THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, day 10

September

2019

DECISION

ZSOŚS.440.140.2019

Based on Article. 105 § 1 of the Act of June 14, 1960, Code of Administrative Procedure (Journal of Laws of 2018, item 2096, as amended), art. 12 point 2, art. 22, art. 23 sec. 1 points 3 and 5 and article. 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) in connection with Art. 160 sec. 1 and 2 of the Act of May 10, 2018 on the protection of personal data (Journal of Laws of 2018, item 1000, as amended), after conducting administrative proceedings regarding the complaint of Mr. K. M. Zam. in W., for the processing of his personal data for marketing purposes by S.S.A. based in S.,

I discontinue the proceedings

Justification

The Office of the Inspector General for Personal Data Protection (currently: the Office for Personal Data Protection) received a complaint from Mr. K. M., hereinafter referred to as the "Complainant", about the processing of his personal data for marketing purposes by S. S.A. with its seat in S., hereinafter referred to as the "Company".

It should be noted here that on the date of entry into force of the Act of May 10, 2018 on the protection of personal data, on May 25, 2018, the Office of the Inspector General for Personal Data Protection became the Office for Personal Data Protection. Pursuant to Art. 160 of this Act, the 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 on the Protection of Personal Data in accordance with the principles set out in the Code of Civil Procedure. All activities undertaken by the Inspector General for Personal Data Protection before May 25, 2018 remain effective.

In the content of the complaint, the Complainant requested an examination by the Inspector General for Personal Data Protection (currently: the President of the Office for Personal Data Protection) whether the Company's activity consisting in

including a non-negotiated consent clause for the processing of personal data for marketing purposes in the insurance contract, despite the express objection from the Complainant , expressed in the application for insurance, complies with the provisions on the protection of personal data. The complainant explained that as a member of the District Chamber of Civil Engineers, having building qualifications and performing independent technical functions, pursuant to the provisions of the Regulation of the Minister of Infrastructure and Development of September 11, 2014 on independent technical functions in construction (currently: the Regulation of the Minister of Investment and Development of April 29, 2019 on vocational training to perform independent technical functions in construction, Journal of Laws 2019, item 831), is required to have third party liability insurance, concluded as part of the group insurance of the Chamber members. The complainant indicated that in order to initiate the procedure, an application should be submitted, a template of which is available on the website [...]. The complainant also pointed out that by completing the application in point V, consent to the processing of personal data for marketing purposes may be canceled, which by submitting the above-mentioned the complainant did so.

Moreover, as the Complainant explained, in response he received an insurance policy which contained consent to the processing of the Complainant's personal data for marketing purposes, although the Complainant did not express such consent, as indicated above. The complainant also stated that he had tried to explain the situation with the representatives of the Company, but was informed that it was not possible to remove this provision from the insurance policy, despite the objection made. In a letter of [...] July 2017, the Complainant specified that he requested that the deficiencies in the processing of his personal data be remedied.

In the course of the proceedings initiated by the complaint, the President of the Personal Data Protection Office obtained explanations regarding the circumstances of the case, read the evidence and made the following findings.

By letters of [...] February 2018, the Inspector General for Personal Data Protection (currently: the President of the Office for Personal Data Protection) informed the Complainant about the initiation of proceedings in the case and asked the President of the Management Board [...] based in S. (hereinafter: : "President of the Management Board") to respond to the content of the complaint and to provide written explanations.

On [...] February 2018, the Office of the Inspector General for Personal Data Protection (currently: the Office for Personal Data Protection) received a letter from the Company's Management Board Representative (hereinafter referred to as the "Proxy"), explaining that the Company did not process the Complainant's data for marketing purposes. The plenipotentiary explained

that the Company processes the complainant's personal data only for the purpose of implementing the concluded insurance contract pursuant to Art. 23 section 1 point 3 of the Act on the Protection of Personal Data (hereinafter referred to as: "the Act") and for the fulfillment of other legally justified purposes of the data controller pursuant to Art. 23 section 1 point 5 (excluding data processing for direct marketing purposes). Moreover, the attorney indicated that the Company's IT systems showed that the Complainant had lodged an objection pursuant to Art. 32 (1) (8) of the Act on the processing of his data on [...] January 2017. The Plenipotentiary then explained that the Company accepted the objection and noted it in the IT system (proof: screenshot from the Company's IT system), while the entry on the policy No. [...], to which the Complainant refers, is part of the Data Administrator's Statement, but due to the objection, as already indicated above, the Company does not process data for marketing purposes.

The President of the Office for Personal Data Protection informed the Complainant and the President of the Management Board of the Company by letters of [...] March 2018 about conducting administrative proceedings, as a result of which evidence was collected sufficient to issue an administrative decision and about the possibility to comment on the collected evidence and materials and the requests made in accordance with the content of art. 10 § 1 of the Act of June 14, 1960, Code of Administrative Procedure (hereinafter referred to as: "k.p.a."), within 7 days from the date of receipt of the above-mentioned writings.

In such a factual and legal state, the President of the Personal Data Protection Office considered the following:

At the outset, 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. Such a position is confirmed by numerous judicial decisions. For example, we can cite the judgment of the Supreme Administrative Court in Warsaw of October 4, 2000 in the case file number V SA 283/00, where it was stated that “It is necessary to indicate (...) the need to apply the norms of substantive law in force on the date of the decision. It should be clearly emphasized that the provisions of the Code of Administrative Procedure do not bind the date of initiation of the proceedings on the factual and legal grounds for examining the case. The decisive factor in this respect is the state in force on the date of issuing the decision ”. Additionally, 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 the public administration authority issues an administrative decision on the basis of 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 status 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). Moreover, 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".

As the explanatory proceedings showed, the President of the Management Board [...] does not process the Complainants' personal data for marketing purposes, against the objection raised by the Complainant. As indicated above, the Company accepted the objection raised by the Complainant and recorded it in the IT system, as proof of which the Representative of the Management Board attached to the explanations sent to the President of the Personal Data Protection Office a screenshot of the relevant IT system of the Company. The attorney of the Company explained at the same time that the entry on the policy no. [...], to which the Complainant refers, is part of the Data Administrator's Statement, but due to the objection raised, the Company does not process the Complainant's personal data for marketing purposes. Therefore, the proceedings are redundant and should be discontinued.

In this situation, these proceedings are subject to discontinuation pursuant to Art. 105 § 1 of the Code of Administrative Procedure, as it is irrelevant. In accordance with the above-mentioned a provision, when the proceedings for any reason have become redundant in whole or in part, the public administration authority issues a decision to discontinue the proceedings, respectively, in whole or in part. The wording of the above-mentioned regulation leaves no doubt that in the event that the procedure is deemed groundless, the body conducting the procedure will obligatorily discontinue it. At the same time, the literature on the subject indicates that the pointlessness of the administrative procedure, as provided for in Art. 105 § 1 of the Code of Civil Procedure means that there is no element of the material legal relationship, and therefore it is not possible to issue a decision settling the matter by deciding on its substance (B. Adamiak, J. Borkowski "Code of Administrative Procedure. Comment" 7th edition Wydawnictwo CH Beck, Warsaw 2005 r., p. 485). The same position was taken by the Provincial Administrative Court in Kraków in its judgment of 27 February 2008 (III SA / Kr 762/2007): "The procedure becomes redundant

when one of the elements of the substantive legal relationship is missing, which means that the case cannot be settled by deciding on the substance ”.

The determination by the public authority of the existence of the condition referred to in Art. 105 § 1 of the Code of Civil Procedure obliges him to discontinue the proceedings, because then there are no grounds to decide the merits of the case, and further conduct of the proceedings in such a case would make it defective, having a significant impact on the result of the case.

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 Act of June 14, 1960 - Code of Administrative Procedure (Journal of Laws of 2018, item 2096, as amended), from this decision, the party has the right to submit an application for reconsideration within 14 days from the date of delivery of the decision side. 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 Personal Data Protection Office. 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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