*Teka Komisji Prawniczej PAN Oddział w Lublinie, vol. XVIII, 2025, no. 1, pp. 465-484*
*https://doi.org/10.32084/tkp.9144*

# COMPLIANCE WITH THE PRIORITY RULE OF THE NON-APPLICATION PROCEDURE AND LIMITING THE PRINCIPLE OF EQUAL ACCESS TO PUBLIC INFORMATION

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**Abstract.** The Act of 6 September 2001 on access to public information is overflowing with regulations creating good practices. These regulations create access principles that organise the procedure, making it more understandable and friendly for the participants. Among this catalogue of principles, the principle of equal access to public knowledge and the principle of priority of the non-application procedure find their place. Although these principles are of equal importance, they are not always compatible. This paper aims to highlight and discuss situations in which compliance with the priority rule of the non-request procedure limits the principle of equal access to public knowledge. However, this requires a prior characterisation of these rules and a definition of their role in the access procedure.

**Keywords:** equality; bulletin; rule; access to public information.

## INTRODUCTION

Each procedure is governed by its own rules to ensure its correctness and achieve the expected result. Their co-occurrence is to guarantee order during the procedure, its efficiency, speed and protection against delay. Generally speaking, a set of rules that are somewhat "put out of the way" protects the procedure against irregularities and prevents abuses resulting from intentional or non-culpable, but nevertheless erroneous conduct of the entity conducting the proceedings or its participant. Such functions are also fulfilled by the principles that apply to the procedure related to the provision of public information. It is regulated by the Act of 06.09.2001 on access to public information.[1] Importantly, unlike other procedures, these rules have not been placed in a specific part of the legal act, e.g. at its beginning, but have been "scattered" throughout the content of the UDIP. The reasons for this state of affairs should be sought in the volume of the legal act, as the

[1] Journal of Laws of 2022, item 902 [hereinafter: UDIP].

*ISSN 1899-7694*
*e-ISSN 2719-7379*

regulations determining the procedure for providing public information have been included only in 23 articles. However, this in no way causes difficulties in deriving such rules from the content of the UDIP, nor does it give rise to problems in understanding them. On the contrary, one may be tempted to say that prior (made for one's needs) cataloguing of access rules accelerates familiarisation with the procedure and makes it easier to understand.

These rules can be classified according to various criteria. One of the permissible ways of differentiating the discussed rules is the division carried out based on what they specifically refer to, i.e. whether they concern the subjects of the process of making available, its subject matter, or other procedural matters. This classification distinguishes between subjective, objective and strictly procedural principles [Tomaszewska 2019, 36-41]. Due to how a specific rule is presented in the content of a legal act, it is possible to distinguish direct rules located in a way and in such regulations from which specific conduct guidelines follow [ibid.]. On the other hand, there are hidden rules that do not result directly from the provision or are dominated by a different pattern of conduct, the occurrence of which somehow imposes itself due to the content of a specific regulation. The above classifications are not separable [ibid.].

The group of so-called hidden principles undoubtedly includes the subjective principle of equal access to public knowledge, otherwise (more simply) also known as the principle of equality. It results from the content of Article 2(1) UDIP, which directly refers to the catalogue of entities entitled to information. This leads to the conclusion that it is impossible to share the position of A. Kardas and P. Kardas, according to which there are no formal provisions at the statutory level from which the principle of equality could be derived [Kardas and Kardas 2019]. According to the regulation mentioned above: Everyone is entitled to..... the right of access to public information, hereinafter referred to as the "right to public information" (Article 2(1) UDIP). The first word in the regulation is crucial. The study's main objective is to characterise the principle of equal access to public knowledge and establish its relationship with another rule – a *strictly* procedural rule, namely the principle of the priority of the non-application procedure.[2] There are certain situations and circumstances (not provided for in the regulations of the Act on the Prevention of Public Knowledge) that mean that the being in force and, above all, compliance with the principle of the priority of the non-application procedure may lead, and often leads, to the restriction of the principle of equality (equal access to public knowledge).

[2] See on the subject of principles: Bernaczyk, Jabłoński, and Wygoda 2005, 42; Bernaczyk 2008, 121-22.

## 1. GENERAL CHARACTERISTICS AND SUBSTANTIVE SIGNIFICANCE OF THE PRINCIPLE OF EQUAL ACCESS TO PUBLIC KNOWLEDGE

Equality is a component of the modern system of state and law [Steinborn 2004, 22]. It is closely related to human dignity and the principle of social justice [Nitecki 2008; Garlicki 2023, 96, Ziółkowski 2015].[3] The relationship between equality and justice is most visible in everyday terms, where in trivial situations, in everyday life, the individual looks for the so-called justice. A person desires justice when he feels that he has been treated differently from another person he knows, and in his opinion, he should be treated the same way. He then feels bitterness, regret and even anger. It then points to the phenomenon of discrimination and injustice. For the average individual in a larger community (local, national or EU), equality means an even distribution of privileges and burdens [Mikuła 2019]. A similar definition is already visible in the preamble to the Constitution of the Republic of Poland,[4] where the constitution-maker points to equality in the rights and duties of individuals towards the common good, which is Poland.

The principle of equality, currently expressed in Article 32 of the Constitution of the Republic of Poland (in the chapter devoted to the freedoms, rights and duties of man and citizen), assumes that: "Everyone is equal before the law. Everyone has the right to equal treatment by public authorities."[5] Notably, despite the concise definition of equality in the Constitution, it cannot be assumed that an attempt to put this value within a definitional framework is a simple procedure. The reasons for this state of affairs should be sought a.o. in the double consideration of this value. In the opinion of the Constitutional Tribunal: "the position assuming that Article 32 of the Constitution constitutes only a 'systemic principle' is not fully correct. This provision expresses the principle of equality as a norm (principle) of objective law and – a derivative of this principle – a special type of subjective right, the right to equal treatment. Everyone has the right to be treated as a person in an analogous (as to the essential elements) situation."[6]

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[3] See more: Ziółkowski 2015.

[4] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of No. 78, item 483, as amended.

[5] It is further complemented by the principle of non-discrimination, according to which: "No one shall be discriminated against in political, social or economic life for any reason." Domańska emphasises that the equality rule and the prohibition of discrimination are elements of the same idea and that the ban on discrimination fulfils the equality rule [Domańska 2019].

[6] Decision of the Constitutional Tribunal of 24 October 2001, ref. no. SK 10/01, OTK ZU 7/2001, item 225, see also Deryng-Dziuk 2017; Klat-Górska 2015; Tuleja 2023.

When considering the content of constitutional regulations, it is possible to use a collective term indicating legal equality, which may be regarded as equality before and in law. In this case, it is about the legislator's obligation to shape the content of the applicable law evenly, i.e. to determine it, taking into account the idea of equality (equality in law) and, at the same time, the obligation of public authorities to treat all entities equally in the process of its application (equality before the law) [Sadurski 1988, 87ff].[7] In both cases, the idea of equality is a factor limiting the freedom of conduct of the legislator and entities applying the law, it is intended to protect against excessive interference in the sphere of freedoms and rights of entities and against their unconstitutional differentiation. In the jurisprudence of the Constitutional Tribunal, it is indicated that Article 32 of the Constitution requires equal treatment of all addressees of legal norms characterised to the same extent by the same relevant feature, and at the same time permits for different treatment of entities which do not have such a feature.[8] This interpretation leads to the conclusion that there are specific categories of entities within which these entities should be treated in the same way (because they share some common characteristic) [Idem 1979, 52]. *A contrario*, the absence of belonging to a particular group allows for different treatment from that of others showing similarity. This is closely related to the Aristotelian postulate, according to which similar things should be treated similarly, and those that are not similar should be differentiated [Kardas 2019].[9] Similar statements can be found in the case law of the CJEU. In the judgment of the General Court of 27.04.2022, it was indicated that the principle of equality requires that comparable situations must not be treated differently and that different situations must not be treated equally unless such treatment is objectively justified.[10] However, the principle of equality is not absolute,[11] and the Constitutional Tribunal's rulings allow for differentiation between similar entities when relevant and proportionate arguments dictate it, those related to other principles, values or constitutional norms that support the different

[7] See also: Szewczyk 2019.

[8] Ruling of the Constitutional Tribunal of 18 February 2014, ref. no. U 2/12, OTK ZU 2A/2014, item 12; judgment of the Constitutional Tribunal of 9 March 1988, ref. no. U 7/87, OTK ZU 1988, item 1.

[9] See also: Garlicki and Zubik 2016; Deryng 2014; Safjan and Bosek 2016.

[10] Judgment of the General Court of 27 April 2022, Robert Roos and Others v European Parliament, Joined Cases T-710/21, T-722/21 and T-723/21, https://curia.europa.eu/juris/document/document.jsf?text=&docid=258344&pageIndex=0&doclang=pl&mode=lst&dir=&occ=first&part=1&cid=2675120 [accessed: 29.08.2024]; judgment of the Court of 5 July 2017, Werner Fries v Lufthansa CityLine GmbH, Case C-190/16, https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX%3A62016CJ0190&qid=1724945629279 [accessed: 29.08.2024].

[11] See also: Banaszak 2012.

treatment of similar entities.[12] "Equality before the law is also the legitimacy of choosing a particular criterion for differentiating legal entities."[13]

The constitutional understanding of the principle of equality plays a role in identifying the principle of equal access to public knowledge. As indicated earlier, this principle is included in the catalog of implicit principles. Justification for this identification should be sought in the location of this principle. It is derived from the content of Article 2(1) UDIP, which, in the first place (primarily), determines the scope of entities authorised to apply for public information. Thus, he creates yet another principle of a subjective nature, namely the rule of subjective universality. In any case, however, the fact that they belong to a group of principles that do not result directly from regulations that are not directly visible does not make them worse in kind, less essential, or secondary. These principles, and among them the principle of equal access to public knowledge, are of dominant importance in shaping the situation of an entity expressing the desire to obtain specific public information and taking particular steps towards realising its aspirations. This is even though the part of the provision that refers to the principle of equality has not been developed in terms of content. Article 2(1) UDIP indicates that everyone has [the same – points out K.T.] the right to access public information. At this point, the keyword is everyone because everyone has a specific right to which the administrative law doctrine assigns the name of public subjective right.

In the face of the commonly suggested understanding that equal means identical, one may be tempted to say that it is a kind of analogy in treating entities seeking access to public knowledge. Accordingly, all subjects should be treated equally – without any distinction, regardless of the unique features that differentiate them, such as young or old, sick or healthy, poor or wealthy, modest or effusive, guilty or innocent [Perelman 1959, 22-23, 31; Łazarska 2012]. However, M. Błachut rightly notes that: "analysing the various semantic contexts of the concept of equality, the use of equality as identity is of little use and impossible to implement in the legal sense" [Błachut 2005, 79-82; Sierpowska 2012; Kmieciak 1988, 57]. In law, this kind of value should instead be identified through the prism of similarity or proportionality since sameness implies conformity as to all characteristics, and equality only adequacy as to one or several of them [Błachut 2005, 79-82; Sierpowska 2012; Kmieciak 1988, 57; Sadurski 1978, 52; Steinborn 2004, 22]. Therefore, it should be assumed that everyone has the same rights, and the principle of equal access to public knowledge is about guaranteeing: the legal

[12] See the judgement of the Constitutional Tribunal of 3 September 1996, ref. no. K 10/96, OTK ZU 4/1996, item 33, see also Szewczyk 2019; Płoszka 2019.

[13] Judgment of the Constitutional Tribunal of 28 November 1995, ref. no. K17/95, OTK ZU 1995, item 37.

possibility of exercising the right of access on equal terms for all entities included in the concept of everyone and equal treatment of all persons seeking information by entities subject to an information obligation (entities referred to in Article 4 UDIP). M. Mazur defines this state of affairs as equal access to public information [Mazur 2015].

Since the principle of equal access to public knowledge in its understanding is based on the constitutional interpretation of the idea of equality, individuals (entities) interested in obtaining public information should feel confident that the procedure related to providing them with the relevant information will be based on the same rules, without any discriminatory or favouring conduct. Since everyone has a guaranteed right to access public information, an individual should not be afraid that age, gender, profession, wealth, education and other similar elements concerning them will make it difficult to obtain public information. Confirmation of the principle of equality, or in other words, one of the means to implement its existence, is the deformalization of the access procedure so that no one feels afraid of deciding to reach for public information. This is also to be achieved by the freedom of choice of means using which an individual can exercise his right of access to public knowledge, resulting from the principle of alternative [Bernaczyk 2008, 122]. An individual deciding to apply for public information does not have to worry about the fact that he is not able to formulate the application, that he is not able to prepare it properly, or that he does not know what should be included in it. The legislator has not provided formal requirements for applying for public information. However, the doctrine indicates that for purely practical reasons, it is essential that the application is precise and detailed enough to be able to read the intention of the interested party and to determine how the information is to be made available. The application does not have to contain the applicant's data, does not require justification and does not need to be signed [Sitniewski 2011, 160-61]. However, there must be opportunities to provide the expected information (e.g. only an e-mail address or a correspondence address). The totality of all these elements is to mobilise potential interested parties so that everyone, more or less educated, more or less wealthy, with a solid or weak personality, feels that he has the same opportunities to assert his rights and the same chances of obtaining the expected information. This, of course, also works the other way around; for example, entities interested in information cannot expect that the use of a request for access to public information form voluntarily developed by an entity obliged to provide information and made public will lead to a faster consideration of the submitted request – to consider it in the first place before others [ibid., 51ff]. In addition, they cannot count on the fact that using the form will result in a favourable resolution of the case *ex officio*.

Another example where compliance with the principle of equal access to public knowledge is evident (or at least should be) is the guarantee of participation in the meeting of popularly elected collegiate bodies (Article 3 UDIP). According to the regulation mentioned above and additionally, in connection with the content of Article 7 UDIP, those willing to participate in these meetings should be able to count on passive participation even in the event of increased interest and disproportionate premises and technical conditions of the entity organising the meeting. To ensure equal access and, at the same time, to protect against allegations of discrimination, this body must create objective criteria based on which it will consider the reported willingness to participate in the meeting. However, it is essential to develop evaluation measures in advance and make them public using methods that are intended to ensure the possibility of reaching all members of a given community – e.g. the local community (commune, district, voivodeship) [Kędzierska and Kotarba 2016, 163]. As indicated in the doctrine, access to meetings specified in Article 7 UDIP is not equivalent to a guarantee of participation in each meeting; however, the lack of appropriate accommodation or technical facilities may not lead to unequal treatment of the interested parties and admission to participate, for example, of persons from the immediate environment of the authority, known to the authority or favourable to it. This would undoubtedly lead to preferential treatment of the so-called chosen ones while at the same time discriminating against others and violating the principle of equal access to public knowledge. An auxiliary element in this situation is organised audiovisual and ICT transmissions, referred to in Article 18(3) UDIP. Their organisation is to respond to possible difficulties in guaranteeing participation in the meeting to anyone interested.

## 2. GENERAL CHARACTERISTICS AND SIGNIFICANCE OF THE PRINCIPLE OF PRIORITY OF THE NON-APPLICATION PROCEDURE

Under Article 10(1) UDIP, public information not made available in the Public Information Bulletin (hereinafter referred to as BIP) or the data portal is made available upon request. Thus, making information available does not always have to come down to providing specific data to the interested party but can also be based on creating real opportunities for independent access to public information [Baran and Południak-Gierz 2017]. Although the regulation's wording emphasises the request mode, the provision also refers to the non-requesting mode. Moreover, it uses two instruments to implement the right of access (the bulletin and the portal), which makes it a priority mode. It is no coincidence that concerning this provision, in the case law, one can find a term indicating a negative clause

of requesting access to information [Stefanicki 2004, 104],[14] and in the doctrine, there is a distinction between the principle of the priority of the non-requesting procedure, where reference in the first place to the bulletin creates grounds for claiming that it is an essential means of informing about public matters. E. Natanek-Gudowska and G. Kuca rightly point out that the legislator's introduction of a solution consisting of placing public information in the Public Information Bulletin or portal was a reasonable action [Gudowska-Natanek and Kuca 2024] positively affecting both sides of the disclosure process. Undoubtedly, this regulation has a double servile function, benefiting both entities obliged to provide information and the interested parties themselves. It has a positive effect on the situation of the entities providing the information because it reduces the unnecessary effort of the obligated party that would have to take each time the same information is made available to different interested parties. This principle leads to the exemption of obliged entities from their obligation to provide information upon request when the information is contained in BIP or a data portal.[15] This leads to time savings, reduced financial resources, and material outlays that would have to be used or incurred for each individual examination of the application and providing a response [Kędzierska 2015, 6]. The providing entity does not have to re-engage in searching for the expected information and its transmission if this information is already on the BIP website or in the data portal. Therefore, it is impossible to effectively obtain information in the application mode if the information covered by the content of the inquiry has already been made public using a legally defined publisher. Significantly, however, the entity obliged to provide information cannot refer the interested party to any website where the requested information is located but to the BIP website or data portal; moreover, in the case of BIP, it cannot be any page of the bulletin, but specifically the one run by it. An obliged entity may not invoke the fact that information has been made public in the Public Information Bulletin if the information contained there has not been made available by it. Approaching in detail the issue of the correct implementation of the request of the entity interested in information in the face of the rule of non-requestable disclosure of public information, it should also be pointed out that simply referring the interested party to the 'own' BIP website will not always be sufficient. This reference

[14] See the judgment of the Voivodship Administrative Court in Poznań of 10 August 2023, ref. no. II SAB/Po 76/23, https://orzeczenia.nsa.gov.pl/doc/18A90A06F3 [accessed: 22.08.2024], the judgment of the Voivodship Administrative Court in Olsztyn of 5 October 2023, ref. no. II SAB/Ol 65/23, https://orzeczenia.nsa.gov.pl/doc/255A47064B [accessed: 23.08.2024].

[15] See also judgment of the Voivodship Administrative Court in Gdańsk of 1 December 2005, ref. no. II SA/ Gd 436/05, https://orzeczenia.nsa.gov.pl/doc/2E4FEA63CD [accessed: 30.08.2024]; compare: judgment of the Supreme Administrative Court of 8 March 2024, ref. no. III OSK 58/22, https://orzeczenia.nsa.gov.pl/doc/067F405E9B [accessed: 23.08.2024].

requires a precise indication of where the information is located. In addition to the address of the bulletin, the referral also requires a specific tab or subpage – the access path.[16] Additionally, the information found there (in the Public Information Bulletin) must relate to the essence of the request, directly and specifically satisfy the information interest, and contain facts that are particularly important from the inquirer's point of view.[17] The point is not for the entity to find various data on the website, based on which it will create the expected (in fact processed) information. Still, it is to reach specific – simple information covered by its original interest.

Failure to include information in the Public Information Bulletin or the data portal is a prerequisite for applying for the requested information [Gudowska-Natanek and Kuca 2024],[18] but the publication planning itself does not act as a brake or excuse for the failure to comply with the information obligation.[19] If the document requested by the applicant for access under the UDIP procedure has not yet been included in the bulletin but has only just been sent for publication, it cannot be considered that the applicant has been appropriately informed.[20] Since the legislator has set 14 days as the basic deadline for the implementation of the information obligation, it cannot be required that the interested party wait patiently until the document is finally placed on the bulletin website. Such a procedure does not properly handle the request of the person concerned. It is also worth noting that making public information available in BIP also exempts the obliged entity from the obligation to confirm its existence in writing and to publish it in the bulletin.[21] The holder of this information is not obliged to make printouts from the BIP and deliver them to the interested applicant.[22]

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16 See judgment of the Voivodship Administrative Court in Olsztyn of 5 October 2023, ref. no. II SAB/ Ol 65/23, https://orzeczenia.nsa.gov.pl/doc/255A47064B [accessed: 23.08.2024].

17 Ibid. and see judgment of the Voivodship Administrative Court in Białystok of 27 March 2008, ref. no. II SAB/Bk 7/08, https://orzeczenia.nsa.gov.pl/doc/C1AC518E0C [accessed: 22.08.2024]; judgment of the Voivodship Administrative Court in Bydgoszcz of 22 August 2017, ref. no. II SAB/Bd 6/17, https://orzeczenia.nsa.gov.pl/doc/B5CFBF03BA [accessed: 22.08.2024]; judgment of the Voivodship Administrative Court in Wrocław of 9 November 2023, ref. no. IV SAB/Wr 263/23, https://orzeczenia.nsa.gov.pl/doc/98030C3860 [accessed: 22.08.2024], see also Bidziński, Chmaj, and Szustakiewicz 2023].

18 Judgment of the Supreme Administrative Court of 11 July 2023, ref. no. III OSK 979/22, https://orzeczenia.nsa.gov.pl/doc/4BD2DDA322 [accessed: 22.08.2024].

19 Judgment of the Supreme Administrative Court of 7 April 2022, ref. no. III OSK 4394/21, https://orzeczenia.nsa.gov.pl/doc/3E6168DF13 [accessed: 30.08.2024].

20 Ibidem; compare: Supreme Administrative Court judgment of 17 June 2011, ref. no. I OSK 462/11, https://orzeczenia.nsa.gov.pl/doc/C47E066152 [accessed: 30.08.2024].

21 Judgment of the Supreme Administrative Court of 11 July 2023, ref. no. III OSK 979/22, https://orzeczenia.nsa.gov.pl/doc/4BD2DDA322 [accessed: 22.08.2024].

22 Ibid.

Although the wording of Article 10(1) UDIP may suggest a restriction of the principle of alternativeness and, thus, a limitation of the freedom of conduct of the interested party in the procedure, the negative effect of the regulation is only apparent. Individuals may choose between various legally guaranteed methods of obtaining public information (see: Articles 3 and 7 UDIP). Thus, establishing the principle of priority in the non-application procedure strikes at the legally guaranteed freedom of choice of means and forms by which the information is available. However, this does not result in a real limitation of the sharing process, and one may even be tempted to say that in certain situations, it works beneficially. Since the information has been previously placed in BIP and appears there continuously,[23] the unit can immediately (saving time) satisfy its interest in terms of information. They can do it without leaving home, from anywhere in the world, provided they have access to the Internet and an appropriate device (computer, phone, etc.), and they can use their skills to navigate the Internet. Thanks to the provision of public information without a request, the individual is not forced to manifest their interest by performing a conventional, legally important activity, which is the submission of a request to an entity obliged to provide information [Bernaczyk 2008, 122; Piskorz-Ryń and Sakowska-Baryła 2023].

## 3. THE RELATIONSHIP BETWEEN THE PRINCIPLE OF EQUAL ACCESS TO PUBLIC KNOWLEDGE AND THE PRINCIPLE OF PRIORITY OF THE NON-APPLICATION PROCEDURE

According to Article 8 UDIP, an official ICT publication – the Public Information Bulletin – was created to make public information available to the public in the form of a unified system of pages in the ICT network. "The Public Information Bulletin was created to make public information available to the public in electronic form free of charge."[24] It is difficult to fully agree with the statement in the doctrine, according to which the introduction of the obligation to publish information in the Public Information Bulletin has a disciplinary effect on the obligated [Gudowska-Natanek and Kuca 2024]. Not all public information is subject to mandatory inclusion in BIP, but only the data referred to in principle in Article 6

[23] See para. 20(1) of the Regulation of 18 January 2007 on the Public Information Bulletin (Journal of Laws No. 10, item 68), see also the judgment of the Voivodship Administrative Court in Wrocław of 2 June 2010, ref. no. IV SAB/Wr 15/10, https://orzeczenia.nsa.gov.pl/doc/B662A387C0 [accessed: 30.08.2024].

[24] Judgment of the Supreme Administrative Court of 11 July 2023, ref. no. III OSK 979/22, https://orzeczenia.nsa.gov.pl/doc/4BD2DDA322 [accessed: 30.08.2024].

UDIP,[25] information on the methods of making public information available in possession and not made available in the bulletin, and information clearly indicated in specific provisions. In addition, it should not be forgotten that not including a particular piece of information in BIP is not subject to appeal to the administrative court. The interested party also does not have standing to file a complaint in ascertaining the failure to maintain or improper maintenance of BIP websites by an entity obliged to provide information referred to in Article 4 UDIP.[26] This is due to the content of Article 10 UDIP, according to which the interested entity is not deprived of the possibility of obtaining information if it has not been made available in BIP. It can assert its constitutional right by applying for the same information in the application procedure.

In its assumption, publishing information using the so-called non-application methods, particularly with BIP, is intended to equalise opportunities for all individuals in society. The universality confirms this and is free of charge for publication. One may be tempted to say that thanks to the publication of information in BIP, it is possible to implement other procedural rules, e.g. the rule of speed or free of charge. Moreover, in the case of this type of request for information, the obliged entity does not verify because it is not able to verify the age of the person concerned, his citizenship, legal capacity and other elements relating to his physical or mental personality, as well as his economic situation.[27] This leads to the conclusion that the publication of information as part of the so-called request-free provision of public knowledge is the instrument using which the principle of equality in access to public information is most fully implemented, and thus, the statutory assumption that everyone has the right to access public information is most fully expressed. At this point, however, it is worth asking ourselves whether this is always true. Does everyone everywhere and everyone have the right to access public knowledge? Concerning the relationship between the principle of equal access and the principle of priority of the application procedure, it cannot be unequivocally stated that they always conform to each other. This is despite their equal nature as rules ordering the same procedure – the access procedure. Compliance with the principle of priority of non-application procedures does not serve the principle of equality in all circumstances. What about people who are defined as electronically

[25] This does not apply to the content of administrative and other similar acts, court rulings and positions on public issues.

[26] Decision of the Voivodship Administrative Court in Poznań of 21 September 2010, ref. no. IV SA/Po 776/10, https://orzeczenia.nsa.gov.pl/doc/5491A03D8B [accessed: 30.08.2024], compare: decision of the Supreme Administrative Court of 21 December 2005, ref. no. I OSK 1210/05, https://orzeczenia.nsa.gov.pl/doc/2DBA675E93 [accessed: 30.08.2024].

[27] See also: Bidziński, Chmaj, and Szustakiewicz 2023.

restricted[28]? What about people serving their sentences in isolation or detention centres? Can we say that they have equal opportunities to obtain information? Do they have the same possibilities of obtaining information placed in BIP? Giving a positive answer is all the more difficult if we also take into account the fact that such methods of access as access to meetings of collegiate bodies and the display or display of information in generally accessible places, as well as the use of devices installed in publicly frequented places, are by their very nature not (because they cannot be) accessible to persons deprived of their liberty [Mazur 2016]. The answers to all these questions cannot be affirmative because the legislator, when creating the principle of the priority of the non-application procedure (with a view to the benefits that it may bring to the interested parties themselves), did not foresee exceptional situations in which specific individuals *in facto* are deprived of the possibility of obtaining information contrary to the omnipresent principle of equality.[29] The lack of regulations in this respect results in the arbitrariness of the behaviour of obliged entities, which only may, but do not have to, meet the information expectations at their discretion. Despite the general publication of the data, they can show their goodwill and, as a result, make the information available again at the interested party's request. However, it is by no means their obligation. In this case, it would be incorrect to say everyone has an equal chance and can expect equal treatment.

First, it is worth referring to those mentioned above who do not have specific competencies in using computer equipment or the ability to search for information in the electronic space. Of course, one can agree with the statement that access to websites is common today [Gudowska-Natanek and Kuca 2024], but this does not mean that everyone has real opportunities to find out what is on these websites, what has been made public. This is mainly about people over 60 years of age who were not born in the times of the Internet; their teaching did not include computer science, and they could not count on having a computer because, in the times of their youth, this type of equipment was the good of the so-called elites. While the lack of appropriate equipment with Internet access in modern times does not have to be a problem because the legislator itself in Article 11(2) UDIP provides for the admissibility of installing devices in generally accessible places, enabling public information, this method of making public under the UDIP regulations is supplementary (and not obligatory, as BIP).[30] Thus, the assertion that nothing can prevent the obliged entity from making a computer available to the

[28] See more on the subject of digitally excluded people: Wensierska 2024.

[29] S. Szczepaniak points out that the regulations on making information available in the BIP are relatively modest regarding the procedural effects of making information available in this mode [Szczepaniak 2022, 237].

[30] See also: Zaremba 2009, 181.

interested party in a publicly accessible place is not valid [ibid.]. Such admissibility does not prevent inequalities in the said accessibility. This is because the entity may, but does not have to make this, because the legislator has not created this type of obligation [ibid.]. It all depends on goodwill and the free discretion of the provider. The lack of appropriate regulations for the obligatory conduct of the entity obliged to provide information is a significant limitation of access to information and, thus, of the principle of equality.

It is difficult to agree with the position that people who do not have specific skills (the elderly or the infirm) must be distinguished from people who do not have the appropriate equipment. According to M. Mazur, people who do not have specific equipment do not constitute a digitally excluded group [Mazur 2016]. On the contrary, thanks to the methods of sharing referred to in Article 11 UDIP, they have increased opportunities to obtain the information they are interested in [ibid.]. However, what is essential in modern realities is that not having specific equipment must be dictated by the lack of financial resources. Although it arouses extreme emotions, Polish society is still full of people and even entire families who lack the necessities of life (necessary for an everyday existence), not to mention having specific equipment with Internet access. Therefore, it is in vain to expect people who do not have particular equipment and have not had it before that they will be able to operate it on their own, even if such equipment is provided or rented to them. Their situation is not subject to differentiation. Obtaining information in their case is as problematic as in the case of the elderly or infirm. In both cases, we can speak of digital exclusion, although not intellectual, but physical.

At this point, the arguments according to which people who do not have equipment or knowledge about "navigating" the Internet can freely use the help of others, the help of people in their immediate environment, i.e. children, grandchildren, are not convincing here. Apart from the fact that not every such person has relatives (they are lonely) or has such people but does not necessarily live with them or visit them, asking for help requires one side to ask for assistance and a positive attitude on the part of the other side (which is not always possible). In this case, it is necessary to have appropriate commitment and, above all, patience in passing on knowledge to older people, whose understanding of "technological innovations" does not necessarily (not in every case) have to be at a sufficiently high level. All of the statements indicate that goodwill is also needed in this case, which puts the digitally excluded categories in a difficult position. It cannot be considered that they fall within the statutory concept of anyone with the right of access. Although they are legally entitled to it, they have limited chances of obtaining it if a specific piece of information has been made available in BIP and the obliged entity does not provide for an exception to compliance with the principle of priority of the non-application procedure.

These persons are effectively deprived of the right to public information due to an irrelevant feature, such as the lack of ability to use Internet resources [Kłaczyński and Szuster 2003]. The content of Article 10 UDIP does not prohibit making available to the interested party the requested information, which has previously been made public in the BIP, especially when the person, for some personal reasons, may have difficulties or limited possibilities of using the Internet [Kamińska and Rozbicka-Ostrowska 2016, 253ff]. Still, it remains within the sphere of the rights and not obligations of the addressee of the request [ibid.]. M. Kłaczyński and S. Szuster rightly point out, stressing that solutions consisting of making information available via the Internet, however modern, relatively common or inexpensive, may lead to a violation of the principle of equal access to public knowledge [Kłaczyński and Szuster 2003].

People serving an isolation sentence in a penitentiary facility are in a slightly better position. This claim is based on specific regulations that make the situation of persons deprived of their liberty more favourable, at least from the point of view of the applicable law. As emphasised in the judicature, these entities have not been systemically deprived of the possibility of obtaining public information,[31] on the contrary, there are appropriate regulations that constitute a "gate" for interested parties to reach for information made available in BIP. In this case, it is not about the rules of the UDIP but about the provisions of the Act of 6 June 1997 – the Executive Penal Code.[32] From the very beginning of KKW, the legislator indicates that the convicted person retains civil rights and freedoms, and their limitation may only result from the law and the final judgment issued on its basis (Article 4(2) KKW). The provisions of the UDIP do not prohibit inmates from accessing public information, nor does the KKW. However, it is assumed that persons whose freedom has been "restricted" due to committing a prohibited act must expect (must be aware) some limitation of their freedoms and rights. Although, this does not deprive these persons of their right to obtain public information.[33] Their opportunities to get information are, nevertheless, different from those who are not serving a custodial sentence.[34] In one of the judgments, the Supreme Administrative Court pointed

[31] Judgment of the Supreme Administrative Court of 21 June 2012, ref. no. I OSK 730/12, https://orzeczenia.nsa.gov.pl/doc/28F125EA27 [accessed: 27.06.2024].

[32] Journal of Laws of 2024, item 706 [hereinafter: KKW].

[33] Although the access to public information of persons incarcerated in prisons is not unlimited, the applicable legal provisions do not deprive this access in an absolute manner and serving a sentence in isolation conditions cannot lead to the exclusion of the application of Article 10(1) UDIP (the principle of priority of the non-request mode), see judgment of the Supreme Administrative Court of 21 April 2017, ref. no. I OSK 1850/15, https://orzeczenia.nsa.gov.pl/doc/585BB2A5A6 [accessed: 27.08.2024].

[34] Ibid.; The use of the so-called other means of communication by prisoners is confirmed,

out that the catalogue of rights to which an inmate is entitled is not exhaustive, so despite the lack of an explicit reference to access to the Internet, a person sentenced to stay in prison may assert his or her rights on general principles provided for in the Executive Penal Code.[35] Due to the circumstances in which the inmate is located, access to the Internet cannot be universal. Still, since the inmate has access to radio and television legally guaranteed in Article 102 KKW, it is worth asking whether this catalogue could not be extended to include controlled access to the Internet (access to selected websites), which in reality of the 21st century seems to be a standard.

Under Article 110a KKW, the director of the penitentiary may consent to the possession of electronic and electronic equipment by an inmate in a cell if the possession of these items does not violate the rules of order and safety that are in force in the penitentiary facility. Although the way Article 110a(4) KKW does not make it explicit, the law does not entirely exclude the possibility of having access to the Internet but creates a kind of condition. The possession of this type of communication must not threaten order or safety in the prison or the safety of the people in it. This is not equivalent to a general ban on the use of the Internet by inmates but makes the exercise of this right dependent on the decision of the director of the prison, who, when deciding on the fulfilment of the required security condition, issues a positive or negative decision on the possession of equipment and access to the Internet for the personal needs of the convict. In this, the better position of individuals is revealed, although it is only imaginary. The lack of an absolute ban on the possession of a device and a means of communication does not make it easier to obtain specific public information, as it depends on the goodwill of the prison administration. As it is accepted in the case law, the fact that the person concerned is in prison and, therefore, does not have free access to the Internet is legally irrelevant.[36] It cannot result in a finding of violation of Article 2(1) UDIP.[37]

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a.o. in Article 90(9) KKW, Article 91(11) KKW, Article 92(14) KKW, Article 115(8a) KKW, Article 105(1) and (3) and (4) KKW, Article 105c(1) KKW. Confirmation for the use of means of communication by convicts is also provided by the content of Article 223a KKW.

[35] Judgment of the Supreme Administrative Court of 21 June 2012, ref. no. I OSK 730/12, https://orzeczenia.nsa.gov.pl/doc/28F125EA27 [accessed: 27.06.2024]; judgment of the Voivodship Administrative Court in Warszawa of 15 October 2013, ref. no. II SAB/Wa 158/13, https://orzeczenia.nsa.gov.pl/doc/EF89FA5248 [accessed: 30.08.2024]; see Article 6(2) KKW, Article 102(10) KKW, Article 102 KKW, and see considerations concerning the convicted person's means of asserting his or her rights [Mazur 2015].

[36] Judgment of the Supreme Administrative Court of 11 July 2023, ref. no. III OSK 979/22, https://orzeczenia.nsa.gov.pl/doc/4BD2DDA322 [accessed: 27.08.2024], see also judgment of the Supreme Administrative Court of 21 June 2012, ref. no. I OSK 730/12, https://orzeczenia.nsa.gov.pl/doc/28F125EA27 [accessed: 27.06.2024].

[37] Ibid.

The argument that a person serving a sentence in solitary confinement should take into account the fact that, due to their location, cannot count on a full guarantee of the exercise of their rights, as is the case with an average citizen, that "he or she should take into account the restrictions on his or her freedoms and rights, which are an indispensable element of the execution of a sentence in solitary confinement conditions, is not convincing."[38] In addition, one should not forget about the content of Article 110b(1) KKW, according to which even if the consent to possess the equipment is granted, the convict in the cell is obliged to pay a flat-rate monthly fee in connection with the use of this equipment. Although due to its low value, it is difficult to find in this case a significant limitation in the availability of information published without a request, it should not be forgotten that it is not about paying the fee under standard conditions – i.e. by a usually working and earning individual.[39] Theoretically, therefore, this type of fee may be considered a kind of limiting factor, as well as the system of disciplinary penalties provided for in the KKW, among which the deprivation of the inmate of the possibility of using audiovisual and computer equipment plays an important role (Article 143(3) point 2 KKW).

At a disadvantage (as M. Mazur rightly points out) are persons subject to an isolationist preventive measure, namely those in pre-trial detention [Mazur 2015]. This is particularly puzzling and incomprehensible because these people are in an extraordinary situation – their guilt has not yet been proven. Yet, they have fewer opportunities to obtain public information. Regardless of the content of Article 214(1) KKW, according to which a pre-trial detainee enjoys at least the same rights as a convict serving a prison sentence in the ordinary system in a closed type of prison, the legislator provides for appropriate restrictions – certain kinds of exceptions (Article 209 KKW). Under Article 216(1) KKW, these units may not have means of communication, technical devices used to record and reproduce information, computer equipment, and, apart from the deposit, objects and documents that may hinder the proper course of criminal proceedings. The content of the regulation creates an absolute prohibition that cannot be repealed by an order of the director of a penitentiary facility with the appropriate content based on Article 216(3) KKW [Lachowski 2021], under which the authority at whose disposal the detainee remains may limit or determine how the detainee may exercise their rights. It is also important to note that, as is evident from Article 217c(1) KKW, a pretrial detainee may not use any

[38] Judgment of the Supreme Administrative Court of 30 May 2012, ref. no. I OSK 481/12, https://orzeczenia.nsa.gov.pl/doc/DC387CA8AE [accessed: 27.08.2024].

[39] See Regulation of the Minister of Justice of 9 December 2022 on the amount of the flat monthly fee related to the use of additional electronic or electrical equipment in a residential cell, Journal of Laws item 2623.

means of communication other than the prison telephone. This regulation imposes an absolute ban on the director of a penitentiary facility on creating opportunities for pre-trial detainees to use means of communication, such as access to the Internet [Mazur 2015]. This undoubtedly prevents them from searching for information on their own in BIP or the data portal using devices and communication systems at the disposal of the penitentiary facility.

## CONLUSIONS

The presented considerations show that the statutory assumption that everyone has the right to access public knowledge in many situations may constitute a theory unsupported by reality (desired and expected). The content of Article 10 UDIP is binding and does not provide for any exceptions in the manner in which public information is made available.[40] Information previously made available in the BIP or the data portal is not subject to re-access upon request. As it was assumed at the stage of drafting the regulation, since the publication of information in BIP is universal and free of charge, everyone has the opportunity to obtain public information using this type of access path, referred to as modern and perspective [Aleksandrowicz 2004, 209-10]. This means everyone applying for information in BIP or the data portal will be treated similarly regardless of the real possibilities of reaching for it. Considering the constitutional understanding of the principle of equality, identical treatment of persons in a particular life situation may, in extraordinary circumstances, lead to a violation of equal access to public information (as referred to in Article 2 UDIP). While in the case of persons deprived of liberty (except pre-trial detainees), the legislator provides for legal solutions that are to counterbalance the obstruction in obtaining public information made available electronically, in the case of digitally limited persons, it is impossible to find a regulation that even seemingly tries to "protect them". This state of affairs is unacceptable, as these people often suffer adverse effects from not keeping up with technological progress through no fault of their own. This leads to their detriment. They cannot obtain public information on their own without the help of others, and the law does not guarantee them the possibility of receiving it through an application. Their identical treatment as any other individual cannot mean compliance with the principle of equal access to public knowledge since the constitutional principle of equality provides for the admissibility of differentiation. Legal regulation of exceptions to the principle of priority of the non-application procedure concerning persons who, for various

[40] Judgment of the Supreme Administrative Court of 21 June 2012, ref. no. I OSK 730/12, https://orzeczenia.nsa.gov.pl/doc/28F125EA27 [accessed: 27.06.2024].

objective reasons (partially or wholly through no fault of their own), are not able to obtain information in any other way than in the application mode would lead to achieving and maintaining a real, and not only legal, balance in the process of making public knowledge available. The fact that people do not have access to the Internet or are unable to use this accessibility, or have the deprivation of personal liberty should not lead to a violation of social balance by depriving certain groups of individuals of the possibility of obtaining public information. From the point of view of the interested parties, it is not only about legally guaranteed equality in the light of the applicable law but about factual equality allowing obtaining the same, on the same terms, as would be possible to obtain if they were not in a particular situation, in extraordinary circumstances.[41] It is worth noting here the statement of A. Zalasiński that: equal treatment is maintained when the differences in treatment are proportional to the degree of actual inequality [Zalasiński 2014, 314].

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[41] See on the subject of factual equality: Haczkowska 2014.

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