NEJVYŠŠÍ SPRAVNI SOUD

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Supreme administrative courts and evolution of the right to publicity, privacy and information.

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Answers to Questionnaire: Poland

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Supreme Administrative Courts and the evolution of the right to disclosure, privacy and information

(Questionnaire)

1. Briefly describe the administrative institutional backing of free access to information and of the protection of personal data. Whenever those agendas are institutionally linked, provide for a brief description of such relations.

The right to public information is guaranteed under Article 61 of the Constitution of the Republic of Poland. Pursuant to paragraph 1 of the Article, a citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions. Such a right shall also include the obtainment of information on the activities of economic or professional unions and other persons or organisational units relating to the field in which they perform the duties of public authorities and manage communal or State property.

Pursuant to Article 1(1) of the Act of 6 September 2001 on access to public information (Dz. U. [Polish Journal of Laws] of 2014, item 782), all information about public matters constitutes public information within the meaning of the Act and is made available and re-used on the basis of principles and procedure specified in this Act. Under art. 2(1) of the Act on access to public information, everyone has the right to access public information. Public authorities and other entities performing public tasks are obliged to make public information available (Article 4(1)). Public information may be made available through the announcement of public information, through the provision of information upon request or through the access to meetings of authorities.

The access to public information is not unlimited. Article 5 of the Act on access to public information specifies the grounds for restricting access to public information. The provision stipulates that information classified by law (Article 5(1)), protected under the right to privacy or by trade secret (Article 5(2)) shall not be provided. The restriction related to the right to privacy relates to the privacy in the strict sense and to the protection of personal data.

The Act of 29 August 1997 on the protection of personal data (Dz. U. of 2014, item 1182) regulates matters related to the protection of personal data. Pursuant to Article 1(1) of the Act, any person has the right to have his/hers personal data protected, and the processing of personal data may be carried out in the public interest, the interest of the person to whom the data refers, or the interest of any third party, within the scope and subject to the procedure provided for by the Act (Article 1(2)). Furthermore, the Act on the protection of personal data appoints a central administration authority, Inspector General for Personal Data Protection, and determines the Inspector's tasks and competences (cf. response to question 3).

It has to be highlighted that, in Poland, the legislator has appointed a central administration authority only with regard to personal data; there is no such authority in the domain of access to public information. Therefore, the public information access system in Poland is decentralised, which means that in order to obtain public information one should approach particular entities obliged to provide such information.

2. Describe in general terms the regular administrative and court procedure in a typical disputable case of free access to information. Describe also the procedural role of your supreme administrative instance.

The decision on the refusal to provide public information and the decision on the discontinuation of proceedings for the provision of public information are regulated under provisions of the Code of Administrative Proceedings (Dz. U. of 2013, item 267, as amended). However, appeals against such decisions are examined within 14 days (which is an exception, as generally appeal proceedings should be resolved within a month); and the grounds of a decision on the refusal to provide public information include also names and functions of persons having taken a stance during the proceedings for the provision of information, as well as a denomination of entities for the sake of which the decision on the refusal to provide information was issued.

Decisions refusing the provision of public information are subject to the control of administrative courts. Appeals examined within the framework of proceedings for

the provision of public information are regulated under provisions of the Act of 30 August 2002 Law on Proceedings before Administrative Courts (Dz. U. of 2012, item 270, as amended), although the transfer of the files of the case and a response to the complaint has to be completed within 15 days from the receipt of a complaint, and the complaint is examined within 30 days from the receipt of the case file together with the response to the complaint. These time limits are shorter than standard time limits applied in the case of proceedings before administrative courts, as according to general rules an authority shall transfer the complaint to the court together with the files of the case and the response to the complaint within 30 days.

If an entity obliged to provide public information does not provide such information and does not issue a relative decision, it fails to act. The Act on access to public information does not provide for a separate procedure for lodging actions for failure to act by an entity obliged to provide public information. A protection measure in such a situation is an action for failure to act submitted to a competent administrative court by intermediary of a given authority. The reason for that is the fact that, under Article 3 § 2 (8) of the Law on Proceedings before Administrative Courts, administrative courts examine also actions for failure to act by administrative authorities.

Pursuant to Article 173 of the Law on Proceedings before Administrative Courts, a cassation appeal shall lie to the Supreme Administrative Court against a judgment or an order concluding proceedings in the case, unless a special provision provides otherwise. The Supreme Administrative Court assesses the correctness of the voivodeship court's judgment in terms of the interpretation and application of material and procedural law provisions.

3. Describe the procedural role of your supreme administrative instance in the agenda of protection of personal data.

As indicated above, the question of personal data protection is regulated under the Act on the protection of personal data. The Act appoints a central administration authority, Inspector General for Personal Data Protection, and determines the Inspector's tasks and competences. The basic task of the Inspector General is to control the conformity of data processing with the provisions regarding

personal data protection. It consists in verifying the compliance of activities not only with provisions of the Act, but also with provisions of other legal acts referring to the question of personal data protection. Such a control may be conducted on the Inspector's own initiative, as well as in reference to a submitted request, comments or objections. It may take the form either of a systematic control, of a regular (periodic) or sporadic control, as well as of an incidental (*ad hoc*) control. The main measure with the use of which the discussed control obligation may be fulfilled is the Inspector General's right to conduct an inspection, a visual inspection of IT equipment, media and systems, the right to request explanation, to interview persons, as well as the right to access documents and to copy them. Duties of the Inspector General do not consist only in activities aimed to protect interests of those persons to whom the processed data refers, but cover also the protection of the general interest, including the one related to the access to information (data sets). A manifestation of powers attributed to the Inspector General is the power to issue administrative decisions in cases concerning the application of provisions regarding personal data protection. When the Inspector General is acting upon request, the case should be resolved without undue delay, however no later than within a month from its receipt by the Inspector General.

The Inspector General for Personal Data Protection is appointed by the Sejm, upon the consent of the Senate, for a term of office of four years. The Inspector General may only be a person being a citizen of Poland permanently residing in the territory of the Republic of Poland, distinguished by a high moral authority, with a university degree in law and appropriate professional experience, who have never been convicted of any offense. Thus, the solution adopted by the Polish legislator consists in the creation of one specialised authority devoted to the protection of personal data.

By deciding to create a separate authority for the protection of personal data, the Polish legislator made it independent. The independence of the Inspector General is guaranteed under the provisions concerning its appointment and functioning. The Inspector General's independence is protected under the provisions regarding the principle of rotation in the office. During the term of office, the Sejm dismisses the Inspector General upon the consent of the Senate only in enumerated cases, i.e. if the Inspector General: resigns, becomes permanently incapable to perform his duties a result of a disease, violates his oath, becomes convicted by a

final court judgment of an offence. In other situations it is impossible to dismiss the Inspector General before the end of the term of office. The Inspector General has been granted a formal and a temporary immunity by the legislator. The Inspector General cannot be held criminally responsible nor deprived of their liberty without a prior consent of the Sejm. The Inspector cannot be detained or arrested, except for situations in which the Inspector is caught in the act of committing an offence and if their detention is necessary to ensure the due course of justice. A competent legal protection authority promptly informs the Marshal of the Sejm about the detention. The Marshal may order an immediate release of the detainee. While exercising their function, the Inspector General cannot be a member of any political party or trade union and cannot conduct any political activity. At the same time, the Inspector General cannot hold any other post, except for a post of university professor, and cannot perform any other professional activities. The present legal regulations indicate that any dependence of the Inspector General may be indicated only in the context of financing of their activities (from the State Budget) and of the possibility of their dismissal by the parliament. The Inspector General submits annual reports on their activity to the Sejm.

It is worth indicating that the Inspector General for Personal Data Protection's position in the political system is very special and cannot be classified within the traditionally understood tri-partite division of power. Although the Inspector is appointed by the Sejm upon a consent of the Senate, the role of the parliament is limited only to the choice of a new Inspector General and to the acceptance of annual reports on activities. The authority in question does not constitute any part of the executive. The Inspector does not report to Prime Minister nor to the President. Obviously the Inspector General does not belong to the judiciary either.

Considering the legal status of the Inspector General as a central state (public) administration authority and the lack of any body of higher instance, there is no possibility to appeal a first instance decision issued by the Inspector General. However, a party not satisfied with such a decision may apply to the authority for reconsideration of the case. Final decisions of the Inspector General may be appealed before first instance administrative courts. A judgment of a first instance administrative court may be appealed before the Supreme Administrative Court (cf. response to question 2).

4. Provide for a general overview of historical development of access to information rights in your jurisdiction while focusing on most important legislative and judicial milestones. Also, please try to generally describe the main driving forces behind the development of these rights.

A discussion concerning the right to obtain pubic information began in Poland after the socio-political transformations which took place after the year 1989.

It resulted in the right to public information being guaranteed under the Constitution of the Republic of Poland of 2 April 1997. The provision guaranteeing the right of access to public information is Article 61 of the aforementioned Constitution, included in its Chapter II entitled: “The freedoms, rights and obligations of persons and citizens” among freedoms and political rights. As mentioned above (cf. response to question 1), pursuant to the provisions of the said Article, a citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions. Such a right shall also include the obtainment of information on the activities of self-governing economic or professional organs and other persons or organisational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury. The right to obtain information comprises the access to documents and to meetings of collective public bodies selected by universal suffrage, including the possibility to register sound or image. The right to obtain information may be restricted only for the purposes of protection, provided for in the law, of other persons’ freedoms and rights as well as of public order, safety or important economic interest of the state The procedure for providing the said information is specified in the law, and in the case of parliamentary chambers – in their rules. In addition to the foregoing Article, the right to information is stipulated in the Constitution of the Republic of Poland in the following provisions: Article 54(1) regarding the freedom to acquire and to disseminate information; Article 51(3) regarding the right of access to official documents and personal data collections; and in Article 74(3) regarding the right to be informed of the quality of the environment and its protection.

Legislative work on legal regulations concerning the access to public information began in Poland after the adoption of the Constitution of 1997. The Act on access to public information was finally adopted in 2001.

Nevertheless, it has to be highlighted that already before the entrance into force of the Act on access to public information the Supreme Administrative Court acknowledged the citizens' right to information under Article 61 of the Constitution of the Republic of Poland, emphasising that the provision could constitute an independent basis for requesting the provision of information concerning the activity of municipal authorities (cf. judgment of the Supreme Administrative Court of 8 November 2000, II SA 1077/00, of 19 September 2001, II SA 948/01, and of 30 January 2002, II SA 717/01).

5. Give basic subjective observation as to the role and importance of free access to information in political system of your country. In particular, focus on how the importance of freedom of information is perceived by general public and by non-governmental sector.

As indicated above (cf. response to question 4), the right to information is one of the fundamental constitutional rights of individuals and constitutes a component of the constitutional clause of democratic state under the rule of law. However, judges may assess the significance of the right only form the perspective of its application. Due to the foregoing and to the constitutional status of judges (independence, prohibition of being a member of any political party, exercising their office only under the Constitution and laws), the latter are not authorised to assess the political significance of the right to information.

6. Give subjective general observation as to whether and eventually how free access to information rights are in practice abused or misused by the petitioners.

As far as judgments of administrative courts are concerned, the question of abusing the right of access to information was analyzed within the framework of a case concerning an applicant sending over 100 requests for the provision of public

information to an authority. In the judgment of 30 August 2012 (I OSK 799/12), the Supreme Administrative Court stressed that the applicant abused his right to obtain public information and, thus, disturbed the functioning of the municipal office and decreased the effectiveness of the office's operations in the field of performance of its statutory tasks. The Supreme Administrative Court pointed out that, while examining – in the foregoing context – the allegation according to which the authority failed to act, it was necessary to determine whether the authority's action of failure to act made it impossible for the applicant to access the requested information, or whether he could access the information in a different way indicated by the authority. Furthermore, the Court highlighted that such an assessment should be used "extremely rarely, in exceptional situations and only when the facts clearly indicate that the applicant overuses his right to obtain public information". In the aforementioned case, the applicant asked for documents published on the authority's website, as well as documents which could be accessed at the seat of the authority. However, the applicant did not use these forms of access and asked for the documents to be sent to his address.

7. Give a list and brief explanation of security, law enforcement and/or defence institutions that can benefit in your country from the exceptions laid down in Art. 7(e), Art. 8(4) and 8(5) of the Directive 95/46/EC.

The exceptions specified in Articles 7(e), 8(4) and 8(5) of the Directive 95/46/EC may in Poland be benefited from by members of the following uniformed services: Police, Border Guards and secret services, i.e. Central Anti-Corruption Bureau, Internal Security Agency, Foreign Intelligence Agency, Military Intelligence Service and Military Counterintelligence Service. It is possible under authorising provisions included both in regulations applicable to particular formations and in the provisions of specific Acts. The aim of the aforementioned services is to safeguard the defence of the state, security and public order. That is the scope within which the legislator authorised them to benefit form the above-mentioned exceptions.

8. Subjectively identify most emerging actual problems that arise from processing of personal data by aforementioned security, law enforcement and/or defence institutions. Whenever appropriate, demonstrate them on particular examples.

At present, it is difficult to indicate problems occurring in relation to the processing of personal data by the foregoing security, public order and defence institutions, as no cases regarding personal data processing by these institutions have been examined by administrative courts. However, a problem concerning the processing of the so-called sensitive data has been noticed by the Constitutional Tribunal. In the judgement of 20 January, K 39/12, The Tribunal stated that Article 29(1)(2)(i) of the Act of 23 December 1994 on the Supreme Audit Office (Dz. U. of 2012, item 82, 1529 and 1544), to the extent to which it allows authorised representatives of the Supreme Audit Office to process data revealing political views, religious of philosophical beliefs, as well as data concerning the genetic code, addictions or sexual life, is incompatible with Article 47 and Article 51(2) in conjunction with Article 31(3) of the Constitution of the Republic of Poland.