligations and implementation of the FATCA legislation, hereinafter also referred to as: the "FATCA Act", the Bank requested to the Complainant with a request to complete a written declaration by answering three questions: what is the main country of tax residence of the Complainant (point 1), is he also tax resident in other countries (point 2) and whether he has the status of a US taxpayer ( point 3).

The complainant questioned the legality of the Bank's activities in obtaining data on the main country of tax residence and the status of tax resident in countries other than the Republic of Poland or the United States of America, and therefore submitted a complaint to the Bank's Branch, in which he requested the legal basis for collecting by the Bank above personal data.

By letters of [...] June 2016 and [...] June 2016, the Bank informed the Complainant that: "in order to ensure the correctness of determining the tax residence of its Clients, it aims to collect complete information on all its Clients and allows all Clients to submit Statements. The bank is obliged to correctly fulfill its payment and reporting obligations under the provisions of the Personal Income Tax Act. The above regulations also impose on the Bank the need to clearly establish the tax residence of all its clients. "

The complainant, due to the lack of - in his opinion - exhaustive explanations from the Bank, withdrew from submitting the questioned declaration and terminated on [...] October 2016 all agreements between him and the Bank.

In written explanations of [...] January 2017, submitted to the President of the Personal Data Protection Office, the Bank stated that the questions about the main country of residence and tax residencies in other countries were included in the disputed form in order to fulfill the obligation under the Act of July 26, 1991 on personal income tax. As the Bank explained (quoted), "the obligation to correctly identify the tax residence of the Bank's customers is indicated in particular by Art. 3 sec. 2a, art. 30a paragraph. 2 together with Art. 42 (2) of the above-mentioned the law. The bank is obliged to correctly fulfill the payer's obligations and reporting obligations under the provisions of the above-mentioned PIT Act. These provisions impose on the Bank the need to clearly establish the tax residence of customers. " At the same time, the Bank emphasized that it had previously processed the Complainant's personal data concerning tax residence, collected in connection with the Bank's obligation to prepare annual personal information for non-residents on the income obtained and tax collected (IFT), which information is forwarded to the tax office. Additional questions included in the declaration form, concerning the Complainant's tax residence, were complementary to the question concerning FATCA and were used to verify the data already held by the Bank in its files.

Currently, due to the termination by the Complainant of all contracts binding him, the Bank processes his personal data in the following areas: first name, middle name, surname, PESEL number, date of birth, country of birth, place of birth, ID series and number, validity date of the ID card, parents' names, mother's family name, registered address, residential address, correspondence address, mobile phone number, e-mail address, country of residence and citizenship. The legal basis for their

processing is Art. 6 sec. 1 lit. c) 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 EU L 119 of 04/05/2016, p. 1 and EU Official Journal L 127 of 23/05/2018, p. 2), hereinafter: "Regulation 2016/679", as the Bank stores the above-mentioned personal data in order to fulfill its legal obligation referred to in art. 74 sec. 2 points 4 of the Accounting Act of September 29, 1994, ie for archiving purposes - for a minimum period of 5 years from the end of the calendar year in which the complainant's bank accounts were closed. Moreover, the Bank processes the Complainant's personal data pursuant to Art. 6 sec. 1 lit. f) Regulation 2016/679, for purposes resulting from the Bank's legitimate interests, i.e. to protect against possible claims of the Complainant - including claims submitted in proceedings conducted by the President of the Office for Personal Data Protection.

In this factual state, the President of the Personal Data Protection Office (hereinafter also referred to as the "President of the Personal Data Protection Office") weighed as follows.

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), hereinafter referred to as "u.o.d.o.", entered into force.

Pursuant to Art. 160 sec. 1-3 of the Personal Data Protection Act, 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 U. of 2016, item 922, as amended), hereinafter also referred to as the "1997 Act", in accordance with the principles set out in the Act of June 14, 1960, Code of Administrative Procedure (Journal of Laws of 2020, item 256). At the same time, the activities performed in the proceedings initiated and not completed before the effective date of the provisions of the Act on From May 25, 2018, 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, and repealing Directive 95 / 46 / WE (EU Official Journal L 119 of 04.05.2016, p. 1 as amended and EU Official Journal L 127 of 23.05.2018, p. 2), hereinafter referred to as "Regulation 2016/679".

Pursuant to Art. 57 sec. 1 of Regulation 2016/679, without prejudice to other tasks specified under it, each supervisory authority on its territory monitors and enforces the application of this regulation (letter a) and considers complaints brought by the data subject or by an authorized by him - in accordance with Art. 80 by Regulation 2016/679 - the entity, organization or

association, to the extent appropriate, conducts proceedings on these complaints and informs the complainant about the progress and results of these proceedings within a reasonable time (point f).

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 Act of August 29, 1997 on the protection of personal data (with regard to the provisions governing the administrative procedure) and on the basis of the Regulation 2016/679 (in the scope determining the legality of the processing of personal data). The manner of conducting proceedings in cases initiated and pending before the date of entry into force of new regulations on the protection of personal data, resulting from the provisions of law, correlates with the well-established position of the doctrine, according to which “a public administration body assesses the actual state of the case according to the date 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., EI / 2012).

At the same time, however, it should be pointed out that the allegations raised by the Complainant regarding the Bank's obtaining data on the Complainant's tax residence directly refer to the Bank's activities undertaken during the period of the application of the Act of August 29, 1997 on the protection of personal data, hence the analysis of the processing of the Complainant's personal data by the Bank cannot be performed in complete isolation from the regulation contained in the above-mentioned legal act.

In view of the above, the President of the Personal Data Office indicates that in the light of the provisions of Regulation 2016/679, the processing of personal data is lawful when any of the conditions listed in art. 6 sec. 1 of the Regulation 2016/679 (equivalent to Article 23 (1) of the 1997 Act in force until 25 May 2018), i.e. when:

the data subject has consented to the processing of his personal data for one or more specific purposes (analogous to Article 23 (1) (1) of the Act of 1997);

processing is necessary for the performance of a contract to which the data subject is party, or to take action at the request of the data subject prior to concluding the contract (analogous to Article 23 (1) (3) of the Act 1997);

processing is necessary to fulfill the legal obligation incumbent on the controller (similarly in Art. 23 (1) (2) of the Act 1997);

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

processing is necessary for the performance of a task carried out in the public interest or as part of the exercise of public authority entrusted to the controller (by analogy in Article 23 (1) (4) of the Act 1997) or finally;

processing is necessary for the purposes of the legitimate interests pursued by the controller 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 (by analogy in Article 23 (1) (5) of the Act 1997).

These conditions apply to all forms of data processing and are equal to each other, which means that for the legality of the data processing process, it is sufficient to meet one of them.

Referring the above to the facts established in the case, it should be noted that the Bank obtained the Complainant's personal data on [...] August 2015 in connection with the conclusion of the account agreement [...] number [...] and the contracts for maintaining an account concluded with the Complainant [...] In the currency of [...], account [...] in currency [...] and debit card [...] number [...] (assigned to account [...] number [...]). The premise legalizing the collection and processing of the Complainant's personal data by the Bank was then Art. 23 sec. 1 point 3 of the 1997 Act, because the Bank has collected data in order to take the necessary actions related to the conclusion and servicing of the above-mentioned contracts. Importantly, in order to use A. S.A.'s banking products, the Complainant provided the Bank with information on its foreign exchange status [...], country of residence [...] and citizenship [...]. These data were entered by the Bank's employees into an individual "Customer Card" assigned to the Complainant. As is clear from the collected evidence, at this stage of cooperation with the Bank, the Complainant did not question the legitimacy of obtaining by the financial institution the above-mentioned personal data.

Turning to the merits of the present case, which is the Bank's attempt to obtain information about the main country of tax residence of the Complainant and the possible status of tax resident in countries other than the Republic of Poland or the United States of America, it should be clarified that the Bank - contrary to the complainant's allegations - was entitled by virtue of the right to process such information. In certain cases (e.g. when paying capitalized interest on amounts accumulated in bank accounts), the Bank acts as a flat-rate income tax payer and therefore has specific reporting obligations.

Pursuant to Art. 30a paragraph. 1 point 3 of the Act of July 26, 1991 on personal income tax, hereinafter referred to as:

"u.p.d.o.f.", the bank acts as a payer of 19% flat-rate income tax on interest charged on cash accumulated in bank accounts and paid to individuals. As a tax payer, the bank is obliged, inter alia, to prepare and send to the taxpayer and the tax office,

with the help of which the head of the tax office competent according to the place of residence of the taxpayer performs his tasks, personal information on the amount of income earned by the taxpayer - and therefore the Bank's customer - (Article 42 (2) of the Act on GDPR). However, in order to properly calculate the amount of the income earned, on which the advance income tax should be collected, the Bank is required to properly determine the country of tax residence of its client in advance. A tax residence, also known as a tax domicile, is nothing more than a permanent place specified by law to fulfill financial obligations. The essence of tax residence is to determine who and to what extent is taxed in a given country. Determining tax residence is therefore important as it determines the group of the bank's customers who are taxable in the territory of the Republic of Poland and indicates which of their income is subject to domestic tax liability.

According to Art. 3 sec. 1 u.p.d.o.f., natural persons residing in the territory of the Republic of Poland are subject to tax on all their income regardless of the location of the sources of income, and therefore regardless of the country in which the income was obtained (it is the so-called unlimited tax liability). At the same time, a person residing in the territory of the Republic of Poland is a natural person who: has a center of personal or economic interests on the territory of the Republic of Poland or stays in the territory of the Republic of Poland for more than 183 days in a tax year (Article 3 (1a) of the updof ). However, according to the wording of Art. 3 sec. 2 u.p.d.o.f., natural persons who do not have a place of residence in the territory of the Republic of Poland are subject to tax liability only on income generated in the territory of the Republic of Poland (it is the so-called limited tax obligation).

Importantly, in the case of natural persons residing for tax purposes in countries other than the Republic of Poland, the bank takes into account the provisions of international agreements on the avoidance of double taxation concluded by Polish authorities with the countries of tax residence of such persons. The application of tax exemptions or lower tax rates, resulting from the relevant agreements on the avoidance of double taxation, it is possible to exclude, however, on the condition of presenting a tax residence certificate, i.e. a certificate issued by the tax administration of the country of tax residence, confirming the place of residence for tax purposes in this country (Article 30a (2) of the updof).

Transferring the above legal considerations to the present case, the President of the Personal Data Protection Office took the position that the Bank was not only entitled but also obliged to obtain data on the Complainant's tax residence. The above was necessary in order to fulfill the payment and reporting obligations incumbent on the Bank, as the payer of the flat-rate personal income tax, calculated on the interest income earned by the Complainant on funds accumulated in his bank account. As is

clear from the facts established in the case, the Complainant had in the Bank, inter alia, bill [...]. However, pursuant to the provisions of the Regulations applicable to the Complainant [...] (constituting Appendix No. [...] to the Bank's written explanations of [...] January 2017), "in the case of accounts [...] (...), the funds collected bear interest from the date of payment to the account by the day preceding the date of their collection, and the interest due is added in accordance with the provisions of the Interest Rate Table ". The above leaves no doubt as to the fact that the Bank was obliged under the agreement binding it with the Complainant to charge and pay interest on the amounts accumulated in the Complainant's account. Due to the above, the Bank was also bound by the above-described obligations towards both the Complainant and the tax administration authorities. Moreover, it should be noted that the Complainant also used other products offered by the Bank, including an account [...] in the currency of [...]. As it follows from the above, the Complainant was interested in cash turnover in a foreign currency, which could have led the Bank to believe that he had the status of tax resident in countries other than the Republic of Poland, and thus justify the intention to update the information on the applicant's foreign exchange status. In the opinion of the President of the Personal Data Protection Office, the Bank had both factual and legal grounds to demand from the Complainant the information requested in the questioned form. The only action of the Bank that should be criticized is the failure to provide the Complainant with clear and complete information on the specific provisions of the law which were the basis for the Bank's request to fill in the disputed form. The Bank provided exhaustive explanations in the above scope only in the proceedings conducted by the President of the Personal Data Protection Office, initiated by the Complainant's complaint. The above is inconsistent with the Complainant's right to control the processing of his personal data, which was established on the date of the complaint under Art. 32 sec. 1 of the Act 1997. However, as the Complainant did not submit a request for an administrative decision ordering the data controller to fulfill his obligation to provide information, there is no basis in the present proceedings to issue such a decision.

Finally, it should be noted that the Bank did not obtain the disputed data, as the Complainant terminated all agreements between him and the Bank at the end of 2016. Due to the termination of contracts and the closure of bank accounts, the Bank is currently processing the Complainant's personal data pursuant to Art. 6 sec. 1 lit. c) Regulation 2016/679, in order to fulfill its legal obligation referred to in art. 74 sec. 2 points 4 of the Accounting Act of September 29, 1994, i.e. for archiving purposes - for a minimum period of 5 years from the end of the calendar year in which bank accounts were closed. Moreover, the legal basis for the processing of the above-mentioned data constitutes Art. 6 sec. 1 lit. f) of Regulation 2016/679, because the Bank



stores information about the Complainant for purposes arising from the Bank's legitimate interests, i.e. to protect against possible claims of the Complainant, including claims submitted in the proceedings conducted by the President of the Office for Personal Data Protection.

In conclusion, in the opinion of the President of the Personal Data Protection Office, there are no grounds to conclude that the Complainant's personal data was obtained unlawfully by the Bank beyond the scope prescribed by law, and therefore there was no prerequisite in the case for issuing a decision ordering the restoration to legal status. .

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

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. 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 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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