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Paweł Hajduk[1]

DIVERGENCE BETWEEN AUTHORITIES ON PUBLICLY AVAILABLE SPATIAL DATA IN POLAND

Abstract: The article aims to outline the divergence between authorities on publicly available spatial data in Poland, using the example of a dispute between the Polish Data Protection Authority and the Surveyor General of Poland concerning the publication of the numbers of land and mortgage register on the Polish spatial information website Geoportal. The issues of whether the number of the land and mortgage register is personal data and grounds for processing land register numbers from the DPA's and Surveyor General's perspectives are analyzed. Then, the reasons for this conflict and, more broadly, for disputes between authorities are examined. It is hypothesized that the main reason for this dispute is that the different aims drive different authorities empowered in the regulation of processing publicly available data.

Keywords: spatial data, personal data, dispute, authorities

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[1] Cardinal Stefan Wyszyński University in Warsaw, Faculty of Law and Administration, Department of Informatics Law, Doctoral School, ORCID ID: https://orcid.org/0000-0001-5583-2267, email: p.hajduk@outlook.com

Introduction

As a result of the digital transformation, the use (processing) of personal data in all aspects of social reality has become widespread. Data is a critical concern in social, political, and economic life in this environment (Obendiek, 2022). It includes spatial information. The legislator's response at the EU and national (Polish) level is to introduce legal acts to respond to the threats posed by this new reality. The critical act is Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1-88) (GDPR).

The consequence is that situations arise where it is necessary to balance the obligations under the norms of data protection law and the implementation of statutory obligations under sectoral regulations. The problem originated in an extensive network of legal acts, the application of which is not coordinated.

The article aims to outline the divergence between authorities on publicly available spatial data in Poland, using the example of a dispute between the Polish Data Protection Authority and the Surveyor General of Poland concerning the publication of the numbers of land and mortgage register on the Polish spatial information website Geoportal. To meet this objective, it is necessary to analyze whether the land and mortgage register is personal data and grounds for processing land register numbers from the DPA's and Surveyor General's legal perspectives. Furthermore, to position this problem in a more comprehensive perspective, the article also analyzes the reasons for this conflict and disputes between authorities in general.

Considering the extensive normative grid at the EU and national levels and the complexity of the presented issue, it needs to be emphasized that this article should be treated as an introduction to the discussion on the authorities' competence in spatial data processing in the context of intersection between regulations, in particular, data protection law.

Materials and methods

The article was prepared based on the legal-dogmatic research method, using the analysis of legal acts at the level of EU and Polish law, analysis of case law, and views of legal literature.

It is necessary to make a caveat concerning the scope of conducted analysis. From a procedural perspective, the dispute between the Polish Data Protection Authority (also: DPA) and the Surveyor General of Poland is multi-layered. However, for the purposes of this article, i.e., the divergence between authorities on publicly available spatial data in Poland, the analysis is limited to two fundamental issues: whether land register numbers constitute personal data and whether there is a basis for processing land register numbers in the Polish spatial information portal. These two issues have been decided in the Polish Data Protection Authority's decision of 24 August 2022, reference DKN.5112.13.2020, and, subsequently, in the judgment of the Voivodship

Administrative Court in Warsaw of 5 May 2022, reference II SA/Wa 2222/20. Hence, the legal analysis in the article is limited to these issues.

Dispute between the Polish DPA and the Surveyor General of Poland

The Polish DPA, in the decision of 24 August 2022, reference DKN.5112.13.2020, imposed the highest possible fine (100,000 Polish zlotys) on the Surveyor General of Poland. It concluded that the Surveyor General of Poland had violated Article 5(1)(a) of the GDPR, i.e., the principle of the lawfulness of personal data processing, and Article 6(1) of the GDPR, by making personal data available on the Geoportal without a legal basis in the scope of land and building register numbers. As indicated in the decision, the scope of data disclosed in the land and mortgage register is broad and includes first names, surnames, parents' first names, the individual's PESEL identification number, and property address (following Article 25 of the Act on Land Registers and Mortgages (Journal of Laws of 2022, item 1728)). Information on this number allows feasible access to data disclosed in the register because gaining access does not require having any specified permission. Furthermore, the Polish DPA stressed the scale and severity of the threat to individuals, pointing out that making land registry numbers public allows any person to view the personal data in the land registries, which exposes a significant number of people to identity theft.

In its decision, the DPA indicated a breach of the principle of lawfulness which means that personal data was intentionally made available on Geoportal to any Internet user without a legal basis. Furthermore, the DPA argued that the scope of disclosed data covers a wide range of data, the publication of which allows for establishing detailed information about owners of properties in Poland. On the other hand, the Surveyor General of Poland argued, as a line of defense, that such a number is not personal data and that the processing was lawful because it had legal grounds in Polish Geodetic and Cartographic Law and sector-specific regulations. The arguments of both sides will be analyzed further in this article.

The Surveyor General of Poland has filed an appeal against this decision with the Voivodship Administrative Court in Warsaw. However, in the judgment of 5 May 2022, reference II SA/Wa 2222/20, the Voivodship Administrative Court in Warsaw upheld the decision of the Polish Data Protection Authority and endorsed the reasoning presented in the decision.

For the broad procedural context of this case, the Polish Data Protection Authority issued yet another decision of 6 July 2022, reference DKN.5131.27.2022, where it found a violation by the General Surveyor of Poland of provisions related to the failure to report a personal data breach (Article 33(1) of the GDPR) and on the failure to notify data subjects of a personal data breach without undue delay (Article 34(1) of the GDPR).

Additionally, the Surveyor General of Poland was fined for the highest maximum amount for procedural violations during an inspection conducted by the Polish DPA. The Voivodship Administrative Court in Warsaw, in a judgment of 23 February 2021, reference II SA/Wa 1746/20, upheld the decision of the Polish DPA, pointing to

violations of Articles 31 and 58(1)(e) and (f) of the GDPR for failing to ensure, during the inspection of compliance with data protection regulations, access to premises, equipment and means for processing personal data and access to personal data and information necessary for the performance of tasks, as well as failure to cooperate during the inspection.

To the best knowledge, both judgments of the Voivodship Administrative Court in Warsaw are not final. The Surveyor General of Poland has filed a cassation appeal against both judgments, which is waiting to be heard.

The number of the land and mortgage register as personal data

The Surveyor General of Poland argued that the personal data protection law could not apply to the disclosure of land and mortgage register numbers, as these numbers do not constitute personal data. However, in the first instance judgment of 5 May 2021 (reference II SA/Wa 2222/20), the Voivodship Administrative Court in Warsaw unequivocally ruled that land and mortgage register numbers in the current normative form in Poland constitute personal data.

The ruling of the Voivodship Administrative Court ought to be accepted since the land and mortgage register numbers meet the definition of personal data provided for in Article 4(1) of GDPR, according to which "'personal data' means (1) any information relating to (2) an identified or identifiable (3) natural person ('data subject'). Further, the GDPR stipulates that "an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person."

While the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31–50) (Directive) was still in force, the Article 29 Working Party published its Opinion 4/2007 on the concept of personal data of 20 June 2007, where part three considers the meaning of a critical element of the definition of the term "personal data," i.e., information about an identified or identifiable (natural) persons (Opinion 4/2007 on the concept of personal data, 2007). In the opinion, it is indicated that personal data are also those pieces of information that make it possible to identify a natural person, even in a non-direct way (for example, through a telephone number, a car registration number, or an insurance number). However, it is not all information, but the only information that can be acquired by all means reasonably likely to be used. The subject of assessment remains what these measures in a particular situation are.

Concerning the notion of personal data, a discussion, even before the entry into force of the GDPR arose, as to whether data should be identifiable objectively or subjectively. The essence of this discussion was whether identifiability should be assessed in the context of a given entity's technical and organizational capabilities or

whether it should be made from an objective standpoint. The issue was, to some extent, considered by the Court of Justice of the European Union (CJEU) in the Patrick Breyer case. That case concerned whether a dynamic IP address could be considered personal data. The CJEU took the view adopted by the Advocate General that the means are not likely reasonably to be used to identify the data subject if (1) "the identification of the data subject was prohibited by law or (2) practically impossible since it requires a disproportionate effort in terms of time, cost and man-power, so that the risk of identification appears, in reality, to be insignificant" (Court of Justice of the European Union judgment of 19 October 2016, Breyer v. Bundesrepublik Deutschland, reference C-582/14, ECLI: EU:C:2016:779). It leads to the conclusion that the CJEU was more inclined towards a more objective theory that protects data subjects to a greater extent.

However, bearing in mind the facts of this case, the land and mortgage register numbers constitute personal data, as based on the number alone obtained in the spatial information portal (Geoportal), any person can, through an Internet search engine and the Electronic Land Register portal, determine the owner of the property and the information on its financial situation that is disclosed.

It is worthwhile to underline that the legal literature has pointed out the problem (Drobek, 2015). Moreover, this stance is aligned with the established case law of the administrative courts in Poland (referred to in the judgment in the analyzed case: judgment of the Voivodship Administrative Court in Kraków of 14 May 2014, reference II SA/Kr 126/14; judgment of the Voivodship Administrative Court in Wrocław of 2 December 2010, reference II SA/Wr 546/10; judgment of the Supreme Administrative Court of 18 February 2014, reference I OSK 1839/12).

In practice, this means that land register numbers are covered by the personal data protection regime (Drobek, 2015), including the standards under Article 8 of the Charter of Fundamental Rights of the European Union (2000/C 364/01) and Article 51 of the Constitution of the Republic of Poland (Journal of Laws of 1997, No. 78, item 483, with amendments).

Moreover, it could be argued that making the land and mortgage register number public poses a significant threat to individuals' rights. For example, information from the register might be used in the civil proceedings for payment in Poland. Based on information about pending enforcement proceedings or the size of mortgage obligations disclosed in the register, the parties of the civil proceedings for payment may attempt to demonstrate the merits of granting interim measures (for example, by seizure of the movables) before initiating proceedings by proving that an economic situation of the other party is so unsatisfactory as to require the granting of interim measure. Therefore, it constitutes an integral part of proving the premise of the so-called "legal interest," which, according to Article 730(1)(1) of the Polish Civil Procedure Code, is one of the two prerequisites, in addition to the assertion of a credible claim, for the court to grant interim measure.

Grounds for processing the land and mortgage register numbers – analysis of the Polish Data Protection Authority and the Surveyor General of Poland

This subsection is divided into three parts; it addresses the arguments about the legal basis for data processing by the General Surveyor of Poland. The first subsection presents arguments of the Polish DPA, the second provides information on the position of the Surveyor General of Poland, and the third one shows the reasoning provided in the judgment of the Voivodship Administrative Court in Warsaw of 5 May 2021, reference II SA/Wa 2222/20 (first instance), rendered in this case.

The Polish DPA's arguments.

The Polish DPA ruled that the Surveyor breached Article 5(1) letter (a) of the GDPR and Article 6(1) of the GDPR by "making available on the Geoportal without a legal basis personal data in the scope of land and building register numbers obtained from the land and building register (maintained by starosts)."

Following Article 5(1) letter (a) of the GDPR, data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject ("lawfulness, fairness and transparency"). Subsequently, Article 6(1) of the GDPR provides legal grounds for processing data. The Polish DPA decided that the Surveyor General of Poland had no basis for processing this personal data, i.e., publishing land registry numbers in the Geoportal. DPA pointed out the sector-specific regulations that the Surveyor General of Poland had breached.

The first is Article 13(1) letter (f) of the Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE) (OJ L 108, 25.4.2007, p. 1–14) (the INSPIRE Directive), in according to which "Member States may limit public access to spatial data sets and service, where such access would adversely affect the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law." Moreover, the INSPIRE Directive in the recital 24 expresses that "the provision of network services should be carried out in full compliance with the principles relating to the protection of personal data."

Next, Article 5a section 4 of the Polish Geodetic and Cartographic Law imposes an obligation on the General Surveyor of Poland to apply safeguards to prevent misuse or unlawful access to or transfer of processed personal data.

Furthermore, Article 11, section 2 point 5 of the Act 4 March 2010 on spatial information infrastructure (Journal of Laws of 2021, item 214) (the Polish Spatial Information Infrastructure Act) indicates that access to spatial data sets and services shall be restricted based on provisions for personal data protection.

Finally, the Polish DPA stressed that Article 36, with the mark of 4 section 16 of the Law of 6 July 1982 on Land Registers and Mortgages, applies to the General Surveyor of Poland. This provision stipulates that it is prohibited to provide third parties with access to the data contained in sections one and two of the land and mortgage registers, which

are made available free of charge to the authorities in charge of the real estate cadastre to verify the compatibility of the data of the land and building register with the data contained in the land and mortgage registers.

The Surveyor General of Poland's arguments.

The Surveyor General of Poland, during the proceedings in the Voivodship Administrative Court in Warsaw, raised a number of substantive arguments concerning legal grounds for processing that need to be analyzed.

The Surveyor General of Poland argued that it is legally obliged to make the numbers of the land and mortgage register publicly available. It raised that this is its statutory task which could be derived from at least two regulations.

First, the General Surveyor of Poland referred to Chapter 6 of Annex II of Commission Regulation (EU) No 1089/2010 of 23 November 2010, implementing Directive 2007/2/EC of the European Parliament and of the Council as regards interoperability of spatial data sets and services (OJ L 323 8.12.2010, p. 11) (Commission Regulation 1089/2010). It argued that it is obliged to publish land registry numbers on the Geoportal, implying that the processing of personal data would be legally performed under Article 6(1)(c) of the GDPR.

The purpose of the Commission Regulation 1089/2010 is to lay down requirements for technical arrangements for the interoperability and harmonization of spatial data sets and services. Annex II covers requirements for spatial data themes, and Chapter VI refers directly to the cadastral parcels, including spatial object types. However, it seems that in indicated Chapter, there is no direct link to any relevant obligation to provide public information on the land register numbers or owners' identity.

The second regulation on which the General Surveyor of Poland based its argument is the Polish Geodetic and Cartographic Law in connection with the Polish Spatial Information Infrastructure Act. The General Surveyor of Poland argued that the limitation of data processing stipulated in Article 11 of the Polish Spatial Information Infrastructure Act could not cover the land register number itself. Instead, access to the information should be limited directly by Article 24 section 5 of the Polish Geodetic and Cartographic Law, which scope is by reference defined in Article 20 section 2 point 1 of the Polish Geodetic and Cartographic Law. However, the information on a land and mortgage register number is not covered directly by the referred section yet only by another section (Article 20 section 1). Since the scope of the limitation does not cover the land and mortgage register number, the Surveyor General of Poland, as it argued, is not only allowed to publish the numbers but is even obliged to do so under Article 24 section 5 of the Polish Geodetic and Cartographic Law. Consequently, it argues that it cannot be fined for performing statutory tasks.

The Voivodship Administrative Court in Warsaw's reasoning.

The Voivodship Administrative Court in Warsaw, in the judgment of 5 May 2021, reference II SA/Wa 2222/20, upheld DPA's decision and argumentation.

First, as presented above, the court ruled that the land register numbers constitute personal data. According to the court, the subjects affected by the respective rights and obligations disclosed in the land records are also natural persons. Moreover, the scope

of the data of natural persons disclosed in the land register is extensive. The public land register numbers allow the identification of natural persons whose data are included in the land register. The court referred to a well-established line of case law in this regard.

Similarly, concerning the issue of the legal basis for processing, the court ruled that the General Surveyor of Poland did not have any applicable basis for processing. The court's reasoning suggests that, in its view, all sectoral regulations, which are complementary, should be considered when determining the legal basis for publishing land registry numbers in the Geoportal. Following the Polish DPA, the court stressed that Article 36, with the designation of 4 section 16 of the Law of 6 July 1982 on Land Registers and Mortgages, applies to the General Surveyor of Poland. It means that the court found, based on the sector-specific regulations, that there is a prohibition on disclosing this information to the public, which also binds the General Surveyor of Poland.

As stated, The Surveyor General of Poland has filed a cassation appeal against the judgment, which is waiting to be heard by the Supreme Administrative Court.

Analysis of reasons for disputes between authorities

The matter of legal arguments regarding the nature of the land and mortgage register numbers as personal data and the legal basis for publishing these numbers in the Geoportal highlights another, more profound issue. Due to the ubiquitous processing of personal data discussed in the introduction, there emerges a situation in which data protection regulations, such as the GDPR, permeate all industries with sector-specific regulations. As in this case, the relationship between sector-specific regulations and the GDPR is often ambiguous. It means that the scope of competence of the authorities in the public administration system overlaps. The current provisions of Polish administrative law do not provide practical tools to resolve potential inconsistencies between authorities in a model where there is uncertainty on the part of supervised entities in the market regarding the correct interpretation of the law.

For this problem to be addressed, it is first necessary to establish what reasons may cause disputes between authorities in the regulated fields. Following the article by Aagaard (2011), three primary sources of overlapping regulations and potential disputes between authorities may be distinguished. The first reason would be unintended broad regulations implemented by the legislature in the context of uncertainty about outcomes of the legislative process or because of compromises during such process. It is argued that the legislative bodies are incentivized to assign broad competencies to regulators so that they have the flexibility to respond either to threats or to a change in the underlying problem they were initially intended to tackle. The second one is an organic tendency of authorities to expand their competencies to achieve pragmatic objectives, for example, increasing the scope of authority up to the limits of competencies or as part of an argument to enhance the budget. Therefore, the risk of dispute emerges through the application of general clauses in the law, where there is scope for interpretation and a debate over how a particular clause should be

understood. However, these appear to be relatively rare cases, and their use should be determined by compelling reasons for adopting such a solution, for example, justified by the severe risk of violation of fundamental rights (Aagaard, 2011).

It needs to be agreed that these reasons may arise in relation to different normative contexts. The degree to which these general reasons apply to the case examined in this article will be reviewed below.

Analysis of the reasons for the dispute between the Polish Data Protection Authority and the Surveyor General of Poland

There could be different purposes for processing the same set of data. For example, it could be used for the public interest (security or transparency of the payment system) or be treated as a tradable item for marketing purposes. Considering the complexity of these processes, the GDPR stipulates one of the principles for processing personal data, the minimization principle. Under Article 5(1) letter (c) of the GDPR, "personal data shall be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, following Article 89(1), not be considered to be incompatible with the initial purposes ("purpose limitation")." It means that the processing of personal data is lawful if it is limited to the extent necessary to fulfill the given purpose, based on the grounds in Article 6 of the GDPR, one of which is that processing is necessary for compliance with a legal obligation to which the controller is subject (Article 6(1)(c).

However, in practice, it is difficult to draw the line between the scope of data necessary to fulfill the purpose and those exceeding the purpose, as it is necessary to balance between the fulfillment of the obligation and the determination of the necessary scope of data. In general, from the perspective of the ability to fulfill the obligation, it is more prudent to have a broader range of data than a narrower one.

It is even more complicated for the authorities because they are bound by the principle of legalism, according to which public authorities act on the basis and within the limits of the law (Article 7 of the Constitution of the Republic of Poland). Processing data to a greater extent than necessary violates the principle of legalism, but it can be argued that failure to perform an obligation provided by a legal provision also violates this principle.

There is a risk that on the part of the authority (which is at the same time the controller of personal data) at the stage of performing the statutory obligation, a perception will arise in which the processing of personal data to the extent objectively exceeding the principle of minimalism is not only not prohibited, but it is necessary to perform the statutory obligation. It seems that it can be cautiously hypothesized that this type of situation might have arisen in this case. However, a similar tension between privacy and the use of spatial data is also described in the US literature, so it could be argued that it is not specific only to European jurisdictions (Rissman et al., 2017).

The question of what purpose motivated the actions of the Polish Data Protection Authority and the Chief Geodesist of Poland should be considered. It seems to be a relevant consideration from the perspective of purposive interpretation, according to which the understanding of a provision should be derived from the purpose of its enactment in conjunction with other provisions in the given act and supporting legal acts (Zieliński, 2008).

The concept of a purpose should be distinguished from that of a task, even though they remain related. A purpose (in Polish: "cel") is defined in the Polish Polish Scientific Publishers (PWN, 2022) as "a direction to which one is aiming". In this sense, a goal is the long-term outcome of the entity's activities that has been set. The definition of the goal provides a framework for the activities of a given entity, providing interpretative directives on which actions should be carried out and to what extent. It is an accepted position in the legal literature according to which tasks should be understood as activities carried out at a given time to maintain or bring about a particular order of things, as opposed to purposes that set long-term objectives (Szyrski, 2015).

From this perspective, the purpose of the Polish Data Protection Authority seems unambiguous. From the perspective of this authority, the processing of personal data of an extensive range of persons (property owners in Poland) took place without legal basis, in violation of the principle of minimalism, and this process threatened to violate the rights and freedoms of these persons. Therefore, the President of the Office for the Protection of Personal Data (the name of the Polish DPA) was obliged to do so as the competent authority for the protection of personal data, according to Article 34(1) of the Act of 10 May 2018 on the Protection of Personal Data (Journal of Laws of 2019, item 1781).

On the other hand, it seems more difficult to reconstruct the purposes of the actions taken from the perspective of the Surveyor General of Poland. The Surveyor General of Poland has a legal position that is obliged to publish land registry numbers in the Geoportal, and that process is lawful because it serves statutory tasks. According to Article 6(1) of the Polish Geodetic and Cartographic Law, the Surveyor General of Poland is the government administration's central authority, competent in geodesy and cartography. Suppose one were to argue in favor of disclosing information on land and mortgage register numbers in the Geoportal. In that case, it could be raised that this serves to increase the security of legal transactions in real estate and ensures that potential real estate purchasers have full and flexible access to the legal status of the property, which allows for more streamlined real estate transactions. However, when analyzed from the perspective of the regulation, such arguments cannot stand, and the administrative courts' position should be agreed with.

Conclusions

Protecting data privacy is not just about compliance. Ultimately, it is about pursuing statutory aims and values. Applying them is difficult because following one may lead to the impairment of the other. Different statutory aims and values drive various

authorities empowered in processing data. There will be more situations like this, especially in publicly available data, like spatial data, because this is an intersection of different aims and regulatory areas.

The overlapping (intersection) of regulations is not limited to spatial data but relates to other areas of regulation, such as financial markets, anti-money laundering (Kindylidi, 2022), and competition (Costa-Cabral & Lynskey, 2017). Meanwhile, the issue of vague regulations, together with a failure to consider the data protection perspective by the actors, is crucial for the development of enforceable personal data law. The question of how it is possible to delimit the powers of different authorities arises.

In the legal literature, anticipating the situation referred to in this article, regarding the problem of extensive access to the data disclosed in the land and mortgage registers, it has been proposed to change the model of access to the land and mortgage registers in such a way that unrestricted access to the land and mortgage registers as such is preserved, while the scope of data disclosed for the unrestricted access is limited on a subject-based manner (Gryszczyńska, 2020).

As an ancillary note considering the definition of personal data presented above, also other spatial data (depending on the extent to which they are collected) than land register numbers may constitute personal data to the extent that they allow for the identification of an individual natural person (for example when aggregated with other information). Furthermore, spatial data is considered to play an essential role in environmental protection and proper planning of the use of space, as well as spending of public funds and tax incentives, as well as accountability of such pre-settlements (Rissman et al., 2017). Hence, solutions are proposed to introduce anonymization of spatial information with as negligible loss of data quality as possible, such as that provided by Hasanzadeh et al. (2020).

The seriousness of this issue from a fundamental rights perspective is demonstrated by the fact that this situation has become of interest to the Polish Commissioner for Human Rights (Marcin Wiącek met with the General Surveyor of Poland, 2022). The debate on whether land register numbers meet the definition of personal data and if such processing is legal is a debate on where the line between the right to privacy and the need to use personal data and to what extent lies.

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