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PRAWO DOSTĘPU DO INFORMACJI JAKO PODSTAWA DEMOKRATYCZNEGO KONSTYTUCYJNO-PRAWNEGO MODELU ORGANIZACJI WŁADZY

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Adnotacja. Artykuł poświęcono badaniu specyfiki realizacji prawa do dostępu do informacji na Ukrainie, opracowywaniu zaleceń w celu wyeliminowania czynników i przyczyn naruszenia tego ostatniego, formułowaniu propozycji poprawy regulacji tego prawa i instytucjonalnego mechanizmu jego zapewnienia. Przeprowadzona analiza doktrynalna istniejących badań naukowych wykazała brak jednego zintegrowanego podejścia do zrozumienia natury prawnej, treści, specyfiki wdrożenia, roli i znaczenia prawa dostępu do informacji w procesach budowy demokratycznego konstytucyjnego modelu prawnego organizacji władzy. Ustalono, że sytuację w zakresie realizacji prawa dostępu do informacji można poprawić nie tylko poprzez legislacyjną transformację tekstu ustawy Ukrainy „O dostępie do informacji publicznej", a także poprzez zapewnienie zwiększenia indywidualnej odpowiedzialności urzędników i służb organów władzy państwowej, samorządu lokalnego, kierowników organów ścigania, pracowników służb prawnych za podejmowanie decyzji i aktów prawnych naruszających lub ograniczających prawo dostępu do informacji.

Słowa kluczowe: prawo dostępu do informacji, wolność informacji, otwartość informacyjna, informatorzy, zarządcy informacji.

THE RIGHT TO ACCESS INFORMATION AS THE BASIS OF A DEMOCRATIC CONSTITUTIONAL AND LEGAL MODEL OF THE ORGANIZATION OF AUTHORITY

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Abstract. The article is devoted to the study of the specifics of the implementation of the right to access information in Ukraine, the development of recommendations for eliminating the factors and causes of violation of the latter, the formation of proposals for improving the regulatory regulation of this right and the institutional mechanism for ensuring it. The conducted doctrinal analysis of existing scientific research has shown that there is no single integrated approach to understanding the legal nature, content, specifics of implementation, role and significance of the right to access information in the processes of building a democratic constitutional and legal model of power organization.

Key words: right of access to information, freedom of information, information openness, whistleblowers, information managers.

ПРАВО НА ДОСТУП ДО ІНФОРМАЦІЇ ЯК ОСНОВА ДЕМОКРАТИЧНОЇ КОНСТИТУЦІЙНО-ПРАВОВОЇ МОДЕЛІ ОРГАНІЗАЦІЇ ВЛАДИ

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Анотація. Стаття присвячена дослідженню особливостей реалізації права на доступ до інформації в Україні, виробленню рекомендацій щодо усунення факторів та причин порушення останнього, формування пропозицій з удосконалення нормативного регулювання зазначеного права та інституційного механізму його забезпечення. Проведений доктринальний аналіз наявних наукових досліджень засвідчив відсутність єдиного комплексного підходу до розуміння правової природи, змісту, специфіки реалізації, ролі та значення права на доступ до інформації у процесах побудови демократичної конституційно-правової моделі організації влади. Встановлено, що ситуацію у сфері реалізації права на доступ до інформації можна покращити не лише за рахунок законодавчої трансформації тексту Закону України «Про доступ до публічної інформації», а також шляхом забезпечення підвищення індивідуальної відповідальності посадових та службових осіб органів державної влади, місцевого самоврядування, керівників правоохоронних органів, працівників юридичних служб за прийняття рішень і правових актів, які порушують або обмежують право на доступ до інформації.

Ключові слова: право на доступ до інформації, свобода інформації, інформаційна відкритість, інформатори, розпорядники інформації.

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"Let people know the facts and the country will be safe"
Abraham Lincoln

Introduction. The formation of Ukraine as a democratic, legal state highlights the problem of ensuring real access of citizens to information about the activities of public authorities and private law entities. The right to access information (hereinafter referred to as the right to access) plays a special role in this process, because, firstly, it acts as a legal guarantee of the realization of the right to information, the right to participate in the management of State Affairs, and secondly, without citizens' access to information, their right to freedom in the state cannot be realized. In such circumstances, the principles of the rule of Law, popular sovereignty, and freedom of information turn into a legal fiction, the nation becomes autonomous, and the state becomes alien to its own citizens. The right of access allows citizens to obtain an adequate understanding and form critical judgments about the state of society, to increase the effectiveness and effectiveness of public control over the activities of both public authorities and subjects of private law. The real availability of information is not only a necessary element of the implementation of constant and reliable communication between citizens and their representatives in government structures, but also a means of effective functioning of public authorities themselves (Bamsted, 1992: 17).

The relevance of the research topic is due to the need: 1) morphological and structural-functional characteristics of the right to access as one of the fundamental elements of the institution of freedom of information; 2) defining the range of guarantees for the implementation of the right to access, clarifying their legal nature and content; 3) distinguishing the right to access from related legal institutions, related state-legal phenomena and processes; 4) determining the nature of the ratio of "lawful restriction" of the implementation of the right to access and its differentiation from "illegal violation"; 5) search for and outline possible ways to effectively improve the functioning of the system of consistently organized legal means, through which legal influence is ensured and the goals of legal regulation of public relations related to the availability of information are achieved. The object of research is public relations arising in the sphere of implementation of the right of access to information in Ukraine. The subject of the research is the general regularities and features of the functioning of the mechanism of legal regulation of the right to access information in Ukraine.

The main part. For the first time in the domestic legal tradition, the Constitution of Ukraine has established the right of everyone to freely collect, store, use and disseminate information orally, in writing or in any other way – at their choice. This set of powers constitutes the legal institution of freedom of information. The use of the concept of "everyone" in Article 34 of the Basic Law means that these constitutional rights and freedoms are inalienable and have a natural character, and therefore are granted to everyone from birth.

It is significant that the right to access is not directly enshrined in the constitutional text, but only follows from the principle of popular sovereignty and the symbiosis of powers provided for in Part 2 of Article 34 of the Constitution of Ukraine. If we adhere to the literal interpretation of constitutional norms, we should state that there is no actual mention of the right of access in the text of the Basic Law. Instead, the right to freely receive information from publicly available sources has been consolidated, which, in accordance with its legal nature, prohibits the state from restricting a citizen in obtaining any information that other persons wish or can transmit to him (De Salvia, 2004: 623).

Along the way, it should be noted that Part 2 of Article 34 of the Constitution of Ukraine provides only for the right to collect, that is, to search, and not to receive information directly from state authorities. It can be assumed that the right to search means the right to get information from publicly available sources. In addition, the Constitution of Ukraine separately provides for the right of every citizen to get acquainted with information about themselves in state authorities, local self-government, institutions and organizations (Part 3 of Art. 32) and the possibility of free access to information on the state of the environment, the quality of food and household items is guaranteed (Part 2 of Article 50). This is another, additional evidence that Part 2 of Article 34 does not provide for the right to access information, but only the right to receive information from publicly available sources (Nesterenko, 2012: 94–95).

"The right to access", "the right to information", and "the right to appeal" exist within the framework of the Institute of freedom of information and are its separate elements. At the level of doctrine, and even more often in the law enforcement plane, these rather related, but not relevant to each other categories are identified. Therefore, there is an objectively determined need to distinguish between the latter and find out the nature of their relationship with each other. In the current legal doctrine, it is possible to distinguish two main approaches to solving the problem of distinguishing the right to information from the right to access. Proponents of the first approach consider the right of access to information as one of the many powers of the fundamental, complex subjective right to information (Greg Terrill, 2000: 42–46). Within the framework of the second, more reasonable approach, the right to access information is considered as an independent subjective right, acting as a means of ensuring the openness of public authorities, a tool for implementing the right of a person to receive information that interests him from state authorities and local self-government (Birkinshaw, 2010: 527). Thus, the right of access cannot be equated with the right to information, due to the different functional purpose of these elements of the Institute of freedom of information.

If the function of the right to access information is reduced to the ability to obtain directly from public authorities information about their activities and information about themselves, as well as socially significant information at the disposal of private law persons, then the purpose of the right to information is to provide the possibility of Free Search and acquisition of any information from publicly available sources, obtaining information about the actions

of the authorities, but already in the interpretation of media representatives, the ability to watch movies, get acquainted with scientific works, works of art, etc. (Banisar, 2004: 22). The only thing that the right to information from the state requires is to comply with the policy of non – interference (negative obligations) and, conversely, the right to access information generates the state's obligation to create conditions for the unhindered receipt of information from its managers (positive obligations) (German promise to adopt freedom of information law, 2004). In other words, if the right to information is a negative right, then the right to access information is a positive right. In order to avoid groundless identification of these two categories, the proposal of O.V. Nesterenko should be accepted, and abandon at the level of the constitutional text the complex but vague concept of "the right to information" and apply two independent concepts "the right to freedom of information", through the prism of which the free flow of information of any content is objectified and the right to access information that has public significance is the result of or related to the exercise by public authorities of the powers granted to them by law (Nesterenko, 2012: 98).

When public authorities exercise their powers to consider citizens' appeals, certain legal relations arise between them, which by their legal nature are close to informational ones. Therefore, it can be concluded that a citizen in the process of exercising the right to petitions becomes a participant in a certain kind of information legal relationship, because according to Part 2 of Article 34 of the Constitution of Ukraine, "everyone has the right to freely collect, store, use and disseminate information", including through appeals. As the study of judicial practice materials shows, often law enforcement entities and information managers identify these two categories by putting an equal sign between them or considering the right to appeal as one of the forms of exercising the right to access information. There are frequent cases when responding to an information request, subjects of power are guided by the norms of the law of Ukraine "on citizens' appeals", and the Unified Register of court decisions is overflowing with decisions of administrative courts in disputes about citizens' appeals in the reasoning part of which judges define an information request as a form of exercising the right to appeal.

The fundamental difference between the right to appeal and the right to access public information is that if the right to appeal is exercised, a person informs an official or official of certain content in his appeal in order to encourage him to perform actions of a legal or organizational and administrative nature. At the same time, an information request is sent in order to obtain information about yourself or the activities of public authorities. So, when exercising the right to appeal, a person acts as an informant, and the state acts as a subject of obtaining information to which a public authority must respond in a certain way. If a person makes an information request, the state acts as an informant, and the person acts as a subject who receives information about the activities of state or local government bodies. Perhaps, it was in order to avoid confusion when considering information requests that the Law of Ukraine "On access to public information" specified its scope. In particular, Part 2 of Art. 2 provides that this law does not apply to relations regarding the receipt of information by subjects of power in the exercise of their functions, as well as to relations in the sphere of citizens' appeals, which are regulated by a special law.

The problem of determining the nature of the relationship between "lawful restriction" of the exercise of the right of access and its separation from "illegal violation" does not lose its relevance. Finding ways to solve this problem is perhaps the most difficult due to the fact that illegal violation of the right of access occurs for reasons of ensuring the public good and security. In the doctrinal plane, two main approaches to solving the issue of positively defining the boundaries of the exercise of the right of access have been established. The content of the first concept, which reflects the principle of absolute freedom, boils down to the fact that any information about all actions of the authorities must necessarily be brought to the attention of citizens (Access to information by the media in the OSCE region: country reports, 2008: 360). But in our opinion, this approach is too radical, utopian and objectively not conditioned. De facto, there is not a single country in the world where this kind of vision of freedom of information would find its embodiment, on the contrary, all states to one degree or another legally limit the limits of citizens' access to information about the activities of public authorities. It is appropriate in this context to recall the content of the First Amendment to the US Constitution, which concerns the Prohibition of any restrictions on freedom of information. However, the presence of such a legal apologist did not protect American society from the legislative consolidation of restrictions on the implementation of the right of access. It is doubtful that any state, no matter how democratic, will ever decide to lift such restrictions due to the selfish nature of its origin. Anthony de Yasai's view that even the most altruistic state cannot have goals other than its own is quite successful in this context (Entoni de Yasai, 2008: 91). We can also talk about other reasons that determine the utopian nature of this approach. In particular, Julian Assange, in his book "Conspiracy Theory as a method of management", proves the need for state regulatory restriction of citizens' access to information on the activities of public authorities as a means of its survival (Assange, 2010). At all times and peoples, there has never been and does not exist a state that would recognize and ensure the principle of absolute information freedom. Regulatory restriction of the right of access is a tool of mental control over society and a means of survival of the state as an autopoietic system. If this state of affairs is deformed, then the state will not be able to perform its functions and, as a result, will lose its status as a universal form of Organization of society.

Apologists for the second approach recognize the right of the state to establish legitimate, rule-of-law-based restrictions on the right to access information (Ekshtayn, 2004: 184). The principles and motivations behind this approach are more convincing. However, we should pay tribute to the critics of this concept, who have repeatedly focused on the problem of forming holistic and mutually agreed approaches to the interpretation of the categories "security", "order", "protection" and other concepts reflected in the text of the European Convention for the protection of human rights and fundamental freedoms and actually reproduced in Part 3 of Article 34 of the Constitution

of Ukraine. The latter establishes a catalog of grounds for restricting the right to information in the interests of ensuring national security, public order, and so on. In the context of the above, the content of Judge Hugo Black's speech in the New York Times v. United States, which stressed that the word "security" is a broad, vague and general concept, and its outlines cannot serve as a basis for limiting the scope of the principle of freedom of information, is indicative. The protection of military and diplomatic secrets at the cost of awareness of representative bodies alone does not guarantee real security.

There is a paradoxical situation when the state, for the reasons of protecting citizens from crime and terrorism, restricts their natural right to access information, while simultaneously opening up an immense range of means and mechanisms for manipulating public opinion, concealing corruption and abuse. In support of this, we should cite the words of Ayan Rand, the content of which most accurately crystallizes the essential motives that guide the state by limiting the right of society to know: "History is saturated with episodes when state governments tried to hide the worst crimes against their own citizens under the veil of secrecy. Hiding the true facts of their activities, Soviet leaders simultaneously spent millions on propaganda, trying to justify their rule in the eyes of repressed citizens" (Rend, 2011: 146). What can we say about the totalitarian Soviet regime, when such means are not disdained by the politicians of seemingly "democratic" states. As was the case with the Jewish chemist Mordecai, who helped the world community learn about the Mossad plans and Israel's nuclear program (Haunam Peter, 1999: 59). Many more examples can be found and cited that will demonstrate more convincingly than any theoretical postulates the civilizational value of the right of access as a universal vaccination against many disasters and cataclysms of a military-political, humanitarian or even socio-economic nature.

At the same time, despite all the theoretical gossip, the question of criteria for distinguishing "lawful restriction" from "illegal violation" of the right to access information remains open. In our opinion, restriction of the exercise of the right of access can be considered legitimate only if it is carried out on the basis and in strict accordance with the law, the content of which in turn must comply with the principle of the rule of law, be organic, understandable and do not contain double standards, General and vague concepts, elements of the conceptual and categorical apparatus, which can be ambiguously interpreted.

Studies of the state of implementation of the Law of Ukraine "On access to public information" (hereinafter referred to as the Law) conducted by a number of reputable human rights and public organizations indicate that there are no significant changes in the level and quality of ensuring the implementation of the right of citizens to access information. Against the background of processes related to the gradual updating of the constitutional text and qualitative reform of the system of local self-government, law enforcement agencies and public administration bodies, the law clearly needs to be updated by making appropriate changes and additions.

A positive impact on expanding the boundaries of transparency of public authorities will be a norm that would provide for openness, from the date of decision-making, official information that is contained in the documents of subjects of power and constitutes an internal official response, memos, recommendations, if they are related to the development of the activities of the institution, the decision-making process and precede their public discussion and/or adoption, as well as collected in the process of exercising control or supervisory functions by public authorities. The consolidation and strict compliance with a regulatory requirement of this content would ensure unhindered public access to all official information about the activities of public authorities.

Among scientists, public figures, and professional experts, the opinion remains widespread that in order to improve the state of ensuring the right to access information in Ukraine, the institution of an Information Commissioner should be introduced to monitor the implementation of the constitutional right of citizens to information. As the experience of states where there are specially authorized bodies that constantly exercise institutional control over ensuring the implementation of the right to information shows, the implementation of the norms of laws on access to information is more successful. In order for the activities of the Information Commissioner to be effective, it is obvious that he should not only consider the complaint, but should be given a fairly wide range of powers designed to ensure the implementation of general and targeted types of control over the completeness of compliance with the right to access information, and if necessary, be able to quickly take measures to stop the violation of this right. Of course, the effectiveness of such an institution will largely depend on the person who heads it. In this regard, a good example for Ukraine can be Australia, where a law professor who became one of the founders of the freedom of Information Committee in the 1970s was invited to the post of Information Commissioner.

So, what matters is not only the scope of powers of the Information Commissioner, but also the procedure for his appointment and the requirements that the candidate for this position must meet. If the risk factors are not taken into account, then it is useless to hope that this institution will not turn into another fiction, as, for example, happened with the Ministry of Information Policy, whose results are not seen by either the public or the parliament. The issues raised should be approached more responsibly, purposefully and carefully. The issue of introducing the institution of an Information Commissioner requires its conceptualization, for the purposes of which a number of measures should be taken, namely: 1) streamline the tasks and powers of existing bodies, eliminating duplication of individual functions, overcoming conflicts of competence; 2) decide what to do with those structures that exist, but the effectiveness of which is extremely low or not at all. Only by deciding on the future of existing departments, the vectors of their further reform and transformation can we talk about the formation of favorable conditions and the rationality of introducing new bodies.

Another important and at the same time relevant for our state is the issue of exemption from legal liability of "whistleblowers", that is, persons who disclosed information with good intentions, since they believed that

the concealment of such information harms the public interest (Nesterenko, 2012: 176). For example, you can recall the Gongadze case and the role and significance of Mykola Melnichenko, an employee of the Presidential Security Service, in it. The official information provided by him provoked a "cassette scandal", which showed the involvement of the then President of Ukraine, the head of his administration and a number of other state and political figures in the murder of journalist Gongadze.

As the experience of the countries of "established democracy" shows, the normative consolidation of this principle and the creation of a legal mechanism for its implementation helps to stop the rather harmful practice of state functionaries hiding information about crimes committed by officials and officials of public authorities. Today, more than 30 countries have provisions in national legislation aimed at protecting civil servants who disclosed information with good intentions, because they believed that withholding this information harms the public interest (Vapisag, 2011). Special laws in this area have already been adopted in the United States – "On whistleblowers", Canada – "Public Servants Disclosure Act" 2007, Great Britain – "Republic Interest Disclosure Act", 1998, New Zealand – "The Protected Disclosures Act", 2000 (Vapisag, 2011). In the current conditions, the information legislation of Ukraine (Art. 11 of the Law) is devoid of any mechanisms to protect "whistleblowers" and actually imposes the burden of providing evidence of an offense or proving the fact of a significant threat to the health or safety of citizens and the environment on the official who made the information public (Zakharov, Nesterenko, Severyn, 2008: 80–85).

A problematic issue remains the use of laws as a basis for refusing access to information, the norms of which indirectly regulates access to information, but at the same time are used as a reason for illegal violation of the right to access information. The Law of Ukraine "On access to public information" is based on the presumption of openness of information about the activities of public authorities and the exclusivity of cases in which the authorities may restrict access to such information. However, to ensure the effectiveness of this presumption, it is necessary that the provisions of the law are embodied in other regulatory legal acts that indirectly regulate relations in the field of access to information. Of course, the law contains relevant norms designed to neutralize the negative impact of such legislative conflicts. In particular, Part 4 of Art. 13 of the Law obliges all information managers, regardless of the normative legal act on the basis of which they act, when resolving issues related to access to information, to follow the norms of the Law of Ukraine "On access to public information», and Paragraph 2 of the final provisions provides that until the legislation of Ukraine is brought into compliance with this Law, other acts of legislation of Ukraine are applied to the part that does not contradict this Law. At the same time, domestic state-legal realities are increasingly convincing every day of the need for legislative coordination of the regulatory provisions of the relevant legislative acts with the norms of the Law "On access to public information" and the establishment of additional guarantees of access to information.

The situation in the sphere of implementation of the right of access can be improved not only by legislative transformation of the text of the law, but also by ensuring an increase in individual responsibility of officials and officials of state executive authorities and local self-government, heads of law enforcement agencies, employees of legal services for making decisions and legal acts that violate or restrict the right to access information. So, the solution to the problem of effective functioning of the legal mechanism for ensuring the implementation of the right to access information is not only in the plane of legislative transformations and institutional transformations, but is directly related to the processes of comprehensive improvement and optimization of the work of all state authorities and management, regardless of whether their activities are directly or indirectly aimed at ensuring, guaranteeing, implementing and protecting the right to access information.

Conclusion. The domestic state-legal reality is such that neither citizens nor representatives of the media or human rights organizations have real access to complete and reliable information about the activities of public legal entities. According to the Ukrainian independent Center for Political Studies, the law of Ukraine "On access to public information" is implemented by central executive authorities only by 50%. The number of laws and bylaws that to one degree or another ensure the functioning of the legal mechanism for implementing the right of access has reached a critical mass, most of them are of a general nature, it is very difficult to apply them without taking into account the specifics of the object, they are absolutely not systematized and not coordinated with each other, and the most remarkable is that for many years no one has even tried to streamline them. However, Ukraine is one of those relatively small states that still recognized and enshrined at the legislative level the right to access information. The implementation of these recommendations in the law enforcement plane will prevent cases of illegal violation of the right to access information and generally improve the state of its compliance in Ukraine.

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