Twinning project "Implementation of the best European practices with the aim of strengthening the institutional capacity of the apparatus of the Ukrainian Parliament Commissioner for human rights to protect human rights and freedoms (apparatus)"
No. EuropeAid/137673/DD/ACT/UA

Activity 2.1.4. Developing new or improving the existing methodologies and procedures to carry out a monitoring of the observance of human rights, ensuring activities of the Ombudsperson in preventing such violations

Document	Guidelines for Civil Servants on Balancing Privacy and Access to Public Information
Short description of the document	These guidelines aim to provide guidance primarily to civil servants who are dealing with requests by individuals to provide access to public information where providing such information may infringe on other individuals' privacy by disclosing their personal data. The overall aim of these guidelines is to propose a way of how the rationale of the right to access public information and the rationale of the right to personal data protection should be combined without sacrificing one to another. The guidelines therefore focus on the balancing method.
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Date	December 2017, Kyiv

GUIDELINES FOR CIVIL SERVANTS ON BALANCING PRIVACY AND ACCESS TO PUBLIC INFORMATION

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1. Introduction.

The **aim** of these guidelines is to provide guidance primarily to civil servants who are dealing with requests by individuals to provide access to public information where providing such information may infringe on other individuals' privacy by disclosing their personal data. Civil servants in this context shall mean those employees at public sector institutions who have an obligation stemming from the Law of Ukraine on Access to Public Information to examine requests to provide access to public information. These guidelines can also be of interest to other employees of other entities who have analogous obligations under the Law of Ukraine on Access to Public Information. They shall also guide the work of entities responsible for examining appeals against replies to requests for access to public information. The overall aim of these guidelines is to propose a way of how the rationale of the right to access public information and the rationale of the right to personal data protection should be combined without sacrificing one to another, to result in one human rights-based approach.

The conflict of the right of access to information and the right to personal data protection cannot be decided in the abstract by relying on the greater importance of one of the rights. According to the European Court of Human Rights (ECtHR), "[b]earing in mind the need to protect the values underlying the Convention, and considering that the rights under Article 10 and 8 of the Convention deserve equal respect, a balance must be struck that retains the essence of both rights."[1] The Court of Justice of the European Union (CJEU) also practices the weighing up of interests in examining whether a restriction of the right to personal data protection should be allowed for the sake of access to information.[2] The general rule thus is that these two rights have to be balanced when they are in conflict.

Analysis of the practice of Ukrainian public authorities, however, shows that balancing is often missing from the examination of requests to provide access to public information containing personal data.

Specific **objectives** of these guidelines are therefore, first, to describe the test to be applied in balancing the right to privacy (personal data protection) and the freedom of expression (right to seek information), particularly in light of requirements of the European Convention on Human Rights (ECHR) but keeping in mind the standards of relevant European Union (EU) law, and, second, to provide guidance on how to overcome difficulties involved in the balancing test.

[1] ECtHR, *Delfi AS v. Estonia*, Grand Chamber judgment of 16/06/2015, § 110.
[2] CJEU, C-28/08 P, *European Commission v. The Bavarian Lager Co. Ltd*., judgment of 29/06/2010, § 78.

- **The conflict of the right to access information and the right to personal data protection cannot be decided in the abstract.**
- **The two rights have to be balanced against each other in a concrete conflict.**

2. Assessment of the need for balancing when dealing with a request to provide access to public information containing personal data.

It is commonly held[3] that balancing works best when it is conducted at the earliest possible stage of examination of a particular type of the conflict between the right to access public information and the right to personal data protection. Most clarity is granted when the legislature, following an assessment of conflicting rights, provides for an explicit rule in the law giving priority to either the right to access information or the right to personal data protection.

Thus, the Law of Ukraine on Access to Public Information in Article 6 § 1 lists categories of information with restricted access (confidential information, secret information, information for internal use only). This provision, however, does not provide for an absolute exemption from disclosure and, when the grounds for restricting access indicated in Article 6 § 2 (restriction should serve one of the legitimate interests, disclosure should cause harm to those interests, the harm from disclosure should exceed the interest in receiving information) cease to exist, Article 6 § 4 requires that restricted information shall be provided by the information processor. The above law also (1) provides for a list of categories of information access to which cannot be restricted except in very limited cases (Article 6 § 5) and (2) indicates the type of information access to which does not belong to the category of restricted information because it serves the interests of preventing corruption (Article 6 § 6 where a reference is made to the rules and exceptions provided in the Law on Prevention of Corruption).

Balancing does not apply in the case of absolute rules in the domestic laws. The compliance of the results of application of such laws with human rights standards can nevertheless be examined at the ECtHR and therefore, where domestic law allows for a scope of interpretation, it should be interpreted in line with the ECHR inasmuch as possible. Furthermore, absolute rules provided in the legislation can be questioned at the level of constitutional courts. In case of the legislation of the EU, they can be questioned at the CJEU. Thus, in *Volker and Markus Schecke and*

[3] Twinning Project UA/47b, Activity 1.2. (Conducting a comparative analysis of national and European legislation concerning the activities of the Ombudsperson) Mission Report, § 209 - relying on the PhD thesis by N. Pirc Musar.

Hartmut Eifert v. Land Hessen,[4] the CJEU had to judge the proportionality of the publication, required by EU legislation, of the name of the beneficiaries of EU agricultural subsidies and the amounts they received. The CJEU, noting that the right to data protection is not absolute, argued that the publication on a website of data naming the beneficiaries of two EU agricultural aid funds and the precise amounts received constitutes an interference with their private life, in general, and with the protection of their personal data, in particular. The CJEU considered that such interference with Articles 7 and 8 of the EU Charter for Fundamental Rights was provided for by law and met an objective of general interest recognised by the EU, namely, including enhancing the transparency of community funds use. However, the CJEU held that the publication of the names of natural persons who are beneficiaries of EU agricultural aid from these two funds and the exact amounts received constituted a disproportionate measure and was not justified having regard to Article 52 (1) of the Charter. The CJEU thus declared partially invalid EU legislation on the publication of information relating to the beneficiaries of European agricultural funds.

In the situations examined in these guidelines, i.e. when a request for public information containing personal data is examined, balancing of rights to access information and to privacy is not needed where, under the applicable law, the data subject has provided consent to the disclosure of personal data. The Law of Ukraine on Access to Public Information in Article 10 § 3(2) stipulates that consent of the person whose personal data are contained in the information in the form of open data is a sufficient condition for providing this information on request in the form of open data. However, in situations where consent of the person would make the disclosure of personal data legitimate but the consent was not given, balancing is needed. In Ukraine, this follows *inter alia* from Article 10 § 3 of the Law on Access to Public Information which provides for a list of alternative conditions where, in the absence of the consent foreseen under § 3(2), any other condition (notably, existence of explicit rules in law prescribing disclosure under § 3(3) or prohibiting restriction of access to such information under § 3(4)) sufficiently justifies disclosure of information containing personal data. Similarly, the Law on Personal Data Protection in Article 11 indicates the consent of data subject as one but not the only possible ground for processing personal data and, notably, in § 6 envisages the need to protect the legitimate interests of third parties as one such ground except where the need to protect personal data prevails over such interest, i.e. unless balancing of interests leads to the result in favour of the protection of personal data.

In this context, it should be recalled that the right of access to information is normally not conditional on the need to know but, rather, is understood as the right to know and,

[4] CJEU, joined cases C-92/09 and C-93/09, *Volker and Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v. Land Hessen*, judgment of 09/11/ 2010, §§ 47–52, 58, 66–67, 75, 86 and 92.

consequently, a person requesting information should not justify their interest. The situation is different in case of a conflict of interests where the relative weight of the right to access information needs to be measured against the right to personal data protection. In the absence of arguments as to why access to personal data is necessary, the recipient of the request to provide access to information cannot weigh up the interests involved and, if the data subject had not consented to disclosure of those data, must refuse access to them.

For example, the CJEU in *Bavarian Lager*[5] examined a situation where following a request by the company Bavarian Lager to minutes of a meeting at the Commission where matters related to this company had been discussed, the Commission sent the company a document containing the minutes of that meeting with five names removed because, of those five names, three persons could not be contacted by the Commission in order to give their consent, and two others expressly objected to the disclosure of their identity. The CJEU held that the Commission was right to verify whether the data subjects had given their consent to the disclosure of personal data concerning them because this was required under legal acts on personal data protection (§ 75). In the absence of such consent the Commission was right to require under the relevant EU regulation on data protection (Article 8(b) of Regulation No 45/2001) that, in respect of the five persons who had not given their express consent, Bavarian Lager establish the necessity for those personal data to be transferred (§ 77). As Bavarian Lager had not provided any express and legitimate justification or any convincing argument in order to demonstrate the necessity for those personal data to be transferred, the Commission was not able to weigh up the various interests of the parties concerned. Nor was it able to verify whether there was any reason to assume that the data subjects' legitimate interests might be prejudiced, as required by Article 8(b) of Regulation No 45/2001 (§ 78). Consequently, the Commission was right to reject the application for access to the full minutes of the meeting, i.e. to the names of persons who participated in that meeting but did not consent to disclose this (§ 79). As we can see, in the absence of a particular exception to the rule on non-disclosure of personal data defined by the legislature (specific category of data or existence of the consent of data subject), the request of access to public information containing personal data can be granted only if necessity to do so can be established after weighing up the interests involved, which presupposes that the request for access to information in these cases should contain arguments on the necessity of access.

Law can also create presumptions in favour of one right in a particular type of situations (e.g., a general presumption of confidentiality of pending judicial proceedings data). Such

[5] CJEU, *Bavarian Lager* judgment.

presumptions can be rebutted in a particular case in the process of application of the balancing test. The existence of a presumption is then a factor which needs to be taken into account in the process of balancing and which affects the intensity of scrutiny in a particular case. Moreover, a person who requests information can demonstrate that the presumption does not apply to the requested information. Thus, the CJEU in its judgment in *Sweden and Others* v *API and Commission*[6] accepted the existence of a general presumption that disclosure of the written submissions lodged by an institution in court proceedings would undermine the protection of court proceedings within the meaning of the second indent of Article 4(2) of Regulation No 1049/2001, as long as those proceedings remain pending. That general presumption of confidentiality applies also to written submissions lodged by a Member State in such proceedings. However, as the Court has stated, the existence of such a presumption does not exclude the right of the person concerned to demonstrate that a document whose disclosure has been requested is not covered by that presumption (§ 103). It is noteworthy that under EU law there is no presumption favouring the legitimate interests of the data subjects to whom the personal data to be transferred relate over the interest of transparency.[7]

- **Balancing can be performed by the legislature when making the law, by the executive when applying the law, and by the judiciary when examining appeals on balancing or lack of balancing of the two rights.**
- **Where the domestic legislation provides for specific rules on what type of data should be disclosed or refused to be disclosed in what type of situations and there is no room for interpretation (i.e., the rule is absolute), this domestic legislation should be applied without balancing the two rights.**
- **Where the specific rule in the domestic legislation leaves room for interpretation (i.e., the rule is not absolute and allows for exceptions) or where there is no specific rule, the balancing test should be applied when examining a request to provide access to public information containing personal data.**

[6] CJEU, joined cases C514/07 P, C528/07 P and C532/07 P, *Sweden and Others v. API and Commission*, judgment of 21/09/2010, § 103.
[7] CJEU, T-115/13, *Gert-Jan Dennekamp v. European Parliament*, judgment of 15/07/2015, § 127.

3. Balancing the right to access information and the right to personal data protection.

Under the ECHR, in order to be justified, an interference with the right to freedom of expression must be "prescribed by law", pursue one or more of the legitimate aims mentioned in Article 10 § 2, and be "necessary in a democratic society."[8] Balancing of rights takes place when assessing "necessity in a democratic society" but the assessment of the first two criteria takes place prior to that and serves as a required preparatory stage. The three criteria, or the three steps of balancing test, will be presented below.

3 steps of the balancing test:

Step 1. Identifying that the restriction of the right to access information is "prescribed by law," i.e. that it has a legal basis in the domestic law.

Step 2. Identifying the "legitimate aim" served by the restriction of the right to access information.

Step 3. Assessing the "necessity in a democratic society" to restrict the right to access information, i.e. balancing the interests involved.

3.1. Legal basis in the domestic law.

Step 1 of the balancing test requires identification of the domestic legal basis for the restriction of the right at issue. The expression "prescribed by law" in Article 10 § 2 of the ECHR not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects. The law must be formulated with sufficient precision to enable a person to regulate his or her conduct. That person must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice.[9]

[8] ECtHR, *Magyar Helsinki Bizottság v. Hungary*, Grand Chamber judgment of 08/11/2016, § 181.
[9] ECtHR, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, Grand Chamber judgment of 27/06/2017, §§ 142-143.

In Ukraine, a legal basis for limiting the right to access information containing personal data is provided in Article 6 § 2 of the Law on Access to Public Information which requires balancing of the harm to be suffered by the person whose data are to be disclosed and the public interest to receive this information in deciding on the need to restrict access to information. It follows that the same test should apply when deciding under Article 6 § 4 whether the grounds to restrict access still exist in a situation where a request to access previously restricted (e.g. because it contained personal data and restriction was necessary for the "protection of rights of others") information is filed.

3.2. Legitimate aim of restricting rights.

Step 2 of the balancing test requires identification of the "legitimate aim" for restricting the right to access information as an element of the freedom of expression protected under Article 10 ECHR. The legitimate aim expresses the "public interest" for which the restriction of individual rights is needed.

The restriction on the person's right to seek information as an aspect of her freedom of expression under Article 10 ECHR, when it is done for the purpose of protecting someone's personal data from disclosure, pursues the legitimate aim of protecting the rights of others.[10] In certain cases, a more specific purpose could be protection of reputation. Protecting the "reputation and rights of others" is the most common ground for restricting the freedom of expression under the ECHR.[11] In the EU law system, the protection of personal data is one of the most common possible restrictions to free access of information[12].

Identification of the legitimate aim is usually the least problematic stage of the three-step test as both the parties involved and the ECtHR do not dispute the presence of such aim. E.g., in *Magyar Helsinki* case the ECtHR simply stated that it was not in dispute between the parties that the restriction on the applicant's freedom of expression pursued the legitimate aim of protecting the rights of others, and it sees no reason to hold otherwise.[13]

[10] ECtHR, *Magyar Helsinki* Grand Chamber judgment, § 186.
[11] D. Bychawska-Siniarska, Protecting the Right to Freedom of Expression under the European Convention on Human Rights. A handbook for legal practitioners, Council of Europe, 2017, p. 63.
[12] Activity 1.2. (Conducting a comparative analysis of national and European legislation concerning the activities of the Ombudsperson) Mission Report, § 155.
[13] ECtHR, *Magyar Helsinki* Grand Chamber judgment, § 186.

3.3. Necessity in a democratic society.

Step 3 of the balancing test is its essential part when the actual weighing up of the relevant interests (public interest to be informed and the interest to protect the individual against the harm to their privacy) takes place. At this stage, the link between the legitimate aims and the interference with the right to privacy is assessed. The ECtHR case-law requires a "pressing social need" for and the "proportionality" of interference for it to be seen as "necessary in a democratic society" as required under Article 8 § 2 ECHR.[14]

Pressing social need is the public interest served by getting access to information. The notion of proportionality is used to assess whether the harm produced by interfering with the right to privacy outweighs the public interest served by getting access to information. This assessment essentially consists of weighing up two public interests, i.e. the one served by access to information as an element of the freedom of expression and the other identified at step 2 of the balancing test, namely the interest of the protection of the right to personal data protection as an element of the right to privacy.

The ECtHR acknowledges that States have a certain margin of appreciation in performing the proportionality test. The ECtHR in its case-law provides some criteria for assessing proportionality but is ready to acknowledge a diversity of results of their application in different states. The ECtHR holds that "[w]here the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts."[15] Consequently, domestic authorities are required to use the criteria developed by the ECtHR but are free to identify additional elements important for deciding a concrete case. Importantly, the ECtHR holds that in cases which require the right to respect for private life to be balanced against the right to freedom of expression, the outcome of balancing should not, in principle, vary according to whether the application has been lodged with the ECtHR under Article 8 of the ECHR by the person who was the subject of the news report, or under Article 10 by the publisher. As the right to respect for private life and the right to freedom of expression deserve equal respect, the margin of appreciation should in principle be the same in both situations.[16]

As the number of the ECtHR cases addressing specifically the issue of balancing while deciding on a request to provide access to public information containing personal data is

[14] ECtHR, *Satakunnan Markkinapörssi* Grand Chamber judgment, § 164.
[15] ECtHR, *Von Hannover (No. 2) v. Germany*, Grand Chamber judgment of 07/02/2012, § 107.
[16] ECtHR, *Satakunnan Markkinapörssi* Grand Chamber judgment, § 163.

low,[17] guidance should also be sought from cases where the conflict of these two rights arose in other situations, notably concerning the consequences of publication of personal data in the media. In this respect, it is noteworthy that the ECtHR in *Axel Springer*[18] identified the criteria of contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, form and consequences of the publication, and, where it arises, the circumstances in which photographs were taken, the way in which the information was obtained and its veracity, and the gravity of the penalty imposed on the journalists or publishers. Furthermore, attention should be paid to the criteria used by the ECtHR to define the scope of the right to access information in the absence of the clear textual basis for this right in the ECHR. In particular, in *Magyar Helsinki Bizottság v. Hungary*[19] the ECtHR identified the purpose of the information request (information sought has to be necessary for the exercise of freedom of expression), the nature of the information sought (information sought must generally meet a public-interest test, e.g. provide transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allow participation in public governance by the public at large), the role of the applicant (whether the person seeking access to the information in question does so with a view to informing the public in the capacity of a public "watchdog") and the readiness and availability of information (involving an assessment of the burden for authorities in gathering information) as such criteria.[20] The various sets of criteria should be combined in performing the balancing of competing rights in the situation where a request for access to public information containing personal data is examined.

Broadly speaking, in the situation of the conflict of rights, the scope of the right to access public information and the scope of the right to personal data protection depend on 1) who the person asking for public information is; 2) who the person whose personal data are contained in the requested public information is; 3) what kind of a public interest would be served by disclosing the information; 4) what type of personal data would be disclosed, which area of human life is potentially affected and how badly. As we shall see, the criteria developed by the ECtHR reflect a certain gradation of interest protected under the right to freedom of expression and the right to privacy with some persons and interests enjoying a broader protection than others. The CJEU

[17]. Notable ECtHR cases include *Társaság a Szabadságjogokért v. Hungary*, judgment of 14/04/2009; *Youth Initiative for Human Rights v. Serbia*, judgment of 25/06/2013, and, most prominently, *Magyar Helsinki* Grand Chamber judgment. Even the number of ECtHR cases in a broader category of "freedom of information cases" is low – see Activity 1.2. (Conducting a comparative analysis of national and European legislation concerning the activities of the Ombudsperson) Mission Report, § 206.

[18] ECtHR, *Axel Springer v. Germany*, Grand Chamber judgment of 07/02/2012, §§ 90-95.

[19] ECtHR, *Magyar Helsinki* Grand Chamber judgment.

[20] *Ibid.*, §§ 157-170.

follows a similar approach to that of the ECtHR regardless of the fact that, in addition to a human rights catalogue, it also has at its disposal an elaborate set of rules with regard to personal data protection and a separate, although somewhat less developed, framework of the right of access to documents.

What follows is a presentation of the aforementioned criteria derived from the ECtHR (and to some extent the CJEU) case law, to be applied in the situation of a conflict of rights where a request to provide access to public information containing personal data is examined.

- **Factors to be taken into account in balancing the right to receive information and the right to personal data protection where a request to access information containing personal data is examined:**
    1. **Status of the person asking for public information.**
    2. **Status of the person whose personal data is potentially affected.**
    3. **The importance of the public interest served by disclosing personal data.**
    4. **The extent of harm potentially suffered by the data subject.**
- **Diversity of outcomes of balancing in various States is possible within the margin of appreciation left to the States.**

3.3.1. Status of the person seeking public information

Article 10 ECHR (freedom of expression) which contains the right to receive and impart information does not mention the right to seek information and, consequently, does not identify who has this right. The ECtHR currently interprets Article 10 in line with "a broad consensus, in Europe (and beyond) on the need to recognise an individual right of access to State-held information in order to assist the public in forming an opinion on matters of general interest".[21] The ECtHR reads in the freedom to receive information the right of the public to be adequately informed, in particular on matters of public interest.[22] According to the ECtHR, the public has a right to be informed, and this is an essential right in a democratic society which, in certain special circumstances, can even extend to aspects of the private life of public figures.[23] Importantly, according to the ECtHR, the right of an individual to access information held by a public authority and the obligation of the Government to impart such information to the individual does not

[21] ECtHR, *Magyar Helsinki* Grand Chamber judgment, § 148.
[22] Handbook, p. 15.
[23] ECtHR, *Satakunnan Markkinapörssi* Grand Chamber judgment, § 169.

generally exist but may arise where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right.[24] Different categories of individuals have a different scope of right of access to information based on the weight of the public interest related to their requests for information which, in turn, depends on the status of and the role played by those individuals.

For the ECtHR, "an important consideration is whether the person seeking access to the information in question does so with a view to informing the public in the capacity of a "public watchdog"."[25] The press plays an essential role in this respect and journalists are in a special, privileged position. The media's privileged position in imparting information derives from the ECtHR's view of the central role played by political expression in a democratic society, both with respect to the electoral process and to daily matters of public interest.[26]

Furthermore, the ECtHR has recognised that "given the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information, the function of bloggers and popular users of the social media may be also assimilated to that of "public watchdogs" in so far as the protection afforded by Article 10 is concerned,"[27] which may be interpreted as broadening the notions of the press and the journalist. On the other hand, in *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*[28] the ECtHR seems to have introduced a requirement of an analytical input of the journalist for the publication to be protected as a journalistic activity, which prevents over-broadening of the notion of the journalist.

On the other hand, the function of creating various platforms for public debate is not limited to the press but may also be exercised by, among others, NGOs, whose activities are an essential element of informed public debate. The ECtHR has accepted that when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press and may be characterised as a "social watchdog" warranting similar protection under the ECHR to that afforded to the press. It has recognised that civil society makes an important contribution to the discussion of public affairs.[29] An example of an NGO acting as a "social watchdog" was the Hungarian Helsinki group, "a well-established public-interest organisation committed to the dissemination of information on issues of human rights and the rule of law" (§ 178) which was seeking information from the relevant police departments for the completion of the

[24] ECtHR, *Magyar Helsinki* Grand Chamber judgment, § 156.
[25] *Ibid.*, § 168.
[26] Handbook, p. 63.
[27] ECtHR, *Magyar Helsinki* Grand Chamber judgment, § 168.
[28] ECtHR, *Satakunnan Markkinapörssi* Grand Chamber judgment, §§ 174-175.
[29] ECtHR, *Magyar Helsinki* Grand Chamber judgment, § 166.

survey on the functioning of the public defenders' scheme (§ 180) and, in particular, "nominative information on the individual lawyers in order to demonstrate any recurrent appointment patterns", which was, "undisputedly, within the subject area of its research" (§ 175). In the case of *Társaság a Szabadságjogokért v. Hungary*[30] the role of the "social watchdog" was played by "an association involved in human rights litigation with various objectives, including the protection of freedom of information" (§ 27) which was seeking access to a constitutional complaint filed by a member of parliament, with the intention "to impart to the public the information gathered from the constitutional complaint in question, and thereby to contribute to the public debate concerning legislation on drug-related offences" (§ 28).

Moreover, a right of access to information also extends to academic researchers and authors of literature on matters of public concern.[31] It should be observed that European data protection law is aware of the special value of science to the society, permits the retention of data for scientific research once they are no longer needed for the initial purpose of their collection and indicates that more detailed provisions, including the necessary safeguards, to reconcile the interest in scientific research with the right to data protection should be developed at the national level.[32]

- **The public has a right to be informed.**
- **Journalists have a privileged position and the widest scope of access to information.**
- **The notion of the journalist is understood broadly.**
- **"Social watchdogs" enjoy protection similar to that of journalists.**
- **Interests of researchers and literature authors are recognised.**

3.3.2. Status of the person whose personal data are potentially affected

Generally, voluntary entry to the public arena diminishes the protection of privacy. Examples of voluntarily entering the public arena include discharging public functions in the capacity of a politician, participating in a public debate, and committing offences of a political nature which attract the attention of the public.[33] However, the fact that a person is the subject of (defendant in) criminal proceedings cannot generally (e.g., in a case on social security fraud)

[30] ECtHR, *Társaság a Szabadságjogokért v. Hungary* judgment.
[31] ECtHR, *Magyar Helsinki* Grand Chamber judgment, § 168.
[32] Activity 1.2. (Conducting a comparative analysis of national and European legislation concerning the activities of the Ombudsperson) Mission Report, § 197.
[33] ECtHR, *Krone Verlag GmbH & Co. Kg v. Austria,* judgment of 26/02/2002, § 37.

remove from them the protection of their privacy.[34] In the same vein, being the subject of civil proceedings (such as in the situation of a child over whose custody the parents litigate) does not mean entering the public scene either.[35] A difference between public and non-public persons as well as between different categories of public persons reflect the idea that the more the person is within the public scene the less protection they enjoy.

The potentially affected data subject can be a private person, a relative public figure or an absolute public figure. Private persons enjoy the most and absolute public figures the least protection of their personal data.[36]

The ECtHR case-law on the freedom of expression regarding imparting information is also of importance in cases regarding receiving information. Thus, it should be kept in mind that politicians are the least protected category against criticism and, consequently, the scope of their privacy is the narrowest. The ECtHR has accepted that politicians exercising official functions can conceivably be regarded as absolute public figures.[37] Other figures of public importance enjoy more protection than politicians but are nevertheless public persons who are considered a legitimate object of constant scrutiny by their co-citizens. The limitations imposed on this type of individuals must be linked to the reasons leading them to acquire the public impact.[38] Notably, in *Von Hannover v. Germany*[39] which concerned private life of the princess of Monaco the ECtHR held that persons who are not politicians exercising official functions can only be "relatively public figures" (§§ 72, 73) and in their case the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published materials make to a debate of general interest (§ 76). High-ranking officials (including the president of a country, ministers, members of parliament, etc.) and civil servants (including police officers, prosecutors and law enforcement officers, and all public employees) are accorded a higher level of protection of their privacy than politicians.[40] Within this category, judges are granted special protection (e.g., they are protected more than prosecutors).[41] Privacy of ordinary, non-public persons is accorded a

[34] ECtHR, *Eerikäinen and Others v. Finland*, judgment of 10/02/2009, § 66.
[35] ECtHR, *Krone Verlag GmbH v. Austria*, judgment of 19/06/2012, § 54.
[36] N. Pirc Musar, Information Commissioner, Republic of Slovenia, Personal Data Protection in View of the Freedom of Expression and Protection of Privacy, https://www.ip-rs.si/fileadmin/user_upload/Pdf/clanki/Personal_data_protection_in_view_of_the_freedom_of_expression_and_protection_of_privacy.pdf , p. 4.
[37] *Von Hannover v. Germany*, judgment of 24/06/2004, § 72.
[38] J. G. Roca, P. Santolaya (eds.) Europe of Rights: A Compendium on the European Convention of Human Rights, Martinus Nijhoff Publishers, Leiden, 2012, pp. 395-397.
[39] ECtHR, *Von Hannover v. Germany*, judgment of 24/06/2004.
[40] Handbook, p. 66.
[41] *Ibid*., p. 68.

higher level of protection than in the case of the abovementioned categories of individuals. A special protection is granted to information concerning minors.[42]

A stable relationship between a public person and a private person can bring the private person into the sphere of public interest so that aspects of his life become matters of public interest contributing towards a certain "publification" of this person.[43] Thus, in *Karhuvaara and Iltalehti v. Finland* the ECtHR held that the public had a right to be informed about the conviction of the spouse of a politician as it could affect people's voting intentions.[44] However, family relations do not necessarily make a person a public figure. For example, the ECtHR in the case of a senior employee of the bank who was not a public figure agreed that the fact that his father had been a politician did not make him a public figure either.[45]

- **Entering the public arena diminishes the protection of privacy.**
- **Distinction between public and non-public persons and between different categories of public persons are important.**
- **The scope of privacy protection from the narrowest to the broadest:**
    1. **Politicians.**
    2. **Figures of relative public importance:**
        - **high-ranking officials and civil servants. Special protection to judges;**
        - **other figures of relative public importance (e.g. celebrities).**
    3. **Non-public persons.**
    4. **Minors.**
- **Private persons may become public because of their stable relationship with a public person.**

3.3.3. The importance of the public interest served by disclosing personal data

In the field of public relations we can theoretically talk about various forms of public domain: internal, external (which can be further divided into professional, general, political). For implementing the public interest balancing test it is not relevant how large the public domain is, or

[42] Handbook, p. 71; ECtHR, *Krone Verlag GmbH v. Austria*, judgment of 19/06/2012, § 49 mentions "the State's positive obligations under Article 8 of the Convention to protect the privacy of persons, in particular minors."
[43] Compendium, p. 397.
[44] ECtHR, *Karhuvaara and Iltalehti v. Finland*, judgment of 16/11/2004, § 45.
[45] ECtHR, *Standard Verlags GmbH v. Austria (No. 3)*, judgment of 10/01/2012, § 38.

what kind of public it is. What is important is that the public interest balancing test must not be implemented when it is evident from the appeal that only private interest of one or more individuals is in question.[46] The ECtHR specifies that "it must be a prerequisite that the purpose of the person in requesting access to the information held by a public authority is to enable his or her exercise of the freedom to "receive and impart information and ideas" to others"[47] (rather than to have it just for themselves) and gathering of the information has to be "a relevant preparatory step in journalistic activities or in other activities creating a forum for, or constituting an essential element of, public debate."[48] The journalists or NGOs are also required to be acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.[49]

Even though the right of the public to be informed can extend to aspects of the private life of public figures, articles aimed solely at satisfying the curiosity of a particular readership regarding the details of a person's private life, however well-known that person might be, cannot be deemed to contribute to a debate of public interest.[50] The public interest cannot be reduced to the public's thirst for information about the private life of others, or to an audience's wish for sensationalism or even voyeurism.[51]

The case-law of the ECtHR reflects the gradation of protected interests also in the sphere of protected types of expression and political speech is considered the most protected type of speech. The rationale for allowing little scope for restrictions on political expression likewise militates in favour of affording a right of access to such information held by public authorities.[52] Nevertheless, the public interest to be informed refers not only to matters of political interest or matters affecting elected politicians but also any issue which arouses public concern among citizens in general.[53] In *Thorgeir Thorgeirson v. Iceland*[54] the ECtHR held that there is no warrant in its case-law for distinguishing between political discussion and discussion of other matters of public concern for the purpose of deciding which restrictions apply in respect to such speech. Therefore, criticism of civil servants, namely reporting what was being said by others about police brutality with the principal purpose of urging the Minister of Justice to set up an independent and impartial

[46] N. Pirc Musar, Information Commissioner, Weighing Tests with Emphasis on Public Interest Test in Accessing Information of Public Character, https://www.ip-rs.si/fileadmin/user_upload/Pdf/clanki/Weighing_tests_with_emphasis_on_public_interest_test_in_accessing_information_of_public_character.pdf , p. 9.
[47] ECtHR, *Magyar Helsinki* Grand Chamber judgment, § 158.
[48] *Ibid.*
[49] *Ibid.*, § 159.
[50] ECtHR, *Satakunnan Markkinapörssi* Grand Chamber judgment, § 169.
[51] ECtHR, *Magyar Helsinki* Grand Chamber judgment, § 162.
[52] *Ibid.*, § 163.
[53] Compendium, p. 379.
[54] ECtHR, *Thorgeir Thorgeirson v. Iceland*, judgment of 25/06/1992, §§ 64-70.

body to investigate complaints of police brutality, was on a matter of serious public concern and, irrespective of the fact that it did not refer to political matters, legality of its restrictions had to be assessed applying the same criteria defined in Article 10 § 2. This case shows that non-political speech is clearly included in the category of protected speech and, consequently, information necessary for informing the public on these matters should be covered by the right of access to information. Furthermore, freedom to receive information also covers cultural expressions and entertainment.[55]

The most recent definition of the public interest provided by the ECtHR is as follows: "[t]he public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about."[56] Notably, "[i]n order to ascertain whether a publication relates to a subject of general importance, it is necessary to assess the publication as a whole, having regard to the context in which it appears."[57]

It is worth mentioning that prior existence of some type of debate in the media, among citizens or public bodies is relevant for deciding whether the requested information is related to the public interest (e.g., in a situation when the journalist reacts to an earlier speech[58]) but it is not decisive. In *Bergens Tidende and Others v. Norway*[59] the ECtHR did not agree "that the fact that the articles were not published as part of an ongoing general debate on the issues attached to cosmetic surgery, but were specifically focused on the standard of treatment provided at a single clinic, means that the articles did not relate to matters of general public interest."

Having identified the public interest of a particular request for information it is necessary to assess whether granting of the information request and, in particular, disclosure of personal data contained in the requested information is relevant for the public debate, i.e. whether it would actually serve that public interest.

[55] Handbook, p. 17; ECtHR, *Khurshid Mustafa and Tarzibachi v. Sweden*, 16 December 2008, § 44: „The importance of the latter types of information should not be underestimated, especially for an immigrant family with three children, who may wish to maintain contact with the culture and language of their country of origin."
[56] ECtHR, *Magyar Helsinki* Grand Chamber judgment, § 162.
[57] *Ibid.*
[58] ECtHR, *Oberschlick v. Austria (No. 2)*, judgment of 01/07/1997, §§ 32-33.
[59] ECtHR, *Bergens Tidende and Others v. Norway*, judgment of 02/05/2000, § 51.

It is possible that partial disclosure of personal data would serve the public interest equally well. The CJEU in *Dennekamp v. Parliament*,[60] in which it examined the refusal of the European Parliament to provide access to the list of members of the European Parliament (MEPs) who participated in the additional pension scheme adopted by the European Parliament, ruled that, for the purpose of exposing potential conflicts of interests, it was sufficient that Dennekamp be granted access to the names of the MEPs members of the scheme who had actually taken part in the votes on the scheme, and not to the entire list of the MEPs in the scheme.

It is also possible that certain requests of access to information do not serve the public interest at all. In *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*,[61] in a situation where taxation data was publicly accessible under Finnish law in order to ensure that the public could monitor the activities of government authorities, the ECtHR was not persuaded that publication of taxation data in the manner and to the extent done by the applicant companies (the raw data was published as catalogues *en masse*, almost verbatim) had contributed to a debate of public interest or that its principal purpose was to do so. It is noteworthy that in this case the applicant companies ordered taxation data from the Finnish National Board of Taxation. Following the first order, the Board requested an opinion from the Data Protection Ombudsman, on the basis of which the Board invited the applicant companies to provide further information regarding their request and indicating that the data could not be disclosed if the newspaper continued to be published in its usual form. The applicant companies subsequently cancelled their data request and paid people to collect taxation data manually at the local tax offices. Later on, the Data Protection Ombudsman won domestic judicial proceedings in which they asked the Data Protection Board to prohibit the applicant companies from processing the taxation data in that manner and to that extent. The ECtHR agreed with the reasoning of the domestic courts of Finland (Supreme Administrative Court) and in particular their finding that the publication of the taxation data in the manner and to the extent described did not contribute to a debate of public interest and that the applicants could not in substance claim that it had been done solely for a journalistic purpose within the meaning of domestic and EU law. The ECtHR case *inter alia* implies that the Finnish National Board of Taxation was right in not granting the applicants' request for large amounts of taxation information that was in principle publicly accessible, because it did not serve a public interest.

Specific arguments indicated by the authors of the request for information help to prove the relevance of the requested information for the indicated purpose and for the public debate

[60] CJEU, T-115/13, *Gert-Jan Dennekamp v. European Parliament*, judgment of 15/07/2015, §§ 87, 113, 143.
[61] ECtHR, *Satakunnan Markkinapörssi* Grand Chamber judgment.

on that matter. In *ClientEarth and PAN Europe v. EFSA*[62] the CJEU examined a situation where two NGOs requested access to a document which would reveal not only expert opinions submitted to European Food Safety Authority (EFSA) but also disclose which expert submitted which opinion. The CJEU held that the applicants sufficiently proved the necessity to disclose those personal data when they relied on the "existence a climate of suspicion of EFSA, often accused of partiality because of its use of experts with vested interests due to their links with industrial lobbies, and on the necessity of ensuring the transparency of EFSA's decision-making process" (§ 53) and their argument "far from being limited to considerations of a general and abstract nature, was supported [...] by a study which identified the links between a majority of the expert members of an EFSA working group and industrial lobbies" (§ 57). Thus, the disclosure of personal data was "necessary so that the impartiality of each of those experts in carrying out their tasks as scientists in the service of EFSA could be specifically ascertained" (§ 58), which served the interest of transparency of decision-making by a public authority (§§ 55, 56) and ensuring that the authority is more accountable to citizens in a democratic system (§ 56).

- **Identifying public interest:**
  - **public, not private;**
  - **curiosity is not enough;**
  - **matters of political interest and other issues of public concern are covered;**
  - **existence of prior debate is relevant but not decisive.**
- **Disclosure of information has to serve this interest.**

3.3.4. The extent of harm potentially suffered by the data subject

The extent of harm *inter alia* depends on the type of data (sensitive or not), the area of life potentially affected (intimate sphere, family, privacy, public sphere) and whether disclosure of personal data upon request would actually have impact on the life of the data subject.

Sensitive personal data (also referred to as "special categories of personal data") such as those concerning ethnic or racial origin, political views, religious or other convictions, genetic, biometric data, health, sexual life, etc. are protected to a greater extent than other personal data. This is confirmed by e.g. the text of the Law of Ukraine on Personal Data Protection (Art. 7) and

[62] CJEU, C-615/13, *ClientEarth and Pesticide Action Network Europe v. European Food Safety Authority*, judgment of 16/07/2015.

the EU General Data Protection Regulation (GDPR) 2016/679 (Art. 9). Nevertheless, the presence of strong public interest in the information can justify the revelation of confidential data such as medical reports on the health of the former President of the French Republic after his death.[63] The EU GDPR stipulates that sensitive personal data should not be processed, unless processing is allowed in specific cases set out in legislation (recital 51) *inter alia* in cases where it is in the public interest to process such data (recitals 51-56). Article 9 § 2 (g) of the GDPR provides that processing of special categories of personal data is not prohibited if it "is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject."

The less intimate the area of life of an individual is affected, the higher the tolerance for encroaching into that person's privacy by means of disclosing their personal data is.[64] Notably, the CJEU in the aforementioned case of *Dennekamp v. Parliament*,[65] in which it examined the refusal of the European Parliament to provide access to the list of members of the European Parliament (MEPs) who participated in the additional pension scheme adopted by the European Parliament, found that the personal data at issue fell into the public sphere of MEPs and as such required a lesser degree of protection (§ 124). In the weighing up of interests, the CJEU considered that the aim of the transfer intending to increase the confidence of citizens in the EU was of such importance that the transfer could not prejudice the interests of the MEPs (§ 126).

The actual harm inflicted by disclosing personal data may depend on whether those data had been known to other persons even before their disclosure on request. The ECtHR in some cases appears to have adopted a notion of private life linked to greater or lesser knowledge of the facts transmitted and not to the private nature of the facts themselves.[66] The ECtHR has held that publication of a senior executive's earnings in a company in crisis, including a photocopy of the income tax return was not confidential information because it could be known by a wide number of persons;[67] and that the wedding photograph of a presumed terrorist, although it affects his privacy, does not allow a restriction on freedom of expression because it was also published in other media.[68] In *Magyar Helsinki* case[69] the ECtHR held that "information of a statistical nature about the number of times the individuals in question had been appointed to represent defendants in

[63] Compendium, p. 405, ECtHR, *Editions Plon v. France*, judgment of 18/05/2004, §§ 44, 53.
[64] N. Pirc Musar, Personal Data Protection in View of the Freedom of Expression and Protection of Privacy, p. 4.
[65] CJEU, T-115/13, *Gert-Jan Dennekamp v. European Parliament*, judgment of 15/07/2015.
[66] Compendium, p. 398.
[67] Compendium, p. 405; ECtHR, *Fressoz and Roire v. France*, Grand Chamber judgment of 21/01/1999, § 53.
[68] Compendium, p. 405; ECtHR, *News Verlags GmbH & Co.KG v. Austria*, judgment of 11/01/2000, § 59.
[69] ECtHR, *Magyar Helsinki* Grand Chamber judgment.

public criminal proceedings within the framework of the publicly funded national legal-aid scheme concerned personal data but did not involve information outside the public domain"(§ 198) and in principle could "be known to the public through other means, such as information contained in lists of legal-aid providers, court hearing schedules and public court hearings", which is why "the disclosure of public defenders' names and the number of their respective appointments would not have subjected them to exposure to a degree surpassing that which they could possibly have foreseen when registering as public defenders" even though the information in question "was not collated at the moment of the survey"(§ 195). In recent cases, however, the ECtHR has made clear that the fact that information was already in the public domain did not necessarily remove the protection of Article 8.[70] Notably, where there had been compilation of data on a particular individual, processing or use of personal data or publication of the material concerned in a manner or degree beyond that normally foreseeable, private-life considerations arose. In a situation where the data collected, processed and published in the newspaper had provided details of taxable earned and unearned income and taxable net assets, the ECtHR treated it as information concerning private life even though, pursuant to Finnish law, the data could be accessed by the public. Consequently, the weight of the interest to provide protection of such data should be balanced against the weight of the right to know these data. Notably, the safeguards limiting access to such information (e.g. the rule that journalists can only retrieve certain amount of data and have to specify that the information is requested for journalistic purposes) provided in the domestic law should be applied and not circumvented. If this is not ensured, the harm to be suffered by the data subjects would outweigh the interest of the public to know those data.[71]

In the aforementioned *ClientEarth* case,[72] in which it had to examine the necessity of disclosing the identity of experts who authored comments relevant in the decision-making process, the CJEU was not persuaded that disclosure of personal data would have led to effects prejudicial to the integrity and privacy of the experts concerned (§ 67) because these allegations were "unsupported by evidence" (§ 70) but rather were merely "a consideration of a general nature which is not otherwise supported by any factor which is specific to this case" (§ 69). Even though the respondent authority relied on examples of individual attacks to which experts whose assistance it had requested were exposed (§ 67), the CJEU held that those examples did not "in any way prove that the disclosure of the information at issue would have been such as to create a risk that the privacy or the integrity of the experts concerned would be undermined"(§ 68).

[70] ECtHR, *Satakunnan Markkinapörssi* Grand Chamber judgment, §§ 134-135, 187-188.
[71] *Ibid.*
[72] CJEU, C-615/13, *ClientEarth* judgment of 16/07/2015.

- **Greater but not absolute protection for sensitive data.**
- **The less intimate the sphere of life affected by disclosure, the more protection.**
- **Being already in the public domain is relevant but not decisive.**

4. Outcomes of balancing.

In the doctrine, the balancing test is criticised for opening an often too broad pool of possibilities for any balancing and deciding body due to a lack of more specific determining criteria which are necessary to assess all the relevant factors, impacts and possible harms of any balancing result.[73] Application of the balancing criteria described above can indeed lead to different outcomes where the balancing is performed in the same situation by different bodies.

When the application of the balancing criteria point in the same direction, it is relatively easy to determine whether personal data are to be disclosed or not. Thus, when "the preservation of the most intimate sphere of life of a juvenile who had become the victim of a custody dispute and had not himself stepped into the public sphere deserved particular protection on account of his or her vulnerable position," the outcome of balancing is obvious.[74] Both because the person whose personal data are affected is a non-public figure and a minor and because the sphere affected is his strictly private life, the most intimate sphere, the disclosure of his identity and publication of his photograph was not necessary for understanding the particulars of the enforcement of the court decision in a case concerning the dispute between a couple over the custody of their son. Consequently, accessing such information for the purpose of informing the public is also not necessary and the protection of personal data prevails.

However, when different criteria used in balancing point in different directions, the overall outcome of balancing is not easily predictable. For example, when a newspaper reports about a case in which a senior employee of the bank who happens to be a son of a politician is charged with embezzlement and in doing so discloses the identity of that employee, a lot of factors are to be assessed. In *Standard Verlags GmbH v. Austria (No. 3)*[75] the ECtHR noted that the senior employee of the bank was not a public figure, the fact that his father was a politician did not make

[73] Activity 1.2. (Conducting a comparative analysis of national and European legislation concerning the activities of the Ombudsperson) Mission Report, § 204.
[74] ECtHR, *Krone Verlag GmbH v. Austria*, judgment of 19/06/2012, § 57.
[75] ECtHR, *Standard Verlags GmbH v. Austria (No. 3)*, judgment of 10/01/2012.

him a public figure, and he did not enter the public scene in any other manner either. However, the ECtHR observed that "the question whether or not a person, whose interests have been violated by reporting in the media, is a public figure is only one element among others to be taken into account" (§ 38) while another important factor was "the contribution made by articles or photos in the press to a debate of general interest" (§ 39). As "the article at issue is not a typical example of court reporting but focuses mainly on the political dimension of the banking scandal at hand" and "does not deal with the conduct or contents of the investigation as such" (§ 43) but "the article's focus is instead on the extent to which politics and banking are intertwined and on the political and economic responsibility for the bank's enormous losses"(§ 44), "[i]t is difficult to see how the applicant company could have reported on these issues in a meaningful manner without mentioning the names of all those involved" (§ 44). In particular, the article described how the regional governor who was also a shareholder and performed a supervisory function at the bank, together with a member of the bank's executive board, were trying to put the blame on the aforementioned employee of the bank and in this context referred to his father, member of the Socialist Party and former member of the regional government, thus hinting at motives of party politics (§ 44). As regards the harm suffered by the data subject because of the disclosure of his identity, the ECtHR agreed that "the disclosure of [the employee's] identity had been detrimental to him, namely to his professional advancement" but attached more weight to the argument that "his name and position at [that bank] must have been well known in business circles before the publication of the article at issue" (45) and, consequently, held that "the domestic courts have overstepped the narrow margin of appreciation afforded to them with regard to restrictions on debates of public interest" (§ 46) by punishing the newspaper for disclosure of personal data.

Even though different actors, notably the domestic courts and the ECtHR, may reach opposite conclusions applying the same criteria, the only way to ensure compliance with the ECHR is to apply the criteria developed by the ECtHR, to take into account existence of common standards or emerging trends on a particular issue in Europe (thus determining the breadth of the margin of appreciation left to the States) and, within the remaining margin of appreciation, to take into account relevant legal and social circumstances specific to Ukraine. In particular, it should be assessed to what extent Ukrainian law provides for transparency in specific fields, what public interest transparency currently serves and how weighty this public interest is compared to other interests, is the situation comparable to that of other States, etc.

- **Where balancing criteria point in the same direction, the outcome of balancing is relatively easy to determine.**
- **Where balancing criteria point in different directions, the outcome of balancing is less predictable.**
- **In order to comply with the ECHR standards balancing should:**

- be based on the criteria established by the ECtHR;

- take into account prevailing standards and emerging trends in Europe to determine the remaining margin of appreciation;

- within the remaining margin of appreciation, involve assessment of the specificities of legal and social conditions in Ukraine.

5. Final observations.

Since the outcomes of the balancing test may not always be easily predictable, it is a good strategy to eliminate or minimise the need for balancing at the stage of responding to a request for access to information. Balancing can be done at the earlier stage of legislating or it can be made easier by designing internal policies on personal data collection and taking a proactive approach in publishing data.

It has already been noted that theoretically the sooner a balancing test can be applied (i.e. at the lowest possible level), the more efficient the system is,[76] which is why balancing at the stage of legislating is a good way of resolving the conflict of rights. However, the legislation will never be able to regulate all situations of a possible conflict without becoming too rigid and insensitive to specificities and, consequently, other strategies of minimising the need for balancing have a role to play.

Internal policies of personal data collection can be improved by thinking about possible future requests for access to information and limiting the collection of personal data to what is strictly necessary.[77] In addition, the data subjects can be informed in advance of the possible future disclosure of their data, which enables them to give or refuse their consent in advance, and of the

[76] Activity 1.2. (Conducting a comparative analysis of national and European legislation concerning the activities of the Ombudsperson) Mission Report, § 209.

[77] European Data Protection Supervisor, 2011, Public access to documents containing personal data after the *Bavarian Lager* ruling, https://edps.europa.eu/sites/edp/files/publication/11-03-24_bavarian_lager_en.pdf , pp. 6-11; European Data Protection Supervisor, 2013, Transparency in the EU Administration: Your Right to Access Documents. EDPS Factsheet 2, https://edps.europa.eu/sites/edp/files/publication/factsheet_2_en.pdf , p. 5.

possibility to object to disclosure at a later stage. The EU Article 29 Working Party, an advisory body on data protection established under Directive 95/46/EC, is of the view that "[t]o ensure legal certainty and transparency towards the data subjects, it is good practice, whenever possible, to take a proactive approach and define in advance the personal data that could be made publicly available. Data subjects can then be informed, at the time of collection of the data, whether any part of the personal data they provide, or that will be further processed during the administrative procedure, will become publicly available as a result of freedom of information laws."[78]

As regards proactive publishing of data, it is noteworthy that under EU law the principle of transparency enshrined in Articles 1 and 10 of the Treaty on European Union and in Article 15 § 1 of the Treaty on the Functioning of the European Union aims at obliging State authorities to actively inform citizens on issues which are supposed to be in the public interest. This, however, does not mean that the authorities are free to publish all the data they collect for the public interest. In proactively making the personal data available for the purposes of transparency, proportionality principle should be observed and due respect for data protection principles, such as minimisation and purpose limitation, should be ensured.[79]

- **Resolving the issue of balancing at the stage of legislating, designing internal policies on personal data collection, and taking a proactive approach in publishing data helps reduce the number of situations where balancing will be needed at the stage of examining a request for access to public information containing personal data.**
- **Internal policies on personal data collection are particularly useful for informing data subjects of the possible future disclosure of their data and their rights in this matter as well as for avoiding the collection of personal data beyond what is strictly necessary.**
- **Proactive approach in publishing personal data serves the public interest of transparency but it should comply with the safeguards stemming from the personal data protection laws, such as proportionality, minimisation, and purpose limitation.**

[78] Article 29 Data Protection Working Party, 1021/00/EN WP 207, Opinion 06/2013 on open data and public sector information ('PSI') reuse, http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp207_en.pdf , p. 9.

[79] Article 29 Data Protection Working Party, 1806/16/EN WP 239, Opinion 02/2016 on the publication of Personal Data for Transparency purposes in the Public Sector, http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2016/wp239_en.pdf , pp. 6, 10, 13.