

THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, on 04

January

2019

DECISION

ZSOŚS.440.107.2018. II

Based on Article. 138 § 1 point 1 of the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2018, item 2096) and art. 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) in connection with Art. 160 of the Act of May 10, 2018 on the Protection of Personal Data (Journal of Laws of 2018, item 1000, as amended), after administrative proceedings regarding the application of Ms AP ([...]) for reconsideration of the case ended with the decision of the Inspector General for Personal Data Protection of [...] May 2018 ([...]), regarding the disclosure of her personal data by the Commander-in-Chief of the Border Guard ([...] Border Guard Unit in K.) to Director of the Nursing Home in S.,

uphold the contested decision

JUSTIFICATION

The Office of the Inspector General for Personal Data Protection (currently: the Office for Personal Data Protection) received a complaint from Ms AP (residing [...]), hereinafter referred to as the "Complainant", about disclosure of her personal data by the Commander-in-Chief of the Border Guard ([...] Border Guard Branch in K.) for the Director of the Nursing Home in S. The complainant indicated that [...] in May 2016 she received a decision of the Social Insurance Institution in O. refusing the right to sickness benefit for the period from [...] until [...] December 2015. The basis for issuing the above-mentioned decision was a letter from the Border Guard in K. about crossing the border with the District [...] [...] on December 2015, addressed to the Nursing Home in S., hereinafter referred to as "DPS" - the applicant's employer.

In the course of the investigation, the Inspector General for Personal Data Protection established the following:

In the files of the case in question there is a copy of the decision of [...] May 2016 issued by ZUS Branch in O., pursuant to which the authority refused the complainant the right to the benefit for the period from [...] to [...] December 2015. In the justification of the decision, the authority stated, inter alia, that while receiving the sickness benefit for incapacity for work in the

above-mentioned during the period of DPS contributions paid by the payer, [...] December 2015 The complainant crossed the border crossing with the [...] District in B. as the driver of the vehicle.

In the files of the case in question there is a copy of the protocol of the control of the correct use of the sick leave from work carried out [...] in April 2016 by the Director of the DPS. The content of the findings contained in the protocol includes the following information: "on the basis of information obtained from [...] the Border Guard Unit in K., doc. No. [...] of [...] April 2016, it was established that on [...] -12-2015 at [...] Mrs. PA crossed the border crossing as a driver with the District [...] in B. The briefing was conducted by an officer [...] ”.

In the files of the case in question there is a copy of the DPS application of [...] April 2016 for the disclosure of data from the personal data set directed to the [...] Commander of the Border Guard Division in K. regarding information on the dates of the applicant's crossing the state border with the Oblast [...] in the periods [...] - [...] May 2015, [...] - [...] December 2015 and from [...] February 2016. until the date of response to the request. As the legal basis justifying access to personal data, DPS indicated Art. 68 sec. 1 of the Act of June 25, 1999 on cash benefits from social insurance in the event of sickness and maternity (Journal of Laws of 2017, item 1368). In a letter of [...] April 2016, the Border Guard replied to the request of the DPS.

The Inspector General for Personal Data Protection received explanations from the Border Guard, which confirmed the above-mentioned facts. At the same time, the Border Guard indicated that when answering the request of the DPS, it was mistakenly considered that the body authorized to receive information on the protection of the state border was the Nursing Home. The Border Guard also informed the Inspector General about actions taken to eliminate such phenomena in the future. The Inspector General did not examine the issues related to the applicant's refusal to receive the benefit by ZUS, because such cases, pursuant to Art. 1 of the Act of November 17, 1964, Code of Civil Procedure (Journal of Laws of 2017, item 459) are civil cases and should be considered in proceedings conducted by common courts.

After re-examining the facts of the case, including reading the entire evidence gathered in the case, the President of the Office for Personal Data Protection noted the following.

It should be noted that the President of the Personal Data Protection Office, when issuing an administrative decision, is obliged to decide on the basis of the facts existing at the time of issuing this decision. This position is based on the jurisprudence of the courts. In particular, it is worth mentioning the judgment of the Supreme Administrative Court, file no. no. I OSK 761/07, where

it was stated that: "when examining (...) the legality of the processing of personal data [the Inspector General] is obliged to determine whether the data of a specific entity are processed on the date of issuing the decision and whether it is done in a manner consistent with law (...)".

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 the "Act", defines the rules of conduct in the processing of personal data and the rights of natural persons whose personal data are or may be processed in data filing systems (Article 2 (1)). The processing of personal data is lawful only if their administrator has one of the material conditions for the admissibility of processing, listed in art. 23 sec. 1 of the Act (processing, pursuant to Article 7 (2) of the Act, is understood as any operations performed on these data, including their sharing).

It should be noted that pursuant to Art. 18 of the Data Protection Act, the authority for the protection of personal data ex officio or at the request of the person concerned, by way of an administrative decision, orders the restoration of the legal status only if it finds that there has been a breach of its provisions. It follows, therefore, that the authority may order the removal of deficiencies by ordering the disclosure of the requested data only after the previous assessment of the behavior of the data controller, who previously unreasonably refused to provide them, or remained inactive despite requests addressed to him. Therefore, the role of the authority is to examine whether the controller of personal data addressed with the request for disclosure of data properly responded to it. It is the personal data administrator (in this case the Border Guard) who is obliged to examine whether there are legal grounds to take into account the request addressed to him regarding the disclosure of personal data, and the President of the Personal Data Protection Office to control this process. The disclosure of personal data in the relationship between the public and the employer, as is the case in the case at hand, may take place in the cases provided for by law. Therefore, other conditions may not apply, except for those indicated in Art. 23 sec. 1 point 2 of the "act", ie it is necessary to exercise the right or fulfill the obligation resulting from the provisions of law.

DPS, requesting the provision of the above-mentioned data, indicated art. 68 sec. 1 of the Act of June 25, 1999 on cash benefits from social insurance in the event of sickness and maternity (Journal of Laws of 2017, item 1368). According to its content, the Social Insurance Institution and payers of contributions referred to in art. 61 sec. 1 point 1, are entitled to inspect the insured as to the correctness of the use of exemptions from work in accordance with their purpose and are authorized to formally control medical certificates. Pursuant to § 5 sec. 1 point 2 of the Regulation of the Minister of Labor and Social Policy

of 27 July 1999 on detailed rules and procedures for controlling the correct use of sick leave from work and formal control of medical certificates (Journal of Laws of 1999, No. 65, item 743) the control of the correct use of sick leave due to illness consists in determining whether the insured person does not use the sick leave from work in a manner inconsistent with the purpose during the period of the inability to work.

When referring to the provisions regulating the functioning and powers in the field of personal data processing by the Border Guard, in particular the transfer of personal data obtained in connection with the implementation of statutory tasks, art. 9a of the Act of 12 October 1990 on the Border Guard (Journal of Laws of 2017, item 2365), according to the content of which, providing information about a person obtained during the performance of operational and reconnaissance activities and in the manner referred to in Art. 9 sec. 1a, it is allowed only at the request of the court or the prosecutor, as well as the Head of the National Criminal Information Center; this information may only be used for the purpose of criminal prosecution (section 1). The prohibition specified in sec. 1 does not apply if the law imposes an obligation or enables the provision of such information to a specific authority or such an obligation results from international agreements or arrangements, and also in cases where concealing such information would endanger the life or health of other people (paragraph 2).

After re-examining the files of the proceedings in question, it appears that there was an unauthorized disclosure of the complainant's personal data, which, as admitted by the authority providing the data, resulted from a misinterpretation of the term "competent authority". The Border Guard, on the other hand, took steps to prevent similar situations from occurring in the future.

In the present case, there was a breach of the provisions on the protection of personal data by disclosing personal data to an unauthorized person to the complainant, however, due to the irreversibility of this situation, the authority for the protection of personal data has no basis for issuing a decision ordering restoration to lawfulness, in the light of Art. 18 sec. 1 of the act.

On the other hand, as regards the request to send evidence documenting the suspicion of a crime, along with the notification to the District Prosecutor's Office in B. committing a crime is the responsibility of the law enforcement authorities of the President of the Personal Data Protection Office, exercised ex officio, not at the request of the persons concerned. The obligation resulting from this provision does not fall within the scope of the decision-making, substantive decisions of the personal data protection authority regarding the order to restore the legal state. A person seeking protection of his rights under the Act on the Protection of Personal Data is not an entity that may request that a notification be sent to an appropriate

authority about an offense related to the processing of personal data and may not demand it in administrative forms of this procedure. The provision of art. 19 of the Act does not give the party a claim in this respect.

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

The decision is final. Based on Article. 21 sec. 2 of the Act on the Protection of Personal Data and in connection with joke. 3 § 2 point 1, art. 13 § 2, art. 53 § 1 and article. 54 of the Act of August 30, 2002, Law on proceedings before administrative courts (i.e. Journal of Laws of 2018, item 1302), the party 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 entry 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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