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# The Right to Privacy as an Exemption from Freedom of Information in the Case of Persons Performing Public Functions (Poland's Example)

## *Prawo do prywatności jako wyjątek od dostępu do informacji publicznej w przypadku osób pełniących funkcje publiczne (przykład Polski)*

ABSTRACT

The article discusses the right to privacy as an exemption from freedom of information in Poland as specified in the Act of 6 September 2001 on access to public information. The aim is to examine how Poland regulates the relationship between two important values: freedom of information and the right to privacy. There are many situations where the right to privacy as an exemption from freedom of information occurs. The article however is focused specifically on the issue where a requester asks for public information that may relate to the privacy of persons performing public functions. This problem is valid, especially in the light of the recent application of the First President of the Supreme Court to the Constitutional Tribunal which touches upon the right to privacy of persons performing public functions. The author argues that although Poland assures freedom of information and the right to privacy, Polish public authorities and courts have a problem striking the right balance between those two values. This is primarily the result of general terms used by the legislator, which must be explained through a judicial interpretation.

**Keywords:** freedom of information; public information; right to privacy; persons performing public functions

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## INTRODUCTION

Freedom of information assumes that citizens knowingly operate in democracy, not only through the exercise of voting rights, but also they know the rules of functioning of the state: decision-making mechanisms and disbursement of public funds and their consequences.[1] This means that a decision-making process and an operation of the state should be held in a transparent manner – visible and understandable to all. Access to information about public institutions is thereby the mechanism of society's control over public authorities. It implies that transparency of public life is a measure of the level of democracy. The idea of open government is also a means to increase trust and confidence throughout society. However, one may ask whether freedom of information is an absolute right or there are circumstances and motives that justify exemptions from unrestricted "right to know".

In Poland, access to public information is regulated by the Act of 6 September 2001 on access to public information.[2] Poland has not decided to guarantee absolute freedom of information as it introduced exemptions from this general principle. One of them is the right to privacy. However, the right to privacy does not have to always withhold revealing public information. According to the law, the right to privacy as an exemption does not relate to the information on persons performing public functions, being connected with performing these functions.

The paper argues that although Poland assures freedom of information and the right to privacy, Polish public authorities and courts have a problem striking the right balance between those two values. This is primarily the result of general terms used by the legislator that have to be explained through a judicial interpretation. The presentation of this problem is made through the analysis of the relevant literature and judicial verdicts.

The article consists of three parts. The first part briefly describes the legislative history and the scope of the AAPI. The second section concisely discusses the right to privacy as a value protected by Polish law. The last section presents how the right to privacy is used in case of access to public information when this information relates to persons performing public functions.

[1] E. Ausems, *Council of Europe and animal welfare*, [in:] *Ethical Eye: Animal Welfare*, Strasbourg 2006, pp. 249–252.

[2] Consolidated text, Journal of Laws 2020, item 2176, as amended, hereinafter: the AAPI.

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## THE SCOPE OF THE AAPI

The first-time freedom of information in Poland was established in the Constitution of the Republic of Poland of 1997.[3] Article 61 of the Polish Constitution states that 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.[4] According to Article 61 (2) of the Polish Constitution, 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.[5] Article 61 (4) of the Polish Constitution provides that the procedure to obtain information shall be specified by statute, and regarding the Sejm and the Senate by their rules of procedure. The Polish Parliament exercised this constitutional delegation to enact by passing the AAPI in 2001. The AAPI defines what kind of information is available, who is responsible for disclosure, who has access to the information and according procedure.[6]

[3] Journal of Laws 1997, no. 78, item 483, as amended, hereinafter: the Polish Constitution. English translation of the Constitution at: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (access: 10.12.2021). Poland is a signatory country of the European Convention on Human Rights of 1950 that in Article 10 warrants freedom of information; since recently Article 42 of the Charter of Fundamental Rights of the European Union guarantees that "any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents". The main EU regulation is however Article 15 of the Treaty of Functioning of the European Union providing that "any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph".

[4] W. Taras calls the problem of public information as a "trendy" topic since the mid-1990s. See W. Taras, *Prywatność a jawność – bilans 25-lecia i perspektywy na przyszłość, red. A. Mednis, C.H. Beck, Warszawa 2016, ss. 275*, "Studia Iuridica Lublinensia" 2016, vol. 25(4), nr 4, p. 271.

[5] Cf. Article 3 of the AAPI.

[6] In Poland, access to public information and data protection are regulated in two separate acts thus constitute two different legal regimes. The relationship between the right to personal data protection and the right to access public information is set out in Article 86 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119/1, 4.5.2016). Pursuant to this provision, personal data in official documents held by a public authority or a public body or a private body for the performance of a task carried out in the public interest may be disclosed by the authority or body in accordance with Union or Member State law to which the public authority or body is subject in order to reconcile public access to official documents with the right to the protection of personal

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Article 1 of the AAPI provides that access is guaranteed to public information and all information on public matters constitutes public information in the understanding of the Act and is subject to being made available on the basis of principles and under the provisions defined in this Act. This general notion of public information is explained in Article 6 of the AAPI which provides a non-exhausted list of what may constitute public information. Pursuant to this provision available is information on internal and foreign policy, including intentions of legislative and executive authorities, drafts on normative acts, and programs on realization of public tasks, methods of their realization, performance, and consequences of the realization of these tasks. Available is also information on public entities, in particular about their legal status or legal form, organization, subject of activity and competencies, bodies and persons performing functions therein and competencies, property structure of entities, as well as principles of their functioning. Access is also guaranteed to public data like official documents and to information on public property such as property of the State Treasury and state legal persons.

Article 4 of the AAPI lists the entities that are obliged to disclose public information. The entities are: (1) organs of public authorities;[7] (2) organs of economic and professional self-governments (e.g., self-governments of lawyers, doctors, and architects);[8] (3) entities representing the State Treasury or other persons and units (e.g., associations if they administer public money, public and non-public schools, public higher education institutions, municipal companies); (4) public trade unions, organizations of employers, and political parties. Public information must be current and in possession of the body responsible for disclosure.[9] The obligation to provide public information by the public authorities and other entities performing public

data pursuant to this Regulation. Also, Recital 154 of this Regulation emphasizes the need to reconcile this right and the reuse of public sector information. This recital indicates that national law should reconcile public access to public documents and the reuse of public sector information with the right to the protection of personal data and may therefore provide for the necessary consideration of the right to the protection of personal data under this Regulation. The provision of Article 86 and Recital 154 of this Regulation refer to national laws when there is a need to weigh the relations between the right to the protection of personal data and the right to access to public information. This means that the problem presented in this study should be analysed in the context of Article 5 of the AAPI.

[7] For example, authorities of central and local government, courts, Sejm and Senat (Polish Parliament).

[8] In Poland, professional self-governments associate all person of the same profession and are regulated by a statute. A regulated profession is a profession which requires specific qualifications and can be exercised after obtaining a permit, which can be earned only after fulfilment of the requirements of the laws of the state (e.g., passing an exam, completing of a professional training, and entry on the list).

[9] H. Izdebski, *Ustawa z dnia 6 września 2001 r. o dostępie do informacji publicznej*, [in:] *Dostęp do informacji publicznej – wdrażanie ustawy*, ed. H. Izdebski, Warszawa 2001, p. 25.

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functions does not apply to published information or information which is already in possession of a requester.[10]

Each person has access to public information. Individuals are entitled to that right regardless of citizenship unless they are adults and incapacitated. A requestor has no obligation to demonstrate either a legal interest or actual interest.[11] However, requests are subject to preliminary assessments as to whether they ask for public information, important to the public. The content of an application should be objective and a requester should show an objective not subjective interest if he wants to obtain public information.[12]

Article 5 (2) of the AAPI provides two exemptions from the right to public information: the privacy of a natural person and the secret of an entrepreneur.

The short description of the AAPI shows that the scope of this statute is broad. There are many entities responsible for disclosure of information and the category of public information is very general. Article 6 of the AAPI provides examples of public information, but because that list is not exhausted, it elucidates interpretative uncertainties to limited extend.

## THE RIGHT TO PRIVACY IN POLAND

Before a discussion of the right to privacy as an exemption from freedom of information, it is worth presenting briefly a general concept of this right.

Privacy and the right to privacy are distinct notions. The right to privacy has a short history and its protection by law have developed during the last past years. The concept of privacy, however, has much deeper and longer roots. The first general ideas of privacy played the significant role in ancient times.[13]

The birthplace of the right to privacy is the United States of America. This is at least the common conviction which is certainly the consequence of the publication in 1898 of the famous article by S.D. Warren and L. Brandeis, who created the foundations for the development of the idea of the protection of private life.[14] This article triggered the discussion about the right to privacy which ultimately, in international dimension, resulted of adoption of the legal acts that protect the right

[10] Judgment of the Supreme Administrative Court of 20 November 2003, III SAB 372/03.

[11] I. Kamińska, M. Rozbicka-Ostrowska, *Ustawa o dostępie do informacji publicznej. Komentarz*, Warszawa 2012, p. 43.

[12] *Ibidem*.

[13] J. Braciak, *Prawo do prywatności*, [in:] *Prawa i wolności obywatelskie w Konstytucji RP*, eds. B. Banaszak, A. Preisner, Warszawa 2002, p. 280.

[14] S.D. Warren, L. Brandeis, *The Right to Privacy*, "Harvard Law Review" 1890, vol. 4(5), p. 193–220.

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to privacy, in particular the Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights of 1966.[15]

There are many approaches, concepts and definitions of privacy created by scholars.[16] The three most common definitions are as follows. First, privacy means "a person's feeling that others should be excluded from something which is of concern to him, and also recognition that others have a right to do this".[17] Second, privacy is "a value to be oneself; relief from the pressures of the presence of others".[18] Third, privacy is "an outcome of a person's wish to withhold from others certain knowledge as to his past and present experience and action and his intention for the future; a desire to be an enigma to others or to control other's perceptions and beliefs about the self".[19] It seems that definitional approach to privacy is not useful. It is impossible to give a full and universal definition of privacy because of at least two reasons. First, understanding of privacy depends on the culture and traditions of a given country and society, and second, these are individuals who usually create their own notions of privacy, they decide what is or is not private for them.

R. Gavison argues that privacy is related to the amount of information known about an individual.[20] Western nations acknowledged that privacy as a value deserves attention and protection since it relates to democracy. Privacy is essential to democratic government because it fosters and encourages the moral autonomy of the citizen, a central requirement of a democracy. Part of the justification for majority rule and the right to vote is the assumption that individuals should participate in political decisions by forming judgments and expressing preferences. Thus, to the extent that privacy is important for autonomy, it is important for democracy as well.[21] Therefore, it seems that the government should make explicit commitment to privacy as a value that should be considered in reaching legal results.[22]

Democracies should respect the right to privacy; however, problems arise when legislatures include the notion of privacy in laws. The legislatures do not explain what they mean by privacy. It is difficult to find a precise meaning of the concept of privacy in legal systems because the determination of the legal concepts is to a greater extent in the domain of doctrine and case law than legislators[23] and, as

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[15] J. Braciak, *op. cit*., p. 280.

[16] *Ibidem*. The Polish literature on the right to privacy is very often based on U.S. sources and the definitional approach to that problem is very similar in both countries.

[17] D.M. O'Brien, *Privacy and the Right of Access: Purposes and Paradoxes of Information Control*, "Administrative Law Review" 1978, vol. 30(45), p. 64.

[18] *Ibidem*, p. 65.

[19] *Ibidem*.

[20] R. Gavison, *Privacy and the Limits of Law*, "Yale Law Journal" 1980, vol. 89(3), p. 423.

[21] *Ibidem*, p. 456.

[22] *Ibidem*, p. 424.

[23] *Prawa człowieka. Zarys wykładu*, ed. J. Hołda, Warszawa 2008, p. 114.

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J. Braciak states, scholars inspired by courts defining privacy indicate different types of violations against which the individual is given protection.[24] "The right to privacy is designed for the purpose of enabling us to discuss, classify, and condemn wrongful or unjustified invasions of privacy".[25] This is also true with respect to the right to privacy as an exemption from freedom of information, where the courts case by case have to decide if the sphere of privacy of the individual deserves governmental protection.

In Poland, the evolution of privacy protecting was like in other countries. In the beginning scholars, followed by the legislature and courts, were the main advocates of legal protection of privacy.[26] For many years Polish law lacked constitutional and statutory regulations that would either explicitly proclaim the right to privacy or protect personal data.[27]

The central role in the protection of privacy performed the doctrine and judicature of private law. It is widely accepted that the foundations for the general formulated principle of protection of the private sphere are created by Article 23 of the Act of 23 April 1964 – Civil Code[28] which states the open catalogue of personal interests.[29] Privacy is not mentioned in that provision but in the 1970s Professor A. Kopff argued that also the right to privacy should be subject to protection of Article 23.[30] The Polish courts recognized the right to privacy almost a decade later.[31]

In Poland, for the first time, the right to privacy was explicitly expressed in Article 47 of the Polish Constitution, according to which everyone shall have the right to legal protection of his private and family life, of his honor and good reputation and to make decisions about his personal life.[32]

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[24] J. Braciak, *op. cit.*, p. 293.

[25] W.A. Parent, *A New Definition of Privacy for the Law*, "Philosophy and Law" 1998, vol. 2, p. 309.

[26] J. Braciak, *op. cit.*, p. 331.

[27] *Ibidem*.

[28] Consolidated text, Journal of Laws 2020, item 1740, as amended.

[29] Article 23 of the Civil Code stipulates that the personal interest of a human being, in particular health, dignity, freedom, freedom of conscience, surname or pseudonym, image, secrecy of correspondence, inviolability of home, and scientific, artistic, inventor's and rationalizing achievements, shall be protected by civil law independent of protection envisaged in other provisions.

[30] A. Kopff, *Koncepcja praw do intymności i do prywatności życia osobistego. Zagadnienia konstrukcyjne*, "Studia Cywilistyczne" 1972, vol. 20.

[31] J. Braciak, *op. cit*., p. 338.

[32] The right to privacy is guaranteed also by Article 8 of the European Convention on Human Rights of 1950, ratified by Poland in 1992. The administrative courts rarely refer to the Convention and the verdicts of the European Court of Human Rights in cases regarding access to public information and privacy of persons performing public functions.

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The essence of the rights protected by this provision and the constitutional term "everyone" indicate that only individuals have expectation of privacy, since only they have a private life, family, honor, and good reputation.[33]

P. Winczorek concludes that the constitutional notion of private life is understood as the circumstances, behaviors and events that are not directly related to carrying out tasks and competences of public authorities, or other activities of public ambit.[34] However, the Polish Constitution specifies the elements of the right to privacy, obligates public authorities to not interfere within a defined sphere of life (activities) of the individual and provides adequate protection against any acts which threaten thereof.[35]

The Supreme Administrative Court held that the right to protection of personal data is an emanation of the personal interests of the individual, such as the right to personality, informative self-determination, and its main objective is to ensure that privacy, dignity, or human personality is respected.[36]

## THE RIGHT TO PRIVACY OF PERSONS PERFORMING PUBLIC FUNCTIONS

### 1. General remarks

As mentioned at the outset of the paper, the AAPI introduced limitation on freedom of information in Article 5 (2). Pursuant to this provision the right to public information is subject to limitation in relation to privacy of a natural person or the secret of an entrepreneur. The limitation does not relate to the information on persons performing public functions, being connected with performing these functions, including the conditions of entrusting and performing these functions and in the event when a natural person or entrepreneur resigns from the right to which he was entitled to. It means that under statutory protection is information regarding individuals and corporate bodies if revealing of this information would infringe their right to privacy, protection of personal data, and the corporate interest.[37]

Above limitations have to comply with Article 61 (3) of the Polish Constitution which provides that limitations upon the right to public information may be imposed by a statute solely to protect freedoms and rights of other persons and economic

[33] B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2012, p. 294; judgment of the Voivodeship Administrative Court in Warsaw of 24 November 2004, II SA/Wa 1584/09.

[34] P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej*, Warszawa 2000, p. 66.

[35] B. Banaszak, *op. cit.*, p. 298.

[36] Judgment of the Supreme Administrative Court of 28 November 2002, II SA 3389/01.

[37] I. Kamińska, M. Rozbicka-Ostrowska, *op. cit*., p. 83.

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subjects, public order, security or important economic interests of the State. The Voivodeship Administrative Court held that a person who is interested in access to public information, regardless of his own private interest in obtaining it is, therefore, obliged to undergo the rigors resulting from the restrictions.[38]

Although freedom of information is the general rule, exemptions from this principle should be interpreted strictly.[39] The first step in dealing with matters concerning disclosure of information is to determine whether in a concrete case a person is asking for public information. Only after finding that this is public information, a public authority examines the matter regarding negative aspects of disclosure of this information.[40] The authority always must weigh whether access to public information or public interest should prevail in a particular case.

## 2. Definitional problems of the notion persons performing public functions

As it was stated above the limitation of the right to public information does not relate to the information on persons performing public functions, being connected with performing these functions.[41] This shows that the AAPI created a mechanism by which the privacy of persons discharging public functions is limited.

One of the most discussing issues under the AAPI is the meaning of "persons discharging public functions". The doctrine of administrative law criticizes this notion for being too general and extending the understanding of entities obliged to disclose public information, thus obliging them to disclose information belonging to the private sphere of their lives.[42]

To decode the meaning of a person performing public functions it is necessary to analyse the judgments of administrative courts which have developed this concept.[43]

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[38] Judgment of the Voivodeship Administrative Court in Warsaw of 8 December 2001, II SA/Wa 1844/11. The Court also held that by limiting a constitutional sphere of freedom of the citizen, the statute must do so in a way that primarily does not violate the essence of freedom and will not erode the relationship of the right, which is limited, to the purpose which serves the limitation; that purpose must also be qualified in terms of the constitutional value. Necessary proportion must be preserved to assume that a particular restriction of civil liberties does not violate the constitutional hierarchy of goods (the principle of proportionality).

[39] Judgment of the Voivodeship Administrative Court in Warsaw of 25 May 2005, II SAB/Wa 58/04.

[40] G. Sibiga, *Dostęp do informacji publicznej a prawa do prywatności jednostki i ochrony jej danych osobowych*, "Samorząd Terytorialny" 2003, no. 11, p. 5.

[41] I. Kamińska, M. Rozbicka-Ostrowska, *op. cit.*, p. 84.

[42] There are similar notions in other acts, e.g., the definition of a public official in the Polish Penal Code. However, those definitions are of little help since they are created for implementation of the according acts.

[43] See judgments brought up by P. Sitniewski (*Odmowa dostępu do informacji publicznej. Przesłanki, granice, procedura*, Warszawa 2020, pp. 192–197).

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In the judgment of 2018, the Supreme Administrative Court ruled that the concept of a "person discharging a public function" covers any person who has an impact on determining public affairs within the meaning of Article 1 (1) of the AAPI, i.e. on the public sphere.[44]

"It is assumed that a distinguishing feature of a person performing a public function is that he or she has a specific scope of powers allowing for shaping the content of the tasks performed in the public sphere. (…) a person performing a public function (…) will be anyone who performs a function in public authorities or in the structures of any legal persons and organizational units without legal personality, if this function includes disposing of public property, management of matters related to the performance of their tasks by public authorities, as well as other entities that exercise this power or manage municipal property or the property of the State Treasury".[45]

Performing public functions can be assigned only to elected and appointed employees, and to others when they perform public tasks. People employed in auxiliary and service positions never perform public functions.[46]

According to the courts, the criterion that allows to distinguish between a service (technical) activity and a public function is participation in the preparation of decisions concerning other entities. Participation in the preparation should be understood as the possibility to impact the final content of a decision made by another person. It is not about any possibility of influencing the decision-maker – in particular as a result of the existence of informal relations – but about such possibility of influencing the content of the decisions, which would result directly from the function assigned to a given person.[47]

A person may, in a certain period, be recognized as performing a public function and for this period the information related to the performance of this function will be available, while later it may be deprived of this status. The termination of the performance of a public function does not mean, however, that the information from the period in which this function was performed ceases to be made available with the restriction of the privacy of the individual.[48] The concept of a person per-

[44] Judgment of the Supreme Administrative Court of 15 June 2016, I OSK 3217/14.

[45] Judgment of the Voivodeship Administrative Court in Wrocław of 20 December 2016, IV SAB/Wr 191/16.

[46] Judgment of the Supreme Administrative Court of 15 November 2013, I OSK 1044/13. A person performing function can be also an academic teacher. See R. Tabaszewski, *Status nauczyciela akademickiego jako osoby pełniącej funkcję publiczną. Uwagi na tle ustawy Prawo o szkolnictwie wyższym i nauce*, "Białostockie Studia Prawnicze" 2020, vol. 25(4).

[47] Judgment of the Voivodeship Administrative Court in Poznań of 19 May 2016, IV SA/Po 1001/15.

[48] Judgment of the Voivodeship Administrative Court in Warsaw of 20 October 2016, II SA/Wa 708/16.

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forming a public function is understood broadly and is not limited only to public officials, but includes any person that discharges public tasks. This concept refers also to persons who apply to perform them.[49]

In another judgment, the Voivodeship Administrative Court in Olsztyn claimed that local government employees performing public functions within the meaning of Article 5 (2) of the AAPI are not only employees issuing administrative decisions under the authority of the mayor of the city, but also other local government employees who, as part of their duties, perform tasks that have an impact on making rulings of an imperative nature. Undoubtedly it will be the core staff of divisions or departments of the office who conduct administrative proceedings in individual cases of other entities, although they do not issue an administrative decision, but prepare all evidence of such a case and even prepare the draft of administrative decisions. These are also persons authorized to issue certificates on behalf of the authority, or accepting applications in individual administrative matters, e.g., applications for an identity card, driving license or other official documents.[50]

The courts' decisions are helpful in determining what constitutes public information with respect to persons performing public function. For instance, the Supreme Administrative Court held that information about the age of the Supreme Court judges is information connected with the performance of public functions and it must be disclosed.[51] Similarly, information about the secretary of the municipality (local government official) cannot be limited.[52]

The Supreme Administrative Court determined that correspondence, including an e-mail communication of a person performing public duties with his co-workers is not public information, even if in some parts this information may concern public functions carried out by this person. Such correspondence is unofficial although it may contain proposals on how to settle a particular case.[53] In another judgement, the Voivodeship Administrative Court in Warsaw ruled that internal email correspondence between employees of a public authority or between them and consultants or other public authorities, is seen as not having the characteristics of public information. It is not binding as to how to resolve a case. Electronic mail

[49] Judgment of the Voivodeship Administrative Court in Bialystok of 26 May 2020, II SA/Bk 191/20.

[50] Judgment of the Voivodeship Administrative Court in Olsztyn of 22 September 2016, II SA/Ol 829/16.

[51] Judgment of the Supreme Administrative Court of 5 March 2013, I OSK 2872/12.

[52] Judgment of the Voivodeship Administrative Court in Gdańsk of 14 November 2012, II SA/Gd 545/12.

[53] Judgment of the Supreme Administrative Court of 21 June 2012, I OSK 666/12.

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is only a tool in the office and is used for communication. These contacts do not have an official character.[54]

Another example when interpretational doubts arise is a situation when a requester wants to know a salary of public administration staff. The Supreme Administrative Court held that information about the expenditure on employee remuneration is public information. However, this does not mean the publication of lists of employees' names with their monthly remuneration. The applicant may demand detailed data on the expenditure of public funds on the salaries of a specific group of employees, as well as of an employee who is the only one holding a specific position within the organizational structure of a public entity. Disclosing is without revealing the personal data of a person.[55] Yet the Voivodeship Administrative Court in Gdańsk accepted a wider interpretation and held that teachers are persons performing public functions and therefore there are no grounds to limit the disclosure of public information due to the protection of their privacy, including information on their remuneration. In the opinion of this Court, there is no doubt that such disclosure covers information about the taught subject, years of service, and working hours because comparing these data with information on remuneration allows for social control of the correctness of spending public funds on education-related tasks.[56]

Scholars have also tried to list examples of information about public officials that should be available. G. Sibiga presented the following types of information: contact information (name, work telephone number and e-mail address), information on compliance with determined by law requirements necessary to hold office (age, seniority, citizenship, education, professional qualifications), terms of office (place in the organizational unit structure, competences, and other benefits received from the title of office), information about performing functions (e.g., on issued decisions) and information that under other acts is available according to the proceedings regulated by the AAPI (e.g., declaration of assets of persons carrying out public functions in the local government).[57]

The courts have noted that if someone decides to take on a public activity, they are subject to the judgment and legitimate interest of others. They must accept the fact that the public is interested in information from the sphere of their private life, which is significant for the performance of undertaken social role.[58]

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[54] Judgment of the Voivodeship Administrative Court in Warsaw of 4 March 2014, II SAB/Wa 702/13.

[55] See judgment of the Supreme Administrative Court of 18 February 2015, I OSK 695/14; judgment of the Supreme Administrative Court of 18 February 2017, I OSK 796/14.

[56] Judgment of the Voivodeship Administrative Court in Gdańsk of 15 January 2020, II SA/Gd 557/19.

[57] G. Sibiga, *op. cit.*, p. 5.

[58] See judgment of the Supreme Court of 14 June 1994, SA Cr 282/94.

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The Constitutional Tribunal has played a core role in determining whether public officials are protected by the constitutional provisions and have the right to privacy.

In 2002 the Tribunal held that in case of the collision of two values – on the one hand, the constitutional right to information, and on the other, the right to privacy – the absolute priority to the former cannot be granted. There is no formula to ensure that citizens have access to information by all means.[59] With respect to persons seeking or holding a public office, the right to privacy should be significantly reduced. According to this judgment, as far as the sphere of private life (in a broader sense than the commonly accepted) is subject to full legal protection, the protection of private life is subject to certain restrictions, justified by the legitimate interest.[60]

However, the Constitutional Tribunal has not precluded the right to privacy of public officials. The existence of the guaranty and realization of the constitutional right to information may not lead to conclusions according to which public persons are deprived of protection of the rights that the Polish Constitution guarantees to all persons. This applies especially, though not exclusively, to the constitutionally guaranteed protection of privacy.[61] Undoubtedly, there is information that also with respect to public figures will not fall within the scope of the right to information. This includes, in particular, information on health or intimacy, including sexual life.[62] The above verdicts did not resolve uncertainties and the Chair of the Supreme Administrative Court made an application to the Constitutional Tribunal to check the conformity of Article 5 (2) with the Polish Constitution. In his opinion, everyone is entitled to the constitutional right to privacy, including persons performing public functions. Moreover, he claimed that the right to privacy is a value superior to the right to information. Among other arguments, he pointed out that while the Polish Constitution provides restrictions on the right to privacy, it does not mention persons who carry out public functions. The Constitutional Tribunal held that statutory provisions of the APPI are consistent with the constitutional right to privacy. The Tribunal again emphasized that with respect to information concerning the activities of public institutions we are dealing with a far-reaching interpenetration of the sphere of information relating to the activities of these institutions and information

[59] Judgment of the Constitutional Tribunal of 19 June 2002, K 11/02, OTK ZU 2002, no. 4A, item 43.

[60] Judgment of the Constitutional Tribunal of 21 October 1998, K 24/98, OTK ZU 1998, no. 6, item 97.

[61] Judgment of the Constitutional Tribunal of 20 November 2002, K 41/02, OTK ZU 2002, no. 6A, item 89.

[62] Judgment of the Constitutional Tribunal of 20 March 2006, K 17/05, OTK-A 2006, no. 3, item 30.

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about a behavior of public officials, including those involving a private sphere of life of these people. It is impossible to demarcate the line in these cases precisely.[63]

In the same judgment, the Constitutional Tribunal established how to determine the scope of the right to information about public institutions and officials. First, information whose nature and character may affect the interests and rights of others, may not go beyond the necessity of the transparency of public life, assessed against democratic standards. Second, it must be always information relevant to the evaluation of the functioning of institutions and persons performing public functions. Third, it may not be information that would compromise the sense of protection of the right to private life.[64]

As for the relationship between private life and public activities, the Constitutional Tribunal ruled that there is no doubt that the law in this area must use a generic and descriptive phrase, and an assessment of a connection between private and public sphere should always be made on the case-by-case basis.[65]

The above examples show that the courts and the Constitutional Tribunal have adopted a wide definition of a person performing public function and did not resolve the relationship between access to public information and privacy of public officials. This situation led the First President of the Supreme Court to make an application to the Constitutional Tribunal regarding the conformity to the Polish Constitution of Article 5 (2) of the AAPI to the extent that they do not specify the meaning of the terms: "persons performing public functions" and "information connected with the performance of public functions", which in an unauthorized way broaden the understanding of entities obliged to disclose public information under Article 61 (1) of the Polish Constitution and contravene the principle of the specificity of the legal provisions, which is part of the rule of law. The First President also claimed that the AAPI impose on public authorities and other entities performing public tasks the obligation to disclose public information about persons performing public functions, connected with the performance of these functions also regarding information relating privacy of these persons.[66]

The First President pointed out that one must agree that that in the case of persons discharging public functions public information is also such information that may be of a private nature. However, the AAPI does not specify how the conflict between the right to privacy (Article 47 of the Polish Constitution) and the access to public information (Article 61 (1) of the Polish Constitution) should be balanced. The First President claimed that the current provisions of the AAPI would allow for such an interpretation, according to which it is possible to disclose

[63] *Ibidem*.
[64] *Ibidem*.
[65] *Ibidem*.
[66] Application of the Supreme Court to the Constitutional Tribunal, K 1/21, p. 1.

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any information from the private sphere, since this sphere and performance public function always intersect.[67]

The First President noted that under the AAPI we observe a negative phenomenon – "the bottom-up clarification of constitutional standards". The variety of judicature verdicts proves that these provisions have lost the attribute of legal certainty since they are subject to an unusually wide range clarification in the processes of judicial interpretation. Moreover, they are the source of incoherent jurisprudence and create application problems by administrative bodies.[68] Therefore, the above proves that Article 5 (2) of the AAPI does not meet the requirement of the specificity of legal provisions.[69]

It looks like the definitional problems arise from the lack of statutory regulations which should set the boundary between the privacy of persons holding public function and the obligation to provide information about the functions they performed.

## CONCLUSIONS

It is evident that both freedom of information and the right to privacy are recognized by the Polish legal system. In Poland, access to public information and the right to privacy are protected by the Polish Constitution and relevant statutory law. Legislation safeguarding informational privacy expresses the concern that privacy is an important value. Legislation supporting the right to know of the public acknowledges that in a free society a citizen should be informed about decisions and practices of the government.

The APPI is not a perfect regulation as it has a very broad scope, many public entities are responsible for disclosure of information and "public information" is a very unclear notion.

In Poland, freedom of information is not an absolute right. The right to privacy as an exemption aims to protect in the first-place privacy of persons who do not perform public functions. However, because of the content of Article 5 (2) and (3) of the AAPI the right to privacy of public officials is a serious issue and causes problems in determination and application of the whole exemption.

The right to privacy of persons discharging public functions is part of controversy since the Polish Constitution was passed and the AAPI did not execute the constitutional delegation properly. The act uses generic and vouge notions and did not construct the proper relation between the right to know and the right to privacy.

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[67] *Ibidem*, pp. 6–7.
[68] *Ibidem*, p. 9.
[69] *Ibidem*, p. 10.

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Because of the lack of any statuary instructions, the Polish administrative courts accepted a wide interpretation of the concept of persons performing public functions.

It is impossible for statutory law to list all the entities that perform public functions and all the circumstances in which information from the public sphere may constitute public information. However, it seems that the law should contain at least interpretative guidelines which would help apply these regulations. In this respect, the First President of the Supreme Court is correct claiming that the discussed provisions have lost the legal certainty and allow for the interpretation that would deprive public administration employees of the right to privacy.

In summary, the current law causes difficulties in application of law by authorities possessing certain data and courts. The right to privacy as an exception from the principle of access to information should be changed in a way that provide clearer and unified understanding of law.

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ABSTRAKT

Artykuł dotyczy prawa do prywatności jako wyjątku od dostępu do informacji publicznej, który wynika z ustawy z dnia 6 września 2001 r. o dostępie do informacji publicznej. Celem jest zbadanie, jak polskie prawo reguluje relacje pomiędzy dwiema wartościami: wolnością informacji a prawem do prywatności. Jest wiele sytuacji, w których prawo do prywatności, jako wyjątek od dostępu do informacji, może się pojawić. Artykuł dotyczy szczególnie jednego problemu, mianowicie kiedy wnioskodawca żąda udostępnienia informacji publicznej, która może stanowić informację ze sfery prywatnej osoby pełniącej funkcję publiczną. Zasygnalizowany problem jest bardzo aktualny, zwłaszcza w świetle niedawnego wniosku Pierwszego Prezesa Sądu Najwyższego do Trybunału Konstytucyjnego, który dotyczy prawa do prywatności osób wykonujących funkcje publiczne. Autorka wskazuje, że mimo iż Polska zapewnia dostęp do informacji i prawo do prywatności, to jednak władze publiczne i sądy mają problem z wyznaczeniem właściwych relacji pomiędzy prawem do informacji a prawem do prywatności osób pełniących funkcje publiczne. Jest to spowodowane przede wszystkim użyciem przez ustawodawcę ogólnych pojęć, które są interpretowane w drodze wykładni sądowej.

**Słowa kluczowe:** dostęp do informacji publicznej; informacja publiczna; prawo do prywatności; osoby pełniące funkcje publiczne