

## **THE RIGHT TO INFORMATION ON THE ACTIVITIES OF PUBLIC ADMINISTRATION – COMMENTS ON THE BACKGROUND OF THE POLISH LEGAL SOLUTIONS**

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### **Abstract:**

An individual's right to information on the activities of public administration is one of the fundamental rights that would allow a wide use of social control over the organs of authorities and create a civil society. It is also important due to individual interests of citizens, in connection with exercising their subjective rights. Polish legal system, and first of all Constitution of Republic of Poland, guarantees the protection for the right to information in the wide scope. Nevertheless, an analyze of legislative solutions and relevant case studies improve that there are still some not precisely regulated areas concerning the subjective right that may causes that the individual will not be able to exercise the right to information effectively.

### **Key words:**

the right to information; activity of public administration; openness of public authorities;

This paper focuses on the basic (general) legal regulations that are in force in the Polish legal system and that determine subjective and objective boundaries that apply to the exercising of the subjective public right, namely the right to information on the activities of public administration authorities. Consequently, it either passes over the issues that refer to particular regulations or only indicates them briefly. Such a framework is meant to achieve the main objective of concentrating on legal guarantees of the right to information, in particular those legal measures that allow verifying the behaviour of public administration authorities in this respect. It should be emphasized that a legal value of particular significance for the exercise of any subjective right can be found in those legal instruments that provide an individual with an opportunity to actually use the right in an effective way. In the context of the subject that this paper deals with, it is not only legal guarantees to obtain information as such that is important, but also guarantees related to the methods and quality of its communication.

It should be stressed that the right to information acquires particular significance in the relationship between an individual (citizen) and a public administration authority (the executive). This right, which is directly related to the transparency of public authorities, constitutes one of these basic rights that allow for a wide range of social control over individual authorities but also enable building a civil society. It is also important due to the individual interests of citizens in connection with the exercising of other subjective rights that are vested in them. From this point of view, it acquires additional significance, as exercising it

directly affects the standard and quality of administrative practice, thus becoming a vital structural part in the transparency of administrative activities<sup>1</sup>.

In the Polish legal system, the right to obtain information on the activities of public administration and the related access guarantees have been granted under Article 61 of the Constitution<sup>2</sup>. This right is included in the list of public subjective rights of a political nature<sup>3</sup>. Access to public information is considered to be a consequence of Article 4 para. 1 of the Constitution of Poland, adopting the rule that the supreme power is vested in the Nation, and from the ensuing subordination of state authorities to citizens. In fact, the Constitution of Poland of 1997 is the first act of the national law granting the right to information, understood as an information relationship between an individual and the state; more precisely, a possibility to demand information on the activities of entities that enjoy public control. On the other hand, specification of the manner and procedure in which information is granted, and consequently, how the right is exercised, has been delegated to the ordinary legislator. While specifying the list of subjects entitled to obtain information, Article 61 para. 1 of the Constitution of Poland narrows the entitled group to citizens only, which stems from the political nature of the right. Disputable as it is in the doctrine, the group of subjects entitled to demand information under the Constitution<sup>4</sup> expands at the level of statutes, where the right to information is expressly extended to include any subject regardless of the citizenship factor. However, the system-maker has not precisely specified the list of subjects obliged to provide information, indicating only to whom the information should refer: organs of public authority and their activities as well as persons discharging public functions and other persons or organizational units to the extent in which they perform the duties of public authority and manage communal assets or property of the State Treasury. Undoubtedly, this circle should

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<sup>1</sup> Cf. T. Górzyńska, *Prawo do informacji i zasada jawności administracyjnej* (Zakamycze, 1999), 21 ff.; T. Górzyńska, "Kilka słów o prawie do informacji i zasadzie jawności," *Państwo prawa. Administracja. Sądownictwo. Prace dedykowane prof. dr hab. Januszowi Łętowskiemu w 60. rocznicę urodzin*, A. Łopatka, A. Wróbel, S. Kiewlicz (Warsaw, 1999), 116 ff.

<sup>2</sup> Pursuant to Article 61 of the Constitution of the Republic of Poland of 2 April 1997 (J. of Laws No. 78, item 319 as amended – further: the "Constitution of Poland"): "para. 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. para. 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. para. 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. para. 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."

<sup>3</sup> However, the right to be informed of the quality of the environment and its protection, which crystallizes the right to information in general, is undoubtedly the right of a social nature. Such understanding stems in particular from situating Article 74 para. 3 of the Constitution of Poland, under which everyone has the right to be informed of the quality of the environment and its protection, in that part of the Constitution of Poland that is devoted to freedoms and rights of economic, social and cultural character. For more details on the right to information as a constitutional subjective right. See in particular: M. Bednarczyk, *Obowiązek bezwziostkowego udostępniania informacji publicznej* (Warsaw, 2008) 26 ff.

<sup>4</sup> *Ibidem*, 45-50.

include not only legislative and judicial authorities but also the executive, i.e. public administration. The latter will comprise public administration authorities in the strict sense and the entities known as administrating authorities, as well as any persons discharging their functions in such entities. Further discussion will be limited to these subjects, as such is the scope of issues identified at the beginning of this paper. A public administration authority should be understood, as J. Boć has it<sup>5</sup>, as a person or a group of persons within the organisational structure of a state or a territorial self-government that have been appointed in order to implement norms of the administrative law in a manner and with effects specific to that law, acting within the powers conferred upon them by law. The concept of an administrating authority should be applied to any subject upon which administrating functions have been conferred by law or for which there exist legally created grounds to vest the administrative function therein and the function was actually vested in the authority<sup>6</sup>.

The subject matter of a claim stemming from Article 61 of the Constitution of Poland is information on the activities of organs of public authority, including public administration, i.e. public information. As regards the foregoing, this paper assumes the concept of P. Fajgielski<sup>7</sup> that information on the activities of public administration means information that is important for the completion of public tasks and constituting the knowledge of subjects, objects, actions, facts or states that is a significant enabling factor for the activities of public administration authorities as such or achieving expected results of these activities. It should be noted here that public information will constitute a competent entity's statement of knowledge concerning specific facts or regulatory environment or the ensuing legal consequences of both. This statement does not produce in itself any direct legal effects; nevertheless it may influence the exercise of certain rights or duties of a receiving party or third parties<sup>8</sup>.

The Constitution does not provide for a fixed method to make public information available. The methods for making information available as specified in Article 61 para. 2 of the Constitution of Poland (access to documents and guaranteed entry to sittings of collective organs formed by universal elections) are models only as they determine just the minimum scope and form of the information transferred. In fact, Article 61 of the Constitution of Poland does not specify in what language public information should be disclosed. Still, it may be inferred from Article 27 of the Constitution of Poland, stating that the official language of the Republic of Poland is Polish. On the other hand, in light of Article 4 of the Act of 7.10.1999 on the Polish Language<sup>9</sup>, the use of the Polish language is obligatory, in principle, for all public administration authorities.

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<sup>5</sup> As in: Prawo administracyjne, ed. J. Boć (Wrocław, 2007) 130. In particular, we should include here: government administration authorities, local government authorities and organs of a special status such as the National Broadcasting Council (KRRiT), the Supreme Chamber of Control (NIK), the Ombudsman for Children (RPD) and the National Bank of Poland (NBP).

<sup>6</sup> Ibidem, 132.

<sup>7</sup> Cf. P. Fajgielski, Informacja w administracji publicznej (Wrocław, 2007) 15.

<sup>8</sup> In this way in particular: W. Taras, Informowanie obywateli przez administrację (Wrocław-Warsaw-Cracow, 1992) 21.

<sup>9</sup> J. of Laws No. 90, item 999 as amended, further: the "Act on the Polish Language".

Procedures in which information is disclosed are specified in statutes. Taking into account the issues addressed by this paper, a fundamental act defining the general legal framework for the rules that govern obtainment of information on the activities of public administration is the Act of 6 September 2001 on Access to Public Information<sup>10</sup>. It is a general act applicable wherever there are no specific rules of access to public information. Another essential act is the Act of 14 June 1960 Code of Administrative Procedure<sup>11</sup> that governs access to information on individual administrative cases heard by public administration authorities. These acts constitute a direct source of provisions that justify the claim of those subjects who request access to public information from administrative authorities<sup>12</sup>.

It is not without significance here to invoke the provisions of the European Code of Good Administrative Practice<sup>13</sup>. Although it is not legally binding, its significance as a standard-setting document for the activities of the Polish executive authorities cannot be questioned. It is also particularly useful when interpreting the provisions of the administrative substantive and procedural law in the discussed field.

Guarantees concerning the right to information on the activities of public administration as included in the Act on Access to Public Information are limited as to their subject matter by the concept of public affairs<sup>14</sup>, yet the legislator decided not to define it. In light of the regulations specified in the Act, the concept should be related to matters connected to completion of public tasks, discharging of public functions and disposing of public property. The right was granted to all subjects (natural persons, legal persons and non-corporate bodies) regardless of citizenship or the existing real or legal interest. Limitations upon otherwise unlimited access to official information arise from regulations on access to classified information and other statutorily protected secrets. Furthermore, the right to information is limited for reasons related to privacy of a natural person or a business secret. This limitation does not apply to information on persons discharging public functions and information connected with discharging of such functions, including on the circumstances of being

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<sup>10</sup> J. of Laws No. 112, item 1198 as amended, further: the “Public Information Act” (APIA).

<sup>11</sup> Consolidated text: J. of Laws of 2000 No. 98, item 1071 as amended, further in the text: “CAP”.

<sup>12</sup> It should be emphasized here that before the effective date of the Act on Access to Public Information, in areas not governed by specific regulations there had been a possibility – confirmed by judicial decisions (cf. judgment of the Supreme Administrative Court of 30 January 2002 (II SA 717/01), Cause List 2002, No. 7-8, item 68 – for an interested party to cite directly Article 61 of the Constitution of Poland (independent and direct applicability of the Constitution) as the grounds to claim access to public information. This was possible because of the direct applicability of the Constitution stemming from Article 8 para. 2 of the Constitution of Poland and the great level of detail of the subdivision included in Article 61 of the Constitution of Poland.

<sup>13</sup> European Parliament Resolution – European Code of Good Administrative Practice adopted by the European Parliament on 6 September 2001, further: “ECGAP”. For more on the disputable legal character of the resolution, see K. Miaskowska-Daszkiewicz, “Prawo do dobrej administracji – uwagi na tle Rekomendacji Komitetu Ministrów Rady Europy CM/Rec (2007)7,” *Standardy wykonywania władzy publicznej*, ed. K. Miaskowska-Daszkiewicz, R.M. Pal (Lublin-Stalowa Wola, 2008) 146 ff.

<sup>14</sup> Pursuant to Article 1 of the APIA every piece of information on public affairs constitutes public information within the meaning of that Act.

entrusted with the function or discharge thereof, also in the case when a natural person or a business entity resigns from their right<sup>15</sup>. The subjects that are obliged to disclose public information in light of the Act cited above are public authorities and other entities that carry out public tasks<sup>16</sup>. Consequently, these are also public administration authorities as defined for the purposes of this paper.

The Act defines the subject matter of the information claimed in very broad terms<sup>17</sup>. In terms of its scope it is connected with all information concerning public affairs.

The statement of knowledge, which public information constitutes, is given in the procedure specified in the Act on Access to Public Information and may take on different forms, ranging from oral information to the permanent record of reality, i.e. a document<sup>18</sup>.

Two basic groups of procedures for the provision of public information are: the basic procedure, consisting of the submission of information on an authority's own initiative in the Public Information Bulletin (BIP), and additional (auxiliary) procedures: a. the procedure consisting of providing information at the request of an interested party; b. the procedure of announcement of public information on an authority's own initiative by laying out or otherwise displaying in locations available to the general public or by installing devices that make it possible to become acquainted with public information; c. the procedure applicable to collective organs formed by universal elections, consisting of entry to sittings thereof and access to all materials that document their sittings<sup>19</sup>. Regardless of the procedure in which it is disclosed, public information should include at least the identifying data of a disclosing party and a person who has created the information or is responsible for its content as well as the date of disclosure.

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<sup>15</sup> Cf. Article 5 of the APIA. Among the statutorily protected secrets, the following should be named in particular: personal data protection, confidentiality in tax matters, bank secret, physician's professional secret, pharmacist's professional secret and the occupational secret of legal professionals. For details on access to classified information, see J. Zaleśny, "Dostęp do informacji niejawnych w sferze spraw publicznych," *Obywatelskie prawo do informacji*, ed. T. Gardocka (Warsaw, 2008) 37-72.

<sup>16</sup> Cf. Article 4 of the APIA including a model list of obliged entities.

<sup>17</sup> Pursuant to Article 6 of the APIA, the subject matter of the information may concern in particular: internal and foreign policy; information on organs of public authority, including their legal status and form, organisation, focus and powers, persons discharging functions therein, ownership structure and assets at their disposal; rules governing operations of such entities, including procedures for enacting public laws; methods for receiving and processing of cases; status of cases received, order of processing or settlement thereof; registers, records and files kept and the rules governing access to data included therein; and public data such as: content and form of official documents, content of administrative acts and other adjudications, information on public property, including property of the State Treasury and territorial government units as well as property of state and communal legal persons, public debt, public assistance and public burdens. For a detailed description of the types of information that is made available by public administration, see P. Fajgielski, *op. cit.* 74-112.

<sup>18</sup> Pursuant to Article 6 para. 2 of the Act on Access to Public Information, an official document is the content of a declaration of intent or a statement of knowledge recorded and signed in any format by a public official as understood by the Penal Code, within the official's legal powers, addressed to another entity or filed to records of the case.

<sup>19</sup> Article 7 of the APIA.

Provision of information on the authority's own initiative<sup>20</sup> is effected by: publication in the Public Information Bulletin (BIP) or placement by laying out or otherwise displaying in a location available to the general public. Such procedures may be obligatory or optional.

The BIP is developed as an official data communication medium meant for publication of public information. It constitutes a modern form of public information dissemination using a uniform system of sites on a data communication network. Pursuant to Article 8 para. 3 of the APIA, public administration authorities are to use this procedure obligatorily for information on the following groups of issues: internal and foreign policy<sup>21</sup>, public administration entities<sup>22</sup>, rules governing operations of such entities<sup>23</sup>, contents of the documents that deal with the course and findings of audits and evaluations; information on the state of the nation, local governments and their organizational units and information concerning public property. It should be remembered, however, that pursuant to the disposition included in Article 8 para. 3 clause 2 of the APIA, public administration authorities may also use the BIP for dissemination of other public information.

On the other hand, the auxiliary access mode, i.e. dissemination of public information by laying out or otherwise displaying in locations available to the general public or by installing devices that make it possible to become acquainted with public information, may be used wherever access to the basic medium (BIP) is hindered by technical or financial constraints.

Public information is provided at the request of an interested party when it has not been disclosed on the authority's own initiative. In principle, readily available information is disclosed orally or in writing without a written request<sup>24</sup>. It may be provided to the requesting party as unprocessed or processed information. Unprocessed information should be provided in a manner and form conforming to the applicable regulations and the request. Processed information is information that has been organized by an obliged subject with the use of additional effort and measures, based on the data owned in connection with the requesting party's demand and based on the criteria specified by the requesting party itself. Access to processed information is limited by legitimate social interest considerations.

The rule is that the information is made available at the request of an interested party without unnecessary delay, within 14 days at latest, unless the obliged entity is unable to do so. If this is the case, the entity is obliged to notify the requesting party to this effect and communicate

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<sup>20</sup> For an at length discussion of the non-requested provision of public information, see M. Bednarczyk, op.cit.

<sup>21</sup> This applies in particular to information on planned activities of the executive, drafting of normative acts or programmes concerning implementation of public tasks, methods of their implementation and target results.

<sup>22</sup> Including on their: legal status, organisation, focus, powers and competent persons and bodies discharging their functions therein.

<sup>23</sup> Special emphasis should be put on: information on their mode of operation, methods for receiving and processing of issues, status of cases received, order of processing or settlement thereof; registers, records and files kept and the rules governing access to data included therein.

<sup>24</sup> Cf. Article 10 of the APIA.

reasons for the inability, postponing the deadline for processing of the case by a maximum of two months from the request submission date<sup>25</sup>.

In principle, while making public information available at the request of a party, public administration authorities are obliged to do so in a way and form specified in the request, unless the obliged entity's technical capabilities prevent it from doing so. If this is the case, the obliged entity must notify the requesting party to this effect, providing information on the way and form in which it is able to comply with the request and appointing a time limit of 14 days for submission of a relevant request. Should the appropriate request be not received within the time limit specified above, the proceedings instigated by way of the original request are discontinued<sup>26</sup> by an administrative decision. Moreover, the time limit is extended if a public administration authority has to incur additional costs related to processing the request. Extension of the time limit entails obligatory notification of the requesting party to this effect<sup>27</sup>.

As regards the legal form in which public information is disclosed, there is no express declaration on the part of the legislator. In both legal doctrine and judicial decisions, a predominating approach is that public information – as a statement of knowledge – is made available by way of an action of a material and technical nature<sup>28</sup>; some say, however, that the same should be considered an administrative decision<sup>29</sup>. It is difficult to share the second approach, especially in light of the circumstance that public information, in line with Article 10 para. 2 of the APIA may also be disclosed without a formal request in written or oral form. If this is the case, there are no normative grounds whatsoever to classify such an action as an administrative decision, if only we take into account the prevailing rule that such actions require obligatorily the form of a written instrument for the entire proceedings and the decision itself.

As to the refusal to disclose public information and discontinuation of the proceedings, such actions are initiated as a qualified action of an authority, i.e. an administrative decision. In principle, the decision is bound by the provisions of the CAP, subject to the proviso that the appeal processing time is shortened to 14 days<sup>30</sup>. This means that a party interested in obtaining public information may appeal against the decision<sup>31</sup> with a possible effect of

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<sup>25</sup> Cf. Article 13 of the APIA.

<sup>26</sup> Cf. Article 14 para. 2 of the APIA.

<sup>27</sup> Cf. Article 15 of the APIA.

<sup>28</sup> In this way in particular: W. Taras, op. cit. 22, and broad discussion of approaches presented by the doctrine and judicial decisions in: G. Sibiga, *Prawne formy działania podmiotu udostępniającego informacje publiczne na żądanie*. Speech at the conference: "Dostęp do informacji publicznej – rozwój czy stagnacja," Institute of Legal Studies of the Polish Academy of Sciences (PAN), Warsaw, 6 June 2006; copied typescript; cf. theses to Article 16.

<sup>29</sup> In this way in particular: T. R. Aleksandrowicz, *Komentarz do ustawy o dostępie do informacji publicznej* (Warsaw, 2008) 249.

<sup>30</sup> Cf. Article 16 of the APIA.

<sup>31</sup> The appeal is processed summarily i.e. within 14 days. See Article 16 para. 2 of the APIA.

having the decision's content changed after repeated examination of all real and legal circumstances of the case. It is also possible for the requesting party to appeal to a voivodeship administrative court against the final decision, and thus exercise control over the lawfulness of public administration authorities' actions as regards refusal to disclose public information or discontinuation of the proceedings. If the latter is the case, the summary procedure applies also<sup>32</sup>.

On the other hand, pursuant to Article 22 para. 1 of the APIA, the party that has been refused access to public information due to exclusion of its openness to the public and by invoking personal data protection, the right to privacy and secrets other than a state secret, professional secret, confidentiality in tax matters or statistical confidentiality, has the right to bring an action to a common court to have such information disclosed. In this situation, the legislator has not provided for the summary procedure.

Theoretically then, in light of legal regulations referred to above, it should be considered that guarantees concerning the right to information on the activities of public administration are full and provide the entitled subjects with a real possibility to exercise their right. Analysis of the existing judicial decisions shows, however, that this is not quite the case.

The first important issue from those that are not conclusively regulated and make it problematic for interested parties to exercise their rights, consists of the grounds for refusal to disclose public information. Contentious judicial decisions as they are in this respect do not have a positive impact on the guaranteed character of the right. Two dominant, yet polar approaches may be identified. In accordance with the first approach, if a requested piece of information is not public information within the meaning of the Act in question, then there are no grounds to issue a decision refusing disclosure of the public information. Such a request is usually dealt with by way of an ordinary letter addressed to a requesting party<sup>33</sup>. At the same time, no legal solutions are provided concerning settlement of a possible dispute between a party interested in obtaining information and the authority, whether a given piece of information constitutes public information within the meaning of the Act. It is the authority alone that makes an arbitrary decision in this respect. Such verification is possible at the stage of proceedings before administrative courts. The second approach assumes that any refusal to disclose public information should be in the form of an administrative decision, citing Article 104 of the CAP as a legal basis for its issue<sup>34</sup>. As it seems, this approach should be approved. Although an action of a public administration authority consisting in sending a letter to a

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<sup>32</sup> Cf. Article 21 of the APIA under which the case dossier is submitted to the court within 15 days, while the complaint should be processed within 30 days.

<sup>33</sup> Cf. the judgment of the Supreme Administrative Court (NSA) in Warsaw of 11.12.2002, II SA 2867/02, Cause List 2003, No. 6, p. 33; the judgment of the Supreme Administrative Court (NSA) in Warsaw of 25.03.2003, II SA 4059/02, *LEX No.* 78063; the judgment of the Voivodeship Administrative Court (WSA) in Białystok of 15.03.2007, II SAB/Bk 69/06, ONSai WSA 2008, No. 6, item 102; the judgment of the Voivodeship Administrative Court (WSA) in Warsaw of 26.04.2007, II SA/Wa 162/07, *LEX No.* 322803; the judgment of the Supreme Administrative Court (NSA) in Warsaw of 26.04.2007, II Sa/wa 162/07, *LEX No.* 322803.

<sup>34</sup> Cf. the judgment of the Supreme Administrative Court (NSA) in Warsaw of 16.01.2004, II SAB 325/03, *LEX No.* 162287; the ruling of the Voivodeship Administrative Court (WSA) in Warsaw of 25.01.2007, II SA/Wa 1932/06, *LEX No.* 301725; the judgement of the Voivodeship Administrative Court (WSA) in Cracow of 30.01.2009, II SAB/Kr 109/08, *LEX No.* 478699.



citizen may be subject to the administrative court control as to its lawfulness, the complaint is processed in a procedure other than the summary procedure guaranteed by the Act on Access to Public Administration. And the time, and thus the speed of processing the case is undoubtedly an important factor in the effectiveness of obtaining public information. Analogous problems occur when an authority states that it does not possess the requested information. Without doubt, it would be more expedient for the entitled subjects if the Act was amended to expressly indicate that for such situations a refusal administrative decision should be issued with all its consequences. Such an approach is also justified by the circumstance that the existing judicial decisions and the legal doctrine have both taken a stand that the refusal to undertake an action of a material and technical nature should always be by way of an administrative decision.

Another important issue that is indirectly related to the aforementioned problems is the situation when an authority fails to act, i.e. not process the case on time in the situation where the public character of the requested information is disputable. Analysis of judicial decisions in this field leads to the conclusion that this issue – as a disputable one – is not settled unambiguously, which is by no means expedient to the beneficiaries of the right to information. The first of the approaches presented above assumes that if the requested public information is the public information within the meaning of the Act, and a public administration authority fails to act, then a party is entitled to lodge a complaint about such failure to act to an administrative court<sup>35</sup>. The second approach that can be observed in judicial decisions assumes that regardless of the public character of the requested information, the refusal to disclose it should take the form of an administrative decision, whereas failure to act or send a letter that merely provides information that is not an administrative decision should be considered the authority's failure to act that can be complained about to an administrative court<sup>36</sup>. The second approach should be considered as the legitimate one as it affords the entitled party an increased measure of protection under the right to information guaranteed by Article 61 of the Constitution of Poland. Yet, it would be appropriate if the legislator stated its relevant position in an express way.

In connection with the problem of an authority's failure to act and irrespective of remedies by which the subjects may counter it, another problem may occur; namely, of the damage caused by non-provision of the requested information or providing it too late. In such situations, although there are no specific regulations in the Act on Access to Public Information, the applicable provisions should be the general ones governing liability of the State Treasury or a territorial self-government unit for damage resulting from non-settlement, to which the authority is obliged under Article 417 <sup>1</sup>§ 3 of the Civil Code<sup>37</sup>.

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<sup>35</sup> See the judgment of the Supreme Administrative Court (NSA) in Warsaw of 10.01.2007, I OSK 50/06, *LEX No.* 291197.

<sup>36</sup> See the ruling of the Voivodeship Administrative Court (WSA) in Warsaw of 25.01.2007, II SA/Wa 1932/06, *LEX No.* 301725; the judgment of the Voivodeship Administrative Court (WSA) in Cracow of 30.01.2009, II SAB/Kr 109/08, *LEX No.* 478699.

<sup>37</sup> In line with the provision cited, if the damage has been caused by non-settlement or lack of decision and the law obligatorily requires them, then redress may be claimed once the relevant proceeding find that non-settlement or lack of decision was unlawful, unless separate provisions provide otherwise. See, in greater detail,

It seems also that in the situation where incomplete information is given, liability of the State Treasury cannot be excluded, of course if the conditions laid down by statutes are met.

To sum up this part of the discussion concerning the exercise of the right to information that is vested in an interested party regardless of its legal interest, it should be stated that this right is not fully guaranteed. As the range of entities that are considered public administration entities obliged to disclose information is extensive and as the material scope determining what is and what is not public information is wide, satisfactory guarantees cannot be given. In particular, it should be pointed out that there are no legal remedies that would enable the entitled subjects to effectively exercise their right to information that is complete, true and as requested in a quick and straightforward way. The legal situation is seriously aggravated by contradictory judicial decisions, which also result in non-respecting of the principle of equality before the law. Consequently, the legislator's interference in the indicated areas is necessary.

The second normative model that allows exercising the right to information on the activities of public administration authorities is the one where the public character of the information is excluded due to protection of privacy considerations and available only for reasons related to the legal interest of an individual. The model is not so developed in terms of norms as in principle it is limited to institutions rooted in the Code of Administrative Procedure occurring in individual administrative proceedings. Basic institutions related to the exercise of that right are: the general principle of Article 9 of the CAP providing for the obligation to inform; the right to access the case file; and issuance of certificates. These institutions already enjoy a well-established position, also because of the effective period of the legal instrument that regulates them.

The obligation to inform under Article 9 of the CAP consists of two specific obligations. The first one refers to parties to the proceedings who should be informed about real and legal circumstances that may influence assertion of their rights and obligations being the subject of the administrative proceedings. The second obligation refers to both the parties to and other participants in the proceedings. It consists of a public administration authority overseeing that such subjects do not suffer damage due to ignorance of the law, and thus being obliged to provide necessary instructions and clarifications. Within the meaning of the aforementioned provision, the damage should be understood as any material or moral injury or the loss of a possibility to have the case settled as expected in terms of both the essence of the case and the time of settlement<sup>38</sup>. Unfortunately, the authority's obligation to inform is not normatively connected with a party's claim to receive such information. It is worth noting here that procedures concerning specific proceedings sometimes use the institution of binding interpretation of legal regulations<sup>39</sup>, which can be requested by an entitled subject (with an

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P. Dzienis, *Odpowiedzialność cywilna władzy publicznej* (Warsaw, 2006). A similar solution was adopted by the Supreme Court in its judgment of 27.03.2003, V CKN 41/01, OSNC 2004, No. 6, item 96 for situations where public information provided within the statutory time limit is admittedly compliant with the data possessed by the entity obliged to provide information but at variance with facts, so – objectively speaking – untrue.

<sup>38</sup> For more details, see J. Borkowski, Gloss to the judgment of the Supreme Administrative Court (NSA) of 15.10.1992 Sa/Ka 766/92, OSP 1994/5/92.

<sup>39</sup> Cf. in particular Article 10 of the Act of 10.07.2004 on Freedom of Economic Activity (consolidated text: J. of Laws of 2007 No. 155, item 1095 as amended) and Article 14b §1 of the Act of 20.09.1997 – Tax Ordinance (consolidated text: J. of Laws of 2005 No. 8, item 60 as amended).

awarded claim). This is the type of qualified official information provided at the request of a party and originating from a competent public administration authority. Most often, it concerns the scope and manner of application of the laws to a particular case. Its attributes include binding force and particular protection for the receiving party. In principle, the amendment or repeal thereof is possible on a statutory basis.

Information in the general administrative proceedings should be provided in the course of the entire proceedings. This principle is closely related to another one expressed in Article 8 of the CAP – the principle to increase citizens' trust in state agencies and improve citizens' legal culture and awareness. Given the well-established judicial decisions, this particular relationship results in adoption of certain rules governing information given in the course of such proceedings. The basic one says that nobody should be affected by negative consequences of their action, if it is undertaken in line with the official information given to them, whereas such adverse consequences of the action shall be eliminated by the authority itself<sup>40</sup>. Nevertheless, even the misinstruction cannot create a subjective right for the party to receive a right that does not stem from the legal regulation<sup>41</sup>.

Violation of the principle stemming from Article 9 of the CAP may be caused by failure to give relevant information or instruction, disclosure of information that is imprecise, too vague or incomplete; namely the information that omits legal or real circumstances important for settlement of the case or information that is false<sup>42</sup>. Violation of this principle may constitute sufficient grounds to repeal an administrative decision in the course of the appeal proceedings or as part of the judicial control over administration<sup>43</sup>.

The institution of access to an administrative case file has been statutorily guaranteed only to a party to the proceedings, and is related to bringing into effect the right specified in Article 51 para. 3 of the Constitution of Poland, stating that everyone shall have a right of access to official documents and data collections concerning himself. Pursuant to Article 73 of the CAP, a public administration authority is obliged to provide a party to the proceedings with access to the case file as well as a possibility to take notes on and make copies of the file at any stage of the proceedings. Refusal to perform such activities may occur for files subject to state secret<sup>44</sup>, or other files excluded by the authority for important national interest considerations. The refusal takes the form of a ruling that can be complained against. The

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<sup>40</sup> Cf. W. Taras, Gloss to the judgment of the Supreme Court (SN) of 23.07.1992 III ARN 40.92, Pip 1993, No. 3, p. 110; the judgment of the Voivodeship Administrative Court (WSA) in Warsaw of 1.12.2005 VII SA/Wa 747/05, *LEX No.* 196272.

<sup>41</sup> Cf. the judgement of the Voivodeship Administrative Court (WSA) in Warsaw of 14.11.2006 V SA/Wa 1628/06, *LEX No.* 339651.

<sup>42</sup> In this way in particular: B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz* (Warsaw, 2006) 80.

<sup>43</sup> Cf. the judgment of the Voivodeship Administrative Court (WSA) in Łódź of 17.02.2009 II SA/Łd 807/08, *LEX No.* 478536.

<sup>44</sup> In legal doctrine, a controversial issue is the legislator's omission of business secret as justification of refusal to access the case file. For more details, see Z.R. Kmiecik, *Zakres udostępniania akt sprawy w postępowaniu administracyjnym RPEiS 2008, No. 2, 95 ff.*

material scope of the obligation specified in Article 73 is also outlined by technical considerations. The obligation refers only to files that are currently held by a given authority and the party cannot demand that the files are brought from another authority. This regulation is justified by the need to protect privacy of the parties to the proceedings. On the other hand, it does not provide sufficient protection to statutorily protected secrets other than a state secret, such as business secret. Undoubtedly, it enables the party concerned to learn about extensive legal and real circumstances of the relevant case.

Pursuant to Article 217 of the CAP, a certificate is issued by a public administration authority, if the law requires official confirmation of specific facts or the state or when a person applies for a certificate due to its legal interest by way of the official confirmation of specific facts or the regulatory environment. The obligation to issue a certificate applies in particular to confirmation of information included in the records or register kept by or in possession of a public administration authority.

Although the essence of the certificate is not to share information but to officially confirm a specific fact or state, the literature on the subject emphasizes that the obligation to issue certificates at the request of a citizen constitutes a “passive obligation to provide information”<sup>45</sup>.

To sum up the second part of this discussion, it should be emphasized that the right to information on the activities of public administration authorities, as exercised in individual proceedings concerning a specific case of a given party is guaranteed to the extent that allows its effective use. This is derived in particular from the fact that access to information is determined by the need to provide for the widest possible protection of a special interest i.e. the legal interest rooted in the subjective public law. The transparency of administration in this respect has been limited to immediate stakeholders, yet the limitation is justified by the need to protect privacy. Surely, the deficiency here is that the obligation to provide information has not been linked to the claim awarded to the party as well as the fact that the obligation to give complete, unambiguous, clear and precise information does not stem expressly from any legal norm. Nevertheless, the output of judicial decisions and a well-established position of legal doctrine are both oriented towards the fullest exercise of an individual's right in the administrative proceedings, including the right to information. Definitely, the effective period and applicability of the CAP and institutions regulated therein are not without significance here. Therefore, this method of regulation should be considered more comprehensive than the regulatory model applicable to access to generally available public information.

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