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The paradoxes of application of the legislation on personal data

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The subject. The article is devoted to the analysis of legislation on personal data and it's enforcement in the educational process in higher educational institutions.

The purpose of the article is highlight controversies in legislation on personal data, generating mistakes in enforcement during the educational procedures.

The description of methodology. The author uses methods of complex analysis, synthesis, as well as formal-logical and formal-legal methods.

The main results and scope of their application.

The practice of interpreting the concepts of "personal data", "confidential personal data", "official secret", "publicly available personal data" is extremely contradictory.

Currently, there are hundreds departmental regulatory legal acts about various aspects of the protection of official secrets. Analysis of these acts shows that the rules aimed at preserving the confidentiality of official information regulate the following aspects of the functioning of state and municipal bodies, institutions and organizations: a) ensuring access to official information; b) providing state and municipal services; c) document flow and record keeping; d) staffing; e) anti-corruption; (e) use of information systems; (g) interaction with the media; (h) prevention of conflicts of interest.

The study load cannot be attributed to the personal data, that requires the consent of the teacher to be processed. The study load is nothing more than publicly available information, arising from the principles of collegiality of educational process management, competitiveness of education, its openness and transparency, that are established in the legislation on education.

Conclusions. Extended interpretation of confidential personal data and inclusion of the teaching load to it is unacceptable. This contributes to conflicts of interest, corrupt factors and devaluation of higher education.

Key words: freedom of information, personal data, public personal data, confidential personal data, official secret, conflict of interest, teaching load.

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1. Contradictions in the legal regulation of the turnover of personal data and the practice of applying legislation in this field.

Just as there is a notion of pairs of categories and the law of unity and struggle of opposites is derived in philosophy, so in the political and legal reality there are paired categories and opposite tendencies of the same political and legal phenomenon. For example, the paired categories "content" and "form" are simultaneously the law of their unity and opposition: eternal unity and the contradiction between content and form of law. The opposite categories and opposite tendencies are democracy and authoritarianism, democracy and oligarchy , equality and clanism, law and expediency, etc.

There is a contradiction between the dynamics of social relations, on the one hand, and stability of the law as a form of reflection on the other. This contradiction is also the driving force behind the development of law [1, p. 146-147], and the cause of the conflict situations that arise during its implementation.

Thus, from the point of view of constitutional values, the principles of open society, freedom of information, transparency and collegiality of governance operate . In this democratic tendency, the state takes care of legal education and legal awareness of citizens . As part of the

value-trends adopted, naprime district, federal law from 9.02.2009 № 8-FZ "On providing access to information about the activities of state bodies and local self-government bodies". Within the same trend , the Federal Law "On Education in the Russian Federation" of December 29, 2012 No. 273- FZ , Article 3 of which is devoted to the basic principles of state policy and legal regulation in the field of education, among which: information openness and public accountability of educational organizations (para. 9); democratic character of education management, ensuring the rights of teachers (para.10); inadmissibility of restriction or elimination of competition in the sphere of education (para. 11).

However, in reality, reverse trends also exist, because it is known that nothing bothers the bureaucratic apparatus like information of citizens. In order to ensure information security, under the pretext of protecting information and, finally, to ensure the confidentiality of official information , the tendency for information is to be concealed , and not only outside the state or municipal institution, but within the collective. So, under the pretext of inadmissibility of disclosure and protection of personal data in some departments, some universities hide information of some colleagues.

Indeed, in Soviet times it was possible, knowing only the name and the name of the person, and even better - also his patronymic and the year of birth, in any address table for 5 cents to find out his address and phone.

And try to do something like that now! You will get a refuse on the basis of the Federal Law "On Personal Data"[1]. In any case , the author of these lines was denied once in the provision of the list of members of the department with their telephones, since in accordance with the law specified, name, patronymic and telephone number of the citizen are his personal data and can be provided to a third party (in this case - a colleague in the department) only with the consent of the carrier of these personal data.

The law, however, does not say whether an oral and a written agreement must Dunno th of the situation . From the point of view of common sense phone colleague, colleagues needed, usually for business purposes (to agree on a teacher's replacement in the event of a business trip, Bole situ ...), sometimes for personal reasons (to congratulate on his birthday, to express condolences on the occasion of a close relative's death) and therefore the consent is supposed to be oral. As in the case of a conflict situation, the official who provided personal data to a third party will prove that it was the consent of the personal data subject? In this will depend on of a specific situation , and if the authorities set the goal not to provide any personal data to any employees, it will also derive from the fact that the consent must necessarily be written. But is it not absurd? In this case, the question arises as to the form of such consent. In whose name should such consent be granted? What details should it contain? In other words , absurdist norms about personal data and referring colleagues to third parties, including colleagues in the department, can bring to life a number of absurd situations under the guise of protecting personal data or official secrets .

Meanwhile, when hiring a government agency, including an institution of higher education, each employee gives his consent to the processing of personal data . Thus, a standard form of a document called "The agreement on the processing of personal data of employees SNIU" (Samara National Research University named after Acad. Of SP Korolev) contains 26 products s employee's personal data, the processing of which employees give their consent. It would seem that from the moment of employment and signing of the said Agreement, the employee transfers his personal data to official ones , and within the framework of his business need These data are no longer data that are subject to special protection, i.e. confidential data.

As a deputy of the Samara Provincial Duma, the author of these lines once asked for information about the availability of a diploma of a candidate of legal sciences from the head of the legal department of the Duma, to whom the allowance for the academic degree was accrued immediately after the defense, until approval by the Higher Attestation Commission, which

[1] Федеральный закон «О персональных данных» от 27.07.2006 №152-ФЗ // СЗ РФ. 2006. №31 (ч.10). Ст.3451.

undoubtedly was a violation of law . In reviewing the diploma (or providing a copy of it), everything was refused for the same reason for belonging to this information to personal data.

The same problem had to be faced when an employee of the Office of the Human Rights Ombudsman of the Samara Region, not being a lawyer, appeared to be such, carrying out, in fact, the functions of the investigator in the situation of the investigation of the circumstances of the bondage rent concluded between the 82-year-old invalid rentee (the rent was 500 rubles per month for a two-room apartment in the center of Samara worth 5 million rubles.) And an unscrupulous rent-payer.

The investigator conducted inquiries in the interests of the latter, and the deputy's request for her education was answered : " The information you requested about the formation of an employee of L. refers to personal data and can only be provided upon the request of the court. But out of respect for you as a well-known and authoritative depot, we attach a copy of the diploma of an employee L. " It turned out that the employee graduated from the philological faculty of the SSU and hardly had the right to work in his position .

We have to state that the practice of interpreting the notions of "personal data", "confidential personal data", "official secrets", "public personal data" extremely contradictory . The question of application of the legislation on personal data in labor (service) relations caused great interest among the representatives of various sectors of the Russian legal science [2-12].

2. Legal regulation of official secrets.

At present, there are many (hundreds) departmental regulations that regulate various aspects of protection of official secrets. The analysis of these acts shows that the norms aimed at maintaining the confidentiality of official information regulate the following aspects of the functioning of state and municipal bodies, institutions and organizations: a) providing access to official information; b) provision of state and municipal services; c) document circulation and record keeping; d) staffing; e) fight against corruption; e) use of information systems; g) interaction with the media; h) prevention of conflicts of interest.

According to the findings of AA. Antopolsky [13, p. 25], the norms of Russian legislation regulating official secrets do not constitute a single system, and such norms , as well as references to official secrecy, are found in a variety of normative legal acts, not legislative but departmental level. Moreover, there is a tendency to increase their number and volume, in other words, more and more outweigh the tendency of hiding information, as opposed to what the government puts "in the window" of his political and legal activities.

In accordance with part 1 Art. 8 of the Federal Law "On Information, Information Technologies and Information Protection" restriction of access to information on the activities of state bodies or local authorities can **only** be in the mode of state or official secrecy.

However, there is no official secret as a legal concept, despite numerous attempts to legally fix this concept. And the use of this term in legislation gave the basis for the corresponding doctrine and the use of the term in the doctrinal sense.

In practice, there was also the problem of the correlation of official secrecy and confidential information. So, the President of the Russian Federation decrees, and the Government of the Russian Federation can approve the list of confidential information by decisions. In doing so, ialnoy Confidential information may be classified as official information to which access is restricted, except for the public authorities to the extent that federal legislation proclaims their activities openly and publicly.

In a certain sense, the notion of confidential information coincides with the concept of official secrecy provided that the concept of official secrecy is not interpreted extensively. However, in an attempt to expand the notion of official secrecy in comparison with state shock secrecy as a narrower concept, some scholars and practitioners go too far, turning into the official secret almost everything and everything, the entire sphere of authority and office work of officials in government, and even in other state and municipal structures (institutions, organizations), governments are not.

As a result, any more or less significant information is not given even to the employees of these structures under the pretext of official secrets, confidential information or, finally, information of limited distribution. In legislation and scientific doctrine, there was no such thing as the information of limited distribution before the Yeltsin period . This concept was introduced by Government Decision No. 1233 of 03.11.1994 "On approval of the Regulation on the treatment of restricted information by the federal executive bodies and the authorized body for the management of atomic energy"[2].

In fact, this Regulation normatively confirmed and consolidated the distinction between state secrets - on the one hand, official secrets - on the other. The situation introduced a list of information that can not contain official secrets.

However, the Statute raises many questions in both form and content. This question's not allowed to s in the new edition of the Regulation, to some extent complicate ive w s razgran ichenie concepts of state, official and commercial secrets.

3. Situations in which the interpretation of the meaning of legislation on personal data when it was applied was allowed .

P ersonalnye data do not belong to the state or to the official secret, unless, of course, we are not talking about the persons holding public Russian positions (President, Prime Minister and Ministers, State Duma deputies and Federation Council members, judges and prosecutors, Commissioner for human Rights in the Russian Federation, members of the Electoral Commission of the Russian Federation), and the person's holding public office of subjects of the Russian Federation (governor and so on), as well as the people, replacing senior municipal posts.

However, in actual STI are people, including professional lawyer s, which, firstly, include personal data to official secrecy, and secondly, are arbitrarily expand the concept of sensitive personal data, have ranked them letters cial all personal data.

In Art. 10 of Federal Law No. 273-FZ of 25.12.2008 "On Combating Corruption" provides the notion of conflict of interests as a contradiction between public (state and public) and private interest (personal, narrow-group).

It is noted in the scientific literature that "a conflict of interests takes place if the said contradiction is capable, hypothetically, of **influencing a decision taken by a person who is empowered by administrative (official) powers due to his official (official) duties.** This sign of conflict of interest is called personal interest" [14, p. 282].

At the Department of State and Administrative Law of the Samara University. S.P. The queen has a conflict situation associated with the design of a part-time professor of a non-resident doctor of legal sciences, K. (from Moscow). Two professors already worked at the department in the same specialty, with rank and merit even higher . And the native professor K., without having a single hour of classroom payloads and "remotely" (the head of the chair) guiding Moscow from the educational and production practice of students in Samara for three hundred hours and reviewing work , never once in two years did not appear in the Samara high school. The same "preferential" picture was formed with respect to one more employee - assistant professors , this time from Samara, with whom the manager also concluded a "distance" contract. Meanwhile, the law provides for th "Remote e" of labor is, contracts with teachers, and in that university no remote th forms and training.

The conflict was caused by a clear violation of it the principles of equality and fair distribution of the teaching load at a specified department, whose leadership, in our opinion, it came not from the principle of s established by x in the formation of legislation, and of are personal 's preferences first , the sympathy of the first and dislikes th , which in itself borders on corruption-related factors.

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[2] Постановление Правительства №1233 от 03.11.1994 в ред. от 20.07.2012 // СЗ РФ. 2015. №30 (ч.II). Ст.3165.

Teachers of the department were requested information about the training load of the staff of the department of K. and S., but its leadership avoided providing this information, and even a written request was followed by a "figure of silence". The situation acquired a paradoxical form also because, quite recently, before the introduction of the electronic form of individual plans, they were on chairs in a free access. The first page of the individual plan indicates that it was adopted at the meeting of the department (the number and date of the protocol, usually at the end of August), and on the last page it is also indicated that the report on the implementation of the individual plan, as well as comments to it, was adopted at the meeting department (number and date of the protocol, usually at the end of June). The second copy of the individual plan is kept in the training department.

Thus, consideration at the meeting of the department means that the members of the department have the right to know the content and training load from individual colleagues' plans, otherwise the examination at the department does not make any sense, turns into formality and profanity. The very form of the individual plan indicates that the personal data contained in them is public information.

As a result, the teachers made an official request to the head of the department for the provision of the educational process of the university . The answer was that the training load refers to personal data, and therefore can not be disclosed, that is, given to anyone whatever. Based on the answer, any personal data, including the training load, can be provided only with the consent of the personal data carrier ("bearer" , Professor K., with reference to the head of the department , refused to give "consent"). Moreover, the answer ended and we apologize that " the employee can be dismissed at the initiative of the employer in case of disclosure of the secret protected by law, which has become known to the employee in connection with the performance of his labor duties, including the disclosure of the personal data of another employee " (clause" c "of Article 81 of the Labour Code RF).

Based on this interpretation, the teaching load of teachers, which all previous years is available free of members of the department, being an integral part of the decisions of the department of planning and study load on the approval of the performance of I individual plans become rel ositsya to guards yaemoy law secret.

Naturally, there are no federally first law, which would include training load to the legally protected secret. Moreover, F ederalnom law "On personal data" as in F ederalnom law "On Education in the Russian Federation" workload not even attributed to the personal data processing that are taught atel must give consent. The training load is nothing more than public information, derived from the principles of collegial management of the educational process, competitiveness education, its openness and transparency, that is, the principles established in the legislation on education. Otherwise, it would be impossible to make a single schedule of student activities.

The refusal of the head of the department for the provision of the educational process of the SNIU was followed by a new appeal from the staff of the department, who asked to reply:

1) Are not all types of schedules of training sessions, which indicate the training hours (and, consequently, the training load) and the names of teachers, "disclosure" of their personal data, since the surname, name and patronymic are personal data according to law?

2) Why is the teaching load of teachers taken by the decision of the department, if it is "personal data" and "official secret"?

3) Are the members of the department "third parties", participating in voting on the acceptance of the training load and its execution? What does it mean in this connection the signing of consent to the processing of personal data when hiring?

4) Like them, staff members of the department can be considered at a meeting of the department "planning, organization performance, summarizing the work of the department as well as personnel issues and **performance of the individual teachers** " (p.1.11 Regulations on the Department of State and Administrative Law), if the members of the department denied providing this information under the pretext of official secrets ?

The answer of the head of the department for providing the educational process of the SNIU was as follows:

1. The schedule of training sessions is not the disclosure of personal data.
2. At the meeting of the department, the department's work plan is adopted, taking into account the total number of training assignments, types of workload of teachers. The individual plan of the teacher is approved by the head of the department.
3. We explain that the head of the planning and organization department of the educational process and the head of the department for the provision of the educational process do not own the process of storing and accounting for the individual teachers of the department and can not transfer the department's documentation to third parties. For the individual plans of the teachers of the department you should contact the head of the department.
4. At the meeting of the department, the staff of the department considers the planning, organization, implementation, summarizing the work of the department, and not the structure of the teaching assignments of individual teachers.

As a result of this interpretation of the legislation, the circle "closes": the head of the department does not react to written requests for information on the teaching load of teachers , and the structure that stores the second copies of individual plans refers to him, the head of the department.

This interpretation distorts the meaning of the local normative acts of the educational institution . Thus, subparagraph 1 of paragraph 1.4 of the Regulation on the processing of personal data of employees of the Samara University. S.P. The Queen (accepted by the Academic Light of the University on June 30 , 2017) follows the Federal Law "On Personal Data" stating that "any information relating directly or indirectly to a certain individual or subject to personal data" is personal data.

But not any personal data is confidential and legally protected. In other words, if in any federal law certain personal data are not named confidential, then they are not such, but are, on the contrary , generally available.

We agree with the conclusions of the expert of encasing I on about boznachennoy conflict, which has provided Head of the Department of State and Municipal Law of the Omsk State University them. F.M. Dostoevsky, Honored Lawyer of the Russian Federation, Doctor of Juridical Sciences, Professor A.N. Kostyukov:

"1. If in the Regulations on the Department it is said that at the meeting of the department "questions of planning, organization of implementation, summarizing the work of the department, as well as personnel issues and the results of the activity of individual teachers" are considered (clause 11.11 of the Regulations on the Department of State and Administrative Law) can Follow the important its jurisdiction in the case, if the members of the department refused to provide relevant information rmatsii . Similar provisions are present in other universities, and there are unlikely to be cases when faculty members are denied this information.

2. The teaching load of teachers of the department does not belong to the state or official secret protected by law. The federal law, which would attribute the teaching load of teachers to any secret, does not exist.

3. The teaching load of teachers of the department does not belong and can not relate to personal data, because the list of personal data protected by law does not include the teaching load of teachers. The pedagogical load is not personal, but official data, just as the official data are used to compile the schedule of students and other open information.

4. Additional consent (sanction) of the head of the department for the provision of the teaching load of the members of the department is not required, since this is included in the functional duties of the secretary of the department. Before the process of computerization, the translation into the electronic form of individual plans of teachers, all individual plans were in the department in free access, no secrets in them have never been. Therefore, the refusal of the secretary of the department to provide the members of the department with the academic load of colleagues in the department is illegal.

5. The refusal of the head of the department to provide the teaching load of any teachers of the department to its members under any pretext is illegal.

6. Moreover, the head of the department is responsible for the workload, and he is responsible not only to the leadership of the university, but also to the department headed by him. Understand the formula according to which the head of the department is responsible for the formation of the academic load at the department, so that it is exclusively his prerogative, to which no one has the right to interfere and no one has the right to control, is completely wrong".

This conclusion is encouraging that such misuse of the concept of "personal data" will not be widespread , since the broad interpretation of legislation on personal data , especially in higher education, contributes to the prosperity of corruption- related factors in universities.

This conflict situation was highlighted in the newspaper "Samarskoye Obozrenie" [15, p. 2-3]. Illuminated problems acquire, according to responses from other universities after the publication "Just a secret", a wide scale in many universities in Russia.

5. Conclusions.

It is necessary to point out to all Russian universities the inadmissibility of an extensive interpretation of personal data of confidential content, the inadmissibility of violating the principles of fairness and openness in the distribution of workload among the members of the department, as concealing this information from colleagues generates not only a conflict of interests, but also demoralizes incentives for professional improvement and scientific growth, devalues higher education in general, its quality and prestige.

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