Polish government attempts to limit access to public information

16.09.2013

Constitutional Complaint Regarding Freedom of Information Act's Provisions

Below you will find translation of our Constitutional Complaint regarding provisions of FOIA that restrict access to information on legislative process.

The Complaint in Polish is available here. Polish Freedom of Information Act can be dowloaded here. The amendments introduced in 2011 are available here.

2nd January 2013 Warsaw

Constitutional Court, Warsaw

Complaining Party:
Association of Leaders of Local Civic Groups

represented by
Advocat Maciej Klama,
Head of a lawyer's office, Konin, 5/18 Tuwima Street

Participants:
1. Parliament of the Polish Republic
2. Attorney General

CONSTITUTIONAL COMPLAINT

Acting on the basis of Art 79 of the Constitution of the Republic of Poland as well as Art 46sec.1 of the act from 1st August 1997 on the Constitutional Court (Journal of Law no.102, item 643 with amendments); on behalf of the Association of Leaders of Local Citizens Groups of which I enclose a power of attorney to challenge Art 6sec.2 in conjunction with Art 3sec.1 point 2 of the act from 6th September 2001 about access to public information (Journal of Law, 2001 no. 112, item 1198 with amendments) -

I bring a declaration of non-compliance with Art 61sec.1 in conjunction with Art 61sec.2 of the Constitution of the Republic of Poland;

At the same time I request the reimbursement of the costs of proceedings in the case of the Applicant – effective in Constitutional Court Art 24sec.2 of the act from 1st August 1997 (Journal of Law no. 102, item 643 with amendments).

Determination of the Complaint

Attached to this complaint is the judgement of the Supreme Administrative Court from the 21st June 2012 (I OSK 666/12), served on 3rd October 2012 on the deferred judgement from the Voivodeship Administrative Court in Warsaw on the 6th December 2011 (II SAB 260/11) instructing the President of the Council of Ministers (the Prime Minister to consider point 2 of the application of the Association about access to public information from 21st June 2011, i.e. access to the

correspondence of members of the Council of Ministers and their assistant in the case of the amendment to the bill about access to public information (including electronic correspondence) and at the same time the complaint dismissed of our Association, appearing in these proceedings as a party exercising the right of all to access public information. Emanating from this verdict there is no entitlement to any legal appeal.

The Supreme Administrative Court based its consideration on Art 6sec.2 of the act on access to public information – by distinguishing „official documents" and „internal documents", stating that the latter does not meet the conditions recognising such documents in the realm of public information. Such use of Art 6sec.2 is related to the wording of Art 3sec.1 point 2, which defines, contrary to Art 61sec.2 of the Constitution, the category of official documents from all documents including information about the work of public authorities; literally - it can be assumed that rule Art 3sec.1 point 2 (moreover, an unauthorised ruling) was read by the Supreme Administrative Court - „access to official documents" is a separate category regarding „obtaining public information" in understanding Art 3sec.1 point 1, and at the same time exhausting the term concerning "access to documents", referred to in Art 61sec.2 of the Constitution of the Republic of Poland.

In the opinion of the plaintiff, such an understanding of Art 6sec.2 in conjunction with Art 3sec.1 point 2 violates that which is constitutionally guaranteed in Art 61sec.1 of the Constitution of the Republic of Poland, a citizen's right to access information about the work of public authorities, promising, in accordance with Art 61sec.2 of the Constitution, access to documents – without making any distinction between official documents as defined in the cited ruling of the Supreme Administrative Court as well as in cited judgements contained within it.

In accordance with Art 79sec.1 of the Constitution of the Republic of Poland, everyone, who's constitutional freedoms or laws were violated, has the right, in the terms of the act to bring a complaint to the Constitutional Court in the case of constitutionality of the law or other normative acts, on the basis of which the court or public administrative body has declared a final decision about freedom or law or on its responsibilities under the Constitution. Pursuant to Constitutional Court Art 46sec.1 from 1st August 1997 (Journal of Law No. 102, item 643 with amendments), the constitutional complaint, hereafter known as the "complaint", may be brought after recourse to all other legal options have been exhausted if this option is planned, during three months from notifying the Plaintiff of the final verdict, final decision or any other final decision.

The plaintiff claims that their statutory objective is the dissemination and protection of freedom, human rights and civil liberties as well as supporting the development of democracy, monitoring and educational work. In particular, those undertaken by members of the Association and those they cooperate with in spreading transparency and honesty in public life, incl. making freely available access to public information and effective, non-governmental, transparent and open civic monitoring of how public property is managed and how public policy is implemented. How these goals are achieved include, amongst others: by monitoring public authorities and other entities receiving public funds.

Since 2006 the Association has been carrying out a programme called the Non-Governmental Centre for Access to Public Information, whose work is to spread transparency in the work of public authorities, incl. the legislative process. The Association has publicly discussed the potential changes in the regulations concerning access to public information as well as in the case which was a subject of a Constitutional Court ruling on 18th April 2012 (K 33/11). The Association, within its own statutory activities is, as is everyone, entitled to access to public information (Art 2sec.1 of the act on access to public information; Art 61sec.1 of the Constitution of the Republic of Poland in relation to Art 10sec.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) – the right to receive information on the workings of public authority authorities.

The Association, making use of every right to access public information, submitted an application on 21st June 2011 and addressed to the President of the Council of Ministers (the Prime Minister), unquestionably a public authority body, for making available public information about, amongst others: correspondence of the members of the Council of Ministers and their assistants in the case of the amendment to the act on access to public information (incl. electronic correspondence). Although it does not have a bearing on the case, it is necessary to emphasise that the plaintiff's application was submitted after the bill was accepted by the Council of Ministers. However, the actual authors of the proposed changes as well as the procedure of their introduction were unknown. Due to the above information being unavailable, the Association took advantage of its specified entitlement in Art 45 of the Constitution and regulations of the act from 30th August 2002 - the right of proceedings in front of administrative courts.

The Plaintiff participated in the final proceedings in which the aforementioned judgement of the Supreme Administrative Court was given, as a subject directly enacting the right of every subject to access public information, enshrined in Art 2sec.1 of the act on access to public information and the right of the citizen referred to in Art 61sec.1 in conjunction withsec.2 of the

Constitution of the Republic of Poland, within the meaning resulting from Art 10sec.1 of the European Convention on Human Rights. In conjunction with this independently of the violation of constitutional laws represented by members of the Applicant who have the right to bring this constitutional action and indeed, should be treated as any other, whose constitutional freedoms or rights were violated.

In the context of the legitimacy of the Applicant it is necessary to recall the ruling of the European Convention on Human Rights from 14th April 2009 in the case of Társaság & Szabadságjogokért versus Hungary (verdict no. 37374/05), in which a non-governmental organisation working for transparency in public life went to court to determine a violation of Art 10sec.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The court stated that

> ‘taking into consideration the law protecting Art 10, in the moment when the authorities want to hinder the gathering of information, the legislature cannot permit unauthorised restrictions as they can become a form of indirect censure. For example, in journalism, gathering data is an important preparatory step as well as being an inherent defence of part of the freedom of the press (see Dammann versus Switzerland, no.77551/01 § 52, 25th April 2006). Amongst others, the function of the press is to create forums for public debate. However, this function is not restricted only to the media and professional journalists. In this present case, a non-governmental organisation was also involved in preparing forums for public debate. It can therefore be claimed that the goal of the Applicant’s work was to ensure an important element of public debate was well-informed. The court often noted the important contribution of civil society in discussions on public issues (see, for example, Steel & Morris versus the United Kingdom, no.6841/01 § 89, EKPC 2005-II). The Applicant is an organisation actively involved in the dispute concerning human rights as well as aiming to ensure certain objectives, e.g. the protection of the right to freedom of information. Therefore, the Applicant can be described, along with the press, as a social watchdog organisation (see Riolo versus Italy, no.42211/07 § 63, 17th July 2008; Vides Aizsardzības Klubs [environmental protection organisation] versus Latvia, no.57829/00 §42, 27th May 2004). In these circumstances, the Court was persuaded that the work of the Applicant has similarly guaranteed protection in the European Convention as that enjoyed by the press.’

What is important to note in this case is that the Applicant has already been informing the public about the amendment to the act on access to public information and presented potential consequences of introducing the proposed changes ever since 2008 when the Minister of Internal Affairs decided to start the legislative process. In the judgement of the European Court of Human Rights mentioned above;

> 'the Court held that the barriers created in order to hinder access to information being the subject of public interest can discourage the work of those who work in the media or other related areas. As a result, they cannot perform their own work as an institution of social mediation which can have a negative influence on providing society with accurate and reliable information (see, mutatis mutandis [concerning existing differences], Goodwin v Great Britain, ruling from 27th March 1996, protocol 1996-II, p.500, § 39)'.

Justification

On 21st June 2011 the Association of Leaders of Local Citizens Groups sent the Prime Minister its application for access to correspondence (incl. electronic correspondence) of the Members of the Council of Ministers and their assistants connected to the amendment of the act on access to public information. The President of the Council of Ministers referred the Association to the Ministry of Internal Affairs’ Public Information Bulletin website. However, the requested information could not be obtained there. Therefore, the Association filed an action for withholding public information to the Voivodship Administrative Court in Warsaw.

The Warsaw Voivodship Administrative Court ruled on12th June 2012 that the requested information was unquestionably within the definition of public information, stating quite clearly that

> ‘it should be noted that the information requested by the Association constitutes public information.’

The President of the Council of Ministers (the Prime Minister) also recognised that the requested information was in the realm of public information. The legal dispute concerned the answer of the President of the Council of Ministers who claimed in answer to the application that the requested data is present on the Ministry of internal Affairs’ Public Information Bulletin. The circumstances established during the course of the proceedings confirmed that the requested information was not on the Public

Information Bulletin website and so the Court's decision accepted the failure to act by the President of the Council of Ministers and ordered him to act in accordance with the law on access to public information, i.e. make available the information, in line with Art 61sec.3 of the Constitution and issued on the basis of Art 16sec.1 of the act on the decision to refuse availability of information.

Following the ruling of The Voivodship Administrative Court in Warsaw, the President of the Council of Ministers filed an appeal to the Supreme Administrative Court on the decision concerning the availability of correspondence to the amendment of the act on access to information, incl.:

1) Violation of substantive law:

a) Its erroneous interpretation of Art 4sec.3 and Art 6 of the act on access to public information in relation to Art 147sec.1 & 2 and Art 149sec.1 of the Constitution of the Republic of Poland as well as Art 33sec.1 point 2 and Art 26sec.1 point 1 & 2 andsec.2 of the act from 8th August 1996 of the Council of Ministers (consolidated text from the Journal of Law, 2003 no. 24, item 199 later amended), i.e. by acknowledging that the President of the Council of Ministers is obliged to consider the application about providing information on the availability of correspondence of members of the Council of Ministers and their assistants. Irrespective of constitutional regulations constituting those ministers (Art 147 of the Constitution) in the Council of Ministers' who head specific government departments or conduct such tasks designated to them by the President of the Council of Ministers and as well as the scope of work of the minister heading a specified government department defined in the act (Art 149sec.1) or where the office supports the minister as well as subordinate bodies to him/her or a ministry under his/her supervision (Art 33sec.1 point 2 of the act on the Council of Ministers), however, by virtue of the act of the Office of the President of the Council of Ministers ensuring support only to the entities mentioned in act 1 & 2 of Art 26 of the act on the Council of Ministers and therefore only in the scope of the Applicant's inquiry to the Council of Ministers and the President of the council of Ministers, the Deputy President of the Council of Ministers as well as Michał Boni, Minister-Member of the Council of Ministers (regulations of the President of the Council of Ministers from 30th January 2009 concerning the detailed decision of the work of Michał Boni, Minister-Member of the Council of Ministers (Journal of Law, no. 23, item 130).

b) Art 147sec.1&2 and Art 149sec.1of the Constitution of the Republic of Poland as well as Art 33sec.1 point 2, Art 39sec.2&3 and Art 26sec.1 point 1&2 andsec.2 and Art 31 of the act from 8th August 1996 of the Council of Ministers (consolidated text from the Journal of Law, 2003 no. 24, item 199 with amendments), as well as the regulations of the President of the Council of Ministers from 30th January 2009 on the detailed decision of the work of the Michał Boni, Minister-Member of the Council of Ministers (Journal of Law, no. 23, item 130) and Art 471 of the act from 16th September 1982 about civil servants (consolidated text from the Journal of Law, 2001 no. 86, item 953 with amendments) through their failure resulting in the acknowledgement that the President of the Council of Ministers is obliged to make available correspondence of the members of the Council of Ministers and their assistants, irrespective of constitutional regulations constituting those ministers (Art 147sec.1 of the Constitution) in the Council of Ministers' who head specific government departments or conduct such tasks designated to them by the President of the Council of Ministers and the scope of the work of the minister heading a specified government department defined in the act (Art 149sec.1) where the office supports the minister as well as subordinate bodies to him/her or a ministry under his/her supervision (Art 33sec.1 point 2 of the act on the Council of Ministers), however, by virtue of the act of the Office of the President of the Council of Ministers provides support only to the entities mentioned in act 1 & 2 of Art 26 of the act on the Council of Ministers and therefore only in the scope of the applicant's inquiry to the Council of Ministers and the President of the council of Ministers, the Deputy President of the Council of Ministers as well as Michał Boni, Minister-Member of the Council of Ministers (regulations of the President of the Council of Ministers from 30th January 2009 concerning the detailed decision of the work of Michał Boni, Minister-Member of the Council of Ministers (Journal of Law, no. 23, item 130).

The appeal also concerned the argument that The President of the Council of Ministers (the Prime Minister) is obliged to consider the application under point 2, i.e. the availability of a member of the Council of Ministers' correspondence, in this case, Michał Boni and his assistant Witold Przeciechowski on the amendment to the act on access to public information (incl. electronic correspondence), proceedings in the court of first instance were alleged invalid on the basis of Art 183 § 2 point 3 of the act – the law governing proceedings in administrative courts, and in view of this, that the making available to the Association of printouts of incoming and outgoing correspondence from the mail box of the assistant to the Political Minister-Member of the Council of Ministers, Witold Przeciechowski, for the period 1st May – 8th July 2011 as well as printouts of incoming and outgoing correspondence from the mail box of the Head of the Strategic Advisors Team to Michał Boni, President of the Council of Ministers, covering the period 1st May – 8th July 2011 as ruled on 1st December 2011 by the Voivodship Administrative Court in Warsaw in its case sign. act II SAB/Wa 295/11.

The Supreme Administrative Court's ruling from 21st June 2012 dismissed the Association's complaint and at the same time revoking the ruling of the court of first instance.

The Supreme Administrative Court based its decision on Art 6sec.2 in conjunction with Art 3sec.1 point 2 of the act on access to public information by distinguishing between 'official papers' and 'internal documents', stating that the latter do not fulfil the conditions which could regard such documents as public information. Referring to the facts of the case, the Supreme Administrative Court ruled that,

> 'the act on access to public information does not include any legal limitations on information designed to protect the decision-making process from interference which could arise from disclosure during its course. In the jurisprudence of administrative courts the view was expressed that a decision can be taken only after amassing all the necessary information in compliance with positions and analysis of numerous different variations of previous settlements. Therefore in the understanding of Art 6sec.2 of the law on access to public information the distinction between 'government papers' and 'internal documents' in fact plays a role in how some public authority business is conducted yet without determining the course of that business. These are documents serving the exchange of information, collating necessary documents and facilitating agreement of views and positions. They can be of any form, though are not binding, nor a way for settling a matter, nor reflecting the stance of the public authority body and so therefore, are not synonymous with public information (see Supreme Administrative Court ruling from 27th January 2012, sign. act I OSK 2130/11, unpublished, ruling from 15th July 2010 sign. act I OSK 707/10, unpublished).
>
> In fact, all these comments largely concern documents in hardcopy form but entirely refer to electronic correspondence of a public official, such as a member of the Council of Ministers and all those that cooperate with him/her.
>
> Correspondence, incl. electronic correspondence of an agent engaged in public authority work and all those that cooperate with him/her is not public information even if it, in some part, concerns the agent engaged in public authority work.
>
> Such correspondence are not deemed in any way as official and even if they include propositions concerning the manner of conducting a particular public case with the necessary freedom for taking the correct decision after considering all other reasons in favour of various possibilities of conducting it.
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> Civic monitoring is not necessary for every stage of the decision-making process. It is justifiable enough to ascertain that such a control could hinder its progress since each proposal would be subject to civic premature judgement. Meanwhile, the process of drafting a bill and deliberating on its proper wording requires prudence and calm to dispel non-functional or improper solutions threatening the constitutional good. It is a misplaced allegation that accepting such a view as accurate, excludes social supervision over drafting legislation. The moment the bill gains official stature and is made public by the authority which produced it, it is subject to public consultation and society can have an influence on its wording.'

Both the correspondence of an individual and its electronic means is also private correspondence even if it's in the service of an official matter.

'Internal documents' can be classified as such when they do not have a bearing on the running of the public authority and do not express an official position.

Within the scope of the accusations in the cassation appeal they are therefore unfounded as the requested information was not public information since the provisions of the act from 6th September 2001did not apply. The President of the Council of Ministers was not obliged to make it available so therefore not evading his responsibilities.

Contrary to the statement of the Court, the requested correspondence in the application was not for private correspondence if it came from those persons conducting public functions in particular ministries and other administrative bodies but was connected, at the time of filing of the application, to a completed stage of government legislative processing. Furthermore, it is not the subject of the complaint to the Constitutional Court but an important factor nonetheless, none of the accusations in the cassation appeal concerning access to the requested correspondence made any mention that this information did not constitute public information.

In the ruling from 21st June 2012 of the Supreme Administrative Court discussed above the Applicant links the constitutional violation of the right to access public information. The Constitution defines in Art 61 that the citizen has the right to access **information about the workings of public authorities as well as those persons engaged in functions**. The law also ensures access to information about the workings of self-government and self-regulatory bodies but also other persons as well as organisational units in the scope of performing municipal functions and managing municipal or state assets. Under Art 61sec.2 of the Constitution **the right to access information ensuring access to documents** as well as access to collegial meetings of public authorities chosen in the general elections, with the possibility of making an audio or video recording. The restrictions of the law can **only occur in respect of specified provisions in acts protecting the freedoms and rights of other persons and economic entities as well as maintain public order, security or important economic state interests.**

The Constitutional Court, in its ruling of 16th September 2002 (sign. Act K 38/01), claimed that, amongst others, that 'formulating Art 61sec.1 of the Constitution is a reference to the longer because dating back to the eighteenth century in the history of the development of rights regulating access to public information'. The law covered a wide range of material connected to the workings of the state. It did not matter whether it applied to the imperial or the dominium sphere, if it was covered by the regulation in Art 61sec.1 formulating 'the workings of public authorities' concerns each of those areas. Access to public information, in accordance with the wording of Art 61sec.2 is not only limited to selected categories of documents but all the information which concerns the area set out in Art 61sec.1 of the Constitution.

In a democratic state it is legally recognised that the transparency of the workings of the state should be treated in a privileged way, meaning that any doubts as to the availability of information should work in favour of access. It is worth remembering that the right to public information is a human right, therefore its character in a democratic state is a specific rule and determines sine qua non democracy. In the absence of transparency the workings of public administration and in particular the legislative process are deprived of one of the most important controlling functions of its representatives – leading to the violation of Art 4 of the Constitution of the Republic of Poland.

Legislators, following international documents, accurately constructed Art 61 of the Constitution, which insec.3 settled the grounds for restricting access to public information. This observation is also consistent with the principle of proportionality expressed in Art 31 of the Constitution of the Republic of Poland. With a similar intention the Committee of Ministers of the Council of Europe constructed one of the principles of access to public information as it should function in the Council of Europe member states – access to information is equal: restrictions on the access to information can result only in the defence of legitimate public interest as well as the interest of the individual in a case where information directly concerns that individual. (see Committee of the Ministers of the Council of Europe Directive from 25th November 1981, no.R/81/19 in the case of access to information in public authorities.

Meanwhile, both the construction of Art 61 of the Constitution as well as the restrictions determined in Art 5 of the act on access to public information clearly express the definition of public information covering the full range of public authorities workings. The legislator accepted the wording of this legal concept 'workings' as 'the carrying out of public tasks' and 'public matters'.

The provisions of the Constitution of the Republic of Poland and the act on access to public information gave rise to the adoption of both in doctrine and in jurisprudence that public information is every message produced by or referred to as the widely defined term of a public authority as well as produced and referred to as other subjects engaged in a public function not related to public services and property or assets of the Commune or the State Treasury (see M. Jaśkowska, Access to Public Information in light of the Ruling of the Supreme Administrative Court in Toruń in 2002, Supreme Administrative Court rulings from: 30th October 2002, sign. act II SA 1956/02, pub. M.Prawn, 2002/23/1059, 25th March 2002, sign. act II SA 4059/02, pub. M.Prawn, 2003/10/436, 12th December 2006, sign. act I OSK 123/06 – Lex 291357).

Proceedings on the availability of the content of the correspondence of those involved in the legal process and the wider correspondence of those present in the decisive part of state apparatus requires raising important questions regarding the democratic workings of state law. As Bogusław Banaszak stressed in the commentary on Art 61 of the Constitution there was a shift in the second half of the twentieth century in an overwhelming majority of democratic states in regarding the workings of public authority as the manifestation of state sovereignty and the performance of the nation state in such a way that only some actions, and in particular their effects (e.g. legal norms and law enforcement) were public. Concealing much of the workings of public authority and their governing bodies was supposed to ensure that their work was greatly enhanced. Today, ensuring citizens of the right to information about the workings of public authorities is an important element in the reliability of the workings of democratic state authorities and is aligned with the common acceptance in democratic states with the principle of

open government, meaning openness; i.e. transparency in the workings of all public authority bodies. Legislators and constitutionalists are trying to achieve this aim in many states and it is also considered a necessity by international institutions. By way of an example, resolution 2005/68 of the United Nations Human Rights Commission stipulates that,

> 'a transparent, responsible, accountable and participatory system of public authority (…) is the foundation on which rests good government, and this basis is a necessary condition for fully implementing human rights (…)'.

It is worth adding that the Council of Europe includes transparency one of the guiding principles of functioning public administration in its project for the Recommendation of Good Administration in 2004. The principle of open government is closely associated with the creation of civil society and serves to implement the most important principles of constitutional democracy – the sovereignty of the Nation (see commentary do Art 4) – in two ways:

1) firstly, in order for the citizen to be able to fully participate in a democratic way in exercising authority in the state he/she must possess the knowledge from being informed about public issues;

2) secondly, having this knowledge being informed about the workings of public authorities he/she can then properly control and decide about the responsibility of those that exercise that responsibility in public authorities. (Constitution of the Republic of Poland. Commentary. Associate Prof. Bogusław Banaszak, pub. C.H.Beck, 2009).

A vital aspect of transparency is the element of the workings of public authorities which is also noted by J.Jabłońska-Bońca and M.Zieliński. They emphasised that transparency is associated with the subjective treatment of the citizen in his/her relation with the state as well as determining the extent the citizen plays in the governing of their country. They cited the view of K.Grzybowski, in accordance with which

> 'democracy is the government of people but the sovereign can, in reality, rule if he/she is informed, aware and knows the facts on which to base his/her decisions.' (p.27).

In the democratic state citizens are the collective sovereign, which signifies, amongst other things that they should have an assured and real influence on the workings of state authorities and which the self-same authorities have an obligation to respect their citizens' rights and freedoms. There is a real possibility to exert an influence on public authority bodies only when citizens have access to knowledge about the work of these bodies. To such a recognised principle establishes the principle of sovereignty and representation (expressed in Art 61 of the Constitution) but also other principles guaranteeing citizens a share in public life, incl. the right to access public information expressed in Art 61 of the Constitution of the Republic of Poland as well corresponding to the principle of transparency in public life. Without the right to public information citizens would possess only illusory power. They would also not be in a state to monitor their chosen representatives. The transparency of public information, incl. information about the law, is therefore one of the elements guaranteeing the implementation of rights to participate in steering public cases which now belongs to commonly accepted human rights (rights and political freedoms). It is the right, also called the right to municipal participation, which is formulated, amongst others in the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights as well as the European Charter of Local Self-Government. (Governmental Announcement of a Normative Act, G.Wierczyński, Wolters Kluwer Polska Sp. z o.o., 2008, Warsaw).

Transparency is not an absolute value and is subject to specific restrictions by the Constitution. However, some rulings of the Supreme Administrative Court basically recognises that the specified part of the information concerning the workings of public authorities, for different reasons, is in essence excluded from the concept of public information which led to the violation of Art 61sec.2 of the Constitution of the Republic of Poland. The Supreme Administrative Court decision in this case did not face the dilemma of whether disclosing this information may, for example harm national security yet stated that there exists such dilemma if, in general, the requested information is not able to weigh all the interests involved. It is a decision actually based on the contrary to Art 61sec.1 and Art 62sec.2 of the Constitution in Art 6sec.2, with amendments and from Art 3sec.1 point 2 of the act on access to public information.

As the **Constitutional Court stated in its ruling on 20th March 2006 (K 17/05)**, on admissible restrictions to the law on public information, the regulation set forth in Art 31sec.3 of the Constitution is modified by Art 61sec.3 of the Constitution only directly concerning conditions for intervention, while remaining a fully valid use of the rest of the elements of proportionality, unexpressed in Art 61sec.3, in particular the necessity to justify the standard of the democratic state as well as no interference in the right of law. Both constructions also have in common the condition of justifying the limitation as the necessity to protect the law and freedoms of others.

The violation of the right in this case is expressed by the use by the Supreme Administrative Court of Art 6sec.2, with

connection, with Art 3sec.1 point 2 of the act on access to public information, the constitutional law was restricted to information on the subject of the workings of public authorities and those carrying out municipal functions, which means a greatly reduced use of Art 61sec.1 of the Constitution and without any consideration of the principle of such a narrow restriction from the point of view of Art 61sec.3 of the Constitution.

It should be noted that the act on access to public information did not introduce in the legal system a definition of public information. It was also certainly not specified in Art 6sec.2, in connection with Art 3sec.1 point 2 of the act. In accordance with the wording of Art 61sec.4 of the Constitution only the mode of access to public information is defined. However, the Court did not rely on the restrictions of access to requested information but on the interference in the wording of Art 61sec.1 of the Constitution of the Republic of Poland, recommending the narrowing the scope to the wording of Art 6sec.2 of the act on access to public information.

It is necessary to indicate that the Supreme Administrative Court's initial ruling is not the only which interprets such terms in Art 6sec.2 in conjunction with Art 3sec.1 point 2 of the act on access to public information in a way which limits the law referred here in Art 61sec.1 in conjunction withsec.2 of the Constitution of the Republic of Poland and has no justification with the disposition in Art 61sec.3 in conjunction with Art 31sec.3 of the Constitution; within the ruling other rulings of similar nature were cited but are by no means isolated examples. This complaint of Art 6sec.2 (since the Supreme Administrative Court based its own judgement on it) but in connection with Art 3sec.1 point 2 of the act on access to public information does not follow from episodic legal events but presents the establishing of defined legal standards in understanding access to public information, thus violating, in the Applicant's opinion, Art 61sec.1 in conjunction withsec.2 of the Constitution of the Republic of Poland.

In the ruling of 29th February 2012 the Supreme Administrative Court (sign. act I OSK 2130/11) stipulated amongst others that it 'does not share the view of the court of first instance that all documents and information in possession of the Chancellery of the President of the Republic of Poland, incl. all legal and expert opinions, constitutes public information. The Court shares the opinion expressed in the annulment of the administrative courts' rulings (IV SAB/Po 9/06, I OSK 89/09).' It was established in the justification that 'the President of the Polish Republic is an agent taking part in the legislative process.' Art 122 of the Constitution grants him various powers. The President can sign an act, refer it to the Constitutional Court or send the act to Parliament for a second reading. In taking this kind of decision the person having this authority should have full knowledge as to the field or subject of the act concerned. Thus given the sheer range of acts this could relate to the use of expert opinions. However, these opinions are public information if they relate exactly to a specific act which is already part of the legislative process. **On the other hand, there are internal documents, serving in the gathering of information, which could be beneficial in the decision-making process in the future.** It should be added that opinions and expertise of only a cognitive nature and not directly concerning future actions and intentions of the required subject, having only to expand the scope of knowledge and information already within it. Therefore giving into this process of tight social monitoring would be ineffective and hamper the internal process of forming positions of agreement and opinion concerning the existing state of things, its assessment as well as possible need for change'. Representatives of the doctrine reacted decisively to such a ruling by stating that

> **'if this opinion is held it will signify one of the most extreme restrictions on the law about information and a fundamental barrier for civic participation.'** (B.Banaszak, M.Bernaczyk, Social Consultations and the Right to Information in the Legislative Process in comparison to the Constitution of the Polish Republic and the Demand of 'Open Government', Scientific Papers of Administrative Jurisdiction, year VIII no.4 (43)/2012, p.24)

It is clear to see in the Supreme Administrative Court's ruling on 9th June 2011 (I OSK 431/11) that the opinion was formed concerning the exclusion from the category of documents referred to in Art 61sec.2 of the Constitution of others than listed in Art 3sec.2 as well as Art 6sec.2 of the act on access to public information. The Supreme Administrative Court stated that

> **'government documents should be distinguished from private documents. It should be noted that ascertaining public information in a public authority's papers is the evidence of what is officially stated, approved or applied in them**, how and when they appear in the implementing of the entrusted tasks of specific matters. On the other hand private documents do not possess the attribute of public information which a private subject sends to a public authority. In understanding the bill on access to public information private documents do not constitute public information.'

Other courts rely more and more often on such a statement of ruling from the Supreme Administrative Court on 22nd March 2011 (I OSK 431/11) where the position was expressed that it

> 'should incidentally be noted that the Supreme Administrative Court ruling on 9th June 2011, sign. act I OSK 431/11, **expressed the view used by the legislator that 'all the documents presented by the applicants (Art 28sec.8 uzppr) which is assessed in Art 6 of the law on access to public information signifies that availability in this mode will only be official documents** of a public information nature and not private papers.'

It is simultaneously worth noting that such an interpretation could lead to a restrictive practice – in the situation where to date many cases of access to public information were one of several tools available to citizens to monitor public authorities. The validity of Art 6sec.2 of the act on access to public information causes uncertainty for citizens using the right resulting from Art 61sec.1 & 2 of the Constitution of the Republic of Poland. The rulings of administrative courts noted above were referring to the concept of internal documents which were in no way defined in the act on access to public information. However, in several cases administrative courts rejected the concept of the internal document and rule on the citizen's broad right on access to public information – such as in the case of the ruling of 1st December 2011, sign. act I OSK 1550/11: as a rule, everything that is present in files of proceedings will be subject to availability, irrespective of whether it will be an official document or private. It is not without significance whether a document present in files is 'internal' or 'working'. (similarly: Supreme Administrative Court ruling from 20th January 2012, sign. act I OSK 2118/11, Supreme Administrative Court ruling from 29th February 2012, sign. act I OSK 2215/11, Supreme Administrative Court ruling from 1st December 2011, sign. act I OSK 1516/11). The situation in which the provision of the act constitutes the exemption of the right of the citizen to access documents also leads to a violation of the principle of legal certainty of the situations where citizens, who depending on the assumed basis of the adjudication of Art 6sec.2 of the act on access to public information, will have reduced access to public information (as in convicted sentences) or broader cases of rulings on the standard decoded from Art 61sec.1 & 2 of the Constitution of the Republic of Poland.

Consequently, in the opinion of the Applicant, non-compliance is the basis of this constitutional complaint, constituting the basis of the Supreme Administrative Court's decision in its ruling of 21st June 2012 – provisions in Art 6sec.2in conjunction with Art 3sec.1 point 2 of the act from 6th September 2012 on access to public information (in such an understanding of it, not only in its ruling, which became the reason for this constitutional complaint, the Supreme Administrative Court presented from Art 6sec.1 in connection withsec.2 of the Constitution of the Republic of Poland.

The interpretation of the contested ruling of the Supreme Administrative Court has resulted in non-compliance with the Constitution of the Republic of Poland as specified in the context of Art 61sec.1 of the Constitution in the division of official and internal material. The legal basis in the form of Art 6sec.2 in conjunction with Art 3sec.1 point 2 of the act on access to public information on which the ruling was issued can however, as the above jurisprudence shows, be applied in a non-compliant manner with the wording of Art 61sec.q in conjunction with Art 61sec.2 of the Constitution.

Applying the provision of Art 6sec.2 in conjunction with Art 3sec.1 point 2 of the act, within the court's meaning, calls into question the sense of applying some of the specified conditions restricting access to public information in Art 61sec.3 of the Constitution of the Republic of Poland. Hence, the legislator constituted the broadest right on access to public information that all documents including information which are provided for in Art 61sec.1 of the Constitution of the Republic of Poland can be made available and restrictions of access to them cannot be based on their form or appearance but only on the necessity to protect other laws and values.

Once again it is necessary to emphasise that the provisions of the Constitution of the Republic of Poland and the acts on access to public information gave rise to the adoption of both in doctrine and jurisprudence that public information is every message produced by or referred to the widely defined term of a public authority as well as produced and referred to other subjects engaged in a municipal function not related to municipal services and property or assets of the State Treasury (see M. Jaśkowska, Access to Public Information in light of the Ruling of the Supreme Administrative Court, Toruń 2002, ruling of the Supreme Administrative Court on 30th October 2002, sign. act II SA 1956/02, pub. M.Prawn, 2002/23/1059, 25th March 2002, sign. act II SA 4059/02, pub. M.Prawn, 2002/10/436, ruling of the Supreme Administrative Court on 12th December 2006, sign. act I OSK 123/06 – Lex 291357).

Meanwhile, the meaning of the understanding of Art 6sec.2 in conjunction with Art 3sec.1 point 2 strongly intervenes in the right to public information without the principle of proportionality. It is necessary to remember that this is their way of reasoning. The Supreme Administrative Court stated that

> 'such correspondence has of no official nature whatsoever and even if there is included a proposition concerning the way of conducting a specified public matter is within the scope of necessary discretion for adopting the

proper decision after considering all the reasons for the wide range of possibilities for its settlement.

> Civic monitoring is not necessary for every stage of the decision-making process. It is justifiable enough to state that such monitoring could hinder its progress since each proposal would be subject to civic premature judgement. Meanwhile, the process of drafting a bill and deliberating on its proper wording requires prudence and calm to dispel non-functional or improper solutions threatening the constitutional good. It is a misplaced allegation that accepting such a view as accurate, excludes social supervision over drafting legislation. The moment when the bill gains official stature and is made public by the authority which produced it, it is subject to public consultation and society can have an influence on its wording.'

Therefore, the Supreme Administrative Court therefore only commits, in the light of Art 61sec.1, incomprehensible and unauthorised distinctions about information having an official nature but also shows in its justification of the futility of submitting the decision-making process to civic control in determining the wording of the provisions of the bill. The Supreme Administrative Court does not explain on what they understand as the 'official nature' of this process and the provision of the law contravening Art 61sec.1 of the Constitution in the division between official and internal documents concerning their potential access. On the contrary, support of the settlement on the basis of Art 61sec.1 & 2 of the Constitution of the Republic of Poland, which confirms the above mentioned ruling as well as positions of doctrine would deliver a different settlement. Therefore, Art 6sec.2 of the act on access to public information constitutes a further threat to conducting constitutional law for public information. The above mentioned case law and doctrine clearly specifies that the defined conditions of public information are fulfilled if the information concerns the work of municipal authorities. In the subject of this complaint, it is assured that the requested data falls into this concept.

However, firstly there exist no specified conditions in this case mentioned in Art 61sec.3 of the Constitution of the Republic of Poland. In general, they are not taken into consideration by the court. Nevertheless, the settlement amounts, in practice, to the unavailability of the requested information. In the place of specific exceptions to the principle of transparency in the Constitution there have appeared other kinds of restrictions in accessing public information in the ruling of the Supreme Administrative Court. In this context it is important to note that the Voivodship Administrative Court in Warsaw, which acts in this specific case as a court of first instance, stated that all the documents which the applicant requested constituted public information, thus paving the way for its availability or denial of access based on the values specified in Art 61sec.3 of the Constitution. It should be noted that in legislation in other states, there exists some kind of distinction between information of an external nature and that of an internal one. However, the specification of public information does not change. The EU regulation 1049/2001 allows restrictions on transparency in cases when access to a document includes an opinion for internal use as part of a discussion and initial consultation within the said institution and will not be awarded even after a decision was made, if the disclosure of such a document would seriously violate the decision-making process of the institution, unless there is an overriding public interest in its disclosure (cf. Regulation (EC) no.1049/2001 of the European Parliament and Council, 30th May 2001 in the case of public access of European Parliament, Council and Commission documents, Official Gazette L 145, 31st May 2001, Art 4 point 3). However, it is the form of the restriction in accessing and the categorical statement in relation to this type of documents that does not apply to the regulation, leaving access to important documents beyond civic monitoring. Irrespective of whether there are reasons or not in favour for wide access to this type of data, the form of access to public information in Poland does not include standards permitting restrictions on transparency in these circumstances. It could be treated as a demand for changing the law but it cannot be considered, as in the repeal of the Supreme Administrative Court's ruling that a restriction on access is permissible by means of recognising that the material does not constitute public information. As Supreme Administrative Court judge Irena Kamińska admitted in an interview for Polish Press Agency,

> 'case law is still coming to terms with using the concept of the internal document. Such a document, as a result of case law, is not public information and therefore is not subject to availability. Of course, we realise that such an interpretation is strongly criticised by groups of constitutionalists and defenders of the right to information. (…)'. (Sędzia NSA: ustawa o dostępie do informacji musi być zmieniona" http://m.wyborcza.pl/wyborcza/1,105226,12714519,Sedzia_NSA__ustawa_o_dostepie_do_informacji_publicznej.html)

Such action is not only a form of legal 'escape' from legal norms but also effectively deprives citizens of the chance to gain information about the workings of municipal public authorities and other persons and institutions engaged in municipal work. The EU regulation remains in accordance with international standards in access to public information when facts show which ones can be used as the basis for denying access to documents and which can be used to argue within appeal bodies. Meanwhile, in Poland we have to deal with the situation in which the Supreme Administrative Court states that official correspondence between workers of various ministries after the development and adoption of guidelines stage to a bill concerning specific proposals for provisions does not constitute public information. In its reasoning, the Supreme

Administrative Court accepted that they are of an internal nature citing that the documents are not official in the understanding of Art 6sec.2 which is an erroneous interpretation of the provision, which most clearly defines their nature, with reference to a part of the structure of public information and not creating by itself a legal norm – and for this reason, it cannot be understood as even an element of the definition of public information. Therefore, this action is tightly bound with the provision in Art 3sec.1 point 2 of the act and to this last provision treating it contextually, i.e. within the complete statutory understanding of public information and then it appears that the act is not in accordance with the Constitution.

The wording of Art 61sec.1 of the Constitution and Art 1sec.1 of the act on access to public information is essential if it is connected to how public authority work is conducted. Therefore, drafting laws is clearly based on these tasks. The resolution of the Supreme Administrative Court will deny access to correspondence in the case of drafting guidelines to the act resulting in citizens not knowing the authors of specific regulations and being unable to legally demand their disclosure. In spite of this experience, which has an influence on the so-called, 'Rywingate' affair, the court permitted the legislative process to be treated as classified, thus preventing any civil monitoring of the quality of the law-making process. Moreover, it violated the Constitution of the Polish Republic. It is important to remember that the Constitutional Court indicated in its ruling from 15th October 2009, sign. Act K 26/08 how the principle concerning the transparent workings of the state should be perceived: universal access to public information constitutes an indispensible condition for the existence of civil society and therefore, the fulfilment of democratic principles in the workings of municipal public authorities in the Polish legal state. Access to public information is, on the one hand, a recognised condition of civic participation in public authority decision-making processes (see P. Winczorek, Commentary of the Constitution of the Republic of Poland, 2nd April 1997, Warsaw 2000, p. 83) and on the other, allowing effective civil monitoring of the work of official bodies (see W. Skrzydło, the Constitution of the Republic of Poland. Commentary, Kraków 1998, p. 58; I. Lipowicz, Constitution of the Republic of Poland as well as Commentary on the Constitution of the republic of Poland, 1997, ed. J. Bocia, Wrocław 1998, p. 114). Hence, the huge significance of universal access to public information. In democratic societies there exists a fundamental right to know and be informed about the whys and wherefores of government business (see J. E. Stiglitz, On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life, (w:) Globalizing Right. The Oxford Amnesty Lectures, ed. U. J. Gibneya, Oxford-New York 2003, p. 115).

In respect to the above, we submit a form of order sought.

Attached:
1. power of attorney as well as proof of stamp duty paid
2. Copy of the ruling
3. Four copies of the complaint together with attachments

Citizens Network Watchdog Poland (formerly the Association of Leaders of Local Civic Groups) Translation by Nigel Warwick