

Legal grounds for restriction of right to data access

Правові підстави обмеження права на доступ до інформації

Yuliia Bohdan

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data, right for access to data, restriction of access, national legislation, international legislation.

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інформація, право на доступ до інформації, обмеження доступу, національне законодавство, міжнародне законодавство.

Right to information is one of the most important components in the system of human rights and freedoms system. It is an important factor of human uniqueness acceptance and is essential for every individual. This right gives an opportunity to express one's thoughts and beliefs freely and justify one's opinions. That is why right to information, in particular freedom of expression is closely connected with freedom of opinion and religion thus establishing a certain background for other rights and freedoms exercising. Freedom of expression is an essential principle of mature democratic tolerant community and one of prerequisites for ideological pluralism development which is a social value itself.

For the society which acknowledges information as a main value it is inevitable that authority and citizens' rights and responsibilities in informational area are to be reassessed and transformed. As T. Mendel mentions, in order to guarantee the utilization of free data and concept flow government must realize that information must never be used as a tool to support its interests but for the community's sake and on its behalf¹.

The issue of restricting the right to data is regulated by certain legislative acts namely: the Constitution of Ukraine, the Law of Ukraine "On information", "On access to public data", "On state secret" etc.

ECHR rulings with its official status of legal source in Ukraine are an important element of legislation regulating the data access (including data of public interest).

Restriction of right to data access has been studied by Ukrainian and foreign scholars including C. Azimov, I. Bachylo, V. Bryzhko, A. Venherova, B. Hohol, O. Zayets, Y. Zakharov, N. Kovaliova, V. Kopylova, T. Kostetska, O. Kokhanovska, N. Kushakova-Kostytska, A. Marushchak, V. Masych, O. Nesterenko, Y. Petrov, V. Pylypchuk, V. Politanskyi, O. Cherviakova, T. Chubakura, H. Shloma, M. Yakushev, V. Yarosh. Essential right of individual to access the data is still not a reasonable ground to create any obstructions for others to exercise this right only if there is a need to reveal specific data. But if this information is required by other individuals to exercise their legitimate rights, these restrictions are justified only upon condition that these rights are equal hierarchically to right to reputation and privacy².

We agree with opinion of M. Koziubra that restriction of right to information certainly is impossible without observance of principle of proportionality – according to this principle state interest may not impose any restrictions on freedom of individuals³.

According to *Carl Gottlieb Svarez*, state is authorized to restrict individual rights and freedoms only to the extent deemed reasonable to guarantee the civil rights and freedoms sustaining. He states that proportionality

¹ Мендел Т. Свобода информации: Сравнительное правовое исследование. 2-е изд., исправ. и допол. Paris, UNESCO, 2008. С. 33.

² Кушакова Н.В. Конституційне право на інформацію: правомірні та неправомірні обмеження. Вісник Конституційного Суду України. 2002. № 3. С. 68–69.

³ Козюбра М.І. Верховенство права – основоположний принцип правової і політичної системи України. Правова система України: історія, стан та перспективи: у 5 т. Харків: Право, 2008. Т. 1: Методологічні та історико-теоретичні проблеми формування і розвитку правової системи України / За заг. ред. М.В. Цвіка, О.В. Петришина. С. 166.

is also ensured with condition that damage preceded by the restriction exceeds the damage inflicted to society or individual due to this restriction⁴.

Regarding the restriction of right to information, opinion of S. Pohrebniak may be used as example of proportionality principle applied – he claims that such phenomenon exists as proportionality test with the similar two-stage structure. Firstly we must identify the fact that actions of government led to restrictions of certain right. Second stage – authority must demonstrate that a legitimate aim was set and the relevant restriction was proportionate to this aim. That is why adequate and consistent application of proportionality principle and proportionality test is a background for establishment of balance in case of restrictions imposing⁵.

According to part 1 of Article 6 of the Law of Ukraine “On access to public data” dd. January 13, 2011, data with restricted access comprise:

- 1) confidential information;
- 2) sensitive information;
- 3) service information.

Restriction of access to data is performed in accordance with the applicable law with the following requirements met (part 2 of Article 6 of the Law of Ukraine “On access to public data”):

- 1) exclusively in the interests of national security, territorial integrity or public order with aim to prevent mass disturbances or crimes, citizens’ health protection, protection of reputation or rights of other people, to prevent disclosure of data received confidentially or to ensure the impartiality of justice;
- 2) data disclosure may inflict substantial damage to these interests;
- 3) damage caused by disclosure exceeds the public interest for its obtaining.

It is prohibited to restrict access to data related to budget funds allocation, ownership or utilization of state property including copies of relevant documents, conditions of funds/property acquisition, personal data (names) of property/funds beneficiaries (individuals or legal entities). If all requirements under this article (part 2) are met, this provision does not cover the cases when disclosure or provision of this information may damage the interests of national security, crime investigation or prevention (part 5 of Article 6 of the Law of Ukraine “On access to public data”).

According to part 6 of Article 6 of the Law of Ukraine “On access to public data” information mentioned in declaration of person authorized to perform functions of state official is not classified as data with restricted access if this declaration is submitted according to the Law of Ukraine “On corruption prevention” (except information mentioned in part 1 (4) of Article 47 of the abovementioned Law⁶).

Also, according to the Law of Ukraine “On information” (part 4 of Article 21), data with restricted access shall not include:

- 1) data related to environmental issues, food products and utility items quality;
- 2) data related to accidents, disasters and any extreme situations which already happened or may happen and threaten the citizens’ safety;
- 3) data related to healthcare and social welfare issues including nutrition, clothing, accommodation, medical treatment and social support, social-demographic indicators, law enforcement efficiency, level of educational and cultural development;
- 4) data related to human rights and freedoms violation including information kept in former USSR security archives (political repressions, Great Famine of 1932–1933 and other crimes committed by the representatives of Communist and/or National-Socialistic totalitarian regimes;
- 5) data related to illegal actions of state agencies, local self-government and relevant officials;
- 5.1) data related to activity of state and communal enterprises, business entities with registered capital 50 % share owned by state or territorial community, business entities with registered capital 50 % share owned by business entity, with 100 % share of state or territorial community are subject to mandatory disclosure;

⁴ Альбрехт П.А. Забута свобода: принципи кримінального права в європейській дискусії про безпеку / Пер. з нім. Одеса: Автопринт, 2006. С. 69–70.

⁵ Погребняк С.П. Тест на пропорційність. Юрист України : наук.-практ. журнал. 2013. № 2. С. 7.

⁶ Про доступ до публічної інформації: Закон України від 13 січня 2011 р. № 2939-VI. URL: <http://zakon5.rada.gov.ua/laws/show/2939-17ю>

6) other data, access to which shall not be disclosed according to laws and international agreements claimed as binding by Verkhovna Rada of Ukraine⁷.

Majority of ECHR rulings present specific samples of data which must be disclosed to community with no restrictions for its dissemination; factors are outlined which may be used to elaborate solutions in cases when individual right to information may restrict or damage other person's right to privacy and reputation.

T. Kostetska stresses on proper regulation of restricting the right to information. She mentioned that "the need to ensure balance between free access to data and protection of individual and state interests led to legislative formulation of relevant restriction and restricted access data"⁸. In order to identify the content of definitions we need to take into account provisions of applicable legislation of Ukraine establishing legal grounds and procedures for restriction of access to certain categories of data. As all Ukrainian citizens, legal entities and state power bodies enjoy their right to information including opportunity to receive, use, disseminate and store data required to exercise relevant rights, freedoms and legitimate interests to perform certain functions and activities. It means that data with restricted access is data access to which is granted to limited amount of people and its disclosure is prohibited by the data owner according to the law. Access restriction is ensured only to the benefit of state security interests or to protect legal rights of individuals and legal entities.

Therefore, we speak about restriction of access to data but not to the document. If one document contains open and confidential information, first part may be provided in the format of separate document upon request.

International law defines restrictions of right to information according to the scope of its application binding for all states with requirement to prevent relevant offences. Accomplishment of this task places additional commitments on states with conditions related to application of legal instruments compliant with requirements formulated according to international practice of human rights and freedoms protection. At the same time right to information as complex legal phenomenon contains heterogenic rights and freedoms differentiated by its limits and restriction capacity.

Regarding the certain aspects of restricting the right to information regulated by international acts, we may outline the following.

Article 19 of Universal Declaration of Human Rights states that every person has right to beliefs and opinions and express it freely; this right includes freedom to adhere to one's beliefs and freedom to search, receive and disseminate information and ideas by any means and regardless of borders. But according to part 2 of Article 29 every person enjoying one's rights and freedoms must be subject to restrictions established by the law exclusively with the aim to ensure acknowledgement and respect to other person's rights and freedoms, meet the social ethical requirements, maintain public order and promote democratic values and principles⁹.

Article 10 of Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the *European Convention on Human Rights* (1950) states that everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary¹⁰.

Part 2 of Article 19 of International Covenant on Civil and Political Rights (1066) states that everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. Part 3 establishes that the exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these

⁷ Про інформацію: Закон України від 2 жовтня 1992 р. № 2657-XII. URL: <http://zakon.rada.gov.ua/go/2657-12>.

⁸ Костецька Т.А. Право на інформацію в Україні. Київ: б.в, 1998. С. 28.

⁹ Загальна декларація прав людини, прийнята і проголошена у резолюції № 217 А (III) Генеральної Асамблеї ООН від 10 грудня 1948 р. URL: http://zakon.rada.gov.ua/go/995_015.

¹⁰ Європейська конвенція про захист прав людини і основоположних свобод від 4 листопада 1950 р. URL: http://zakon.rada.gov.ua/go/995_004.

shall only be such as are provided by law and are necessary for respect of the rights or reputations of others; for the protection of national security or of public order (order public), or of public health or morals¹¹.

Grounds for restriction of access to data are also established in national legislation, namely: Article 34 of the Constitution of Ukraine stipulates that exercise of the abovementioned rights may be restricted by the law in the interests of national security, territorial integrity or public order with aim to prevent mass disturbances or crimes, citizens' health protection, protection of reputation or rights of other people, to prevent disclosure of data received confidentially or to ensure the impartiality of justice¹².

In terms of access procedures data are differentiated into open data and data with restricted access. Any information itself is open except of data granted the status of confidential according to the law. That is why often restriction of right to information relates to data with restricted access (classified as confidential information, sensitive information and service information according to Article 21 of the Law of Ukraine "On information").

Data with restricted access must be provided by the owner upon condition that it was legitimately and properly disclosed previously if there are no legal grounds to restrict access to this data which existed before.

Except of legal definition of "confidential information" sources contain another interpretation of this concept where confidentiality stipulates that information (partially or completely) is not accessible to persons who usually deal with this specific type of data, thus shaping its value and establishing certain environment to ensure the lowest level of disclosure under the responsibility of person designated to maintain the secrecy¹³.

We must note that confidential information itself presents data related to its owner (personal data) or other data owned by private subject (know-how, data related to non-public events, data regarding the features and properties of natural objects, its location etc). Confidential information may be owned either by state or by other entities/individuals.

Another type of data with restricted access is sensitive information (Article 8 of the Law of Ukraine "On access to public data" which comprises state secret, professional and bank secrecy, pre-trial investigation confidentiality and other data restricted in accordance with the law). Relevant status is granted after the application of mentioned three-stage testing mechanism which is not typical for confidential data – taking into account the peculiarities of relevant relations regulation (more freedom for subject), private subjects grants the confidential status at one's sole discretion.

Next type of data with restricted access is service information:

- a) contained in documents of authorized subjects – interagency correspondence, explanatory notes, recommendations (if related to extension of agency activity scope or monitoring/controlling functions performance by state power bodies, decision-making process and precede the public discussion and/or decision-making);
- b) accumulated in the course of operative, search, counterintelligence activity including data related to defense sector which is not classified as state secret.

Documents containing this type of data are classified as "for service use only". In this case access is granted according to part 2 of Article 6 the Law of Ukraine "On access to public data".

Access to the list of data classified as service information composed by state power bodies, local self-governance bodies, other authorized subjects (including subjects delegated to perform certain activities) shall not be restricted (Article 9 the Law of Ukraine "On access to public data").

We share the opinion of M. Bulgakova who states that restriction of access to data by authorized subjects is performed as inclusion of such data into relevant lists approved by state power bodies with status of service information (restricted access)¹⁴.

¹¹ Міжнародний пакт про громадянські і політичні права, прийнятий і проголошений у резолюції № 2200 А (XXI) Генеральної Асамблеї ООН від 16 грудня 1966 р. URL: http://zakon.rada.gov.ua/go/995_043.

¹² Конституція України: Закон України від 28 червня 1996 р. № 254 к/96-ВР. Відомості Верховної Ради України. 1996. № 30.

¹³ Цивільне право в Україні: курс лекцій: у 6 т. Т.1. / Р.Б. Шишка (керівник авт. кол.), О.Л. Зайцев, Є.О. Мічурін та ін.; За ред. Р.Б. Шишки та В.А. Кройтора. Харків: Національний університет внутрішніх справ. 2004. С. 332–333.

¹⁴ Булгакова М.Г. Правові підстави обмеження доступу до інформації. URL: <http://legalanalytics.com.ua/consultacija/145-info-consult.html>.

As O. Zolotar mentions, the status of service information does not deprive it of publicity but restricts the access to it. Therefore before responding to request for data submission, relevant documents must be subjected to three-stage testing in each case because it may reveal lack of legal grounds for restriction of access to this data that previously existed¹⁵.

ECHR practices demonstrate that any interference and restriction of right to information must be compliant with social needs and be proportionate to claimed legitimate purpose. State must identify the social need for restriction without only defining the interest requiring this kind of protection. A. Vladimirets claims that restriction of access to personal data of individual may correspond to protection of right to family life privacy; restriction of access to legal entity data – prevention of confidential information disclosure; restriction of access to military objects data – state security interests; restriction of access to data on criminal records – protection of reputation and personal life; restriction of access to data law enforcement staff technical support and unit capacity – public order maintenance and prevention of crimes or mass disturbances. It is difficult to balance between the social interest for data receipt and protection of interests¹⁶. That is why, according to V. Bryzhko, legislation must provide detailed description of mechanism to control and guarantee restricted rights recovery¹⁷.

It means that right to information itself is not a sufficient ground for restriction of right to privacy or reputation (just because someone is interested in the data). But when this data is required by person to exercise one's rights, these restrictions are deemed to be justified if those rights are equal hierarchically.

Therefore grounds for restricting the right to information are fixed in both national and international legislation. We stress that constitutionally established right to information performs a very important function for individuals and importance will be enhanced since Ukraine has officially set a course towards European values and principles – democracy, rule of law, respect to human rights and freedoms. Restricted right to receive and disseminate information will lead to unjustified abridgement. Our task is to guarantee the opportunity to exercise this right by citizens, meeting thus their vital needs and interests.

Summary

Numerous international and Ukrainian legislative acts contain provisions related to protection of fundamental human rights and freedoms. But development of modern society creates unique environment with conditions requiring the state to impose certain restrictions as abridgement of certain constitutional rights exercised by one person is simultaneously a guarantee for other persons to do the same. This article analyzes legal grounds of restricting the right to data access.

Анотація

У багатьох міжнародних документах і різних нормативно-правових актах України закріплено основні положення щодо прав і свобод людини та громадянина, їх забезпечення та захисту. Але функціонування сучасного інформаційного суспільства неминує породжує ситуації, які потребують від держави обмежити громадянські права та свободи, оскільки певні обмеження конституційних прав одних осіб одночасно є гарантією реалізації прав інших. Саме розгляду правових підстав щодо обмеження права на доступ до інформації й присвячена ця стаття.

¹⁵ Золотар О.О. Свобода інформації в контексті концепції природного права. *Правова інформатика*. 2011. № 1(29). С. 13.

¹⁶ Владимирець А.Ю. Теоретичне обґрунтування обмеження права на інформацію. Цінності сучасного конституціоналізму. Тодиківські читання: зб. тез наук. доп. і повідомл. Міжнар. наук. конф. (28–29 вересня 2012 р.). Харків: Права людини, 2012. С. 253–255.

¹⁷ Брижко В.М. Методологічні та правові засади упорядкування інформаційних відносин: монографія. Київ: ПанТот, 2009. С. 175–177.

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Yuliia Bohdan,

*Doctoral Candidate of Department of Constitutional Law and Human Rights
National Academy of Internal Affairs*