COURT DECISIONS

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Commentary on the Judgement of the Supreme Administrative Court of 28 Sept. 2018, Ref. No. I Osk 2016/16 (Partly Approving)

Thesis: The functional and grammatical interpretation of the term a "person performing a public function" does not directly refer to the public officer referred to in Article 115(13) of the Penal Code[2].

Introduction

The facts described in the justification of the Supreme Administrative Court[3] ruling indicate that the Provincial Administrative Court in Warsaw, in its judgement of 14 March 2016[4], after examining a complaint from the Chancellery of the Prime Minister against the decision of the Inspector General for the Protection of Personal Data (hereinafter referred to as the GIODO) concerning the processing of personal data, repealed the contested decision of the GIODO and the preceding decision issued by that authority.

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[2] Dz.U. 2019, item 1950 as amended; hereinafter: the Penal Code.

[3] Reference No. I OSK 2016/16, Legalis No. 1866573; hereinafter: the Supreme Administrative Court of 28 September 2018.

[4] Reference No. II SA/Wa 1754/15, Legalis No. 1456389.

The GIODO obtained information from an inter-company trade union organisation at the Agency for Restructuring and Modernisation of Agriculture (hereinafter: the ARMA), via the Trade Union of Public Service Employees, about possible irregularities in the course of personal data processing by the Chancellery of the Prime Minister in an inspection conducted by this entity at the ARMA. The aforementioned control was carried out by the Chancellery of the Prime Minister pursuant to the provisions of the Act of 15 July 2011 on control in government administration[5], entitled *Verification of information on the malfunctioning of the Agency for Restructuring and Modernisation of Agriculture*[6].

The GIODO, when issuing the decision, ordered the removal of personal data concerning the names and surnames of ARMA employees performing public functions from the website of the Public Information Bulletin of the Chancellery of the Prime Minister's Office. All of the personal data were collected during the abovementioned inspection and contained in the post-control report. In the opinion of the GIODO, the publication of a document which contains personal data to the extent that it may cause an infringement of the right to privacy should take place after appropriate processing of the personal data. When the positions of the ARMA employees are left in the content of the post-control report, it will not violate the obligation to provide public information specified in the Act on Access to Public Information and will ensure the protection of the right to privacy with respect to the principle of proportionality.

After a re-examination of the request submitted by the Chancellery of the Prime Minister, the GIODO upheld the previously issued decision, thus upholding the arguments adopted in its justification.

As a result of a complaint filed by the Chancellery of the Prime Minister to the Provincial Administrative Court, which ended with a judgement overruling the decisions issued by the GIODO, both the ARMA and the GIODO filed annulment appeals against the abovementioned judgement. The complaint was based on an infringement of procedural and substantive law, *inter alia*, in the form of an incorrect interpretation of the notion of a 'person performing a public function' under the Act on Access to Public Information of September 6, 2001[7].

The Supreme Administrative Court, hearing the complaints in the annulment, dismissed them by judgement of 28 September 2018 pursuant to Article 184 of the Administrative Court Procedure Law[8], considering that they did not contain proper justification. In its reasoning, the Supreme Administrative Court indicated that none of the alleged charges in both annulment proceedings was effective, and so could not challenge the contested judgement. As the court justified, the fact that the first and last names of persons performing public functions contained

[5] Dz.U. 2020, item 224; hereinafter: the Act on Control.

[6] Unpublished.

[7] Dz.U. 2019, item 1429, as amended.

[8] Dz.U. 2019, item 2325, as amended.

in the post-control report, when compared with other information contained in the report, makes it possible to indirectly determine the personal data of family members of persons performing public functions employed by the ARMA, does not constitute grounds for removing the first and last names of persons performing public functions from the Bulletin of Public Information (from the post-control report). Such an action would result in an unjustified restriction of the right to information and would be contrary to the purpose of the Act on Access to Public Information and its basic principles.

Doctrinal interpretation of the term "of" a "person performing a public function"

The main problem which emerged in the Supreme Administrative Court's commentary ruling concerns whether making available (by the Chancellery of the Prime Minister on the website of the Bulletin of Public Information) a post-control document containing the names of persons performing public functions was adequate and compliant with the obligation referred to in Article 6 (1)(4a) second indent of the Act on Access to Public Information.

The interpretation of the term a 'person performing a public function' plays an important role in the sentence. Analysing the current legal status, it should be noted that the issue in question was already repeatedly interpreted in the past, which is clearly reflected in the extensive doctrine and judicature. More importantly, however, it is not entirely or definitively conclusive, and still leaves great opportunities for interpretation.

The approach presented in the Provincial Administrative Court's and the Supreme Administrative Court's judgement concerning a broadening and thus functional interpretation of the term 'a person performing a public function', based on selected case law and doctrine, does not, in the author's opinion, deserve full acceptance. Undoubtedly, one should fully agree with the final decision of both the Provincial Administrative Court and the Supreme Administrative Court as the only possible and legally justified one, however, not on the basis of the functional interpretation of the legal norm referred to in Article 5(2) of the Act on Access to Public Information presented by the indicated courts, but on the basis of the applicable law.

While it remains clear that the protection of the privacy of third parties cannot justify the deletion of the personal data of persons performing public functions from the post-control document, the fact of who should be considered a person performing a public function is disputable.

In the opinion of the Constitutional Tribunal, it is not possible to determine precisely and unequivocally whether and in what circumstances a person working in a public institution can be considered to be performing a public function. Not every public person will be one who performs public functions. Performing a public function involves performing specific

tasks in an office, within the structures of public authority or on another decision-making position in the structure of public administration, as well as in other public institutions. An indication of whether we are dealing with a public function should therefore refer to an examination of whether a specific person within a public institution performs to some extent the public task imposed on that institution. Thus, it refers to entities that have at least a narrow scope of decision-making competence within a public institution. When trying to indicate the general characteristics that will determine if a certain entity performs a public function, it can be considered, without a greater risk of error, that these are positions and functions whose performance is tantamount to taking actions that directly affect the legal situation of other persons, or are at least connected with the preparation of decisions concerning other entities. Therefore, such positions, even if held within public authorities, which are of a service-related or technical nature, are excluded from the range of the public function[9].

This interpretation, presented by the Constitutional Tribunal, led the Provincial Administrative Court and the Supreme Administrative Court to state that 'a person performing a public function' is at the same time a public officer as defined in Art. 115(13) of the Penal Code. This statement, on the basis of the whole justification of the commented ruling, raises well-grounded doubts. In this respect, the author of the commentary does not share the position presented by the Supreme Administrative Court, but does not deny its final judgement.

It has been shown that one of the most significant problems in terms of access to public information is the dissemination of information about people performing public functions. Such a state of affairs seems unavoidable because it involves sharing information about an individual, often an employee of a public organisational unit. This person, on the one hand, is guaranteed the right to privacy, personal data protection, as well as the protection of personal rights from the employer's side, and on the other hand, it is already stipulated in the Constitution[10] itself and in the legislation that a certain scope of information concerning him/her remains publicly available and may meet with justified interest from the social perspective. Such a duality is inevitable, because persons acting in the name and on behalf of public authorities, or managing public property, should take into account the fact that this type of activity cannot go without public interest[11].

The Act on Access to Public Information does not specify which entities, and on the basis of which terms of reference, are given the status of 'a person performing a public function'.

[9] Judgement of the Constitutional Tribunal of 20 March 2006, ref. K 17/05, Dz.U. 2006, No. 49, item 358.

[10] Dz.U. 1997, No. 78, item 483 as amended, hereinafter referred to as the Constitution of the Republic of Poland.

[11] Sakowska-Baryła M, Dostęp do informacji o osobach pełniących funkcje publiczne — informacja publiczna? Legalis, 2016.

The grammatical interpretation, however, supports the perception of the notion of 'a person performing a public function', taking into account first and foremost the subject matter of the competences granted to him/her. In this respect, the public function consists in governing, managing public property, making decisions in the public sphere or preparing the corresponding decisions in written form[12].

While agreeing with the fact of full transparency of public life, special attention, however, based on the more recent findings of the judicature, should be paid to the permanent process of expanding the catalogue of persons performing public functions. Therefore, the adoption by the Provincial Administrative Court and the Supreme Administrative Court, in the face of the currently binding regulations of the General Data Protection[13], that a person performing a public function is at the same time a public officer referred to in Article 115(13) of the Penal Code seems to be largely over-interpreted.

According to the rule in question, a public officer shall be, for example, an officer of the Prison Service or a person who is an employee of the government administration, another state authority or local government, unless they perform only service-related activities, and a person who is entitled to issue administrative decisions. Therefore, assuming that a person performing a public function is at the same time a public officer, it should be recognised that every guard in a prison or pre-trial detention centre, and every government administration employee, who does not perform exclusively service-related or technical activities, is at the same time a person performing a public function. Therefore, pursuant to Article 5(2) of the Act on Access to Public Information, none of these persons may exercise

[12] Wierzbica A, Komentarz do ustawy o ograniczeniu prowadzenia działalności gospodarczej przez osoby pełniące funkcje publiczne, 2017, issue 1, Legalis 2017; resolution of the Supreme Court (7) of 18 Oct. 2001, I KZP 9/01, Legalis No. 50807.

[13] Refers to Regulation (EU) 2016/679 of the European Parliament and of the Council 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 (OJ L 679 of 2016, No. 119, p. 1), hereinafter: the General Data Protection Regulation. '(39) Any processing of personal data should be lawful and fair. It should be transparent to individuals that personal data concerning them are collected, used, viewed or otherwise processed and to what extent these personal data are or will be processed. The principle of transparency requires that all information and any communication relating to the processing of those personal data should be easily accessible and understandable and should be in clear and plain language. [...] Personal data should be processed only where the purpose of the processing cannot be reasonably achieved by other means. [...] (69) Even if personal data may be processed lawfully, where the processing is necessary for the performance of a task carried out in the public interest or in the exercise of public authority vested in the controller or in the legitimate interests of a third party, any data subject should have the right to object to the processing of personal data relating to his particular situation. It should be the responsibility of the controller to demonstrate that the important legitimate interests of the controller override the interests or fundamental rights and freedoms of the data subject'.

the right to the protection of their personal data as a constitutional guarantee of one of their fundamental personal rights.

It should be noted that the principle of completeness of the system of law in its implementation obliges every law-abiding entity to find the legal norm applicable to the facts under which the law-abiding entity decides on a case. Every well-structured legal system should be complete, which means it should not contain any loopholes. However, there is a problem of loopholes in the law, which must be solved when applying the law. A loophole in the law is only such a lack of regulation that can reasonably be claimed not to be intentional by the legislator. In other words, if the legislator acted rationally, this state of affairs would be adjusted by the legislator[14]. At the same time, no interpretation or analogy must be used to fill in any loopholes. This is because filling them in would be an improvement of the law to a state that is consistent with the ideas of the interpreter[15].

In view of the above, it should be assumed that the legislator's rationale also applies to the possible absence of a legal definition of 'a person performing a public function' in the Act on Access to Public Information. It seems that the lack of this definition does not in any way constitute a peculiar *intra legem* loophole, as there are legal norms applicable to the particular situation in the current legal order. The standards in question will be, e.g. the provisions of: Article 51(1) in conjunction with Article 61 of the Constitution of the Republic of Poland on 2 April 1997, Article 2 of the Act of 21 August 1997 on restrictions on conducting business activities by persons performing public functions[16], and Article 2 of the Act of 31 July 1981 on the remuneration of persons holding public executive positions[17]. The legal standards contained in these laws directly point to positions that should be clearly classified with a public function. In this respect, according to Article 2(10) of the Act on restrictions on conducting business activities, employees of state agencies holding the following positions: president, vice-president, team director, director of the local branch and his deputy, or occupying equivalent positions, are considered to be persons performing public functions. Taking the above into account, the arguments presented by both the Provincial Administrative Court and the Supreme Administrative Court are fully justified, however, not on the basis of the functional interpretation of Article 5 of the Act on the Access to Public Information, but on the basis of the applicable law. The approach presented by the ARMA indicating that a person performing a public function on the basis of the Act on Access to Public Information

[14] Winczorek P, Stawecki T, Chauvin T, Wstęp do prawoznawstwa. Warsaw, 2011, pp. 137–138.

[15] Constitutional Tribunal ruling of 27 May 2003, Ref. No. S 2/03, OTK-A 2003, No. 5, item 46; the judgement of the Supreme Court of 25 Nov. 2004, Ref. No. III PK 57/04, OSNP 2005, No. 13, item 188.

[16] Dz.U. 2019, item 2399; hereinafter: the Act on Restricting Business Activity.

[17] Dz.U. 2019, item 152.

has a totally different meaning than a public officer according to Article 115(13) of the Penal Code seems to be more accurate.

This is also supported by the nature and purpose of sharing information of a public nature, including the personal data of persons in public functions, with the public. The relationship between public information concerning the personal data of persons performing public functions should, in principle, be enumerative and defined *a priori*. Adopting a different interpretation, it may be considered *a priori* that the examination of whether a person employed within the state administration performs a public function shall be limited only to the examination of whether he or she performs only service-related or technical activities. In other words, an overly broaden interpretation of the notion of a person performing a public function will result in every state administration employee, as a public official referred to in Article 115(13) in conjunction with Article 15(19) of the Penal Code, in principle, simultaneously performing a public function. Therefore, the restrictions resulting from Article 5(2) of the Act on the Access to Public Information concerning the ban on information about persons on account of their privacy will be superfluous, and the provision will become dead. It seems that every question about the personal data of a particular employee of the state administration, due to his/her official activity, in connection with his/her function, will be public information subject to disclosure.

On the other hand, assuming the grammatical interpretation of the term 'a person performing a public function' being in compliance with the legal order in force and consisting in recognising that they are specific persons performing functions enumerated in normative/prescriptive acts, it is possible, without any doubt, to indicate which person benefits from the limitation resulting from the content of Article 5(2) of the Act on Access to Public Information, and which does not. It is of great importance as it corresponds to Article 47 of the Constitution of the Republic of Poland (restriction of the right to public information due to privacy)[18].

A precise listing of persons performing public functions allows for unquestionable operation of the entity obliged to provide public information, i.e. information which contains personal data of the persons performing public functions.

In addition to the above, attention should be drawn to another aspect of an overly broad interpretation of the term 'person performing a public function'. It may be contrary to the constitutional principle of equality under the law. If we consider that in the current legal order, the notion

[18] A similar view was presented by the jurisprudence that took place at the turn of the 1990s; *see*: the resolution of the Seven Judges of the Supreme Court, the Administrative, Labour and Social Security Chamber of 16 July 1993, adopted in the case of ref. No. I PZP 28/93, OSNP 1997, No. 1, item 10—'Information on the academic titles held by a legal advisor, completed studies, as well as on the amount of remuneration (gross and net) as an employee not holding any position in a local government body, although it is public information, is not made available for the sake of protecting the employee's privacy'.

of 'a person performing a public function' is defined by law, and the fact of being such a person results in certain restrictions *ex lege* (e.g.: prohibition to conduct his or her own business activity or jointly with other persons, as well as to manage such activity, or to be a representative or agent in carrying out such activity), then on the other hand, we should recognise, by way of free interpretation, a number of other persons, e.g. state administration employees who do not exclusively perform service-related or technical activities (e.g. a senior or chief specialist in the department of any ministry[19]), also as persons performing public functions, without applying to them the restrictions referred to above, in a straight line leads to a violation of the principles of the democratic state of law, including its constitutional guarantees.

Moreover, referring to the commented judicature, a certain apparent inconsistency should be noted in this respect. On the one hand, both the Provincial Administrative Court and the Supreme Administrative Court state that the names and surnames of persons performing public functions in the ARMA contained in the published post-control document make it possible to indirectly determine the personal data of the ARMA employees' family members, who are not *de facto* persons performing public functions. The above leads to the acknowledgement by the abovementioned courts that there are possibilities of legal protection of their personal data in relation to these persons (i.e. family members of a person performing a public function), e.g. by applying appropriate legal measures (anonymisation, pseudonymisation) in relation to those data which indirectly identify them, the disclosure of which is protected by the provisions of Article 5 (2) of the Act on Access to Public Information. On the other hand, both the Provincial Administrative Court and the Supreme Administrative Court recognise that a person performing a public function is, inter alia, any employee of the government administration, other state authority or local government, unless he performs exclusively service-related activities, as well as a person who is authorised to issue administrative decisions (definition of a public officer referred to in Article 115(13) of the Penal Code).

Therefore, assuming the interpretation of the notion of 'a person performing a public function' presented by the abovementioned judicial authority, it should be stated that the ARMA employees who are also members of the family of persons performing public functions in this agency, if they themselves do not perform only service-related or technical activities in it, are also persons performing public functions. Therefore, it is surprising that the court suggests the possibility of introducing legal solutions aimed at protecting their personal data. As persons exercising public functions, they cannot benefit from the limitations of Article 5 (2) of the Act on Access to Public Information. Their personal data should therefore be published as public information in connection with their public function.

[19] According to the definition included in Article 115(13) of the Penal Code—public officer.

At this point, the emerging trend in the judicature is worth noting. The interpretation extending the term of 'a person performing a public function' identical to the one presented by the Provincial Administrative Court and the Supreme Administrative Court in the commented judgement was fully reflected in another judgement of the Provincial Administrative Court[20]. In the justification of the ruling, the Court stated, among other things, that employees of the state administration (excluding persons performing exclusively service-related or technical activities) do not benefit from the protection referred to in Article 5(2) of the Act on Access to Public Information, and the data such as name, surname, position and the amount of the award granted to them, in connection with the performance of their public function, constitute public information.

Right of access to public information

Another important issue arises, which, due to its nature, is quite significant and worthy of comment. According to Article 1(1-2) of the Act on Access to Public Information, all information on public matters constitutes public information and shall be made available in accordance with the rules and procedures specified in this Act.

What is important is that the right to public information is protected by the Constitution and its limitation can only take place due to the protection of the freedom and rights of other persons and economic entities and the protection of public order, security or an important economic interest of the state[21]. In the case of the Sejm and the Senate, the procedure concerning access to public information is defined in their regulations. In any other case, the course of access to public information is specified in the Act.

In order to fulfil the obligation to provide public information, it needs to be published in the Public Information Bulletin. Another way of making information of a public nature available is be making it available at the request of the person concerned or by displaying it in places accessible to the public. It should be noted that the content of an official document is subject to disclosure in accordance with the provisions of the Act on Access to Public Information, and not the document itself. In this respect, it is not possible to request that a document be issued, but only that the content of the document be read. Such a request may be met, for example, by providing the applicant with a photocopy of the document containing the requested content[22].

The legislator, when preparing the Act on Access to Public Information, introduced two completely new concepts, the definitions of which were

[20] Ref. No. IV SAB/Wr 77/19, Legalis No. 1975221.

[21] Polish Constitution, Article 61(1–3).

[22] Compare the judgement of the Provincial Administrative Court in Krakow of 31 Oct. 2012, Ref. No. II SA/Kr 1192/12, Legalis No. 818086.

not specified both in the Act itself and in other legal acts. The concepts in question are 'public affairs' and 'public information'. While the notion of public information was in a way defined by the indication of exemplary types of public information in Article 6(1) of the Act on Access to Public Information, the issues of the legal definition of 'public affairs' were outside any legal interpretation. Through case law and doctrine, over the last few years, the abovementioned concepts have been defined, thus introducing their proper meaning into legal circulation. In this respect, it should be stated that public affairs are all matters that are related to the existence and functioning of a specific public-private community. The phrase 'public' proves that these are matters which concern the general public and it corresponds to a large extent to the concept of the general good. Thus, 'a public affair' is any matter which results from the activity of both public authorities and other authorities and persons and organisational units in the performance of public authority tasks and the management of public property. However, the public information should be regarded as the content resulting from the documents produced or held by public authorities or an entity that is not a public administration authority but is nevertheless related to them, or in any way concerning them. What is irrelevant, however, is the manner in which these entities came into the possession of the abovementioned documents and what the real issues involved are. It is important that these documents (including their content) contribute to the performance of public tasks by a public authority or an entity that is not a public administration authority, and that these documents relate directly to the tasks[23].

In accordance with Article 6(1)(4a), second indent, of the Act on Access to Public Information, public information shall include documents containing the process and outcome of inspections and the presentations, opinions, conclusions and findings of those carrying them out. In the context of the above, in connection with the content of the legal standards referred to in Articles 55–57 of the Act on Control, a question arises whether the documents concerning the course and results of the inspection collected in the inspection files constitute public information, and whether the post-control report, which undoubtedly constitutes public information, is made available under the terms and conditions and under the procedure of the Act on Access to Public Information.

According to Article 55 (1) of the Act on Control, the head of the controlled unit has the right to inspect the control files at each stage of the control, in compliance with the provisions on legally protected confidentiality. The above provisions show that the legislator is very precise and specifies the entities which have the right of access to the inspection records and results. Undoubtedly, on the basis of the provisions of the Act on Control, this right is only available to the controlled entity.

[23] Compare the judgement of the Provincial Administrative Court in Warsaw of 14 Oct. 2009, Ref. No. II SAB/Wa 81/09, Legalis No. 837438.

The issues concerning the possibility of making available the records of proceedings, whether criminal, civil, administrative (by analogy also control-related), have been the subject of both doctrine and case law. Each of the proceedings referred to above has its own procedure, which regulates the rules of access to the files of these proceedings. In the jurisprudence of administrative courts, for a very long time there was the opinion that the files of an administrative case, as referring to the activities of public entities, constitute public information and are subject to disclosure under the rules and in the procedure described in the Act on Access to Public Information. However, finally a standpoint was presented in which it was considered that in the case of pending proceedings, the procedural act always takes precedence. In this respect, the files of a given case (as a whole) do not constitute public information and are not made available (in full) to the applicant. The above does not mean, however, that the applicant may apply for access to specific documents which constitute public information and which are not included in the file of a given proceeding, e.g. criminal or administrative (on the basis of a control analogy). The limitation of access to the entire file of a given proceeding results primarily from the fact that the file as a whole is a collection of various types of documents, also including private documents and those which do not constitute official documents. Access to the case-file as a whole cannot therefore be required under the provisions of the Act. This position was confirmed, inter alia, by the resolution of the Supreme Administrative Court of 9 December 2003[24].

It is also worth noting that in certain specific circumstances, access to information on the outcomes of an inspection referred to in Article 56 of the Act on Control may not be requested under the Act on Access to Public Information. According to the aforementioned legal standard, the right to prepare information on the inspection is optional and has been limited to justified cases. At the same time, the group of entities to which the head of the controlling unit may make information available has been defined by law[25]. In the case, when the head of the controlling unit did not order to prepare information on the results of the inspection, the request to prepare it in order to make it further available on the basis of the control agreement seems to have no legal basis. It should be noted that in light of the jurisprudence, public information refers to the sphere of facts contained in a specific document (letter). In other words, public information is a document which already exists in a public space, because it was prepared in connection with some situation or event. Producing a completely new document (opinion or standpoint) on the request of a citizen cannot be considered public information. An application for making public information available cannot therefore initiate the necessity of creating the specific information. The right of access to public information includes the right to demand information about specific facts

[24] Ref. No. I OPS 7/13, Legalis No. 744461.

[25] The Act on Control, Article 57.

and states existing at the moment of the information being provided, not about intentions of taking specific actions not recorded in any form[26].

The Act on Access to Public Information cannot and does not constitute a means of using it to request any information. This means that the subject matter of the Act delineates and covers access only to public information and not public access to any information[27].

In the case of a request for access to information on the outcomes of inspections, there is still another issue to consider, which concerns so-called processed information. Although the Act on Access to Public Information does not define the concept of 'processed information', according to Article 3(1)(1), the right of access to public information also applies to processed information to the extent that it is of particular public interest.

Following the case law, it can be concluded that processed information is the type of information that does not exist in the form expected by the applicant at the time that the applicant files the application. Therefore it is necessary that the obliged entity should carry out certain analytical, organisational and intellectual activities in order to process the simple information that they have. In other words, processed information is information which has been prepared especially for the applicant in accordance with the criteria indicated by the applicant[28].

Considering the above, it seems that the request submitted by the applicant on the basis of the Act on Access to Public Information, referred to in Article 56 of the Act on Control, would be tantamount to a request to provide access to public processed information. However, the prerequisite for drawing up and granting the abovementioned information by the controlling authority (head of the controlling unit) would be the applicant's indication of a special public interest in this respect.

Apart from the above, it is worth mentioning that the opportunity to access the abovementioned information was not so apparent until 2019. It was emphasised that the Act on Control juxtaposed with the Act on Access to Public Information was a *lex specialis*. However, any doubts which may arise in this respect were resolved by the Supreme Administrative Court in the judgement of 28 June 2019[29]. The Supreme Administrative Court in its justification relied on the normative meaning of the phrase referred to in Article 1(2) of the Act on Access to Public Information, from which it derived the substantive right of access to public information. The conceptual analysis of the phrase 'different principles and ways of accessing information that is public information' clearly shows that the legislator explicitly uses both the notion of 'principles' and

[26] Compare the judgement of the Supreme Administrative Court of 20 June 2002, Ref. No. II SAB 70/02, *Wokanda*, 2002, No. 11, p. 31.

[27] Judgement of the Provincial Administrative Court in Warsaw of 16 March 2004, II SAB/Wa 2/04, Legalis No. 603752.

[28] Compare the verdict of the Supreme Administrative Court of 30 Sept. 2015, Ref. No. I OSK 1746/14, Legalis No. 1362646; the verdict of the Supreme Administrative Court of 5 April 2013, Ref. No. I OSK 89/13, Legalis No. 762558.

[29] Ref. No. I OSK 2941/17, Legalis No. 2232857.

'ways/procedures' of access to public information, thus distinguishing these categories[30]. Thus, a possible difference in making public information available on the basis of acts other than the Act on Access to Public Information requires that these acts have both the principles of access to information and the way of making it available. The Supreme Administrative Court stated that both Article 54 and Article 55 of the Act on Control do not refer to the principles of access to information, but to the way of making the information available, and to a limited extent. Therefore, any limitations on the issue of access to public information should be considered in light of the Act on Access to Public Information and Article 61(1–3) of the Constitution of the Republic of Poland, and not the Act on Control. The above explanation makes it possible to assume that the Act on Control, due to the lack of full regulations concerning the principles and procedure of making public information available, does not constitute a *lex specialis* to the Act on Access to Public Information.

Summary

The long-term lack of actions aimed at amending both the Act on Control and the Act on Access to Public Information, aimed at preparing clear and final regulation of issues related to access to public information, while leaving them only to the jurisprudence and doctrine, which constantly expand the circle of people performing public functions, may only intensify undesirable behaviours resulting in limiting or even violating constitutional guarantees of fundamental civil rights and freedoms.

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Legal Acts

Act of 2 April 1997 Constitution of the Republic of Poland (Dz.U. 1997, No. 78, item 483 as amended).

[30] In its content, the Act on Access to Public Information includes both regulations concerning the scope of the public subjective right to public information and the situation of beneficiaries of this right and entities obliged to implement it (principles), as well as regulations of a procedural nature (procedure/manner). The rules of access to public information are determined by material and legal standards, and the method of access to public information is determined by procedural standards.

Act of 6 June 1997 Penal Code (Dz.U. 2019, item 1950 as amended).
Act of 31 July 1981 on the remuneration of persons holding public executive positions (Dz.U. 2019, item 152).
Act of 21 August 1997 on restrictions on conducting business activities by persons performing public functions (Dz.U. 2019, item 2399).
Act of 6 September 2001 Access to Public Information (Dz.U. 2019, item 1429, as amended).
Act of 30 August 2002 on the Administrative Court Procedure Law (Dz.U. 2019, item 2325 as amended).
Act of 15 July 2011 on control in government administration (Dz.U. 2020, item 224).
Regulation (EU) 2016/679 of the European Parliament and of the Council 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 (OJ L 679 of 2016, No. 119, p. 1).

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Summary: The subject matter of the commentary focuses on the issue of the functional and grammatical interpretation of the notion of 'a person performing a public function', which, in the author's opinion, does not directly refer to the public officer referred to in Article 115(13) of the Act of 6 June 1997 Penal Code.

The author highlights the unjustified perception of a person performing a public function by the Polish justice system as being viewed as a public officer as defined in Article 115(13) of the Penal Code.

The main arguments focus on the risks arising from an overly broad interpretation of the concept of a person performing a public function. In fact, the lack of a defined set of persons performing public functions may give rise to a malfunction on the part of the entity obliged to make public information available, and thus to the constitutional principle of limiting the right to public information on the grounds of privacy.

The final part of the commentary is a reflection on making public information available under the provisions of the Act of 15 July 2011 on Control in Government Administration, and a starting point for a broader discussion on the need to amend the current legal system.