OFFICE FOR PERSONAL DATA PROTECTION

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* UOOUX00E5ATP *

Ref. UOOU-00169 / 20-13

DECISION

Chairwoman of the Office for Personal Data Protection as the appellate body competent pursuant to § 10

and § 152 para. 2 of Act No. 500/2004 Coll., the Administrative Procedure Code, decided pursuant to the provisions of § 152

para. 6

letter b) of Act No. 500/2004 Coll., Administrative Procedure Code, as follows:

Appeal filed by XXXXXX against the resolution of the Office for Personal Data Protection ref.

UOOU-00169 / 20-7 of 3 March 2020, is rejected and the contested resolution is upheld.

Justification

Definition of things

[1] Resolution of the Office for Personal Data Protection (hereinafter referred to as the "Office") no. UOOU-00169 / 20-7

of 3 March 2020 the application of XXXXXX ('the applicant') was rejected;

on access to the file kept in connection with complaints about the sending of unsolicited commercial communications,

which were evaluated as a commercial communication sent by him.

[2] The applicant requested access to the file containing complaints against him which:

were no longer included in the administrative proceedings, resp. decision no. UOOU-01734 / 19-60. He stated that

that he has the right to know whether and what accused persons are being brought against him and what possible mistakes

has to fix. The purpose of the inspection was to prevent a situation where the administrative body repeatedly

withheld information on similar submissions, effectively preventing any errors

rectify and thus minimize the impact on both the data subjects and the applicant himself. Further

he argued that he was concerned by the file and that he was undoubtedly kept in order to initiate administrative proceedings

ex officio proceedings against the applicant, on the basis of which he considered that he had fulfilled the legal preconditions interest in inspection in the sense of the provisions of § 38 paragraph 2 of Act No. 500/2004 Coll., Administrative Procedure Code.

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[3] The Office did not comply with the request. In the grounds of the resolution, first of all the administrative body of the first instance

stated that no administrative proceedings are being conducted in the matter, which precludes the application of § 38 paragraph 1 of the Administrative Procedure Code. He also dealt with whether there was a legal or other serious interest of the applicant

to inspect the file in the regime of § 38 para. 2 of the Administrative Procedure Code. He reasoned that

arguments about data protection are odd, as they have tried to assert their rights directly after

applicants, however, were not satisfied, so they subsequently chose the path of protection through

complaints to the supervisory authority. At the same time, it is they who decide which way

they want to protect their rights. He further stated that after a number of administrative proceedings with the applicant, where they were

repeatedly criticized, had its procedures for disseminating commercial communications properly

edit. If this has not happened, the ex post remedy after the complaint has not been filed with the Office does not constitute

the right to inspect the file of the non-initiated proceedings. At the same time, he referred to Section 22 of Act No. 255/2012 Coll.,

on the control, according to which documents or their parts are excluded from inspection, enabling

identification of the person who initiated the inspection.

[4] The applicant objected to the resolution within the statutory time limit.

Decomposition content

[5] The applicant first summarized the current course of communication with the Office and justified the request

was raised with regard to the sanction within the decision no. UOOU-01734 / 19-60, when as

circumstance for determining the amount of the fine was taken the number of violations, the time after which the violation

and, in some cases, repeated sending to the same addressee without a valid one

consent. He further elaborated the obligation according to § 76 par. k) of Act No. 250/2016 Coll.,

on liability for misdemeanors and proceedings concerning them, on the basis of which it concludes that the Office is obliged in

within 60 days of receiving the complaint, forward it to the suspected offender and invite him to file it

explanation and, if the case is not adjourned within this period, initiate infringement proceedings. The applicant further

considers that

that the complainant's identity must be revealed to him at the latest in the request for clarification,

for only in this way can he express himself in a relevant way. Argument of the administrative authority of the first instance

on the protection of the complainant's identity. Also the reasons for the resolution

not to have access to the file should be only brief and formal, based on one

argument - the absence of initiated proceedings. With regard to § 76 par. 1 let. k) of the Act

No. 250/2016 Coll. however, it is a matter of arguing in a circle and acting contrary to basic principles

administrative activity, as it hinders access to justice, is non-transparent, unpredictable

and shows signs of official arbitrariness.

[6] The applicant expressed his belief in the existence of his right of access to the file, as it is a file

conducted against him, concerns him, and thus has a legitimate right to know the subject matter of the allegations made

he could comment on them and, as can be deduced from the context of the justification for the dissolution, settle them.

Finally, he referred to the partial case-law concerning the need for action by public authorities

in a predictable and transparent manner for the application of law with an emphasis on legal certainty

and a fair relationship. He concludes that the Office's practices are unacceptable,

and therefore proposes that the contested resolution be annulled and the case referred back to the administrative authority

first instance for further proceedings.

Assessment by a second instance body

[7] On the basis of the appeal lodged, the Appellate Body examined the contested order in its entirety

scope, including the process that preceded its release, and reached the following conclusions.

[8] The provisions of Section 38 of the Administrative Procedure Code regulate the possibility to inspect the details specified here

persons in the file. The file in the sense of the Administrative Procedure Code is then further defined in its § 17 in principle as a summary of documents concerning the same matter, resp. administrative proceedings or proceedings where he is at reasonable use referred to.1 It is the responsibility of the administrative body to keep the file. According to § 17 par. 1 the first and third sentences of the Administrative Procedure Code shall apply: 'A file shall be established in every case; [s] pis consists in particular

submissions, minutes, records, written copies of decisions and other documents submitted

This regulation follows on from the regulation in Act No. 499/2004 Coll., on archiving

and the Registry Service and amending certain laws; according to § 65 paragraph 1 sentence one of this Act:

'[I] n the case of documents, all documents relating to the same matter shall be placed in the file.'

The case law and professional literature on the management of the file further state: “the administrative file consists of all documents relating to the same matter. This rule does not apply only if the law provides otherwise.

It is, after all, logical, everything that testifies to the actions of the administrative body must remain in the file

and the parties to the proceedings, since this is a material stop trace ’of the proceedings.’ 2; '[I] n part of the file are both documents on which the administrative body relied directly, as well as those which the administrative body “too

did not help ‘or were obtained in breach of the law. It is not possible with the contents of the file

to manipulate arbitrarily and purposefully. ”3 Finally, in the judgment no. 8 As 236 / 2016-51 of 28 June

In 2017, the Supreme Administrative Court came to the conclusion that it must also be part of the administrative file documents received or created in the pre-administrative phase: 'Procedure

defendant, who kept the documents provided before the commencement of administrative proceedings in a separate so-called was only correct until the initiation of the administrative proceedings. After that

the defendant concluded that it was necessary to initiate the administrative proceedings and did so

continue to keep the already established file, or make the complaint file part of the administrative file

established at the commencement of the administrative procedure. "

[9] From the above, as well as from the professional literature, 4 it can be deduced that within the documentation

acts prior to the commencement of the proceedings, the file is kept only in the regime of the Archival Act
and the file service (and related regulations), but not in the sense of § 17 of the Administrative Procedure Code. Write down
becomes a file pursuant to this provision or a part thereof only at the moment of the commencement of the proceedings. Case
law
however, it inferred the possibility of obtaining information on the content of those dossiers, on the basis of a request under
Act No. 106/1999 Coll., on free access to information, or in the regime of inspection of the file
according to § 38 of the Administrative Procedure Code.5 The Supreme Administrative Court also in the last mentioned
judgments
emphasized that for objective reasons the absence of initiated proceedings is the application of § 38 para. 1
of the Administrative Procedure Code and thus only the regime of a person demonstrating a legal interest is possible
or another serious reason pursuant to Section 38 (2) of the Administrative Procedure Code. "The Supreme Administrative
Court emphasizes that
the duty of assertion and the duty of evidence are not in relation to inspection of the file pursuant to Section 38 (2)
administrative procedure is self-serving. These are the facts stated by the applicant for inspection
in the file and relating to an alleged legal interest or other serious reason which the administrative
allow the authority to assess whether, in a particular case, it is appropriate to allow the applicant to file
1 judgment NSS 2 As 418/2017 of 30 May 2018: “Pursuant to § 158 par. 1 and § 177 par. 2 of the Administrative Procedure
Code, the
activities shall be applied in the alternative by Part Four of the Administrative Procedure Code and similarly by the provisions of
Part One and in Section 154 of the Administrative Procedure Code
listed provisions of Part Two. According to the doctrine, the regulation concerning the keeping of the file (§ 17 of the
Administrative Procedure Code) or inspection of
file (§ 38 of the Administrative Procedure Code) is not explicitly stated in § 154 of the Administrative Procedure Code (it will not
be applied similarly), but it applies to
the need for its appropriate use, if necessary. That it is necessary is based on the assumption that even the management of
control

an administrative file must be kept. This presupposes not only § 17 of the Administrative Procedure Code (talking about keeping the file in all 'things', not only in all 'proceedings') '

2 NSS judgment no. 1 Afs 58 / 2009-541 of 31 March 2010 (2119/2010 Sb. NSS)

3 Potěšil, L., Hejč, D., Rigel, F., Marek, D. Administrative Code. Comment. 1st edition. Prague: C. H. Beck, 2015, pp. 103-106.

4 Vedral, J. Administrative Code. Comment. 2nd edition. Prague: Bova Polygon, 2012, pp. 217-218 and 431-432

5 see eg NSS judgments ref. 8 As 81 / 2010-63 of 29 July 2011 and ref. 8 As 80 / 2010-68 of 28 February 2011

(or part thereof) or whether it is possible to provide protection for the rights of any from the participants, or other persons concerned or in the public interest, and access to the file with reference to the obstacle provided for in § 38 para. 2 of the Administrative Procedure Code in fine. (…) The applicant could reasonably be required to assert and prove the facts evidence of the fulfillment of a condition of legal interest or other serious reason, and thus made it possible administrative authorities to weigh whether the request for inspection of the file (or its part) will not be granted contrary to the rights of the other persons concerned or the public interest, in particular where the conduct has taken place in this case, a request made by the suspect before the actual initiation infringement proceedings, where this person could learn from the file the content of the explanations provided other persons. "6

[10] The existence of a legal interest or other serious reason on the part of the applicant is therefore not sufficient not only to claim, but also to prove. From the above-cited judgment of the Supreme Administrative Court it is also clear that the very fact that the applicant is a person suspected of an offense, against which the file is kept is not a sufficient reason, as even in such a case there must be a reason proven. Thus, the attempt to rectify the relations with the complainants can be considered as the alleged reason as data subjects and then, above all, the minimization of the impact on applicants from the point of view (non) continuing the offense of which he is suspected, thereby not increasing it social harm.

[11] In this context, the Appellate Body emphasizes in particular that it disseminates commercial communications in within the meaning of § 2 letter f) of Act No. 480/2004 Coll. on the basis of a valid title and perform all related obligations are obligations arising directly from the law and their observance must be ensured from the very beginning of the activity. Compliance with legal obligations cannot be postponed “until you someone will not complain ", or until notified by the supervisory authority. On this The Office cannot deal with the fact that complaints about the dissemination of commercial communications by the applicant are resolved by the Office long - term, while these are not isolated excesses, as evidenced by the previous proceedings in cases of unauthorized dissemination of commercial communications (eg file no. UOOU-03164/17 - granted fine in the amount of CZK 28,500, UOOU-08227/18 - fined in the amount of CZK 90,000, UOOU-01734/19 - fined CZK 350,000), as well as less formal notices from parties to the Office which were sent to the applicant before the management of the above was taken administrative proceedings (eg within the files file number UOOU-00921/16, UOOU-05638/16). You can't either disregard the fact that large parts of complaints and suggestions about the dissemination of commercial communications preceded by calls and requests from the recipients themselves (complainants) of unsolicited commercial activities communication to the applicant so that the communication is not sent to them, however, the applicant does not did not reflect. The applicant must therefore be in an effort to comply with the dissemination rules business communications are fully aware of their long-standing shortcomings, but The elimination cannot be linked to the need to become acquainted with the individual complaints made by the Office continuously receives. Removing these shortcomings will also happen also to fulfill interest complainants, whose protection the applicant protects in the grounds of appeal. But it only works apparent patronage, because if the recipients of unsolicited commercial communications did not call their rights with the disseminator, filing a complaint with the supervisory authority is a fully legitimate which they have voluntarily chosen - even if it is indirect protection and in view of the non-existence public subjective right to initiate proceedings ex officio or to initiate them in a certain

period is in principle unenforceable.

6 NSS judgment no. 8 As 80 / 2010-68 of 28 February 2011

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[12] The appellate body and the voucher of the administrative body of the first do not consider it an odd argument
degree to the provisions of § 22 of the Control Rules, which stipulates: “They are excluded from inspecting the file
documents or parts thereof from which the person who made the complaint can be identified
Although the applicant considers that any further action by the Office is necessary
requires full disclosure of the identity of all complainants and the content of their complaints, even in this case
is based on a false assumption. It is clear from the context of the applicant's statements so far
presumption that the Office should be bound in some way by the complaints and their content and others
the procedure in the case must therefore necessarily relate to the complaints themselves. Given the nature of the complaints,
which, by their nature, are merely an incentive to initiate proceedings of their own motion, do not in themselves have an effect
initiation of proceedings, its course or scope has no effect. Nor do they predetermine the type of proceedings to be in
because, for example, an inspection, which is a special procedure of the inspection body,
in which he ascertains whether and in what way the auditee fulfills the obligations arising from others
legal regulations or imposed on him on the basis of these regulations (see § 2 of the Control Rules), is
ex officio proceedings. Complaints can therefore serve as mere "indicators",
in which direction or in relation to what obligations to conduct control. Range controlled
however, it can significantly exceed the complaints and in principle with their content or
may not even be directly related to the applicant. Protection of complainants according to § 22 of the Control Rules thus
Undoubtedly, it is also important in the case of the issue of dissemination of commercial communications.
[13] As regards the alleged obligation to initiate proceedings within 60 days of receipt of the complaint against
on the basis of § 76 par. 1 let. k) of Act No. 250/2016 Coll., it should be noted that this
the provision does not require the administrative authority to initiate proceedings ex officio within a specified period. How
has already described the administrative body of the first instance with reference to the relevant case law, infringement
proceedings

it can be started even after this period, as postponement is not a substantive solution in this case

things. In addition, the suspected offender is known, so its possible application is excluded.

In relation to received notifications of suspected misdemeanors, only the obligation under

§ 42 of the Administrative Procedure Code, according to which the administrative body receives initiatives to initiate

proceedings ex officio

and, if the applicant so requests, the Office shall inform him within 30 days of the handling of the notification.

With regard to the number of complaints that against the applicant continuously comes to the Office in irregular

intervals, nor is it in compliance with the principles of administrative law on the speed and economy of proceedings,

as well as an effort to minimize interference with the rights of all persons concerned, ie including the applicant

and potential complainants, the constant initiation of proceedings, their endless dissemination or management

number of parallel controls well possible. This cannot be overcome even by a potential reduction

the gravity of the applicant's infringement, since, as stated above, the absence

the immediate onset of legal liability as a secondary obligation cannot be justified

failure to fulfill primary obligations. These must be adhered to unconditionally and, moreover, necessary

respect for them, the applicant was repeatedly and long-term warned, not only by

supervisory authority, but also by complainants, who often try to invoke their rights

at first against him, but unfortunately to no avail.

[14] In conclusion, the Appellate Body rejected the applicant's arguments and, overall

The review did not find the contested decision illegal and did not find any errors

in the procedure preceding the adoption of this Decision.

Instruction: Pursuant to the provisions of Section 91, Paragraph 1 of Act No. 500/2004 Coll.,

Administrative Procedure Code cannot be revoked.

Prague, July 2, 2020

official stamp imprint

JUDr. Ivana Janů

chairwoman

(electronically signed)