ACCESS TO PUBLIC INFORMATION IN POLAND

Comparing the legal regulation in matters of access to public information in Poland and other EU countries my feeling is that Polish judges as well as other Polish entities that are asked for public information in Poland, have more problems than the rest of the European countries where public affairs have never been a matter of state secrecy.

Here is an example that I have recalled from the past. The wording of the old Polish Constitution of 1951 contained the only solution concerning the affairs of the state. (ARTICLE. 79.1 of the 1951 Constitution: "Vigilance towards the enemies of the people and the urgent safeguarding of state secrets is a duty of every citizen of the Polish People's Republic.")

After the door was opened the people started to ask everything.

The second thought which came to me, was the suspicion that the request for information in your countries is solely considered as to whether the request, violates or does not violate any privacy without isolated public information from other information.

While Polish judges' balance, not only between the right to privacy and the right to information, we also have to balance the meanings of "public case", "obliged entity", "appropriate act." (For example if it is the Act of access to public information, the Act on the re-use of public sector information, may be the Environmental Protection Law etc.) (Article.61.1 of Constitution: A citizen has the right to obtain information on the activities of public authorities and persons holding public office. This right also includes obtaining information on the activities of economic and professional self-government authorities, as well as other persons and organizational units, in so far as they perform the tasks of public authority and manage the property of the State or the property of the State Treasury. Article 1.1. of the Act of access to public information: Any information on public matters constitutes public information within the meaning of the Act, Article 1. 2. The provisions of the Act shall not prejudice the provisions of other laws defining different rules and procedures for accessing information that is public information.).

What is the role of administrative courts in Poland in matters concerning public information?

First- to recognize the complaint against the failure to act
Second- to control the legality of the decision.

The first case happens if the addressee of the question, in the 14 day time limit, is silent or does not fulfil the entire request. (Article 13. 1. of the Act of the access to public information: Providing of public information on request shall be without undue delay, but not later than within 14 days of the date of the request).

The applicant has the right to file a complaint against the failure to act. (SLIDE)

Recognising such a complaint, our court considers the following questions:

Does the request concern public information?
Is the addressee obliged to answer?
And Is the Act of access to public information appropriate?

Theoretically this duty seems to be easy in accordance with article 61 of Constitution.
However, in practice, the courts face many interpretation problems. They are:

Identifying the obliged entity is not often an easy job.
State tasks are carried out not only by state bodies, and

Many private entities were also entrusted with such tasks through commissioning public tasks.

We also find difficulties in interpreting the definition of “public information”, which has been widely defined. This is because access to public information does not mean the right to request any information whatsoever. The scope of the act sets out and covers access to public information (Article 2. 1 of the Act of access to public information: Everyone has the right of access to **public information**, hereinafter referred to as "the right to information".).

On the one hand the interpretation problems leads to a too hasty refusal on the part of the addressee of the request. The addressee do not feel obliged to respond to the application, and as a result the court faces complaints against inaction.

On the other hand, the law is abused by sending hundreds of requests to the selected institutions. (In 2016 Voivodship Administrative Court in Gliwice received 197 complaints (118 against failure to the act, 77 against decision). That amount represents 15% of all complaints directed to IV Department in our Court.
Examples of questions about public information
questions such as the official telephone number of the commune headman,
the shape of the emblem worn by the car ticket controllers and the number of employees,
the number of cats and dogs homeless caught by the municipality,
the number of telephone calls made from the company's mobile phones over one year by the employees,
the content of scientific research conducted as part of dissertation not yet published,
dates of birth of judges of particular courts and places in which they reside,
civil law contracts concluded with public institutions,
how many responses in the field of public information were given the xxx Commune etc.).

Hundreds of applications containing many questions, regarding a very wide range of information requested, can cause the paralysis of real functions of the body.

Often, the aim of the applicant is not to care for public affairs or the proper budget economy.
The inquirer collects information, for their particular purposes, for scientific work or for private matters.

Taking into consideration the fact that the application is free of charge and the applicant is not obliged to show any interest, there is no possibility of refusing such applications on the grounds of our legal regulations. (Article 2. 2 of the Act of access to public information: A person exercising the right to public information may not be required to demonstrate a legal or factual interest).

Besides, the court is supposed to analyse the status of the addressee, seek links between the local government and public companies. By this, I mean schools, hospitals, commercial companies that are private entities but perform tasks entrusted to them, e.g. road works and telecommunications, etc.).

The second courts task is to control the legality of the decision.
Refusal to provide public information requires acting in a special way. It is an administrative decision to which the claimant can appeal to our court. (Article. 16. 1.of the Act of access to public information**:** The refusal to provide public information is followed by a decision).

Refusal to provide information is possible due to a company’s confidentiality or privacy of an individual (Article 51.1 of Constitution: No one may be obliged otherwise than under the Act to disclosure of information about his person. Article 5.2 of the Act of access to public information :The right to public information is subject to restrictions on the privacy of a natural person or the

secrecy of an entrepreneur. This restriction does not apply to information relating to persons performing public functions related to the performance of these functions, including the terms of entrustment and performance of the function, and the case where the natural or legal person resigns from their rights).

Until 2011, prior to the introduction of amendments to the Act about access to public information, such an act was subject to a review by a civil court. Since 2011 the obligation to check the legality of the decision rests with the administrative court.
In my humble opinion it seems to be not very adequate in many cases.

Why do I think so?

Polish administrative courts controls the legality of decision. The control includes the conformity with substantial law. (Act of 25 July 2002. The Law on the Administrative Courts**:** Article 1. § 1. The administrative courts exercise the judicial system by controlling the activities of the public administration.
§ 2. The control referred to in § 1 shall be exercised in respect of lawfulness unless the law provides otherwise).
Act of 30 August 2002 on proceedings before administrative courts: Article. 3. § 1. Administrative courts control the activities of the public administration).

The documents from which certain specific facts arise, should be in the case file.

These documents should be assessed by the court (**The case of NSA I OSK 3076/12 of March 6, 2013http://orzeczenia.nsa.gov.pl/doc/D00217A23D**
The court ca not justify the scrutiny of the position of the authority solely from the point of view of the rationality of the reasoning contained in the justification of the decision being examined. It is not his role. Control of legality, so the entitlement granted by Article 184 of the Constitution of the Republic of Poland includes the assessment of compliance with substantive law, the assessment of compliance required by law, the assessment of the respect of the rules of competence. Judicial review must be made in all three of the aforementioned areas. Eliminating any one of them would render it defective and in a way that would undermine the constitutional right to the court referred to in Art. 45 sec. 1 Constitution. The assessment of the legality of the administration is not only based on the legal status, but also on the actual situation of the case. The Court of First Instance is obliged to base its decision on the facts as documented in the file. Administrative files play a fundamental role in controlling the legality of the contested conduct of a public administration body. The body must provide the administrative court with complete evidence of the case. In case the administration fails to submit the full court file, the court should not adjudicate on the case, but should call on the authority to complete the file. If this is not done, the judgment will not be lawful.

Judgment of the WSA in Gliwice of October 10, 2013, no. IV SA / Gl 815/13 http://or.nsa.gov.pl/doc/C54A809FA4.
The court considered necessary to consult the lawyer's entire opinion, in order to assess whether the substance of the case was related to the need to protect the interests of the client, and the refusal to provide public information corresponds to the substantive premises of the "professional secrecy of the lawyer".
This obligation would not be sufficient to limit the formal finding that a refusal of access to public information in the form of an administrative decision on the grounds of the secrecy of a solicitor is justified..

However the case files are open. As provided in Article 12a (4) of the procedural act, the file shall be made available to the parties. (They can review the file to receive copies and extracts. The only rule is that disclosure involving a threat of morality, state security, public order and also classified information).
Classified information is a matter regulated by a separate act (Law of 5 August 2010 on the protection of classified information).

What do we do with a document which is the subject of a request for information, but there is doubt whether or not the information required, consists of protected data?

Placing in a court file, a document that is of interest to the party and which only the court is supposed to decide, whether or not it is possible, is therefore a challenge.
After all, the judge cannot keep the document in his or her private drawer because it is part of the case file. Leaving it on file may expose the court to liability for damages in case of disclosure of data that is in fact private or protected by another secret.

Another significant problem arises from the fact that the courts have not been given the power to conduct evidence, and in particular the appointment of experts, as opposed to the civil courts who do hold such powers.

This causes the solution to the often complex problem of invoking the trade secret that requires the knowledge of a judge who is not a professional - e.g. a chemist, a pharmacist, an engineer, and so on. Occasionally this pertains to data that is strictly specialised in various fields and it would be easier to use the opinion of an independent professional in this matter. But we don't have such an opportunity.

I argue that administrative courts are entrusted with competences, often requiring expert judgment, and that the legislator has not sufficiently provided the tools necessary to assess the legitimacy of the addressee of the application as well as assess the document or other information that is required.

The last, but not least problem, stems in the case of the private data protected by the law.

In case of refusal for privacy reasons, the addressee of the application often solves the problem of balancing the right to information and the right to privacy by anonymizing certain data. However, when the essence of the question is precise, this data is required for an administrative decision.

Of the many publicity questions requiring a special balance between the two types of rights guaranteed in the 1997 Constitution of the Republic of Poland, are questions about the amount of earnings. If these are questions of a general nature and the salary is paid from the state budget, there is no doubt that the question should be answered.

Sometimes, however, the question of the amount of remuneration on a particular position in small institution, leads to the disclosure of a person's earnings and thus violates his or her privacy.

In this case our Constitutional Tribunal states that in the case of finding a circle of persons whose private life may be the subject of interest to the public, there is a single mechanism or criteria for examining the extent of possible interference (**Judgment of the Constitutional Court of 20 March 2006, ref. Act K 17/05 OTK-A Publication 2006/3/30:** Not only persons acting in the range of the empire, but also those influencing the decision-making process of the sovereign nature, so persons holding such positions and functions whose performance is tantamount to taking actions that directly affect the legal situation of others or is at least linked to the preparation of widely understood decisions on other subjects. It is not possible for the Court to make it clear and unambiguous whether and under what circumstances a person operating within a public body can be considered to hold a public function. Not every public person will be the one who performs public functions. The Court pointed out that not every employee of such an institution would be that officer whose sphere of protected privacy may be narrowed from the perspective of the legitimate interest of third parties exercising the right to information. It cannot be asserted that, in the case of finding a circle of person whose private life may be the subject of interest in the public, there is a single mechanism or criteria for examining the extent of possible interference.

As you can see in our legislation, the right to information is to ensure that public authority in all forms and facets is transparent, and that right is treated very broadly.

On the other hand, however, it is necessary to maintain the right to privacy of individuals and other secrets guaranteed by law.

Life is so rich that it is impossible to create casuistic solutions. It would be difficult to create a general, abstract, and even more closed catalogue, involving situations protected by privacy and overriding public interest.
Hence the problem of access to information will always be a challenge for our courts.

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