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OPENNESS IN ACTIVITIES OF LOCAL GOVERNMENT ORGANISATIONS

Introduction

Openness is among fundamental issues of contemporary public administration. According to the principle of public life's openness, each citizen has the right to public information and public authorities have the duty to supply it. It is grounded in a range of legal acts, including the Constitution of the Republic of Poland of 2 April 1997,¹ the Access to Public Information Act of 6 September 2001,² and system legislation: the Local Community Government Act of 8 March 1990,³ the County Government Act of 5 June 1998,⁴ and the Regional Government Act of 5 June 1998.⁵ Pursuant to Article 11b Section 1 LCGA, "Activities of local community authorities shall be open. Openness may only be limited by virtue of legislation." An identical regulation concerning openness of county authorities is contained in Article 8a Section 1 CGA, while Article 15a Section 1 RGA assumes openness in activities of a region's bodies. Openness of activities of local government authorities includes in particular citizens' right to gain information, be present at meetings of a local community council and its committees, as well as access documentation of public tasks, including minutes from meetings of local authorities and their committees.

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¹ Journal of Laws No. 78, item 483 as amended [hereinafter: the Polish Constitution].

² Journal of Laws of 2020, item 2176 as amended [hereinafter: APIA].

³ Journal of Laws of 2020, item 713 as amended [hereinafter: LCGA].

⁴ Journal of Laws of 2020, item 920 as amended [hereinafter: CGA].

⁵ Journal of Laws of 2020, item 1668 as amended [hereinafter: RGA].

This paper will attempt to define public information in the Polish law system, guarantees of the openness principle in a democratic rule of law, scope of openness in activities of local government organisations, and to analyse regulations concerning openness of local government units at the time of COVID-19 epidemic. The analysis will be based on the doctrine's position, decisions of administrative courts, and practice of public administration.

1. Definition of public information

Public administration holds a huge quantity of information, even an information monopoly in some areas. It is thus able to use it to affect its environment and realise public tasks [Supernat 2002, 487]. Public information is a complex notion, without a single universal definition [Fajgielski 2007, 13]. As G. Szpor notes, information may be viewed from an interdisciplinary perspective, where it is a transferable tangible good that reduces uncertainty [Szpor 2008, 17]. J. Zimmermann points out openness has no direct relation to administrative law, yet "administrative law should anticipate and introduce appropriate conditions for preserving that openness." Openness helps to notice a recipient and make the law more comprehensible and thus "more easily enforceable" [Zimmermann 2016, 124-25].

M. Jaśkowska is of the opinion, meanwhile, "the notion of public information cannot be [...] approached against the background of Article 1 of the Access to Public Information Act without regard to Article 61 of the Constitution, since the linguistic interpretation might lead to an excessively narrow understanding of the concept. It would result in treatment of any news relating to a public affair, or a matter concerning a certain community, as public information. The notion would not apply, therefore, to information about individual cases resolved with an administrative decision, for instance, unless parties to proceedings comprised some public elements" [Jaśkowska 2002, 26-27].

Public nature of information is decided not by a purpose of a request for its disclosure, but its contents. What matters is that this is information about public affairs.⁶ Subject matter of requested information is

⁶ Judgement of the Regional Administrative Court of Warsaw of 4 March 2014, ref. no. II

determined by an applicant. It is not the role of a requested entity, meanwhile, to determine if public information supplied is satisfactory to an applicant.⁷ The very fact information is held by an entity discharging public tasks and thus obliged to supply public information does not mean this is public information under the APIA. In line with the very broad definition of public information arising from Article 1 Section 1 APIA, public information is any information about public affairs.⁸

Public information should be taken to mean any message created by broadly defined public authorities as well as any other entities holding public functions as far as their discharge of public tasks and management of community or Treasury assets are concerned. Information not originating with but referring to these entities has the nature of public information as well. Thus, public information denotes contents of any documents not only edited and created directly by a given entity. This attribute also applies to contents of documents used by an entity to carry out tasks entrusted to it by law. It does not matter how such documents came to be held by a requested entity and whether they are also held by other entities. What matters is that these documents serve realisation of public tasks by and relate directly to the requested entity.⁹ Thus, public information comprises contents of various documents connected or in any way referring to public authorities or entities other than public administration authorities. They include both documents produced directly by these authorities and entities and those not originating with them but employed as part of realisation of tasks stipulated by law. For information to be public, it must refer to the domain of facts. It is evident, on the other hand, this form of public information can only be made available subject to the restrictions arising from Article 5 APIA.¹⁰

SAB/Wa 637/13, Lex no. 1471464.

⁷ Judgement of the Regional Administrative Court of Warsaw of 14 January 2015, ref. no. II SAB/Wa502/14, Lex no. 1751251.

⁸ Judgement of the Regional Administrative Court of Gdańsk of 12 February 2014, ref. no. II SAB/Gd 236/13, Lex no. 1471419.

⁹ Judgement of the Supreme Administrative Court of 18 September 2014, ref. no. I OSK 45/14, Lex no. 1664475.

¹⁰ Judgement of the Regional Administrative Court of Warsaw of 19 March 2014, ref. no. VIIISA/Wa 987/13, Lex no. 1466198.

2. Guarantees of the openness principle

The right of citizens to participate in key decision-making processes that affect them personally is the essence of democracy. This expresses empowerment of local communities, which have not only the legal capacity but also the possibility of regulation and management, at their own responsibility and in the interest of their inhabitants, of a substantial part of public affairs [ibid.]. The right to information is categorised as a human right adopted by the international community [ibid., 7]. The right of access to public information has the structure of a public right. This right corresponds to the duty of providing citizens with public information by entities specified by legislation.¹¹ Obtaining of public information is to serve the universal good that is connected with functioning of state and public structures. The right to public information should not be taken advantage of, therefore, to satisfy individual (private) needs by obtaining information which is indeed public but for commercial, educational, professional, and similar purposes. Such information can be obtained in ways customary for a given type of relations [Drachal 2005, 147-49].

The APIA does not incorporate a closed-end catalogue of public information. The legislator wanted to provide the public with an instrument of the broadest possible control of public institutions. The instrument should encompass an unlimited number of circumstances, since the dynamic nature of socio-economic relations continues to give rise to new situations with active roles of public entities that are subject to social control. Therefore, the list of circumstances in Article 6 Section 1 APIA should only be seen as a guideline [Szustakiewicz 2015, 58-60]. The nature of public information should only be attributed to information referring to the public domain of activities as indicated by Article 61 of the Polish Constitution, that is, discharge of public tasks and administration of local or State Treasury assets. What is also important is that public information must relate to the domain of facts.¹²

¹¹ Judgement of the Regional Administrative Court of Warsaw of 13 March 2014, ref. no. II SAB/Wa 6/14, Lex no. 146805.

¹² Judgement of the Regional Administrative Court of Cracow of 11 October 2012, ref. no. II SAB/Kr 137/12, Lex no. 1234523.

For information to be treated as public, what is decisive is not its creation in itself but the fact it has been obtained and processed for the purpose of realising public tasks. Given this broad concept, public information cannot be reduced to official documents.¹³ According to a decision of the Local Government Appeal Court, someone requiring public information that has been processed for the purpose of its obtaining should not only show the information is important to a wide range of potential recipients but also that its obtaining provides an actual opportunity for improvement to operations of a public administration authority, for instance, and thus improvement to protection of public interest. Nature and status of an entity demanding public information, in particular, the potential for use of such information, affect determination whether special public interest applies. The intention, on the part of an individual exercising their right to public information, to evaluate timeliness of dealing with administrative cases and determine if a public administrative authority fully abides by the principle of prompt case handling cannot be found sufficient for accepting such an individual acts in public interest and whether a case they require information about is of special importance to the public.¹⁴

3. Scope of openness of local authorities' activities

The formally guaranteed and the actual (real) right to public information allows citizens to make rational decisions in their own matters (concerning their individual interests) and in public affairs. It also provides for conscious participation in management of public affairs and exercise of social control. The way the right to information is realised is treated as a measure of democracy and the rule of law at present [Olejniczak-Szałowska 1995, 4].

Actions of public authorities are natural objects of society's interest. If combined with the ability to obtain public information, this interest contributes to formation of knowledge which should translate into citizens' political decisions at elections or referenda, among other things. Regardless of objectives or actual later uses, though, it must be said the desire

¹³ Judgement of the Regional Administrative Court of Poznań of 22 October 2015, ref. no. IV SAB/Po 114/15, Lex no. 1933148.

¹⁴ Decision of the Local Government Appeal Court in Wrocław of 15 May 2012, ref. no. SKO 4541/11/12, OwSS 2013, No. 1, item 38-43.

to obtain knowledge about authorities' operations is closely associated with humanity and substantiated by the desire to satisfy other needs that arise from human nature [Bernaczyk 2014, 136]. The principle of openness is an extraordinarily important part of activities of public authorities, with "openness in activities of local government, which are closest to the population, being crucial. Therefore, it should be regulated so broadly, while also precisely, that its exercise is genuine and satisfies citizens' needs in this respect" [Dolnicki and Cybulska 2012, 165].

System legislation envisages members of local government communities participating in exercise of public power directly or through their representatives. This is to be fostered by the broadly-defined principle of openness (transparency) of public administration's activities [Obrzut 2002, 204]. The openness of local authorities includes in particular citizens' right to gain information, be present at meetings of local councils and their committees, as well as access documents produced in exercise of public tasks including minutes of local authorities and local council committees [Augustyniak 2015, 21ff.]. Rules of access to and use of the documents are set out in community statutes.¹⁵ Analysis of Article 11b Section 2 LCGA, Article 8a Section 2 CGA, and Article 15a Section 2 RGA shows the local government legislation also contains a sample catalogue of the ways the right of access to information about activities of local authorities is exercised [Fleszer 2010, 33-48]. Three major areas can be identified here. These are: participation in meetings of decision-making bodies and work of local authority committees, possible access to documents arising from exercise of public tasks, including minutes of local authority and local council committee meetings, broadcasting and recording of decision-making body meetings. The openness also involves the right of citizens to information about voting of individual councillors on matters important to local populations.¹⁶ This is obviously not a closed-ended catalogue, but only these three areas will be discussed here due to space constraints of a paper.

¹⁵ Judgement of the Regional Administrative Court of Łódź of 13 August 2014, ref. no. II SAB/Łd 69/14, Lex no. 1502653.

¹⁶ Judgement of the Regional Administrative Court of Gdańsk of 4 March 2020, ref. no. II SA/Gd 585/19, Lex no. 2822036.

Participation in meetings of decision-making bodies and work of local authority committees is the first dimension of access to public information. Meetings of local councils, county and regional assemblies are convened by their chairpersons as needed, though on a minimum quarterly basis. Meeting notices are enclosed with agendas and draft resolutions. A decision-making body operates by way of resolutions, primarily in open voting. This rule is part of realisation of the constitutional right of citizens to information about activities of public authorities and officials. The principle of open voting may only be abandoned if allowed by legislation.¹⁷ It should be also pointed out resolutions are published in Regional Official Journals and Public Information Bulletins, *inter alia*.

The possibility of access to documents arising from exercise of public tasks, including minutes of local authority and local council committee meetings, is the second area. Councillors other than committee members can take part in committee meetings and their debates and submit motions without the right to vote. By virtue of Article 11b Section 3 LCGA, local councils shall determine rules of access to and use of documents in community statutes. The concept of 'rules of access to and use of documents' is narrower than the general notion of the right to public information. The rules mean procedural directives of an exclusively technical and organisational nature. The legislation does not authorise a local council, on the other hand, to restrict the principle of openness of local authorities or to determine the scope of information to be made available.¹⁸ A provision of community statutes making availability of council and committee meeting minutes conditional on their 'formal approval' is a substantial breach of Article 61 of the Polish Constitution, Article 11b Sections 2 and 3 LCGA, and Article 19 APIA and deprives citizens of access to public information, that is, minutes of council meetings, at a certain stage in the authority's operations (prior to approval by the council). As a result, it limits the potential for citizens' participation in public decision-making and control over the process.¹⁹

¹⁷ Supervising Authority's Resolution of Chief Lublin Region Administrator of 6 July 2016, NK-I.4131.207.2016.AHor, NZS 2016, No. 4, item 66.

¹⁸ Judgement of the Regional Administrative Court of Poznań of 14.11.2017, ref. no. II SA/Lu 585/17, Lex no. 2430748.

¹⁹ Supervising Authority's Resolution of Chief Mazovian Region Administrator of 19 April 2013, LEX.O.4131.7.2013.LP, Mazow 2013, No. 4793.

Broadcasting and recording of decision-making body meetings is the third dimension. According to new regulations, meetings of a decision-making body are broadcast and recorded with sound and image-recording equipment. What is more, such records are made available in Public Information Bulletins, at websites of a local community (county, region), and in other customary ways. Local communities and counties may (in agreement with the head of the Central Electoral Office) use the equipment for broadcasting or recording of proceedings of local electoral offices in discharge of this obligation.²⁰ This obligation consists of two duties, to be accurate, broadcasting (in real time) of local council meetings, then placement of the recordings at designated locations [Moll 2018]. Audio-video or IT materials must constitute full and faithful records of such meetings prepared in such a way as to fulfil the provision of Article 19 APIA. A full record means it is free from gaps (interruptions) or any other defects (e.g. distortions, reduced volume) that prevent an authorised person from unlimited access to contents of a collegiate body's meeting.²¹ Online broadcasting and availability may expand the range of those following activities of local (county, regional) authorities. The regulations in place should also solve the continuing problems with recording and publication of meetings by citizens or councillors [Kłucińska, Sześciło, and Wilk 2018, 31-44]. Information about local council meetings is public under Article 1 Section 1 in conjunction with Article 6 APIA. A record of council meeting is a material representing the course of such meeting and the council's actions, thus evidence of a collegiate body's activities. In the circumstances, materials and documents created at a public collegiate body's meeting, including audio-video recordings, are information about public affairs under Article 1 Section 1 APIA and should be made available if properly requested.²²

The foregoing methods of supplying information are provided for by the Access to Public Information Act. System legislation orders specification

²⁰ Article 20b Section 1b-1c LCGA, Article 15 Section 1a-1b CGA, Article 21 Section 1 RGA.

²¹ Judgement of the Regional Administrative Court of Rzeszów of 22 November 2019, ref. no. II SAB/Rz 102/19, Lex no. 2752879.

²² Judgement of the Supreme Administrative Court of 17 June 2015, ref. no. I OSK 1564/14, Lex no. 2089729.

of rules of access to information in statutes of local government authorities [Dolnicki 2016, 241]. Statutes are fundamental system acts in a basic local government organisation. Together with other prevailing regulations, they form grounds for operation, organisation, and functioning of both a local community and its supporting units.²³ Statutes of a local community, insofar as they determine access to and use of documents, cannot exclude the principle of openness of local authorities' actions or restrict access to such documents as minutes of a local council meeting prior to their approval.²⁴ Local community statutes may regulate not only the issues grounded separately in specific legislation, but also any issues associated with work of a local community, insofar as prevailing laws are not breached.²⁵

It should also be noted the right to public information is subject to certain restrictions. In line with Article 5 Section 1 APIA, it is limited insofar as and as laid down in regulations about protection of classified information and protection of other statutory secrets. In addition, by force of Article 5 Section 2 APIA, the right to public information is restricted by privacy of individuals or commercial secrets. This restriction, however, does not apply to information about individuals in public functions and connected with discharge of such functions, including terms and conditions of appointment and discharge of a function, and to cases where an individual or entrepreneur resign from their rights [Czerw 2013, 7-24].

4. Openness of local government's activities at the time of the COVID-19 epidemic

As M. Jabłoński notes, it is desirable to formalise rules of holding collegiate body meetings and participation in meetings of a body or any committees it appoints. In practice, such regulations are absent, which leads to permanent breaches of statutory provisions (secrets) that apply to objects

²³ Judgement of the Supreme Administrative Court of 9 May 2019, ref. no. II OSK 1600/17, Lex no. 2700034.

²⁴ Judgement of the Regional Administrative Court of Poznań of 8 May 2014, ref. no. II SAB/Po 19/14, Lex no. 1465638.

²⁵ Judgement of the Regional Administrative Court of Gliwice of 28 November 2017, ref. no. IV SA/Gl 624/17, Lex no. 2422809.

of such meetings. Negligence of rules of participation in themselves (numbers of seats, decisions to refuse entry due to space constraints, etc.) is not the most common case [Jabłoński 2008, 13-14]. This acquires special significance at the time of the COVID-19 epidemic. In the circumstances, it must be verified whether the meeting procedure envisaged by the Special Solutions in Connection with Prevention, Counteracting and Fighting COVID-19, Other Infectious Diseases and Crisis Situations They Cause Act of 2 March 2020²⁶ guarantees citizens' access to meetings of collegiate local government bodies.

The regulations concerning organisation and procedure of meetings during the epidemic are not introduced permanently to the system legislation of the particular local government levels, since they are exceptional solutions for the time of the COVID-19 crisis. There are no legal obstacles to statutes of a local government unit providing for remote meetings, provided however it should only apply in cases of threat to life or health of councillors or other persons, or considerable damage to property [Jóźwiak 2020, 29-36].

In accordance with Article 15zzx of the COVID Act, the legislation allows local government organisations and collegiate: executive bodies of local government organisations and associations thereof, metropolitan unions, regional accounting chambers, local government courts of appeal, and support local government units to convene and hold meetings, sessions, assemblies or other forms of activities specific to these organisations, to make decisions and resolutions by means of remote communication or correspondence (remote meetings) for the duration of an epidemic risk or epidemic.

Like J. Korczak observes, "participation (in a meeting) does not necessarily consist in physical presence at its location, since the contemporary, generally known means of communication provide for participation via broadcast of a meeting. The participation can also involve use of information processed as records of a meeting and its subsequent replaying" [Korczak 2014, 25]. The remote procedure applies to both voting and holding of a meeting. The statutory requirements must be followed

²⁶ Journal of Laws item 1842 as amended [hereinafter: the COVID Act].

just like at a formally called meeting. The new regulations should be employed in such a way as to fulfil other requirements of legislation and statutes to the greatest possible degree. These include timely determination of a meeting date and its agenda and distribution of materials including draft resolutions. In the light of legislation, this is chair of a council who organises its work and effective notification to all councillors of date and place of a meeting is one of their basic duties.²⁷ Specific designation of a means of electronic communication that would guarantee effective remote meeting of a community council without statutory restrictions would be in order [Śwital 2020, 183-92]. Substantial defects of a resolution that cause it to be void include violations of regulations determining resolution-making competences of local government units, breaches of legal grounds of a resolution, breaches of system legislation and substantive law due to defective interpretation and regulations of resolution passing procedures.²⁸

Conclusion

The analysis of regulations, administrative court decisions, and practice of administration in this paper is intended to present the principle of openness in activities of local government authorities. The right to information, which provides for effective participation in decision-making processes concerning both general public and local affairs, is the fundamental advantage of openness and its basic dimension. Citizens have the right to take part in making decisions, to involvement in discharge of public tasks and shared management of local government affairs. Openness is a dimension of social control as well. The regulations of broadcasting meetings of decision-making bodies are a positive development as they guarantee access to and replaying of such meetings at any time on the internet, at the Public Information Bulletin website, and in other customary ways. The COVID-19 epidemic has also enforced modifications to organisation of local council meetings. The proposed solutions are not

²⁷ Supervising Authority's Resolution of Chief West Pomeranian Region Administrator of 4 November 2015, NK-3.4131.300.2015.SA, Zacho.2015/4473.

²⁸ Judgement of the Regional Administrative Court of Gliwice of 20 August 2020, ref. no. III SA/Gl 409/20, Lex no. 3068154.

introduced directly to system legislation, as they are adopted for the duration of the epidemic. They are not completely specific, however, and require interpretation. Where meetings are held as part of the correspondence procedure, citizen participation may be excluded, and thus the right of access to public information may be limited. Hybrid meetings could be postulated in this connection that would guarantee citizens' participation in operations of authorities and their committees and would enable citizens to be involved in the meetings.

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Openness in Activities of Local Government Organisations

Abstract

The paper aims to present a definition of public information in the Polish legal order, guarantees of openness under the democratic rule of law, and scope of openness in activities of local government organisations, and to analyse regulations concerning operation of local government units at the time of COVID-19

pandemic. The analysis is based on the doctrine, decisions of administrative courts, and practice of public administration.

Key words: public information, openness, access to public information, decision-making local government body

Dostęp do informacji w praktyce działalności samorządu terytorialnego

Abstrakt

Celem artykułu jest przedstawienie definicji informacji publicznej w polskim porządku prawnym, gwarancji zasady jawności w demokratycznym państwie prawnym, zakresu jawności działania jednostek samorządu terytorialnego oraz analiza przepisów w zakresie jawności działania jednostek samorządu terytorialnego w czasie pandemii COVID-19. Analizy zostaną przeprowadzone na podstawie stanowiska doktryny, orzecznictwa sądów administracyjnych i praktycznego działania administracji publicznej.

Słowa kluczowe: informacja publiczna, jawność, dostęp do informacji publicznej, organ stanowiący jednostek samorządu terytorialnego

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