DISCRETIONARY POWERS OF A JUDGE WHEN CONSIDERING DISPUTES RELATED TO ACCESS TO PUBLIC INFORMATION

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It has been established that in legal relations regarding access to public information, the latter, in addition to being formally recorded on material media, must necessarily be in the possession of the entity authorized to dispose of such information. Therefore, access to public information involves obtaining information that currently exists (or was created) in a documented form, or is required to exist in the possession of the administrator, if this corresponds to his competence (scope of authority). Based on this, access to public information should not be used as a means to create [new in content] information (except for cases when certain information a priori must be in the administrator), as well as to establish/clarify any circumstances (data, information). That is, if an information request, even if it meets the requirements for its preparation, involves the creation of something new, not inherent or that goes beyond the legal status (competence) of the public information manager, then we are not talking about "access" to public information, the procedure for providing which is regulated by Law No. 2939-VI, but about the "creation" of necessary (desired) information, which may include the establishment of additional circumstances (information, facts). The latter, by its very nature, replaces the concept of "access" to public information with its "production", which in this case forces us to resort to methods and means that do not correspond to legal relations in the field of public information, especially taking into account the purpose of their regulatory regulation.

Given the above, in disputes regarding the refusal to satisfy a request for access to public information, the court should move away from the positivist approach and not only have the right, but also, in some cases, be obliged to verify the legality of not only the reason for refusal chosen by the information administrator, but also to find out whether he had other reasons for refusing to satisfy the request and whether the requested information belongs to the category of public information at all. It is this approach that will avoid the need to oblige the administrator to reconsider the request for access to public information in situations where the requested information does not belong to this category in advance or the administrator has other reasons for refusing to provide it.

Keywords: access, discretionary powers, judge's competence, judge's powers, administrative court, administrative proceedings, judge, reason, public information.

Ensuring transparency and openness of public authorities is ensured by creating mechanisms for the implementation of everyone's right to access public information. Such access is based on the principles of transparency and openness of the activities of public authorities; free receipt, distribution and any other use of information that has been provided or made public in accordance with the Law of Ukraine "On Access to Public Information", except for restrictions established by law; equality, regardless of race, political, religious and other beliefs, gender, ethnic and social origin, property status, place of residence, language or other characteristics.

It is worth noting that the use of judicial discretion in the exercise of judicial activity can

be justified by a number of objective reasons, in particular:

– with the rapid development and change of social relations, the legislative body cannot always respond to such a change in time and adopt the regulatory legal act necessary for its regulation. Judicial discretion enables the judicial branch of power to regulate such a situation, preventing and overcoming gaps in the law;

– with all the diversity of social relations, the legislative body, as a rule, tries to foresee all possible options for the development of events, however, each situation is individual and the legislator is not always able to do this.

Many regulatory and legal norms are relative in nature, and judicial discretion contributes to their personification for correct application in each specific case;

– not always for certain objective or subjective reasons the legislator adopts sufficiently clear, understandable legal norms, and such a situation forces the law enforcement body to use its discretion to apply such a norm. Judicial discretion can be considered not only as a means used by judges, but also as an element of the judge's freedom in the administration of justice. This freedom is necessary for the proper administration of justice. For example, V. Bihun defines judicial discretion as "the limits of the judge's freedom in judicial decision-making; the method of exercising judicial power by the judge; a principled position in the administration of justice that determines the limits of the judge's authority in resolving issues and cases in judicial proceedings" [8, p. 22]. In this case, the tasks of judicial proceedings, the principles of law and the judge's own internal conviction act as the legal limits of such freedom.

One of the guarantees of the right to access to public information is ensuring the possibility of appealing decisions, actions or inaction of information managers. Thus, part two of Article 23 of the Law of Ukraine "On Access to Public Information" stipulates that the requester has the right to appeal, in particular, the refusal to satisfy a request for information [1].

The most common in the practice of administrative courts are disputes regarding the appeal of the refusal to satisfy a request for information.

The grounds for refusing to satisfy a request are provided for in Part One of Article 22 of the Law of Ukraine "On Access to Public Information", which provides for an exclusive list of grounds for refusing to satisfy a request for access to public information, which include:

1) the information manager does not possess and is not obliged, in accordance with his competence provided for by law, to possess the information for which the request was made;

2) the requested information belongs to the category of information with limited access in accordance with Part Two of Article 6 of this Law;

3) the person who submitted the request for information did not pay the actual costs associated with copying or printing provided for in Article 21 of this Law;

4) the requirements for the request for information provided for in Part Five of Article 19 of this Law were not met.

From the point of view of this study, the situation is relevant when, when refusing to satisfy a request for access to public information, the information manager indicates the wrong reason or not all the available reasons for refusing to satisfy the request.

In this case, can the court, when deciding a case on appealing such a refusal, assess the disputed legal relationship in terms of the presence of all the grounds for refusal provided for by law?

In modern legal science, there is no unambiguous attitude of legal scholars to the phenomenon of judicial discretion. The spectrum of their opinions is quite wide - from denying the existence of this institution to substantiating it as an objectively determined power-legal regularity of the mechanism of legal regulation.

Problems regarding discretionary powers, judicial discretion and its limits were highlighted in their works by M. Kozyubra, S. Shevchuk, M. Mazur, S. Tagiyev, A. Benitsky, V. Kostrytsky and others.

In particular, O. Stovba, expressing his vision of the application of judicial discretion, notes that this is the ability of the court to go beyond the law or to refuse to apply it at all to resolve the case [2, p. 102].

M. Savenko claims that judicial discretion is an element of the judge's freedom when per-

forming certain procedural actions. The limits of this freedom are determined by the task of the court, the framework of the law and the law [3, p. 75].

A. Barak, considering judicial discretion as the authority to choose between two or more alternatives, emphasizes the possibility of choice, and not freedom independent of any factors. He says that discretion implies "a zone of possibilities rather than just one position" [4, p. 13-15].

According to other authors, the concepts of "freedom" and "discretion" are not identical and cannot be equated, since in this case factors that limit the discretion of the law enforcement entity are subject to consideration, and the term "discretion" itself acquires a conditional and limited character.

However, the court's ability to choose a certain decision when exercising discretionary powers is not so much a right as its obligation.

According to Article 9 of the Code of Administrative Offenses of Ukraine, the court shall consider administrative cases only upon a statement of claim filed in accordance with the requirements of the Code of Administrative Offenses of Ukraine, within the limits of the claims. The court may go beyond the limits of the claims if this is necessary for the effective protection of the rights, freedoms, interests of a person and a citizen, and other entities in the sphere of public legal relations from violations by entities of public authority. According to paragraph 10 of part one of Article 245 of the Code of Administrative Offenses of Ukraine, in case of satisfaction of the claim, the administrative court may choose another method of protecting the rights, freedoms, interests of a person and a citizen, other subjects in the sphere of public legal relations from violations by subjects of power, which does not contradict the law and ensures effective protection of such rights, freedoms and interests [5].

The cited provisions of the Administrative Court of Ukraine give grounds to speak about the recognition of the discretionary powers of the administrative court and the possibility of interfering at its own discretion (judicial discretion, judicial discretion) within the limits of the powers of a state authority or local self-government body.

It is worth understanding that in legal relations related to access to public information, the latter, in addition to being recorded on material media, must also be in the possession of the administrator of public information.

Thus, access to public information involves obtaining the information that exists (created) - in a documented (objectified) form - or must exist (be) in the possession of the administrator, if this provides for (covers) the scope of his competence (powers) [6].

For these reasons, access to public information should not be used as a method (mechanism) for creating [substantially new] information (except for situations where certain information should be in the possession of the administrator), as well as for clarifying / establishing certain circumstances (data, information). Therefore, if an information request, even if it meets the requirements for its design, involves the creation of something new, unusual or that goes beyond the legal status (competence) of the administrator of public information, then we are no longer talking about "access" to public information, the procedure for which is intended to be regulated by Law No. 2939-VI, but about the "creation" of the requested (desired) information, which in some cases may also include the establishment of additional circumstances (information, facts). The latter essentially replaces the concept of "access" to public information with its "production", which in this case encourages the use of methods and means that are not typical for legal relations related to public information, especially when considering the purpose of their regulatory regulation, which is defined in Law No. 2939-VI [7].

Based on these considerations, we can conclude that in disputes related to the refusal to satisfy a request for access to public information, the court must avoid a positivist approach, instead it not only has the right, but in some cases is obliged to verify the legality of not only the grounds chosen by the information administrator for refusing to satisfy the request, but also to find out whether such administrator had other grounds for refusing to satisfy the request and whether the requested information belongs to the category of public information at all.

This approach will avoid the need to oblige the administrator to re-consider a request for

access to public information in situations where it knowingly concerns information that does not belong to such a category, or the administrator has other grounds for refusing to provide it.

References

1. On access to public information: Law of Ukraine dated 13.01.2011 No. 2939-VI. URL: https://zakon.rada.gov.ua/laws/show/2939-17#Text.

2. Justice: philosophical and theoretical understanding: col. monograph / A. M. Bernyukov, V. S. Bigun, Yu. P. Loboda, B. V. Malyshev, S. P. Pogrebnyak, S. P. Rabinovich, V. S. Smorodynsky, O. V. Stovba; editor-in-chief V. S. Bigun. Kyiv, 2009. 316 p.

3. Savenko M. D. Judicial discretion in civil proceedings. Scientific notes of NAUKMA. 2004. T. 26. Legal sciences. P. 75–79.

4. Barak A. Judicial discretion. Kyiv: Publishing House «Center for Educational Literature», 2022. 320 p.

5. Code of Administrative Procedure of Ukraine: Law of Ukraine dated 06.07.2005 No. 2747-VIII. URL: https://zakon.rada.gov.ua/laws/show/2747-15#Text..

6. Leheza Ye., Odyntsova I., Dmytrenko N. Teoría y regulación legal del apoyo informativo de los procedimientos administrativos en Ucrania. Ratio Juris Unaula. 2021. Vol. 16, no. 32, pp. 291-306. DOI: https://doi.org/10.24142/raju.v16n32a12.9.

7. Leheza Ye., Len V., Shkuta O., Titarenko O., Cherniak N. Foreign experience and international legal standards of applying artificial intelligence in criminal proceedings. Revista de la universidad del zulia. 2022. Vol. 13, no. 36, 276-287. DOI: https://doi.org/10.46925//rdluz.36.18.8.

8. . Bihun V. S. Philosophy of Justice: Idea and Implementation: Monograph. Kyiv, 2011. 303 p.

ДИСКРЕЦІЙНІ ПОВНОВАЖЕННЯ СУДДІ ПРИ РОЗГЛЯДІ СПОРІВ, ПОВ'ЯЗАНИХ З ДОСТУПОМ ДО ПУБЛІЧНОЇ ІНФОРМАЦІЇ

Встановлено, що у правових відносинах щодо доступу до публічної інформації, остання, окрім формального закріплення на матеріальних носіях, обов'язково повинна знаходитися у володінні суб'єкта, уповноваженого розпоряджатися такою інформацією. Отже, доступ до публічної інформації передбачає отримання інформації, яка на даний момент існує (або була створена) в документально оформленій формі, або ж зобов'язана існувати у володінні розпорядника, якщо це відповідає його компетенції (обсягу повноважень).

Виходячи з цього, доступ до публічної інформації не повинен використовуватися як засіб для створення [нової за змістом] інформації (окрім випадків, коли певна інформація апріорі повинна бути у розпорядника), а також для встановлення/з'ясування будь-яких обставин (даних, відомостей). Тобто, якщо інформаційний запит, навіть якщо він відповідає вимогам до його оформлення, передбачає створення чогось нового, не властивого або такого, що виходить за межі правового статусу (компетенції) розпорядника публічної інформації, то мова йде не про «доступ» до публічної інформації, процедуру надання якого регламентує Закон № 2939-VI, а про «створення» необхідної (бажаної) інформації, що може включати й встановлення додаткових обставин (відомостей, фактів). Останнє, за своєю сутністю, підмінює поняття «доступу» до публічної інформації на її «виробництво», що в такому випадку змушує звертатися до методів і способів, які не відповідають правовідносинам у сфері публічної інформації, особливо враховуючи мету їх нормативного врегулювання.

Враховуючи вищевикладене, у спорах щодо відмови у задоволенні запиту на доступ до публічної інформації, суд повинен відійти від позитивістського підходу та не тільки мати право, але й, в окремих випадках, бути зобов'язаним перевірити правомірність не лише обраної розпорядником інформації підстави для відмови, а й з'ясувати, чи були у нього інші підстави для відмови у задоволенні запиту та чи взагалі запитувана інформація належить до категорії публічної інформації. Саме такий підхід дозволить уникнути необхідності зобов'язувати розпорядника повторно розглядати запит на доступ до публічної інформації у ситуаціях, коли запитувана інформація заздалегідь не відноситься до цієї категорії або ж у розпорядника існують інші підстави для відмови у її наданні.

***Ключові слова**: доступ, дискреційні повноваження, компетенція судді, повноваження судді, адміністративний суд, адміністративне судочинство, суддя, підстава, публічна інформація.*