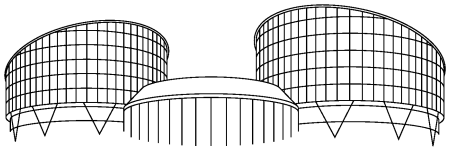

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF SIEĆ OBYWATELSKA WATCHDOG POLSKA
v. POLAND

(Application no. 10103/20)

JUDGMENT

Art 10 • Freedom to receive and impart information • Refusal to grant applicant NGO access to certain Constitutional Court judges' meeting diaries • Information necessary for exercise of right to freedom of expression and in the public interest given the political context • No individual assessment of interests at stake • Failure to show refusal pursued any legitimate aim or "necessary in a democratic society" • Denial of access to records of all persons entering and leaving the Constitutional Court building during a certain time period not amounting to an interference as information not "ready and accessible"

STRASBOURG

21 March 2024

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Sieć Obywatelska Watchdog Polska v. Poland,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Marko Bošnjak, *President*,
Alena Poláčková,
Krzysztof Wojtyczek,
Ivana Jelić,
Gilberto Felici,
Erik Wennerström,
Raffaele Sabato, *judges*,
and Ilse Freiwirth, *Section Registrar,*

Having regard to:

the application (no. 10103/20) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish non-governmental organisation, Sieć Obywatelska Watchdog Polska ("the applicant NGO"), on 5 February 2020;

the decision to give notice to the Polish Government ("the Government") of the complaint concerning Article 10 of the Convention;

the observations submitted by the Government and the observations in reply submitted by the applicant NGO;

the comments submitted by the Helsinki Foundation for Human Rights and Access Info Europe, which were granted leave to intervene by the President of the Section;

Having deliberated in private on 5 December 2023 and 20 February 2024,

Delivers the following judgment, which was adopted on the latter date:

INTRODUCTION

1. The applicant NGO, founded in 2003 with the aim of enhancing transparency in the public domain and raising awareness of good governance and the accountability of power in Poland, complained under Article 10 of the Convention about the Constitutional Court's refusal to grant access to certain judges' meeting diaries and to records of all persons who had entered and left the Constitutional Court building during a certain time period.

THE FACTS

2. The applicant NGO was represented by Mr A. Kuczyński, a lawyer practising in Warsaw and Mr M. Bernarczyk, a lawyer practising in Wrocław.

3. The Government were represented by their Agent, Mr J. Sobczak, of the Ministry of Foreign Affairs.

4. The facts of the case may be summarised as follows.

5. The applicant NGO has lodged numerous requests for access to various types of information, including the meetings diaries of public officials such as government ministers and members of the chancellery of the Prime Minister.

6. In 2017 information concerning alleged meetings between Ms J. Przyłębska, the President of the Constitutional Court, and Mr M. Muszyński, the Vice-President of the Constitutional Court, with the Minister Coordinator of Special Services, Mr M. Kamiński, circulated on national media outlets. Various press publications indicated that such meetings had taken place, but the exact dates and circumstances were never given, and nor was the source of the information. At the time of the alleged meetings between the government officials and persons within the official structure of the Polish Constitutional Court, the Constitutional Court was processing the Polish Prosecutor General's application of 8 June 2017 (case no. K 8/17) seeking to declare unconstitutional certain parts of domestic criminal procedure law relating to presidential pardons. The facts underlying case no. K 8/17 had their origins in Mr M. Kamiński's earlier actions as a government official. The judgment in this case would therefore affect Mr M. Kamiński's status in pending criminal proceedings.

7. On 6 July 2017 the applicant NGO sent an email to the Constitutional Court asking it to disclose information concerning the meetings diaries of Judge J. Przyłębska and Judge M. Muszyński, after 1 January 2017, in so far as they concerned the performance of the duties of the Constitutional Court. The applicant NGO also asked for the records of all people who had entered and left the Constitutional Court building since 1 January 2017. The request did not contain any reasoning or reference to a legal basis in domestic law.

8. On 9 August 2017 the applicant NGO was informed by the Constitutional Court's press office that a meetings diary was not an official document and did not constitute public information pursuant to the provisions of the Act on Access to Public Information (*ustawa o dostępie do informacji publicznej*). Moreover, the Constitutional Court did not keep records of people entering and leaving the building, and therefore such information could not be provided.

9. On 7 September 2017 the applicant NGO lodged a complaint with the Warsaw Regional Administrative Court (*Wojewódzki Sąd Administracyjny*) alleging inactivity on the part of the Constitutional Court. It further asked the administrative court to oblige the President of the Constitutional Court to provide the public information requested.

10. On 23 January 2018 the Warsaw Regional Administrative Court dismissed the applicant NGO's complaint. The court held that the meetings diaries of the President and Vice-President of the Constitutional Court, in so far as they related to the performance of their professional duties, did not constitute public information. A meetings diary was not an official document: it was an internal office document used to organise work and did not prescribe

courses of action for the Constitutional Court. Moreover, according to the case-law of the administrative courts, a visitors' logbook recording people entering and leaving the building did not relate to the operation of the Constitutional Court and as such did not contain public information.

11. The applicant NGO lodged a cassation appeal, relying in particular on the provisions of the Polish Constitution and also mentioning Article 10 of the Convention. It argued that the finding, that information about meetings held by the President and Vice President of the Constitutional Court and persons entering the building of that Court did not amount to "public information", was based on an incorrect interpretation of these provisions.

12. On 18 June 2019 the Supreme Administrative Court (*Naczelny Sąd Administracyjny*) dismissed the cassation appeal. The court concurred with the legal assessment of the Regional Court. It noted that the character of meetings diaries and visitors' logbooks had already been considered in many of its judgments, which had been decided consistently. Meetings diaries and visitors' logbooks constituted internal documents and did not contain public information relating to the operation of the Constitutional Court, because they did not refer to the public sphere of the Constitutional Court's activity. Putting a particular event in the diary was not evidence of factual circumstances: it did not prove whether a particular event recorded there had in fact occurred or not. A meetings diary therefore did not relate to the sphere of facts because it did not confirm the information contained in it.

13. As regards the visitors' logbook, the Supreme Administrative Court found that it did not qualify as public information because it did not contain information about public activities performed by the Constitutional Court. It contained information about third persons who were not connected with public administration. It was a carrier of information of a purely technical nature, used for the administration of a building, supporting the work of the reception desk and serving to maintain safety and good order in the court building.

14. The right of access to public information referred to in Article 61 § 1 of the Constitution concerned only information about such activities of constitutional bodies as were directed towards the performance of specific public tasks.

15. The Supreme Administrative Court further noted that, contrary to the applicant NGO's claim as formulated in its cassation appeal, the Regional Administrative Court had not stated that information on meetings held by the President and Vice-President of the Constitutional Court did not amount to public information. The Regional Court had only held that the request for access to information concerning meetings diaries did not concern public information. The Supreme Administrative Court went on to say that the applicant NGO had requested access to meetings diaries and not access to

information on meetings held by these persons, and expressly stated that such a request would amount to a request for public information.

16. The Supreme Administrative Court noted also that there was no obligation in domestic law to keep a meetings diary or to keep records of persons entering and leaving public buildings.

17. The judgment was served on the applicant NGO's lawyer on 6 August 2019.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

18. Article 61 of the 1997 Constitution provides as follows:

> "1. A citizen shall have the right to obtain information on the activities of public bodies, as well as persons discharging public functions. That right shall also include the right to receive information about the activities of self-governing economic or professional bodies and other persons or organisations relating to the field in which they perform the duties of public authorities and manage public assets or the property of the State Treasury.
>
> 2. The right to obtain information shall ensure access to documents and entry to sittings of collective public bodies formed by public elections, with the opportunity to make sound and visual recordings.
>
> 3. Limitations on the rights referred to in paragraphs 1 and 2 above may be imposed by statute solely to protect the freedoms and rights of other persons and economic entities, public order, national security or significant economic interests of the State.
>
> 4. The procedure for the provision of information, referred to in paragraphs 1 and 2 above, shall be specified by statute or, regarding the Sejm and the Senate, by their rules of procedure."

19. The Act of 6 September 2001 on Access to Public Information provides, in so far as relevant:

> **Section 1**
>
> "1. Any information about public matters shall constitute public information within the meaning of this Act and shall be made available in accordance with the rules and procedures specified by this Act. ..."

20. The relevant international and comparative law material concerning access to public information have been summarised in the Court's judgment in *Magyar Helsinki Bizottság v. Hungary* ([GC], no. 18030/11, §§ 35-64, 8 November 2016).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

21. The applicant NGO complained that the authorities' denial of access to the information it had sought from the Constitutional Court represented

a breach of its rights as provided for in Article 10 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. 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 rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

1. The parties' submissions

22. The Government contended that the applicant NGO had failed to show that it had suffered any significant disadvantage or damage of either a financial or non-pecuniary nature and that therefore the present application should be found inadmissible for lack of significant disadvantage. They further contended that the meetings diaries of the President and the Vice-President of the Constitutional Court did not constitute public information within the meaning of the domestic law, so the applicant NGO could not reasonably claim that its right to obtain information about the activities of the Constitutional Court had been violated.

23. The applicant NGO objected to the Government's suggestion that it had not suffered a significant disadvantage. It submitted that the essence of its activity as an NGO was sourcing information on the activities of public authorities and that deprivation of access to such information undermined the very purpose of that activity. It further submitted that such information was a prerequisite for its contribution to public debate which it had manifested on frequent occasions. The applicant NGO further contended that even if the Court were to find that it had not suffered a significant disadvantage, the application should still be examined on the merits in the interests of respect for human rights as defined in the Convention and the Protocols thereto (Article 35 § 3 (b) of the Convention).

2. The Court's assessment

(a) No significant disadvantage

24. As regards the Government's preliminary objection that the applicant NGO has not suffered a significant disadvantage, the Court has held that this admissibility criterion, inspired by the general principle of *de minimis non curat praetor*, hinges on the idea that a violation of a right, however real from

a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court (see *Ladygin v. Russia* (dec.), no. 35365/05, 30 August 2011). Violations which are purely technical and are insignificant save from a formalistic point of view do not merit European supervision (see *Shefer v. Russia* (dec.), no. 45175/04, § 18, 13 March 2012). The assessment of this minimum level is relative and depends on all the circumstances of the case (see *Gagliano Giorgi v. Italy*, no. 23563/07, § 55, ECHR 2012 (extracts)). The severity of a violation should be assessed by taking into account both the applicant's subjective perceptions and what is objectively at stake in a particular case (see *Korolev v. Russia* (dec.), no. 25551/05, ECHR 2010; *Finger v. Bulgaria*, no. 37346/05, § 70, 10 May 2011; and *Eon v. France*, no. 26118/10, § 34, 14 March 2013).The Court has accepted that individual perceptions encompass not only the monetary aspect of a violation, but also the general interest of the applicant in pursuing the case (see *Havelka v. Czech Republic* (dec.), no. 7332/10, 20 September 2011). However, the applicant's subjective perception cannot alone suffice to conclude that he or she has suffered a significant disadvantage. The subjective perception must be justified on objective grounds (see *Ladygin*, cited above). A violation of the Convention may concern important questions of principle and thus cause a significant disadvantage regardless of pecuniary interest (see *Korolev*, cited above).

25. The Court has also noted that that the Convention does not limit the application of this admissibility criterion to any particular right protected under the Convention. In the context of Article 10 of the Convention, the Court has stressed the utmost importance of freedom of expression as one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment (see *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24). This approach has been consistently endorsed in the Court's case-law (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 78, 7 February 2012; *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 48, ECHR 2012 (extracts); and *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 100, ECHR 2013 (extracts)). Therefore, in cases concerning freedom of expression the application of this admissibility criterion should take due account of the importance of that freedom and should be subject to careful scrutiny by the Court (see *Syłka v. Poland*, no. 19219/07 (dec.) § 28, 3 June 2014; *Margulev v. Russia*, no. 15449/09, § 41, 8 October 2019 and *Šeks v. Croatia*, no. 39325/20, § 48, 3 February 2022). This scrutiny should encompass, among other things, such elements as contribution to a debate of general interest and whether a case involves the press or other news media.

26. Turning to the circumstances of the present case, the Court accepts that the point at issue is clearly of subjective importance to the applicant NGO, whose main area of activity is gathering information, sharing it with

the public and contributing to public debate. The decision to deny access to information it sought therefore undermined the very core of its activity. As to what was objectively at stake, the Court observes that the case has attracted media attention (see paragraph 6 above) and concerns the question whether the meetings diary of the President of the Constitutional Court should be characterised as public information which should be made accessible to an NGO acting as a public watchdog. Taking the above into account, the Court would also emphasise the objective significance of non-governmental organisations' access to information which may be important to the public.

27. As to whether respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits, the Court reiterates that the application raises an issue that is not insignificant, either at the national level (see paragraph 6 above) or in Convention terms.

28. Having regard to the foregoing, the Court considers that the requirement of Article 35 § 3 (b) of the Convention, namely the lack of any significant disadvantage for the applicant NGO, has not been satisfied and that the Government's objection should therefore be dismissed.

(b) Applicability of Article 10 to the present case

29. The core question to be addressed in the present case is whether Article 10 of the Convention can be interpreted as guaranteeing the applicant NGO a right of access to information held by public authorities. The Court is therefore called upon to rule on whether the denial of access to the information sought by the applicant NGO resulted, in the circumstances of the case, in an interference with its right to receive and impart information as guaranteed by Article 10.

30. The question whether the grievance of which the applicant NGO complained falls within the scope of Article 10 is therefore inextricably linked to the merits of its complaint. Accordingly, the Court holds that the Government's objection should be joined to the merits of the application.

The Court further finds that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant NGO

31. The applicant NGO submitted that all the criteria laid down in *Magyar Helsinki Bizottság v. Hungary* ([GC], no. 18030/11, 8 November 2016) had been satisfied.

32. Firstly, the information had been necessary to enable the applicant NGO to exercise its freedom to "receive and impart information and ideas", that is, to verify at their source the allegations and speculation in the Polish media concerning meetings held by prominent public officials with Ms J. Przyłębska and Mr M. Muszyński on the premises of the Constitutional Court.

33. Secondly, the nature of the information sought satisfied the public-interest test. In this connection the applicant NGO referred to the background to its request and the information which had circulated in the media at that time concerning alleged meetings of Ms J. Przyłębska and Mr M. Muszyński with the Minister Coordinator of Special Services (see paragraph 6 above).

34. Thirdly, as regards the role of the applicant NGO, it was committed to the dissemination of information on issues concerning human rights and the rule of law. The applicant NGO had identified itself from the outset and in its request of 6 July 2017 as an association and provided its address and number in the National Judicial Registry, as well as its website address and its registered purpose. Its request for information had been made with a view to informing the public in its capacity as a public "watchdog".

35. Fourthly, the information sought had been ready and available. As regards the visitors' logbook, the applicant NGO acknowledged that the criteria of readiness and availability were not subject to effective verification in domestic law and this issue had not been reviewed during the proceedings before the administrative courts.

(b) The Government

36. The Government acknowledged the role of the applicant NGO as a well-established public-interest organisation committed to the dissemination of information on issues of human rights and the rule of law. They also assumed that the purpose of the request for information had been to "receive and impart" that information to the public. Two out of the four criteria analysed in *Magyar Helsinki Bizottság* (cited above, §§ 158-58 and 169-70), had therefore been satisfied. They submitted, however, that, in their view, the criterion of the nature of the information sought had not been met in the case of either the meetings diaries or the visitors' logbook. Additionally, the visitors' logbook was not "ready and available". They therefore asserted that the fourth criterion had not been met either.

37. Referring to the nature of the information sought, the Government submitted that in the light of the domestic legislation and the well-established case-law of the administrative courts, the information sought by the applicant NGO had not been "public", and therefore the Constitutional Court had had no obligation to impart it to the applicant NGO. The case-law of the Supreme Administrative Court referring to the nature of public officials' meetings diaries had been based to a large extent on cases initiated as a result of

requests made by the applicant NGO. The Government indicated fifteen judgments of the Supreme Administrative Court delivered between 2014 and 2019 in which the applicant NGO had been refused access to the meetings diaries of various public officials. The Supreme Administrative Court had been consistent in holding that the meetings diaries were internal, unofficial documents used for technical purposes and the proper organisation of the work of the relevant bodies and that they did not constitute "public information". What is more, the inclusion of a particular meeting in the diary had only a technical character and did not confirm whether that meeting had in fact taken place.

38. As regards visitors' logbooks recording persons entering and leaving public buildings, the Government submitted that also in that respect the case-law of the Supreme Administrative Court had been consistent in referring to them as holding information of a purely internal character. In the present case the visitors' logbook did not refer to the public operations of the Constitutional Court and did not include public information. What is more, the criterion of the "readiness and accessibility" of that document had not been met given that, as indicated by the President of the Constitutional Court in her reply to the applicant NGO's request, the Constitutional Court had not kept a record of persons entering and leaving its premises.

39. The Government further noted that the applicant NGO had requested the meetings diaries of the President and Vice-President of the Constitutional Court rather than information about the meetings of those persons as recorded in the diaries in question. The Government submitted that according to the reasoning of the Supreme Administrative Court's judgment of 18 June 2019, such a request could have different legal consequences for the applicant NGO.

40. They further submitted that the applicant NGO's request regarding the meetings diary of Mr M. Muszyński as Vice-President of the Constitutional Court could not be granted because he had been appointed to that post the day before the request, that is, on 5 July 2017. Consequently, the request in question referred mostly to the period in which Mr M. Muszyński had been an ordinary judge of the Constitutional Court.

41. The Government also submitted that the information sought by the applicant NGO from the Constitutional Court had not been necessary for it to carry out its work as a human rights organisation contributing to debate on matters of public interest. They concluded that the denial of access to information the public character of which had not been demonstrated had not amounted to an interference with the applicant NGO's rights protected under Article 10 of the Convention.

2. Third-party interveners

(a) Helsinki Foundation for Human Rights

42. The Helsinki Foundation for Human Rights ("the Foundation") summarised the controversy surrounding the election of judges to the Constitutional Court, its impartiality and its functioning (for more information see the Court's judgment in *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, §§ 4-63, 7 May 2021).

43. The Foundation also gave some background to the request lodged by the applicant NGO. It submitted that, according to press reports, shortly after the election of Ms J. Przyłębska to the position of President of the Constitutional Court, she had met with Mr M. Kamiński, Minister Coordinator of Special Services, in the Constitutional Court building. The official reason for that visit was that he wanted to congratulate Ms J. Przyłębska on her appointment to the position of President of the Constitutional Court. The alleged visit had taken place despite the then ongoing proceedings in the Constitutional Court concerning the limits of the President's right to grant pardons. Moreover, the Constitutional Court had initiated proceedings in the dispute between the Supreme Court and the President over jurisdiction, forcing the Supreme Court to stay the relevant proceedings.

44. The Foundation submitted that in those circumstances the actions of Polish NGOs seeking to verify information concerning the functioning of the Constitutional Court had to be seen as a form of protection of the public interest. Public opinion had to be able to assess whether the Constitutional Court was a truly independent body since a politicised court could quickly become a tool in the hands of politicians.

45. Lastly, the Foundation described its own so far unsuccessful attempts to obtain access to public information from the Constitutional Court, which had refused to inform the Foundation of the number of cases in which the President of the Constitutional Court had selected judge rapporteurs in disregard of the statutory criteria.

(b) Access Info Europe

46. Access Info Europe set out the relevant legislation or case-law from selected European countries and asserted that, in its view, public officials' meetings diaries amounted to public information which "should be accessible by anyone".

47. It further submitted that access to information held by judicial bodies fell within the scope of the access-to-information laws of a majority of the Council of Europe member States.

3. The Court's assessment

(a) General principles

48. The question which arises in the present case is whether the matter complained of by the applicant NGO falls within the scope of Article 10 of the Convention. The Court observes that paragraph 1 of this Article provides that the "right to freedom of expression ... shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority".

49. The Court notes that Article 10 does not confer on the individual a right of access to information held by a public authority or oblige the Government to impart such information to the individual. However, such a right or obligation may arise where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information", and where its denial would constitute an interference with that right (see *Magyar Helsinki Bizottság*, cited above, § 156). In determining this question, the Court will be guided by the principles laid down in *Magyar Helsinki Bizottság* (ibid., §§ 149-80) and will assess the case in the light of its particular circumstances and having regard to the following criteria: (a) the purpose of the information request; (b) the nature of the information sought; (c) the role of the applicant; and (d) whether the information was ready and available. These criteria are cumulative (see *Centre for Democracy and the Rule of Law v. Ukraine* (dec.), no. 75865/11, §§ 50-63, 3 March 2020; *Mikiashvili and Others v. Georgia* (dec.), nos. 18865/11 and 51865/11, §§ 51-56, 19 January 2021; and *Bubon v. Russia*, no. 63898/09, §§ 39-45, 7 February 2017).

50. As regards the purpose of the information request, a person requesting access to information held by a public authority must be doing so in order to enable his or her exercise of the freedom to "receive and impart information and ideas" to others. The Court has therefore placed emphasis on whether the gathering of the information was a relevant preparatory step in journalistic activities or in other activities creating a forum for, or constituting an essential element of, public debate (see, *mutatis mutandis*, *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, §§ 27-28, 14 April 2009, and *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*, no. 39534/07, § 36, 28 November 2013). Therefore, in order for Article 10 to come into play, it must be ascertained whether the information sought was in fact necessary for the exercise of freedom of expression (see *Roşiianu v. Romania*, no. 27329/06, § 63, 24 June 2014). Obtaining access to information would be considered necessary if withholding it would hinder or impair the individual's exercise of his or her right to freedom of expression (see *Társaság a Szabadságjogokért*, cited above, § 28), including the freedom "to receive and impart information and ideas", in a manner

consistent with such "duties and responsibilities" as may follow from paragraph 2 of Article 10.

51. As regards the nature of the information sought, the Court has found that the information, data or documents to which access is sought must generally meet a public-interest test in order to prompt a need for disclosure under the Convention. Such a need may exist where, among other things, disclosure provides transparency as to the conduct of public affairs and as to matters of interest to society as a whole and thereby allows participation in public governance by the public at large (see *Magyar Helsinki Bizottság*, cited above, § 161).

52. The Court has emphasised that the definition of what might constitute a subject of public interest will depend on the circumstances of each case. The public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention, or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about. The public interest cannot be reduced to the public's thirst for information about the private life of others, or to an audience's wish for sensationalism or even voyeurism. In order to ascertain whether a publication relates to a subject of general importance, it is necessary to assess the publication as a whole, having regard to the context in which it appears (see *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, §§ 97-103, ECHR 2015 (extracts), with further references).

53. In this connection, the privileged position accorded by the Court in its case-law to political speech and debate on questions of public interest is relevant. The rationale for allowing little scope under Article 10 § 2 of the Convention for restrictions on such forms of expression (see *Lingens v. Austria*, 8 July 1986, §§ 38 and 41, Series A no. 103, and *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, § 61, ECHR 1999-IV) likewise militates in favour of affording a right of access under Article 10 § 1 of the Convention to such information held by public authorities.

54. As regards the role of the applicant, a logical consequence of the two criteria set out above is that the particular role of the seeker of the information in "receiving and imparting" it to the public assumes special importance. Thus, in assessing whether the respondent State had interfered with applicants' Article 10 rights by denying access to certain documents, the Court has attached particular weight to the applicant's role as a journalist (see *Roşiianu*, cited above, § 61) or as a social watchdog or non-governmental organisation whose activities related to matters of public interest (see *Társaság a Szabadságjogokért*, cited above, § 36; *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung*, cited above, § 35;

Youth Initiative for Human Rights v. Serbia, no. 48135/06, § 20, 25 June 2013; and *Guseva v. Bulgaria*, no. 6987/07, § 41, 17 February 2015).

55. The function of creating various platforms for public debate is not limited to the press but may also be exercised by, among others, non-governmental organisations, whose activities are an essential element of informed public debate. The Court has accepted that when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press (see *Animal Defenders International*, cited above, § 103) and may be characterised as a social "watchdog" warranting similar protection under the Convention to that afforded to the press (ibid.; see also *Társaság a Szabadságjogokért*, cited above, § 27, and *Youth Initiative for Human Rights*, cited above, § 20). It has recognised that civil society makes an important contribution to the discussion of public affairs (see, for instance, *Steel and Morris v. the United Kingdom*, no. 68416/01, § 89, ECHR 2005-II, and *Társaság a Szabadságjogokért*, cited above, § 38).

56. The manner in which public watchdogs carry out their activities may have a significant impact on the proper functioning of a democratic society. It is in the interest of democratic society to enable the press to exercise its vital role of "public watchdog" in imparting information on matters of public concern (see *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 59, ECHR 1999-III), just as it is to enable NGOs scrutinising the State to do the same thing. Given that accurate information is a tool of their trade, it will often be necessary for persons and organisations exercising watchdog functions to gain access to information in order to perform their role of reporting on matters of public interest. Obstacles created in order to hinder access to information may result in those working in the media or related fields no longer being able to assume their "watchdog" role effectively, and their ability to provide accurate and reliable information may be adversely affected (see *Társaság a Szabadságjogokért*, cited above, § 38).

57. Lastly, in reaching a conclusion that the refusal of access was in breach of Article 10, the Court has previously had regard to the fact that the information sought was "ready and available" and did not necessitate the collection of any data by the government (see *Társaság a Szabadságjogokért*, cited above, § 36, and contrast *Weber v. Germany* (dec.), no. 70287/11, § 26, 6 January 2015). On the other hand, the Court dismissed a domestic authority's reliance on the anticipated difficulty of gathering information as a ground for its refusal to provide the applicant association with documents, where such difficulty was generated by the authority's own practice (see *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung*, cited above, § 46).

58. The fact that the information requested is ready and available ought to constitute an important criterion in the overall assessment of whether a refusal to provide the information can be regarded as an "interference" with the

freedom to "receive and impart information" as protected by that provision (see *Magyar Helsinki Bizottság*, cited above, § 170).

(b) Application of the above principles

As regards the meeting diaries

59. In the present case, the Court is satisfied that the applicant NGO wished to exercise the right to impart information on a matter which it considered to be of public interest and sought access to information to that end.

60. The Court notes that the applicant NGO did not need the information sought to prepare a press article or to complete a survey (compare and contrast *Mikiashvili and Others*, cited above, § 49, and *Magyar Helsinki Bizottság,* cited above § 175). However, the applicant NGO's activity amounts to gathering and disseminating information which might be important for the public or contribute to public debate. This is in particular so in the political context of the present case, where doubts had been raised as to the contact between the President and Vice-President of the Constitutional Court and an active politician on the premises of the Constitutional Court, while a case was pending before that court which outcome would have repercussions for the politician (see paragraph 6 above). The Court therefore considers that the information sought was necessary for the applicant NGO to exercise its right to freedom of expression. It follows that in the circumstances of the present case the criterion of the purpose of the information sought was fulfilled.

61. As regards the nature of the information sought, the Court has found in previous cases that the denial of access to information constituted an interference with the applicants' right to receive and impart information in situations where the data sought amounted to "factual information concerning the use of electronic surveillance measures" (see *Youth Initiative for Human Rights,* cited above, § 24), "information about a constitutional complaint" and "on a matter of public importance" (see *Társaság a Szabadságjogokért*, cited above, §§ 37-38), "original documentary sources for legitimate historical research" (see *Kenedi v. Hungary*, no. 31475/05, § 43, 26 May 2009), decisions concerning real property transaction commissions (see *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung*, cited above, § 42) and the names of public defenders and the number of times they had been appointed, in the context of conducting a survey (see *Magyar Helsinki Bizottság*, cited above, § 180). The Court attaches a great deal of weight to the presence of particular categories of information considered to be in the public interest.

62. Turning to the circumstances of the present case, the Court notes that in its information request of 6 July 2017 the applicant NGO sought a list of the meetings held by Judge J. Przyłębska, the President of the Constitutional Court, and Judge M. Muszyński, the Vice-President of the Constitutional

Court, after 1 January 2017, in so far as they concerned the performance of duties of the Constitutional Court (see paragraph 7 above). The Court does not dispute that the information sought was in the public interest, especially taking into consideration the political context of the case and the public debate around the impartiality of the Constitutional Court (see paragraphs 6 and 42above), and it considers that an NGO whose aim is to disseminate information should have the right to receive information which might be important for the public or contribute to public debate.

63. The Court notes that the Supreme Administrative Court in its judgment of 18 June 2019 held that according to the domestic well-established case-law, a meetings diary was an internal document which did not refer to the public sphere of the Constitutional Court's activities. According to the Supreme Administrative Court, putting a particular event in the diary was not evidence of factual circumstances; it did not prove whether a particular event recorded there had in fact occurred or not. The diary therefore did not relate to the sphere of facts because it did not confirm the information it contained (see paragraph 12 above). Such line of the domestic case-law in essence did not take into account the Convention criteria in respect of what information can be considered to be of public interest. It is not the Court's role to pronounce itself in general on whether meeting diaries should be public or non-public documents for the purposes of the domestic law and the contracting States enjoy a wide margin of discretion in this respect. However, in the specific circumstances of the present case, especially in light of its political context (see paragraph 60 above) the diaries of meetings should have been considered as having a public-interest character. The domestic case-law as it stood, qualifying meeting diaries as internal, non-public documents, did not provide any possibility to take this aspect of the request for information into account.

64. The Court is aware of the Supreme Administrative Court's argument that the applicant NGO could have asked for a list of the meetings actually held by the President and Vice-President of the Constitutional Court during the period specified (see paragraph 15 above). Regardless of whether the applicant NGO could have formulated its request for information in a different manner, the Court considers that by asking for the meeting diaries for a specific period, the applicant NGO had made it clear that it sought information about the meetings held by the President and Vice President of the Constitutional Court on the premises of the Constitutional Court. The Court observes that none of the domestic courts considered the context in which the applicant NGO requested this information, despite the speculations that circulated in the national media at that time (see paragraph 6 above). By failing to make any individual assessment of the interests at stake (see further paragraph 76 below), the domestic authorities effectively denied the applicant NGO access to information which, in the Court's view, was of public interest, especially taking into consideration the political context of the

case. The Court considers therefore that also the second criterion that is the nature of information sought has been fulfilled.

65. It was not disputed between the parties that the applicant NGO was a well-established public-interest organisation committed to the dissemination of information on issues concerning human rights and the rule of law. It was likewise not disputed that the meetings diary requested did exist. The information sought was therefore "ready and accessible". It follows that all the threshold criteria for the right of access to State-held information have been met in the present case.

66. The denial of access to information therefore amounted to interference with the applicant NGO's right to receive and impart information. Accordingly, the Government's objection (see paragraph 22 above) as to the applicability of Article 10 of the Convention to the present case should be dismissed.

67. It remains to be determined whether the interference was justified.

68. In order to be justified, an interference with the applicant NGO's right to freedom of expression must be "prescribed by law", pursue one or more of the legitimate aims mentioned in paragraph 2 of Article 10, and be "necessary in a democratic society".

(c) The parties' submissions

69. The Government submitted that there had been no interference with the applicant NGO's rights under Article 10 of the Convention. They therefore made no comments as regards the circumstances justifying the interference complained of.

70. The applicant NGO submitted that neither the Constitution nor the Act on Access to Public Information contained a definition of "public information". Neither did those documents contain a distinction between "public" and "internal" spheres of activity of the State administration. That distinction had been developed in the case-law of the administrative courts after 2010 even though no legislative changes had been made in that respect. The applicant NGO contended that it was unacceptable under Article 10 § 1 of the Convention that the interference complained of had its basis in case-law, which was retrospective in nature, and not in statute law enacted by Parliament. The applicant NGO further submitted that the primary consequence of that legal basis was the lack of foreseeability of the concept of the "internal document", which was constantly evolving in the direction of further restrictions on access to information without any indication where the boundaries between the public (and accessible) and the internal (and inaccessible) lay.

71. The applicant NGO concluded that the arguments referred to above were sufficient to find a violation of Article 10 of the Convention. In particular, it contended that it was impossible to show any "legitimate aim" or "pressing social need" behind the denial of access to information classified

by the domestic authorities as "internal". In any event, no legitimate aim or pressing social need had been shown or relied on either in the domestic proceedings or in the Government's observations.

(d) The Court's assessment

72. As regards the words "in accordance with the law" and "prescribed by law" which appear in Articles 8 to 11 of the Convention, the Court observes that it has always understood the term "law" in its "substantive" sense, not its "formal" one; it has included both "written law", encompassing enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament, and unwritten law. "Law" must be understood to include both statutory law and judge-made "law". In sum, the "law" is the provision in force as the competent courts have interpreted it (see *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 88, ECHR 2005-XI, with further references).

73. The Court notes that the provisions of the Constitution and the Act on Access to Public Information are indeed general in nature and it would appear that they warrant broad access to public information (see paragraphs 18 and 19 above). They rely on the notion of "public information", which has not been defined in the law. However, the provisions of the Act on Access to Public Information have been interpreted by the administrative courts, which have developed the concept of the internal and public spheres of administration. Public officials' meetings diaries have been classified as internal documents. It appears from the Government's submissions that the case-law of the Supreme Administrative Court in this respect is consistent and well established.

74. The Court concludes therefore that the denial of access to information sought had a basis in the domestic law.

75. It remains to be established whether the interference complained of pursued one or more of the legitimate aims mentioned in paragraph 2 of Article 10, and whether it was "necessary in a democratic society".

76. In this connection the Court notes that the domestic authorities failed to present any argument, either in the domestic proceedings or in the Government's observations, to show that the denial of information sought by the applicant NGO had pursued any legitimate aim or had been "necessary in a democratic society". The Court is mindful of the fact that access to certain information may be restricted for security reasons or for the protection of State secrets or the private life of others. However, the domestic authorities did not refer to any of those reasons to justify the denial of access to information. Without taking the specific circumstances of the case into account (see paragraphs 63-64 above), they limited their argument to asserting that the information sought could not be characterised as "public" within the meaning of the domestic provisions and was therefore not subject to disclosure (see paragraph 12 above).

77. In view of the above, the Court is precluded from further assessing the legitimate aim of the domestic authorities' refusal to provide the applicant NGO with the information requested and from analysing whether the interference with the applicant NGO's right was proportionate in the circumstances of the case.

78. There has accordingly been a violation of Article 10 of the Convention in that respect.

4. As regards the records of entry

79. In its request of 6 July 2017 the applicant NGO also asked for the records of everyone who had come into and out of the Constitutional Court building since 1 January 2017 (see paragraph 7 above).

80. The Court notes that according to the information which the applicant NGO received from the Constitutional Court on 9 August 2017, that court did not keep records of persons entering and leaving the building (see paragraph 8 above). This information was not the subject matter of the domestic courts' examination and the applicant NGO acknowledged in its observations that it could not be effectively verified whether the requested logbook actually existed (see paragraph 35 above). As noted by the Supreme Administrative Court, there was no obligation in domestic law to keep records of persons entering and leaving public buildings (see paragraph 16 above). It follows that, in the case of the logbook recording persons entering and leaving the Constitutional Court building, there is no evidence that the information sought by the applicant NGO was "ready and accessible". The Court therefore concludes that there has been no interference with the applicant NGO's right to receive and impart information as regards the denial of access to a logbook recording persons entering and leaving the Constitutional Court building.

81. It follows that there has been no violation of Article 10 of the Convention in that respect.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

83. The applicant NGO made no claim in respect of pecuniary and non-pecuniary damage.

B. Costs and expenses

84. The applicant NGO also claimed EUR 6,200 for the costs and expenses incurred before the domestic courts and the Court.

85. The Government submitted that the applicant NGO's claim was unsubstantiated and not supported by any documents.

86. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses.

FOR THESE REASONS, THE COURT,

1. *Joins to the merits*, by a majority, the Government's objection as to applicability of Article 10 of the Convention and to dismisses it;

2. *Declares*, by a majority, the application admissible;

3. *Holds*, by 6 votes to 1, that there has been a violation of Article 10 of the Convention in respect of the refusal to grant the applicant NGO access to the meeting diaries;

4. *Holds*, unanimously, that there has been no violation of Article 10 of the Convention in respect of the refusal to grant the applicant NGO access to the records of entry;

5. *Dismisses*, unanimously, the applicant NGO's claim for costs and expenses.

Done in English, and notified in writing on 21 March 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth Registrar	Marko Bošnjak President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Wojtyczek is annexed to this judgment.

M.B.
I.F.

DISSENTING OPINION OF JUDGE WOJTYCZEK

1. I respectfully disagree with the view that Article 10 is applicable in the instant case and that it has been violated.

I refer in this regard to the views expressed in my dissenting opinion appended to the judgment in the case of *Guseva v. Bulgaria*, no. 6987/07, 17 February 2015.

2. In addition, I find problematic some specific arguments developed in the reasoning of the judgment. In particular, I disagree with the special treatment reserved for journalists and NGOs under the Court's case-law (see, in particular, paragraphs 26 and 54-56). I have explained my objections to this approach in the above-mentioned dissenting opinion, point 7 (compare also my concurring opinions in the cases of *Makraduli v. the former Yugoslav Republic of Macedonia*, nos. 64659/11 and 24133/13, 19 July 2018, points 8-9, and *Monica Macovei v. Romania*, no. 53028/14, 28 July 2020, point 4).

I am not sure that it is correct to say that in Poland the notion of public information has not been defined in the law (see paragraph 73). A definition is given in section 1 of the Act on Access to Public Information (see paragraph 19) and this definition has been further refined in the extensive case-law of the domestic courts. It would have been preferable to follow the usual manner of presenting the relevant legal framework and practice and to include detailed information in this part of the reasoning about the domestic case-law subsequently relied on (see paragraphs 63 and 73).

The applicant NGO did not request "a list of the meetings held" (as stated in paragraph 62) but rather the "meeting diaries". Given the well-established domestic case-law concerning access to such diaries, I am not convinced that by asking for the meeting diaries the applicant NGO made it clear that it was seeking information about the meetings actually held (see paragraph 64).

3. At the same time, I fully agree that, under the Polish Constitution, the public have the right to obtain information about the official meetings of holders of senior public office. I would note in this connection that the applicant NGO can still request information about the actual meetings held by the President and Vice-President of the Constitutional Court in their official capacities during the relevant period and is entitled under Polish law to obtain such information. To submit a fresh request for public information, couched in the terms suggested by the Supreme Administrative Court, would not appear to be an excessive burden.