

Information on the activity of public authorities in Poland during the epidemic

Abstract: The Constitution of the Republic of Poland of 2 April 1997 mentioned i.a. the right to obtain information about the activities of public authorities, which was laid down in more detail in the Act of 6 September 2001. Due to the status of the epidemic and numerous restrictions on fundamental rights and freedoms providing citizens with access to reliable information on the activities of the authorities is particularly important. Meanwhile, according to the COVID Act during the epidemic, the provisions on inactivity of organs shall not apply. These provisions allowed to challenge, among others, the inaction of the authorities obliged to consider requests for public information. In practice, these legal solutions in the state of epidemics already lead to too frequent situations that the possibility of obtaining public information depends only on the good will of the authority. The Ombudsman has already pointed out this problem.

Keywords: the right to obtain information, human rights, epidemic, crisis

In a crisis situation, the question of preserving and respecting human rights always arises. Looking for an answer, it is worth considering how far and to what extent a state can restrict human rights in a crisis situation. Can significant statutory changes be made at this time, including constitutional ones? At a time when

most countries in the modern world are facing problems caused by the spreading SARS-CoV-19 virus, these questions also concern the right that seems obvious in Poland, i.e. the right to information on the activity of public authorities.

The right of access to public information is one of the most important rights in the catalogue of civil and political rights. It is aimed at creating a civil society by increasing transparency in the activities of public authorities, protecting, and strengthening the principles of the democratic rule of law, and ensuring social control over the activities of public authorities¹. And it can be assumed that nothing serves a public institution better than social control. This right is also one of the basic instruments for ensuring citizens' participation in public life. The right of access to public information has been recognised as a human right by the European Court of Human Rights². Democracy requires openness. Limiting the transparency of public authority means limiting the democracy.

The principle of openness of the public authority's activity was directly enshrined in the Constitution of the Republic of Poland of April 2, 1997³, then this principle was repeated in the provisions of all 3 local government acts⁴ and its implementation was specified in more detail in the Act of September 6, 2001 on access to public

¹ Judgement of the Supreme Administrative Court of 1 October 2010, I OSK 1149/10, all cited judgements: Centralna Baza Orzeczeń Sądów Administracyjnych, <http://orzeczenia.nsa.gov.pl>.

² E.g. in the following judgements: Youth Initiative for Human Rights v. Serbia (judgement of 25 June 2013, 48135/06), Hungarian Helsinki Committee v. Hungary (judgement of 8 November 2016, 18030/11).

³ Journal of Laws No. 78, item 483, as amended and corrected.

⁴ Article 11b of the Act of 8 March 1990 on Commune Self-Government, consolidated text: Journal of Laws of 2019, item 506, as amended, Article 8a of the Act of 5 June 1998 on District Self-Government, consolidated text: Journal of Laws of 2019, item 511, Article 15a of the Act of 5 June 1998 on Voivodship Self-Government, consolidated text: Journal of Laws of 2019, item 512.

information⁵. The right resulting from Article 61 of the Constitution is one of the foundations of democracy, one of the elements of the political framework of the Polish state.

In accordance with the provisions of the aforementioned acts, any entity, including any natural person, regardless of nationality, age or legal capacity, could request any entity performing public tasks or disposing of public property to provide public information. This entity should make this information available without undue delay, but within a maximum of 14 days and in exceptional cases within 2 months (Article 13(1) and (2) of the Act on Access to Public Information). The applicant had had the right to seek administrative and judicial redress for the authority's inaction. Since 29 December 2011, judicial control of the exercise of the right to information in Poland has become the exclusive domain of administrative courts⁶.

In view of the state of the epidemic caused by SARS-CoV-19 and numerous restrictions on fundamental human rights and freedoms, as well as the immense widespread feeling of threat and uncertainty, it is particularly important to ensure access to reliable information on the activities of the authorities. Due to the state of epidemic threat and the state of epidemic emergency in Poland, special legal solutions were introduced in 2020. Some of them jeopardise or even limit civil rights, including the right to information on the activity of public authorities.

Through the provisions of the Act of 31 March 2020 amending the Act on Special Arrangements for the Prevention,

⁵ Consolidated text: Journal of Laws of 2019, item 1429 as amended.

⁶ On that day, the provisions repealing Article 22 of the Act on Access to Public Information came into force (the Act of 16 September 2011 on the Amendment of the Act on access to public information and certain other Acts Journal of Laws of 2011 No. 204, item 1195); this Article had stipulated that in certain situations the refusal to provide public information could be appealed to the common court – district civil court.

Counteraction and Control of COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them and Some Other Acts⁷, the latter⁸ was supplemented with Art. 15zrz and Art. 15zrs. Thus, the act called “the anti-crisis shield” not only introduced provisions allowing for support for entrepreneurs, but also made changes which were essential for most procedures. Both provisions regulated the institution of suspension of time limits, i.e. interruption of the time limit or stay of the time limit which has not started yet. Under Article 15zrz(1) of the CoVID-19 Act, time limits laid down “in administrative law” have been suspended. Under Article 15zrs of the CoVID-19 Act, procedural and judicial time limits for administrative and administrative court proceedings have been suspended (section 6). In practice, this meant that the above time limits did not start, and the ones which started were stayed for the period indicated in this provision, i.e. for the period of epidemic threat or state of epidemic emergency.

Promptness of legislation does not have a positive impact on the quality of law making. This assessment is further confirmed by the quality of the law adopted in Poland in connection with combating the pandemic. The wording of Article 15zrz of the CoVID-19 Act deserves special criticism. Due to the internal contradiction of this provision, its incorrect wording gives rise to significant doubts as to the time limits covered by this legal provision⁹. Although the

⁷ Journal of Laws of 2020, item 568.

⁸ The Act of 2 March 2020 on Special Arrangements for the Prevention, Counteraction and Control of COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them, Journal of Laws of 2020, item 374, as amended, hereinafter: the CoVID-19 Act.

⁹ In paragraph 1 mentions about the time limits laid down “in administrative law”, however, paragraphs 4 and 5 already concern the time limits laid down in the Labour Code or the limitation periods for criminal offences. More on this: E. Szewczyk, *Zmiany wprowadzone do ogólnego postępowania administracyjnego przez ustawę*

time limit for making public information available is contained in substantive administrative law, it is generally accepted that it is indicative, procedural. Consequently, the issues of the timely making public information available during the state of epidemic threat or emergency shall be considered by the analysis of Article 15zszs and not Article 15zszr of the CoVID-19 Act¹⁰.

In accordance with the solution contained in the aforementioned Article 15zszs, the authorities conducting administrative proceedings were not obliged to observe the time limits for dealing with cases indicated in procedural acts or special provisions. The latter type is represented by the time limit of 14 days or 2 months for making public information available, as specified in art. 13(1) and (2) of the Act on Access to Public Information. Under Article 15zszs(10) of the CoVID-19 Act, the authority was under no obligation to inform the party that the case would not be dealt with within the prescribed time limit. Thus, this provision waived the obligations of the authorities laid down in procedural acts – Article 36 of the Code of Administrative Procedure¹¹ and Article 140 of the Tax Ordinance¹². First and foremost, pursuant to Article 15zszs(10) of the CoVID-19 Act, during the state of epidemic

o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych, „Samorząd Terytorialny” no. 6/2020, p.

¹⁰ The interpretation contained in the Internet publication: *W jakim zakresie tzw. specustawa COVID-19 wpływa na terminy załatwiania spraw w trybie ustawy o dostępie do informacji publicznej [To what extent does the so-called special CoVID-19 act affect the time limits for dealing with cases under the Act on Access to Public Information?]* is different. <https://gov.legalis.pl/w-jakim-zakresie-tzw-specustawa-covid-19-wplywa-na-terminy-zalatwiania-spraw-w-trybie-ustawy-o-dostepie-do-informacji-publicznej/>

¹¹ Act of 14 June 1960, consolidated text: Journal of Laws of 2020, item 256, as amended.

¹² Act of 29 August 1997, consolidated text: Journal of Laws of 2020, item 1325, as amended.

threat or emergency, the provisions on authorities' inactivity shall not be applied, and the authorities conducting the proceedings are not subject to penalties or fines nor are ordered to pay the applicants compensation for failure to reach a decision within the time limits prescribed by law. The literature points out that if the entire public administration in Poland ceased to operate, under Article 15z(10)(1) of the CoVID-19 Act it would be perfectly legal. However, the provision interpreted in this way would be inconsistent with the Constitution, from which the principle of reliable operation of public institutions is derived¹³.

Furthermore, by Article 15z(11) of the CoVID-19 Act, the legislature has determined that the cessation of activity by the court or the authority conducting the proceedings during this period may not give rise to legal remedies for inactivity, protraction or infringement of the party's right to their case being examined without undue delay.

Interestingly, these provisions were adopted by 2 chambers of parliament without amendments. It was assumed that they would protect, in the first place, the parties in a situation where they could not exercise their rights of appeal, and the authorities against the need to pay compensation for damages resulting from actions, including decisions, being taken within deadlines longer than provided for in the acts. However, these legal solutions have in practice created too many situations where the possibility of obtaining public information depended exclusively on the good will of the authority. This problem was discussed

¹³ <https://www.wirtualnemedi.pl/artykul/specustawa-ws-koronawirusa-ogranicza-dostep-dziennikarzy-do-informacji-publicznych-przepisy-niezgodne-z-konstytucja>

by the Commissioner for Human Rights¹⁴, journalists¹⁵, lawyers¹⁶ as well as the citizens network Watchdog Poland¹⁷ and social activists¹⁸ shortly after the legislation was passed. It has been argued that this regulation, in an unprecedented way, restricts the constitutionally guaranteed right of everyone to access information on the activity of public authorities, which results in censorship of information accessible to the public and deprives citizens of any control over the authorities.

It was pointed out that this provision violates not only the constitutional principle of openness, but also the principle of reliable operation of public institutions and limits the right to have one's matter adjudicated by an impartial and independent court. It should be stressed that the Constitution of the Republic of Poland does not allow for the limitation of the right to have the matter adjudicated by a court even during martial law (Article 233). For these reasons, it is justified to argue that what was stipulated in the amended Act of 2 March 2020 was in fact constitutionally illegal. These provisions also contributed to the violation of Article 41 of

¹⁴ https://www.rpo.gov.pl/sites/default/files/WG_do_MSWiA_ws_dostepu_do_informacji_publicznej.pdf

¹⁵ <https://www.wirtualnemedial.pl/artykul/specustawa-ws-koronawirusa-ogranicza-dostep-dziennikarzy-do-informacji-publicznych-przepisy-niezgodne-z-konstytucja>. According to Article 3a of the Press Law (Act of 26 January 1984, consolidated text: Journal of Laws of 2018, item 1914), the Act on Access to Public Information shall apply to questions submitted by journalists, e.g. concerning expenditure of public institutions.

¹⁶ <https://t.co/JGjtP9IK2Q> pic.twitter.com/QCoScN8nhz – Tymon Radzik (@TymonRadzik), “Będzie problem z sądowym dochodzeniem”, March 31, 2020

¹⁷ Sz. Osowski, *Władza poza kontrolą dziennikarzy i społeczeństwa*, published on 09.04.2020, <https://www.forbes.pl/opinie/prawo-do-sadu-dostep-do-informacji-publicznej-zagrozone/cf2lcke>.

¹⁸ P. Słowik, *Koniec jawności w Polsce. „Bo koronawirus”*, Dziennik Gazeta Prawna. <https://prawo.gazetaprawna.pl/artykuly/1467401,koronawirus-w-polsce-przepisy-o-bezczynnosci-organow-administracji-publicznej.html>

the Charter of Fundamental Rights of the EU, which guarantees the right to good administration, which includes the duty to deal with citizens' affairs efficiently. The problem raised by i.a. the Commissioner for Human Rights and direct objections brought i.a. by social organisations, were rejected by the Prime Minister who during his press conferences claimed that officers should focus on fighting the epidemic and not on providing public information¹⁹.

Meanwhile, though, the time of the epidemic is not only the time of the threat of an infectious disease. It is also marked with anxiety, uncertainty, loss of the sense of security. It is precisely in this period that citizens want to know how the authorities manage the crisis, what they are spending public money on, whether they are not reporting false data, and whether the army or police are not abusing their powers. At such a difficult time for most people, restriction of universal access to information on the activity of the authorities wielding extraordinary instruments to fight the epidemic is particularly dangerous for the society. The right to public information during the epidemic is also extremely important because the openness of public authorities' actions has an impact on the way in which restrictions are adopted in a situation where none of the states of emergency indicated in the Constitution have been introduced²⁰.

The provisions of Article 15zzs of the CoVID-19 Act make social control practically impossible, in a completely unjustified

¹⁹ P. Słowik, *Brak jawności to brak demokracji. W odpowiedzi premierowi*, Dziennik Gazeta Prawna. <https://prawo.gazetaprawna.pl/artykuly/1469517,slowik-brak-jawnosci-to-brak-demokracji-informacja-publiczna.html>

²⁰ The citizens network Watchdog Poland has requested the Council of Ministers to use a single website to inform about all COVID-19-related legislation and to publish these acts on a single website without delay and to post the proposed legislation on www.legislacja.gov.pl. <https://siecobywatelska.pl/uporzadkujmy-prawo-piszemy-do-rzadu/>

manner. Furthermore, the wording of Article 15zszs and of the related Article 15zszr of the CoVID-19 Act gives rise to significant divergences of interpretation.

The first of these interpretation problems concerns the duration of the restrictions contained in these provisions and indirectly relating to the right of access to public information. The solutions contained in Article 15zszr and Article 15zszs of the CoVID-19 Act were of special and temporary. They were meant to apply only during the state of the epidemic threat or epidemic emergency declared due to COVID-19²¹. The state of epidemic threat was declared under § 1 of the regulation of the Minister of Health of 13 March 2020 on declaring a state of epidemic threat on the territory of the Republic of Poland and was in force since 14 March 2020²². However, under § 1 of the regulation of the Minister of Health of 20 March 2020 on declaring a state of epidemic emergency on the territory of the Republic of Poland²³, it was very soon (on 20 March 2020) superseded by the state of epidemic emergency which has been in force ever since.

The discussed provisions were introduced into the Act of 2 March 2020 by the Act of 31 March 2020 and entered into force on the same date, i.e. on 31 March 2020. The legislator has not introduced any transitional regulations which would make the provisions of Art. 15zszr and Art. 15zszs of the Act retroactively effective. However, not only in these, but also in other provisions in force since 31 March 2020 (e.g. Art.), the legislator has repeatedly used the same phrase: “during the state of the epidemic threat or epidemic emergency declared

²¹ In Article 15zszr the legislator used the term “CoVID-19” but in Article 15zszs the term “CoVID” was used.

²² Journal of Laws 2020, item 433.

²³ Journal of Laws 2020, item 491, as amended.

due to COVID-19”²⁴. Since the state of epidemic threat was in force in Poland from 14 March 2020, it should be assumed that it was the date starting from which that the effect of those provisions was legally binding. Such an interpretation is in accordance with § 51(2) of the Principles of Legislative Technique²⁵. It contains a rule according to which provisions of an act – other than those which gained retroactive effect under final provisions – which have retroactive effect resulting from their contents and relating to events or circumstances that arose prior to the date of the act’s entry into force, shall be edited in a manner that clearly indicates these events or circumstances. This principle was respected in the discussed regulations of Art. 15zzr and Art. 15zsz of the CoVID-19 Act.

Unfortunately, this is not the only interpretation concerning the starting date of the legal standards under consideration being in force. Two different positions have already been expressed in jurisprudence. In their judgements, administrative courts are both of the opinion that the effect of Article 15zzr and Article 15zsz of the CoVID-19 Act is legally binding as of 14 March 2020²⁶, and of the opposite view, stating definitely that the provisions of Article 15zsz(1)(1) of the Act of 2 March 2020 may only apply to time limits that were running at the time of its entry into force, i.e. on 31 March 2020 (the effect of interrupting the time limit), and to the time limits which only were to begin (the effect of suspending

²⁴ Unfortunately, the legislator was not precise and used various conjunctions, which changed the meaning of the provision.

²⁵ Consolidated text: Journal of Laws of 2016, item 283.

²⁶ Judgement of the Voivodship Administrative Court in Białystok of 22 April 2020, I SA/Bk177/20; judgement of the Voivodship Administrative Court in Gdańsk of 21 May 2020, II SAB/Gd135/19.

the time limit) after 31 March 2020.²⁷ Even though the state of the epidemic is still in force at the date of handing this paper over for publication, special arrangements concerning time limits in administrative proceedings are no longer in force. By virtue of Article 46(20) of the Act of 14 May 2020 Amending Certain Acts on Protective Measures in Relation to the Spread of SARS-CoV-2²⁸, Articles 15zrz and 15zrs of the CoVID-19 Act were repealed. Although they were repealed on the date of entry into force of this Act, i.e. on 16 May 2020 (Article 76 of the Act of 14 May 2020), under Article 68(6) and (7) of the aforementioned Act of 14 May 2020 the time limits for administrative and administrative court proceedings were only resumed as of 24 May 2020.

The second issue related to the interpretation of Article 15zrs is whether the legal solutions contained therein should apply to processing of requests for public information at all. The mere provision of information is a material-technical activity, and the time limit specified is only an indication. Thus, the provisions on procedural time limits in administrative proceedings, as provided for in the Act of 2 March 2020 following its amendment of 31 March 2020, should not apply. The time limit for providing public information should not depend on the state of epidemic threat or epidemic emergency declared due to CoVID-19. The provisions of the Act on Access to Public Information still required that the requested information be made available without undue delay, but within a maximum of 14 days from the submission of such a request. The assumption that Article 15zrs(1)(5) of the CoVID-19 Act concerned processing of requests for public

²⁷ Judgement of the Voivodship Administrative Court in Wrocław of 12 May 2020, II SA/Wr225/20.

²⁸ Journal of Laws of 2020, item 875.

information meant *de facto* an unjustified exemption of public authorities from providing public information without undue delay or within a maximum of 14 days²⁹. However, it is clear that the solutions introduced on 31 March 2020 in Article 15zszs(10) and (11) of the CoVID-19 Act limited or removed altogether the possibility to seek effective administrative and judicial protection in cases of inaction or protraction on the part of the entity obliged to provide public information.

According to those provisions, the applicant could not, by means of a reminder, plead inactivity or protraction on the part of the obliged entity in relation to the cessation of consideration of the request for public information during the period of epidemic threat and epidemic emergency declared because of CoVID-19. It should be noted, however, that Article 15zszr(6) of the CoVID-19 Act stipulates that the actions taken to exercise a power or fulfil an obligation in the period of withholding the initiation of or suspending the time limits shall be effective. Therefore, the reminder lodged must be examined. However, the authority competent for its consideration may not conclude that the obliged authority was inactive or protracted the proceedings during the period referred to in the discussed provision, even if the requested authority, being able to consider the application and provide information, has refrained from doing so.

On the other hand, it was principally impossible for an administrative court to examine a complaint about the inactivity or protraction on the part of an entity obliged to consider a request for public information between 14 March 2020 and 24 May 2020. Although Article 15zszr(6) (Article 15zszs(7)) of the CoVID-19 Act

²⁹ This was pointed out by the Commissioner for Human Rights in a letter to the minister in charge of administration. https://www.rpo.gov.pl/sites/default/files/WG_do_MSWiA_ws_dostepu_do_informacji_publicznej.pdf

also concerned judicial remedies and the action brought before the administrative court was effective, the court was not able to examine it during that period due to the wording of Article 15z(6) of the CoVID-19 Act. The legislature has unequivocally prohibited the courts from holding hearings and public sessions through Article 15z(6) of the CoVID-19 Act. Exceptions to this prohibition applied only to the cases referred to in Article 14a(4) and (5) of the CoVID-19 Act – the so-called urgent matters. These were, for example, cases relating to temporary arrest, involving minors or people suffering from mental illnesses.

This statutory prohibition may be interpreted as restricting the constitutional right to having one's matter adjudicated by an impartial and independent court. It should be stressed that the Constitution of the Republic of Poland of 2 April 1997 makes it impossible to exclude such a right even during martial law. Article 233(1) of the Constitution of the Republic of Poland stipulates that an act defining the scope of restrictions on human and civil freedoms and rights during martial law and state of emergency cannot restrict the freedoms and rights specified in Art. 30 (human dignity), Art. 34 and Art. 36 (citizenship), Art. 38 (protection of life), Art. 39, Art. 40 and Art. 41(4) (humane treatment), Art. 42 (incurring criminal liability), Art. 45 (access to court), Art. 47 (personal rights), Art. 53 (conscience and religion), Art. 63 (right to submit petitions, proposals and popular complaints) and Art. 48 and Art. 72 (family and child). Paragraph 3 makes reference to permissible restrictions on human and civil freedoms and rights in the state of natural disaster. Then, it is possible to impose statutory restrictions on the freedoms and rights specified in Art. 22 of the Constitution (freedom of economic activity), Art. 41(1), (3) and (5) (personal freedom), Art. 50 (breach of domicile), Art. 52(1) (freedom of movement and residence on the territory of

the Republic of Poland), Art. 59(3) (right to strike), Art. 64 (right of ownership), Art. 65(1) (freedom to work), Art. 66(1) (right to safe and hygienic working conditions) and Art. 66(2) (right to rest and leisure). In the light of the cited provisions of the Constitution, it should be concluded that the courts examining complaints about the inaction of public authorities in the processing of requests for public information could, when making a pro-constitutional interpretation, omit those provisions of the special act of 2 March 2020 as amended on 31 March 2020.

Conclusion

The exercise of the constitutional right of access to public information enables the acquisition of knowledge about the activities of authorities and entities administering public property, ensures communication between the rulers and the ruled in the public sphere and constitutes a source of civic spirit in shaping the political (public) and economic scene and in the sphere of individual selections, for which knowledge about what the entities in power do and what are the justifications for their decisions is necessary. In the state of the epidemic it is particularly important to ensure access to reliable information on the activities of the authorities. Article 15zzr and article 15zsz of the CoVID-19 Act, that have so negatively affected the exercise of the right to be informed about the activities of public authorities have been repealed. However, even a short-term limitation of fundamental human rights and this against constitutional principles, should not take place in any democratic state of law. Moreover, the mere change in the legal status often does not change the negative practice. And before the pandemic, it was difficult to obtain some information of a public nature. It should be requested that the

public authority in Poland not only deal with fighting the epidemic but also responds within the statutory time limit to requests for disclosure of public information

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