

Part I.
**The Multi-Dimensional
Nature of Asymmetric
Information in Public
Administration – From Clear
Answers to Difficult Questions**

Chapter 1. The Administrative Perspective on the Asymmetry of Information

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Abstract

The systemic necessity of bodies of public authority to obtain information is universally valid. After all, the functions of the public authority cannot be performed without adequate and properly processed data. Therefore, the information needs of the public administration constitute a *topos* of the legal order, the legitimacy of which is not undermined by the awareness of the dangers and risks related to the administrators obtaining and processing information – including those dangers and risks that are aggravated by the current crisis of democratic states governed by the rule of law. Information (obtaining and analyzing information, determining the relevant results of its meaning in the given case) is the necessary, unavoidable, and incessant “fuel” for administration. Therefore, the normativization of processes of this type always accompanies the organization of administration. The analysis presented considers selected legal regulations from Polish administrative law that introduce mechanisms protecting the bodies of public administration against asymmetry of information.

Keywords: asymmetry of information, public administration, normativization

*Multi multa sciunt, nemo omnia*¹

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¹ There are many who know a lot, but nobody knows everything.

1. Introduction – systemic conditions/*signum temporis*

The systemic approach supported by the insights drawn from the historical perspective justifies the prevalent tendency to associate the concept of asymmetry of information with the advantages (and their consequences) enjoyed by the administrators, and the related risks and pathologies. Preferences related to satisfying the public interest and access to public authority make the organization of administrative activity in a democratic state governed by the rule of law inextricably linked to civilization, safeguarding, and amortization of the systematically inevitable, and justified access to a public authority (administrative authority).

These conditions are also confirmed in the area of the normativization of access to information. The awareness of the related risks and the resultant concern over possible abuses are the inseparable element of the constataions and contestations articulated in the analyses of the functioning of public power and, what is characteristic, specifically emphasized with regard to public administration. This results in the introduction of numerous legal rules – both general and specific, preventive and applicable *ex post*, international and national – which differently secure against, limit or mitigate the threats related to the classically understood – in the context of public administration – asymmetry of information.²

Yet, such tendencies do not change the systemic necessity of public authorities to obtain information. After all, the functions of public authorities cannot be performed without adequate and properly processed data. Moreover, the dangers of terrorist attacks and, recently, the new challenges posed by the pandemic have triggered the increase in the importance of administrative police, which has inevitably increased the need for information on the part of the administrative bodies. These circumstances provide fertile ground for the temptation to use the latter trend under false pretenses, thereby abusing the possibilities that are typical of the primary function of public administration. This risk is relatively greater in countries in which the functioning of the state and law is being diverted away from the standards of a democratic state governed

² Indeed, it could be assumed that legal order is characterized by the increasingly enhanced predilection for, *sui generis*, sensitivity to the dangers and pathologies that accompany the asymmetry of information understood in this way. The accepted models of legal solutions are therefore constantly being improved. What is problematic, however, is their efficient application, their suitability for the changing practical challenges. The dangers related to legislative inflation are also an issue.

by the rule of law for political reasons.³ A public authority that does not respect the applicable law sacrifices the common good for partisan political interests, and appropriates or paralyzes public institutions, will sooner or later destroy the authority of the state. In turn, this process inevitably brings the threat of the anarchization of social relationships, which is “supported” by the geometrically declining trust in those who exercise public authority.

Among other things, such civilizational regression of legal systems and orders⁴ provokes the return to perceiving public administration not so much as a partner that should be trusted,⁵ but as an unpredictable structure, which is not always axiologically disciplined. As a result, its needs and activities are no longer understood. This inevitably reduces the efficiency of obtaining information by the administrators.

Regardless of such pathogenic dangers (and their social consequences), the timeless conditions and needs of administrative activity still apply. The most relevant of those are, in particular, the need to strike a balance (especially between public interest and private interests) and the requirement to define the scope of normativization and to assess the adequacy of the extent of application of the authoritative method of regulating social relationships. There is no doubt that the functions of public administration (and therefore the accompanying public goals and tasks) require appropriate methods and instruments – including in the area of obtaining and processing information.

In this melting-pot, which is enhanced and intensified by increasingly complex and intense challenges of everyday life, and despite the awareness of the possible threats related to the informational domination of public administration, it is worth approaching the problem of the asymmetry of information of public administration *a rebours* – i.e. from the point of view of the information shortcomings on the part of administrators.⁶ Possessing the requisite information is a *sine qua non* condition of correct and efficient administration. This is because, regardless of both objective and universal dangers,⁷ and of current pathologies and experienced crises, the classic insight

³ This (alas!) already global tendency has recently been somewhat hampered. However, Poland is not a country that seems likely to be able to enjoy the opportunities created by such “reflection.”

⁴ Which are dangerously devolving into legal “disorders.”

⁵ As a systemically designated depositary of a common good, which fairly and legally balances public interest and private interests.

⁶ *Nota bene*, the title of this monograph provides a literal justification for such reorientation of the research perspective. The positioning of this phenomenon “in” administration opens up the possibility of analyzing unequal access to information related to administering – even in the situation when the problem of unequal information resources affects the administrators.

⁷ There are also new sources of dangers – for more, see, e.g.: Grażyna Szpor and Agnieszka Gryszczyńska, eds., *Internet. Strategie bezpieczeństwa* (Warszawa: C.H.Beck, 2017); A. Gryszczyńska,

into the fundamental role of information in the process of administering remains valid.⁸

Moreover, it seems that public authority (and administration as its key element) has already lost the monopoly for – and possibly even the priority in – creating informational dangers, particularly yielding to the companies from the GAFA cartel (Google, Apple, Facebook, and Amazon).⁹ This makes it all the more important that – for the sake of systemically facilitating the performance of the functions of the state and law – the information needs of public administration are always accepted (or at least tolerated) and trust in the administrators is gained (in this context) – it could be said: no matter what.

2. Information needs of public administration as a *topos* of the legal order

Relevant legal provisions define the ability of bodies of public administration to obtain information in comprehensive, multifaceted, and multilayered ways. This is because data must be used and processed to conduct any form of administrative activity. The scale of the data, the consequences of their use, the scope of the accompanying effects, and the manner of introducing them into legal circulation are diverse. At this point, it is sufficient to refer to the connotations of the distinctions between legal/factual, authoritative/non-authoritative, or individual/general activities.¹⁰ Yet, in principle, the scheme of administering is always the same: having the required information *in concerto* → comparing the information with legal (factual) conditions that determine the content (the purpose) of a given form of administrative activity → applying the effects of the above subsumption to achieve a specific legal (factual) result.

Therefore, there is no doubt that information (obtaining and analyzing information, determining the results of its meaning that are relevant to the

“Cybersecurity of Public Registers in Poland: Selected Legal Issues,” in *Geographic Information Systems Conference and Exhibition “GIS Odyssey 2016” – Conference proceedings*, ed. Agnieszka Bieda, Jarosław Bydłosz and Anna Kowalczyk (Zagreb 2016), 105–113.

⁸ The nature and purpose of this publication require that the further analysis focus on the summarily approached context of substantive law, with the aim of “observing” it from the perspective of administrative proceedings.

⁹ For a brief summary of this process, the related dangers and attempts to normativize the digital services market regulations see, e.g.: Wojciech Orliński, “Koniec monopolu GAFA, czyli życzenia na 2021 rok.” *Duży Format – Gazeta Wyborcza*, January 4, 2021, 16.

¹⁰ However, it is possible to delve further (internally) into the context to capture further differences, e.g. in the context of general activities – by distinguishing between normative acts, planning acts and program acts.

given case) is a necessary, unavoidable and incessant “fuel” for administration. Therefore, the normativization of the processes of this type always accompanies the organization of administration. In this context, the questions of *ratio legis* essentially apply to the required information and the procedure of obtaining it.¹¹ Different models of solutions can be applied here. In each case, they should be adequate for the specificity of the subject matter – properly configured and balanced in terms of the methods of obtaining information, the scope of required data, and the consequences of gathering it or failing to do so.

Moreover, due to the importance and scale of the informational connotations of law and administration, in some situations, the problem of information – as an unquestionable *topos* of the legal order – becomes even more relevant. This is the case with the provisions that introduce various administrative law sanctions for a lack of information, concealing information, or providing false data. Among those, the norms pertaining to misleading administrators are particularly important. A good example here is the institution of unduly collected benefits, which is often used by the legislator to counteract such asymmetry of information on the part of the administrators that can result in the unlawful award of benefits.¹²

3. The evidentiary context of the information needs of public administration

The further analysis of the asymmetry of information from the perspective of administrative proceedings reveals an interesting shift of emphasis caused by the application of the principle of objective truth¹³ in proceedings initiated on request (regarding the award of rights to the applicant). The jurisprudence and literature increasingly emphasize the need to modify the approach to the distribution of the burden of proof in administrative proceedings. This is because, in this context, there can be talk of a settled line of judgments of the

¹¹ Naturally, this is not to undermine the importance of verifying the rationality of the legislator in the first stage, prejudging the legal regulation of a given sphere of social relationships.

¹² E.g.: Article 30, para. 2, items 1 and 2 of the Act on Family Benefits of November 28, 2003, Journal of Laws of 2020, item 111, as amended, hereinafter referred to as “the Act on Family Benefits”; Article 23, in connection with Article 2, para. 7, items a) and d) of the Act on the Aid for Individuals Entitled to Alimony of September 7, 2007, Journal of Laws of 2020, item 808, as amended; Article 25, para. 2, item 2 of the Act on State Aid in Raising Children of February 11, 2016, Journal of Laws of 2019, item 2407, as amended.

¹³ Article 7 and Article 77 § 1 of the Administrative Procedure Code, Journal of Laws of 2020, item 256, as amended, hereinafter referred to as the “APC.”

administrative courts indicating the need for the party to present evidence that is necessary for the administrative matter to be settled substantively and to the advantage of the applicant.¹⁴ This approach is also supported by the legal doctrine. For instance, while referring to Article 7 of the Administrative Procedure Code, P. M. Przybysz emphasizes the importance of the principle of the active participation of the parties in the proceedings (Article 10 APC), and emphasizes that the party is required to contribute actively to satisfying the principle of objective truth. He points out that the party should provide the necessary evidence and emphasizes the consequences that the failure to do so would have for the party.¹⁵

Importantly, this interpretational tendency is often supported by the introduction of a detailed specification of the data that the party should provide,¹⁶ although, in order to strike a balance between evidential obligations of bodies of public administration and the parties, regulations are also added explicitly specifying which data should (in the given administrative proceedings) be obtained by the administration.¹⁷ It is worth mentioning that the normative emphasis on the evidential obligations of the parties can also be accompanied by specifically arranged sanctions. This is because it sometimes happens that the legislator offsets the possibility of a lack of cooperation in collecting evidence by substituting the classic response to a lack of cooperation (i.e. the threat of issuing a negative decision) with a sanction that involves leaving the application unprocessed.¹⁸

¹⁴ E.g. ruling of the Voivodship Administrative Court in Warsaw of February 23, 2007, case ref. VI SA/Wa 2219/06 (Legalis Database 269055); judgment of the Supreme Administrative Court of November 5, 2020, case ref. I OSK 1268/18, (Legalis Database 1865057); judgment of the Supreme Administrative Court of October 30, 2020, case ref. I OSK 1253/20 (Legalis Database 2507879).

¹⁵ Piotr Marek Przybysz, *Kodeks postępowania administracyjnego. Komentarz aktualizowany* (LEX/el. 2019). Similarly e.g.: Andrzej Wróbel, "Art. 7," in *Kodeks postępowania administracyjnego. Komentarz aktualizowany*, ed. Małgorzata Jaśkowska, Martyna Wilbrandt-Gotowicz and Andrzej Wróbel (LEX/el. 2020). However, it should be remembered that legal regulations which "retain" the burden of proof on the part of a body of public administration are also in force (e.g. Magdalena Śliwa and Paweł Wajda, "Zasada prawdy obiektywnej (art. 7 k.p.a.) i ciężar dowodu w postępowaniach administracyjnych prowadzonych przez KNF," *Monitor Prawa Bankowego* 2014, no. 5: 54–72).

¹⁶ E.g. Article 23, para. 4 of the Act on Family Benefits of July 27, 2017 in connection with the provisions of the Regulation of the Minister of Family, Labor and Social Policy on the Manner and Procedure of the Family Benefits Proceedings and the Scope of Information to be Included in the Application, Certificates and Declarations Related to the Settlement of the Entitlement to Family Benefit, *Journal of Laws*, item 1466.

¹⁷ E.g. Article 23(b) of the Act on Family Benefits.

¹⁸ Article 24a, para. 1 of the Act on Family Benefits; Cf. also Article 24a, para. 2 of the same Act. However, what is peculiar and worrying is that the legislator does not always regulate such issues at the level of a statute – cf. § 8, items 1 and 2 of the Ordinance of the Minister of Family, Labor and Social Policy of July 27, 2017 on the manner and procedure, the manner of determining income and

4. Information deficits of public administration as a determinant of a legal institution – example from the Act on Social Welfare

An interesting example of sequentially developed procedures that are applicable in the area of substantive law – structured, among other things, to overcome evidential shortcomings arising from the asymmetry of information on the part of the administrators – is provided by the regulations of the Act on Social Welfare of March 12, 2004¹⁹ regarding the setting of the charge incurred by a spouse, descendants or ascendants of a nursing home resident. Admittedly, they refer to an obligation (and proceedings initiated *ex officio*), but their originally non-authoritative course provides an interesting context, undoubtedly enhancing (at least potentially) the citizen's influence on the content of the findings *in concreto*.

In such cases, the first stage is the attempt to conclude a contract with the liable party, whose income and financial capabilities should be taken into account.²⁰ Therefore, the relevant information has to be obtained first, on the basis of which the amount of the charge can be set using the non-authoritative form of administrative activities.²¹ Only after this method fails are administrative proceedings initiated. However, what is particularly worth emphasizing is that the attitude of the liable party determines not only the procedure of setting the amount of the charge but also the scope of the required data.²² This is because, in the case of the most “assertive” liable parties, their financial and health situation is no longer relevant (Article 61, para. 2f of the Act on Social Welfare). It therefore transpires that the sanction for the lack of cooperation in evidential proceedings can translate not only into a reduction of required information but also into an increase in the charge incurred by the party.

the type of information to be contained in the application, certificates and declarations pertaining to the settlement of the entitlement to benefits from the alimony fund, Journal of Laws, item 1467.

¹⁹ Journal of Laws of 2020, item 1856, as amended.

²⁰ Article 103, para. 2 of the Act on Social Welfare.

²¹ With all the consequences thereof.

²² Cf. Article 61, paras. 2b–2f of the Act on Social Welfare.

5. The problem of the objective lack of evidence (a brief mention)

Given the above considerations, it is worth formulating the reservation that information shortcomings in administrative proceedings can sometimes be caused by an objective lack of evidence. The resulting evidential deadlock constitutes a significant obstacle to the substantive processing and settlement of the administrative issue. However, in this case, the lack of knowledge on the part of the administration does not arise from the asymmetrical distribution of information but from the symmetrically experienced lack of information. It should be emphasized²³ that this situation is more problematic than the lack of data arising from asymmetry (in the perspective under review). This is because the source of information (and not just the access to it) is missing in this case.²⁴

6. Conclusions

Regardless of the crisis of trust in the administrators created by the failures and pathologies of administration – which have recently been additionally aggravated by the disgraceful practices of countries in which the authorities are moving away from the standards of a democratic state governed by the rule of law – it should be concluded that the need for administrative bodies to possess the information that is necessary for correctly performing public tasks is universal and objective. Naturally, a prior rational and justified diagnosis of those needs and the proper normativization of the procedure of obtaining and using information are required. Unfortunately, the practice continues to show that each of the above phases is exposed to numerous risks – and what is particularly worrying, some of those risks are provoked by the public authorities. And after all, without such “inspirations,” striving to establish the truth, which is the objective of obtaining and processing information, is encumbered with numerous risks.²⁵

²³ Regardless of the specific provenance of such information deficits on the part of the administrators.

²⁴ In this context, it is worth mentioning the recent (unsuccessful – the bill has not been enacted) attempt to create conditions for systemically coping with such problems. The bill – General Provisions of Administrative Law (Sejm form no. 3942 of the Sejm of the 4th term) – provided for the possibility of concluding a form of administrative contract for “determining the factual or legal situation of the case”; the proposed name for such contracts was an *arrangement* (PL: *układ*) (cf. Article 41, para. 3 of the above bill).

²⁵ This context of risks is well illustrated by the following proverb: “A lie will go round the world while truth is pulling its boots on,” see: Seth Mnookin, *The Panic Virus. A True Story of Medicine*,

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Science, and Fear (New York, London, Toronto, Sydney: Simon & Schuster, 2011), vii. Offering the above citation as the motto of his book, Mnookin describes it as a "proverb popularized by Baptist preacher Charles Haddon Spurgeon in an 1855 sermon and often attributed to Mark Twain."

Chapter 2. Computerization of Public Administration and the Implications for Information Asymmetry

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Abstract

The progressing computerization of public administration implies significant changes in the asymmetry of information. E-administration has significantly increased the scope of its services for both citizens and business entities. Public entities collect, store, and produce information, such as economic data and digitized collections of books.

Keywords: information asymmetry, computerization, public administration

1. Introduction

Nowadays, the concept of information asymmetry appears to be confusing. Information asymmetry is not considered a current topic anymore. It is rather an intellectual achievement of the past. There is no doubt that the problem of information asymmetry is related to the problem of the so-called imperfect information. Historical observations show that information asymmetry is one of several market failures. One of the authors who mentioned this problem was George A. Akerlof, who stated in article entitled “The Market for ‘Lemons’: Quality Uncertainty and the Market Mechanism” that information asymmetry leads to a market failure.¹

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¹ See: George A. Akerlof, “The Market for ‘Lemons’: Quality Uncertainty and the Market Mechanism,” *The Quarterly Journal of Economics* 84, no. 3 (1978): 488–500.

It should also be noted that the concept of asymmetry is of interest to many scientific disciplines (economics, sociology, political science, political psychology, administrative science, organization and management sciences, and legal sciences). Although this constellation has consequences in terms of the approach to the topic of asymmetry, there is a certain convergence of research perspectives.

The subject of this chapter is primarily the justification (or perhaps only: pointing to a specific intuition) of the claim that computerization of public administration is a response to the threats of information asymmetry. However, today, we often encounter conviction that information asymmetry enables the analysis of current behavior and situation of the market economy. In most cases, it involves having different (unequal) information resources about the conditions of exchange, which is in conflict with the assumption of information transparency in the standard model of pure and perfect competition. Nevertheless, the asymmetry of information is also found extensively applied in analyses of the activities of modern public administration. It indicates the existence of a wide range of interactions and behaviors that can be encountered – both with respect to the very processes of public actions and the behavior of entities associated with them.

The fact is that information is the most important resource in modern administrations. The performance of their main tasks is primarily based on information processing. Furthermore, the basis for the existence of an information society is a continuous, efficient, and purposeful flow of information, in which public organizations play an important role. It can be said that information processes are inextricably connected with information management. It influences the development of information services provided by public institutions.² Nevertheless, the information may sometimes suffer from inconsistency or unreliability. Inconsistency is related to information as a product, while unreliability is related to information as a process.³

Generally speaking, the phenomenon of information asymmetry is a significant factor, which not only disturbs the effectiveness of the market mechanism, but its effects may also be non-economic, influencing the shape of the public sector, especially the public administration. Therefore, it is reasonable to believe that, as in economics, the asymmetry of information is treated as one of the causes of market failure and the ineffective allocation of resources.⁴ As

² Dušan Bogdanov, *Zarządzanie informacją publiczną w jednostkach samorządu terytorialnego* (Opole: Uniwersytet Opolski, 2016).

³ Elisabeth Lesca and Humbert Lesca, *Gestion de Information* (Paris: Litec., 1995), 69–75.

⁴ Jarosław T. Czochoński, "Asymetria informacji i jej znaczenie w gospodarowaniu przestrzenią," *Rozwój Regionalny i Polityka Regionalna* 2017, no. 37: 16–17.

a result, by analogy – in public administration (public sector) – it should be assumed that it may be of decisive importance. For instance, for making wrong location decisions in spatial management or creating unfavorable conditions for public activities.

2. Is the progressing computerization a response to the threats of information asymmetry?

Public administration is currently striving to improve the quality of its services through the increased use of information and communication technologies. Its modernization is presented as a necessity, both in order to meet the changing needs of the population and to remain competitive in an increasingly uncertain and demanding international environment. In response to the process of computerization of public administration, the Sejm of the Republic of Poland amended the Act on Government Administration Departments by introducing a new department – Computerization. The provisions on the Computerization Department entered into force on July 1, 2002. Since 2005, the Computerization Department has been managed by the Minister of the Interior and Administration.⁵ The program of computerization of public entities was based on the State Computerization Plan. It is prepared by the Minister of the Interior and Administration and then adopted by the Council of Ministers in the form of an ordinance.⁶

It is worth remembering that the legislator uses the concept of computerization to define the tasks of public administration entities. According to Article 12a of the Act on Government Administration Departments,

“Computerization is a department of the government administration that encompasses computerization of public administration and entities performing public tasks, public administration ICT systems and networks, the support of investments in computerization, the implementation of Poland’s international obligations in computerization and telecommunications, participation in shaping the European Union policy on computerization, the development of services provided electronically, telecommunications, cyberspace security in the civil dimension, the PESEL

⁵ Małgorzata Ganczar, *Informatyzacja administracji publicznej, nowa jakość usług publicznych dla obywateli i przedsiębiorców* (Warszawa: CeDeWu, 2009), 59.

⁶ Dariusz Adamski, “Informatyzacja podmiotów realizujących zadania publiczne,” in *E-Administracja, prawne zagadnienia informatyzacji administracji*, ed. Dariusz Szostak (Wrocław: Presscom, 2009), 33.