

THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, 23

April

2020

DECISION

ZKE.440.79.2019

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 Personal Data Protection Act of May 10, 2018 (Journal of Laws of 2019, item 1781) and art. 12 point 2, art. 22, art. 32 sec. 1 point 8 of the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, as amended, and of 2018, item 138), in connection with Art. 6 sec. lit. a of the Regulation of the European Parliament and of the Council (EU) 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, 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), after conducting administrative proceedings regarding the complaint of Ms PM about irregularities in the processing of her personal data for marketing purposes by ASA, President of the Personal Data Protection Office

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 Ms P. M. (hereinafter referred to as: the Complainant) about irregularities in the processing of her personal data for marketing purposes by A. S.A. hereinafter referred to as: the Bank) represented by L. R. - O. In connection with the above, the complainant applied for the quotation "removal of deficiencies in the processing of personal data by fulfilling her obligations under Art. 32 sec. 1 of the Act ".

In the course of the administrative procedure conducted in this case, the President of the Personal Data Protection Office (hereinafter: "the President of the Personal Data Protection Office") determined the following.

1. In a letter of [...] September 2017, the Bank explained that it had obtained the complainant's personal data in connection with the contracts it concluded: [...] of [...] .04.2004, for a payment card [...] to the account of [...] .11.2004 after the expiry date

of the card replaced with a payment card [...] of [...] .11.2011, account [...] in [...] for individual customers of [...] .02.2015. The complainant's data obtained in connection with the conclusion of the above-mentioned contracts are processed by the Bank pursuant to Art. 23 sec. 1 point 3 of the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, as amended, and of 2018, item 138), hereinafter referred to as: the "1997 Act" in the scope of: first name , surname, gender, address of residence, citizenship, tax status, foreign exchange status, PESEL number, series and expiry date of the ID card, date and place of birth, mother's family name, mobile phone number, e-mail address.

2. The evidence provided by the Bank shows that it processed the complainant's personal data for marketing purposes on the basis of the consent expressed in the declaration attached to the agreement [...] of [...] October 2004, ie pursuant to Art. 23 (1) (1) of the 1997 Act.

3. The complainant on [...] .02.2015 quoted "gave an oral instruction to the Bank's employee regarding the lack of consent to any contact for marketing purposes" during the conclusion of the contract [...] (the complainant's correspondence with the Bank from July 2017). However, the Bank's employee contacted the Complainant on [...] July 2017 and [...] July 2017 in order to present the Bank's marketing offer. The complainant again objected to the processing of her personal data for marketing purposes on [...] .07.2017.

4. Moreover, the Bank's letter of [...] .09.2017 shows that the objection lodged by the complainant on [...] .02.2015 was not effectively accepted because the Bank's procedures require that the client's oral instruction be confirmed on paper. The objection lodged by the Complainant was successfully registered in the Bank's system on [...] .07.2017. However, as the Bank explained, the complainant's personal data was included in the previously prepared database for the purposes of the insurance marketing campaign on [...] .05.2017 for third parties, which then contacted the complainant three times after withdrawing their consent. Complaints about marketing contact by these entities were received by the Bank on [...] .07.2017.

5. The complainant, in a letter of [...] .10.2017, again filed a complaint about the processing of her personal data for marketing purposes by the Bank by sending the Bank's marketing information to her e-mail address. In a letter of [...] .01.2018, the Bank explained that it did not process the complainant's personal data for marketing purposes and that marketing information was sent to the complainant by the administrator of the e-mail server used by the complainant, i.e. [...]. As indicated by the Bank in the above-mentioned this was due to the fact that the quotation "The Bank, apart from offers sent directly to the e-mail addresses of its clients, also directs marketing campaigns to media houses, which, through the owners of e-mail servers,

present offers to users of free e-mail accounts". The Bank also confirmed that it noted the complainant's objection to marketing activities by marking consent to the processing of data for marketing purposes in the internet banking system on [...] .07.2017.

6. The Bank also explained that the complainant's personal data are currently being processed for the purpose of handling complaints and notifications pursuant to Art. 118 of the Act of 23 April 1964 Civil Code (Journal of Laws of 2019, item 1145, 1495) for evidentiary purposes, until the claims are time-barred, in the scope of: name and surname, correspondence address, PESEL number, series and number of ID card, gender, phone number, email address, online IB ID, mother's name.

In these facts, the President of the Personal Data Protection Office considered the following.

On May 25, 2018, the provisions of the Act of May 10, 2018 on the protection of personal data (Journal of Laws 2019, item 1781), hereinafter referred to as "u.o.d.o.", entered into force.

Pursuant to Art. 160 sec. 1-3 of the 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, 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), hereinafter referred to as "the Code of Administrative Procedure". 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, also 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 (Journal of Laws UE L 119 of 04.05.2016, p. 1 as amended), hereinafter referred to as "Regulation 2016/679".

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 1997 (with regard to the provisions governing the administrative procedure) and on the basis of Regulation 2016/679 (as regards the legality of the processing of personal data). The method of conducting proceedings in cases initiated and not completed 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 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 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., El / 2012).

In the judgment of May 7, 2008 in the case with reference number Act I OSK 761/07 The Supreme Administrative Court stated that "when examining [...] the legality of the processing of personal data, GIODO is obliged to determine whether the data of a specific entity are processed on the date of issuing the decision on the matter and whether it is done in a lawful manner" .

At the time the event described by the applicant took place, the 1997 Act was in force. After May 25, 2018, the provisions of Regulation 2016/679 apply. The provision of fundamental importance for the assessment of the legality of the processing of personal data was Art. 23 sec. 1 of the 1997 Act (Article 6 (1) of Regulation 2016/679 respectively). Pursuant to the aforementioned provision, the processing of personal data is lawful when the data controller meets one of the conditions listed in this article, i.e. when

the data subject has consented to it, unless it concerns the deletion of data concerning him (Article 6 (1) (a) of Regulation 2016/679, respectively),

it is necessary to exercise an entitlement or fulfill an obligation resulting from a legal provision (Article 6 (1) (c) of Regulation 2016/679, respectively),

it is necessary for the performance of the contract when the data subject is a party to it or when it is necessary to take action before concluding the contract at the request of the data subject (Article 6 (1) (b) of the Regulation 2016/679, respectively) ,

it is necessary to perform tasks specified by law for the public good (Article 6 (1) (e) of Regulation 2016/679, respectively),

it is necessary to fulfill legally justified purposes pursued by data controllers or data recipients, and the processing does not violate the rights and freedoms of the data subject (Article 6 (1) (f) of the Regulation 2016/679, respectively).

It should be added that these conditions apply to all forms of data processing listed in art. 7 sec. 2 of the 1997 Act. Each of the above-mentioned premises legalizing the processing of personal data is autonomous and independent from each other. This means that meeting at least one of them conditions the lawful processing of personal data.

According to the position of the Provincial Administrative Court in Warsaw II SA / Wa 1254/17 on the basis of "Art. 23 sec. 1 point 5 of the Act of 1997, the processing of such data is allowed when it is necessary to fulfill legally justified purposes pursued by data administrators or data recipients, and the processing does not violate the rights and freedoms of the data

subject. Pursuant to art. 23 sec. 4 of the 1997 Act, for the legally justified purpose referred to in para. 1 point 5, it shall be considered, in particular, direct marketing of the controller's own products or services. Art. 32 sec. 1 of the Act of 1997 provides that each person has the right to control the processing of data concerning him, contained in data files, and in particular the right to object to the processing of his data in the cases specified in Art. 23 sec. 1 point 4 and 5, when the data controller intends to process them for marketing purposes or to transfer their personal data to another data controller (point 8). Pursuant to Art. 32 sec. 3 of the 1997 Act, in the event of an objection referred to in para. 1 point 8, further processing of the questioned data is unacceptable. However, the data controller may leave the name or names and surname of the person in the file and the PESEL number or address only in order to avoid the re-use of that person's data for the purposes covered by the objection. "

After May 25, 2018, in accordance with Art. 21 sec. 2 of Regulation 2016/679 "if personal data are processed for direct marketing purposes, the data subject has the right to object at any time to the processing of his personal data for the purposes of such marketing, including profiling, to the extent that the processing is related to such direct marketing ".

Referring the above to the circumstances of the present case, it should be noted that the complainant demanded the quotation "to remove the deficiencies in the processing of personal data by fulfilling her obligations under Art. 32 sec. 1 of the 1997 Act "by the Bank, in particular, it objected to the processing of its data for marketing purposes pursuant to Art. 32 sec. 1 point 8 of the 1997 Act. Pursuant to Art. 32 sec. 3 of the 1997 Act, the Bank was obliged to consider the complainant's objection submitted in [...] .02.2015 and to stop processing her personal data for marketing purposes. The objection was not considered until [...] .07.2017. In the discussed case, the Bank's behavior in the period from [...] .02.2015 to [...] .07.2017 appears to be a breach of the provisions of the Act on the Protection of Personal Data. Nevertheless, the President of the Personal Data Protection Office does not have any legal instruments that would make it possible to offset the effects of the previous breach.

At the same time, it should be pointed out that the legal basis for the processing of the complainant's personal data by the Bank for marketing purposes until the objection was raised on [...] February 2015 was the consent submitted in the declaration attached to the agreements concluded by the complainant with the bank in 2004. This premise was expressed in Art. 23 (1) (1) of the 1997 Act (Article 6 (1) (a) of Regulation 2016/679). Currently, the Bank does not process the complainant's personal data for marketing purposes.

Notwithstanding the foregoing, I would like to inform you that if, in the opinion of the complainant, there was a breach of her personal rights, e.g. in the form of a breach of the right to privacy by sending marketing information to her without any legal

basis, she may pursue her claims in this respect in a civil action brought before the locally competent a court of law. According to the content of Art. 24 § 1 of the Act of 23 April 1964 Civil Code (Journal of Laws of 2018, item 1025), the person whose personal right has been violated may, inter alia, demand monetary compensation or payment of an appropriate amount of money for the indicated social purpose.

Taking into account the above considerations, it should be concluded that there was no basis for issuing a decision ordering the restoration of legal status by the President of the Personal Data Protection Office, it is reasonable to issue a decision refusing to fulfill the request of the data subject.

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, he has the right to lodge a complaint against the decision to the Provincial Administrative Court in Warsaw within 30 days from the date of its delivery to the party, via the President of the Office for Personal Data Protection (address: ul. Stawki 2, 00-193 Warsaw). However, due to the state of epidemic in force on the date of the decision, pursuant to Art. 15zzr paragraph. 1 point 1 of the Act of March 2, 2020 on special solutions related to the prevention, prevention and combating of COVID-19, other infectious diseases and crisis situations caused by them (Journal of Laws of 2020, item 374, as amended), these time limits do not start running at present; they will begin to run on the day following the last day of an epidemic or immediately following a possible epidemic emergency.

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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