

PERIOD OF RETENTION OF PERSONAL DATA OBTAINED IN THE COURSE OF THE RECRUITMENT PROCESS

Both the Ministry of Digital Affairs and the Personal Data Protection Office (PDPO) have recently published explanations regarding practical issues related to the protection of the personal data of job candidates contained in their CVs. The interesting thing is that these standpoints are diametrically opposite, and the tone of the statements of these two authorities connected with the dispute over competences between them seems unprecedented (bearing in mind that this case does not concern political or public issues). The above situation leads to significant uncertainty in this area and creates significant risks for employers.

Below we present the approach of both the Ministry and the PDPO as to the permitted period of retention (storage) of CVs of job candidates.

STANDPOINT OF THE PERSONAL DATA PROTECTION OFFICE

In October 2018, the PDPO published a guide for employers concerning personal data protection at the workplace. According to the standpoint expressed therein, the personal data of candidates whose recruitment process did not end with employment should be erased (or, alternatively, returned, if they were stored in hard copy) immediately following the end of the recruitment process, and if no recruitment process is being conducted at the given time – basically immediately following the receipt of the CV (unless the employer nevertheless decides to commence the recruitment process with respect to such candidate shortly thereafter). The argument that retention of CVs and other documents related to the recruitment process is necessary for the purpose of defending against potential claims of discrimination during the recruitment process does not change the standpoint of the office. The PDPO came to the conclusion that an employer may fully protect itself against such claims even without documentation relating to the unsuccessful recruitment of the candidate raising such claims.

Issues

- Standpoint of the Personal Data Protection Office
- Standpoint of the Ministry of Digital Affairs

STANDPOINT OF THE MINISTRY OF DIGITAL AFFAIRS

The above standpoint of the PDPO has caused confusion among lawyers and entrepreneurs because it is inconsistent with the existing commonly adopted view and market practice. As a result of numerous reservations and queries, on 23 January 2019, the Polish Ministry of Digital Affairs published legal explanations relating to the periods of retention of the CVs of job candidates who were not employed following the completion of the recruitment process. This standpoint in general corresponds with the reasonable needs of entrepreneurs. Pursuant to the explanations, we may be dealing with two types of situations:

- CVs are received by companies without any connection to a specific recruitment process – in such a case the period of retention of CVs may in principle be unlimited, as the submission of a CV should be treated as consent to the unlimited in time processing of personal data (unless, as we understand it, the candidate expressly specifies a narrower scope of such consent). Of course, the consent may be withdrawn by the candidate at any time;
- CVs are received by companies as part of an ongoing recruitment process – data of candidates may be retained for a period not longer than three years, i.e. until the expiry of the limitation period for potential claims. However, such period should be applied only in the case of a high risk that such proceedings will be initiated by a candidate. Otherwise, the Ministry states that a period of several months for waiting for claims, if any, to be raised should be sufficient and that afterwards the CVs should be destroyed.

THE DISPUTE CONTINUES

The PDPO's reaction to the explanations was adamant. In its statement, the PDPO declared that it is the only entity authorised to issue interpretations of the personal data protection regulations and suggested that compliance with the explanations provided by the Ministry may in the future result in liability for damages on the part of the State Treasury towards entrepreneurs on whom the PDPO imposes a penalty for an infringement of the GDPR consisting in the retention of CVs for a period longer than the one resulting from the PDPO's guidelines.

We are nevertheless of the opinion that there are numerous arguments pointing to the PDPO's standpoint being incorrect (and, at the same time, justifying the standpoint of the Ministry), yet, in practice, failure to adhere to the PDPO's standpoint may give rise to the risk of penalties being imposed by the PDPO, particularly since the content and tone of the PDPO's last statement points to its ambitious approach to this subject.

Should you be considering whether and how to change your policy relating to the retention of CVs in light of the above situation, we are happy to assist you.

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