

Processing Personal Data by the Police in the Light of Changes in EU Law

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Abstract. *In implementing their statutory tasks the Police can acquire a whole range of personal information, including sensitive data. This usually has a direct relation with combating crime. Therefore, such powers might be implemented without the knowledge and consent of persons to whom the information (data) concerns. Because police activities cause serious and profound intrusion into the sphere of a person's private life, whose protection is guaranteed by the Constitution, they must be carried out within the limits strictly permitted by law. When discussing national regulations in force which control the issue of personal data protection, one must also take into consideration EU regulations. First of all the European Parliament and Council Regulation (EU) 2016/679 of 27th April 2016 on the protection of natural persons with regard to the processing of personal data and the European Parliament and Council Directive (EU) 2016/680 of 27th April 2016 on the protection of natural persons with regard to the processing of personal data. This directive, commonly known as the police directive, constitutes regulations on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection and prosecution of criminal offences and execution of penalties. The national legislator faces a difficult task of implementation of the above-mentioned European legal acts, all the more so because the choice of particular solutions, to be adopted in their transposition to the legislative and implementing provisions, still remains an open issue. The adopted solutions ought to, on the one hand, ensure coherence with national regulations that implement them, on the other hand, they ought to cause the appropriate adjustment of the Polish law regulations to their requirements. The article presents the normative contents and remarks regarding appropriate, consistent with EU law processing of personal data by the Police.*

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Introduction

The Police is a uniformed and armed formation which serves society, provides for people's safety and maintains security and public order. Its main tasks include, inter alia, crime and minor crime detection and prosecution of perpetrators.¹ Within its tasks, the Police conduct operational, surveillance, investigative, administrative and policing activities.² What is important is that, in fact, all of these are directly related with processing personal data, including sensitive data.

For this reason (violation of individual's privacy limits) the issue of the legal foundations for the activities of state's organs — including the Police — in the rule of law, has become significantly important. The rule of acting within well-defined limits of the law, more importantly, within the Polish legal order has been elevated

¹ Cf.: art. 1 sec. 2 of the Act Police of 6 April 1990 (OJ of 2016 r., item 1782 as amended).

² Cf.: art. 14 sec. 1 of the Police Act.

to the constitutional status³ because it concerns the guarantee of civil liberties and protection of an individual from the omnipotence of the state and its apparatus. In a democratic state, where the law rules, organs of state authorities can be formed only on the basis of law, and the legal norms must strictly determine their competence, tasks and mode of the proceedings, designating at the same time the limits of their activities. Such organs can act only within the above-mentioned limits. It may sound like a cliché, but provided an individual has freedom to act in accordance with the law, that which is not clearly forbidden by the law is allowed, so organs of public authorities may act only where and when the law authorises them.⁴ Thus, the Police, as previously indicated, can only do what the law allows them to,⁵ because as a part of public administration they can act only according to and within the limits of law.

Main Part

The law included in the Constitution, in principle, forbids interference of the state in the legally established extent of a human's life, while in case of violation of this sphere it orders the state to provide protection to an individual.⁶ Protection of private life includes, importantly, information autonomy (article 51 of the Constitution), which means the right to independent decision making on disclosing information about themselves to others, as well as the right to exercise control over such information if it is the other entities that possess it. The right to the disposition of one's own personal data constitutes one of the elements of the right to have a social life⁷, since one cannot be obliged to disclose information about it on any other basis than the act on disclosing information about their person, and public authorities cannot obtain, gather and disclose other information on citizens than is necessary in a democratic country under the rule of law. Everyone has the right to access the official documents and data collected regarding them. However, this right might be limited by an Act.⁸

The fact that there is relation between the right to privacy and personal data protection is not under discussion, and the Constitutional regulations mentioned remain in a specific mutual relationship: the right to privacy, constituted in Article 47, is guaranteed, *inter alia*, in the aspect of personal data protection, envisaged in Article 51.⁹ The right to protect personal data is strictly correlated within the sphere of respect of privacy, freedom and human integrity.

³ Cf.: art. 7 Konstytucji Rzeczypospolitej Polskiej of 2 April 1997 (OJ. No. 78, item 483 as amended).

⁴ Skrzydło W, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. LEX 2013 (commentary to art. 7, No. 428260).

⁵ Cf.: Ochendowski E, *Prawo administracyjne, część ogólna*. Toruń, 1999, p. 22.

⁶ Skrzydło W, *op. cit.*, (commentary to art. 47, No. 428300).

⁷ Wyrok Sądu Apelacyjnego w Warszawie of 19 May 2016. No. I ACa 1056/15 (LEX No. 2087795).

⁸ Cf.: art. 51 Konstytucji Rzeczypospolitej...

⁹ Sakowicz A, *Prawnokarne gwarancje prywatności*. Cracow, 2006 (LEX No. 53884).

Therefore, in the context of police powers, how should the right of an individual to protect privacy, guaranteed in the Constitution, be regulated? Let us again remember — everyone has the right to legally protect their private life.¹⁰

Restrictions on privacy in information autonomy, despite the protection of privacy granted in the Constitution, exist in the current legislative system. These often have a direct connection with a combating crime. In itself the necessity to undertake certain actions which, in the modern world and also in a democratic country, are not possible to avoid because there is a need to protect citizens' security, does not in any way predetermine the fact that the number of such actions might be unlimited and defined in an arbitrary manner. Thus, if the Constitution states that the manner and policy of gathering information about an individual should be in the most detailed way regulated in the legislation, it means that the legislation should exactly determine when public authorities are entitled to gather information about citizens and when they should abandon this right.¹¹ It should be taken into account that while assessing the unlawfulness of the action, one needs to remember that the aforementioned unlawful conduct is eliminated by acting within the lawful boundaries defined in the legislation,¹² which has a considerable and direct importance when evaluating the Police right to process personal data.

In cases when the law obligates the entity to process personal data, undoubtedly, then such data processing is permissible as the data processing is certainly fundamental in order to comply with obligation resulting from this law. Similarly when it comes to competences clearly determined in the law with regard to the processing of personal data, such data processing is acceptable because it would be not possible to execute this power without data processing. Even if the law does not refer directly to data processing but assigns the entity to exercise a privilege for which data processing is essential, the entity is authorised to process such data.¹³

The principle is that the Police service, while carrying out statutory tasks, is enabled to gain a range of information about a person and also obtain it implicitly, gather, check, use and process it.¹⁴ This privilege also refers to sensitive data and can be enforced without the knowledge or consent of the people to whom the information/data refer. The Police actions, understandably, cause (and in some ways need to cause) essential and deep interference in the private life of a person. When discussing the Police mandates to process personal data it should be noticed that Polish law — as a rule — very clearly underlines also the freedom and protection of secrecy of communication. Limitations on these rights may occur exclusively in circumstances defined in the law and in the manner described there.¹⁵ It is no longer “only” the right to protect privacy and personal data as particular “static” information/data. Communication is something dynamic, referring to aspects of privacy “in progress” and constantly changing.

¹⁰ Cf.: art. 47 Konstytucji Rzeczypospolitej...

¹¹ Safjan M, *Wyzwania dla państwa prawa*. Warsaw, 2007 (LEX No. 64220).

¹² Wyrok Sądu Apelacyjnego w Warszawie of 25 November 2016. No. I ACa 1565/16 (LEX No. 2237384).

¹³ Barta J, Fajgielski P, Markiewicz R, *Ochrona danych osobowych: komentarz*. LEX 2015 (No. 526474).

¹⁴ Cf.: art. 20 ustawy o Policji.

¹⁵ Cf.: art. 49 Konstytucji Rzeczypospolitej...

The right to protect secrecy of communication involves the right to free communication in any possible manner. It can be both verbal and written communication as well as in a written form composed of letters of the alphabet, pictures or other graphical symbols, sounds etc., the right, therefore, is considered very widely and involves various forms of human communication. The privilege also refers to the secrecy of correspondence, secrecy of phone calls and of other forms of communication.¹⁶ However, the aforementioned, so much emphasised, civil rights are also not the absolute ones. The Act of Police contains provisions which allow obtaining and processing a wide range of data, including telecommunications, address and Internet, without knowledge and consent of a person to whom they concern.¹⁷ A particularly deep level of interference of the Police into communication is the privilege allowing it to undertake an operating control.¹⁸

It should be emphasised that the Police, in order to carry out its statutory tasks, is allowed to use personal data obtained not only by police officers, but also by other authorities, services and state institutions as a result of operational and exploratory activities and further process the personal data in terms of the Act on 29th of August 1997 *on the protection of personal data*¹⁹ without knowledge and the consent of the data subject.²⁰ The Police, in order to fulfil its statutory tasks, is authorised to collect, gather, check and use information, including personal data, obtained or processed by authorities of other countries and by Interpol. The Police is also allowed to communicate the information, including personal data, which is used to prevent and combat crime to authorities in other countries or Interpol in terms described in the Act on 16th September 2011 *on systematic information sharing between law enforcement bodies of the Member States of the European Union*²¹, in European Union legislation and the provisions of international agreements.²²

The Police, therefore, can and must process a range of information which in fact is personal data, otherwise it would not be able to carry out the statutory duties of the Police. However, it should be also remembered that police officers, while performing their professional duties, are strictly obliged to respect human dignity and obey and protect human rights.²³

When referring to legally binding regulations on personal data protection one has to bear in mind community law, especially Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 *on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and the repealing Directive 95/46/EC*²⁴ (later referred to as 'the Community Regulation'), which shall come into force on 25 May 2018.²⁵

¹⁶ Skrzydło W, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Cracow, 2002, p. 145.

¹⁷ Cf.: art. 20c, 20cb, 20da ustawy o Policji.

¹⁸ Cf.: art. 19 ustawy o Policji.

¹⁹ OJ of 2016, item. 922.

²⁰ Cf.: art. 14 sec. 4 ustawy o Policji.

²¹ OJ No 230, item. 1371 as amended.

²² Cf.: art. 20 sec. 2aa and 2ab ustawy o Policji.

²³ Cf.: art. 14 sec. 3 ustawy o Policji.

²⁴ OJ.U.E.L.2016.119.1.

²⁵ *Electronic source*: <http://www.lex.pl/czytaj/-/artykul/ue-zblizaja-sie-powazne-zmiany-w-ochronie-danych-osobowych>, accessed: 13.11.2017.

A national legislator has to transmit the above-mentioned Community Regulation to Polish law. Issues that have to be defined in the new national law on personal data protection include primarily the constitutional position of supervisory authorities, rules of supervision in order to provide personal data protection, rules of cooperation for personal data protection and penalties necessary to guarantee effective supervision. More detailed issues of personal data protection will have to be regulated, for instance, the rules of accreditation for certification entities that take part in the new certification procedure²⁶ and tightening the laws existing so far. The perspective of the general Community Regulation which will come into effect on 25 May 2018 as well as a viewpoint and *ratio legis* of Polish changes in the law do not allow data protection to be seen only from the perspective of national law. The scale of forthcoming changes is so vast that both the national legislator and data administrators should now actively analyse new mechanisms of data protection. These new changes will undoubtedly be a challenge for the legislator since they require a complex review of legal acts in order to adjust existing regulations to new frames of data protection described in directly and legally binding EU regulation in the transitional period, and consequently create conditions for the regulation to be fully observed. According to approximate data of Government Legislation Centre around 800 legal acts need to be analysed. The 2-year period of *vacatio legis* from the general regulation publication in the EU Official Journal to it being effective requires intensified work in this matter.²⁷

Apart from the Community Regulation, the Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 *on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHAD*²⁸ (later referred to as 'the Directive') is of significant importance for the tasks performed by the Police. The Directive defines regulations on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties including protection against threats to public order and prevention of such threats. According to this Directive member states protect basic rights and freedoms of natural persons, especially their right to personal data protection, and they ensure that personal data exchange by competent EU bodies, if resulting from EU law or national law, shall not be limited or forbidden because of reasons concerning a natural person's protection on account of personal data processing. Member states are obliged to adopt and publish by 6 May 2018 statutory, executive and administrative regulations required for the Directive implementation. Necessary changes to law this time directly concerning, among others, the Police, will have to be significant.

The Directive is to provide appropriate personal data protection to all participants of criminal proceedings i.e. witnesses, victims and perpetrators, as well

²⁶ *Electronic source:* <https://www.gov.pl/cyfryzacja/nowe-prawo-ochrony-danych-osobowych>, *accessed:* 13.11.2017.

²⁷ Bielak-Jomaa E, Lubasz D (Eds), *Polska i europejska reforma ochrony danych osobowych*. Warsaw, 2016 (LEX No. 296398).

²⁸ OJ.EU.L.2016.119.89.

as to facilitate communication between law enforcement agencies. It is assumed that the entities would be able to exchange information more effectively. The unification of 28 member states regulations in a form of the Directive should enable faster exchange of information and, therefore, improvement of security in the EU and, simultaneously, maintenance of proper data protection standards. Law enforcement agencies will have to observe the principles of purpose limitation, adequacy and lawfulness. The Directive defines clear rules for personal data transfer outside EU in order to provide adherence to the principles of such transfers in question. The unification of law in all EU member states is in order to facilitate information exchange in the process of law enforcement, and therefore, it will allow conditions for more effective crime prevention.²⁹

The main premise of the new laws is thence a guarantee that the personal data of victims, witnesses and suspects is properly protected (a suitable level of protection) and at the same time the activities of law courts are facilitated, as well as that relevant cross-border cooperation between competent bodies in their fight against crime and terrorism is guaranteed. The new regulations intend to maintain a balance between the right to privacy and the necessity to maintain confidentiality of personal data processing by the police (and other authorised actors). Having these issues regulated in a similar way in all EU member states means that the police and courts will not have to exercise different regulations with regard to data protection depending on the country of origin of the person whose data are to be processed.

The provisions of the Directive have been correlated with the text of the general Community Regulation, in that both legal acts are based on the same general principles. An expression of this tendency is also the possibility of designating one supervisory body. However, the EU legislator did not decide to harmonise the rules in the form of a regulation, thus leaving the Member States a certain margin of discretion as to how to implement the new obligations. The principles of the directive take into account the specific needs of the police and the justice system and respect the different legal traditions of the Member States.

We need to hope that clear principles of data protection and cooperation will allow law enforcement and judicial authorities to cooperate effectively, while maintaining the highest standards of personal data protection.³⁰

Until the adoption of the Directive, the principles of protection of personal data processed by law enforcement and judicial authorities were defined in Council Framework Decision 2008/977/ JHA of 27 November 2008 *on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters*,³¹ which however, it was limited to personal data sent or shared between Member States of the European Union. However, it did not apply to internal processing of personal data in the Member States of the European Union. In addition, Framework Decision 2008/977/ JHA did not introduce e.g. distinctions between different categories of data subjects (criminals, suspects, victims, witnesses) and did not provide special guarantees regarding data relating to persons from outside the circle of suspects.

The currently adopted Directive includes, as mentioned above, both the rules for cross-border and national data processing by the competent authorities of the

²⁹ *Electronic source:* http://bip.gioudo.gov.pl/1520278/id_art/9748/j/pl, accessed: 15.11.2017.

³⁰ *Electronic source:* <https://gov.legalis.pl/dyrektywa-policyjna/>, accessed: 15.11.2017.

³¹ OJ.U.U.E.L.2008.350.60.

Member States for the purpose of prosecuting crimes, while preserving the specificity of police cooperation and judicial cooperation in criminal matters. The scope of data processing has also been extended to protect and prevent threats to public safety, which was not covered by the framework decision which the directive is intended to replace.

The provisions of the Directive have to, as mentioned above, ensure the protection of citizens' fundamental right to data protection when used by law enforcement authorities: personal data of each person should be processed in accordance with the law, reliably and only for a specific purpose. The processing of data by law enforcement agencies in the Union must comply with the principles of necessity, proportionality and legality and must provide adequate guarantees to data subjects. Supervision of compliance with these standards is to be exercised by an independent, national data protection authority. The directive also requires Member States to provide effective judicial protection measures.

Conclusions

The choice of detailed solutions that will be adopted in the transposition of the Directive to the laws, regulations and administrative provisions necessary for its implementation remains within the jurisdiction of the national legislator.

The solutions adopted should ensure, on the one hand, consistency with national regulations implementing the Community Regulation, and on the other hand, ensure that the provisions of the Polish law that are appropriate to the requirements of the Directive are met. It should be emphasised once again that the package of changes in the European Union regulations in the field of data protection introduces a radical change both in the substantive and formal sense in the sphere of personal data protection.

It seems reasonable to assume that, pursuant to art. 41 sec. 3 of the Directive, in the Polish legal system — within the field of personal data protection — there will be one supervisory body, established under the Community Regulation, which will replace the current Inspector General for Personal Data Protection. At the same time, due to the almost complete Polish catalogue of entities operating in the area of crime prevention, conducting preparatory proceedings, detecting and prosecuting criminal acts and executing penalties, the focus should be on the future specificity of the operation of these entities and the scope of changes that should be introduced in their constitutional provisions.

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- czości, prowadzenia postępowań przygotowawczych, wykrywania i ścigania czynów zabronionych i wykonywania kar, w sprawie swobodnego przepływu takich danych oraz uchyłająca decyzję ramową Rady 2008/977/WSiSW (OJ. UE.L.2016.119.89.).
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Streszczenie. Policja, realizując zadania ustawowe, może uzyskiwać cały szereg informacji o osobie również danych wrażliwych. Mają one najczęściej bezpośredni związek ze zwalczaniem przestępczości. Dlatego też uprawnienie to może być realizowane bez wiedzy i zgody osób, których informacje (dane) dotyczą. Ponieważ policyjne czynności, powodują istotne i głębokie wkroczenie w prywatną sferę życia człowieka, której ochronę gwarantuje konstytucja, musi się ono odbywać ściśle w granicach prawem dozwolonych. Omawiając obowiązujące krajowe przepisy regulujące problematykę ochrony danych osobowych, należy także mieć na uwadze regulacje wspólnotowe. Przede wszystkim rozporządzenie Parlamentu Europejskiego i Rady (UE) 2016/679 z 27 kwietnia 2016 r. w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych... oraz dyrektywę Parlamentu Europejskiego i Rady (UE) 2016/680 z 27 kwietnia 2016 r. w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych... Dyrektywa ta, potocznie zwana dyrektywą policyjną, ustanawia przepisy o ochronie osób fizycznych w związku z przetwarzaniem danych osobowych przez właściwe organy do celów zapobiegania przestępczości, prowadzenia postępowań przygotowawczych, wykrywania i ścigania czynów zabronionych oraz wykonywania kar. Przed prawodawcą krajowym trudne zadanie implementacji ww. europejskich aktów prawnych, tym bardziej, że nadal jeszcze kwestię otwartą pozostaje wybór szczegółowych rozwiązań jakie przyjęte zostaną w ich transpozycji do przepisów ustawowych i wykonawczych. Przyjęte rozwiązania winny zapewnić z jednej strony spójność z wdrażającymi je przepisami krajowymi, zaś z drugiej powodować odpowiednio do ich wymogów dostosowanie przepisów prawa polskiego. W artykule przedstawiono treści normatywne oraz sprostżenia dotyczące właściwego, spójnego z prawem wspólnotowych przetwarzania danych osobowych przez Policję.

Резюме. Полиция, осуществляя предусмотренные законом задачи, может получить информацию о лице, даже в сфере так называемых чувствительных данных. Как правило, между этими данными и борьбой с преступностью существует непосредственная связь. Поэтому данное полномочие можно применять без уведомления и согласия лиц, которых информация (данные) касается. Поскольку деятельность полиции тесно связана с вмешательством в частную сферу жизни человека, охраняемую конституцией, данное вмешательство должно оставаться в рамках предусмотренных законом. Описывая действующие национальные правовые положения, регулирующие вопросы по защите персональных данных, необходимо обратить внимание на законодательство Евросоюза. Прежде всего распоряжение Европарламента и Совета (ЕС) № 2016/679 от 27 апреля 2016 г. о защите физических лиц в области

обработки персональных данных ... и директиву Европарламента и Совета (ЕС) № 2016/680 от 27 апреля 2016 г. о защите физических лиц в области обработки персональных данных ... Данная директива, в разговорной речи называемая „полицейской“, предусматривает защиту физических лиц в сфере обработки персональных данных соответствующими органами с целью противодействия преступности, проведения предварительного расследования, раскрытия и преследования преступлений, а также исполнения наказаний. Перед польским законодателем стоит трудная задача имплементации вышеупомянутых европейских правовых актов, тем более, что все еще открытой является проблема выбора определенных решений, которые будут приняты при транспозиции в нормативные и исполнительные акты. Принятые решения должны стать гарантом, с одной стороны сплоченности с вводившими их национальными правовыми положениями, с другой стороны, должны способствовать соответствующему приспособлению к польскому законодательству. В статье представлено нормативное содержание, а также замечания, касающиеся соответствующей обработки персональных данных полицией, согласованным с законодательством ЕС.

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