THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, day 24

July

2019

DECISION

ZSPR.440.1552.2018

Based on Article. 138 § 1 of the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2018, item 2096, i.e.), Art. 160 sec. 1 and 2 of the Personal Data Protection Act of May 10, 2018 (Journal of Laws of 2018, item 1000, as amended) in connection with joke. 18 of the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922 and of 2018, item 138) in connection with joke. 6 sec. 1 lit. c) 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 EU L. 2016.119.1 of 04.05. .2016 and EU Official Journal L.2018.127.2 of 23.05.2018) and in connection with Art. 105 paragraph. 4, art. 105a paragraph. 1 and art. 105a paragraph. 3 of the Act of August 29, 1997 Banking Law (Journal of Laws of 2018, item 2187, i.e.), after conducting administrative proceedings regarding the complaint of Mr. A. M. in W., for the processing of his personal data by P. S.A. in W., including making them available to B S.A. with its seat in W. ended with an administrative decision of the President of the Personal Data Protection Office on [...] December 2018 (regarding [...]),

uphold the contested decision.

Justification

On [...] September 2017, the complaint of Mr. A. M. in W. (hereinafter referred to as the Complainant), represented by Ms A.G., for unlawful processing, sharing and administration of his personal data by P. S.A., based at (hereinafter referred to as the Bank), consisting in making them available to B. S.A. based in W., (hereinafter referred to as B.).

In the complaint, the complainant pointed out that the Bank did not meet the requirements entitling it to start processing its personal data in B databases, in connection with the debt resulting from the obligation on [...] September 2007, because the Bank did not meet all the conditions of Art. 105a paragraph. 3 of the Banking Law of August 29, 1997 (Journal of Laws of 2018, item 2187, hereinafter referred to as the Banking Law), i.e. the Bank did not inform the Complainant about the intention

to process his personal data without his consent in the databases of B.

In the course of the proceedings conducted in the present case, the Inspector General for Personal Data Protection established the following facts

1. The Complainant's personal data was collected by the Bank in connection with the cash loan agreement no. [...] concluded by him of [...] September 2007 and is currently processed in the "Customer Base B" file in the scope of first name, surname, family name, parents' names, mother's maiden name, gender, date and place of birth, PESEL number, type and number of an identity document, position, marital status, address, correspondence address and telephone number.

2. The Bank provided the Complainant's personal data related to the cash loan agreement No. [...] of [...] September 2007 to B. on the basis of an agreement concluded between the Bank and B., which sets out the principles of cooperation in the collection and disclosure of information pursuant to Art. . 105 paragraph. 4 of the Banking Law, due to the reported delays in repayment of the liability of [...] September 2007.

3. Due to the Complainant's delay of more than 60 days in payment of the liability, in a letter of [...] October 2014, the Bank sent a letter to the Complainant informing the Complainant about the intention to process his personal data without his consent, pursuant to Art. 105a paragraph. 3 of the Banking Law. The letter was sent by regular mail to the following address: W, ie to the correspondence address indicated by the Complainant. Therefore, the Bank does not have a postal receipt of sending the letter to the Complainant.

4. As confirmation of sending the above-mentioned correspondence to the Complainant, the Bank sent a printout from the application, which archives data on letters addressed to customers, constituting a notification of the intention to process their personal data after the expiry of the obligation.

5. Liability resulting from the above-mentioned contracts of […] September 2007 were closed on […] April 2016.

6. From the explanations of B. it follows that the abovementioned contract on […] September 2007 was entered into the database of B. […] on October 2007 and has the status of a closed account in database B. and is processed for the purpose of creditworthiness assessment and analysis credit risk pursuant to Art. 105a paragraph. 3 in conjunction joke. 105 section 4 of the Banking Law. At the same time, B. processes the complainant's data in the field of customer management and monitoring inquiries submitted by the Bank.

In this situation, the President of the Personal Data Protection Office (also known as the President of the Personal Data

Protection Office), on [...] December 2018, issued an administrative decision (regarding [...]), by which he ordered the Bank to stop processing the Complainant's personal data relating to the account no. [...], in system B., processed on the basis of Art. 105a paragraph. 3 of the Banking Law.

On [...] December 2018, within the statutory deadline, the Office for Personal Data Protection received an application from the Bank to reconsider the case ended with the above-mentioned decision, in which the Bank indicated that the quotation: "pursuant to Art. 105a of the Banking Law Act, due to the fact that the customer was in default of more than 60 days in the repayment of the liability, on [...] October 2014, a letter was generated, and on [...] October 2014, a letter informing about the debt and constituting a request for payment within 30 days under the pain of processing information constituting banking secrecy after the liability expires without the consent of the Customer by Bank SA and other institutions authorized by law (...) pursuant to 105 para. 4 of the Banking Law. ". At the same time, the Bank argued that the shipment in question was performed by a professional entity that undertook to perform the service consisting in the delivery of a postal item and "has no legal interest to mislead the Bank as its contractor.".

Moreover, the Bank alleged that the President of the Personal Data Protection Office in the above-mentioned he did not consider the decision as evidence in the case, the printout from the application presented by the Bank, which archives data on letters addressed to customers, constituting a notification of the intention to process their personal data after the expiry of the obligation.

After re-examining the evidence gathered in the case and examining the Bank's request for reconsideration of the case, the President of the Personal Data Protection Office considered the following.

The decision contained in the contested decision of the President of the Personal Data Protection Office of [...] December 2018 regarding ... [...]) is correct. Pursuant to Art. 160 of the Act of May 10, 2018 on the Protection of Personal Data (Journal of Laws of 2018, item 1000 as amended), on the date of entry into force of this Act, i.e. on May 25, 2018, the Office of the Inspector General for Personal Data Protection became 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 (Journal of Laws of 2016, item 922, as amended ) in accordance with the principles set out in the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2018, item 2096, i.e.) - hereinafter referred to as Kpa. All activities undertaken by the Inspector General for

Personal Data Protection before May 25, 2018 remain effective.

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. As the doctrine points out, “the public administration body assesses the facts of the case according to the moment of issuing the administrative decision. This rule also applies to the assessment of the legal status of the case, which means that a public administration authority issues an administrative decision based on the provisions of law in force at the time of its issuance (...). Settlement in administrative proceedings consists in applying the applicable law to the established factual state of an administrative case. In this way, the public administration body implements the goal of administrative proceedings, which is the implementation of the applicable legal norm in the field of administrative and legal relations, when such relations require it "(Commentary to the Act of June 14, 1960, Code of Administrative Procedure, M. Jaśkowska, A. Wróbel, Lex., El / 2012). On May 25, 2018, the Regulation of the European Parliament and the EU Council 2016/679 of April 27, 2016 on the protection of individuals with regard to the processing of personal data began to be applied to the processing of personal data in the Member States of the European Union. and on the free movement of such data and repealing Directive 95/46 / EC (General Data Protection Regulation) (Journal of Laws UE.L.2016.119.1 of 04.05.2016 and Journal of Laws of the EU L. 2018.127.2 of 23/05/2018).

The President of the Personal Data Protection Office re-examined whether the Complainant had been informed pursuant to Art. 105a paragraph. 3 of the Banking Law Act on the intention to process, without its consent, information constituting banking secrecy after the expiry of the obligation. At the request of the authority, the Bank attached a printout from the application confirming, in the opinion of the Bank, the date and address of the shipment and the reason for the letter, as well as a copy of the letter informing the Complainant about the failure to fulfill the obligation or delay exceeding 60 days in the performance of the service provided for in the P . SA of the contract (cash loan No. [...] of [...] September 2007. On [...] October 2014, the letter in question was sent by regular mail.

In the opinion of the President of the Personal Data Protection Office, the Bank did not provide evidence that the Complainant had been effectively informed by him of the intention to entrust his personal data without his consent, in accordance with the obligation under Art. 105a of the Banking Law. The mere fact that the sending of letters from the Complainant containing a notification about the intention to process his personal data without his consent does not mean that the complainant was informed of this fact pursuant to Art. 105a paragraph. 3 of the Banking Law.

In the light of the cited provisions, it should be emphasized that although the Complainant's obligation under the contract concluded in September 2007 towards the Bank expired, as it follows from the evidence collected regarding the repayment of the debt, the Complainant was delayed by more than 60 days in the case of the above-mentioned obligations. Significant, however, in the above case is the lack of evidence that the Bank met the Complainant's obligation specified in Art. 105a paragraph. 3 of the Banking Law, i.e. informed him effectively of the intention to process banking secret information concerning him, without his consent after the expiry of the obligation resulting from the above-mentioned the contract. The mere fact of sending the Complainant by ordinary letter a notification of ... October 2014 on the intention to process information constituting a bank secret without the Complainant's mate, does not authorize the Bank to process his data under the conditions specified in Art. 105a paragraph. 3 of the Banking Law. The moment from which the sixty-day period, when the consumer is allowed to delay the performance of the obligation, is to be counted, is the date of performance of the obligation. Only after the lapse of 60 days does the 30-day period in which the institution is still waiting for the performance of the client's obligation begin to run. However, the 30-day period does not run by operation of law, but only from the moment when the institution effectively informs the consumer about the intention to process. Ultimately, it is the ineffective expiry of 30 days from the date of notification that constitutes the fulfillment of the prerequisites of art. 105a paragraph. 3 of the Banking Law. Therefore, it follows that when the Bank processes the Complainant's data under the conditions specified in the above-mentioned provision, the Bank bears the burden of proving that the conditions of Art. 105a paragraph. 3 of the Banking Law. It should be noted that although there is no obligation to send such correspondence by registered mail, in the present state of facts the Bank has no proof that such correspondence in the scope of the above-mentioned the obligation was ever successfully served on the Complainant, and thus that he was effectively informed.

In particular, the letter sent by the Bank of [...] October 2014, which is a printout from the application, which archives data on letters addressed to customers, constituting a notification of the intention to process their personal data after the expiry of the obligation, cannot be considered such evidence. It should be pointed out that the above evidence may not even prove that the Complainant was sent the above-mentioned letters of [...] October 2014, let alone prove that the correspondence was effectively served on the applicant and, consequently, that he was informed. It should be emphasized that the Bank bears the burden of proving that it informed the Complainant about the intention to process his data without his consent.

In the opinion of the President of the Personal Data Protection Office, such an interpretation of Art. 105a paragraph. 3 of the

Banking Law, that it is the natural person (in this case, the Complainant) that bears the burden of proving that he was not informed about the above-mentioned the intention to process personal data. In the opinion of the authority, on the basis of the above-mentioned of the documents presented, consider that the conditions referred to in Art. 105a paragraph. 3 of the Banking Law have been met. The bank does not have a return confirmation of receipt or any other document confirming receipt of the above-mentioned correspondence by the Complainant.

The President of the Personal Data Protection Office also points to the position contained in the judgment of the Supreme Administrative Court of 25 July 2017 (I OSK 2859/16), in which the Bank indicated that as the administrator of personal data, it must have proof that the data subject has been informed about the intention to process them without its consent, and not the customer should prove that he was not informed. There can be no factual presumption in this respect. Information about sending such a message may not constitute compliance with the obligation under Art. 105a paragraph. 3 of the Banking Law. In the above judgment, the Court also drew attention to the fact that there is no evidence that in relation to the party such correspondence - informing about the intention to process data without its consent - had in fact been sent and effectively delivered. In this respect, both the Bank's declaration on sending a standard letter and the content of the model letter sent to the Bank's customers in the indicated period are insufficient. It requires categorically to be 'informed' and not 'sent out'.

In the opinion of the President of the Personal Data Protection Office, the conditions of Art. 105a (3) of the Banking Law, according to which the Bank may process information constituting banking secrecy concerning natural persons after the expiry of the obligation under the contract without their consent, and therefore it is justified to order the Bank to stop processing the Complainant's personal data for the purpose of assessing creditworthiness and analyzing credit risk . In the opinion of the President of the Personal Data Protection Office and in accordance with the judgment of the Provincial Administrative Court in Warsaw of August 2, 2018 in the case file ref. no. II SA / Wa 1957/17, such an interpretation of Art. 105a paragraph. 3 of the Banking Law, that it was the natural person (in this case, the Complainant) that had to prove that he had not been informed about the above-mentioned the intention to process personal data. In the opinion of the authority, on the basis of the above-mentioned the documents presented by the Bank to be considered that the conditions referred to in Art. 105a paragraph. 3 of the Banking Law have been met. The bank does not have a return confirmation of receipt or any other document confirming receipt of the above-mentioned correspondence by the Complainant.

The President of the Personal Data Protection Office shares the position and considerations contained in the judgment of the

Provincial Administrative Court in Warsaw of August 2, 2018 in case no. no. II SA / Wa 1957/17, and referring also to the judgment of the Supreme Administrative Court of 25 July 2017 in case no. no. I OSK 2859/16. In the above judgments, the Provincial Administrative Court and the Supreme Administrative Court stated that the provision of Art. 105a paragraph. 3 of the Banking Law is of a material (protective) nature, not formal. It requires categorically to be 'informed' and not 'sent out'. Due to the fact that personal data is a value protected by law, and the right to their protection - as it is accepted in the literature - is a kind of emanation of a general right guaranteed by the Constitution of the Republic of Poland (Article 47), all regulations abolishing this protection must be read and strictly lectured, taking into account the function they are to serve. With such an interpretation, the wording used in the provision of Art. 105a paragraph. 3 of the Banking Law, regarding the information obligation of the bank, must mean that it is not only a formal obligation. In any case, the manner and form of the notification should make it possible to verify the fact that the bank's customer was informed about the intended processing of his personal data, or at least to confirm that the customer was allowed to read such information. There can be no factual presumption in this respect.

Therefore, in the opinion of the President of the Personal Data Protection Office, the conditions of Art. 105a (3) of the Banking Law, according to which the Bank may process information constituting banking secrecy concerning natural persons after the expiry of the obligation under the contract without their consent, and therefore it is justified to order the Bank to stop processing the Complainant's personal data for the purpose of assessing creditworthiness and analyzing credit risk .

According to Art. 58 sec. 2 lit. g) of Regulation 2016/679, the supervisory authority has the right to remediate in the form of an order pursuant to art. 16, 17 and 18, the rectification or deletion of personal data or restriction of their processing and ordering pursuant to art. 17 sec. 2 and art. 19 notifications of these activities to recipients to whom personal data have been disclosed.

The above-described factual and legal circumstances make it necessary, pursuant to Art. 58 sec. 2 lit. g), ordering the elimination of irregularities in the processing of the complainant's personal data in the manner specified in the operative part of this decision.

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

The decision is final. Based on Article. 21 sec. 2 of the Act on the Protection of Personal Data and in connection with joke. 13 § 2, art. 53 § 1 and article. 54 of the Act of August 30, 2002, Law on Administrative Court Proceedings (Journal of Laws of 2018, item 1302), the party has the right to lodge a complaint with the Provincial Administrative Court in Warsaw against this

decision, within 30 days from the date of service of this decision, through the President of the Office for Personal Data Protection (address: Office for Personal Data Protection, ul. Stawki 2, 00-193 Warsaw).

2019-08-30