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DATA STATE INSPECTION

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Activity 2.2

Preparation of manual to support the day-to-day work of the DSI regarding the management of claims and complaints

written by

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DATU VALSTS INSPEKCIJA

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1. Introduction

This manual is based on the preparatory work of STE Claudia Golembiewski who described the most important steps of the complaint procedure. The author of the current expertise took over this description with small amendments caused by new results of interviews (see my analysis on the current practise of the DSI) and tries to find a methodology of handling complaints. Therefore a manual for internal complaint management is added, which should help new members of staff to deal with complaints. The manual is based on the results of the interviews mentioned above. The text of STE Golembiewski is written in Italics.

2. What should be considered if a complaint has been received?

According to Section 29 in particular paragraph 2 of the Personal Data Protection Law the DSI has to take decisions and review complaints regarding the protection of personal data.

2.1. What kind of Law has to be considered?

The procedure of handling complaints is regulated in Administrative Procedure Law that has been established in 12 June 2003 and 19 January 2004. According to Section 3 of paragraph 1 this Law shall be applied to administrative procedure in institutions to the extent that special norms of law in other laws do not provide otherwise. The Personal Data Protection Law does not contain any regulations about procedures of handling complaints so that the DSI has to handle complaints based on the Administrative Procedure Law.

If there is an application dealing with general questions and without reference to an individual case the the lesniegumu, sudzibu und priekslikumumu izskatisanas kartiba valsts un pasvaldibu institucijas Should apply (Annotation: English version of this Law was not available).

Mainly this Law contains time periods that have to be kept.

- *If the DSI is incompetent for answering the compliant it has to be referred to the competent institution within seven days.*

- *If it is not necessary to gather more information the submitter has to be informed within fifteen days.*
- *If there is a necessity to gather information the complaint has to be answered within a thirty-day period.*
- *If there is a necessity to gather more information the time period for answering the complaint because of objective reasons could be extended. The submitter has to be informed.*

If the complaint refers to questions that have already been answered by the DSI it should be checked if it could make sense to make the information in an abstract manner available on the Internet website of the DSI. If the complaint regards recurring topics it also should be checked if it could make sense to distribute a leaflet containing information. E.g. this could be information about prevention against unsolicited advertising.

In cases of complaints because of singular cases the handling is based on the regulations of Administrative Procedure Law.

2.2. Procedures that have to be considered

If the DSI has received a complaint the regulations of the Administrative Procedure Law have to be considered. In particular these are the sections 41 until 101 of the Law.

- ***Time periods***

Section 64 provides time periods regarding issuing of administrative acts. According to section 64 of the Law the DSI shall take a decision within a month from the day the submission is submitted. If due to objective reasons it is not possible to comply within the one month time period, the DSI may extend the time period in the manner that is regulated in section 64 paragraphs 2 and 3 of the Law.

- **Forms**

There also have to be considered forms that in particular are regulated in sections 55 following of the Administrative Procedure Law. An administrative matter in an institution shall be initiated:

- 1) on the basis of a submission
- 2) on the basis of an initiative of the institution; or
- 3) on the basis of an order by a higher institution or of a notification by another authority.

Regarding to section 59 paragraph 1 of the Law after initiation of an administrative matter, an institution shall acquire information as, in accordance with regulatory enactments, is necessary so that an appropriate decision will be taken.

- *Hearing of the participants in administrative proceedings*

Section 62 of the Law regulates that an institution shall clarify and assess the opinions and arguments of the addressee or the third party.

So the DSI should request the potential violator of Data Protection Law for a statement about the facts of the case. The employees of the DSI have to be authorised by the director of the DSI to request the statement.

First of all the purpose of the complaint has to be found out. The request for the statement should explain what kind of violation the submitter reproaches the potential violator and also the potentially affected section should be specified. These could be e.g. the following:

- *Processing of personal data without a legal basis according to Sections 7 and 11 of the Personal Data Protection Law;*
- *Violation of the principles of proportionality of personal data processing according to Section 10 of the Personal Data Protection Law;*
- *Failure to notify the data subject according to sections 10 and 26 of Personal Data Protection Law;*

- *Failure to ensure quality of personal data according to section 10 of the Personal Data Protection Law.*

- *Further proceedings*

If the DSI has received the statement the responsible employee for the singular case has to write a record about the facts of the case.

This record has to be signed by the potential violator.

If he denies signing the record the employee of the DSI has to make a note and also furthermore has to inspect the facts of the case.

According to the Administrative Procedure Law the DSI has to make considerations in taking a decision to issue an administrative act and determining the content thereof according to sections 65 and 66 of the Law.

The employee has to consult the facts of the case with the head of control division at DSI. The head of supervision division then should arrange a meeting.

The submitter and also the addressee are allowed to participate in the meeting. The employee should make sure that the parties are invited to the meeting.

- ***Decision about further proceedings in singular cases***

After having heard the parties, especially the potential violator of Data Protection Law, the DSI has to take a decision what measures should be taken in the singular case. So especially it has to be decided whether the addressee of the submission should be admonished or fined.

First of all it has to be decided if the complaint is well founded and a violation of Data Protection Law has to be established.

It is necessary to observe the regulations in sections 65 and 66 of the Administrative Procedure Law.¹

- *According to this first of all DSI should establish what kind of infringement of personal data is existent and especially if there is a substantial or a marginal violation of Data Protection Law. Also it has to be examined if the affected personal data are sensitive data according to the Directive 95/46/EC of the European Parliament and the Council of 24 October 1995.*
- *If a lighter violation of Law has to be established and the violator promises to prevent repetition it should be examined if the violator has explained in a believable way to prevent violations in the future.²*
- *In cases there is a substantial violation it has to be examined if the violator regrets the violation and has explained in a believable way to prevent violations in the future. Also it should be examined if it is adequate to issue an administrative act. Then it has to be decided if it is sufficient to admonish the violator.*
- *In cases the infringements are substantial in general it would be necessary to issue an administrative act. It has to be examined if it is adequate to admonish the violator and to abstain from obtaining a fine.*
- *In cases sensitive personal data are concerned or in cases of substantial infringements it has to be examined if there should be obtained a fine. Even in cases of substantial infringements a fine in general would be an adequate measure if the violator does not concede that he is wrong and does not explain in a believable way to prevent violations in the future.*

¹ The expert deleted the specific reference to Article 65 paragraph 2 APL, because she doubts that this provision is applicable under the current legal situation.

² The sentence “So it should be examined to abandon an administrative act.” was deleted by the expert for the reasons mentioned in the footnote above.

- **Forms of an Administrative Act**

Forms that have to be considered by releasing an administrative act are regulated in section 67 of the Law. In section 70 of the Law there are regulations about notification and validity of administrative acts that also have to be considered. In accordance with section 31 of the Personal Data Protection Law the addressee has to be informed that decisions by the DSI may be appealed to a court.

- **Notification to other participants in administrative proceedings**

Regarding to section 71 of the Law the DSI has to make a notification of administrative act to other participants in administrative proceedings. According to section 71 paragraph 1 of the Law a notice of an administrative act shall be given to third parties. According to paragraph 2 of the section in cases the addressee and the submitter are not one and the same person, notice of the administrative act shall be given to the submitter.

In cases there is no administrative act the DSI should give the complainant a final report about the results of the controlling of the DSI.

3. Internal Complaint Management

3.1. Registration of complaints; electronic filing system

Complaints can be submitted orally or in writing. The institution shall immediately formalise an oral submission in writing and the submitter shall sign it (Section 56 Paragraph 1 APL). In practise the complaint therefore should be submitted in a written form or personally by the complainant.

All complaints are registered by the Director's Assistant or an employee of the Supervision Department.³

³See my comments in: STE Dr. Eva Souhrada-Kirchmayer, Analysis of current practise of the DSI, 10. In the evaluation part it is said that the incoming complaints should be registered only by one person and not by persons with different functions and on different places.

The registered complaints are viewed by the director and forwarded to the Head of the Supervision Department and from there to the Control Division.

The Director's assistant and the Supervisory Department⁴ keep an electronic filing system about all complaints received by the DSI which allows to examine which and how many complaints have not been decided yet and which steps of procedure have been taken.

Each complaint is registered under a number under which it can be found.

3.2. Acquisition of information

The responsible staff member has to deal with the case in substance. The staff member collects information with a view to the establishment whether there has been a violation of data protection or not. Each letter which is sent of the DSI has to be approved not only by the employee, but also by the head of the Control Division, the Head of the Supervisory Department and the Director.⁵

The employee has to take specifically into account:

1. the competence of the DSI (has the DSI the power to deal with the case in accordance with the powers laid down in Personal Data Protection law (PDP law)?
2. the form requirements of Section 55 following APL
3. is he complainant data subject or not, and in this connection
4. who are the parties in the procedure (see the rights of the parties)
5. who are third persons involved in the procedure
6. the hearing of participants in administrative proceedings
7. time periods (section 64 APL).

The potential violator has to be requested for a statement about the facts of the case. When the DSI has received the statement the responsible employee has to write a record about the facts of the case. This record has to be signed by the potential

⁴ As long as complaints are registered by different persons on different places, both should have access to this system.

⁵ See my comments in: Souhrada-Kirchmayer, Analysis, 10. The process should be shortened. At least the Head of the Supervision Division should be entrusted to sign.

violator. If he refuses signing the record the employee of the DSI has to make a note and has to collect more facts of the case.

Depending on the case the responsible employee should consider

- if a technician should be involved into the case
- if controls on the spot are necessary (especially in cases of high technical complexity and/or if the acquisition of facts is very difficult without an inspection on the spot).

All correspondence has to be approved by the Head of the Control Division, the Head of the Supervision Department and has to be signed by the Director.⁶

3.3. Inspections on the spot

Inspections on the spot have to be ordered by the Head of the Supervision Department. They can be announced to the controller, if there is no danger that the result of the control will be affected by the announcement. The inspection has to be exercised at least by two employees of the DSI, one jurist and one technician. They have to identify themselves to the controller before starting the control of the spot.

3.4. Decision regarding Termination of Matter or Issue of an Administrative Act

On the basis of the collected facts the head of the supervision department decides if a violation of data protection has taken place and the procedure should go on or if has been no violation. The decision has to be prepared by the responsible employee.

If no violation has been established, the procedure is stopped and the complainant the data controller and other involved persons have to obtain the decision. If the complainant is not concerned himself/herself, he/she has no right to obtain information, which contains personal data related to another person (data subject).

⁶ See my comments in: Souhrada-Kirchmayer, Analysis, 10. The internal process should be shortened. At least the Head of the Supervision Department should be entrusted to sign.

3.5. Meeting of the participants

If the procedure continues, a meeting has to be arranged by the Head of the Supervisory Department. The head of the Supervision Department (Deputy Director), the Head of the Control Division and the Head of the Legal Division as well as the responsible employee are participating in this meeting. The submitter and the addressee of the complaint as well as other involved persons are allowed to participate in this meeting.

The employee should make sure that the parties and other involved persons are invited to the meeting.

The employee has to write a protocol of the meeting.

3.6. Final Decision on Fines

On the basis of the acquired facts the head of the supervisory department takes a decision and decides if the violator should be punished by fines or my admonition. He also decides about the amount of fines. This decision is based on the Latvia Administrative Violations Code. The responsible employee prepares the decision.

In imposing a fine or an admonition it has to be taken into account

- the gravity of violation
- the fact that the violator acted intentionally or not
- the fact if sensitive data are concerned
- the fact if the controller continued his unlawful processing after being informed about the complaint
- the expectation that the controller will repeat/continue his unlawful processing or not.

The decision must comply with the form requirements (Section 67 APL).

The decision has to be addressed to the violator (controller). The submitter has also to be informed about the administrative act. If there have been requested statements of third parties they also get a copy of the administrative decision.

If the time period of four months is over, no fine can be imposed. In this case it has only to be stated that there has been a violation of data protection by the controller.

3.7. Other decisions

According to the DSI can require that data be blocked or that incorrect or unlawfully obtained data be erased or destroyed, or order a permanent or temporary prohibition of data processing. If the preconditions for this are fulfilled, the head of supervision department has to issue a separate decision.

The decision must comply with the form requirements (Section 67 APL).

The decision has to be addressed to the violator (controller). The submitter has also informed about the administrative act. If there have been requested statements of third parties they also get a copy of the administrative decision.

3.8. “Complaints by telephone”

Telephone calls should be documented. In the documentation it should be laid down: the time (moment) of the call; the subject of the call; the name of the calling person, if available; the result of the telephone conversation).

Persons who want to lodge a complaint should be asked to send it in a written form to the DSI or to appear personally at the DSI to formulate the complaint.

3.9. E-Mails

E-mails should be regarded as written complaint. If the complainant should obtain personal data in the course of the procedure, he/she shall be asked to prove his/her identity.

3.10. Appeals to the Administrative Court

Opinions of the DSI, which are given in the course of an appeal procedure to the Administrative Court have to be signed by the Director.

3.11. Evidence of decisions

The Supervision Department has to keep evidence on decisions of the DSI.⁷

3.12. Coordination

The Head of the Supervision Division is responsible for the coordination of jurisdiction of the DSI. He/she supervises the acquisition procedures and is responsible for the current tasks of the DSI.

⁷ The expert is convinced that it is necessary to keep an evidence of decisions for the daily work. The more decisions exist, the more is it necessary to consult the register to “bring a line” into jurisdiction. As soon as possible the decisions should also be anonymized and published in the internet to inform interested citizens on the jurisdiction of the DSI.