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Rule of Law and Information Society: Constitutional Limits to Active Information Provision by Government

1. Introduction

Estonia today is in euphoria over information technology and publicity. Openness and introduction of new technologies is certainly welcome and necessary but we should not forget that information is also a very powerful weapon. The more that is known about a person, the easier it is to control him or her. Administrative law as a branch of law regulating the use of public power also has to control the new threats to the freedom of individuals caused by the information society, including dangers related to disclosure of governmental information. Uncontrolled use and unequal distribution of information, disclosure of data to a wrong person, at the wrong time or in the wrong form, as well as the publishing of incorrect or dubious messages may be just as damaging to individuals, companies and interest groups as an incorrect precept issued by the tax authorities or an illegal search by police. The author of the article aims to explain the possibilities of reconciling the aims of information society and principles of rule of law in today's Estonia, taking a closer look at the active information provision by agencies on the Internet.

In the first, introductory, part of the article I will briefly explore some examples of government information and the legal framework imposed on it in Estonia. In the second part I will examine more closely the relationship between fundamental freedoms and public information, and in the third part the constitutional requirements for information operations in cases where fundamental freedoms are restricted.

1.1. Government information

Surely states have never managed to do without the forwarding and gathering of information: agencies need to gather the relevant data to make appropriate decisions, and it is also necessary to learn from the mistakes that have been made. The opposite to the gathering of information is informing of a particular person or the public. Even in a totalitarian police state it is necessary to ensure that orders and prohibitions are communicated to the addressee. In the information society communication between the state and the citizen becomes more intense.^{*1} The principle of confidentiality of official information is being replaced by freedom of information: the citizen needs to be informed both at his or her request and on the agency's own initiative. The latter type of information operations is called active information provision. Today's information and communication technology opens up significantly more practical possibilities for communication with citizens than was available before.^{*2} Currently the Internet still plays, first of all, an informing function in public administration but in the near future it has to become a channel of exercising public functions. The breakthrough should come with the newly launched electronic ID and digital signature.^{*3}

The state also increasingly uses information, including active information provision, as a specific means of exercising public functions apart from communication arising from other services. Depending on the situation, informing of people, especially as concerns their active persuasion, counselling or warning may be a much more efficient measure to direct behaviour than legal orders or prohibitions.^{*4} Health and consumer protection authorities warn people of dangerous products, services or firms (*e.g.* poor sanitary situation in a restaurant), dangerous modes of behaviour (*e.g.* smoking, consumption of beef due to the threat of BSE). The tax authorities publish data about tax debtors^{*5} and the Ministry of Finance about student loan debtors.^{*6} On the other hand agencies also give advice on certain products, *e.g.* preference of certain medicines, or counsel people in certain situations or fields of activity (in agriculture and in small-scale entrepreneurship in rural areas).^{*7}

¹ Society has always been an information society. Today it is only characterised by the wider scope of gathering and processing of information. See P. Birkinshaw. *Freedom of Information: The Law, the Practice and the Ideal*. London: Butterworths, 1996, p. 6. The development of technology is also not only a modern phenomenon. Just like computers and the Internet today, the spreading of printed media and photography presented a challenge to privacy a century ago. *Cf.* E. J. Eberle. *Dignity and Liberty: Constitutional Visions in Germany and the United States*. Westport: Praeger, 2002, p. 82*f.* The German Constitutional Court used the threat caused by today's technology as an argument in its population census case, BVerfGE, 65, 42.

² Electronic administrative information can be divided into the following groups according to its levels of development: (1) information — publishing information in the Internet with the agency's contact data, opening hours, procedures, possibility of printing out forms of applications; (2) communication — recognition of electronic mail as informal means of communication, publishing of official notices and registers in the Internet; (3) interaction — possibility of making individual enquiries in the state's databases; giving legal force to mutual electronic communication between the citizen and the agency, use of multimedia in administrative procedures, electronic administrative decision. Administration in Estonia has by now mostly achieved the first level and is making successful efforts in the second phase (agencies normally reply to e-mails, there is information on the web at least about the state institutions and larger local governments, several information portals and discussion forums have been opened. See first of all the portal of government: www.riik.ee. Only occasional examples can be brought to demonstrate the "third generation": electronic forwarding of income tax returns; or mobile parking. *Cf.* this with D. Liiv. *Uued tehnoloogiad avalikus halduses (New Technologies in Public Administration)*. – Riigikogu Toimetised (RiTo), No. 4, 2001, p. 51 (in Estonian). About the development of information society in Estonia in general, M. Meriste. – *IT haldusjuhtimises. Aastaraamat 2000*. Available at: www.eik.ee/it2000/o91.htm (in Estonian).

³ See for example initiative "eEurope". Available at: http://europa.eu.int/information_society/eeurope/news_library/pdf_files/initiative_en.pdf. The preparation of widespread use of government databases and information systems takes place in the framework of the project "x-tee". Available at: www.riik.ee/ristmik/ (in Estonian). The demands to establish interactive communication are known also in the presently applicable law, *e.g.* § 7 (6¹) of the Estonian Central Register of Securities Act (Riigi Teataja (The State Gazette) I 2000, 57, 373) requires that the registrar should allow inquiries regarding persons for whom a pension account has been opened. The English translations of most of the statutes cited here are available on the web page of the Estonian Legal Translation Centre: www.legaltext.ee.

⁴ See for example U. Di Fabio. *Information als hoheitliches Gestaltungsmittel*. – *Juristische Schulung (JuS)*, 1997, No. 1; C. Gusy. *Verwaltung durch Information*. – *Neue Juristische Wochenschrift (NJW)*, 2000, p. 977.

⁵ See the home page of the Tax Board www.ma.ee/statistika/volg/veeb02.xls, 23.02.2002 (in Estonian), also the web page maintained by private institutions www.tasuja.ee (in Estonian). Debtors of the Tax Board make up a significant part of the Tasuja database. *Cf.* V. Korpan. *Ekspankur Aare Kilp paljastab maksuvõlglast (Ex-banker Aare Kilp Reveals Persons who Owe Arrears)*. – *Äripäev*, 31 October 2000 (in Estonian).

⁶ See the Ministry of Finance web page: <http://www.fin.ee/pages.php/01070601>. List of debtors of the Estonian Traffic Insurance Fund (legal person in public law) together with the debtor's address and indebted sum: <http://www.lkf.ee/fond/fond.html> (in Estonian).

⁷ See K. Kuusikko. *Neuvonta hallinnossa. Lakimiesliiton Kustannus: Helsinki, 2000*; K. Kuusikko. *Advice, Good Administration and Legitimate Expectations: Some Comparative Aspects*. – *Eur. Publ. Law*, No. 7, 2001, p. 455; T. Leidinger. *Hoheitliche Warnungen, Empfehlungen und Hinweise in spektrum staatlichen Informationshandelns*. – *DÖV*, 1993, p. 925; J. Oebbecke. *Beratung durch Behörden*. – *DVBl*, 1994, p. 147.

1.2. Legal framework in Estonia

The central law handling government information in Estonia is certainly the Public Information Act⁸ (PIA), entered into force on 1 January 2001. It regulates forwarding of information to citizens and the public both on the basis of requests and on the agency's own initiative. Publication of data is preceded by their collection, storing and exchange which should be regulated by the Databases Act and the agency's internal rules of procedure.⁹

Concerning information requests the presumption of publicity of information is applied, *i.e.* disclosure of information can be denied only in the cases provided by law. The requester should not prove the existence of any particular interest. But the PIA only requires access to the already existing data. However, some information that requires additional research can be requested pursuant to the Response to Petitions Act¹⁰ from the year 1994. Thus, the requirement to give information already existed before the PIA. Also in practice the PIA did not bring along an avalanche of requests for information, as it was first feared.¹¹ However, the PIA was indispensable in order to regulate in more detail the possibilities of receiving information and the basis for restricting access to information. What is also notable about the PIA is the wide requirement of publishing documents on the web page, which became fully effective on 1 March 2002. In addition to information directly concerning only the agency (opening hours, contact data, budget) also a number of documents concerning individuals have to be published: *e.g.* all precepts of state supervision authorities, court decisions and the agency's document register that should contain information about all documents prepared in or received by the agency. In addition, the PIA and several specific acts oblige agencies to advise and warn citizens, also stipulating the use of information as a means of exerting "social pressure".¹²

In replying to information requests and active disclosure of information the same PIA provisions restricting access are applicable; they are elaborated in more detail in the Personal Data Protection Act¹³ (PDPA) and the State Secrets Act.¹⁴ But there is no general provision of the PIA or any special statute restricting the disclosure of trade secrets, although some special provisions are binding only for the tax and competition authorities.¹⁵ Subsection 34 (2) of the PIA gives the right to the head of an agency to classify information as internal in the cases provided by the PIA.

Legal protection from administrative action, including disclosure or withholding of information operations, is carried out in administrative courts.¹⁶ In connection with the remarkable intensification of information disclosure it has become clear that disclosure of data connected with a person's name or other personalised data can easily infringe the interests of individuals and companies — even when it does not concern data on a person's private life in the strictest sense of the word. The Data Protection Inspectorate, for example, complains that:

“[they] are approached also with the problem that concerns disclosure of data about the economic activities of legal persons in private law, that is data which in essence can be interesting for competitors in the same field, and having command of this information it is possible to damage the subject of that informa-

⁸ Riigi Teataja (The State Gazette) I 2002, 26, 150 (in Estonian).

⁹ See first of all the Government of the Republic regulation No. 80 “The Foundations of Uniform Procedural Principles” of 26 February 2001 (in Estonian).

¹⁰ Riigi Teataja (The State Gazette) I 1994, 51, 857 (in Estonian).

¹¹ Government of the Republic, explanatory letter to the draft Public Information Act, 2000, www.riigikogu.ee/ems/; Data Protection Inspectorate, Report on the implementation of the Public Information Act, 2001, <http://www.dp.gov.ee/?js=1>. According to the questionnaire conducted by the Data Protection Inspectorate more than half of the data holders had registered only 10 information requests from 1 January until 1 October 2001. Only less than 10% of the data holders who responded to the questionnaire had received over a hundred information requests. See Data Protection Inspectorate, Report 2001.

¹² PIA § 28 (1), 7), 13), 14), 32), § 36 (1), 7); Consumer Protection Act (Riigi Teataja (The State Gazette) I 1994, 2, 13) § 12 (1), 8) and § 3; Food Act (Riigi Teataja (The State Gazette) I 1999, 30, 415; 2002, 13, 81; 79) § 48 (5) and § 51 (1); Product Safety Act (Riigi Teataja (The State Gazette) I 1998, 40, 613) § 11 (1) (all in Estonian).

¹³ Riigi Teataja (The State Gazette) I 1996, 48, 944 (in Estonian).

¹⁴ Riigi Teataja (The State Gazette) I 1999, 16, 271. See also Population Registers Act (Riigi Teataja (The State Gazette) I 2000, 50, 317), Databases Act (Riigi Teataja (The State Gazette) I 1997, 28, 423), Population and Houses Census Act (Riigi Teataja (The State Gazette) I 1998, 52/53, 772), Agricultural Census Act (Riigi Teataja (The State Gazette) I 2000, 35, 217), Human Genes Research Act (Riigi Teataja (The State Gazette) I 2000, 104, 685), *etc.* (all in Estonian).

¹⁵ New version of the Taxation Organisation Act (Riigi Teataja (The State Gazette) I 2002, 26, 150) section 26; Competition Act (Riigi Teataja (The State Gazette) I 2001, 56, 332) §§ 10 (4), 26 (9), 63 (all in Estonian).

¹⁶ In practice there are few disputes concerning the government information provision activities. Only occasional cases on the basis of the Public Information Act have reached the courts (*e.g.* Tallinn Court of Appeal II-3/455/01; II-3/265/01). In 2001 the Data Protection Inspectorate reviewed 43 complaints relating to the PIA (some of them against private individuals). The majority of the complaints concerned refusal to disclose information or delay with disclosure. Altogether six precepts were issued, Data Protection Inspectorate, Report, 2002.

tion or to achieve a certain competitive advantage. The Data Protection Inspectorate has taken the stand that arising from the Public Information Act it is, in general, impossible to impose restrictions on access to such data if there are no other reasons for refusing to grant the request for information. We can only contemplate restrictions arising from a special law.”¹⁷

Also in countries with longer traditions of freedom of information there have been debates concerning the issue of to what extent agencies, when ensuring access to documents, have to enable one private individual to “snoop” after another individual.¹⁸ In the following parts of the article we will try to see whether this problem of contrary interests has, in the light of constitutional rights, been solved efficiently in the Estonian data regulation acts and in current practice. To illustrate it let us examine two examples of active information provision:

- disclosure of information that exerts “social pressure” (information on debtors, warnings regarding products and services);
- electronic access to document register.

2. Fundamental rights and public information

2.1. The impact of information on fundamental rights

Apparently there is no need at this point for a lengthy justification of the claim that, depending on the situation, both the disclosure of as well as failure to disclose governmental information may result in infringement of fundamental rights. In the catalogue of fundamental rights in Estonia, what first captures attention in the context of governmental information is obviously the article on the freedom of information (Constitution § 44). However, in the case of more concrete issues governmental information may entail serious problems of interpretation. Dissimilarities also crop up when comparing different legal systems with each other. In the Constitution of the Federal Republic of Germany, for example, the highest value — human dignity — sets much narrower limits to the disclosure of governmental information than the American constitutional tradition where freedom of expression is considered almost as an absolute right.¹⁹

In German court practice the principle of human dignity has been used to derive the right of informational self-determination, *i.e.* the right of a person to decide when and how much information he or she allows to disclose about himself or herself. The Estonian Constitution (§§ 10 and 18) lends itself to a similar interpretation, although in the conditions of information society such interpretation can also raise doubts. Information is a social phenomenon and data are usually important for more persons than just the particular individual who is directly concerned.²⁰ The German Constitutional Court also emphasises that individuals do not have an absolute authority, comparable to property rights, to decide on the information concerning them, but they only have limited rights in shaping the communication process.²¹ In the United States, on the other hand, the privacy argument is invoked in restricting access to information. Privacy is certainly protected also in Estonia (Constitution § 26 and of the European Convention on Human Rights article 8 (1)) although its scope of protection is narrower than in the case of the right to self-determination.²² The area of protec-

¹⁷ Data Protection Inspectorate, Report, 2002.

¹⁸ For example, the original purpose of the FOIA of the United States was only to guarantee the public monitoring of the activities of governmental authorities, not other private persons. According to this, the courts denied any right of access to records concerning private persons only. However, with the amendments to the FOIA in 1996 an “egoistic” right of access to records concerning another citizen or company was recognised. See J. T. O’Reilly. Expanding the Purpose of Federal Records Access: New Private Entitlement or New Threat to Privacy? – *Adm. Law Review*, No. 50, 1998, p. 371.

¹⁹ E. J. Eberle (Note 1), p. 96.

²⁰ About informational self-determination in Germany see first of all the Population Census case (BVerfGE, 65, 1) of the Federal Constitutional Court. In Estonia the right of self-determination is recognised, for example, by the Data Protection Inspectorate, Report on the Implementation of the Data Protection Act, 2002. Available at: www.dp.gov.ee/uus/files/Ettekanne_AvTS_taitmisest_2001.rtf (in Estonian). Of the same opinion is R. Alexy. Põhiõigused Eesti Vabariigi põhiseaduses (Fundamental Rights in the Constitution of the Republic of Estonia). – *Juridica eriväljaanne*, 2000, p. 50; T. Annus. Riigiõigus (Constitutional Law). Tallinn: Juura, 2001, p. 192 (in Estonian). See generally about human dignity R. Maruste. Põhiseadus ja selle järelevalve (The Constitution and its Review). Tallinn: Juura, 1997, p. 112 *ff.* (in Estonian) (referring also briefly to the need to protect human dignity in the framework of data protection); E. Kergandberg. Fundamental Rights, Right of Recourse to the Courts and Problems Connected with the Guaranteeing of the Right of Recourse to the Courts in Estonian Criminal Procedure. – *Juridica International*, Vol. 4, 1999, pp. 122, 124 *ff.*

²¹ About the opposition between the essence of the right of self-determination and the right to property see W. Hoffmann-Riem. Selbstbestimmung in der Informationsgesellschaft. – *Archiv des Öffentlichen Rechts (AöR)*, No. 123, 1998, pp. 513, 521.

²² Comparison of Germany and the United States: Eberle. Dignity and Liberty, 2002, pp. 94 *ff.* About the Convention, for example M. W. Janis, R. S. Kay, A. W. Bradley. *European Human rights Law*. 2000, p. 300 *ff.*

tion of privacy in Estonia includes only personal data belonging to the sphere of private and intimate life, not any type of information relating to a particular identifiable person.

Both the right of informational self-determination and the inviolability of privacy, in addition to restricting the disclosure of information, also restrict its collection. As an aspect of the right to self-determination also the person's right of access to information that agencies have about him or her is protected (Constitution § 44 (3)).

2.2. Constitutional obligations to disclose information

Apart from the restrictions that fundamental rights impose on gathering, processing and disclosure of information, fundamental rights may also require disclosure of information (in exceptional cases also gathering and analysis of information to protect people from dangers). The first paragraph of § 44 (1) of the Constitution prohibits the state to hamper exchange of information between individuals, protecting also the receiver of information in the social communication process, in addition to protecting the freedom of expression (Constitution § 45 paragraph 1). The right to receive information is also contained in article 10 paragraph 1 of the European Convention on Human Rights. The European Court of Human Rights has refused to derive from this provision the general right of access to unpublished documents at the disposal of the state²³; however, this right has been stipulated in the second paragraph of § 44 of the Constitution which imposes on the agencies the obligation to provide an Estonian citizen, upon his or her request, information *concerning the agency's activities*. The requirement to disclose information concerning the activities of state agencies also derives from the principle of democracy because neither the participation of the public in the decision-making process nor exercising of control over administration are possible in the case of insufficient information.²⁴ The European Court of Human Rights has recognised the right arising from article 6 of the Human Rights Convention for access to documents at the disposal of an agency (including data concerning private individuals) if it is necessary for effective protection of a person's rights, for example in court proceedings.²⁵ In light of the duty to protect rights and freedoms (Constitution § 14), the second paragraph of § 44 of the Constitution should also be interpreted in a similar manner (although this provision only mentions information concerning the "agencies' activities").²⁶

2.3. Conflicts of interests

If for the protection of life, health or property the state may have an obligation to guarantee access to information at its disposal, the question may also be reversed: whether government information, especially disclosure of facts about a person, warnings, recommendations, and appeals could be considered as infringement of those fundamental rights of a third party which are not directly related to information? More specifically: could it be considered a restriction of the freedom to choose one's employment when the police publish in a newspaper a list of "drunken drivers", as a result of which some of the people lose their job? Or when the Consumer Protection Inspectorate makes an announcement about unsanitary conditions in a restaurant, as a result of which the number of visitors in the restaurant declines, could it be said to have a connection to the freedom of enterprise? Let us review the issue on the example of two somewhat opposing legal orders — Germany and the United States.

In Germany, according to the classical concept of violation, factual and indirect effect were originally not considered as violation of fundamental rights.²⁷ In recent decades, however, this idea has been shattered in

²³ See *Leander v. Sweden*, ECHR 10/1985/96/144. Grammatical interpretation of the Convention article could also lead to a different position, H. H. Perritt, C. J. Lhulier. Focus on Cyberlaw: Information Access Rights Based on International Human Rights Law. – Buffalo L. Rew, Vol. 45, 1997, pp. 899, 914 f. See also article 19 of the International Covenant on Civil and Political Rights. – Riigi Teataja (The State Gazette) II 1993, 10/11, 11.

²⁴ I. Harden. Citizenship and Information. – European Public Law, No. 7, 2001, pp. 165, 184 ff.; M. Lauristin. Kas oskame ja tahame kasutada uue meedia võimalusi demokraatia edendamiseks? (Can and Would We Use the Facilities of the New Media to Further Democracy?) – RiTo, Vol. 3, 2001, p. 21 (in Estonian).

²⁵ In the case *McGinley and Egan v. United Kingdom*, ECHR 10/1997/794/995-996, right of access was recognised in the case of a person who had fears that he had been radiated as a result of nuclear testing during service in the military. Arising from the principle of rule of law in Estonia the right of access of the concerned persons to documents relating to administrative procedure is derived. See K. Merusk. Menetlusosaliste õigused haldusmenetluse seaduses (The Rights of the Parties to a Proceeding under the Administrative Procedure Act). – Juridica, 2001, No. 8, p. 519 (in Estonian).

²⁶ *Guerra v. Italy*, ECHR 116/1996/735/932. See also article 16 of the Prevention of Major Industrial Accidents Convention (Riigi Teataja (The State Gazette) II 2000, 17, 105); Convention on the Transboundary Effects of Industrial Accidents (Riigi Teataja (The State Gazette) II 2000, 6, 34) article 9 and annex VIII.

²⁷ R. Alexy (Note 21), p. 34; K. Stern. Das Staatsrecht der Bundesrepublik Deutschland. Köide III/2. München: Beck, 1994, p. 82; H. Dreier (ed.). Grundgesetz: Kommentar. Vol. 1. Tübingen: Mohr, 1996, Vorb. nr. 81. About the contemporary concept of restrictions of fundamental

court practice and commentaries, and in addition to the relatively wide right of informational self-determination, in Germany also the impact of information provision to other fundamental rights is reviewed. In addition to the right to informational self-determination, the German Constitutional Court considered the impacts of disclosure of data to other freedoms in the cases *Drunkard* and *Lebach*. In the first case, the authority had disclosed data concerning persons who had been legally incapacitated due to their alcoholism. In the second case, a public broadcasting company had transmitted a story about the private life of a bank robber (including his homosexual relations). In both cases the court stressed that the disclosure of such data hinders the return of the person into the society.^{*28} In the *Birkel* case concerning the compensation of damages, a health protection authority had warned the population through the media against the products of a well-known noodle company that was supposedly using “egg mass contaminated with microbes” to make its products. The claim proved to be scientifically truthful. The raw material used to produce the noodles did contain microbes, though not in a quantity that would be hazardous to health. But the public had interpreted the Inspectorate’s warning as a dangerous and “particularly nauseating” case. The company was suffering tens of millions of marks worth of damage because of losing their market. The court said that it was a case of an indirect violation of the freedom of enterprise.^{*29} The publication of information is handled as an infringement of rights, if the aim of the authority is to restrict the persons’s factual freedom or such restriction is an obvious result of the publication.^{*30}

The US Supreme Court does not support such wide treatment of freedom. The issue of interfering with a freedom can only arise when “the aim of a measure is to restrict the freedom of choice of an individual or group of individuals to realise themselves in an *essential* field of human activity.”^{*31} In the American constitutional tradition, when solving such cases, the crucial issue is whether the state’s activities infringe life, freedom, or property right.^{*32} The US Supreme Court, however, has not been particularly consistent in the issue of indirect effects. Infringement of freedom was upheld in the case *Wisconsin v. Constantineau*^{*33} but was denied in the case *Paul v. Davis*.^{*34} The first case involved a prohibition issued by the city police chief to sell alcoholic beverages to the complainant as a problematic person. The prohibition was posted in public places and it contained the complainant’s name and photo. The Court considered it elementary that if because of an administrative action a person’s good name, reputation or honour is at stake, it is required that the person be heard (due process). The *Paul* case started with a warning that the police sent to store owners, where among other persons also the complainant had been mentioned as an “active shoplifter” and his photo had been enclosed. In this case the Supreme Court did not see it as an infringement of the person’s constitutional rights, even regardless of the fact that the complainant had been incriminated with an offence that had actually never been heard by the court. By warning against thieves the complainant had been “stigmatised”, but merely the damaging of reputation without interfering with more important interests cannot be considered sufficient to declare the police action as unconstitutional. The authorities would be excessively bound if due process rules should be applied to such consequences.^{*35}

However, the Court indicated in *Paul v. Davis* that instead of the federal courts the complainant could have had recourse to state courts and demanded the rectification of defamation according to common law, and not by invoking constitutional rights. Narrow interpretation of fundamental rights in the United States does not mean, however, that the public interest for disclosure of the information always weighs up the interest to conceal the information. Based on the “core purpose”^{*36} of the FOIA the Supreme Court in the case *U.S.*

rights in Germany see, in particular, the presentations of the annual meeting of scholars of constitutional law: H. Bedthge. *Der Grundrechtseingriff. – Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL)*, Vol. 57, 1998, p. 7; B. Weber-Dürler, *ibid.*, 57.

^{*28} BVerfGE, 78, 77; 35, 202.

^{*29} *Birkel*, LG Stuttgart. – NJW, 1989, p. 2257; OLG Stuttgart. – NJW, 1990, 2690.

^{*30} Similar cases were *Transparenzlisten*, *Osho* and *Clycol* (BVerwGE 71, 183; 90, 112; 87, 37), where authorities suggested to doctors and their patients to use specific medicines, warned parents against religious sects that try to manipulate young people and published a list of wines containing diethylenglycol (a substance that is used in some plant protection agents).

^{*31} About the boundaries of freedom see M. Galligan. *Due Process and Fair Procedures: A Study of Administrative Procedures*. Oxford: Oxford University Press 1996, p. 194; E. J. Eberle (Note 1), p. 73.

^{*32} In particular, the applicability of the due process clause of the Fourteenth Amendment depends on it, which in turn results in the obligation to hear the person, but also imposes substantive requirements. M. Galligan (Note 32), p. 191 *ff.*

^{*33} 400 U.S. 433 (1971).

^{*34} 424 U.S. 693 (1976).

^{*35} Also no restriction of freedom was seen in a case where the management of an army hospital sent a negative reference to the new employer of a person who had previously been employed as a psychiatrist in the hospital, although again the Court did not rule out filing a claim for defamation. *Siebert v. Gielley*, 500 U.S. 226 (1991).

^{*36} The original aim of the US Freedom of Information Act (FOIA) was to guarantee access to *information concerning agencies*, and not access to personal information that has come at the disposal of agencies. S. G. Breyer, R. B. Stewart. *Administrative Law and Regulatory Policy*. Boston: Little 1985, p. 1230.

Dept of Justice v. Reporters Committee^{*37} considered it justified to restrict access to the register of offences maintained by the FBI, although the data had to a large extent been collected from decisions proclaimed at public court hearings, and with some effort the same data could have been collected also later. From the point of view of privacy of a person, there is, however, considerable difference whether through one entry the public gains access to the whole list of offences of the person or whether in order to gain that information all the archives of the US justice authorities would have to be searched, where theoretically the same information is available although in a dispersed manner. Thus, privacy includes not only the protection of sensitive personal data (health, sexual life, *etc.*) but also the “right to control the disclosure of any information about a particular individual”^{*38}, for example information about offences. Disclosure of such information could indeed be of interest to a person’s potential employers, creditors, *etc.* But the aim to shed light on the actions of officials cannot be extended to cover any public or private interest towards a person’s earlier activities.^{*39}

The amendment of the Freedom of Information Act in 1996 abolished the restriction that the disclosure of information has to be induced by the aim of exercising democratic control over the activities of an agency.^{*40} The request for information no longer has to indicate the aim of gaining access to the data. The new version of the law also enables access to the materials at the disposal of an agency concerning private individuals, unless the materials are subject to the exceptions for restrictions of access, which also protect privacy and economic interests.^{*41} This is an important change in the development of the principles of freedom of information and in understanding the aims of the freedom of information.

2.4. Scope of constitutional protection

To what extent should fundamental rights limit the disclosure of government information in Estonia? The Estonian catalogue of fundamental rights and theory, due to partial reception, are similar to those of Germany rather than the United States. However, the neutral or positive attitude of people to the publicity of information in Estonia is closer to the American freedom of expression and openness than the widespread concerns in Germany about the loss of human dignity in the information age.^{*42} Let us take a look at some of the arguments for or against either of the solutions. The aim of these arguments is not to prove that disclosure of information in the case of serious consequences should always be prohibited, but to show that in assessing the legitimacy of disclosing information fundamental rights are decisive even when the effect of the information on fundamental rights is indirect.

Fundamental rights cannot protect a person from truth, inevitability or facts, like for example the hazardous nature of the goods produced by a person or the fact that a person has failed to pay a debt to the tax office. Declining of market share due to the hazardous nature of a product or avoiding entering into transactions with a tax debtor is a reaction of other members of society, their choice. Does obstructing the access of consumers or business partners to such information not impose a restriction to their freedom of choice? Why should a producer of dangerous products or a taxpayer who has evaded his obligations be able to enjoy the benefits arising from information or have an unjustifiably good image? On the contrary, in the information society the state must reduce inequality arising from uneven distribution of information. In particular the creators of new risks must tolerate criticism and hesitant value judgements about their activities.^{*43} As a

³⁷ *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). See also *U.S. Department of Defence v. Federal Labor Relations Authority*, 510 U.S. 487 (1994).

³⁸ 489 U.S. 749, 763 (1989). Cf. with continental right of informational self-determination. See also *Department of the Air Force v. Rose*, 425 U.S. 352 (1976); *Whalen v. Roe*, 429 U.S. 589 (1977); for commentaries about them F. H. Cate, D. A. Fields, J. K. McBain. *The Right to Privacy and the Public’s Right to Know: The “Central Purpose” of The Freedom of Information Act.* – *Administrative Law Review*, Vol. 46, 1994, No. 41, pp. 52 ff.

³⁹ Courts have considered it as self-evident that mentioning of a person’s name in an investigation file invites comments and speculations and has a stigmatising effect. *Halloran v. Veterans Administration*, 874 F.2d 315, 322 (5th Cir. 1989); *Branch v. FBI*, 658 F. Supp. 204, 209 (D.D.C. 1987).

⁴⁰ Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104–231, 110 Stat–3048.

⁴¹ 424 U.S. 693 (1976).

⁴² See about Germany and the United States E. J. Eberle (Note 1), p. 260 f. Transfer of the German dogmatics on human dignity to Estonia is considered questionable by T. Annus (Note 21), p. 190. General attitude towards the publicity of information in Estonia is noticeably favourable as compared to western European welfare states. Scandinavians have always been shocked by the publication of court judgements in Estonia together with persons’ names, as well as showing of video recordings of court hearings on television. The German media has repeatedly made ironic comments about the readiness of Estonians to commercialise their genetic code, see for example *Der Spiegel* 2000/38, 184.

⁴³ Cf. D. Murswiek. *Staatliche Warnungen, Wertungen, Kritik als Grundrechtseingriffe.* – *DVBl*, 1997, pp. 1021, 1027; M. Böhm. *Information, Empfehlungen und Warnung als Instrumente des Umweltrechts.* – *Juristische Arbeitsblätter*, 1997, pp. 794, 796; G. Lübke-Wolff. *Rechtsprobleme der behördlichen Umweltberatung.* – *NJW*, 1987, pp. 2705, 2711. About *Gesetzesvorbehalt* in cases of risk information R. Pitschas. *Öffentlichrechtliche Risikokommunikation.* – *Jahrbuch des Umwelt- und Technikrechts (UTR)*, Vol. 36, 1996, pp. 175, 212.

counter-argument, it should be specified that we are not talking here about the relationship between fundamental rights and facts, but about the issue whether *the state in disclosing facts* has to consider the possible indirect effects that the disclosure may have on fundamental rights. By removing information which is damaging, although correct, from constitutional guarantees, an individual can easily become a victim of an official's whims. Even merely by collecting information, for example about a person's hobbies, the person's freedom of self-realisation can be restricted or obstacles can be created in exercising other rights because in fear of government supervision the person may rather abandon his or her hobby or an idea of seeing a doctor.⁴⁴ A similar situation should also be feared for example when publishing an agency's document index on the Internet together with the names of persons who have made requests to the agency. This can make people consider, when writing a letter or an e-mail to an agency about an important issue, whether it is worth risking that their name may be disclosed.⁴⁵

The question of whether factual obstacles to a person's freedom of behaviour due to the actions of the state restrict fundamental rights or not, should first of all be solved by providing the right substance to concrete fundamental rights.⁴⁶ In today's conflict-filled society the scope of protection of either property rights, freedom to engage in enterprise, freedom of religion or freedom of self-realisation cannot include an unlimited discretion of an individual to behave in whatever way he or she likes.⁴⁷ If the information disclosed by the state can help to obstruct certain strange or capricious behaviour it is not necessarily a restriction because the state cannot reckon with unforeseen wishes or interests. Otherwise, the causal chain of indirect and factual consequences of the state's activities would become endless.⁴⁸ Thus, one important aspect is definitely foreseeability of a consequence.⁴⁹ In the case of information and communication, making of forecasts is complicated. By disclosing seemingly innocent information the officials might not anticipate what consequences it may bring. The state's activities relating to information must not be hampered at every step by the risk that damaging consequences are not completely ruled out. It is important to find the right limits to what extent the state must be able to foresee the possible developments and when caution should be exercised and when action is needed despite the risk, in order not to freeze the discharge of public functions. In an information society the rights of third persons of access to information force the curbing of fundamental rights prohibiting disclosure of information.⁵⁰ The German Federal Administrative Court has emphasised that in the case of indirect and non-intentional effects the consequences have to be serious. In the case of intentional influence the intensity is unimportant.⁵¹ The definition of the restriction of freedom used by the US Supreme Court in the *Paul* case assumed that the restricted behaviour must take place in an important area of human activity — in other words, a person's interest to behave in a certain way must be essential. When proceeding either from the importance of interference, interest to behave, or from both, the limit in a particular case is definitely approximate and requiring of a value judgement.

⁴⁴ Cf. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), 437; A. Scherzberg. Die öffentliche Verwaltung als informationelle Organisation. – W. Hoffmann-Riem, E. Schmidt-Aßmann (eds.). *Verwaltungsrecht in der Informationsgesellschaft*. 2000, p. 218. About restrictions of freedoms in cases of gathering of client information A. C. Aman. *Information, Privacy, and Technology: Citizens, Clients, or Consumers?* – J. Beatson, Y. Cripps (eds.). *Freedom of Expression and Freedom of Information*, 2000, p. 340. About the USA see also *Whalen v. Roe*, 429 U.S. 589 (1977).

⁴⁵ But having recourse to an agency may be necessary for the protection of various fundamental rights (life, health, etc.), and the right of recourse has been separately provided for in § 46 of the Constitution.

⁴⁶ Cf. M. Albers. Faktische Grundrechtsbeeinträchtigungen als Schutzbereichsproblem. – DVBl, 1996, pp. 233, 236; J. Widman. Abgrenzung zwischen Verwaltungsakt und eingreifendem Realakt. München, 1996, p. 60 ff.

⁴⁷ This is the basis for traditional treatment of self-realisation in Germany, which naturally does not mean that the freedom could not be restricted. The question is whether it is a restriction of freedom at all. A short survey of the debate, R. Alexy (Note 21), p. 51 ff. About the need for objective value judgement also in Germany see M. Albers (Note 47), pp. 233, 238 f; B. Weber-Dürler. Grundrechtseingriff. – VVDStRL, Vol. 57, 1998, pp. 57, 83. In objective valuation both the constitutional values will have to be taken into account: T. Würtenberger. Rechtliche Optimierungsgebote oder Rehmensetzungen für das Verwaltungshandeln? – VVDStRL, Vol. 59, 1999, pp. 139, 143, as well as law on the level of ordinary legislation: M. Schulte. Schlichtes Verwaltungshandeln: Verfassungs- und verwaltungsdogmatische Strukturüberlegungen am Beispiel des Umweltrechts. Tübingen: Mohr, 1995, p. 96.

⁴⁸ See T. Annus (Note 21), pp. 178 ff. This problem has been treated in Germany after abandoning the classical notion of restriction. Alexy writes that "the modern notion of restriction is characterised by its complete limitlessness", considering it a right solution in the case of restriction with *small intensity* to return to the criterion of finality (aim). This would mean that in order to qualify a government measure as an infringement the aim of the measure has to be to affect a benefit that is protected as a fundamental value. R. Alexy (Note 21), p. 34. About foreseeability as an element of the concept of the restrictions of the fundamental rights T. Haussühl. Die Produktwarnung im System des Öffentlichen Rechts. Neuried: Ars Una, 1999, p. 40 f.

⁴⁹ Even with the best of intentions an agency cannot consider an unforeseeable consequence when weighing the proportionality of an intended measure. In connection with application of art 3 of the European Convention on Human Rights, foreseeability of consequences is also the basis for dissenting opinion of Justice Jambrek in the case *Guerra et al v Italy*, ECHR 116/1996/735/932. Foreseeability as a criterion of infringement in the delict law and state liability relates to the essential institute of **adequate causal link** as an important element of liability.

⁵⁰ If at all to recognise the right of informational self-determination in Estonia, its scope of protection cannot include just any information concerning a person, but only information regarding which the subject of information has sufficient interest (*i.e.* protected by some other rights) for imposing restrictions on use. Cf. about Germany W. Hoffmann-Riem (Note 22), pp. 513, 527 f.

⁵¹ *Ibid.*, p. 530; *Transparenzliste*, BVerfGE, 71, 183, 192.

But can fundamental rights protect a person also against informing about an offence? At first sight, it might seem unjust but taking a closer look it seems rather logical. We do not claim, however, that failure to comply with sanitary requirements, tax evasion or drunken driving are protected by the constitution. Disclosure of such information can exert legally and politically desirable influence for avoiding an offence or dangerous behaviour, but it can also damage the person's other interests that deserve protection (actually it is often the aim of such information to damage certain benefits in order to influence a person's behaviour). The fact that a person has committed an offence cannot reduce the scope of fundamental rights of the offender, although the delict can naturally be a basis for restricting the rights in accordance with the law.

Regardless of the absence of unanimity concerning the concept of fundamental rights, it cannot be denied that indirect, but foreseeable, obstacles created by government information to the exercise of fundamental rights can, depending on the situation, constitute a restriction of fundamental rights in the meaning of § 11 of the Constitution. This is ruled out neither by the truthfulness of data or the fact that the public is notified of the offence. Disclosure of both the information of a document register as well as "information exerting social pressure" can result in a restriction of fundamental rights.

3. Legitimacy of limitations

Seeing an act of provision of information as a restriction of a fundamental right does not yet mean that the act would be prohibited, however it does impose in Estonia additional requirements on the activities of the state:

- a restriction of fundamental rights has to be provided by law;
- a restriction has to be, both in general terms and in a particular case, necessary in democratic society (proportionality).^{*52}

3.1. "Provided by law"

Unlike citizens, when disclosing information the state cannot base itself on the freedom of expression of an agency or officials.^{*53} The cases and preconditions of disclosing information concerning a person's rights must be established by law adopted by the Parliament. Without authority, information can only be disclosed where it cannot be foreseen to infringe anyone's rights. Interference in a person's rights can only take place in exceptional cases when it is inevitably necessary for an urgent protection of another high-level value, for example another person's fundamental rights.^{*54} For the functioning of democracy, the rule of law and the information society it is necessary that agencies provide general information about the discharge of their functions. In Germany such notification has been considered a supplementary duty that accompanies every public function and that does not require a separate authorising norm.^{*55} It is another issue as to what extent the duty of informing about one's activities can be used to justify organisation of image-building campaigns by the state and local governments with the aim to influence the attitude of the population.^{*56}

The enactment of the Public Information Act in general satisfied the need for legal bases of disclosing information, providing for quite extensive possibilities both for allowing access at the request of a person as well as publication on one's own initiative.^{*57} The bases for active provision of information are contained first of all in the relatively chaotic Public Information Act, in § 28. In many respects they are also covered by other laws (*e.g.* warnings about dangerous products are required in the Food Act, §§ 48 (5) and 51¹ (1), in the Consumer Protection Act, §§ 12 (1) 8) and 12 (3), in the Product Safety Act, § 11 (1) as well as in PIA § 28

⁵² Both requirements derive from the principle of rule of law and have been fixed in the Constitution in § 11.

⁵³ An exception is public broadcasting which is protected by the freedom of the press, as well as the freedom of a scientist working in a public university to disseminate his or her views. But the state itself is an obligated subject and not the addressee of fundamental rights.

⁵⁴ In the case of hazard or risk information relating to consumer protection or environment such collisions are highly probable because the development of technology raises ever new dangers which need to be relieved much earlier than when the legislator is able to take action.

⁵⁵ However, collisions between private and public interests occur also in the implementation of this task and they would need regulation on the level of law. A. Roßnagel. *Möglichkeiten für Transparenz und Öffentlichkeit im Verwaltungshandeln – unter besonderer Berücksichtigung des Internet als Instrument der Staatskommunikation.* – W. Hoffmann-Riem, E. Schmidt-Aßmann (Note 45), p. 274.

⁵⁶ We are not talking here about huge sums the authorities have spent on PR experts that have caused debate in Estonia, but about the effect of advertising and propaganda on democracy and the rights of individuals. Many of the campaigns do not have a burdening influence on third persons (*e.g.* calls to wear reflectors in traffic), but for example the appeals for preference of domestic or environmentally friendly products clearly infringe the interests of producers of alternative goods.

⁵⁷ But *e.g.* there is no legal base for the publication of debtors.

(1) 7). For the publication of tax debts the legal base is currently provided for in the Taxation Organisation Act, in § 11 (4) 1). There is no clear authorising norm for disclosing other debts, first of all as concerns contractual debts.

A question may arise, though, in connection with sufficiency of preciseness of one or another norm.^{*58} In providing the scope of discretion it has to be guaranteed that the officials understand the aims for which the discretionary powers have been given to them.^{*59} There is considerable doubt concerning the constitutionality of the second alternative in § 28 (1) 32) of the PIA. According to this provision the holder of information is required (thus also entitled) to disclose other information “that the holder of information deems necessary to disclose”. In principle this is a *carte blanche* authority for disclosing any information that is not directly prohibited by law. Such general authority cannot be a sufficient for information that restricts fundamental rights. This provision can be understood to be constitutional only if we give a narrow interpretation to the words “deems necessary”, considering only the need to protect interests that are more important than the infringed fundamental rights.

3.2. Proportionality

Proportionality is the main criterion for assessing the rationality of an administrative measure. It is necessary to assess whether the state is not going too far in interfering with people’s rights; or in the context of this article: whether publication is always appropriate, necessary and moderate to achieve a certain aim.^{*60}

First, using the example of product warnings, let us take a look at the aims that can be used to justify the publication of information concerning individuals. Undoubtedly, the protection of people’s life, health and property is a public function on the basis of § 14 of the Constitution and it serves legitimate purposes. As a rule, by nature a warning is an appropriate means for protecting people from the realisation of potential dangers if the addressees of warnings with their own behaviour can avoid the danger. If the actual danger has ceased to exist or it can be eliminated by using less stringent means, there has to be some other aim in order to inform about the violation retrospectively (*e.g.* according to § 51 (1) of the Food Act). Could it be the interest of consumers to also avoid in the future the use of the goods or services of the undertaking that had caused the danger?^{*61} The trend, however, is towards the expansion of the aims of freedom of information.^{*62} A wider approach to the freedom of information is also used in the PIA, the purpose of which is also to promote an open society, not only to provide control over the activities of agencies (§ 1). In addition to the protection of democracy, public information must also fulfil the “library” function, offering a possibility to study information that concerns private individuals and companies.^{*63} Members of an open society are often interested in the activities of others, so that because of lack of knowledge people would not have to make wrong choices (*e.g.* which goods to consume, where it is healthy to live, *etc.*). The consumers may

⁵⁸ To illustrate: The European Court of Human Rights has considered sufficiently exact the rule contained in the Finnish Criminal Procedure Code, according to which a doctor can be required to disclose medical data about his or her patient in a criminal case where the potential punishment is at least six years’ imprisonment, *Z v. Finland*, ECHR 9/1996/627/811.

⁵⁹ The law must not necessarily provide for the form in which the information should be published. Also publishing of information on the Internet does not have to be specifically provided for if in principle there exists a legal base for publication. A. Roßnagel. NVwZ 2000, 624.

⁶⁰ The principle of proportionality has been fixed in the second sentence of § 11 of the Constitution. About the principle of proportionality S. Kaljumäe. Proportsionaalsuse põhimõtte ning selle rakendamise Riigikohtu põhiseaduslikkuse järelevalve ja haldusajade lahendamisel (The Principle of Proportionality and its Application by the Supreme Court in Reviewing Constitutionality and in Settling Administrative Matters). – Riigikohtu lahendid ja kommentaarid, 2000, p. 897 (in Estonian).

⁶¹ The interest of the consumer in having access to records concerning a danger that has already been eliminated can also lie in the necessity to gather evidence in court proceedings relating to damages caused by a product. See D. P. Graham, J. M. Moen. Discovery of Regulatory Information for Use in Private Products Liability Litigation: Getting Past the Road Blocks. – William Mitchell L. Rev., Vol. 27, 2000, p. 653. In Estonia, on the basis of the Code of Civil Procedure § 119 (1) the court may demand documentary evidence from third parties if the evidence is relevant to the case.

⁶² According to the 1996 amendment of the United States FOIA, information has to be made available for any public or private purpose. The EU public access regulation emphasises repeatedly (in point 10 of the preamble, in article 2 paragraph 3) that access must be guaranteed to documents drawn up by the EU institutions as well as documents that have come at their disposal. The European Parliament and Council regulation no. 1049/2001 of 30 May 2001 on public access to the documents of the European Parliament, Council and Commission. – OJ L 2001, 145, 43.

⁶³ For example The US FOIA 1996 amendments (Electronic Freedom of Information Act Amendments of 1996, § 2, Pub. L. No. 104–231, 110 Stat. 3048) enable access also to information on private individuals, regardless of the purpose of an information request. See J. T. O’Reilly (Note 19), pp. 371, 372 *ff.* But see P. J. Cooper, C. A. Newland. Handbook of Public Law and Administration. San Francisco: Jossey-Bass, 1997, pp. 393, 396, according to which the opinion of the Supreme Court in the case “*Dept. Justice*” concerning the purposes of the FOIA was criticised in the Senate discussions of the FOIA amendments but no express amendment in the law was made to revoke it. About the purposes of freedom of information in Great Britain which still focus first of all on guaranteeing democracy and exercising supervision over the executive, as well as on the protection of the citizen as a consumer, S. Palmer. Freedom of Information: The New Proposals. – J. Beatson, Y. Cripps (eds.) (Note 45), p. 253 *ff.*

have a considerable interest to avoid using the services of undertakings that have broken the rules and caused a danger, because violation or negligence may reoccur.^{*64}

However, issuing of warnings and posting the “lists of sins” have their drawbacks. If an undertaking is not trustworthy, why does the supervisory authority allow it to continue operating? Isn’t the agency simply trying to pass on to consumers the responsibility for guaranteeing safety? In prohibiting the further activities of a negligent or criminal undertaking the agency should consider all the circumstances, especially assess the danger of its activities and the possibility of repeating the violations. By issuing a warning or disclosing the undertaking’s name in a database, its fate is left in the hands of the consumers and the media, whereas there is nobody whom to complain to about the reaction of the public. Though, I think that social self-regulation with the help of warnings should be allowed where it is difficult for the state to exercise control and regulation. For example, the fact that someone has sold low-quality fuel once or even several times cannot always in itself be a basis for revoking his licence. At the same time the trader’s credibility is tainted and the consumer should have the right to know it. Instead of prohibiting the operations the undertaking is given a possibility to restore its credibility.^{*65}

Next, it should be considered whether the publication of information that damages a person’s reputation will actually help to achieve the desired aims. Tartu City Government, for example, has given the following justification for its new policy of publishing the list of debtors:

“Tartu City Government decided on 6 April 2000 to publish the names of companies, establishments and people who are indebted to the city. We wish to discipline our contractual partners who have failed to perform their financial obligations to the city. At the same time we consider it important to inform the inhabitants of the city about the companies and people who are indebted to the city.”^{*66}

We can distinguish three aims in this message: (1) to exert pressure on the debtors who are delaying with the payment, (2) to discipline future contractual partners or current partners who have so far been acting correctly, and finally, (3) to inform citizens about the names of persons who are indebted to the city (and thus indirectly also to its inhabitants). The publication can only serve the first aim if the debtor is able to pay the debt should he wish to do so. But in many cases (*e.g.* in the case of tenants who are in a difficult economic situation, companies on the verge of bankruptcy) it is not so. In such situations publication is disproportionate because it does not help to achieve the desired aim. Damaging of reputation can even have a reverse effect on restoring the solvency of the debtor. The legitimacy of the second aim — preventive effect through stigmatising — is doubtful because of its penal nature. The legislator has not considered the violations of contractual obligations as punishable: instead, the contracting parties with their agreement can themselves establish such consequences in the form of penalties for non-performance of the contract. Besides, the actual severity of the punishment would depend on accidental circumstances: on the intensity of the public reaction, not on the guilt of the punished person.^{*67} As concerns the third argument, the same principle applies as in the case of product warnings: if the state has discovered an untrustworthy person, should it inform the public about it, so that the citizens and undertakings could avoid entering into transactions with the debtor?

In reviewing the necessity of a measure it has to be considered that it may be possible to achieve the desired aim by using other means that would be less damaging on the person causing the danger. The PIA, § 28 (31), requires that agencies disclose their document register on the Internet.^{*68} Document registers are necessary for ensuring access to the data that the citizen is interested in. The precondition for usability of public information is the availability of meta-level information about the types of documents at the disposal of an agency.^{*69} But, the document register, as a rule, can mostly fulfil its purpose also without disclosing the

⁶⁴ S. Palmer (Note 63), p. 255. In addition, in favour of access to information concerning private persons an argument has been brought that a citizen must be able to use in his or her interests the information collected with the means obtained from the citizen as a taxpayer. J. T. O’Reilly (Note 19), pp. 371, 382.

⁶⁵ A practical example of this in Estonia are numerous cases of selling low-quality motor fuel in 2001. Information about fuel traders on the web page of the Energy Market Inspectorate: <http://www.eti.gov.ee/index.php?page=kasulik&cat=Kontrollreidid> (in Estonian).

⁶⁶ Available at: <http://info.raad.tartu.ee/debitores.nsf>.

⁶⁷ Cf. German case “*Schuldnerspiegel*”, OLG Rostock. – ZIP 2001, 796, where the use of an “innocent” debtor for generally preventive purposes was condemned.

⁶⁸ The document register is a database maintained by an agency about the documents received by the agency and prepared in the agency, and it also contains information about the sender or addressee of a document, or the document’s type (PIA §§ 11 and 12). An example: the register of incoming documents of the Ministry of Justice at its web page <http://www.just.ee/jdocs/sissetulevad.php>. At the beginning of March 2002, 17 out of 81 documents (*e.g.* complaints and petitions against the Prisons’ Administration) derived from private individuals. Among other information, the title of each document and the name of its sender is available on the Internet. Also through the document register of the Ministry of Transport and Communications (http://www.tsm.ee/index.html?id=127&t_id=46&asutus_id=10&dok_id=744) it is possible to have access to letters (with the sender’s name) which contain replies to passengers’ complaints against transport companies.

⁶⁹ I. Harden (Note 25), pp. 165, 176; W. F. Fox. *Understanding Administrative Law*. New York: Bender, 1997, p. 447. In the United States the obligation of publication of registers began with the case *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Regulation no. 2001/1049/EC requires that EU institutions also maintain document registers. Thereby a document register is only one of the necessary means for guarantee-

identity of the person connected with confidential information.^{*70} Revealing the name of the addressee or the sender must be justified with additional public interest towards the person concerned: *e.g.* the interest of consumers towards documents that have been collected or drawn up in the course of exercising supervision over a producer. In the case of complaints by consumers, the disclosure of the complainant's personal data is rather questionable. Again, it is necessary to make a balanced decision separately in each individual case. This sets limits to the possibilities of automatic disclosure of information.^{*71} Adopting an in bulk approach to the publication of information, especially as concerns publication on the Internet, is undoubtedly cheaper and quicker. Economy can be one of the arguments for publication of information on the basis of general criteria, but it could not be used to justify causing of substantial damage to a person. Even when an automatic publication system is used, we should consider the possibilities of enabling the person to find out about the possibility of publication and, prior to it, submit his or her objections (except, of course, in the case of risk situations requiring urgent reaction).^{*72}

3.3. Form of disclosure

An important role in disclosing personal data is played by the form, intensity and level of detail of the message. Apart from the justification of the substance of the disclosed data, arising from the principle of proportionality it is also necessary to have justification for value judgements (comments that something is bad or good) associated with the data, and for more aggressive methods of influencing the audience (*e.g.* agitation against environmentally dangerous or foreign products). A certain degree of aggressiveness is also needed in a public debate between an agency and a journalist, politician or representative of an interest group.^{*73} In assessing the legitimacy of information provision, not only the truthfulness of the facts is important but also the proper understanding of the message by the audience. In the "list of offences" published by the Energy Market Inspectorate, for example, it is impossible for an average citizen to understand whether the fuel that had been declared as not complying with quality requirements is actually dangerous or not.^{*74}

Conclusions

The basic rights do not exclude the disclosure of information "exerting social pressure" or other information that may damage the reputation of a person, although the disclosure cannot be automatic — every case of disclosure must be preceded by an individual analysis of positive and negative effects. The framework for interference in the informational freedom of private individuals has to be developed by the legislator. The Public Information Act seeks to establish only a minimum of exceptions to the freedom of information in particular cases, but to apply the principle of proportionality, the PIA should introduce an express right (and duty) of consideration for officials, and the officials should be made aware of the need to consider the possible consequences of damaging someone's reputation.

ing actual access. Also necessary are the description of the web page of an agency, search engines, help programs, *etc.* P. J. Cooper, C. A. Newland (Note 64), p. 391.

⁷⁰ Regulation 1049/2001 art 11 paragraph 2 second sentence: references to documents shall be made in a manner which does not undermine protection of the interests in § 4 (§ 4 establishes exceptions relating to public interest, privacy and commercial interests).

⁷¹ D. Kugelmann. *Grundlagen und verwaltungsrechtliche Grundstrukturen individueller Rechte auf Zugang zu Informationen der Verwaltung*. Tübingen: Mohr, 2001, p. 282.

⁷² The obligation to hear derives from the Administrative Procedure Act (Riigi Teataja (The State Gazette) I 2001, 58, 354), § 40 (2) (in Estonian).

⁷³ The structure of all public sector web pages should be subject to similar principles, so that the citizen who finds himself or herself on the web page of another agency should not always start identifying where to find the information that he or she needs. For the same reason pages should not be reorganised without sufficient need. At the beginning of 2002 establishing of technical standards for electronic documents of administrative agencies was not yet completed www.riik.ee/dh/. See also public web pages of Estonian government agencies. Recommendations, p. 1.3, <http://www.riik.ee/kord/wwwjuhend.html> (15.08.2001).

⁷⁴ A. Roßnagel. – E. Schmidt-Aßmann, W. Hoffmann-Riem (eds.) (Note 45), pp. 266, 269, 274 *f.* Also an avalanche of information does not yet mean freedom of information or clarity. See A. Schezberg (Note 45), p. 195.