The procedure for the implementation of the conventional right of access to public information: Ukrainian realities

Порядок реалізації конвенційного права на доступ до публічної інформації: українські реалії

Petro Guyvan

Key words:

right to access information, public information, fair court.

Ключові слова:

право на доступ до інформації, публічна інформація, справедливий суд.

The human right to information is an element of freedom of speech as the defining and fundamental principle of democracy, humanity and justice. In turn, the right to information is also multidimensional, it is quite rich and informative, plays a significant role in meeting the interests of subjects, therefore a narrow, limited understanding of this essential right is unfounded[1]. This right includes such specific powers as the need to be aware of the creation of certain information resources related to the public or personal sphere in a person's life, the ability to request and receive publicly relevant or personal information from subjects authorized to dispose of it, to freely distribute it and demand in cases prescribed by law to maintain confidentiality. These powers can be limited only if the following conditions are combined: restrictions are necessary in a democratic society and are established by law[2], they are used exclusively to ensure proper recognition and respect for the rights and freedoms of others and meet the just demands of morality, public order and general welfare.

Ukrainian national legislation also pays great attention to this aspect. Article 34 of the Basic Law of Ukraine states that everyone has the right to freely collect, store, use and disseminate information orally, in writing or in any other way – of his choice. And Article 32 of the Constitution provides that every citizen has the right to get acquainted in the bodies of state power, bodies of local self-government, institutions and organizations with information about themselves that is not a state or other secret protected by law. The Fundamental Law also guarantees the right of free access to information on the state of the environment, on the quality of food products and household items (part 2 of article 50), the right to know their rights and obligations (part 1 of article 57), stipulates that laws and other legal acts defining the rights and obligations of citizens should be communicated to the public in the manner prescribed by law. An important source of national law in this plane is the Law of Ukraine "On Access to Public Information". At the same time, in addition to the universal declaration of the basic democratic ideas of the right to access to information, the Ukrainian legal system should settle specific relations in certain branches of material interactions, which, unfortunately, is not observed. This aspect of the activities of the legislator must necessarily be implemented on the basis of thorough research and application of international legal experience.

The issue of free access to public information in the scientific literature has been studied by such scientists as V. Porada, N. Timchenko, R. Golovenko, M. Demkova, D. Kotlyar, N. Kamenskaya, A. Litvinenko, A. Nesterenko, A. Novikova, I. Aristova, A. Grishchenko, E. Zakharova, Yu. Todika, B. Kormich, T. Kostetskaya, A. Loginov, A. Marushchak and others. At the same time, the issue of adequate interaction between national law-making and law enforcement in this area and international legislation and practice of the European Court of Human Rights remains insufficiently studied. The purpose of the article is to identify actual problems of a person's access to public information and to study problematic issues arising in connection with the application of the provisions of the Law of Ukraine "On Access to Public Information".

---

[1] Комшалюк І., Поліковський М. Конституційне право на інформацію в Україні. Конституціоналізм в Україні (ідеї, концепції, доктрини): історія і сучасність : матеріали Другої Всеукраїнської наукової інтернет-конференції, м. Львів, 25 квітня 2013 р. Львів : ІНПП НУ «Львівська політехніка», 2013. Вип. 2. С. 21–26. URL: http://historylaw.lp.edu.ua/documents/Materials2.pdf.

[2] Коваль В. Право на доступ до інформації. Проблеми правознавства та правоохоронної діяльності. 2011. № 3(46). С. 242–243.

Information relations on international acts are based and built, guided by the basic principles of international law. These are, in particular, the principles of the rule of law, respect for human rights, equality of participants in relations, compliance with international obligations, free access to information sources, non-dissemination of ideas that threaten national security, public order, moral health of the population, prevention of unauthorized use of national information resources enemy propaganda and interference in the internal affairs of other states and the like. These principles in relation to specific practical relations are filled with real content and manifest themselves in the everyday information circulation in the form of generalized and well-established rules of behavior.

In 2011, the UN Human Rights Committee adopted General Comment № 34 Art. 19 of the International Covenant on Civil and Political Rights. In particular, this document states that in order to effectively exercise the right of access to information, participating countries should open wide access to government information of public interest as a matter of priority. States Parties should make every effort to ensure easy, rapid, effective and practical access to such information. The necessary procedures should also be established to allow the public access to information, for example, through legislation on freedom of information. These procedures should ensure the timely processing of requests for information in accordance with clear rules that do not contradict the Covenant. Fees for processing requests for information should not create undue obstacles to access to information. Authorities should justify any denial of access to information. It is necessary to create a mechanism for processing facts about the refusal to provide information, as well as about unanswered requests (paragraph 19)[3].

The human right to freedom of communication is spelled out in numerous acts of international law. For example, the Declaration on the Rights and Obligations of Individuals, Groups and Organs of Society to Promote and Protect Generally Recognized Human Rights and Fundamental Freedoms, approved by the resolution of the UN General Assembly on December 9, 1998, proclaims that everyone has the right to encourage and strive to protect and fulfill human rights and fundamental freedoms at the national and international levels. Every person, individually and jointly with others, has the right to: a) know, seek, obtain, receive and have information about all human rights and fundamental freedoms, including access to information about how these rights and freedoms are guaranteed domestic law, judicial and administrative systems; b) as provided for in international human rights treaties and other relevant international treaties, to freely publish, transmit or disseminate among others thoughts, information and knowledge about all human rights and fundamental freedoms; c) to study, discuss, form and have an opinion on the observance of all human rights and fundamental freedoms, both in law and in practice, and to draw public attention to these issues using these and other appropriate means. Everyone has the right, individually and in association with others, to develop and discuss new ideas and principles relating to human rights, and to seek their recognition (articles 1, 6, 7)[4].

The source of information law is also the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), which determines that the signatories should guarantee the right to freedom of speech. This right includes the freedom to hold opinions, to receive and impart information and ideas without interference by public authorities and regardless of borders. Actually, the body authorized to implement the practical application of the Convention's provisions through their case-law interpretation is the European Court of Human Rights.

In essence, it is an organization that is designed to protect the rights provided for by the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, and one of such rights is the right to freedom of expression provided for in article 10 of the Convention. This provision indicates that everyone has the right to freedom of expression. This right includes the freedom to hold opinions, to receive and impart information and ideas without interference by public authorities and regardless of borders. The exercise of these freedoms, as it is associated with duties and responsibilities, may be subject to certain formalities, conditions, restrictions or sanctions that are provided for by law and are necessary in a democratic society in the interests of national security, territorial integrity or public order, in order to prevent disorder or crime for the protection of health and morals, the protection of the reputation or the rights of others, the prevention of disclosure of confidential information or for maintaining the authority and impartiality of justice.

---

[3] International Covenant on Civil and Political Rights. General comment № 34. Article 19: Freedoms of opinion and expression (102nd session, Geneva, 11–29 July 2011) / Human Rights Committee. URL: https://undocs.org/en/CCPR/C/GC/34.

[4] Декларация о праве и обязанности отдельных лиц, групп и органов общества поощрять и защищать общепризнанные права человека и основные свободы : международный документ Организации Объединенных Наций от 9 декабря 1998 г. URL: https://zakon.rada.gov.ua/laws/show/995_349.

According to the position of the ECHR, set forth in numerous case decisions, the right of access to data that is of public interest is one of the most fundamental and should be properly protected. In a specific case, the Court concluded that providing information to the public is one of the primary means of protecting the well-being and health of the local population in situations where the environment is at risk. So, the words "this right includes the freedom <…> to receive <…> information <…>" in paragraph 1 of article 10 should be interpreted as having a de facto right to receive information, in particular from the relevant authorities, about the local population, which has been or may be affected by industrial or other activities that pose a threat to the environment. Article 10 imposes on States not only the obligation to provide the public with information on environmental issues, but also contains a positive obligation to collect, process and disseminate information that by its nature could not come to the attention of the public.

Thus, the protection afforded by article 10 has a preventive function regarding possible violations of the Convention in the event of serious damage to the environment, and article 10 has advantages even over direct violation of other fundamental rights, such as the right to life or respect for private and family life (p. 52)[5].

At the national level, the right of access to information should be guaranteed, first of all, by the presence of relevant effective legislation. This will be the basis for ensuring the implementation of the constitutional human right to freedom of access to information, its dissemination and exchange. The issue of organizing a person's access to public information in Ukraine is primarily governed by a special Law "On Access to Public Information". The existence of this legislation by the world democratic community is regarded as a very positive fact, according to the position of the "Global Right to Information Rating", Ukraine is among the most successful countries in the world in terms of the perfection of legislation in the field of access to information (108 points out of 150 possible and ranks 18th) and in terms of the degree of openness and transparency of power structures, we occupy 19th place in the world[6]. But besides the fact of the existence of the legal tool itself, which is designed to guarantee access to information, the decisive importance should be given to practical mechanisms for its use. In this respect, the Ukrainian legal system suffers from considerable voluntarism, vagueness and selectivity of approaches, which often border on abuse and corruption, and sometimes cross this line.

In Ukraine, the authorities still have their own vision in this matter. A striking example is the very difficult, unjustifiably formalized, and therefore absolutely ineffective system of citizens' access to public information[7]. The carriers of this legal relationship are state authorities and local governments regarding information of public interest that they own. Despite the general regulation of relations by the norms of the Law of Ukraine "On Access to Public Information", persons who apply for information constantly complain about the refusal to satisfy requests for information. State authorities and local governments are in fact groundlessly refusing to provide information, relating it to information with limited access; Vultures of restricting access to information, such as: "not subject to publication", "not for printing", "for official use", are used improperly. Authorities do not fully comply with the requirement to disclose information about their activities; there are great difficulties for citizens in obtaining local regulatory acts (and in some cases it is not at all possible) local executive authorities and local governments, not to mention the drafts of such acts[8].

Meanwhile, such problems cannot be explained by anything else, as soon as disregard of legal normative prescriptions by the subjects of authority, who are the managers of public information, and indulgent (if not biased) attitude to this category of cases from the Ukrainian court system. This creates a vicious circle when the illegal denial of access to public information provides a judicial authority, which, in fact, is designed to monitor compliance with international law in terms of free access to information of public interest. An example is the court decision in case № 800/369/17[9], rendered by the Supreme Court.

---

[5] Case of Guerra and Others v. Italy : ECHR (February 19, 1998, appl. № 14967/89). URL: https://swarb.co.uk/guerra-and-others-v-italy-echr-19-feb-1998/.

[6] Право на доступ до публічної інформації. Українська Гельсінська спілка з прав людини: вебсайт. 2016. 19 березня. URL: https://helsinki.org.ua/pravo-na-dostup-do-publichnoji-informatsiji/.

[7] Яка інформація є публічною? Центр демократії та верховенства права: вебсайт. 2017. 12 липня. URL: https://cedem.org.ua/consultations/yaka-informatsiya-ye-publichnoyu/.
Ганжа Л. Як (не) відповідати на інформаційні запити: 5 шкідливих порад. Українська правда. 2016. 8 травня. URL: https://www.pravda.com.ua/articles/2016/05/8/7107539/.

[8] Демкова М., Фігель М. Інформація як основа інформаційного суспільства: визначення поняття та правове регулювання. Інформаційне Суспільство. Шлях України. К. : Фонд «Інформаційне суспільство України», 2004. С. 154–155.

[9] Постанова Великої Палати Верховного Суду від 26 червня 2018 р. у справі № 800/369/17. URL: http://www.reyestr.court.gov.ua/Review/75241956.

In this case, the claimant appealed to the High Qualifications Commission of Judges of Ukraine (HQCJU) with a request for information. This information was necessary for a person to exercise his public right to control the democratic nature, transparency and honesty conducted by the authority to select judges for the Supreme Court as part of a competition held in 2017. Information was requested about the assessments of a specific candidate for the Supreme Court, which was set by the HQCJU in a specific document with specific details – decision № 440/Sun-17 of July 27, 2017.

The entity who must provide this public information refused to provide it, stating that this information is not included in the list of such information, since it was not created by the authority in the course of its activities and is not contained in the form prepared for familiarization. Since this answer frankly contradicts the current national legislation, the interested party filed a claim with the Supreme Court to declare the defendant's act illegal and the obligation to provide the requested information.

The claimant justified his demands with regulatory requirements. According to the rule of article 1 of the Law of Ukraine "On access to public information" public information is reflected and documented by any means and on any media information that was obtained or created in the process of implementation by the subjects of authority of their duties stipulated by current legislation or which is in the possession of subjects of authority, other public information managers defined by this Law. Public information is public, except as required by law. In order to establish whether the requested information should be in the HQCJU, it is necessary to investigate the scope and procedure for the fulfillment by this body of its duties established by law.

It was easy to note that the selection of judges for positions in the Supreme Court was carried out by the High Qualifications Commission of Judges of Ukraine in accordance with the requirements of the Law of Ukraine "On the Judicial System and Status of Judges" (part 4 of article 84). The competition, according to the idea of this law, should be held transparently and openly, and the subject of the authority that holds it should make public the results and be sure to indicate the grounds or motives for making specific decisions defined by law. According to part 2 of article 19 of the Law of Ukraine "On Access to Public Information", the requester has the right to contact the information manager with a request for information, regardless of whether this information concerns him personally or not, without explaining the reason for submitting the request. Since none of the above obligations of HQCJU were collected, the person was forced to defend his constitutional and conventional right to access public information in court.

As part of the selection of judges, the authorized body should take actions that are clearly stipulated in regulatory document № 143/wn-16 "Provisions on the procedure and methodology of qualification assessment, indicators of qualification assessment criteria and means for establishing them". Clause 5 of Chapter 6 of these Regulations establishes the following evaluation criteria: 5.1.1 "Profesional competence" – 300 points, of which: 5.1.1.1 "The level of knowledge in the field of law, including the level of practical skills and skills in law enforcement" – 90 points; 5.1.1.2 "Skills and skills of conducting court sessions and making court decisions" – 120 points; 5.1.1.3 "The effectiveness of the implementation of the judge of justice or professional activities for a candidate for the position of judge" – 80 points; 5.1.1.4 "Professional development activities" – 10 points. The following criterion for evaluating candidates for the position of a judge of the Supreme Court is defined in paragraphs 5.1.2 "Personal competence" – 100 points. It is followed in the Regulations by criterion 5.1.3 "Social competence" – 100 points.

In decision № 440/Sun-17 dated July 27, 2017, which the HQCJU made publicly, nothing was said about the level of the requested ratings for these criteria. But in the decision it is indicated that according to the total criterion of competence (professional, personal and social) the candidate scored 309 points. This information absolutely does not give any idea about the assessments of the candidate for the position of a judge of the Supreme Court within the framework of the competition according to his rating, neither by the criterion of professional, nor by the criterion of personal, nor by the criterion of social competence. So, the estimates that the candidate received for the position of a judge of the Supreme Court according to all the criteria that relate to his competence: professional, personal and social, were not established. The total indicator does not give any information, because it cannot be verified, since various indicators of rating scores must be established on the basis of specific quantitative and qualitative criteria in individual areas.

Without specifying data on the number of points on the criterion of professional competence (subparagraph 5.1.1), the respondent also did not indicate points on the criteria "The effectiveness of a judge's justice or professional activity for a candidate for the position of judge" (paragraph 5.1.1.3) and "Professional development activities level" (paragraphs 5.1.1.4) and other indicators of professional competence. Therefore, the question

remains unclear, but how many points did the candidate score according to these criteria, because professional competence is calculated by adding these assessment indicators. Of course, such a mechanism of "evaluation" was elected by the HQCJU intentionally. Indeed, the uncertainty in the question of the size of the assessment eliminates the possibility of asking the next question "why so much?" Therefore, on meeting the requirements of article 88 of the Law of Ukraine "On Judicial System and the Status of Judges" on the mandatory motivation of evaluations based on the results of a competition is simply out of the question: it is physically impossible to do this without the most evaluations. In this way, in Ukraine, an opaque result of the selection of new judges of the Supreme Court was achieved with numerous fraud, abuse and corruption schemes.

But what about the law? After all, he indicates that the public information must include data obtained or created in the process of the fulfillment by the subjects of authority of their duties. "Regulations on the procedure and methodology of qualification assessment, indicators of qualification assessment criteria and means of their establishment" notes that during the competitive selection of judges, an assessment of the candidates' professional competence (and evaluation of its component criteria), as well as personal and social competence within the framework of the statutory maximum points is the responsibility of HQCJU. So, the defendant, of course, has the requested information, it was at the time of receipt of the information request and should be freely provided to the requesting. A simple analysis of powers and duties would easily allow the Supreme Court to refute the defendant's statement that the requested information "does not contain the main feature of public information: recorded in advance by any means and on any media", since the HQCJ of Ukraine did not create such information, and the Law and Statute on the evaluation procedure did not include the obligation of the latter to create such information. The viciousness of such an assertion was clearly traced from the assessment of the powers of the HQCJU, and the court, if desired, could easily establish this. However, the court quite deliberately did not do this, and he has his own reasons, far from the right, which will be discussed below.

In addition, as is known to any sensible person, if the overall result implies the need to achieve and design it and consist of specific elements, it is thanks to the certainty of these components that this result is obtained. And, even if the interim result may not be present in the decision of the competent authority (№ 440/Sun-17 dated July 27, 2017) (while the sum of assessments for each criterion must be noted), this data should certainly be known to the entity and provided to the person which they concern upon his request.

After all, all digital indicators for evaluating candidates for the posts of judges of the Supreme Court, recorded in the relevant decisions of the High Qualification Commission of Judges of Ukraine, are not primary (obtained as a result of direct assessment of the qualities of candidates by appropriate methods), but secondary. They are calculated by performing a simple arithmetic operation – the addition of primary indicators in certain directions of assessment. It would be reasonable to assume that in order to get the sum as a result of the addition, you should know the terms. This is an axiom. Moreover, continuing the logical chain of thinking, we must come to the conclusion that the terms become known before the sum. Here, of course, the thesis will be fair, which can be briefly defined as propter hoc, ergo post hoc (caused by this, then after that). Indeed, the presence of a causal relationship between phenomena clearly indicates that the causative event occurs earlier than the conditioned one (the order of events in time is established). So, HQCJU should have all the components (indicators of the initial assessment of all candidates in different criteria directions) before starting to summarize them and establish combined assessments, which are reflected in the decisions on the results of qualification assessment.

If, however, take a different position, and take the approach advocated by the AUCSU and the Supreme Court in case № 800/369/17 that the Commission, when making final decisions on the results of the qualification assessment of candidates for the posts of judges of the Supreme Court, did not have any documented information about the results of the initial evaluating candidates according to established methods (from which the combined indicators were somehow derived in the future), we certainly find confirmation of a fairly popular thesis in the society, constantly discussed with optimum, it lies in the fact that the society is constantly convinced that the selection of judges was carried out illegally, the Commission's evaluations were proposed from outside, therefore, it cannot give a sensible explanation of their constituents, not to mention their validity and motivation.

Thus, we investigated how the practical implementation of the right of access to public information should take place according to the law and common sense. But the reality in Ukraine is different. So, as cases on claims to the High Qualifications Commission of Judges, according to the law, the Supreme Court considers exclusively (we only talked about the unfair creation mechanism), then, of course, there are certain agreements and

consistencies between aim to achieve justice and fairness. Because we are talking about personalities who often illegally occupied a warm place and do not want to leave it.

In fact, the review of this lawsuit and the relationship between the requesting information and its manager indicate that the proper evaluation of candidates for judges of the Supreme Court by the High Qualifications Commission of Judges of Ukraine in the manner prescribed by the Law and its own regulations was not conducted. Estimates were given at random, and the criteria were calculated from the ceiling. Consequently, the defendant cannot explain the contents of individual criteria, and even more so of their components. In Ukraine, now began a period of new reforms associated with the change of government. But their result has no signs of credibility and confidence. Therefore, if the new government, like all previous ones, will take care of its well-being and material well-being, it, even realizing the corruption and injustice of a significant part of the judiciary, will leave the status quo. Because traditionally, the Ukrainian legal proceedings, without changing their anti-people essence, nevertheless necessarily adapts to the new government. When the new leaders will think about the welfare of people and the honesty and honesty of the court, the Ukrainian judicial process can wait for a qualitative update.

Summary

This paper is devoted to the study of current issues of access of a particular person to information that has public interest. Analyzed international legislation regulating relations in this field. The content of the fundamental informational human rights under article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Attention is paid to the case law of the European Court of Human Rights on the practical effectiveness of this information law. The paper emphasizes that, despite the existence of special Ukrainian legislation in this area, its application is often based on anti-legal principles, such as the malicious agreement of the authorities with the courts, disregard for the rights of a particular person. Examples of inadequate law enforcement are given, subjective reasons contributing to unfair legal proceedings are analyzed.

Анотація

Статтю присвячено дослідженню актуальних питань доступу конкретної особи до інформації, яка має публічний інтерес. Проаналізовано міжнародне законодавство, що регулює відносини в цій сфері. Досліджено зміст основоположного інформаційного права людини за ст. 10 Конвенції про захист прав людини і основоположних свобод. Приділена увага прецедентній практиці Європейського суду з прав людини щодо практичного забезпечення ефективності вказаного інформаційного права. У роботі наголошується на тому, що, попри існування спеціального українського законодавства в цій сфері, його застосування часто ґрунтується на антиправових засадах, таких як зловмисна домовленість органів влади із судами, нехтування правами конкретної людини. Наведено приклади неналежного правозастосування, проаналізовано суб'єктивні причини, що сприяють несправедливому судочинству.

References:

1. Комшалюк І., Поліковський М. Конституційне право на інформацію в Україні. *Конституціоналізм в Україні (ідеї, концепції, доктрини): історія і сучасність* : матеріали Другої Всеукраїнської наукової інтернет-конференції, м. Львів, 25 квітня 2013 р. Львів : ІНПП НУ «Львівська політехніка», 2013. Вип. 2. С. 21–26. URL: http://historylaw.lp.edu.ua/documents/Materials2.pdf.
2. Коваль В. Право на доступ до інформації. *Проблеми правознавства та правоохоронної діяльності*. 2011. № 3(46). С. 241–246.
3. International Covenant on Civil and Political Rights. General comment № 34. Article 19: Freedoms of opinion and expression (102nd session, Geneva, 11–29 July 2011) / Human Rights Committee. URL: https://undocs.org/en/CCPR/C/GC/34.

4. Декларация о праве и обязанности отдельных лиц, групп и органов общества поощрять и защищать общепризнанные права человека и основные свободы : международный документ Организации Объединенных Наций от 9 декабря 1998 г. URL: https://zakon.rada.gov.ua/laws/show/995_349.
5. Case of Guerra and Others v. Italy : ECHR (February 19, 1998, appl. № 14967/89). URL: https://swarb.co.uk/guerra-and-others-v-italy-echr-19-feb-1998/.
6. Право на доступ до публічної інформації. *Українська Гельсінська спілка з прав людини: вебсайт*. 2016. 19 березня. URL: https://helsinki.org.ua/pravo-na-dostup-do-publichnoji-informatsiji/.
7. Яка інформація є публічною? *Центр демократії та верховенства права: вебсайт*. 2017. 12 липня. URL: https://cedem.org.ua/consultations/yaka-informatsiya-ye-publichnoyu/.
8. Ганжа Л. Як (не) відповідати на інформаційні запити: 5 шкідливих порад. *Українська правда*. 2016. 8 травня. URL: https://www.pravda.com.ua/articles/2016/05/8/7107539/.
9. Демкова М., Фігель М. Інформація як основа інформаційного суспільства: визначення поняття та правове регулювання. *Інформаційне Суспільство. Шлях України*. К. : Фонд «Інформаційне суспільство України», 2004. С. 150–163.
10. Постанова Великої Палати Верховного Суду від 26 червня 2018 р. у справі № 800/369/17. URL: http://www.reyestr.court.gov.ua/Review/75241956.

Petro Guyvan,
Ph.D. Legal Sciences, Honored Lawyer of Ukraine,
Doctoral Candidate of the Yaroslav Mudry National Law University