

Decision of the President of the Office for the Protection of Personal Data

DKN.5112.7.2020

Warsaw, 30.06.2020

Pursuant to Article 104 § 1 of the Act of 14 June 1960 - the Code of Administrative Procedure (Journal of Laws of 2020, item 256) in conjunction with Article 7 and Article 60 of the Act of 10 May 2018 on the protection of personal data (Journal of Laws of 2019, item 1781) and pursuant to Article 58(2)(b) in conjunction with Article 5(1)(a) and Article 6(1)(c) of Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 04.05.2016, p. 1, as amended), following the administrative procedure for the processing of personal data carried out by the General Education School Complex in D., President of the Office for Personal Data Protection,

gives a warning for the infringement by the General Education School Complex in D. of the provisions of Articles 5(1)(a) and 6(1)(c) of Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 2016/679, p. 1. EU L 119, 04.05.2016, p.1 as amended), hereinafter referred to as "Regulation 2016/679", consisting of processing without a legal basis of personal data of pupils in connection with the conduct of surveys (interviews) on their personal situation in the school year 2019/2020 using a survey called "Diagnosing the home and school situation of pupils. Student survey".

Justification

Pursuant to Article 78 paragraph 1, Article 79 paragraph 1 point 1 and Article 84 paragraph 1 points 1-4 of the Act of 10 May 2018 on the protection of personal data (Journal of Laws of 2019, item 1781), hereinafter referred to as the "Act", in connection with Article 57 paragraph 1 point a and point h, Article 58 paragraph 1 point b and point e of the Regulation 2016/679, in order to control the compliance of data processing with the provisions on the protection of personal data, control activities were carried out at the General Education School Complex in D. (ref. DKN.5112.7.2020).

The scope of control included processing by the General Education School Complex in D. (hereinafter also referred to as "GESC") personal data of students in connection with conducting among them in the school year 2019/2020 surveys (interviews) concerning their personal situation, using a questionnaire called "Diagnosing the home and school situation of a student. Student survey".

During the audit oral explanations were received from the GESC employees. The facts are described in detail in the control protocol, which was signed by the GESC Director.

On the basis of the evidence gathered in the case, it has been established that in the process of processing personal data, the GESC, as a controller, violated the provisions on personal data protection by processing without legal basis personal data of students in connection with conducting

among them in the school year 2019/2020 surveys (interviews) concerning their personal situation, using a survey called "Diagnosing the home and school situation of a student. Student survey".

In view of the above, the President of the Office for the Protection of Personal Data initiated, ex officio, administrative proceedings in respect of the infringements found, in order to clarify the circumstances of the case (letter of [...] May 2020, mark: [...]).

In response to the notice of initiation of the administrative procedure, the GESC Director by letter of [...] June 2020. (mark: [...]) submitted explanations indicating, inter alia, that a circumstance to be taken into account by the supervisory authority in connection with the inspection is that there were personnel changes as of [...] July 2019 in the position of Director of the GESC. In addition, the GESC Director argued that due to the lack of continuity in the GESC documentation management and procedures, including those related to personal data protection, he was not provided with the GESC internal documents related to personal data protection in this facility and was not informed about the person acting as data protection officer and his contact details.

The GESC Director also pointed out that he was 'forced' to develop data protection rules in the GESC from the outset, without due support from the DPO, who had not contacted the GESC management until the incident covered by this audit, thereby taking action based on the knowledge and experience of his staff. In addition, after the school pedagogue submitted the questionnaire to the GESC Director for review, the Director of the GESC was to indicate in his conversation with the said pedagogue that the questionnaires must be voluntary and should be anonymous, i.e. the student may or may not complete them, and only complete them in so far as he considered appropriate. The headmaster of the GESC admitted in a letter that the school pedagogue at that time did not consult the content of the questionnaire with the GESC Data Protection Officer because he or she performed his or her duties improperly, i.e. did not contact the GESC management during his or her duties. In addition, the Director of the GESC indicated that in each class where the questionnaires were distributed to students, recommendations were to be made that the questionnaires were voluntary and may be anonymous. According to the Director of the GESC, despite the instructions given by the majority of tutors, some students indicated their names or personal data of their parents or statutory representatives in the survey.

To the above mentioned letter addressed to the Office of Personal Data Protection, the Director of the GESC attached the following annexes:

- 1) Information Security Policy in the GESC of 2019,
- 2) Order No. [...] of the Director of the General Education School Complex in D. of [...] October 2019,
- 3) protocol of destruction of questionnaires of [...] October 2019,
- 4) register of information security incidents in the GESC,
- 5) an analysis of the event in terms of the risk of infringement of the rights and freedoms of individuals (risk analysis) carried out by the Data Protection Officer [...] October 2019,
- 6) e-mail correspondence between the GESC Director and the DPO dated [...] October 2019,
- 7) the post-inspection report of the Board of Education in L. of [...] October 2019,
- 8) information of the Disciplinary Ombudsman for Teachers at Wojewoda [...] to the Director of the GESC with a request to send documents in connection with the initiation of an investigation,

- 9) the handover protocol of the General Education School Complex in D. of [...] July 2019,
- 10) the list of attendance of persons trained in personal data protection by the data protection officer of the GESC of [...] October 2019.

After reviewing all the evidence gathered in the case, the President of the Office for the Protection of Personal Data (hereinafter referred to as the "President of UODO") weighed the following:

Article 5 of Regulation 2016/679, formulates the rules concerning the processing of personal data, which must be respected by all controllers, i.e. entities which, alone or jointly with others, determine the purposes and means of processing personal data. According to Article 5(1)(a) of Regulation 2016/679, personal data must be processed lawfully, fairly and in a way which is transparent to the data subject ('lawfulness, fairness and transparency'). Furthermore, pursuant to Article 6(1)(c) of Regulation 2016/679, processing is lawful only where and in so far as the condition that the processing is necessary for compliance with a legal obligation on the controller is met.

In the course of the inspection it was established (the protocol of acceptance of oral explanations is attached as Appendix no. 1 to the inspection protocol) that in the GESC a survey was carried out among its students using a questionnaire form called "Diagnosing the home and school situation of a student. Pupil survey". (hereinafter "survey"). Within the framework of the survey, there was a processing of personal data of GESC students, including data of minors, mainly in the following scope: name and surname, class designation, identification of legal guardians (parents), information about the state of the family (full, incomplete), as well as information about the death of the legal guardian (parent), separation of legal guardians (parents), their education and professional situation, number of people in the household, financial situation, health and addictions of legal guardians (parents), housing situation and the fact of receiving or not receiving financial assistance. The processing of students' data took place in terms of their collection, storage and deletion.

It was also established in the course of the inspection (minutes of acceptance of oral explanations are Annexes 1 and 23 to the inspection protocol) that the survey was conducted in order to identify students who require psychological support from the school they attend. It was also established that the survey was only carried out using blank paper forms (*in blanco*), which were distributed to classroom teachers of the 7 - 8 classes and high school classes at the request of the Principal of the GESC. It follows from the above that personal data of GESC students were processed only with the use of paper forms on which the data were obtained (collected), then stored and finally destroyed (minutes of oral explanation are attachments no. 1 and no. 23 to the control protocol). All copies of the questionnaire returned to the GESC Director were destroyed by the Commission [...] October 2019. According to the findings of the audit, personal data included in the questionnaires were not entered into electronic telecommunications systems, nor were they recorded on electronic data carriers or other information carriers, including in paper form. After collecting the questionnaires, the educators did not make any scans or paper copies of them, nor did they make any other additional documents containing personal data concerning the questionnaires. As of the date of the audit, students' personal data obtained in connection with the surveys were no longer processed by the GESC.

As it follows from the evidence obtained as a result of the control activities (protocols of acceptance of oral explanations are appendices no. 20, no. 22, no. 23 to the control protocol), the survey was carried out in a way that excludes the possibility of getting acquainted with the data contained

therein by unauthorized persons. According to the statements made by the tutors who conducted or were supposed to conduct the questionnaires, they did not get acquainted with the content of completed questionnaires, and thus with personal data included in them (protocols of accepting oral explanations are appendices no. 20, no. 22, no. 23 to the control protocol). Some tutors, after receiving printed survey forms, did not even carry out the survey at all (the protocol of accepting oral explanations is enclosure no. 24 to the control protocol), i.e. they did not distribute the above mentioned forms to the students to be filled in. Moreover, as it was explained, the way of storing the survey forms took into account the necessity to protect them against access by unauthorized persons, i.e. after the completed questionnaires were collected by the tutors, they were stored in locked lockers, which only the above-mentioned tutors had access to.

In view of the above, it must be concluded that the GESC, in conducting the student survey, violated the principle of lawfulness of data processing, expressed in Article 5(1)(a) of Regulation 2016/679, according to which personal data must be processed lawfully, fairly and in a manner that is transparent to the data subject. This principle is further developed in Article 6(1)(c) of Regulation 2016/679, according to which processing is lawful only where, and to the extent that, the condition that the processing is necessary for compliance with a legal obligation on the controller is met.

Referring to the above mentioned principles, it should be stated that the evidence gathered in the course of the inspection allows us to state that the processing of personal data of GESC students took place without a legal basis resulting from the provisions of applicable normative acts.

In particular, it should be pointed out that in accordance with § 9 of the GESC Statute and § 1.11 of the Primary School's Statute in D. in connection with Article 9.3 of the Act of 27 August 2009 on Public Finance (Journal of Laws of 2019, item 869 as amended), the GESC is a budgetary unit, i.e. also a financial sector unit identical to a public entity within the meaning of Regulation 2016/679. Therefore, the GESC as a public entity may process personal data within the scope of its tasks imposed by the Acts only in accordance with Article 5(1)(a) and Article 6(1)(c) of Regulation 2016/679. In turn, pursuant to Article 30a of the Act of 14 December 2016 Educational Law (Journal of Laws of 2019, item 1148 as amended), schools shall process personal data to the extent necessary to perform the tasks and obligations arising from these provisions.

It should be noted that the provisions of the Act of 14 December 2016 Educational Law (Journal of Laws of 2019, item 1148, as amended) and other legal acts regulating the functioning of educational institutions, do not specify such tasks and responsibilities of schools that would justify the processing of students' personal data as it was done in the GESC in connection with the survey. The carrying out of the survey, which entailed the processing of pupils' data by the GESC, did not constitute the fulfilment of an obligation or task incumbent on that educational institution under the Act, and therefore it must be considered that Article 6(1)(c) of Regulation 2016/679 has also been infringed.

The President of UODO, analyzing all the evidence gathered during the audit, concluded that the claims of the Director of the GESC contained in the letter of [...] June 2020 (mark: [...]), concerning the key issues in this Decision, do not confirm the findings made in this case or are not material to the case and therefore do not bring new circumstances. First of all, it should be noted that the fact of the personnel changes in the Directorate of the GESC referred to by the Director of the GESC is of no significance for the responsibility of the GESC as a personal data controller in the light of Regulation 2016/679. The controller, which is the GESC represented by the Director, is obliged to ensure the continuity of the performance of the duties resulting from the provisions of Regulation

2016/79, regardless of the personnel changes in the above mentioned position. Explanations of the Director of the GESC in this respect, including referring, inter alia, to the circumstances of failure to provide her with the documentation, may be relevant at most in the sphere of her responsibility resulting from the employment relationship between her and the local government body which is the organizer of the GESC, and not in the sphere of responsibility resulting from the regulations on personal data protection.

In addition, the GESC Director's explanation that from the beginning of the implementation of the survey and its copies to GESC teachers they were instructed to conduct the survey anonymously is questionable. First of all, it should be noted that the questionnaire form, already because it included a place to indicate the student's name, suggested filling in the questionnaire by name, which was in breach of the provisions of Regulation 679/2016. Moreover, the Director of the GESC claim to oblige teachers to instruct their students about the anonymity of the questionnaire contradicts her earlier explanations, as well as those of GESC teachers. As the Principal of the GESC explained during the audit (the protocol of acceptance of oral explanations is attached as Appendix 1 to the main audit protocol), she noted during the interview with the school pedagogue about the questionnaire, that by assumption it is not anonymous and instructed the school pedagogue to inform the tutors that completing the questionnaire is optional. She also instructed the tutors to inform the students about the voluntary nature of the survey directly at the time of handing out the survey forms.

It results from the above that the recommendations regarding the anonymity of the survey were not made to the teachers at the very beginning of the survey, because the voluntariness of completing the survey does not in any way mean that it is anonymous, especially because of its content. This state of affairs is confirmed by the explanations of Mrs. M. K., GESC teacher, classroom educator [...] (the protocol of acceptance of oral explanations is attached no. 20 to the protocol of the main audit), according to which on the occasion of handing over the questionnaire forms to her, the school teacher did not inform her about any recommendations concerning the way or date of conducting the survey. According to Ms K. K.'s explanations, the questionnaires were filled in by name, i.e. the pupils gave their names and surnames, and she did not inform the pupils, before they filled in the questionnaire, about her voluntariness and anonymity. Mrs. M. K. also mentioned that after filling in the questionnaires by the students, a pedagogical council took place, during which her teacher friends posed questions to the Director of the GESC, Mrs. J. P., about the anonymity and voluntariness of filling in the questionnaire, as well as the purpose of its content. According to Mrs. M. K., the Director of the GESC informed during the above mentioned pedagogical council that the questionnaire can be filled in voluntarily and anonymously by students. However, from the response of the Director of the GESC, Mrs. M. K. concluded that there is no general recommendation from the Director that the survey must be anonymous.

The fact that the classroom tutors were not informed about the need to conduct the survey anonymously also results from the explanations of Mrs I. J., GESC teacher, class tutor of [...] High School (the protocol of accepting oral explanations is attached as Appendix 21 to the protocol of the main control). Mrs I. J. stated that she learned about the questionnaire from the school teacher, Mrs D. K., who personally brought her printed and unfilled forms of the questionnaire in September 2019 while Mrs I. J. was conducting it of the classroom's teaching hours [...] of the High School. Mrs. D. K. asked Mrs. I. J. to conduct a survey among the students of the class [...], but she also informed her that completing the survey was voluntary (optional). Mrs. D. K. did not inform Mrs. I. J. of any other recommendations concerning the method or date of the survey.

Explanations of similar content were also submitted by: Mrs W. M., teacher of the GESC in D., classroom teacher of [...] Comprehensive Secondary School (the protocol of accepting oral explanations is enclosed in the protocol of the main control), Mrs M. D., teacher of the General Education School Complex in D, tutor of class [...] of a General Secondary School (the protocol of oral explanations is attached as appendix no. 23 to the protocol of the main control) and Mrs M. C., teacher of the General Education School Complex in D., tutor of class [...] of a General Secondary School (the protocol of accepting oral explanations is attached as appendix no. 24 to the protocol of the main control). In view of the above, the claim of the Headmaster of the GESC should be considered as unconvincing, that despite instructions of the majority of tutors, some students indicated their names or personal data of their parents or statutory representatives on the survey, because no one directed such instructions to the students for the most part.

Therefore, pursuant to Article 58(2)(b) of Regulation 2016/679, according to which each supervisory authority has the power to issue a warning to the controller or processor in the event of an infringement of the provisions of this Regulation by the processing operations, the President of UODO considers it justified to issue a warning to the GESC in the event of an established infringement of the provision of Article 6(1)(c) in conjunction with Article 5(1)(a) of Regulation 2016/679.

Recital 148 of Regulation 2016/679 provides that, in order to make enforcement more effective, sanctions, including administrative fines, should be imposed for breaches of the Regulation, in addition to or instead of the appropriate measures imposed by the supervisory authority under this Regulation. If the infringement is minor, the financial penalty may be replaced by a reminder. However, due consideration should be given to the nature, gravity and duration of the breach, to whether the breach was not intentional, to actions taken to minimise the damage, to the degree of liability or any relevant previous breaches, to the manner in which the supervisory authority has become aware of the breach, to compliance with the measures imposed on the controller or processor, to the application of codes of conduct and to any other aggravating or mitigating factors.

The determination of the nature of the infringement consists in determining which provision of Regulation 2016/679 has been infringed and classifying the infringement in the appropriate category of infringed provisions, i.e. those indicated in Article 83(4) or Article 83(5) and (6) of Regulation 2016/679. The assessment of the gravity of the infringement (e.g. low, medium or significant) is indicated by the nature of the infringement, as well as the scope, purpose of the processing in question, the number of data subjects affected and the extent of the damage suffered by them. The purpose of the processing of personal data involves determining the extent to which the processing meets the two key elements of the 'purpose limitation' principle, i.e. the identification of the purpose and its consistent application by the controller or processor. In choosing the corrective measure, the supervisory authority shall take into account whether the damage has been or may be suffered due to a breach of Regulation 2016/679, although the supervisory authority itself is not competent to grant specific compensation for the damage suffered. By specifying the duration of the breach, it can be concluded that the breach has been rectified without delay, for how long it lasted, which consequently makes it possible to assess, for example, the appropriateness or effectiveness of the controller or processor. The Article 29 Working Party, in its guidelines on the application and determination of administrative fines for the purposes of Regulation 2016/679 adopted on 3 October 2017, referring to the intentional or unintentional nature of an infringement, indicated that, in principle, 'intentionality' includes both knowledge and intentional action, in relation to the characteristics of a prohibited act, whereas 'unintentionality' means the absence of any intention to cause an infringement, despite the failure of the controller or processor to fulfil the duty of care

required by law. Intentional infringements are more serious than unintentional ones and consequently more often involve the imposition of an administrative fine.

The President of the UODO considered that, in the circumstances of the present case, a warning to the GESC was sufficient. The President of the UODO considered the above infringement to be an attenuating circumstance, which justified this, to be of an unintended nature. The GESC immediately took a number of corrective measures, such as: destruction of the questionnaire forms or failure to carry out the survey by some teachers, organization of training for GESC employees in order to raise their awareness of personal data protection issues, as well as analysis of the event of conducting the survey among students, due to the risk of infringement of the rights and freedoms of individuals. Moreover, on the basis of the circumstances of the case, there are also no grounds to consider that the data subjects suffered damage as a result of the event.

The President of the UODO also did not receive any other signals that similar behavior resulting in infringements from the GESC had taken place. Thus, the event concerns a one-time incident, not a systematic act or omission that would pose a serious threat to the rights of persons whose personal data are processed by the GESC. The above circumstances justify the granting of a reminder to the GESC for the established breach, taking into account the possibility of avoiding similar events in the future.

It should be noted that, should a similar event occur in the future, any reminder issued by the President of the UODO to the GESC will be taken into account when assessing the grounds for a possible administrative penalty, in line with the principles set out in Article 83(2) of Regulation 2016/679.

In this factual and legal situation, the President of the UODO decided, as in the operative part.

The decision is final. A party has the right to lodge a complaint against the decision with the Voivodeship Administrative Court in Warsaw, within 30 days from the date of its delivery, via the President of the Office for Personal Data Protection (address: ul. Stawki 2, 00 - 193 Warsaw). A fixed entry in the amount of PLN 200 should be made against the complaint, in accordance with Article 231 in connection with Article 233 of the Act of 30 August 2002 Law on proceedings before administrative courts (Journal of Laws of 2019, item 2325, as amended). A party (natural person, legal person, other organizational unit without legal personality) has the right to apply for the right of assistance, which includes exemption from court costs and appointment of an advocate, legal adviser, tax advisor or patent attorney. The right of assistance may be granted at the request of a party submitted before or during the proceedings. The application is free of court fees.