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Access to Administrative Files and Access to Public Information: At the Crossroads of Information Rights

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Abstract
The course of administrative proceedings is documented in the files of an administrative case. Over the development of administrative law, the legislator has established various legal regimes to guarantee that entitled persons have access to all or part of the procedural materials collected in these case files. This article aims to present the two basic regimes of access to case files and analyze their interrelationship. The research demonstrates that, although the regulatory scope of these regimes partially overlaps, there are significant differences in terms of their subject and object. Nevertheless, mutual interaction between these regimes is evident, particularly in how they have evolved over time. The paper concludes with a negative answer to the question of whether the right to public information can substitute a party's information rights under the Administrative Procedure Code. Each of the two access regimes serves a distinct purpose and is governed by specific regulations tailored to that purpose.

Keywords
case files; information rights; administrative proceedings; Administrative Procedure Code; public information

1. Introduction

The enactment of the Act on Access to Public Information (hereinafter the "PIA")[1] was a major breakthrough in the functioning of public administration in Poland. It led to an unprecedented expansion in the openness of the bodies' activities and created a real basis for social control. The PIA also created one of the basic mechanisms for achieving accountability of public administration. The twenty years of applying the PIA has certainly not seen a string of successes alone, but

1 Ustawa z dnia 6 września 2001 r. o dostępie do informacji publicznej [Act of 6 September 2001 on Access to Public Information] [2001] JoL 2176.

the overall balance seems very positive. Therefore, it is worth reflecting on the further development of the right to information in Poland and the construction of information rights resulting from the PIA, and confronting them with similar rights resulting from the Administrative Procedure Code (APC).[2] The analysis of these rights will be set in the context of access to case files.

The administrative case files document the course of administrative proceedings, while at the same time providing the basis for establishing the facts of the case on the evidence gathered in it. The special importance of the case file becomes apparent precisely in the administrative proceedings, which in their basic form take place in the form of cabinet proceedings, while the publicity of the proceedings is limited to its participants. This means that access to the case file plays a very important role in a number of areas. On the one hand, it is crucial to ensure a party's right of active participation in administrative proceedings. On the other hand, the administrative file may contain public information, so access to it may serve to expand the sphere of openness of the authorities' action, which may make social control of the authorities' action a reality. Guided by this observation, the Polish legislator created legal bases on the basis of which it is possible to have access to case files, as well as to public information contained in the case files. The first regulation is contained in Articles 73 and 74 of the APC (also referred to in the text as the procedural regulation). The second regulation is contained in the PIA (also referred to in the text as the systemic regulation).

The importance of openness in administrative proceedings, including the need to guarantee access to files, was emphasised by Professor Stanisław Kasznica.[3] Administrative law sets the limits in this case for the administrative body, which cannot freely shape the legal situation of a third party without providing it with basic guarantees.[4] These guarantees, nowadays obvious, were often illusory in the period of the People's Republic of Poland, and the communist state often honoured secrecy and the lack of transparency of the proceedings conducted. It is only now that one can again speak of transparency in the operation of public administration and openness in the conduct of administrative proceedings in Poland. This justifies all the more an extensive analysis of access to administrative files, as a key mechanism for controlling administration and ensuring protection of the rights of entitled parties.

The subject of this article is a comparison of the subject and object scope of the rights of access to the case file resulting from the APC and the PIA. At first glance, it may seem that the scope of application of these acts overlaps and that there may be a problem of their parallel and competitive application in a given case. However, a closer analysis will show that such competition does not generally occur. Similarly, the problem of the parallel application of the procedural and systemic regulations appears to be apparent. On the basis of the analysis carried out, some *de lege ferenda* conclusions will be formulated with regard to the optimal regulation of the accessibility of administrative case files. The article focuses on the most problematic issues from the scope of the subject under consideration, hence the issues of the subjective scope of the rights arising from the APC and the PIA have only been generally characterised.

2 Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego [Act of 14 June 1960 Code of Administrative Procedure] [1960] JoL 735 as amended.

3 S Kasznica, *Polskie prawo administracyjne. Pojęcia i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Księgarnia Akademicka 1947) 107.

4 Ibid., 10.

2. ADMINISTRATIVE FILES VERSUS PUBLIC INFORMATION

The APC does not contain a definition of the concept of an administrative case file. Therefore, when defining the concept of case files, it is necessary to refer to a doctrinal analysis. In the earlier doctrine of administrative law, the concept of a case file was understood as a written record of a case. The case file included the petitioner's application, as well as its subsequent supplements, statements, official records of witness testimony, inspection, expert opinions, letters, opinions and notes of administrative bodies, submitted to the case, etc. – in a nutshell, everything that concerns the case being settled.[5] As emphasised in the more recent literature on the subject, the notion of case files encompasses all of the materials of the proceedings that are in the possession of the administration relating to a party, its procedural position and the course of the proceedings, and which may affect the content of the decision. Therefore, the notion of a case file cannot be limited only to documents and other materials collected in a specific case that has just been conducted.[6] Hence, I assume that a case file is a record of an administrative case recorded in any form.

The concept of public information is contained in Article 1 (1) API. According to this provision, any information on public matters constitutes public information and must be made available in accordance with the rules and procedures set out in the API. In clarifying this provision, Article 6(1)(4) indicates that public information is public data, i.e. a) the content and form of official documents, in particular: the content of administrative acts and other decisions, documentation of the course and effects of inspections and the speeches, positions, conclusions and opinions of the entities carrying them out, the content of decisions of common courts, the Supreme Court, administrative courts, military courts, the Constitutional Court and the State Tribunal, b) positions on public matters taken by public authorities and by public officials within the meaning of the provisions of the Criminal Code, c) the content of other speeches and assessments made by public authorities, d) information on the condition of the state, local governments and their organisational units. On the other hand, the API considers an official document to be the content of a statement of intent or knowledge, recorded and signed in any form by a public official within the meaning of the provisions of the Criminal Code, within the scope of the official's authority, addressed to another entity or submitted to the case file.

Now, it is necessary to consider whether and when an administrative case file can be treated as public information. At the outset, it should be pointed out that the API does not contain a definition of administrative files, either. The subject of controversy in court jurisprudence is, therefore, whether administrative files constitute public information, in particular an official document, and therefore whether they are subject to access.

The case law is not consistent with regard to the issue in question. In a judgment of 5 December 2001, the Supreme Administrative Court stated that "administrative files are not official documents and, for this reason alone, a request for access to them is unjustified. However, the files may contain official documents – access to these documents would be possible provided that they relate to the sphere of public life."[7] Consequently, it must be assumed that the inclusion of a document in an administrative file does not prejudge the fact that it contains public

5 B Graczyk, *Postępowanie administracyjne. Zarys systemu z dodaniem tekstów podstawowych przepisów prawnych* [Administrative Proceedings. Outline of the System with the Addition of Texts of Basic Legal Provisions] (Wydawnictwo Prawnicze 1953) 35.

6 W Taras, 'Udostępnianie akt sprawy w postępowaniu administracyjnym' [Sharing Case Files in Administrative Proceedings] (1992) Annales UMCS 39(7), 286.

7 Judgment of the Supreme Administrative Court II SA 155/01 [2002] OSP 6, item 78.

information, just as the lack of its inclusion in an administrative file does not mean it does not contain public information. As the administrative court emphasises, "whether a document contains public information is not determined by its placement in the administrative file, but by its content. Otherwise, this would mean that important documents of great significance to citizens would be excluded from access to information if they were not in the administrative file of the case. Such a solution would undermine the intention of the legislator, who wanted citizens to have the broadest possible access to information produced by public authorities."[8]

Among the materials included in the administrative case file, internal documents may raise particular doubts as to their qualification as public information. This category, undefined and unregulated by Polish law, is somehow regulated in case law. For example, the administrative court assumed that a party's request for access to information with regard to "all internal telecom regulator correspondence" is "very broad and includes official documents, as well as letters without this value (e.g. positions, opinions), however, in accordance with the principle of written information expressed in Article 14 of the APC, placed in the proceedings file. It also includes a range of information of a working nature, which has been recorded in traditional or electronic form and is a certain thought process, a process of deliberation, a stage in the development of a final concept, the adoption of a final position by an individual employee or a team. In the court's view, this type of information does not constitute public information within the meaning of the Access to Public Information Act. In light of that act, the administrative body is obliged to provide public information based on its knowledge as of the date of the response, and this knowledge must result from existing, formally verifiable sources: developed and adopted assumptions, enacted programmes or official speeches and positions. Such verifiable sources are not, however, the thought process itself, preceding the clarification of a set position, even if it has been recorded."[9] The position deserves to be accepted. Access to unstructured and non-finalised positions of office employees cannot be treated as a statement of knowledge or intent of the authority, and only in such a situation can one speak of the existence of public information. Besides, the access to internal documents could lead to dangerous consequences. Either it would paralyse the process of the internal fleshing out of the authority's position, or it would lead to a runaway recording of this process in the case file.

3. Access to files under the Administrative Procedure Code (APC)

The scope of rights on the subject of access to the files of proceedings of the APC depends on the nature in which a given subject participates in the proceedings. Such a regulation is, in its intention, a rational choice of the legislator, who decides that the scope of rights of a given entity is derived from the interest (factual or legal) that it has in the pending case.[10] The basic category of subjects who are served by the right of access to the file is the party to the administrative proceedings. Pursuant to Article 28 of the APC, a party to administrative proceedings "is anyone whose legal interest or duty is affected by the proceedings, or who demands an action of the authority on account of their legal interest or duty".

8 Resolution of the Regional Administrative Court II SA/Wa 783/06 [2007] Lex 348275.

9 Resolution of the Regional Administrative Court II SAB/Wa 148/08 [2008] Lex 1042304.

10 S Kasznica, *Polskie prawo administracyjne. Notatki z wykładów Prof. Dr. St. Kasznicy r. akad. 1928/1929* [Polish Administrative Law. Lecture Notes by Prof. Dr. St. Kasznicy, Academic 1928/1929] (Koło Prawników i Ekonomistów 1933) 18.

However, in addition to a party, it is possible to identify other categories of entities that have access to the administrative file. Firstly, these are entities with the rights of a party. This category includes social organisations, the public prosecutor and the ombudsman. It is worth noting an interesting issue related to access to files by the prosecutor and the ombudsman. When participating in administrative proceedings, the public prosecutor and the ombudsman will be entitled to exercise rights under Article 73 of the Code of Administrative Proceedings without any restrictions. Moreover, the public administration body may not restrict their right to access the files, other than in the situation specified in the Act on the Protection of Classified Information. Moreover, in the course of the evidentiary proceedings, the public administration body may order that the case file be shown to an expert. The expert is granted access to the case file only to the extent that this is necessary for their opinion. It should be emphasised that the expert is obliged to preserve business secrets and other legally protected secrets to which they have gained access in the course of performing their function. Finally, it is worth pointing out that specific substantive laws may provide for access to administrative files by other parties. For example, the Competition Protection Act of 2000[11] provided for limited access to the file for interested entities.

The scope of a party's rights regarding access to the file comes from the APC. It should be emphasised that, from a formal point of view, Articles 73 and 74 of the APC exhaustively regulate the rights of a party concerning access to files. The APC directly indicates only four groups of rights: a) reviewing the case file, b) taking notes and copies from the case file, c) requesting authentication of previously made notes and copies from the case file, d) requesting certified copies from the case file. However, these powers do not exhaust all the issues relating to access to the file by authorised parties. Adopting a different position would not take into account the needs of administrative practice and the degree of technological development. For example, at present there is no doubt about the possibility of the party photographing case files.[12] Adopting this thesis does not, of course, mean that it is possible to arbitrarily create new rights that do not have their source in the APC or other acts of administrative law. For example, it can be pointed out that, from the general right to find out about the course of the case that was mentioned earlier, one cannot derive the right to know the position of the office before the case is decided.[13] This means the entitled party does not have access, for example, to drafts or different versions of a decision before it is finalised. Nor can a party demand that they be given the originals of the file or the individual documents contained therein, even after the proceedings have been concluded.

A party has access to the file at any time. This means that they can exercise this right both during and after the administrative proceedings. The public administration body is obliged to provide access to the file until it is compulsorily archived and transferred to the National Archives. Access to the file is free of charge.

Two more complex issues require additional discussion: the possibility of requesting the copying and transfer of the entire case file, and the issue of remote access to the case file.

As regards the first issue, the resolution of the Supreme Administrative Court should be quoted, according to which making files available to a party pursuant to Article 73 § 1 of the

11 Ustawa z dnia 15 grudnia 2000 r. o ochronie konkurencji i konsumentów [Act of 15 December 2000 on Competition and Consumer Protection] [2000] JoL 804 as amended.

12 B Adamiak, 'Glosa do wyroku WSA w Białymstoku z dnia 29 marca 2012 r., II SA/Bk 122/12' [Glossary to the Judgment of the Provincial Administrative Court in Białystok of 29 March 2012, II SA/Bk 122/12] (2013) Orzecznictwo Sądów Polskich vol. 12, 893.

13 J Pokrzywnicki, *Postępowanie administracyjne. Komentarz – Podręcznik* [Administrative Proceedings. Comment – Manual] (Gospodarcze Zrzeszenie Samorządu Terytorialnego 1948) 84.

APC includes making a copy of documentation gathered in the case file by the body, in a manner resulting from its technical and organisational possibilities, at the request of a party.[14] Although from the point of view of a party to administrative proceedings this resolution undoubtedly strengthens its informative rights, it can hardly be regarded as correct on the basis of the wording of Article 73 of the APC, but rather as an example of far-reaching judicial law making. Dogmatic and systemic analysis shows that the Supreme Administrative Court's resolution should not be approved.[15] However, a broader development of this issue goes beyond the subject of this work.

In the case of the second issue, reference should be made to Article 73 § 3 of the Code of Administrative Proceedings, according to which a public administration body may provide a party with an action (make a case file available) in its ICT system, after authenticating the party in a manner specified in Article 20a, paragraph 1 or 2 of the Act on the Informatisation of the Activity of Entities Performing Public Tasks of 17 February 2005. Undoubtedly, this method of access to case files requires some preparation from the authority. In addition, it will not always be possible to make them available, especially if they exist only in paper form. As the NSA emphasises, the content of Article 73 § 3 of the APC does not impose an obligation on an administrative body to convert administrative case files or parts thereof (individual documents) maintained in paper form into digital form in order to make them available to a party in this form, nor does it impose an obligation to make them available at all by means of any electronic communication means (e.g. email), but only by means of its own ICT system. This does not mean, however, that an authority may deny a party the means of access to the case file without sufficiently justifying its position in this respect.[16] A certain deviation from the requirements set out in Article 73 § 3 of the APC was the provision contained in Article 15 to the Act on Special Solutions Related to the Prevention, counteracting and combating of COVID-19, other infectious diseases and crisis situations caused by them of 2 March 2020.[17] This provision indicated that the authority may provide a party with access to the case file or individual documents constituting the case file, also by means of electronic communication within the meaning of Article 2(5) of the Act on the Provision of Services by Electronic Means of 18 July 2002 to the address indicated in the register of contact data referred to in Article 20j(1)(3) of the PIA or another electronic address indicated by the party. The legislator was undoubtedly motivated by the desire to make the way in which files are made available more flexible. However, the lack of adequate safeguards was rightly emphasised, as access to files does not require the authentication of a party to the proceedings or entities on the rights of a party.[18] Although this solution was sometimes evaluated positively,[19] it does not seem to be acceptable after the state of emergency to have such a system of access to files that does not meet basic security principles. In this respect, there is a clear difference with the PIA, where the information made available is not restricted in terms of subjects, so even the use of less secure forms of electronic communication does not give rise to the problem of making files available to

14 Resolution of the Supreme Administrative Court I OPS 1/18 [2019] OSP 5, item 54.

15 J Wegner, 'Glosa do uchwały NSA z dnia 8 października 2018 r., I OPS 1/18' [Glossary to the Resolution of the Supreme Administrative Court of 8 October 2018, I OPS 1/18] (2019) Orzecznictwo Sądów Polskich vol. 5, 145 et seq.

16 Resolution of the Supreme Administrative Court I OSK 2552/19 [2020] Lex 3054548.

17 Ustawa z dnia 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych [Act of 2 March 2020 on Special Solutions Related to the Prevention, Counteracting and Combating of COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them] [2020] JoL 1842 as amended.

18 T Kosicki, *Dostęp do akt w postępowaniu KPA* [Access to Files in KPA Proceedings] (Lex/el. 2021).

19 E Szewczyk, 'Modyfikacje postępowań administracyjnych prowadzonych w okresie stanu zagrożenia epidemicznego lub stanu epidemii' [Modifications to Administrative Proceedings Conducted During the State of Epidemic Threat or State of Epidemic] (2020) Samorząd Terytorialny vol. 6, 25.

unauthorised entities. On the other hand, the aim should be to develop a remote form of access to the case file, although it is unlikely to ever be exclusive.

4. Access to files under the Act on Access to Public Information (PIA)

The PIA provides that this right is available to "everyone". As emphasised, this means that any person, whether a Polish citizen or a foreigner, may demand access to public information without justifying their demand in any way. Thus, the act has extended, in relation to the Constitution, the range of subjects who are entitled to the right to public information.[20] The subjects of this right may be individuals or legal entities, Polish or foreign. The controversial issue is whether the subject of this right may be other public administration bodies. In my view, the answer is negative. Firstly, arguments of a formal nature should be indicated. According to the principle of legalism, public administration bodies may only act on the basis and within the framework of the law. For this reason, the ability of one public administration body to obtain information from another public administration body is always contingent on the existence of a provision establishing the authority of that administration body. If the legislator recognises that a public administration body should have the authority, he equips the body in question with it. An example of this may be the Competition Act, in which Article 72 directly provides that "public administration bodies are obliged to provide the President of the Office with access to files held by them and to information relevant to proceedings pending before the President of the Office". Second, axiological considerations support this view. Since the right of access to files is intended to increase openness in the activities of administrative authorities and to improve public control of their actions, there is no justification for this right to be exercised by the public administration authorities themselves. In this context, the view of the Supreme Administrative Court that the president of the National Bank of Poland (NBP) may request public information from the minister of finance appears to be completely incomprehensible.[21] Another thing that is quite peculiar is the explanation of the court, which concluded that, since no regulation deprives the president of the NBP of the right to obtain public information, it means that he is entitled to this right. This reasoning of the court implies that it has departed from the traditional understanding of the principle of legalism, which dictated the existence of an explicit competence standard for the action of a public administration body, in favour of a kind of "presumption of competence" of a public administration body, unless this competence is excluded by an explicit provision of the law. It appears, however, that the Supreme Administrative Court's view is incidental, as it is contrary to the principle of legalism as well as common sense. Therefore, the position expressed earlier remains fully valid.

The API applies more broadly than just to jurisdictional administrative proceedings. For this reason, the right of access to public information includes various rights, such as: a) the right to obtain public information, including the right to obtain processed information to the extent that it is particularly relevant to the public interest; b) access to official documents, c) access to the meetings of collegial bodies of public authorities coming from universal elections. These rights may be exercised through: a) publishing public information, including official documents,

20 K Tarnacka, 'Prawo do informacji w polskim prawie konstytucyjnym' [The Right to Information in Polish Constitutional Law] (2011) Państwo i Prawo vol. 3, 108–111.

21 Order of the Supreme Administrative Court I OSK 509/09 [2009] Lex 612789.

in the Public Information Bulletin; b) providing access on the basis of an individual request; c) access to meetings of bodies and providing access to materials, including audiovisual and ICT, documenting such meetings.

The fundamental principle of the provision of public information is that there is no need for the person exercising this right to demonstrate a factual or legal interest. Public information should be made available upon request without undue delay, but no later than within 14 days from the date of the request. Importantly, the form in which information is made available is indicated in the request, unless the obliged entity does not have the technical means to satisfy the request. The entity making public information available is obliged to ensure the possibility of copying public information or printing it out and sending or transferring it to a commonly used information carrier. It should be emphasised that the provision of public information is generally free of charge.

5. At the crossroads of access regimes

The relationship between the rights under the APC and PIA raises some doubts. As indicated at the beginning of the chapter, it is necessary to distinguish access to administrative files on the basis of the APC from access to public information contained in administrative files. Both rights have been regulated separately and, as the conducted analysis has shown, their subject and object scopes are partly different. From a formal point of view, however, it is possible to indicate situations when, theoretically, the provisions of the APC and the PIA could apply in one case. This raises the question on procedural grounds as to the relationship between the two powers? Can they be applied in parallel, is there competition between them or do they complement each other?

Firstly, as indicated earlier and confirmed by the court case law, "the modes regulated by the Act on Access to Public Information and the Code of Administrative Procedure cannot be equated."[22]

Secondly, Article 1(2) of the PIA will be of key importance when determining the mutual relations between the APC and the PIA. According to the jurisprudence, the norms of the PIA do not infringe the provisions of other acts specifying different rules and procedures for access to public information. This means that, despite the PIA entering into force, the provisions of Articles 73 and 74 of the APC, as far as they regulate a party's access to administrative proceedings to the files of these proceedings, still apply.[23] Consequently, to the extent to which Articles 73 and 74 of the APC apply, by virtue of Article 1(2) of the PIA, the application of the provisions of the PIA is excluded.[24]

On this basis, it should be considered that the parallel application of the provisions of the APC and the PIA would be excluded with regard to entities to which the provisions of Articles 73 and 74 of the APC apply. Therefore, "access to the files of administrative proceedings, under the provisions of the Act on Access to Public Information, is limited to entities that are not parties to the administrative proceedings. Access to the files of administrative proceedings for the parties to these proceedings is regulated by the provision of Article 73 of the Code."[25]

Similarly, there will be no competition between the indicated provisions. Indeed, a party to administrative proceedings does not have a choice as to whether it wants to obtain access to the administrative file on the basis of Article 73 of the APC, or to achieve the same result on the basis

22 Judgment of the Supreme Administrative Court II OSK 1523/06 [2007] Lex 1613246.
23 Judgment of the Regional Administrative Court II SA/Wa 1487/07 [2007] Lex 971616.
24 Judgment of the Supreme Administrative Court I OSK 194/08 [2008] Lex 516808.
25 Ibid.

of the PIA. On procedural grounds, this means that a request addressed to the authority by a party to an administrative proceeding for access to public information contained in the case file should be treated as a request under Article 73 of the APC. This is confirmed by the case law of the courts. The administrative court held that "since the applicant was a party to the pending administrative proceedings and was requesting access to information the source of which was the documents in the administrative proceedings file, access to the administrative files and the documents contained therein should take place in accordance with the procedure set out in the Administrative Procedure Code and not the Act on Access to Public Information. It should be emphasised that the right of a party to request inspection of the files of proceedings and making notes and copies from them stems from Article 73 of the Code of Administrative Procedure, and not from the legal constructions contained in the Act on Access to Public Information. The legislator, in Article 1(2) of the Act on Access to Public Information, decided to give primacy to the laws already in force, in this case the Code of Administrative Procedure, which, in Chapter 3, Articles 73 and 74, regulates access to files in pending administrative proceedings. In view of the mode of access to files and copies contained in the case file explicitly set out in these provisions, there is no doubt that a party to a given administrative proceedings is provided with access to information under procedural rules."[26] For this reason, as the court further states, "in light of the regulation of Article 1(2) of the Act on Access to Public Information, it is unacceptable to apply the provisions of the Act on Access to Public Information when the requested information, having the nature of public information, is available through another mode". At the same time, some postulate that the priority of applying the provisions of the APC in the scope of access to case files over the provisions of the PIA should be explicitly determined, which would constitute a codification of the hitherto jurisprudence.[27]

6. EU CONTEXT

Before moving on to the conclusion, it is worth pointing out the European context of information rights. Indeed, under EU law, it is clear that information rights from different access regimes cannot be equated or used interchangeably. At the outset, it should be noted that the right of access to the case file has undergone a significant evolution in EU law. Despite the absence of an explicit regulation in EU primary law, the Community courts have taken the position that in all proceedings where sanctions may be imposed, the rights of defence should be guaranteed, including the right of access to the file.[28] However, it was not until the landmark ruling of the Alkali Cartel[29] that the court of first instance recognised that the right of access to the file arose not from the Commission's internal procedural rules, but was an intrinsic right that was part of the right of defence.[30] Today, the right to good administration is recognised in Article 41 of the Charter of Fundamental Rights.[31]

26 Judgment of the Regional Administrative Court II SAB/Wa 148/08 [2008].

27 D Nowicki, 'Dostęp do akt sprawy w ogólnym postępowaniu administracyjnym – w praktyce działania organów administracji i orzecznictwie sądów administracyjnych' [Access to Case Files in General Administrative Proceedings – in Practice, the Operation of Administrative Bodies and the Jurisprudence of Administrative Courts in M Błachucki, G Sibiga (eds), *Kodeks postępowania administracyjnego po zmianach w latach 2017–2019* [Code of Administrative Procedure after Changes in 2017–2019] (INP PAN 2020) 320.

28 K Lenaerts, J Vanhamme, 'Procedural Rights of Private Parties in the Community Administrative Process' (1997) Common Market Law Review 34(3) 534.

29 Judgment of the Court of First Instance T 36/91 EU:T:1995:119.

30 CD Ehlerman, BJ Drijber, 'Legal Protection of Enterprises: Administrative Procedure, In Particular Access to Files and Confidentiality' (1996) European Competition Law Review 17(7), 382.

31 Charter of Fundamental Rights OJ UE C 303/01 [2007].

Under European law, a distinction is made between the right of access to administrative files as part of the right to good administration and the right of access to public documents. This distinction is important and needs to be briefly discussed, all the more so because it is sometimes possible in the doctrine to equate the two rights, or to derive the right of access to administrative files from the right of access to public documents.[32]

The first formal argument in favour of treating the rights in question separately is the text of the CFR itself. The Charter clearly separates the two rights, with separate provisions devoted to them – Article 41(2)(b) on the right of access to administrative records and Article 42 defining the right of access to public documents. However, this argument is not conclusive. The most relevant, in my view, is the axiological argument. Indeed, the axiology of the two rights is different. The right of access to administrative records serves to guarantee the protection of the rights of the individual in the course of administrative proceedings concerning their rights and obligations. The right of access to public documents aims to protect the public interest by increasing transparency in the operation of public institutions. This is also supported by historical interpretation. The right of access to administrative records was created as part of the procedural guarantees of a party in administrative proceedings stemming from the principle of procedural fairness originating from Article 6 of the European Convention on Human Rights and the concept of the rule of law. In contrast, the right of access to public documents is a general right derived from the democratic principle and even from Article 10 ECHR.[33] The specific nature and distinctiveness of both rights is also evident in primary and secondary Community law developing and specifying both rights. In the case of access to public documents, Article 255 TEC, which provides 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 documents of the European Parliament, the Council and the Commission", has so far been of fundamental importance. The development of this provision in secondary law is Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.[34] In the case of the right of access to administrative files, the development of this power will be the specific rules set by Community bodies when dealing with categories of cases – an example being the rules on access to administrative files held by the Commission in Community competition law, discussed earlier.

Despite their differences, the two powers exist in parallel under European law. Harmonisation of their application should therefore be sought in order to avoid conflict between them.[35] A potential area of conflict arises from the fact that the scope of application of the two powers is different. Indeed, the right of access to public documents concerns an unspecified number of people who may not be affected by the proceedings at all. Meanwhile, the right of access to the files of proceedings covers only the circle of entities that have a legal interest in the proceedings (which are directly affected by the proceedings). Meanwhile, in administrative proceedings, documents

32 AJG Ibanez, *The Administrative Supervision and Enforcement of EC Law: Powers, Procedures and Limits* (Hart Publishing 1999) 242. In my view, however, such a position is ahistorical and fails to take into account the different purposes served by the powers in question.

33 HP Nehl, *Principles of Administrative Procedure in EC Law* (Hart Publishing 1999) 60. However, this view is not universally accepted and has caused some controversy.

34 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145, 43.

35 S Ohlhoff, O Fleischmann in G Hirsch F Montag, FJ Saecker (eds), *Competition Law: European Community Practices and Procedure. Article-by-Article Commentary* (Sweet & Maxwell 2008) 2406–2407.

containing legally protected secrets may constitute an important part of the file. For this reason, there is a postulate that when applying the rights resulting from secondary European law, e.g. Regulation 1049/2001, they should be applied in such a way that they do not hinder or render ineffective the exercise of rights resulting from the regulations on access to administrative files.[36]

7. Concluding remarks

The analysis carried out has shown that the provisions on access to administrative case files resulting from the APC and the PIA are complementary. They function side by side complementing each other. This situation is a conscious choice of the Parliament, who, guided by different premises, regulated both rights separately. Such shaping of rights resulting from the indicated regulations is supported by the different axiology of the right of active participation of a party in the proceedings and the right of access to public information – in this scope. We are dealing with a similar situation on the grounds of EU law.

The undertaken analysis suggests there should be a general regulation of the notion of administrative files and a general definition of the scope of the subject (party, third parties, etc.), the object (official, internal, private documents, etc.), their form (traditional, digital, hybrid) and time (during or after the proceedings) of their availability and the availability of the public information contained in them, as well as the harmonisation of the regulations of the APC and the PIA in this respect. Currently, these issues are supposed to be regulated by case law, e.g. with regard to the concept of a private or internal document, but these attempts are marked by a great deal of judicial activism that cannot replace the intervention of the legislator in a state of law. It is therefore necessary to consider what typical documents we can find in the files of administrative proceedings and to whom and on what terms and when we should allow access to them. This access should be differentiated and adjusted to such things as the purpose of a given regulation, the legal interest of a given subject, the subject of a regulation or the efficiency of an administrative proceedings. The obverse of this problem is also the manner of documenting procedural actions. Reflection would also be required in this respect. Both the doctrine and practice treat the issues of official notes and annotations somewhat neglectfully. Meanwhile, their practical significance may be very high and in part determine the content of the case file.

The definition of the file will also allow for a new approach to the implementation of access to the file. In particular, it should be considered in what form and to what extent the file should be accessible. Similarly, it would be necessary to clearly and realistically define the obligations of the state administration body. Given the development of technology, to a certain extent access could be fully automated and would not require additional interaction between the right holder and the authority. Of course, this must not lead to digital exclusion or force anyone to use remote forms of access. In this context, the way in which the limits to access to the file are defined and how the code regulation is urgently supplemented needs to be rethought, as raised earlier.

The main thesis of the chapter is the observation that only in the case of a procedural regulation (APC) can we speak of a fully formed and direct right of access to administrative files. The PIA does not create such a direct right, but only allows access to public information that may be contained in the administrative case file. In particular, this access is possible if the administrative case file contains official documents that are subject to access. For this reason, access to the administrative file is referred to only in the context of the rights under the APC, while in the case of the PIA, it refers to access to public information contained in the file.

36 Ibid., 2407.

We should conclude with a remark that may be considered paradoxical. Over the twenty years of applying the PIA, it has undoubtedly been possible to broaden the sphere of openness of the activity of state administration bodies, which has been accompanied by the development of information rights of entitled entities. On the other hand, there is a noticeable lack of reflection on the definition of the internal sphere of administrative action. It has still not been possible to work out a coherent normative concept of the internal sphere of activity of administrative authorities in Poland. In fact, each of the discussed normative regulations creates its own sphere of openness. While recognising the transparency of state administrative authorities as an important value, it should not be forgotten that there should be a clearly and legally defined sphere of *res internae,* which is necessary in any organisation to function efficiently. The alternative is the expansion of the grey internal sphere and the lack of documentation of the activities undertaken therein, which may negatively affect the scope of exercising the information rights of authorised entities. Therefore, clearly defining the internal sphere, making the definition of public information more flexible and strengthening access to it may be the first challenges to be regulated in the PIA. It may look like a paradox, but to regulate openness and the accountability of public administration, we first need to define what should remain secret or internal information, and why.

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