WARDYŃSKI & PARTNERS

Questioning in criminal proceedings

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A GUIDE FOR BUSINESSES AND BUSINESS EMPLOYEES

Introduction

Clients often consult us when they or their employees are summoned for questioning. In many cases, they do not know why they have been summoned. They ask how they can find out what the case is about, how questioning is conducted, and what are their rights and obligations. They are unsure whether an attorney can or should be present during questioning, and have concerns regarding confidentiality (business secrets, attorney-client privilege).

This guide discusses the rights of people when being questioned, and the obligations they have in connection with being questioned.

Questioning

What is questioning?

Questioning is a formal procedure conducted for instance in criminal, criminal-fiscal, or misdemeanour cases in which the authorised authority (public prosecutor's office, court, or officer in a unit that has this power[1] obtains information).

Questioning can concern information held by various people. A person charged with an offence (person indicted, crown witness, minor crown witness), a witness (including a victim / auxiliary prosecutor), a person reporting a crime, and an expert witness can be questioned.

The way in which questioning proceeds and the rights and obligations of a person being questioned are specified in criminal procedure law, in the 'police laws'[2], and standards provided for in EU law, the Polish Constitution, and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Where can questioning take place?

The law does not specify where questioning has to be conducted, but it does require that the location in which questioning is conducted has to be stated in the record kept of the questioning. This might be for example the premises in which an offence was discovered, a police station, court, and similar places. Usually, this is the place in which the questioning officer is based (a police station or public prosecutor's office) or court, during a hearing or court session. Questioning is only conducted in other locations in special circumstances, such as illness, disability, or other impediments, such as significant distance from the place in which the questioning officer is based. In these cases, the

1 Including the police, Internal Security Agency, Central Anti-Corruption Bureau, Military Counterintelligence Service, Border Guard, Military Police, National Revenue Administration.

2 The Internal Security Agency and Intelligence Agency Act of 24 May 2002, Police Act of 6 April 1990, Border Guard Act of 12 October 1990, Military Counterintelligence Service and Military Intelligence Service Act of 9 June 2006, the Central Anti-Corruption Bureau Act of 9 June 2006, the Act of 24 August 2001 on the Military Police and Military Order Authorities, National Revenue Administration Act of 16 November 2016.

individual concerned can be questioned in their current location (their domicile, hospital, other police unit).

In fact there have been cases in which questioning has been conducted in a Polish court or public prosecutor's office concerning cases being conducted in other countries. This happens when law enforcement agencies in other countries request that someone be questioned on the basis of a European Investigation Order or international treaty on cooperation in criminal matters.

The procedure for issuing a summons to appear for questioning Questioning is conducted following issuance of a summons, or upon an appointment being made. Usually, a summons is sent by post and the addressee must be aware that they have been summoned a minimum of seven days in advance. The time specified must enable arrangements to be made in order to attend, such as organising holiday leave and someone to look after children.

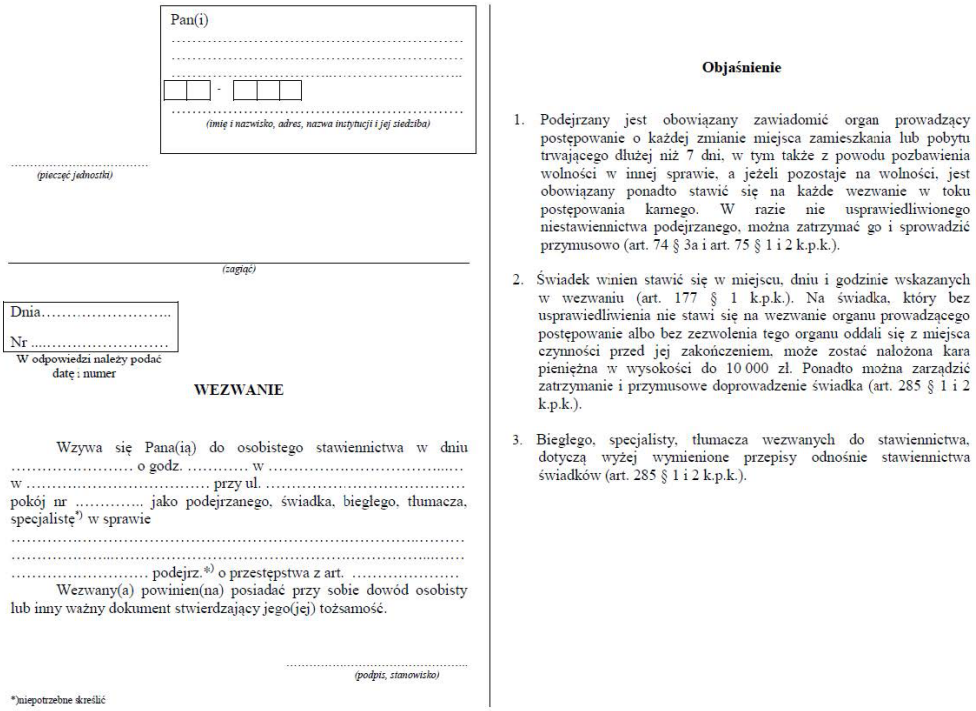
It is also possible for someone to be summoned for questioning by telephone, e-mail, or fax, subject to certain conditions. Firstly, this only applies to matters too urgent to brook delay, which means unusual or unforeseen situations (e.g. a witness has come to Poland unexpectedly). Neglect or poor work organisation on the part of the summoning officer is not legitimate grounds for an urgent summons of this kind[3]. Secondly, the summons must be dispatched sufficiently in advance for the procedure to in fact be conducted. Thirdly, the summoning officer is required to document an attempt to summon someone for questioning in these special cases, for example by placing in the files a proof that an e-mail was sent. This will be important if the questioning does not happen and the summoning officer determines that a penalty is applicable for failure to attend.

What elements are required in a summons for questioning?

A summons for questioning must provide essential information about the scheduled procedure, and therefore must state who issued the summons, the matter to which it relates, the procedural status of the person summoned (witness, person reporting an offence, person charged with an offence), the time and place, whether attendance is compulsory, and the consequences of failure to attend. This applies whether a summons is sent by post or issued by other means.

A police summons for questioning is usually issued using the form below.

3 See Warsaw Appeal Court ruling of 29 May 2001, II AKz 350/01, Lex.



Pan(i)
.....
.....
.....
.....
(imię i nazwisko, adres, nazwa instytucji i jej siedziba)

.....
(pieczęć jednostki)

(zagiąć)

Dnia.....
Nr .....
W odpowiedzi należy podać datę i numer

WEZWANIE

Wzywa się Pana(ią) do osobistego stawiennictwa w dniu ..... o godz. ..... w .....
w ..... przy ul. .....
pokój nr ....., jako podejrzanego, świadka, biegłego, tłumacza, specjalistę*) w sprawie
.....
.....
..... podejrz.*) o przestępstwa z art. .....
Wezwany(a) powinien(na) posiadać przy sobie dowód osobisty lub inny ważny dokument stwierdzający jego(jej) tożsamość.

.....
(podpis, stanowisko)

*)niepotrzebne skreślić

Objaśnienie

1. Podejrzany jest obowiązany zawiadomić organ prowadzący postępowanie o każdej zmianie miejsca zamieszkania lub pobytu trwającego dłużej niż 7 dni, w tym także z powodu pozbawienia wolności w innej sprawie, a jeżeli pozostaje na wolności, jest obowiązany ponadto stawić się na każde wezwanie w toku postępowania karnego. W razie nie usprawiedliwionego niestawiennictwa podejrzanego, można zatrzymać go i sprowadzić przymusowo (art. 74 § 3a i art. 75 § 1 i 2 k.p.k.).
2. Świadek winien stawić się w miejscu, dniu i godzinie wskazanych w wezwaniu (art. 177 § 1 k.p.k.). Na świadka, który bez usprawiedliwienia nie stawi się na wezwanie organu prowadzącego postępowanie albo bez zezwolenia tego organu oddali się z miejsca czynności przed jej zakończeniem, może zostać nałożona kara pieniężna w wysokości do 10 000 zł. Ponadto można zarządzić zatrzymanie i przymusowe doprowadzenie świadka (art. 285 § 1 i 2 k.p.k.).
3. Biegłego, specjalisty, tłumacza wezwanych do stawiennictwa, dotyczą wyżej wymienione przepisy odnośnie stawiennictwa świadków (art. 285 § 1 i 2 k.p.k.).

In addition, the contact details of the summoning officer, such as an e-mail address and telephone number, should be provided for ease of communication and organisation.

Can questioning be rescheduled?

The questioning officer schedules an appointment for conducting questioning, and the person summoned is required to give notice accordingly if they are unable to attend. The person summoned is required to document their absence at the scheduled time (by providing an airline ticket or similar) and state a time when the procedure can be conducted. In our experience, it is usually possible to arrange reasonable times for questioning with the authority that issues the summons.

A medical certificate stating incapacity to attend is also a ground for not attending. This certificate is issued by a court-appointed physician[4] following an examination[5] or, in special cases, without an examination being conducted, on the basis of submitted medical records (for example when someone is in

4 Physicians who have agreements with chief judges of regional courts for court-appointed physician services. The chief judges of the relevant courts publish lists of these physicians.

5 Art. 12(3) of the Court-Appointed Physician Act of 15 June 2007.

need of constant care)[6]. Submitting a certificate of incapacity for work issued by a physician who is not a court-appointed physician may not be sufficient. In such case, a procedural authority can examine, for example, whether the person summoned for questioning is bed-ridden or their state of health has unexpectedly and severely deteriorated[7], and this truly prevents them from attending the questioning.

Is there any kind of penalty for failure to attend?

Failure to attend without legitimate reason could be treated as a contempt and lead to disciplinary penalties being imposed by a public prosecutor (during an investigation) or court (in a court case):

- A means-tested fine for a witness, not exceeding PLN 3 000[8] in total,
- An order that the person should be detained and promptly brought before the relevant authority,
- Being held in custody by a district court at the request of a public prosecutor for up to 30 days.

The first of these penalties can be imposed repeatedly, and a witness subject to this kind of penalty has a week to do the following:

- Provide legitimate grounds for failure to attend and request to have the penalty revoked, or
- File a complaint to the court contesting the penalty.

The time limit for providing legitimate grounds for failure to attend is not mandatory, which means that legitimate grounds can be presented for failure to attend even if the request and documents are submitted after the time limit[9]. On the other hand, the time limit for filing a complaint with the court is final.

6 Art. 12(4) of the Court-Appointed Physician Act.

7 Katowice Appeal Court ruling of 1 April 2009, I AKz 226/09, Lex.

8 A. Sakowicz, Komentarz do Art. 285 Kodeksu postępowania karnego (in:) Kodeks postępowania karnego. Komentarz, A. Sakowicz, K.T. Boratyńska, P. Czarnecki, A. Górski, M. Królikowski, M. Warchoł, A. Ważny (ed.), Lex.

9 A. Sakowicz, Komentarz do art. 286 Kodeksu postępowania karnego (in:) Kodeks postępowania karnego. Komentarz, A. Sakowicz, K.T. Boratyńska, P. Czarnecki, A. Górski, M. Królikowski, M. Warchoł, A. Ważny (ed.), Lex.

Detention and bringing someone before an authority can be used in combination with a fine[10]. A witness can contest this by filing a complaint with a district court within seven days of this procedure being performed.

Holding an individual in custody for disciplinary reasons must be a last resort when a witness persistently fails to attend when summoned, and detaining and bringing the individual before the authority is not sufficient. A witness can file a complaint contesting a court ruling that the person be held in custody, and a complaint of this kind leads to stay of execution of the order[11].

The difference between questioning and making enquiries

Frequently, authorities conducting criminal cases make interview (for example at the scene of an incident) and this is often conducted as the first procedure. This determines the subsequent measures taken, such as conducting a search and seizing items, examination, and questioning.

Interviews are made to ascertain the major facts surrounding an incident, and this procedure is similar to questioning, but the making of interviews is not regulated in any way in the Criminal Procedure Code or the 'police laws'. This means that this is an informal procedure and results in the individuals subject to the interviews being deprived of rights.

The procedure is informal among other things as there is no obligation to issue a caution informing the person concerned of their rights (for example to refuse to make a statement, answer a question, provide information). As a result, the making of interviews is often a way of circumventing the right to remain silent. Also, no official record is kept of interviews[12].

In practice, the only indication of this procedure is official notes placed in the files by an officer[13] who made interviews about the incident in question. It is common for this to be the first document in a case, and the basis for a subsequent investigation.

10 K. Eichstaedt, Komentarz do art. 285 Kodeksu postępowania karnego (in:) Kodeks postępowania karnego. Volume I. Komentarz updated, D. Świecki (ed.), Lex

11 K. Eichstaedt, Komentarz do art. 285 Kodeksu postępowania karnego (in:) Kodeks postępowania karnego. Volume I. Komentarz updated, D. Świecki (ed.), Lex.

12 Cracow Appeal Court judgment of 14 September 2006, II AKA 123/06.

13 Supreme Court ruling of 4 May 2016, III KK 334/15, Lex.

The fact that this is not regulated does not mean unrestricted freedom to make interviews among witnesses or suspects, or in the way in which the information collected is used. In criminal cases[14]:

- Notes cannot be a substitute for statements made by a witness and information provided by a person charged with an offence[15],
- Notes can be read out during a hearing, when they confirm information from persons charged with an offence or statements made by witnesses subsequently[16],
- A person who drew up notes[17] can be examined with regard to the content, provided that this person does not subsequently question a person with whom they made interviews[18].

What is meant by combining receipt of a report of an offence with questioning?

A person who decides to report an offence (for example the company representative signing the statement) can expect to be summoned for questioning by a procedural authority such as a public prosecutor or other unit with this power. This procedure is referred to as 'receiving a verbal report of an offence combined with questioning of an individual as a witness'. A record is kept of this procedure.

If the offence is reported by a person who is not a victim, they have the right to: (in addition to the rights and obligations of a typical witness)

- Be informed (within six weeks) that an investigation has or has not been launched, or has been discontinued,
- File a complaint with the superior public prosecutor or prosecutor appointed to monitor the authority to which the offence was reported, if that prosecutor has not given notification that an investigation has or has not been launched, or has been discontinued,
- File a complaint contesting a ruling that an investigation will not be launched – if the person's rights have been breached as a result of the offence,

14 Does not apply to misdemeanor cases in which official notes on procedures in investigations can be read out at a hearing unless the guilty party requests that the procedure in question (such as witness questioning) be conducted directly.

15 Supreme Court ruling of 4 May 2016, III KK 334/15, Lex, as well as the Cracow Appeal Court judgment of 12 November 2013, II AKa 355/13, Lex

16 D. Świecki, Komentarz do art. 393 Kodeksu postępowania karnego (in:) Kodeks postępowania karnego. Volume I. Updated Commentary, D. Świecki (red.), Lex.

17 Supreme Court ruling of 4 May 2016 r., III KK 334/15, Lex.

18 Wroclaw Appeal Court judgment of 29 December 2009, II AKA 405/09, Lex.

- File a complaint contesting the ruling on discontinuing the investigation (with respect to certain offences[19]), if the person's rights have been breached as a result of the offence.

Does a motion for prosecution have to be filed during questioning?

Sometimes, instituting and conducting proceedings regarding a particular offence requires the victim or other eligible party (such as a company guardian) to file a motion for prosecution. This is an obligation provided for in the Criminal Code, or, as applicable, in other laws prosecuting specific 'offences prosecuted upon a motion'. There are not many offences of this kind. For example, a motion for prosecution is required with respect to:

- Preventing or diminishing satisfaction of creditor claims, unless the State Treasury is the victim (Art. 300 of the Criminal Code),
- Unauthorised destruction of important information or damaging, erasing, or amending that information, or preventing in some other way, or significantly hindering, an authorised person's review of that information (Art. 268 of the Criminal Code),
- Making a punishable threat (Art. 190 of the Criminal Code),
- Destroying, damaging, or rendering useless an item belonging to someone else (Art. 288 § 1 and 2 of the Criminal Code),
- Unintentionally putting someone at risk of loss of life or severe damage to heath (Art. 160 § 3 of the Criminal Code),
- Recording an image of a naked person or person in the course of sexual activity (Art.191a of the Criminal Code),
- Rape committed prior to 27 January 2014 (Art. 197 of the Criminal Code)[20],
- Putting somebody at direct risk of infection with a human immunodeficiency virus or other venereal or contagious disease, a serious terminal disease or truly life-threatening disease (Art. 161 of the Criminal Code).

The motion is usually submitted together with the offence report, whether the offence is reported verbally or in writing. This is the most appropriate moment, because without this motion the authority will not launch proceedings, and will only safeguard evidence and establish whether a motion for prosecution will in fact be submitted.

19 The report made must relate to offences punishable under Art. 228-231, Art. 233, Art. 235, Art. 236, Art. 245, Art. 270-277, Art. 278-294 or in Art. 296-306 of the Criminal Code.

20 Under Art. 3 of the Amendment of 13 June 2013 to the Criminal Code and certain other acts.

The law does not require a special form for this motion, apart from the general assumption that the intention to prosecute the perpetrator must be beyond doubt. It is important, however, that it be filed correctly (e.g. in accordance with the rules for representing a company). The simplest method is to file thee motion in a record documenting that the offence was reported and the witness was questioned at the same time, by marking the appropriate box on the form.

There are a number of consequences of filing the motion, and these are:

- All perpetrators of the offence will be prosecuted, not only those named in the motion[21],
- A victim may withdraw the motion, subject to the public prosecutor's consent (during an investigation), or court's consent,
- A motion for prosecution cannot be resubmitted once withdrawn.

It may also become necessary to submit the motion during an ongoing investigation if it transpires that the offence was initially classified incorrectly. In such a case, once a motion has been submitted, the authority will continue the proceedings instituted earlier.

How questioning proceeds

What obligations must the questioning officer fulfil prior to questioning a witness?

Before beginning to question a witness, the questioning officer must comply with certain obligations.

Firstly, the questioning officer is required to check the identity of the person being questioned based on their personal identification card, passport, or other form of identification, and if that person is acting on someone's behalf, for instance a company, they are required to check their authorisation to take part in the questioning. The same applies to a representative and other persons present during questioning.

The questioning officer is then required to fill in an address slip to be included in the record, containing the witness' particulars, while sometimes this document is drawn up once the questioning has been concluded.

21 Does not apply to close persons.

Next, the questioning officer notes the witness' personal details in the record (first names of parents, mother's maiden name), date and place of birth, occupation, previous convictions for making false statements, and what relation they are to the suspect or person charged with an offence.

Once these details have been noted down, the questioning officer has an obligation to issue a caution informing the witness of their rights (such as the right to refuse to make a statement) and obligations (such as the obligation to keep address details up to date). This caution must be issued by giving a verbal explanation, and the person being questioned also has to be pro vided with two written copies of the caution to be signed, of which one is placed in the case files and the other is given to the questioned person.

Also, the questioning officer is required to inform the person being questioned that they will face criminal liability for making a false statement or concealing the truth (Art. 233 § 1 of the Criminal Code), including when this is due to fear that they or persons close to them may face criminal liability (Art. 233 § 1a of the Criminal Code).

Depending on the subject matter of the questioning, the questioning officer is also required to advise on the right to refuse to make a statement if a person charged with an offence or indicted is a person close to the witness (Art. 182 § 1 of the Criminal Procedure Code), and the right to refuse to answer a question if the answer might put the witness or a person close to them at risk of liability for an offence or fiscal offence (Art. 183 § 1 of the Criminal Procedure Code).

Once these requirements have been fulfilled, unless the witness exercises the right not to make a statement, the questioning may proceed. The first element is an 'unfettered' statement regarding the offence in question, after which the questioning officer can ask the witness questions.

What obligations must the questioning officer fulfil prior to questioning a person charged with an offence?

The procedure is slightly different when a person charged with an offence is questioned for the first time, and consists of two stages: 1) issuing the indictment, and 2) properly conducted questioning.

Once the identity of the person charged with an offence has been determined and the authorisation of defence counsel checked (if present) the charge sheet

is served (read out). This charge sheet is served to the person charged with an offence and their defence counsel. Once the person charged with an offence has read the charge sheet, they confirm the receiving date with their signature.

The public prosecutor then advises the person charged of their rights to:
- Be informed verbally of the grounds for the charges,
- Request that they be served with a written statement of reasons for the indictment. They can make this request at a later stage, up until the moment of notification of final review of the case files),
- Final review of the case files.

The questioning officer then advises the person charged of their rights by serving them two copies of this caution in writing, one of which is placed in the case files.

The questioning officer then asks the person charged to state the following:
- First name/s and surname (including maiden name), and their nickname if applicable, and the first names of their parents, and mother's maiden name,
- Individual civil identification number (PESEL) / tax identification number (NIP),
- Date and place of birth,
- Registered address, place of residence, or, as applicable, long-term stay, address for correspondence, and where possible their e-mail address,
- Nationality/ies,
- Education,
- Marital status,
- Number of children and their ages, number of dependants, and their relationship,
- Occupation studied for, place of study, work, or source of income, profession practiced,
- Monthly salary or other payments (disability, retirement pension), spouse's occupation and income,
- Assets (real property, high-value property or stock),
- Their status with respect to national service,
- Previous convictions,
- State of health, in particular psychiatric treatment, neurological treatment, and treatment for addiction,
- Their relationship (close person, acquaintance) to the victim.

The person charged does not have to provide any information apart from their address. If the other information is not provided, they should however expect that the law enforcement authorities will attempt to determine that

information independently (for example by asking an employer for a statement of earnings or asking the tax office to forward tax returns, etc.)[22].

Once this information has been collected, the questioning officer will ask the person charged whether they understand the nature of the charge. If this is confirmed, they are asked whether they admit committing the offence of which they are charged. Once the individual has stated their position on this issue, they are advised that they have the right to provide information, the right to refuse to provide information, and the right to answer and refuse to answer the questions put to them or to answer certain questions (for example of the defence counsel). If the person charged decides to provide information, the questioning officer must first allow them to make an 'unfettered statement'.

Can persons other than the person being questioned be present?

In addition to the questioning officer and the person summoned (or, as applicable, someone assigned to keep the record, an assistant), other people may be present during questioning. This applies in particular to the parties and their representatives (defence counsel, representative, legal representative, including a probation officer), other witnesses (if the questioning is held to compare different people's statements) interpreters, expert witnesses (such as psychologists), other persons (for example persons specified by victims to assist them during questioning), and other officers (providing security or also conducting the questioning). The person conducting the procedure decides on who can attend questioning during an investigation. What is important the party that filed the request, and that party's defence counsel or representative, cannot be refused participation in the questioning. The authority may however refuse to allow admission to the questioning to persons who are not parties if this is important – for example for the sake of the investigation.

Can a representative of a diplomatic service be present during questioning?

If the person being questioned is a foreign national, they can request for a diplomatic or consular representative to be present during questioning. The presence of a diplomatic or consular representative is dependent however

22 M. Kurowski, Komentarz do art. 213 Kodeksu postępowania karnego (in:) Kodeks postępowania karnego. Volume I. Updated Commentary, D. Świecki (ed.), Lex.

on international treaties between Poland and the country of the diplomatic representative who is to be present.

Can the questioning procedure be recorded by the questioning officer?

A record of the questioning is drawn up, but a video and audio recording of the procedure is also possible. There is an obligation to make a video and audio recording only in cases where:

- The concerned individual cannot be examined at a court hearing,
- The case concerns victims of offences concerning forced sexual acts and witnesses in such cases,
- Procedures are conducted in connection with a request from another authority for legal assistance.

As a general rule, audio and video recordings are not made during questioning. Questioning officers usually say that it is for the lack of technical and organisational means. This is not good practice however, as the European Court of Human Rights (ECHR) has said repeatedly that recording questioning, in particular during an investigation, is a vital element of procedural guarantees for indicted persons. This is because in some cases they are unable to be present at the questioning of witnesses who subsequently, for various reasons cannot be examined in court (for example if they exercise the right not to give statements)[23].

If the questioning is audio and video recorded, then the questioning officer is required to advise all persons present accordingly before activating the recording device, and place the recording in the case files. The record of this procedure may be limited to the most important statements made by those present. The parties (victim or person charged) can be provided with a copy of that recording.

23 Judgments of 15 December 2011 in cases Al-Khawaja and Tahery v. the United Kingdom, complaints 26766/05 and 22228/06, and of 15 December 2015 Schatschaschwili v. Germany, complaint 9154/10.

Can the person being questioned demand to present them the document to which questions relate?

If during the questioning questions are asked regarding documents, the questioning officer is required to present the documents to the person being questioned, so that they can state their standpoint with respect to those documents. The same applies to other evidence in the case files, such as photographs, maps, and boards showing images of individuals. The questioning officer is required to note down precisely in the record what kind of documents (for example the number of documents and the page number) or items (photographs, maps) were presented to the person being questioned, and the precise questions posed and statements made due to the item in question being presented.

What measures may not be used with respect to the person being questioned during questioning?

Questioning can be used as evidence only when information is given freely, and no coercion or other forbidden means are used. In order to prevent restrictions of the freedom of expression of persons being questioned, the law forbids in particular the use during questioning of physical coercion (torture or inhumane treatment) or psychological coercion (including degrading treatment), making unlawful threats, hypnosis, narcoanalysis, pharmacoanalysis, and polygraph machines[24].

Obligations of a person being questioned

What obligations do persons being questioned have?

The range of obligations depends on the role in a criminal case. The differences between obligations of witnesses and persons charged with offences are presented in the table below.

24 The ECHR commented repeatedly on the value of evidence obtained during questioning using coercion. It examines these cases in terms of art. 3 of the ECHR (no torture, inhumane or degrading treatment), and Art. 6 of the ECHR (right to a fair trial).

Obligation	Witness	Person indicted
Giving and updating their address	Yes	Yes, and give notification of any change of place of residence or stay of more than seven days, including due to imprisonment in a different criminal case
Attending questioning	Yes	Yes
Fingerprinting	Without the person's consent, but only to reduce the number of persons charged or to confirm information collected beforehand	Without consent
Exterior body examination and medical examination	Consent required	Without consent, and an obligation of examination involving breach of bodily integrity, except for surgery and procedures performed by a specialist and when this does not endanger life
Taking nasal discharge samples	Without the person's consent, but only to reduce the number of persons charged or to confirm information collected beforehand	Without consent, when absolutely vital and there is no concern about danger to life or health
Taking blood, hair, and secretion samples	Without the person's consent, but only to reduce the number of persons charged or to confirm information collected beforehand	Without consent, but has to be performed by a specialist, and when this does not endanger life
Taking saliva, handwriting, and scent samples	Without the person's consent, but only to reduce the number of persons charged or to confirm information collected beforehand	Without the person's consent, but only to reduce the number of persons charged or to confirm information collected beforehand

Obligation	Witness	Person indicted
Taking photographs, showing to other people	Without the person's consent, but only to reduce the number of persons charged or to confirm information collected beforehand	Without consent
Psychiatric examination	Not applicable, a psychiatrist or psychologist can be present during questioning, as applicable	Without consent, but has to be performed by a specialist, and when this does not endanger life

Does a diplomat have an obligation to attend if summoned and to make statements?

People with diplomatic immunity (the head and members of a diplomatic mission, technical and administrative staff at diplomatic missions, and family members living within the same household) do not have an obligation to attend when summoned and to make statements.

If they fail to attend, they cannot be forced to attend, for example by being detained and brought before the authority.

There is also no obligation of this kind with respect to their actions as members of the mission. This immunity applies to the activities of the person concerned as a diplomat, even when that person is a member of a diplomatic mission in a different host country or does not fulfil that function at all)[25]. This means that once the diplomatic mission comes to an end and they leave the host country, the members of the mission continue to enjoy the privileges guaranteed by diplomatic immunity.

Why does a person being questioned have to give their address?

Prior to questioning commencing, and any time there is a change of address, a person being questioned (witness, person indicted) has to give their address, namely their place of residence and address for correspondence. These

25 Art. 578 of the Criminal Procedure Code and art. 31, 39 of the Vienna Convention on Diplomatic Relations, of 18 April 1961.

addresses do not have to be the same, for example a witness can specify their place of work (company premises) as their address for correspondence. If information about their address is not kept up to date, authorities such as the police, public prosecutor's office, and court will send correspondence to the last known address.

What information regarding address does a person not residing in Poland have to give?

If a witness does not have a fixed place of residence in Poland, they are required to specify an address for correspondence, for instance with family or acquaintances, or their place of work. If they cannot provide an address of this kind, they have to state their residential address abroad, to which correspondence can be sent. If a witness does not give an address for correspondence in Poland or elsewhere, they will be summoned for questioning using the address in Poland last known to the questioning officer (for example their registered address in the individual civil identification number (PESEL) database). If there is no such addressthe summons is placed in the case files and considered served.

Is a witness' address protected in some way?

A witness' address and the address of a person who reports an offence are secured against third-party access. Addresses are placed in an address file that is only accessible to the authority conducting the proceedings. This information may only be disclosed in special situations, where this is essential due to the subject matter of the proceedings (the residential address is a crime scene).

Rights of a person being questioned

What rights does a person charged have, and what rights does a witness have, during questioning?

A person charged with an offence has the following rights during questioning:

- To have defence counsel present (private appointed by the individual or public appointed by the state),

- To remain silent (meaning to provide and refuse to provide information and answer or refuse to answer questions),
- To have an interpreter provided free of charge,
- To be issued a copy (photocopy) of the record drawn up when they were questioned,
- Reimbursement for expenses incurred in order to attend.

Meanwhile, the rights of a witness depend on whether the person is a victim at the same time. The differences in rights are described in the table below

Right	Victim	Witness who is not a victim
Right to representation	Yes	Yes, if this is necessary to protect their interests
Right not to make statements	Yes, if: • this is a close person, • they are bound by a non-disclosure obligation for informationclassed as confidential or secret, or for secrets protected by law, and a court has not waived this obligation	Yes, if: • this is a close person, • they are a joint suspect in a different ongoing case, • they are bound by a non-disclosure obligation for information classed as confidential or secret, or for secrets protected by law, and a court has not waived this obligation
Right to refuse to answer questions	Yes, if this person or a close person might face liability for an offence or fiscal offence	Yes, if this person or a close person might face liability for an offence or fiscal offence
Right to an interpreter	If they do not have sufficient knowledge of Polish language	If they do not have sufficient knowledge of Polish language
Right to photocopy the procedure records	Yes	If the questioning officer gives consent
Taking blood, hair, and secretion samples	Yes	Yes

When can a person charged with an offence request that defence counsel be present during questioning?

A person charged with an offence can request to have their defence counsel present whenever they are questioned. This is an element of the right to a defence guaranteed under the Polish Constitution (Art. 42(2)) and the ECHR (Art. 6(3)(c)). Guaranteeing this right demonstrates adherence to the standard in effect in ECHR case law of the right to an attorney during the first procedure conducted, formulated in Salduz v. Turkey[26]. In this judgment, the ECHR states that for the right to a fair trial to be adequately practical and effective, in practice the right to an attorney must be respected from the moment a person charged with an offence is questioned by police for the first time, unless special circumstances are demonstrated to exist constituting material grounds for limiting that right, known as the 'Salduz doctrine')[27].

When can a witness appoint a representative to be present during questioning?

Both a victim and a witness who is not a victim can appoint a representative (attorney-at-law) to be present during questioning, among other things. However, a witness who is not a victim in the case can only appoint an attorney when necessary to protect their interests.

In practice, public prosecutors are sometimes opposed to an attorney being present at the questioning of a witness. Under current laws, in such a situation, a public prosecutor is required to issue a ruling preventing a representative from being present during the procedure. A ruling of this kind issued during an investigation can be contested by filing a complaint with the public prosecutor immediately superior to the public prosecutor that issued it. The questioning officer is required to issue a ruling of that kind before questioning begins, so that the witness is able to file a complaint to contest it. Filing a complaint causes a stay of questioning until it is reviewed.

26 Judgment of 27 November 2008 in Salduz v. Turkey, complaint 36391/02, § 52.

27 Judgment of 9 November 2018 in Beuze v. Belgium, complaint 71409/10.

What is meant by the 'right to remain silent' of a person charged with an offence?

The right to remain silent is a fundamental guarantee enjoyed not only by people indicted or charged with offences, but also by suspects[28]. The right to remain silent means that a person can refuse to provide information and answer particular questions without giving any reason. There cannot be any adverse consequences for the individual due to exercising this right, and this right also means that procedural authorities cannot force the individual in question to provide information or answer questions, and thus provide evidence detrimental to themselves.

What happens if someone is questioned first as a witness, and then as a person charged with an offence?

Law enforcement agencies often question the same person first as a witness and then as a person charged with an offence. In such a situation, statements made by someone in the capacity of a witness cannot be read out at a hearing, and thus the court adjudicating the case cannot determine facts on the basis of those statements. The record containing those statements will however be in the case files.

When is a witness held liable for making false statements?

Before questioning begins, every witness is advised of liability for making false statements (Art. 233 of the Criminal Code). In addition, in certain situations, a witness has to be advised of their right to refuse to make statements (for instance Art. 180, Art. 182 of the Criminal Procedure Code), or refuse to answer a question, as the case may be (for instance Art. 183 § 1 of the Criminal Procedure Code).

In practice, the questioning officer issues this caution by saying "you are advised that the penalty for making false statements is up to eight years imprisonment" or "you are advised of liability under Art. 233 of the Criminal Code". Cautions serve a much broader purpose than just a reminder of the obligation to tell the truth during questioning.

28 Judgment of 8 February 1996 in John Murray v. United Kingdom, complaint 18731/91, The ECHR stated that this guarantee is an integral element of the right to a fair trial under Art. 6 of the European Convention on Human Rights.

Firstly, if a caution is not issued regarding Art. 233 of the Criminal Code and the right to refuse to make statements and answer a question, a person being questioned cannot subsequently be held liable for the offence of making false statements.

Secondly, liability relates to making false statements or concealing the truth when making statements that serve as evidence in the proceedings. This means situations in which:

- a statement is made[29], and thus when a witness remains silent when questioned they cannot face criminal liability, but disciplinary liability at most (a disciplinary fine)[30],
- a statement is subjectively untrue, i.e. the person being questioned is aware or should be aware that they are making an untrue statement or concealing the truth,
- any information provided that is untrue, even if unimportant, can lead to criminal liability (for example even with respect to personal data provided by a witness)[31].

Thirdly, a person being questioned can be held liable for making an untrue statement or concealing the truth due to fear that they or persons close them may face liability. This is very important when a person being questioned, who should be charged with an offence, is questioned as a witness. It is clearly improper to conduct questioning in this way, because it limits the right of a person being questioned to defence, and cannot lead to criminal liability.

When can a witness refuse to make statements?

As a rule, a witness is required to attend questioning and make statements.

Refusal to make statements means that the witness does not make statements of any kind.

Refusal to answer questions is a situation in which a statement is made, but a witness can refuse to answer certain questions.

29 Supreme Court resolution of 22 January 2003, I KZP 39/02, Lex.

30 M. Szewczyk, A. Wojtaszczyk, W. Zontek, Komentarz do art. 233 Kodeksu karnego (in:) W. Wróbel (ed.), A. Zoll (ed.), Kodeks karny. General Section. Volume II. Section II. Komentarz do Art. 212-277d, Lex.

31 M. Szewczyk, A. Wojtaszczyk, W. Zontek, Komentarz do art. 233 Kodeksu karnego (in:) W. Wróbel (ed.), A. Zoll (ed.), Kodeks karny. General Section. Volume II. Section II. Komentarz do art. art. 212-277d, Lex.

The questioning officer is required to determine whether the person summoned has a right to refuse to make statements at the time of questioning, and inform them of that right and the consequences of exercising it. If the person summoned exercises the right not to make a statement, the questioning officer notes this refusal in the record.

The exceptions to the right not to make statements are few and are strictly interpreted.

Firstly, a person close (whether a minor or adult[32]) to a suspect, or a person charged or indicted, can refuse to make a statement. This right can be exercised up until the moment first testimony in court begins. If a person who has this right does not exercise it when previously questioned, but decides to exercise it at a later stage, the record of previous statements is not admissible as evidence.

Close persons who have a right to refuse to give statements	
Spouse	Current and former wives and husbands
Relations through consanguinity (ascendants)	• Parents, grandparents, and great-grandparents, but not • their siblings (aunt and uncle)
Relations through consanguinity (descendants)	Children, grandchildren, great-grandchildren
Siblings	Brother, sister, including half-brothers and half-sisters, but not cousins and nieces and nephews
Relations through affinity (ascendants)	Stepfather, stepmother, stepgrandfather, step great-grandfather, stepgrandmother, stepgreat-grandmother, and parents-in-law, grandparents-in-law and great-grandparentsin-law
Relations through affinity (descendants)	Son-in-law, daughter-in-law, spouses of grandchildren, own great-grandchildren and spouse's great-grandchildren
Spouse's siblings	Brother-in-law, sister-in-law
Adoptive child, adoptive parent	Even when the adoption comes to an end, and their spouses
Life partner	Heterosexual or homosexual life partner, but not former partners

32 Supreme Court resolution of 19 February 2003 r., I KZP 48/02, Lex and Supreme Court judgment of 4 April 2013, III KK 307/12, Lex.

Refusal to make a statement is also possible when a person being questioned is charged at the same time with complicity in an offence in different ongoing proceedings, and is due to be questioned in that regard. This situation occurs most frequently when a public prosecutor's office moves the case of one of the joint perpetrators to separate proceedings. In practice, this right is frequently exercised by 'minor crown witnesses' (Art. 60 § 3 of the Criminal Code)[33]. A refusal to make statements is conditional upon a final and binding judgment not having been issued in the other separate case, or the person not yet being convicted of that offence.

In addition to these cases, the following have the right to refuse to make a statement:

- a person from whom a public prosecutor is seeking return to the State Treasury of gains from a different person's offence,
- a representative of a corporate entity who has come forward in connection with a criminal trial of a perpetrator of an offence or fiscal offence,
- during a trial concerning a fiscal offence: a person close to the entity charged with auxiliary liability, when that entity is a natural person.

When can a witness refuse to answer a question?

Very often, even at the stage of the summons for questioning or just before the questioning begins, witnesses are advised of the right to refuse to answer a question (Art. 183 § 1 of the Criminal Procedure Code). This is the second exception to the obligation to make a statement.

This right applies when the answer could mean that the person being questioned or a person close to them would face criminal liability for an offence or fiscal offence. During the questioning, however, a witness is not required to explain the reason for exercising that right. It is sufficient to cite the existence of that right in response to a particular question[34].

33 "Minor crown witness" – a witness turning state's evidence in exchange for a partial or a complete discharge of the offence in exchange for leniency in sentencing.

34 "Minor crown witness" – a witness turning state's evidence in exchange for a partial or a complete discharge of the offence in exchange for leniency in sentencing.

Can a witness be penalised for refusing to make a statement or to answer a question?

The right not to make a statement and answer questions applies in strictly defined situations. Sometimes, however, persons who are summoned when there are no grounds for summoning them refuse, during questioning, to make a statement of any kind, or answer any questions posed by the questioning officer, even questions that appear to be neutral, such as where they work or whether they know a certain individual. Conduct of this kind on the part of witnesses (but not victims) for which there are no grounds, where no statement is made, can result in a disciplinary penalty. The list of these penalties and the rules for imposing them are comparable to those applicable to failure to attend without legitimate grounds when summoned by a questioning officer.

Can a witness demand that a question be withdrawn?

Questions asked during questioning must be aimed solely at supplementing, clarifying, or verifying information given by a witness. For this reason, no irrelevant or leading questions may be asked during questioning. During questioning, questions of this kind can be contested, and comments or objections to questions of that kind can be noted in the record.

It is also possible for a question posed by the questioning officer to put the witness or a person close to the witness at risk of shame (questions of an intimate or embarrassing nature). A witness is required to answer questions of this kind provided that they are objectively legitimate from the point of view of the subject matter (such as sexual crime) addressed in the questioning. If on the other hand the witness considers the questions asked by the questioning officer or other person present to be inappropriate or degrading, they can have a comment to this effect noted in the record[35]. Meanwhile, during court proceedings, a witness can demand to be questioned on subjects of this nature in closed session.

35 In a judgment of 28 May 2015 in Y. v. Slovenia, complaint 41107/10, the ECHR found that authorities conducting questioning have an obligation in particularly sensitive cases such as rape to ensure that examination, including cross-examination, does not lead to excessive strain and is not degrading to victims. This obligation means avoiding inappropriate or irrelevant questions.

When can a person being questioned demand that an interpreter be present during questioning?

Questioning is conducted in Polish.

If a person summoned for questioning does not have a sufficient command of Polish, whether active or passive, they can be assisted by an interpreter of the language in question (not necessarily their native language, but a language of their choice, such as the language they use at work). In such a case, an interpreter is present during questioning. The person being questioned cannot be charged for this service. This role must be performed by a certified translator or other person with command of the language in question. Even if they have a knowledge of the language used by the witness, an officer cannot act as an interpreter[36]. Usually, the questions and answers are translated into Polish as the questioning proceeds. In the case of rare languages, sometimes indirect translation takes place, i.e. into English and then into Polish.

In our experience, when questioning is conducted through an interpreter, particular care must be taken when reviewing the recorded statements. Time should not be an issue. It is essential to make sure that the recorded statements truly reflect what was said. In practice, once all of the questions have been asked, the officer conducting the proceedings presents the record of the statements, which are then translated into the witness' language, and the witness can make any clarifications or corrections.

The situation is slightly different when the person summoned for questioning is deaf or mute. In such a case, a sign language interpreter is summoned only when written communication with that person is insufficient, for example due to not being able to write, or mental disability.

As a person present during the questioning, the interpreter signs the record, and if the interpreter does not sign the record, that document will not subsequently be admissible at a hearing[37].

36 Supreme Court judgment of 22 February 1978, I KR 12/78, Lex.

37 Cracow Appeal Court of 2 July 2008, II AKa 89/08, Lex.

When can a person being questioned seek reimbursement for expenses incurred to attend?

If attending the questioning involves expenses, the persons present (witnesses, persons who have to accompany them due to their state of health, for example, and persons charged with an offence as well) can request reimbursement. To do this, an application has to be filed and the expenses incurred documented in each case.

Eligibility for reimbursement depends on who submits the application, the expenses listed in the application, and whether the questioning was conducted during an investigation, or during court proceedings.

A witness or person accompanying them who attends the questioning (even if ultimately the questioning does not take place) has to submit an application for reimbursement with supporting documents within three days of the questioning being concluded. The limits on reimbursement of expenses are presented in the table below.

Type of expenses	Procedure for determining expenses
Travel	Own car: the product of the distance from the place of residence to the place where questioning is conducted and the applicable rate, per km, Other means of transport (train, air, coach, bus, city public transport): the true expenses incurred, supported by documents (invoice or ticket), which must be reasonable and suited to the purpose
Accommodation	Invoice, bill – maximum of twenty times the daily allowance
Upkeep at the place of the procedure (allowance)	8–12 hours: PLN 15, more than 12 hours: PLN 30
Lost earnings or income	The product of the number of days and average earnings/ income per day[38]

In the case of a person charged with an offence, the difference is that they are reimbursed for expenses in a ruling discontinuing an investigation, and if there are court proceedings – in the judgment concluding the proceedings (for example a judgment exonerating the person indicted or discontinuing the proceedings). A person charged with an offence can submit a complaint

38 No more than 4.6% of the base figure for people in public managerial posts, determined in accordance with the budget.

contesting a ruling of that kind with a public prosecutor superior to the public prosecutor who issued the ruling, or with the public prosecutor supervising the person conducting the investigation (for example a police officer conducting an inquiry). If the public prosecutor disputes the complaint, it is reviewed by a court.

Questioning people bound by professional privilege

Can a witness bound by professional privilege be questioned in criminal proceedings?

The issue of summoning people for questioning who due to their profession have a duty of confidentiality, such as lawyers, journalists, physicians, and expert valuers, is arising more and more frequently. This is because recently there has been a tendency to expand the list of professions in which professional privilege applies. Provisions on professional privilege can be found in the individual laws specific to those sectors.

Matters relating to questioning people in this category are regulated by slightly different laws. As a rule, questioning is not possible (absolute confidentiality) or is subject to limitations (relative confidentiality). The range of information covered by this duty, and the way in which it is determined who and according to which rules can waive the duty, also varies.

With respect to absolute confidentiality, the current laws define in a highly restrictive manner the circumstances relating to the profession or function in question that cannot be discussed during questioning.

Profession/function	Areas covered by duty of confidentiality
Defence counsel or attorney with respect to communication with a detained person	Information learned when advising on or handling a case
Priest	Information learned during confession

Profession/function	Areas covered by duty of confidentiality
Journalist	Information regarding the identity of an author of press materials or source
Mediator	Information learned from a person charged with an offence or victim when conducting mediation, unless this relates to offences listed in Art. 240 § of the Criminal Code[39].
Physician – psychiatrist[40]	Regarding statements made by a person who is subject to mental health procedures with regard to an offence they have committed

If absolute confidentiality applies, questioning is not possible, and thus the confidentiality duty cannot be waived.

People bound by relative confidentiality (due to practicing a particular profession or performing a function) can be released from that duty. Moreover, recently, certain types of information have been excluded from confidentiality by law. For example, in the case of attorneys-at-law, notaries, tax advisers, and patent attorneys, the duty of confidentiality now no longer covers:

- information disclosed under AML laws and laws on financing of terrorism,
- information about employed tax arrangements[41].

The issue of who can waive this duty, who can monitor that decision, and the grounds upon which this duty can be waived, varies in the case of regulation of relative confidentiality.

39 These are offences under Art. 118, Art. 118a, Art. 120-124, Art. 127, Art. 128, Art. 130, Art. 134, Art. 140, Art. 148, Art. 156, Art. 163, Art. 166, Art. 189, Art. 197 § 3 or 4, Art. 198, Art. 200, Art. 252 of the Criminal Code or terrorism offences.

40 Art. 52(1) of the Mental Health Protection Act of 19 August 1994.

41 Amendment of 23 October 2018 to Personal Income Tax Act, the Corporate Income Tax Act, the Tax Code, and certain other acts.

Type of confidentiality	Grounds for waiving the confidentiality duty	Authority waiving the confidentiality duty	Appeal authority
Legal profession			
attorney-at-law	for the good of the justice system information cannot be ascertained based on other evidence	court	court of higher instance
legal advisor			
notary			
tax adviser			
lawyers working at the general counsel to the republic of poland			
restructuring counsellor (with respect to sensitive data obtained when performing activities[42])	for the good of the justice system	public prosecutor (in an investigation) or court	court
patent attorney			
court enforcement (regarding information learned while performing activities)	for the good of the justice system	public prosecutor (in an investigation) or court	court
		Minister of Justice[43]	none
Medical profession			
medical	for the good of the justice system information cannot be ascertained based on other evidence	court	court of higher instance

42 § 19 of Restructuring Counsellor Code of Ethics.

43 Art. 20(3) of the Court Enforcement Officer Act

Type of confidentiality	Grounds for waiving the confidentiality duty	Authority waiving the confidentiality duty	Appeal authority
pharmacy	for the good of the justice system	public prosecutor (in an investigation) or court	court
laboratory diagnostics			
nursing and midwifery			
psychology (information relating to the customer, obtained when practicing[44])			
Freelance profession			
journalism (relative)	for the good of the justice system information cannot be ascertained based on other evidence	court	court of higher instance
expert valuer	for the good of the justice system	public prosecutor (in an investigation) or court	court
Other			
bank employee[45]	for the good of the justice system	public prosecutor (in an investigation) or court	court
insurance company employee	for the good of the justice system	public prosecutor (in an investigation) or court	court

44 The confidentiality duty does not have to be waived if breach would put health or life of a customer or persons close to a customer at risk.

45 In this regard the standpoint of the National Public Prosecutor's Office of 22 August 207 available at: https://pk.gov.pl/aktualnosci/aktualnosci-prokuratury-krajowej/prokurator-krajowy-o-tajemnicy-bankowej/ (available as at).

Type of confidentiality	Grounds for waiving the confidentiality duty	Authority waiving the confidentiality duty	Appeal authority
chartered account (information and documents accessed in the course of an audit)[46]	for the good of the justice system	public prosecutor (in an investigation) or court	court
investment fund employee	for the good of the justice system	public prosecutor (in an investigation) or court	court
person operating on exchange	for the good of the justice system	public prosecutor (in an investigation) or court	court
statistics institute employee	for the good of the justice system	public prosecutor (in an investigation) or court	court
labour inspector	for the good of the justice system information cannot be ascertained based on other evidence	court	court of higher instance
post office employee	for the good of the justice system	public prosecutor (in an investigation) or court	court
state audit employee	for the good of the justice system	public prosecutor (in an investigation) or court	court
person bound by confidentiality duty with regard to confidential and secret information	for the good of the justice system	public prosecutor (in an investigation) or court	court

46 While under Art. 78(3) of the Act of 11 May 2017 on Chartered Accountants, Auditing Companies, and Public Supervision, the reporting of an offence by a chartered account is not a breach of confidentiality.

Type of confidentiality	Grounds for waiving the confidentiality duty	Authority waiving the confidentiality duty	Appeal authority
businesses[47]	for the good of the justice system	public prosecutor (in an investigation) or court	court

The issue of questioning witnesses subject to a duty to keep confidential information of the highest classification, i.e. 'secret' or 'top secret', has to be addressed separately. In this case, this duty is waived by the superior authority (for example in the case of the Police Central Bureau of Investigation (CBŚP) this will be the CBŚP chief of police). If the chief of police does not give consent, a court or public prosecutor wishing to question that witness has to apply to the competent supreme government authority (for example the minister for internal affairs and administration).

Who can waive the confidentiality duty?

Various authorities can waive the confidentiality duty. In most cases concerning legally protected secrets, the public prosecutor can waive this duty, and this decision can be monitored by a court. If waiving this duty is solely up to a court, only a public prosecutor can file the motion, and not for example a police officer or Central Anti-Corruption Bureau (CBA) agent conducting questioning. If a party in the case in question (such as a victim) would like the confidentiality duty of a particular witness to be waived, they can file a motion for the duty to be waived, but this is not binding for a public prosecutor. The public prosecutor may, but does not have to, waive this duty or apply to the competent authority for this duty to be waived.

What grounds can there be for waiving a witness' duty of confidentiality?

A confidentiality duty should only be waived in truly exceptional circumstances, once the requirements specified in law are fulfilled. For this reason, both the motion for the duty to be waived, and the relevant ruling:

47 S. Pawelec, Ochrona tajemnicy przedsiębiorstwa w prawie karnym materialnym i procesowym, Warsaw 2015, Legalis

- Cannot be abstract or vague, which means that they have to describe specific circumstances to which the waiver applies (for example a strictly defined case, conduct, and situation being the subject addressed in the questioning[48]),
- Have to demonstrate that the witness truly needs to be questioned for the sake of justice,
- In the case of attorney, notary, tax advisor, journalist, General Counsel to the Republic of Poland, and statistical service duty of confidentiality, have to demonstrate that the information being the subject matter of the questioning cannot be obtained in any other way (subsidiarity).

At what point should a witness' confidentiality duty be waived?

In practice, the problem arises of summoning witnesses for questioning without duty of confidentiality being waived first. Only when, prior to questioning or during questioning of a witness, the witness cites duty of confidentiality, will the questioning officers take measures to have the witness' duty waived. Often, the questioning officers will also expect the witness to explain why answering a question would be a breach of confidentiality. This is improper practice, because explaining why giving an answer would be a breach of confidentiality could by itself be a breach of confidentiality.

When a procedural authority summoning a person is aware that this witness practices a profession that involves a duty of confidentiality, and knows that the questioning relates to the practice of that profession should not even commence the questioning. In such a case, prior to questioning, it should waive that duty itself, or apply to the competent authority (such as a court) in this regard. If a ruling of this kind is issued and served prior to the questioning, a witness can attend the questioning if they decide not to file a complaint with a court. If however a witness files a complaint contesting that ruling, the questioning officer has to stop the questioning until the complaint is reviewed and that ruling becomes legally binding and final.

If on the other hand it does not become apparent until the questioning is in progress that making a statement or answering a question would be a breach of confidentiality, the questioning officer is required to include a declaration made by the person being questioned in the record, stating that making a statement or answering a question would be a breach of confidentiality. The person being questioned is not required to explain why they think they are bound by confidentiality with respect to particular content.

48 Supreme Court ruling of 31 January 2019 r. VI Kz 2/19, Lex.

That declaration should lead the questioning officer to consider having the confidentiality duty waived, and if the questioning officer cannot do that themselves, not conduct the procedure and submit a request to the competent authority (the witness' superior, public prosecutor, or court) for this duty to be waived. In such a case, questioning can only be conducted once the court ruling waiving confidentiality duty becomes legally binding and final.

Can a ruling waiving confidentiality duty be contested?

A public prosecutor or other authorised authority, such as the superior of a witness, is required to promptly decide the question of waiving the confidentiality duty. The parties (victim, person charged), as well as the witness concerned, can contest the ruling waiving the confidentiality duty.

If however the confidentiality duty is waived by a court, it does so at a session at which the parties are not present, within seven days of the motion being filed. A complaint contesting a court ruling waiving duty of confidentiality can be filed by a public prosecutor, the parties, and the witness whose confidentiality duty has been waived.

Conluding the questioning

How is questioning concluded?

Questioning is concluded when the written record is signed. Before the record is signed, the person being questioned is required to read the statements and information provided carefully. They can also submit remarks concerning the record contents if they have been misrepresented or misunderstood by the questioning officer.

What are the important points of the questioning record?

The record documents how the questioning proceeded, and this is why it is so important, including with respect to subsequent assessment of the significance of declarations made during questioning, for it to truly represent how the questioning proceeded. Sometimes, the officer drawing up the record

imposes a particular kind of language to reflect the statements made, while this might not match the style and content of what was said.

If the record does not completely represent the way in which questioning proceeded, each person present can demand that everything relating to their rights or interests be noted with complete accuracy in the record (this might be for example a literal record of what the person being questioned said). A person being questioned is entitled to raise objections regarding the content of the record, and these objections are included in the record together with a declaration made by the person raising the objections.

The record must be read carefully before it is signed, and the declarations noted and requests made by the witness have to be checked. The record has to be read out carefully, and in particular the person being questioned should not do this in haste, and should focus on a range of facts.

Element of the record	Remarks
Caution	Failure to caution a witness could affect possible criminal liability (making false statements) or disciplinary liability (refusing to make statements without legitimate grounds) in the future. If suspects are not issued a caution, this could lead to attempts to contest the significance of information provided, for example in breach of the right to remain silent.
Details provided by a witness	As mentioned, liability for making false statements can apply to various aspects of questioning, including whether the particulars given by a witness are correct.
Time and place of the procedure and the persons present	At times, in practice, the record does not reflect in any way these aspects of the questioning (for example the record does not state that other persons present in the questioning room took part in the procedure).

Element of the record	Remarks
Contents of statements given, and questions and declarations of the questioning officer	This is the most important element of the record. The person questioned has to consider the precision of the assertions noted and vocabulary (for example often not suited to their level of education), and, where essential – that what they said is quoted faithfully. It is also important for the entire questions asked during questioning to be noted in the record. Often, the record only contains the statements made by the person being questioned, and questions are not included, or a note saying 'in response to the public prosecutor's question' without stating the exact nature of the question. Recording the nature of questions might be highly relevant if a witness exercises the right not to answer a question.
Listing the documents presented and inserted in the record	If the documents presented during questioning are not listed, this could be an important fact affecting assessment of the statements made. For example, information in the record that the witness reviewed a company's bookkeeping documentation covering a number of years during brief questioning could raise doubts as to the accuracy of the record.
Noting declarations and requests	In the context of the rights of persons being questioned, it is important that the declarations made be noted, for example concerning the right not to make statements and answer questions, and related to confidentiality. The contents of the record containing these declarations will affect decisions made for example concerning imposing a disciplinary penalty, or applying to the competent authority for confidentiality duty to be waived.

Is it possible for a person being questioned not to sign the record of the questioning?

The record of the questioning must be signed by all of the procedure participants[49]. This may mean placing a signature in the appropriate boxes, but also placing initials on each page of the record. If any person refuses to sign the questioning record, or cannot sign it, the questioning officer will note the reason for it not being signed. The consequences of not signing the record will depend on the grounds for not doing so. In this respect, as a rule, a signature missing on the record without information as to the reason renders the record inadmissible at a hearing[50].

Can a witness demand a copy of the record of the questioning?

During an investigation, the parties have access to the case files, unless this is refused by the person conducting the case in question. This does not apply to a record of questioning which a party attended or was entitled to attend. By the same token, a victim or person charged with an offence are entitled to be provided with a copy of the record of questioning which they attended or could have attended. This is not true in the case of a witness who is not a victim: A procedural authority can refuse to release that record. In court proceedings, the rule is that a person indicted or a victim have access to the files. A witness can only be provided with a record of this kind upon the consent of the chief judge.

Does a witness have to testify in court if they have already been questioned during an investigation?

The record not only details how the questioning proceeded; it is proof above all that the witness provided certain information during questioning that may be useful in the criminal case in question.

49 Persons providing security for a person being questioned are not required to sign the record of questioning

50 A slightly different view: Cracow Appeal Court judgment of 3 September 2012, II AKa 43/12 saying that in principle this does not apply when there is no doubt that the person being questioned was present during questioning, and at the same time the missing signature is not due for example to inconsistencies between the record of questioning and the statements made.

If it becomes clear following an investigation that the evidence gathered is sufficiently credible for an indictment to be filed with the court, that witness may have to be re-examined in court. Under the law, however, a witness does not have to be re-examined in some situations:

- When this is requested by a public prosecutor and the statements made are confirmed by the information provided by a suspect, and this is not extremely important to the case,
- When an understanding is reached concluding the court case (voluntary submission to prosecution, a person indicted is convicted without a hearing),
- When a court restricts the evidentiary proceedings, when there is no doubt as to the information provided by a person indicted who pleads guilty,
- When a witness was not present at a hearing because they were abroad, they cannot be served a summons, insurmountable obstacles arose, or they exercised the right not to make a statement, as a minor crown witness.

In practice, however, once questioned during an investigation, a witness is usually summoned to be examined and to testify in court. In such a case, first the court examines the witness with regard to the facts of the case, and if the witness gives different testimony or does not recall certain facts, the record of their previous statements is read out, and the witness is asked to state their position with respect to those statements.

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