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RIGHT TO INFORMATION: LEGAL POSITIONS OF THE CONSTITUTIONAL COURT OF UKRAINE

Kudriavtseva O.M.,

Candidate of Law Sciences, Associate Professor,

Department of Constitutional Law,

Taras Shevchenko National University of Kyiv

ORCID: 0000-0002-5875-9146

e-mail: o.m.kudriavtseva@gmail.com

Kudriavtseva O.M. Right to information: legal positions of the Constitutional Court of Ukraine.

The article reveals the legal positions of the Constitutional Court of Ukraine regarding everyone's right to information. Attention is focused on information that is collected by state authorities, local self-government bodies, institutions and organizations, and which is not a state or other secret protected by the Law of Ukraine «On Information» and which every person has the right to familiarize himself with. Separate attention is focused on confidential information (information with limited access). One of the types of confidential information is medical information, which, on the one hand, in special cases provided for by the Fundamentals of the Health Care Legislation of Ukraine, can be disclosed to family members or a legal representative of the patient, and on the other hand, in accordance with the decision of the European Court of Human Rights person in the case of «M.K. against Ukraine» confirmation by a doctor of a patient's illness to a member of his family, even if he learned about it from the patient himself, is an interference by the state in a person's right to private life, and in the case of infectious diseases, it is qualified as not carried out «in accordance with the law». Attention is focused on the fact that such situations arise more and more when military personnel undergo medical examinations and that there are prohibitive norms of a special law that forbid the disclosure of medical information regarding a certain list of diseases of a military personnel to his employer (military unit), commander, family members of the military personnel.

Regarding the confidentiality of information and about a person who holds a position related to the performance of the functions of the state, local self-government bodies, and about members of his family, the legal positions of the Constitutional Court of Ukraine are established: absolutely in each specific case it is determined whether information about a person belongs to confidential; there are guarantees of protection of the rights of the above-mentioned persons, and additional legal burdens, and therefore the state is called upon to ensure a balance of public and private interest.

The article also draws attention to the fact that even under martial law conditions, control (direct; indirect) by institutions of public power is prohibited both in terms of content and dissemination of information, even if the state pursues such a goal as protecting the information space from what is considered harmful by the state information that is not necessary for society. The practice of the Constitutional Court of Ukraine on this issue is established. Attention is focused on the fact that censorship cannot be used in Ukraine to protect the information field of the state even in war conditions - it is prohibited in part 3 of Art. 15 of the Constitution of Ukraine.

Key words: human rights, public authority institute, right to information, confidential information, medical information, information about a person, right to private life, state, civil servant, interference with the right to information, censorship, information security.

Кудрявцева О.М. Право на інформацію: правові позиції Конституційного Суду України.

В статті виявлено правові позиції Конституційного Суду України щодо права кожного на інформацію. Акцентується увага на відомостях, які зібрані органами державної влади, органами місцевого самоврядування, в установах і організаціях, і які не є державною чи іншою захищеною Законом України «Про інформацію» таємницею та з якими кожна особа має право знайомитись

щодо себе. Окремо фокусується увага на конфіденційній інформації (інформації з обмеженим доступом). Одним з видів конфіденційної інформації є медична інформація, яка з одного боку в особливих випадках, передбачених Основами законодавства України про охорону здоров'я, може бути розголошена членам сім'ї чи законному представнику пацієнта, а з другого боку відповідно до рішення Європейського суду з прав людини у справі «М.К. проти України» підтвердження лікарем того або іншого захворювання пацієнта члену його сім'ї навіть якщо він дізнався про нього від самого пацієнта – є втручанням держави у право особи на приватне життя і у випадку якщо йдеться про інфекційні захворювання кваліфікується як не здійснено «згідно із законом». Акцентується увага на тому факті, що такі ситуації виникають все більше при проходженні медичних оглядів військовослужбовцями та що є заборонні норми спеціального закону, які забороняють розголошувати медичну інформацію щодо певного переліку хвороб військовослужбовця його роботодавцю (військовій частині), командирі, членам сім'ї військовослужбовця.

Щодо конфіденційності інформації і про особу, яка займає посаду, пов'язану зі здійсненням функцій держави, органів місцевого самоврядування, і про членів її сім'ї, правові позиції Конституційний Суд України є усталеними: абсолютно в кожному конкретному випадку визначається чи належить інформація про особу до конфіденційної; існують і гарантії захисту прав вище згаданих осіб, і додаткові правові обтяження, а тому держава покликана забезпечити баланс публічного та приватного інтересу.

Також в статті акцентується увага на тому, що навіть в умовах воєнного стану забороняється контроль (безпосередній; опосередкований) з боку інститутів публічної влади і за змістом, і за розповсюдженням інформації навіть якщо держава переслідує таку мету, як захист інформаційного простору від шкідливої на думку держави чи не потрібної для суспільства інформації. Практика Конституційного Суду України з цього питання є усталеною. Акцентується увага на тому, що в Україні для захисту інформаційного поля держави навіть в умовах війни не може застосовуватись цензура – вона заборонена ч. 3 ст. 15 Конституції України.

Ключові слова: права людини, інституту публічної влади, право на інформацію, конфіденційна інформація, медична інформація, інформація про особу, право на приватне життя, держава, державний службовець, втручання у право на інформацію, цензура, інформаційна безпека.

Formulation of the problem.

According to Art. 32 of the Constitution of Ukraine, no one can be subjected to interference in his personal and family life, except for the cases stipulated by the Constitution of Ukraine [1]. In part 2 of Art. 32 of the Constitution of Ukraine states that it is not allowed to collect, store, use and distribute confidential information about a person without his consent, except in cases specified by law, and only in the interests of national security, economic well-being and human rights [1]. Every citizen has the right to get acquainted with the information about himself in state authorities, local self-government bodies, institutions and organizations, which are not state or other secrets protected by law (Part 3, Article 32 of the Constitution of Ukraine) [1].

Russia's aggression against Ukraine has actualized the issue of disclosing medical information to family members or the patient's legal representative, because according to the Fundamentals of Ukrainian legislation on health care, there are cases when this is allowed, and since it is allowed in these cases, it is obvious that medical information about a serviceman may be disclosed to members of his family. But another Law of Ukraine – «On combating the spread of diseases caused by the human immunodeficiency virus (HIV) and legal and social protection of people living with HIV» [2] – prohibits such publicity.

In the decision of the European Court of Human Rights in the case «M.K. v. Ukraine» [3] it is stated that even a doctor's confirmation of an infectious disease of a serviceman to a member of his army is an interference of the state in the individual's right to private life, which was not carried out «in accordance with the law».

Russia's active information war against Ukraine has actualized the issue of protection of Ukraine's information field, but taking into account the fact that the norms of the Constitution of Ukraine prohibit censorship.

The evolution of society, the fight against corruption in Ukraine and other factors have actualized the issue of confidentiality of information about a person who holds a position related to the performance of functions of the state, local self-government bodies, and about family members of such a person.

The state of development of this problem.

The work of domestic scientists (V.S. Polityanskyi [4], O. Smolyak [5], O. Nesterenko [6], etc.) is devoted to the issue of the human right to information. The issue of European standards of the right to information, their impact on national legislation and the practice of its application are highlighted in the studies of Yu. Bysaga, L. Deshko [7–11]. Also, in the scientific works of Professor L. Deshko, the issues of medical information and medical confidentiality were raised, decisions of the Constitutional Court of Ukraine on health care issues were analyzed [12; 13].

The purpose of this article is to reveal the legal positions of the Constitutional Court of Ukraine regarding the right to information.

Presenting main material.

According to the Decision of the Constitutional Court of Ukraine in the case regarding the official interpretation of Articles 3, 23, 31, 47, 48 of the Law of Ukraine «On Information» and Article 12 of the Law of Ukraine «On the Prosecutor's Office» (case of K.G. Ustimenko) dated October 30, 1997 No. 5-zp/1997, part five of Article 23 of the Law of Ukraine «On Information» should be understood as meaning that every person has the right to get acquainted with the information collected about him in state authorities, local self-government bodies, institutions and organizations, if this information is not a state or other secret protected by law [15].

The right to information is not an absolute right, it can be interfered with by the state, but it must meet the following requirements: provided by law, legitimate purpose, proportionality.

In this connection, two questions arise: who is the subject that determines the order of familiarization with the collected information and keeping it secret? Another question is, is the list of personally identifiable information exhaustive?

In accordance with the Decision of the Constitutional Court of Ukraine in the case of the constitutional submission of the Zhashkiv District Council of the Cherkasy Region regarding the official interpretation of the provisions of the first and second parts of Article 32, the second and third parts of Article 34 of the Constitution of Ukraine dated January 20, 2012 No. 2-пп/2012 only a natural person, to whom the confidential information relates, has the right to freely, at his own discretion, determine the order of familiarization with it to other persons, the state and local self-government bodies, as well as the right to keep it confidential [16].

The list of personal data recognized as confidential information is not exhaustive [16]. Accordingly, it can expand.

Russia's aggression against Ukraine actualized the issue of the legal regime of medical information (of a military serviceman) and the circle of persons to whom it can be provided.

In accordance with the Fundamentals of the Legislation of Ukraine on Health Protection [17] and the Law of Ukraine «On Information» [10] evidence of a person's state of health, history of his illness, the purpose of the proposed research and treatment measures, prognosis of the possible development of the disease (medical information) according to its legal regime is confidential information. Confidentiality of information, as you know, means that this information is information with restricted access. We emphasize the fact that the doctor is obliged to provide such information in full and in an accessible form at the request of not only the patient, but also his family members or legal representatives. Article 39 of the Fundamentals of the Legislation of Ukraine on Health Care contains exceptions when a doctor can limit full medical information for a patient because it may harm the patient's health. But in this case, he provides full medical information to family members or the patient's legal representative, taking into account the patient's personal interests. This is exactly the algorithm of the doctor's actions when the patient is in an unconscious state.

That is, the general approach of the legislator regarding medical information is as follows: 1) medical information under the legal regime is confidential information; 2) medical information is provided at the request of the following group of persons: the patient, the patient's family members, the patient's legal representative; 3) complete medical information may be limited to the patient; 4) in case of restriction of complete medical information for the patient, it must be provided in its entirety to the following circle of persons: the patient's family members, the patient's legal representative.

In practice, the question arises: how to act if the patient is a military serviceman? Can medical information about a serviceman be provided to his employer (military unit), commander, or can it be confirmed by doctors to family members of a serviceman, a legal representative of a serviceman, if they learned about a particular illness of a serviceman from him or third parties?

The European Court of Human Rights considered the case of «M.K. against Ukraine» [3]. The application related to the alleged violation of the applicant's right to respect for her private life under Article 8 of the Convention in connection with the illegal testing of her for the detection of the human immunodeficiency virus in her blood during a routine medical examination in a military hospital, as well as failure to properly notify her of the results testing. She also complained about the illegal disclosure of test results to third parties, including at her place of employment [3]. In §32, the Court reiterated that personal information concerning a patient belongs to his private life. national legislation must provide appropriate guarantees to prevent the transfer or disclosure of personal health data, which may conflict with the guarantees of Article 8 of the Convention [3].

From this decision of the European Court of Human Rights it follows that, firstly, the person must be properly informed about his diagnosis.

Secondly, compared to the Basics of the national legislation of Ukraine on health care, there is also a law that is special – the Law of Ukraine «On Countering the Spread of Diseases Caused by the Human Immunodeficiency Virus (HIV), and Legal and Social Protection of People Living with OX». Its norms do not contain exceptions that would allow the disclosure of medical information about a patient, including a military serviceman, who has been confirmed to be HIV positive. This special Law is aimed at strictly prohibiting any unjustified disclosure of a person's HIV status. Even if the serviceman has given verbal consent to the disclosure of medical information, the health care institution and the doctor have no right to disclose it in any form: neither in the form of «information» nor in the form of «confirmation».

Thirdly, although disclosure to a military unit can potentially be key in the performance of military service by a serviceman (performance of combat tasks, etc.), nevertheless the Law of Ukraine «On Combating the Spread of Diseases Caused by the Human Immunodeficiency Virus (HIV), and Legal and Social Protection people living with HIV» does not provide any exception to the non-disclosure of information about military personnel, regardless of the purpose.

Other issues that were raised in the decisions of the Constitutional Court of Ukraine regarding the right to information related to the confidentiality of information about a person who holds a position related to the performance of the functions of the state or local self-government bodies, and his family members.

The Constitutional Court of Ukraine, in its decision dated January 20, 2012 No. 2-пн/2012, assumed that «...the nature of information about a natural person as confidential is determined in each specific case. The presence of a person in a position related to the performance of the functions of the state or local self-government bodies provides not only guarantees for the protection of the rights of this person, but also additional legal burdens. The public nature of both the authorities and their officials requires the publication of certain information to form public opinion about trust in the government and support of its authority in society» [16].

In another decision, the Constitutional Court of Ukraine noted that the dissemination of data about such natural persons – family members, which may become known as a result of the dissemination of information about the official himself, except for cases specified by law, may lead to a violation of their constitutional rights, harm dignity, honor, business reputation, etc. [18].

In the interests of national security, economic well-being and human rights, any information or collection of information about an identified or specifically identifiable natural person may be disseminated. In particular, these are: nationality, education, marital status, religious beliefs, state of health, financial status, address, date and place of birth, place of residence and stay, etc., data on personal property and non-property relations of this person with other persons, in particular members family, as well as information about events and phenomena that took place or are taking place in the domestic, intimate, social, professional, business and other spheres of a person's life, with the exception of data related to the exercise of powers by a person holding a position related to the performance of functions state or local self-government bodies [16].

In part 2 of Art. 32 of the Constitution of Ukraine, there are comprehensive grounds for possible legitimate interference in a person's personal and family life. In particular, they are: a person's consent to the collection, storage, use, distribution of confidential information about. If there is no consent, then such actions are possible only in cases defined by law and only in the interests of: 1) national security; 2) economic well-being; 3) human rights.

Protection of the information field of the state is no less relevant issue regarding the right to information. As is generally known in Ukraine, the norms of Art. 15 of the Constitution of Ukraine, censorship is prohibited. This means that even pursuing the goal of «protection of the information

space», control by institutions of public power over the content and distribution of information is prohibited. State authorities do not have the right to limit or prohibit the dissemination of information that they consider harmful or not necessary for society. Martial law is no exception.

Although a person's right to access information is not absolute and may be subject to restrictions, such restrictions must be exceptions provided by law, pursue one or more legitimate goals, and be necessary in a democratic society [19].

Conclusions.

1. Every person has the right to familiarize himself with information collected by state authorities, local self-government bodies, institutions and organizations, and which is not a state or other secret protected by the Law of Ukraine «On Information».

2. One of the types of confidential information is medical information, which in special cases provided for by the Fundamentals of the legislation of Ukraine on health care, may be disclosed to family members or a legal representative of the patient. An exception to this rule is a patient's positive HIV diagnosis – there is a ban on its disclosure in any form to persons other than the patient. As for military personnel, it is prohibited to disclose medical information about a military personnel's HIV-positive status to his employer (military unit), commander, and family members of the military personnel.

3. Regarding the confidentiality of information and about a person who holds a position related to the implementation of the functions of the state, local self-government bodies, and about members of his family, the legal positions of the Constitutional Court of Ukraine are established: absolutely in each specific case it is determined whether the information belongs about the person to confidential; there are guarantees of protection of the rights of the above-mentioned persons, and additional legal burdens, and therefore the state is called upon to ensure a balance of public and private interest.

4. Even in the conditions of martial law, control (direct; indirect) by institutions of public power is prohibited both on the content and on the dissemination of information, even if the state pursues such a goal as protecting the information space from information that is harmful to the state or not necessary for society. The practice of the Constitutional Court of Ukraine on this issue is established: censorship cannot be used to protect the information field of the state even in wartime.

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