LIMITATION OF THE RIGHT TO PRIVACY DUE TO THE REQUIREMENTS OF FREEDOM OF INFORMATION (FOI)

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Abstract: The aim of this paper is to present the limitations of the right to privacy resulting from the right of access to information. This paper presents the characteristics of the right to privacy, with particular emphasis on the sources of these rights and methods of their protection. The next part of the study discusses specific examples of overlap between these rights and resulting situations where the right to privacy is restricted by the right to information. The summary presents an attempt to answer the question about the mutual relation between both rights and their future hierarchy.

Keywords: right to privacy, freedom of information, FOI

1 General information

The reference books indicate that the beginnings of the protection of the right to privacy may be traced back to the turn of the twentieth century in the United States in the form of *the right of privacy* consisting in the limitation of third parties' interference in individuals' personal lives and *the right to be alone.*[1]

In international law this issue has been mentioned in a number of legal documents, including art. 8 of the ECHR, where this regulation does not guarantee the right to private life, but only the right to respect one.[2] The convention pertains not only to vertical but also horizontal relationships – it is a tool of protecting an individual from violations by the country – non-intervention in the private sphere of individuals' lives.[3]

The right to privacy has also been regulated in the Constitution of the Republic of Poland (art. 47). As Z. Zawadzka argues, on the basis of this regulation privacy is usually understood in two ways:

a) the broader meaning – it means freedom from intervention in the sphere inaccessible to other people and freedom to decide on one's life, views and beliefs. In a broad perspective, the right to privacy is guaranteed by a number of regulations of constitutional importance, which specify and complement one another.
b) the narrower meaning – privacy is identified as a right to decide on the range of information about oneself made available to others.[4]

It means that privacy guarantees a certain condition of independence, in which an individual may decide on the extent of communicating and making information about his or her life available to others.[5] In other words, the right to privacy is the right of an individual to autonomously and exclusively decide on the degree to which he or she would like to preserve his or her anonymity.[6] As noted by E. Nowińska while analyzing the limits of this right, at the same time demarcating a publicly-accessible domain, one points out to the fact that it is composed of information which a given person wants to keep for himself or herself or reveal only to specific people, that is information related to one's family, home, social and community life, colleague relations, interests, likings as well as religious and political beliefs, ways of spending free time, personal situation.[7] Importantly, the Constitutional Tribunal of Poland applies different scopes of guaranteed protection depending on the sphere to which a given violation pertains; therefore, the respect to an individual's personal sphere deserves more protection than in the case of his or her economic or financial sphere.[8]

Constitutions of numerous countries, including the Republic of Poland, contain provisions of the protection of personal life without defining this term – the scope and effectiveness of the protection depend largely on the established norms and jurisdiction.[9] One may notice a similar phenomenon in the legal doctrine; A. Kopff, just as A. Szpunar and many other authors, assumes that this sphere is not uniform.[10] *The extent of an individual's life requiring legal protection is each time determined by social needs governed by the condition of the society's sense of law, tradition and the changing state of endangerment of the sphere of private life.*[11]

As D. Fleszer rightly argues, in the doctrine there is no agreement as to the mutual relationship between the right to privacy and the right to personal data protection.[12] According to some authors, privacy has broader meaning than personal data protection – the direct function of personal data protection is protecting the right to privacy.[13] D. Fleszer emphasizes that another notion is also advocated, according to which between the protection of the right to privacy (inherent in constitutional norms) and personal data protection occurs an overlapping relationship – those are two independent legal regimes. However, one may notice that the Polish Constitutional Tribunal frequently considers the right to privacy in relation to art. 51 of the Constitution enacting the right to an individual's informational autonomy, that is a right to autonomously decide to reveal information pertaining to a given person to others as well as a right to control such information possessed by other entities, as protection of an individual's informational autonomy is part of the right to privacy.[14] As A. Sakowicz argues, it has prevented the right from being derived from traditional civil legal instruments of protection of personal rights regulated in art. 23 and 24 of Civil Code.[15] It means that the Constitutional Tribunal considers personal data protection as an element of the right to privacy[16] and such understanding of the abovementioned term is also accepted in this article.

From literal interpretation of this regulation it arises that this right pertains to every person residing in Poland, regardless of his or her nationality[17]. The right to privacy is not a mandatory right and may be subject to restrictions as set up in art. 31.3. of the Constitution. As it has been emphasized in the doctrine, restriction of a right or freedom may take place only when another norm, rule or constitutional regulation supports such an action and the degree of this restriction must remain proportional to the significance of the purpose which this restriction is to serve.[18]

[1] E. Nowińska, *Wolność wypowiedzi prasowej,* Oficyna 2007, Lex no. 63094.
[2] Z. Zawadzka, *Wolność prasy a ochrona prywatności osób wykonujących działalność publiczną. Problem rozstrzygania konfliktu zasad*, LEX 2013, no. 168972.
[3] Ibidem.
[4] Ibidem.
[5] Ibidem and laws cited there, including the Constitutional Tribunal's Judgment of June 24, 1997, K21/96, OTK 1997, no. 2 item 23; the Constitutional Tribunal's Joudgnemnt of May 19, 1998, U6/97, OTK 1998, no. 4, item 46.
[6] D. Fleszer, *Zakres przetwarzania danych osobowych w działalności gospodarczej,* ABC 2008, LEX no. 89763.
[7] E. Nowińska, *Wolność wypowiedzi…,* Lex no. 63094.
[8] Z. Zawadzka, *Wolność prasy…*, Lex no. 168972.
[9] A. Mednis, *Prawo do prywatności a interes publiczny,* Zakamycze 2006, LEX no. 58276.
[10] E. Nowińska, *Wolność wypowiedzi…*, Lex no. 63094.
[11] Ibidem; also: Z. Zawadzka, *Wolność prasy…*, Lex no. 168972.
[12] D. Fleszer, *Zakres przetwarzania danych osobowych w działalności gospodarczej,* ABC 2008, LEX no. 89763.
[13] Ibidem.
[14] Z. Zawadzka, *Wolność prasy…*, Lex no. 168972.
[15] A. Sakowicz, *Prawnokarne gwarancje prywatności*, Zakamycze 2006, LEX no. 53884.
[16] Also: A. Wilk, *Akt urodzenia*, Lexis Nexis 2014, LEX no. 207434.
[17] W. Skrzydło, Komentarz do art. 47 Konstytucji Rzeczypospolitej Polskiej [Commentary to art. 47 of the Constitution of the Republic of Poland], Legislation in force as on: 2013/3/1, LEX.
[18] A. Sakowicz, Prawnokarne gwarancje…, Lex no. 53884.

2 Protection of privacy – legal remedies

Administrative-legal regulations (law on personal data protection), legal-civil regulations (tort liability), and criminal law regulations are indicated as the systems of protection of the right to privacy.

2.1 Personal data protection[19]

A. Drozd argues that the right to personal data protection is a legal institution aiming at protection of privacy, in accordance with art. 47 of the Constitution of the Republic of Poland, which is independently regulated in art. 51 of the Constitution.[20]

Article 51

1. No one may be obliged, except on the basis of statute, to disclose information concerning his person.
2. Public authorities shall not acquire, collect nor make accessible information on citizens other than that which is necessary in a democratic state ruled by law.
3. Everyone shall have a right of access to official documents and data collections concerning himself. Limitations upon such rights may be established by statute.
4. Everyone shall have the right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to statute.
5. Principles and procedures for collection of and access to information shall be specified by statute.

The literature and jurisdiction specify this legal institution as an individual's information autonomy,[21] the essence of which is reduced to leaving every person the freedom to specify the sphere of accessibility of information about himself or herself for others.[22]

The scope of application of the regulations on personal data protection encompasses not only horizontal relationships between individuals but especially vertical relationships between an individual and state (public) authorities.[23] For the purpose of the present paper the vertical relationship is of great significance, as in Polish law a principle is accepted forbidding the acquiring, collecting and sharing of information about the citizens by public authorities.[24]

It must be also mentioned, that system of personal data protection is governed by the rule: you are not allowed to do that, what is not expressly stipulated in law. In other words processing personal data, like for example sharing personal data or enclosing personal data always needs legal basis. It means that legal basis is also required when public authorities process personal data. Personal data protection is limited in a number of ways, including the scope of the right to access public information.[25] In the jurisdiction of the Polish Constitutional Tribunal it is emphasized that the infringement of information autonomy can only be accepted when it is directly provided for by other constitutional regulations or when the need to harmonize this freedom with other constitutional laws or values arises, where this restriction must always be proportional in character.[26] On the other hand, J. Barta argues that every interference in the sphere of information privacy must bear signs of necessity, characteristic for a democratic rule of law.[27]

In the analysis of the present issue one should also refer to the European Union law. Article 16(1) of Treaty on the Functioning of the European Union (TFEU), as introduced by the Lisbon Treaty, establishes the principle that everyone has the right to protection of personal data concerning him or her. The most significant international legal act related to personal data protection is Directive 95/46 of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data and free movement of such data.[28] Directive 95/46 was transformed into national laws of UE – in Poland – Act of 29 August 1997 on Personal Data Protection.[29]

In accordance to this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data. Directive 95/46 has been established to protect fundamental rights and freedoms, notably the right to privacy, which is recognized both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the general principles of Community law; whereas, for that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community.

It should be emphasized that Directive 95/46, in accordance with the dominant opinion of the representatives of legal science, does not determine minimum standards, in spite of the fact that the right to personal data protection is of great importance in the community legal order.[30] Nevertheless, it is also believed that a national legislator should not depart from the provisions of this directive if the body does not directly accept such possibility,[31] because it has been found that since the directive is an act of secondary European law, it still is in force in the Member States as regards the result, at the same time leaving the Member States the freedom to choose its form and the applied measures.[32]

Directive allows the principle of public access to official documents to be taken into account when implementing the principles set out in this Directive. The principles of protection must be reflected, on the one hand, in the obligations imposed on persons, public authorities, enterprises, agencies or other bodies responsible for processing, in particular regarding data quality, technical security, notification to the supervisory authority, and the circumstances under which processing can be carried out, and, on the other hand, in the right conferred on individuals, the data on whom are the subject of processing, to be informed that processing is taking place, to consult the data, to request corrections and even to object to processing in certain circumstances. The processing of personal data by official authorities for achieving aims, laid down in constitutional law or international public law, of officially recognized religious associations is carried out on important grounds of public interest.

However, one should note that the Commission has concluded that the EU needs a more comprehensive and coherent policy on

[19] This part is based on: A. Cebera, D. Horodyski, *Personal data protection and access to public information - the mutual influences and directions of development* [in:] Pravni Rozpravy 2015 mezinárodní vědecká konference oblasti práva a právních věd – právní rozpravy 2015 s podtitulem "vývoj práva", Hradec Králové 2015, p. 354-356.

[20] A. Drozd, *Ustawa o ochronie danych osobowych – Komentarz, Wzory Pism i przepisy*, Warszawa 2008, p. 13. Also: P. Barta, P. Litwiński, *Ustawa o ochronie danych osobowych – Komentarz*, Warszawa 2013, p. 3.

[21] A. Drozd, *Ustawa o ochronie danych osobowych – Komentarz, Wzory Pism i przepisy*, Warszawa 2008, p. 13 and jurisdiction quoted there, including: the judgement of the Constitutional Tribunal of November 10, 1998, K39/97, OTK 1998, no. 6, p. 9.

[22] The judgement of the Constitutional Tribunal of November 12, 2002, SK 40/02, OTK-A 2002, no. 6, item 81, as cited in: P. Barta, P. Litwiński, *Ustawa o ochronie danych osobowych – Komentarz*, Warszawa 2013, p. 3.

[23] A. Drozd, *Ustawa o ochronie …..*, p. 13.

[24] M. Wyrzykowski, *Ochrona danych – zagadnienia konstytucyjne*, Warszawa 1999, p. 25.

[25] P. Barta, P. Litwiński, *Ustawa o ochronie …*, p. 10 and jurisdiction quoted there, e.g. the judgement of the Constitutional Tribunal of June 19, 1992, U 6/92, OTK 1992, no. 1, item 13.

[26] The judgement of the Constitutional Tribunal of November 21, 1995, K 1295, OTK 1995, no. 3, p. 14, as cited in: P. Barta, P. Litwiński, *Ustawa o ochronie…*, p. 11.

[27] J. Barta, *Komentarz do ustawy o ochronie danych osobowych – System informacji prawnej LEX …*

[28] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data,Official Journal L 281 , 23/11/1995 P. 0031 – 0050, "Directive 95/46".

[29] Journal of Laws No 02.101.926 with further amendments; further: PDP Act.

[30] A. Drozd, *Ustawa o ochronie …*, p. 17.

[31] E. Ehmann, M. Helfrich, *Datenschutzrichtlinie. Kurzkommentar*, Kohln 1999, p. 56, as cited in: A. Drozd, *Ustawa o ochronie danych osobowych – Komentarz, Wzory Pism i przepisy*, Warszawa 2008, p. 17. Also: P. Barta, P. Litwiński, *Ustawa o ochronie danych osobowych – Komentarz*, Warszawa 2013, p. 6.

[32] P. Barta, P. Litwiński, *Ustawa o ochronie…*,p. 4.

the fundamental right to personal data protection. In the European Parliament legislative works are underway aiming at creation of a regulation concerning personal data protection, that is an act, which will produce legal effects directly in the legal orders of the member states. Legal basis of this proposal is based on Article 16 TFEU, which is the new legal basis for adoption of data protection rules introduced by the Lisbon Treaty.

The right to the protection of personal data, enshrined in Article 8 of the Charter of Fundamental Rights, requires the same level of data protection throughout the Union. The absence of common EU rules would create a risk of different levels of protection in the Member States and create restrictions on cross-border flows of personal data between Member States with different standards.[33]

2.2 Civil-law regulations (tort liability)

The right to privacy is also protected on the basis of private law regulations, like e. g. provisions of the Polish Civil Code.[34] In accordance to art. 23 CC,[35] personal interests of a human being, such as in particular health, freedom, dignity, freedom of conscience, surname or pseudonym, image, confidentiality of correspondence, inviolability of home as well as scientific, artistic, inventive and reasoning activities shall be protected by the civil law regardless of the protection provided for by other provisions. Abovementioned regulation does not expressly indicate the right to privacy because the catalogue of protected values is exemplary. However, in the doctrine and jurisdiction there are no doubts that the scope of this regulation extends also to right to privacy.[36]

Article 24 CC sets forth that a person whose personal interests are jeopardized by another person's action may demand that the action be abandoned, unless it is not illegal. In the case of actual violation, he/she may also demand that the person who committed the violation perform acts necessary to remove its consequences, in particular that the latter make a statement of a relevant content and in a relevant form. On the basis of the principles provided for by the Code he/she may also demand pecuniary compensation or payment of an adequate amount of money for a specified community purpose. If, as a result of a of personal interests damage to the property was inflicted, the injured party may demand it to be redressed on the basis of general principles.

The limitations of the right to privacy protected on the basis of CC provisions result from numerous legal institutions, including one of the freedom of expression, especially - disclosure claims in the press law. This issue will be set out in the next part of this paper.

2.3 Criminal law regulations

The right to privacy is also protected by another independent legal regime - criminal law. In this branch of law protection of privacy is usually understood in two ways:

a) protection of privacy of the accused;
b) penalization of conducts violating privacy of an entity.

Re. a) protection of privacy of the accused

Protection of privacy on the basis of criminal law may be considered as an element of the presumption of innocence rule, and in consequence consist of protection of privacy of the accused - especially his identity, until being find guilty.[37] Such understanding of the abovementioned issue is also accepted in doctrine.

The Constitution of the Republic of Poland of 2nd April, 1997 in article 42, provides, that everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court. The same principle is stipulated in art. 5 of the Code of Criminal Procedure of 6 June 1997 (hereinafter referred to: **CPC**). Importantly, W. Wróbel argues that, presumption of innocence might be analyzed in internal and external meaning.[38] The criterion of such distinction is based on the catalog of entities and public authorities, which are obliged to act in compliance with this principle. The internal meaning is addressed to authorities conducting the criminal proceeding, and the external meaning to all other entities, with particular emphasis on press and mass-media.

In accordance to art. 13 of an Act of 26 January 1984 on the press law, no one is allowed to publish in a press personal data or picture of a person, when a criminal proceeding against this person is conducted. This prohibition is also applicable to witnesses and victims of a crime. M. Brzozowska-Pasieka emphasis that the prohibition of enclosing personal data of accused also refers to public officials and civil servants, even when they are exercising public authority.[39]

However, the scope of this regulation is restricted - court and prosecutor are entitled to enclose personal data of the accused due to the requirements of important public interest. In doctrine there is no agreement as to the compliance of abovementioned regulation with Polish Constitution, because of the possibility of the arbitrariness of such permission and lack of stipulated guidelines of interpreting the term – public interest.[40] One may notice, that Polish Constitutional Tribunal in judgment of 18 July 2011 established that exceptions from the prohibition of publishing personal data of accused are generally allowed, but the accused must be granted the right to appeal from such decision.[41]

Is must be also pointed out, that as J. Sobczak rightly argues, publishing such data without due permission is penalized by art. 241 § 1 Criminal Code.[42]

There are no restrictions in publishing personal data and picture of sentenced by the final judgment of a court. Importantly, in legal orders of foreign countries another notions are also advocated, for example in Sweden there are no restrictions in publishing personal date of accused.

Re. b) penalization of conducts violating privacy of an entity.

One may notice, that Criminal Code[43] penalizes a few conducts violating particular legal values from which right to privacy is structured. For example, in accordance to art. 190a of the Criminal Code, whoever, by persistent harassment of another person or this person's immediate family member, induces in this person a sense of danger that is reasonable under the circumstances or substantively violates this person's privacy, is subject to the penalty of deprivation of liberty for up to 3 years. If the consequence of an act referred to in § 1 or 2 is the harmed party's attempt on his own life, the perpetrator is subject to the

[33] Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation),http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf, 10.03.2015.
[34] S. Dmowski, S. Rudnicki, *Komentarz do kodeksu Cywilnego*, Warszawa 2007, p. 101.
[35] ACT of 23 April 1964 Civil Code; hereinafter referred to „CC".
[36] See: The judgment of the Court of Appeal of June 10, 1995, I ACr 143/95, LEX no. 23659; The judgment of the Supreme Court of April 28, 2004, III CK 442/02, LEX no. 1125280; The judgment of the Supreme Court of February 25, 2014, I CSK 532/13, OSNC 2015/5/61.
[37] K. Mamak, *Everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court*, e-Czasopismo Prawa Karnego i Nauk Penalnych, no. 17/2013.
[38] W. Wróbel, *O dwóch aspektach konstytucyjnej zasady domniemania niewinności* [w:] Nauki penalne wobec problemów współczesnej przestępczości. Księga Jubileuszowa z okazji 70. Rocznicy urodzin Profesora Andrzeja Gaberle, Warszawa 2007, p. 324.
[39] M. Brzozowska-Pasieka, *Komentarz do art.13 ustawy - Prawo prasowe*, 2014.01.01, LEX. See also The Judgement of the Supreme Court of the March 18, 2008 r., IV CSK 474/2007, LEX 1867126.
[40] E. Ferenc-Szydełko, *Komentarz do art.13 ustawy - Prawo prasowe*, 2013.07.19, LEX.
[41] K 25/09.
[42] J. Sobczak, Komentarz do art.13 ustawy - Prawo prasowe, 2008.04.02, LEX.
[43] Statute of 6 June 1997 Criminal Code.

penalty of deprivation of liberty for between one year and 10 years. The crimes provided above are prosecuted upon the harmed party's motion.[44] M. Mozgawa rightly argues, that abovementioned provision is the one and only one in Polish Criminal Code, which directly refers to the term "privacy".[45]

What is more, on the basis of art. 193 of the Criminal Code, whoever intrudes into someone else's house, apartment, premises or a fenced area, or despite a demand of an authorized person does not leave such place, is subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to one year.

Also art. 212 of Criminal Code protects privacy, and governs that whoever imputes to another person, a group of persons, an institution, a legal entity or an organizational entity without a legal personality, such conduct or characteristics that may degrade them in public opinion or expose them to the loss of confidence necessary to occupy a given position, practice a given profession or operate a given type of activity, is subject to a fine or the penalty of limitation of liberty. If the perpetrator commits the abovementioned act via means of mass communication, he is subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to one year. These crimes are privately prosecuted.

3. Freedom of information

3.1 FOI - introduction

The catalog of human rights established by international treaties and acts does not contain a right to be informed.[46] M. Zaremba assumes that such state of mater has political and historical background,[47] but nowadays – after the period of transformation and democratization – one may notice the changing role of the state. In consequence, a lot of states have established legal regulations concerning the transparency of public life, in other words legislation in FOI type (freedom of information).[48]

3.2 Legal institutions implementing FOI

In terms of the right to information, the following legal institutions to implement this right are hereunder discussed:

a) access to public information;
b) information disclosure claims in the press law, e.g. the right to demand information from companies and entities from outside the public finance sector
c) the right to access environmental information
d) the right to access information on court cases

3.2.1 Access to public information[49]

Access to public information is an elementary feature of a democratic government, which apart from granting clear and reliable rules for electoral competition and the rise to power, provide organizational channels of access to information enabling the society to constantly know, participate and evaluate the government management and the performance of public servants.[50] Access to information creates a mechanism that fosters government's accountability and has a direct impact on improving the democratic system as it contributes to a multiplicity of players, among which are non-governmental organizations, civil society, academia, media and even the powers of the State themselves, acting as social controllers, reduce costs associated with overseeing and monitoring the exercise of power. At the same time, access to government public information favors the creation of communication channels between State institutions and society, which allow constituents to perform a critical, knowledgeable and permanent scrutiny of the government's actions.[51]

In Poland access to information finds its protection in the Polish Constitution from 1997. Art. 61 of the Constitution sets forth:

Article 61

1. A citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions. Such right shall also include receipt of information on the activities of self-governing economic or professional organs and other persons or organizational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury.
2. The right to obtain information shall ensure access to documents and entry to sittings of collective organs of public authority formed by universal elections, with the opportunity to make sound and visual recordings.
3. Limitations upon the rights referred to in paras. 1 and 2 above, may be imposed by statute solely to protect freedoms and rights of other persons and economic subjects, public order, security or important economic interests of the State.
4. The procedure for the provision of information, referred to in paras. 1 and 2 above shall be specified by statute, and regarding the Sejm and the Senate by their rules of procedure.

When it comes to the scope of application of this provision, it is argued that it should be interpreted widely. Provided limitations, mentioned in section 3, constitute a closed catalogue and cannot be construed extensively. They are meant to protect interests that may collide with the right to access to public information and, due to their particular place, they deserve exemption from the list of documents (information) that should be publicly accessible.[52] It must be also noted that the term "a citizen" in section 1 does not limit the right to access to information only to Polish citizens. In fact, the Polish Act of 6 September, 2001 on access to public information (further: Act on access to public information) in art. 2 section 1 stipulates: "Every person shall, subject to Art. 5, have the right of access to public information, hereinafter referred to as the right to public information." However, it may appear that the wording applied in the Act on access to public information does not conform to the Constitution as to who is eligible to obtain access to information, in fact these regulations are in accordance because the Act on access to public information extends the right to obtain access to information to everyone.[53]

Act on access to public information provides further regulations as to what is public information (art. 1), who and in under what conditions is entitled to obtain access to public information (art. 2 and 2a), what rights are included into the right to access to public information (art. 3), which institutions are obliged to grant access to public information (art. 4) and what are the limits of access to public information (art. 5).[54] Generally, it can be summarized that the access to public information encompasses all actions, documents and data that are produces by or concern the activity of public entities particularly public administration. In this regard, it appears that focal points concerning crossing opposite interests of protection personal data and access to

[44] See M. Filar, *Komentarz do art.190(a) Kodeksu karnego*, 2014.11.01, LEX.
[45] M. Mozgawa, Komentarz do art.190(a) Kodeksu karnego, 2014.09.01, LEX.
[46] M. Zaremba, *Prawo dostępu do informacji publicznej – zagadnienia praktyczne*, Warszawa 2009, s. 15.
[47] Ibidem.
[48] Ibidem.
[49] This part is based on: A. Cebera, D. Horodyski, *Personal…*, p. 356-360.
[50] B. Bińkowska-Artowicz, *Informacja gospodarcza. Informacja kredytowa*, Lex online, 2014, chapter 2.1.
[51] http://privacyconference2011.org/includes/IntroductionIFAIIngles.pdf, p. 2; A. Zoll, I*nformacja prawna a prawa obywatela* [in:] K. Grajewski, J. K. Warylewski, *Informacja prawna a prawa obywatela. Konferencja z okazji XXXV-lecia informatyki prawniczej w Polsce i XV-lecia Systemu Informacji Prawnej LEX. Gdańsk, 19-20 czerwca 2006*, Lex online.
[52] W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, LEX online, 2013, commentary to art. 61; Z. Zawadzka, *Wolność prasy a ochrona prywatności osób wykonujących działalność publiczną. Problem rozstrzygania konfliktu zasad*, Lex online, 2013, chapter 4.1.
[53] M. Kłaczyński, S. Szuster, *Komentarz do ustawy z dnia 6 września 2001 r. o dostępie do informacji publicznej (Dz.U.01.112.1198)*, Lex online, 2003, commentary to art. 2.
[54] http://isap.sejm.gov.pl/DetailsServlet?id=WDU20011121198.

public information are not numerous but may and do occur.[55] The limitations as to application of the Act on public access to information set forth in art. 5 section 2 concern the privacy of natural persons and the secret of the entrepreneur. Therefore, these limitations are primarily in accordance with art. 61 section 3 of the Constitution but also they conform to the standard of protection resulted from art. 31 section 3 of the Constitution, which should be applied to every situation of limiting access to public information prescribed in art. 5 of Act on access to public information. Among limitations to access to public information covered by art. 5 the protection of privacy of natural person falls within the scope of abovementioned standard of protection. It means that under Polish law in case of conflict between these two principles the right to protect personal data should prevail over the right of access to public information.[56]

3.2.2 Information disclosure claims in the press law

The reference books indicate the significant role of press in strengthen and developing democracy. Article 1 of the press law stipulates, that according to the Constitution of the Republic of Poland the press enjoys the freedom of speech and realizes citizens' rights for being honestly informed, openness of public life and social control and criticism. It means, that press has a great impact on affecting public opinion, because of its informational function, and in consequence - enable controlling the public authorities by society[57]. In other words the role of press is related to freedom of information. However, it may be restricted by the right to privacy, but this issue, will be stipulated in the another part of this paper.

As noted by M. Zaremba,[58] press law established three different information disclosure claims:

a) Access to public information due to provisions of Act on access to public information (art. 3a Act on press law);
b) State organs, state enterprises and other state organisational units, and in the range of social and economic activity also cooperative organisations and persons running business activity on their own account are obliged to supply information to the press about their activity. Refusal of furnishing information may occur only for the reason of preserving state and official secret and other secret protected by the Law. On the request of the editor-in-chief a refusal is delivered to the interested editorial staff in a written form in the term of three days; the refusal should include indication of an organ, organisational unit or a person it comes from, the date of a refusal, editorial office it concerns, indication of information being its object and the reason for a refusal. (art. 4 Act on press law);
c) demand of responding on press critics (art. 6 Act on press law).

However, one may notice that information disclosure claims set out in point b) and c) are not related to public information, and as so – the scope and effectiveness of the freedom of information is wider than the scope of protection based on the access to public information.

3.2.3 The right to access environmental information

In accordance to article 74 of Constitution, everyone shall have the right to be informed of the quality of the environment and its protection. In doctrine there is no agreement as to the mutual relationship between abovementioned art. 61 (right to access to public information) and article 74.

From literal interpretation of this regulation it arises that right to access to environmental information pertains to different state of matter than art. 61. Due to this interpretation the right to access to environmental information is addressed not only to public authorities but also to private entities.[59] Another notion is advocated by B. Rakoczy, who notes, that the right to access environmental information is address only to public authorities, and is classified only as a part of right to access to public information from art. 61.[60]

Importantly, the Act of 3 October 2008 on providing information on the environment and environmental protection, public participation in environmental protection and on environmental impact assessmen,[61] governs that only public entities are obliged to enclose environmental information. Although the mutual relationship between article 61 and 74 is not obvious, there are no doubts that right to access to environmental information may be classified as a part of FOI.

3.2.4 The right to access information on court cases

The right to access information on court cases may be analyzed as a part of freedom of information rule. It is also related to protection of privacy.

On the one hand, the right to privacy limits the access to information on court cases – only a specified group of entities in entitled to access this data, but on the other hand the right to access information on court cases may be - surprisingly - classified as a part of the right to privacy. This thesis has been found in a number of publications, because the right to privacy also contains the right to access information about myself. I can protect my privacy efficiently, when I am aware of the scope of information about myself processed by other entities.

The Code of Criminal procedure in article 156. § 1 and 5 governs that parties as well as their defence counsels, attorneys, legal representatives and statutory agents may be permitted to examine the files pertaining to the case and to copy them. These records may also be made accessible to other persons with the consent of the president of the court. Unless provided otherwise by law, permission by the person conducting the preparatory proceedings shall be required for the inspection of files of the preparatory proceedings in progress,, making copies and photocopies of the same by parties, defence counsels, legal representatives and statutory agents, and for the issuance of certified copies. With the permission of the state prosecutor, access to files in the pending preparatory proceedings could be given to other persons.

Similar regulation is provided by Act of 17 November 1964 - Code of civil procedure ("**CCP**"). In accordance to article 9 § 1 CCP, cases are heard in public, unless otherwise provided for in specific provisions. The parties to and participants in proceedings have the right to insight into the case files as well as the right to receive copies thereof. However, one may notice that wider scope of protection is provided in non-contentious proceedings (art. 525 CCP). Due to this regulation, case files shall be available to parties to proceedings and, subject to the consent of the presiding judge, to each person who reasonably substantiates his need to see the files.

Act of 14 June 1960 Code of Administrative Procedure[62] also regulate the access to files. At each stage of the proceedings a public administration body shall allow parties to view the file and to make notes or copies thereof (art. 73).

The right to access information on court case or administrative files is considered in this paper as a legal regime separate form access to public information regime. However, when disclosure

[55] Judgment of the Polish Supreme Court of 8 November 2012, I CSK 190/12; P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, 2008, p. 114; Judgment of Voivodship Administrative Court in Szczecin from 30 October 2014, II SA/Sz 502/14; Judgment of Polish Supreme Court of Administration from 19 August 2014, I OSK 2859/13.
[56] M. Kłaczyński, S. Szuster, *Komentarz…*, commentary to art. 5.
[57] Z. Zawadzka, Wolność prasy …, LEX no. 168972.
[58] M. Zaremba, *Prawo dostępu do informacji publicznej, Zagdnienia praktyczne, …..*, p. 239.
[59] M. Zaremba, *Prawo dostępu do informacji publicznej, Zagdnienia praktyczne, …..*, p. 257
[60] B. Rakoczy, *Komentarz do art.74 Konstytucji Rzeczypospolitej Polskiej*, 2013.11.25, LEX.
[61] Journal of Laws 2008 No. 199, item 1227.
[62] Jurnal of Laws 1960 No. 30, item 168.

demand is made not by the party of the proceeding and concerns public information, act on access to public information is applicable.[63]

4. Examples of overlap between these rights and resulting situations where the right to privacy

The next part of the study discusses specific examples of overlap between these rights and resulting situations where the right to privacy is restricted by the right to information. First, the paper explains the restrictions on the right to information resulting from the protection of personal data. Secondly, it discusses the restrictions resulting from the freedom of expression and, at the end, the restrictions resulting from the criminal law and the protection of the accused.

4.1. FOI and personal data protection[64]

The literature indicates a conflict between the right to personal data protection and the right to access to public information, which takes place when the right of an individual to protect his or her personal information and every person's freedom to collect and process information collide.[65] With a view to the above, in the present reflections the following will be proven:

1. the right to personal data protection is one of the elements determining the maximum scope of the application of the right to access to public information;
2. the right to access public information may, in justified circumstances, restrict the application of the right to personal data protection.

It is significant in the legal orders of the Member States of European Union that in spite of harmonization of the regulations pertaining to personal data protection, those rights are given different priority. As an example Polish legislation, in which the right to personal data protection essentially has priority over the right to access public information, as well as Swedish legislation, in which the hierarchy of the rights is reversed, will be cited. The reasons for the emergence of this difference will also be explained. However, the right to protect personal data may be challenged pursuant to provisions of Act on access to public information for example when it concerns the personal data of natural persons who exercises public functions. Polish Supreme Court of Administration stated that the address of residence of a mayor of the city is public information and hence is subject to revealing.[66] Nevertheless, it should be noted that the natural person who exercises public function may seek protection of his/her personal data under the provisions of Act of personal data protection.[67]

In European Union law access to public information in Member States is regulated only as to issues relating to the protection of environment.[68] Because the environmental policy is one of the most important and most regulated domains in European Union the principle of access to information in this area is pivotal. Pursuant to Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC[69] any natural or legal person requesting environmental information is entitled to have the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise. Environmental information shall mean any information in written, visual, aural, electronic or any other material form on environmental matters described in art. 1. This right, however, is not limitless. Pursuant to art. 2 letter f of the Directive: Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law. This regulation suggests that also on EU level the principle of protection of personal data of natural persons is protected over the rule of access to public information. Of course this protection does not result directly from the Directive but is dependent on Member State's national regulations that may provide adequate regulation.[70]

Taking into account the European Union's legal system it must be pointed out that unlike to the personal data protection that is harmonized on a minimum level by the Directive 95/46, the access to information (excluding environmental issues) is not harmonized nor unified. For these reasons the legal systems of Member States vary and reflect national approaches as to these matters.[71]

As it was described above in Poland the scopes of applications of these two principles are meant in general to be separate. However, despite apparent distinction between personal data protection and access to public information it is often not easy to distinguish when each principle applies.[72] For example name and surname of a natural person constituting personal data that are subject to relevant protection and exemption pursuant to art. 5 section 2 of Act on access to public information. Nevertheless, the decision of exempting such data is not mandatory and in fact depends on particular case.

According to the Supreme Court of Poland and Polish Constitutional Tribunal the right to personal data protection stems from the personality rights such as the dignity of human being and privacy right.[73] It is argued that contemporary gathering and processing personal data is technically easy and thus it is necessary to provide adequate protection of natural person from uncontrolled using his/her personal data, which is often performed without his/her consciousness and consent. For this reason in the Act on protection of personal data the legislator regulated carefully issues regarding gathering, processing, using and protecting personal data of a natural person. When interpreting these provisions one should not omit the Directive 95/46/WE, in which it is underlined that systems of personal data protection are created to serve people and thus they must respect elementary rights and freedoms of human being in particular the right to privacy. In the judgment from 28 April 2004, III CK 442/02 the Supreme Court of Poland highlights that when assessing weather, by asking for access to public information, it has been an intrusion into domain of private life, this notion should not be absolutized because due to its level of generality it requires interpretation including particular circumstances of every case. To private sphere of life should be included events and elements constituting personal and familial sphere. It does not mean that every piece of information concerning a natural person constitute his/her private personal life.

Hence, it appears that the regime of personal data protection and access to public information are or at least should be viewed

[63] Judgement of Supreme Administrative Court of 16th December 2005, OSK 1782/04.
[64] This part is based on: A. Cebera, . Horodyski, *Personal…*, p. 353-360.
[65] A. Sibiga, *Postępowanie w sprawach ochrony danych osobowych*, Warszawa 2003, p. 16, as cited in: P. Barta, P. Litwiński, *Ustawa o ochronie danych osobowych – Komentarz*, Warszawa 2013, p. 3.
[66] Judgment of Polish Supreme Court of Administration from 2 July 2002, II SAB/Lu 10/02; M. Kłaczyński, S. Szuster, *Komentarz…*, commentary to art. 6.
[67] M. Jaśkowska, *Dostęp do informacji publicznych w świetle orzecznictwa Naczelnego Sądu Administracyjnego*, Toruń 2002, p. 32 after Kłaczyński, S. Szuster, *Komentarz…*, commentary to art. 6; H. Szewczyk, *Ochrona dóbr osobistych w zatrudnieniu*, Lex online, 2007, chapter 3.2.2.
[68] M. Kłaczyński, S. Szuster, *Komentarz…*, commentary to art. 1.
[69] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, Official Journal L 041, 14/02/2003 P. 0026 - 0032 http://uecelex.lex.pl/celex/2003/32003l0004_en.html.
[70] Report from the Commission to the Council and the European Parliament on the experience gained in the application of directive 2003/4/Ec on public access to environmental information, p. 9.
[71] G. Edelstam, *What about integrity? National Traditions of Registration and Transparency* [in:] M. Ruffert, *Administrative Law in Europe Between Common Principles and National Traditions*, 2013, p. 103-104.
[72] Judgment of Constitutional Tribunal from 20 March 2006, K 17/05.
[73] Judgment of Constitutional Tribunal from 19 February 2002, U 3/01, OTK-A 2002, No 1, section 1 and from 12 November 2002, SK 40/01, OTK-A 2002, No 6, section 81.

separately. Of course there are mutual interactions and relations between them because in certain situations processing public information may interfere with or even breach personal data protection, i. e. the right to privacy or the protection of right to privacy will require rejecting using personal data.[74] Thus, it is hard to decide if for example granting access to the name and surname of a natural person by state authorities breaches the right of this person to privacy.

On the other hand, there are different legal systems that present divergent approach to abovementioned issues. For instance, legal system in Sweden tends to be less susceptible for presented above concerns. The Swedish tradition is strongly oriented on access to official documents and national registration to the extent that might be considered as breaching people's integrity and right to privacy. For example through national registration number of an individual everyone can easily find information about this individual such as his/her income or taxes. There is public access to such data.[75] In Sweden due to its long-lasting tradition, the access to official documents prevails over the personal data protection and is strictly bound with promoting democracy and controlling the state. The access to information about citizens is vast and include ordinary documents, for example in connection to decisions on individual cases such as architectural drawings of a person's home in a building matter. In addition there is access to information in database where information on many individuals can be obtained. Taxation of individual citizens as to how much a citizen earns and the taxes he/she pays are official documents. Such information is considered as harmless by the legislator and it is obviously deemed as important for the democracy as transparency is supposed to serve democracy.[76] Such approach may be intrusive as to personal data protection and places at risk individual' integrity. In this system the personal data protection might appear illusory and cannot serve its function properly. Apart from the personal discomfort resulting from public disclosure of personal documents there are serious criminal problems associated with very broad definition of official documents.

In fact, this dispute concerns basic constitutional values. On the one hand Constitution declares the right of citizens to obtain information about the activities of public authorities (Art. 61 section 1), including, among others, access to documents (Art. 61 section 2), which can be restricted i. a. due to the protection provided in laws for rights and freedoms of other persons (art. 61 section 3). On the other hand, the Constitution provides legal protection for private and family life, honor and good name (Art. 47), and prohibits the disclosure of information concerning a person otherwise than pursuant to the Act on personal data protection (Art. 51 section 1).

As it has already been set out, the national regulations are given different priority to here abovementioned constitutional legal values. In Polish legislation, the right to personal data protection essentially has priority over the right to access to public information, as well as in Swedish legislation it does not. The reasons for the emergence of this difference results from the fact, that up till now, provisions concerning personal data protection were only harmonized, and what is more – Directive 95/46 did not indicate the minimum level of protection.

This state of matter will change, because Commission has concluded that the EU needs a more comprehensive and coherent policy on the fundamental right to personal data protection. In the European Parliament legislative works are underway aiming at creation of a regulation concerning personal data protection, that is an act, which will produce legal effects directly in the legal orders of the Member States. The direct applicability of a Regulation in accordance with Article 288 TFEU will reduce legal fragmentation, improving the protection of fundamental rights of individuals[77]. The conflict between right to personal data protection and right to access to public information will be resolved on the same basis in all EU because the proposed Regulation will unify the different approaches as to restricting the scope of application of access to public information by imposing uniform standards of protection of personal data. As for now, we are presumed, the right to personal data will prevail in EU and in consequence restrict the wide scope of right to access to public information in Member States where this order is reversed, for example in Sweden.

4.2 Right to privacy and restrictions resulting from the press law

The restrictions of a right to privacy may take place due to the regulations of press law in hereunder mentioned situations. First of all the right may be subject to restrictions as per art. 13 of Act on press law, because there are no restrictions in publishing personal data and picture of sentenced by the final judgment of a court.

Secondly, in accordance with art. 4, state organs, state enterprises and other state organizational units, and in the range of social and economic activity also cooperative organizations and persons running business activity on their own account are obliged to supply information to the press about their activity. They are also obliged to answer the press critics.

And finally, restrictions regarding public activity. Article 14 point 6 Act on press law notes, that no one is entitled to publish information or data subjected to someone's private life, unless this information directly refers to public activity of this person, with particular emphasis on exercising public authority. E. Ferenc-Szydełko assumes that this regulation does not apply to entities commonly recognized.[78]

For example one is allowed to publish information about divorce, because it does not refer only to private life – divorce cause consequents also for third parties - for example creditors.[79] What is more, divorce judgment should be announced in open court (art. 326 CCP).

Finally, the reference books indicate that the amount of salary is not protected on the basis of right to privacy, when it concerns public authorities.[80]

4.3 Right to privacy and restrictions regarding to court proceedings

The scope and effectiveness of the right to privacy is restricted by the provisions regarding court proceedings, with particular emphasis on transparency rule. Article 148 § 1 CCP states, that unless otherwise provided for in specific provisions, court sessions shall be open and the court of trial shall hear cases in trial. What is more, due to the art. 326, a judgment should be announced in open court. A Similar regulation is provided by Code of Criminal Procedure, however article 39 of Criminal Code establishes an additional penal measure limiting the right to privacy - a publication of the sentence.

Summary

The aim of this paper was to present the limitations of the right to privacy resulting from FOI. The summary presents an attempt to answer the question about the mutual relation between both rights and their future hierarchy.

[74] Judgment of the Polish Supreme Court of 8 November 2012, I CSK 190/12; A. Żygadło, *Wyłączenia tajemnicy bankowej a prawo do prywatności*, Lex online, 2011, chapter 3.1.
[75] G. Edelstam, *What about integrity?...*, p. 104.
[76] Ibidem, p. 112.
[77] Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), http://ec.europa.eu/justice/dataprotection/document/review2012/com_2012_11_en.pdf, 10.03.2015.
[78] E. Ferenc-Szydełko, *Komentarz do art.14 ustawy - Prawo prasowe*, Lex online 2013.
[79] Ibidem.
[80] J. Sobczak, *Komentarz do art.14 ustawy - Prawo prasowe*, Lex online 2008.

One may notice a phenomenon, that legal institutions related to right to privacy and FOI constitute two independent legal regimes protecting contrary values. In consequence, restrictions from both principles must remain proportional of the purpose, which this restriction is to serve. Difficulties appear in situation of conflict between those two principles, because there are no guidelines as to decide which principle prevail.

In theory of law it is said, that in such state of matter, one should harmonize both principles in order to make both of them as efficient, as it is possible. Another notion is also advocated, according to which personal rights (right to privacy) should prevail political rights (FOI). It means that resolving conflict between those two principles, the scope and effectiveness of the protection of privacy prevails. As far as we are concerned the second resolution was adapted by Polish legislature.

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