ACCESS TO PUBLIC INFORMATION

Access to Public Information Act and Open Government Standards

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On 1 January 2002, the principal provisions of the Access to Public Information Act of 6 September 2001[1] came into force. Taking effect at a later date (between 30 June 2003 and 1 January 2005) for technical and organisational reasons will be the provisions imposing an obligation to supply information in the online *Biuletyn Informacji Publicznej* (Public Information Bulletin),[2] which in the future is going to become the principal official publication.

The Access to Public Information Act (hereinafter referred to as "the Act") obviously has a systemic dimension, having been necessitated by Poland's new systemic and legal environment. The right of access to public information is inscribed in the Constitution—even if perhaps in too general terms, as the practice so far has indicated. Its Article 61 stipulates that "the citizen has the right to acquire information on the activity of bodies of public authority and persons holding public offices.... The right of access to information includes access to documents and attendance, with the possibility of sound and vision recording, at meetings of collegial bodies of public authority emerging from general elections."

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[1] See *Dziennik Ustaw*, (112) 2001, item 1198. An early commentary on the law was published by this writer in: H. Izdebski (ed.), *Dostęp do informacji publicznej. Wdrażanie ustawy*, Urząd Służby Cywilnej, Warszawa, 2001, p. 23 ff.

[2] See E. Gaweł, "Biuletyn Informacji Publicznej," in: *Dostęp do informacji publicznej...*, p. 85 ff.

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The Constitution also specifies the situations in which these rights may be constrained by legislators—"exclusively for reasons of statutorily-defined protection of freedoms and rights of other individuals and economic entities, and protection of public order, security or an important economic interest of the state" (Article 61.3)—and states that procedure for the provision of information is detailed in statutes or, with regard to the Sejm and Senate, in their rules of procedure (Article 61.4).

These constitutional provisions are in conjunction with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, commonly referred to as the European Convention on Human Rights—even if this article is more general, concerning also other subject matter, and applying not only to citizens, but to each and every person. The Convention, as ratified by Poland and published in the official gazette *Dziennik Ustaw*, is given a higher rank than domestic statutes (under Article 91, paragraphs 1 and 2 of the Constitution, and in connection with its Article 241.1). Article 10 of the Convention reads: "Everyone has the right to freedom of expression. This right shall include freedom to... receive and impart information.... The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

One cannot but notice that Article 10 of the Convention is paralleled by Article 54.1 of the Constitution (far more than by its Article 61), which guarantees everyone the freedom to acquire information. The question of interrelations between Article 61 of the Constitution and Article 10 of the Convention was the subject of the Supreme Court's very important ruling of 1 June 2000 [3] in response to an extraordinary appeal against a decision of the Central Administrative Court lodged by its president. The ruling pertained to

[3] III RN 64/00 (OSNAP, 2001, no. 6, item 183).

access of the press to information, and as such it also related to Article 4 of the Press Act of 26 January 1984[4] (in the wording of that time, which was later amended directly and indirectly by Article 24 of the Access to Public Information Act) in conjunction with Article 14 of the Constitution, guaranteeing the freedom of the press. Thus the Supreme Court ruled forcefully that the Polish Constitution sets higher standards of freedom-of-speech protection that those provided for in Article 10 of the European Convention on Human Rights.

Also carrying weight was a more detailed memorandum of explanation attached to the ruling. In it, the Supreme Court cited its own explanation of the ruling of 11 January 1996,[5] which read: "The right of the press to obtain information about the activities of a local government body, as specified in Article 4.1 of the Press Act of 26 January 1984, also includes access to records of the body required to provide the information, unless other laws bar such provision, especially for reasons of protection of state secrets, other statutorily protected secrets and private secrecy beyond the realm of public activity.... The cited provisions of the Press Act should be interpreted in the light of constitutional and international regulations guaranteeing the freedom of the press and citizens' right to be informed honestly, and also in the light of **the principle of openness in public life, which is of fundamental importance for the normative concept of a democratic state**.... In view of the requirement of honestly informing citizens about public administrative activities of importance to them (which is indispensable in a country ruled by law), the rights of the press defined in Article 4.1 of the Press Act must be interpreted as also including access to records of a body responsible for provision of information, but only within the subject mater of the information in question. In this way the press may—in a critical, efficient and responsible manner—verify the information obtained through the body concerned and relating to its activities against the official records in possession of that body. Just as with refusal to provide information, access to official records may only be refused for reasons of protection of state and official secrets, and other statutorily protected secrets."

[4] *Dziennik Ustaw*, (5) 1984, item 24, as amended.
[5] III ARN 57/95 (OSNAP, 1996, no. 13, item 179).

This appraisal, the Supreme Court emphasised, retains its validity under the new legal and constitutional order, where the entire question "should be viewed from the standpoint of the fundamental principle of a democratic state ruled by law, i.e. the principle of openness in public life (Article 2 of the Constitution) and freedom of the press (Article 14 of the Constitution), and also from the standpoint of citizens' constitutional right to obtain information about the activities of bodies of public authority (including, pursuant to Article 61.2 of the Constitution, access to documents and attendance at sessions of collegiate bodies of public authority emerging from general elections), and the constitutional freedom to express one's views and acquire and disseminate information (Article 54.1 of the Constitution), known as the freedom of expression."

This statement by the Supreme Court—overturning a ruling in which the Central Administrative Court applied constitutional principles in a restrictive manner—exposed a misguided though fairly popular approach to Article 61 of the Constitution, whereby the constitutional norms were regarded as exceptions from the principles laid down in statutory regulations on various kinds of secrets.[6] Thus, against the general guidance in Article 8.2 of the Constitution—to the effect that the provisions of Article 61 paragraphs 1 and 2 should be applied directly, with no the need for a statutory definition of the right of access to public information (and the concomitant duties on the part of bodies of public administrations)—the actual practice embraced numerous divergent leftovers from the past. These largely provided for broad interpretation of the regulations restricting such access.

The provisions protecting state and official secrets—now referred to as confidential information under 22 January 1999 legislation[7]—have been in place for a long time. Additional constraints were imposed under the Personal Data Protection Act of 29 August 1997,[8] which in practice insulated too many

[6] For a review of these laws, see R. Taradejna, "Ograniczenia dostępu do informacji wynikające z ustaw szczególnych," in: *Dostęp do informacji publicznej*..., p. 61 ff.
[7] *Dziennik Ustaw*, (11) 1999, item 95, as amended.
[8] *Dziennik Ustaw*, (13) 1997, item 883, as amended.

public areas from the access-to-information right (e.g. data on the remuneration of local government executives).

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Access to public information thus proved insufficiently protected by Article 61, paragraphs 1 and 2 of the Constitution, with exceptions from the general rule contained in secrecy protection statutes. And it was with exceptions that the work started on designing legislation on the right to acquire information. New provisions specifying the procedure for provision of information (pursuant to Article 61.4 of the Constitution) had to be couched with adequate accuracy so as to bring greater detail to the Constitution's substantive and formal provisions, which in practice proved overly general.

This observation, it must be noted, did not apply to Article 74.3 of the Constitution, vesting everybody with the right to information about the condition and protection of the environment. This provision was subsequently fleshed out in the 9 November 2000 Act on Access to Information about the Environment and its Protection and on Assessment of Environmental Impacts,[9] which imposed appropriate obligations on the relevant bodies of public administration. This legislation has since been replaced with the provisions of Section IV of the Environmental Protection Act of 27 April 2001.[10]

Neither was the perceptible lack of access to information alleviated by the mushrooming statutes which, in their respective areas, declared adherence to open government, e.g. the Public Finances Act of 26 November 1998[11] (proclaiming the principle of openness of public finances) or the three fundamental statutes on local government at the levels of *gmina*, *poviat* and *voivodship*, which (in the wording following the amendment of 11 April 2001[12]) affirmed the principle of "openness in the activities of the bodies of the respective local governments."[13] Regarding the local government statutes,

[9] *Dziennik Ustaw*, (109) 2000, item 1157, as amended.
[10] *Dziennik Ustaw*, (62) 2001, item 627.
[11] *Dziennik Ustaw*, (155) 1998, item 1014, as amended.
[12] *Dziennik Ustaw*, (45) 2001, item 497.
[13] The principal laws passed prior to the Act which governed the principles and procedures of access to what the Act classifies as public information are listed by this writer in a commentary on the Act in: *Dostęp do informacji publicznej...*, pp. 28–29.

one should notice that they provide that the principles governing access to information must be laid down in local government bylaws, which contradicts Article 61 of the Constitution (and especially its paragraph 4, if the notion of "principles" is understood here as including also, or primarily, the procedures).

In such a state of domestic legislation, the adoption of a statutory law on the subject defined in Article 61 of the Constitution (and announced in Article 61.4) came as a matter of necessity.

It should be emphasised that Article 61 of the Constitution and the Access to Public Information Act are not dissimilar from the arrangements adopted in the contemporary market-economy democracies. Actually they meet these democracies' legal standards. Poland has thus joined a growing group of countries that not only declare the principle of universal access to records and other sources of public information, but—more importantly—also have the legal instruments to put this principle into effect.

The right of access to public information constitutes a major component of the democratic standard of open government or openness of public authorities and entities responsible to them. And openness is founded on the transparency of organisations and their operations.[14] These standards are still being forged primarily in individual countries' constitutional and statutory legislation, although they have already been developed also for European Union institutions and are in the process of being finalised within the Council of Europe.[15]

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Access to public records was first recognised as a civil right back in the 18th century in Sweden, where it was seen as a major component of freedom of the press, with the media treated as a special intermediary between citizens and public authorities. Just as another Swedish invention, the

[14] Parts of the following text enlarge on the theses which this author presented in the article "Prawie wszystko jawne," *Rzeczpospolita*, 29 October 2001.

[15] Cf. J. Stefanowicz, "Idee leżące u podstaw prawa dostępu do informacji publicznej. Praktyka konstytucyjna i ustawodawcza na świecie," in: *Dostęp do informacji publicznej*..., p. 7 ff.

Ombudsman, this arrangement was long regarded elsewhere as a curiosity that could only work in specific, historically-shaped local conditions. Only over the past decades did the right of access to public information become a standard in Europe and in some democracies on other continents—first in the US (1966), and then in Australia and New Zealand (1982) and also in Canada (1983).

After a recent enactment in the tradition-minded United Kingdom, the only remaining large West European country with no framework legislation on access to public information is now the Federal Republic of Germany, even though several of its *Länder* do have such laws. The Germans make do with the appropriate constitutional norms, which have been expanded upon in the constitutional Tribunal's jurisprudence, and provisions of detailed laws, e.g. on environmental protection. In individual countries either a single law was passed (as in Ireland in 1997) or a series of laws. In France the subject is regulated by five statutory instruments: two laws dated 1978 (on personal data and access to administrative documents), two others dated 1979 (on archives and explanation of administrative acts) and a 2000 act on citizens' rights in their relations with the public administration. In Sweden too a series of constitutional statutes are currently in force, including the acts on freedom of the press (dated 1949), government policy instruments (1974) and the basic freedom of expression (1991).

In individual countries' national legislation[16] the requirement of providing information or access to information may extend to different groups of entities (being either confined to bodies and institutions of public administration, or covering other public authorities as well), and may have a different scope (either data contained in public records only or also other public information). Exclusion of openness is regulated differently, and where oversight is vested in specially authorised offices, these are designed according to disparate blueprints. In Canada, the Information Commissioner has a status similar to

[16] These laws are discussed and compared in many publications, among which mention is due to the output of the 8th Conference of Graduates of the National School of Public Administration (KSAP) devoted to the subject "Should the right of access to information in Poland be institutionalised?" Warszawa, 2001.

that of the Ombudsman (i.e. with no decision-making powers), but he is assigned special tasks regarding the operation of the 1983 legislation on access to information. Similarly-named officer in Ireland in turn is appointed by the president after consulting the government, following a parliamentary resolution. He operates as a second instance body, ruling on cases involving refusal to grant access to official records. And in France the Commission for Access to Administrative Documents has been in place since 1978, comprising two government appointees, two members who sit in their official capacity (including the head of French Archives), and one representative from each of these institutions: the Council of State, the Appellation Tribunal, the Public Sector Audit Chamber, the National Assembly, the Senate and local government.

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In Poland too different concepts were championed on what kind of statutory regulation should apply to the right of access to information and to bodies overseeing the enforcement of this right. In addition to the finally enacted concept, based on proposals from the Adam Smith Centre, other ideas were presented as well, especially in a draft compiled by the Centre for Press Monitoring. And each view could be argued for—or against—by invoking foreign examples and experiences, whether positive or negative. The debate showed that the subject matter was fairly complex, and that account should be taken of the country's traditions and requirements of its legal system, which restricted the room for "implants" from other traditions and other systems.

But the overarching purpose of statutory guarantees of citizens' access to public information is the same in all the countries that have enacted such guarantees. As finely described in a 1997 ruling by Canada's Supreme Court, this purpose is "to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry."[17]

[17] J. M. Reid, "Spostrzeżenia na temat dostępu do informacji," Conference of KSAP Graduates, Warszawa, 2001.

Referring to this ruling, the Information Commissioner of Canada said that in return for an array of rather unpleasant situations and changes in the existing pattern of influences, we receive increased protection, modesty and objectivity in the exercise of power, a more informed society, a freer press, a more effective opposition and, generally, a better government. Although hard to estimate, these benefits are perceptible and extensive; they directly limit alienation and cynicism, which are always inseparably—and dangerously closely—linked with political life.[18]

As a result, the costs of putting the statutory instruments into effect may prove pretty high, especially when coupled with setting up special bodies (or integrated information systems, such as the Public Information Bulletin in Poland). These costs, however, are indispensable for democracy to operate. They are offset by the benefits, including tangible financial gains. As it happens, open government costs less than a "close" one hidden behind a wall of multiplying secrets, because it is more limited and less exposed to corruption.

Access to public information has historically been linked (Sweden) with freedom of the press and an opportunity to publish the results of journalists' access to public information. By its very nature, the media is an important intermediary between citizens and public authorities. The statutory norms of importance for the journalistic community are as important for individual citizens and for the whole civil society, this substratum of democracy. Open government is inseparably linked with the operation of civil society—understood not in the Hegelian sense, but rather in the proper sense imparted to the notion in the late 17th century by John Locke,[19] along the lines of Aristotle, Cicero and St. Thomas Aquinas. Within this meaning, public authority (or the state in its broader sense, including local government) may only be viewed as a servant of the public, not any supreme being. And a servant must not act surreptitiously in relations with his master. Rather, it is his duty to provide the master with relevant information, which in turn makes supervision and control possible.

[18] *Ibidem.*
[19] Cf. H. Izdebski, *Historia myśli politycznej i prawnej*, Warszawa, 2001, p. 13 ff.

But traditionally lack of openness featured strongly in the operation of public authorities, including public administration, thus disabling the mechanisms of civic control of public authorities and their apparatus. Everything performed by the administration, except for its externally bound legal output, was treated as *res interna*, beyond the reach of citizens.

This close character fit in well with the way the public authority's principal objective was understood—as the exercise of state powers, i.e. activity within and for state sovereignty. This is how the objective of the state and its administration is understood in all doctrines (including totalitarian ones) that provide for the authorities' domination over society as a whole and over its individual members.

On the other hand, openness is naturally associated with a belief that not only the administration, but the public authority as a whole are in service to society and its constituent parts. Thus the legislation on access to public information provides an important instrument for advancing a service-oriented character of public authority, which is the essence of democracy in its contemporary meaning.

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As already noticed when discussing the diversity of arrangements followed in various countries, designing appropriate norms on access to public information is by no means easy. This was also the case in Poland, where the relevant work was performed in the forum of Sejm sub-committees with the participation of interested government institutions. The principles laid down in the Act apply to highly diversified sets of entities, data categories, and information technologies—and, in addition, a distinction had to be made between the relevant bodies' duty to provide certain information actively in a form accessible to each interested party (the official online Public Information Bulletin is of paramount importance here) and a passive formula of providing information only when requested. In compliance with international standards, including Article 10 of the European Convention on

Human Rights, the Act clearly specifies that the persons taking advantage of the access-to-public-information prerogative will not be requested to prove they have a legal or factual interest. It is also important, especially given the present tendency to public structures' simplification, that—in rejection of some other countries' arrangements—the Act does not provide for the formation of a special body to protect the access-to-information right. The relevant powers were transferred to judicial bodies: the Central Administrative Court and common courts of law (depending on which value is quoted as the foundation of a refusal to provide information). While provoking no doctrinal doubts, this arrangement may nevertheless give rise to a variety of practical problems.

Summing up, since 1 January 2002 Poland has had a general statutory instrument that provides conditions for the openness and transparency of public authorities (and public administration in particular), and one that meets the standards of democracy, rule of law and open government.

As past practice has amply demonstrated, notwithstanding the constitutional declarations and numerous specific statutes, it is not possible to lay down foundations for democratic transparency without first enacting the general rules.

These foundations are provided by an appropriate political culture based on a democratic interplay of the administration (shaping the relevant operational formulas and mechanisms), the media and the citizens, without whose interest the statutory principles and procedures would remain just verbal declarations. Only in such an environment may the public authorities' subservience to society (in its modern sense) take root. And this culture also comes as an important consequence, and aspect, of open government.