sieć obywatelska
WATCHDOG

Warsaw, 24 October 2017

OPINION OF THE CITIZENS NETWORK WATCHDOG POLAND ASSOCIATION TO THE DRAFT ACT ON OPENNESS OF PUBLIC LIFE (of 23.10.2017)

Introduction

This opinion concerns the draft Act indicated above to the extent to which regulations proposed concern the implementation of the constitutional right to information, i.e. provision of information about activities of public authorities.

It is composed of three parts. In the first one we present general remarks concerning the need for and purpose of the regulation developed. In the second part we present critical comments to those changes introduced by the legal act planned which will have a negative impact on the implementation of the constitutional right to obtain information about activities of public authorities. And in the third one we present unused opportunities for changing the existing solutions which make it difficult for the society to obtain information.

I. General remarks

The analysis of chapters 2, 3 and 11 leads to a conclusion that the proposed regulation constitute mainly the repetition of the current solutions contained in the Act on Access to Public Information. This situation casts doubt on the intention behind the adoption of a legal act which would repeal the Act on Access to Public Information currently in force (see Article 130 (2) of the draft Act).

The Association does not challenge the idea to regulate solutions concerning the broadly understood anticorruption law in a single legal act. In particular the unification of principles of submitting property declarations by persons obliged to do so is a good solution, which the Association already

proposed in 2014[1]. However, we challenge the idea of including the current Act on Access to Public Information into the planned Act. The proposed changes concerning the provision of access to public information could be deemed effectively introduced in the current regulation because the change concerns only several of its provisions.

Retaining the current Act on Access to Public Information will allow avoiding legal chaos caused by the very extensive practice of applying previous regulations and the related judicature, literature on the subject, and need to relate them correctly to the new legal act.

From the point of view of a citizen or another legal subject benefiting from the constitutional right to information, it is beneficial that one Act concerning the way this right is used remains in force. Such solution is also dictated by article 61 (4) of the Constitution of the Republic of Poland "The procedure for the provision of information, referred to in paras. 1 and 2 above shall be specified by statute, and regarding the Sejm and the Senate by their rules of procedure".

The current Act on Access to Public Information mainly constitutes important and interesting reading for the person using it. In turn, most of the planned regulations do not refer to rights of persons benefitting from them but to obligations of public authorities. In other words, the planned regulation, including the previous Act on Access to Public Information, will not help persons interested in finding information about how to benefit from the constitutional right to public information.

For this reason we call for exclusion of the determination of principles and procedure of accessing public information from the planned regulations (article 1 (1) of the draft and, possibly, introduction of some changes in the current Act on Access to Public Information due to the amending regulations.

Then, the change of the title of the planned legal act should also be considered – from the "Act on Openness of Public Life" to, for example, the "Act on Preventing Corruption".

[1] https://siecobywatelska.pl/siec-obywatelska-watchdog-polska-o-oswiadczeniach-majatkowych-2/

II. Planned regulations which are damaging to the constitutional right to obtain information about activities of public authorities

(1) Change of the legal nature of the act on determining the charge for access

In the light of current Article 15 of the Act on Access to Public Information there is no doubt that the determination of the charge connected with additional costs of provision of access to public information is not in the way of provision of information in accordance with the application – within 14 days from the notification about the charge having been appointed, unless the applicant changes the application within that deadline with regard to the methods or form of provision of information, or withdraws the application.

Planned Article 20 (3) of the Act assumes the change of character of the charge. In accordance with that planned regulation, the provision of information in accordance with the application takes place **14 days after the charge has been paid** by the applicant, unless the applicant within that period: 1) fails to pay the charge mentioned in paragraph 1, in the amount notified by the entity obliged to provide access to the information, 2) has changed the application with regard to the method or form of provision of information; 3) has withdrawn the application. This means that the payment of the charge constitutes a condition for the information being provided by the person submitting the application.

In the opinion of the Association, this is an unacceptable regulation because it significantly affects the practical ability to use the constitutional right to information.

There are currently no doubts that the act determining the charge connected with additional costs of provision of access to information is subject to jurisdiction of the administrative court. This means that if a charge is applied without justification, the person using the right to information does not remain defenceless as regards the possibility of public authorities applying a financial burden. However, this does not prevent exercising the right to information because the provision of access to information proceeds independently.

This is an important guarantee for persons benefitting from the right to information because it separates the consequences of a financial burden from the exercising of a constitutional right.

Firstly, being aware that the appeal against the charge will involve court proceedings taking around three years (assuming that the case reaches the Supreme Administrative Court) and the processing

of the application will be suspended, persons exercising this right may lose interest in challenging the charges due to the fact that after all that time the information will no longer be relevant for them. This, in turn, may result in persons exercising this right withdrawing their applications and thus ceasing – as a result of the formal barriers imposed – to exercise their constitutional rights.

It is impossible to determine the sense of the current regulation. At the moment, an obliged entity may enforce the charge applied by bringing an action to a common court, therefore there are legal instruments to enforce the charge imposed. Besides, the provision of access to information by the authorities constitutes the basic obligation on public authorities arising from the fact that Poland is a democratic state under the rule of law (Article 2 of the Constitution of the Republic of Poland) and connected with the right to information guaranteed in Article 61 of the Constitution of the Republic of Poland. **For this reason the provision of access to information may not be treated as a service that should be paid for in advance**. The sense of appointing additional costs is connected with the situation where an atypical application creates additional costs on the part of the addressee, and therefore this is about refraining from charging those additional costs to the obliged entity but the applicant. This objective is effectively achieved in the light of the regulations currently in force – when the obliged entity may enforce additional costs.

You should not forget that it is the public entity, due to its dominant position, incurs the risk of the charge being paid only after an action has been brought and a court ruling has been issued, adjudicating the costs to the claimant. For this reason, there are no grounds for changing the current legal regulations.

(2) Submission of applications in a "persistent" way as the prerequisite of restricting the right to information

Article 21 (2) of the draft presented introduces a new prerequisite, previously unknown in the Polish law, for restricting the right to information. In accordance with the provision indicated:

> *In the case where the applicant persistently submits applications mentioned in Article 16(1), the granting of which due to the quantity or extent of information provided would hinder significantly the operations of the entity obliged to provide public information, this entity can refuse access to public information.*

Thus, this provision introduces an optional prerequisite for restricting the right to information as a result of the obliged entity deciding that the applicant has been submitting applications in a "persistent" way, which apparently "hinders significantly the operations of the obliged entity".

Leaving the competence to assess whether the application is burdensome to the entity obliged to provide access to public information reverses the relationship of obligations. It is not the authority or the entity that is obliged to provide information but the applicant is obliged to behave in a non-persistent way. This gives scope to discretionary behaviour and makes it impossible to exercise constitutional rights.

It is obvious that any possible disputes in this respect will be judged by the appeal body or, further down the line the administrative court, however this means that the wait for the decision may take several years.

The regulation prepared admits the restriction of the right to information due to a prerequisite the criteria of which have not been defined in any way in the Act. **This is a restriction of a constitutional right that is unacceptable in the light of Article 61(3) and Article 31(3) of the Constitution of the Republic of Poland**.

The introduction of such prerequisite which, as might be assumed with quite high probability, entities obliged to provide access to public information will gladly use, is glaringly inconsistent with the obligation of public authorities to build the society's trust in activity of the state. The refusal to provide access to information due to the prerequisite discussed will definitely result in the reduced trust of the person applying both in the obliged entity to which the application is submitted and to the state in general.

This provision is contrary to current Article 2(2) of the Act on Access to Public Information and Article 4(2) of the planned Act in accordance with which the person exercising their right to public information is not required to prove legal interest or actual interest. On the one hand the obliged entity (or any other authority) does not have the competences to examine the legal or actual interest, and on the other hand it would have the competence to refuse the provision of access to information due to the "method" of submitting applications.

Adoption of such unspecified and arbitrary prerequisite restricting the right to public information is unacceptable in the light of the principle of correct legislation arising from Article 2 of the Constitution of the Republic of Poland.

In the light of the currently binding legal regulations, if the obliged entity does receive several or dozen or so applications the subject of which is a specific piece of information, but applicants indicate different methods and forms of providing access to the information (e.g. sending a scan of a letter by e-mail, making a photocopy and sending it by traditional mail, sending a copy of the

document by fax, etc.), then provision of access to that information in the Public Information Bulletin excludes in the light of Article 10(1) of the Act on Access to Public Information the obligation to provide the information on request. Thus, the current law has provided for instruments which are to prevent applications which would cause difficulties for the obliged entity.

(3) Interim provision in accordance with which new regulations, less favourable for the applications, are to be used

In accordance with Article 127 of the legal act planned, any matters concerning access to public information which have not been concluded as of the date of the new Act coming into effect in a final or legally binding decision, provisions of the planned Act (paragraph 1) shall apply. Entities are obliged to provide public information or issue a decision refusing to provide the information in matters mentioned in paragraph 1 within 14 days of the Act coming into effect (paragraph 2).

We would like to point out that, allowing for the above remarks and reservations as to regulations which interfere excessively in the right to information, this means that after the planned Act comes into effect, new regulations shall be in force, also with regard to proceedings that have not been concluded as yet. This means that less favourable regulations will be in force.

You may easily imagine a situation in which, after the Act in the planned shape has become effective, obliged entities refuse the provision of public information due to the fact that the application in the given case has been submitted in a “persistent” manner. The situation in the case of disputes concerning the charge applied will be similar – from the moment of the Act coming into effect the information will not be provided until the charge has been paid.

Such regulation of the interim provision is unacceptable in a democratic state ruled by law. This provision, instead of protecting interests of citizens who have undertaken proceedings before this Act has come into effect, interferes directly in the citizens’ interests (taking into consideration other regulations discussed above).

III. Missed opportunity for changing negative regulations

(1) The term "public information" remains

Planned Article 2(1)(2) of the Act repeats current Article 1(1) of the Act on Access to Public Information. Although in accordance with Article 61(1) of the Constitution of the Republic of Poland we have the right to obtain information about activities of public authorities, in the light of Article 1(1) of the Act on Access to Public Information (transferred to Article 2(1)(2) of the draft Act) the

right refers to provision of access to public information. It is the term "public information" that is the reason that the scope of that right is treated *ratione materiae* (including access to information about public matters) rather than *ratione personae* (information about activities of public authorities). This has led to a narrow interpretation of the scope of the right to information and provided the basis for creation of constructs in the judicature which interfere significantly in the right to information, such as "internal document", "private document", "technical information", "working document", "working information", etc.

In the opinion of the Association, the reason behind the majority of problems concerning the determination of the scope of the right to information is the introduction of the undefined term "public information" into the legislation instead of using the Constitution of the Republic of Poland directly in this respect.

In the letter to the Ombudsman, in which we requested that the Ombudsman applies to the Constitutional Court for the current Article 1(1) of the Act on Access to Public Information to be examined against the Constitution[2], we indicated that this provision may be incompliant with Article 61(1) and (2) of the Constitution of the Republic of Poland.

The statutory term "public information", determining the scope of the right to public information, leads to the restriction of the scope *ratione materiae* of the constitutional right to information. Article 61 (1) of the Constitution of the Republic of Poland determines the citizens' right to obtain information about activities of public authorities and persons holding public functions. This right also includes obtaining information about the activity of business and professional self-government bodies as well as other persons and organisational units to the extent to which they perform public authority tasks and manage municipal property or State Treasury assets (Article 61(1) second sentence of the Constitution of the Republic of Poland).

These provisions also determine the scope of the right to public information, i.e.:

- entitled parties (citizens),
- obliged entities (public authorities, persons holding public functions, business and professional self-government bodies, other persons and organisational units to the extent to which they perform public authority tasks and manage municipal property or State Treasury assets),

[2] https://siecobywatelska.pl/spotkanie-u-rpo-o-jawnosci/

- scope *ratione materiae* (information about activities of public authorities, persons holding public functions, business and professional self-government bodies, other persons and organisational units to the extent to which they perform public authority tasks and manage municipal property or State Treasury assets).

In relation to scope *ratione materiae,* in Article 1(1) of the Act on Access to Public Information it was specified through description of what we have the right to, i.e obtaining public information. The regulation indicated states that "any information about public matters" constitutes public information. This regulation is obviously imprecise because it is difficult to say what information about public matters is. The interpretation of the term "public information" on the basis of the statutory regulation, that it is any information about public matters, has been undertaken by the judicature and doctrine.

Initially broad meaning of public information was assumed in the judicature and doctrine[3]. Bogusław Banaszak and Michał Bernaczyk indicate that the "Decade of application of the Act on Access to Public Information was based on an unchallenged view that «information about public matter» is any message produced by or referring to public authorities, as well as produced by and referring to other entities carrying out public functions with regard to the performance of public authority tasks b them, as well as management of municipal property or State Treasury property. Public information refers to the sphere of facts»[4]. This was also stated by M. Jaśkowska, who pointed out that with regard to this opinion judicature had been consistent for years, which according to the author is indicated for example by the contents of subsequent information about the activity of administrative courts[5]. Judicature provides many examples of such extensive understanding of public information (for example: judgment of the Supreme Administrative Court of 30 October 2002, II SA 1956/02, judgment of the Voivodeship Administrative Court in Poznań of 9 February 2007, IV SA/Po 994/06, judgment of the Voivodeship Administrative Court in Szczecin of 5 August 2010, II SAB/ Sz 7/10, judgment of the Supreme Administrative Court of 7 December 2010, I OSK 1774/10.). The extensive

[3] See: M. Jaśkowska, Dostęp do informacji publicznej w świetle orzecznictwa Naczelnego Sądu Administracyjnego (Access to public information in the light of case law of the Supreme Administrative Court), Toruń 2002, p. 28 and judicature cited therein.

[4] B. Banaszak, M. Bernaczyk, *Konsultacje społeczne i prawo do informacji o procesie prawotwórczym na tle Konstytucji RP oraz postulatu „otwartego rządu" (Social consultations and right to information about the legislative process against the background of the Constitution of the Republic of Poland and the demand for an "open government")*, Zeszyty Naukowe Sądownictwa Administracyjnego, No 4 (43) / 2012, p. 23).

[5] M. Jaśkowska, *Wpływ informatyzacji administracji publicznej na dostęp do informacji publicznej (Impact of computerisation of public administration on access to public information)*, [in:] *Prawne problemy wykorzystywania nowych technologii w administracji publicznej i w wymiarze sprawiedliwości (Legal problems of utilisation of new technologies in public administration and the judiciary)*, M. Barczewski, K. Grajewski, J. Warylewski (edit.), Gdańsk 2008, p. 56-57.

understanding of "public information" is beneficial for all those who exercise that right because it enables them to more fully exercise the right guarantee in Article 61 of the Constitution of the Republic of Poland.

However, for a while we have been observing that the understanding of "public information" and the interpretation adopted in this respect does not lead to the more accurate determination of the scope of the constitutional right to information, in order to make it easier to exercise it, but it constitutes the basis for restricting it.

Two approaches to understanding the term "public information" may be met, and thus two approaches to determining scope *ratione materiae* of that right – subject-based approach and object-based approach. Małgorzata Jaśkowska states that in literature and in judicature two methods for determining the term "public information" have appeared: "object-based", with stronger representation, referring to Article 61 of the Constitution of the Republic of Poland. It is based on the assumption that – in accordance with Article 61(4) of the Constitution of the Republic of Poland – only the procedure for accessing public information were to be regulated through an Act, and not scope *ratione personae* and *ratione materiae*[6], because this arises from the Constitution itself[7]. In this concept, attention is also paid to the application of just article 1(1) of the Act on Access to Public Information, leading to the narrowing down of the term "public information" which could be referred only to information about cases concerning general public and not e.g. individual cases[8]. This, in turn, would restrict access to information about activities of public entities, regardless of who the given information concerns. Besides, attention is paid to the risk of inconsistency of regulations, including in the context of exclusions from Article 5(1) and (2) of the Act on Access to Public Information. The extensive understanding of public information allows the imposition of the need to observe an appropriate form, consisting among other things on restricting the right to public information in the form of an administrative decision, on the authorities. Which is important, M. Jaśkowska notes that with the extensive understanding of public information, it is reduced to official documents, and it is of no importance whether it is an internal or a working document[9]. It is worth pointing out that the extensive understanding of public information and the resulting classification of

[6] In the judgment of the Supreme Administrative Court of 18 February 2015, I OSK 752/14, it was indicated that the extensive definition of public information is based on an assumption that in accordance with Article 61(4) of the Constitution of the Republic of Poland the Act was to determine only the procedure for provision of access to information, whereas its scope *ratione materiae* and *ratione personae* arises from the Constitution of the Republic of Poland itself.

[7] M. Jaśkowska, *Pojęcie informacji publicznej i jej rodzaje (Term "public information" and its types),* [in:] "Kwartalnik Prawa Publicznego" ("Public Law Quarterly"), No 3/2012, p. 60.

[8] *Ibid*.

[9] *Ibid.*, p. 62.

the extensive catalogue of information as designates of this term do not mean that all information which is public information will be disclosed. The availability of public information may be restricted due to prerequisites spelled out in Article 5 (1) and (2) of the Act on Access to Public Information.

In turn, the object-based approach to public information refers to the term "public matter", described in Article 1 (1) of the Act on Access to Public Information. This leads to the narrowing down of the term public information – and thus the scope of the right – because it creates an opportunity for using such creations as: private, public, personal, internal information (documents)[10], which allegedly fail to meet the "public nature" prerequisite under Article 1 (1) of the Act on Access to Public Information, in the practical application of that right. This method of interpretation leaves aside the fact that the protection of other legal interests with which the right to public information may be in collision may be achieved under a different procedure – other than failing to accept certain information as public. This is provided by the form of the decision on refusal to provide access to public information.

The consequence of Article 1 (2) of the Act on Access to Public Information being in force, determining the scope of the right we are entitled to through reference to the term "public matter" is the arbitrary restriction of the right to public information in the course of its application both by entities obliged to provide public information and administrative courts. Bogusław Banaszak and Michał Bernaczyk aptly note that the "twisted route to information leads first through the complicated juridical test to determine its "public" nature, that is becoming increasingly arbitrary"[11].

This is of significant relevance for all persons and entities that exercise their right to public information. The current situation in no way builds trust in the state or certainty in law due to the exclusion of various pieces of information from the scope *ratione materiae* of the right to information. We observe the escalation of this problem in the recent times. Our greatest problems do not arise from the attempt at balancing our interests: the right to public information and other legally protected interests, but from activities to determine that specific piece of information constitutes public information (which does not mean at all that access to it will be provided).

[10] M. Jaśkowska, *Pojęcie informacji publicznej i jej rodzaje… (The term „public information" and its types…)*, p. 67.

[11] B. Banaszak, M. Bernaczyk, *Konsultacje społeczne i prawo do informacji o procesie prawotwórczym… (Social consultations and right to information about the legislative process…)*, p. 23. The authors also indicate that in practice the obliged entities do not conduct a dispute as to the *essence*, i.e.. about the justifiability of restrictions of the right to public information, but "public authorities very often lead a dispute «on the approaches», and thus negate the «public» nature of information without indicating statutory restrictions"

The problem concerning the understanding of "public information" that we have described is of great importance because through the classification of the following information as internal information (documents) due to decisions of administrative courts, access to it has been disabled:

- e-mail correspondence of persons holding public functions (judgment of the Supreme Administrative Court of 15 July 2010, I OSK 7070/10),
- including e-mail correspondence connected with the legislative process (judgment of the Supreme Administrative Court of 21 June 2012, I OSK 666/12, and judgment of 14 September 2012, I OSK 1203/12),
- some legal opinions (expert appraisals), ordered by public authorities (judgment of the Supreme Administrative Court of 27 January 2012, I OSK 2130/11),
- minutes from meetings of the presidential board (judgment of the Supreme Administrative Court of 6 July 2016 in case ref. No I OSK 114/15).

Over 15 years of practical application of the Act on Access to Public Information proves that most of the cases brought before administrative courts in cases concerning access to public information concern complaints against inactivity. This is mainly the result of ongoing disputes concerning the demand for accepting information requested by applicants as "public", in the light of Article 1(1) of the Act on Access to Public Information. This regulation, due to its unspecified nature and reference to the term "public matter", may constitute the basis for the arbitrary restriction of the right to public information due to the exclusion of different pieces of information from the scope of right to public information. It is worth mentioning that for 15 years of the Act remaining in force no simple and clear definition of "public information" has been developed, either in doctrine or in judicature.

Although the judicature emphasises that the term "public information" under Article 1(1) of the Act on Access to Public Information should be interpreted broadly, in many cases the term "public matter" proved a term restricting the right. The doctrine and judicature exclude among other thing internal, private, technical information (documents), etc. from the scope of "information about public matters", despite the fact that there are no statutory prerequisites either to introduce such category of information (documents) or it cannot be assumed that they are not included within the right to public information.

Therefore, if provisions concerning the right to information are not removed from the draft Act, we request the draft Act to be amended in such a way that Article 2(1)(2) is deleted.

(2) Other definition of the "official document"

Another unused opportunity is leaving the definition of an "official document". it is not necessary. This definition has been included in planned Article 2(1)(1).

Again, we refer to the arguments contained in our opinion, in paragraph III.1. The adoption of the definition of the official document in the context of the planned Article 5 (1)(2) (currently Article 6(2) and Article 3(1)(2) of the Act on Access to Public Information) may lead to the situation in which obliged entities, contrary to Article 61(2) of the Constitution of the Republic of Poland will want to provide access exclusively to official documents.

(3) Good steps towards contract registers are discredited by restrictions in the provision planned. The expenses are also not open.

The obligation to keep and publish civil law agreements concluded by entities from the public finance sector, state enterprises, research institutes and obliged companies – planned Article 9 – is believed to be a very good direction. However, we would like to point out the following issues.

Planned Article 8 (2)(2) stipulates that the restriction of the right to information does not concern civil law agreements (contents) concluded by public authorities, and performance of those agreements. It is difficult to understand the reasons for which the restriction of openness of agreements (contents) of all obliged entities has not been included, or the scope has not been specified in the way it was done in planned Article 9 (1). Thus, a large number of contracts may be subject to exclusion from openness. Sometimes, besides the data that are subject to disclosure in registers published, the contents of agreements are also important.

In the context of openness of public funds, it would also be justified to introduce the obligation to keep a register of expenses and publish such a register. It would contain information about the agreements concluded and other expenses. From the point of view of accessibility of information and subjecting public finance to checks, such obligation would offer more benefits.

(4) A provision which causes many problems has remained, i.e. "other statutory principles and procedures for access to information"

Planned Article 3 (1) as a rule repeats Article 1(2) of the Act on Access to Public Information. The possibility of adopting other principles and procedure which regulate differently the principles and procedure of access to public information which have the priority before the Act on Access to Public Information, under the current legal status, but also in the situation where the planned draft Act has come into effect, constitute a significant threat to openness. The Act concerning the exercising the

right to information should regulate procedural aspects in a complex way. At the same time, they should have the priority in the case where any other Acts contain less favourable solutions. This would constitute a guarantee for persons benefitting from the right to information, and at the same time there would be no other regulations which ensure the exercising of openness in a different (including unfavourable) manner.

Summary

The Association challenges in particular the following:

- transferring the regulation of the current Act on Access to Public Information into a new legal act in the situation where regulations concerning the exercising of the right to information about the activity of public authorities occupy only a small part of the regulation, whereas positive changes of the currently binding law may be achieved through amendments made in the current Act on Access to Public Information,
- planned regulations making the provision of access to public information dependent on the previous payment of the charge imposed, which will lead in a disproportionate way to the restriction of the right to information, where the restriction is not necessary and there is no justification for it,
- proposal to introduce a prerequisite restricting the right to public information due to the application addressee deciding that the application is submitted "in a persistent manner" and the processing of the application, in the authority's opinion, would "significantly hinder the operations of the entity". Due to the lack of specification of application of prerequisites for this provision, it will simply lead to the elimination of the constitutional right to information,
- proposal of the interim provision in accordance with which new, less favourable regulations will apply to pending proceedings,
- leaving the term "public information" the use of which – as the 15-year history of application of the current Act on Access to Public Information proves – leads to the restriction of the constitutional right to obtain information about the activities of public authorities.