



NEJVYŠŠÍ SPRÁVNÍ SOUD



Colloquium organized by Supreme Administrative Court of the Czech Republic and ACA-Europe

Provide or Protect? Administrative courts between Scylla of freedom of information and Charybdis of protection of privacy.

Prague, 29-31 May 2016

Answers to Questionnaire: Poland



Colloquium co-funded by the "Justice" programme of the European Union

Provide or Protect? Administrative courts between Scylla of freedom of information and Charybdis of protection of privacy

(questionnaire)

Part I

1. Is the central administrative supervision over providing information and protection of personal data carried out by one administrative authority or are there specialized authorities for each of these fields or is there an absence of such an authority in any of these areas? Does the chosen model cause any application problems?

Personal data protection is handled in Poland by the Inspector General for Personal Data Protection („Generalny Inspektor Ochrony Danych Osobowych” – GIODO). It is a central administrative authority.

There is not a specialized body responsible for providing public information. The relevant entity (one that is carrying out public tasks) must be approached by the individual with a request for public information. The lack of a single administrative authority responsible for providing public information results in inconsistent practice in the scope of providing information by entities obliged to do so. In these circumstances the court’s practice, in particular the case law of the Supreme Administrative Court (SAC), is to set the standards for a uniform interpretation of an Act on access to public information of 2001.

2. What types of information are excluded from providing? Is there one regime regarding all exclusions or is there any differentiation – e.g. absolute exclusion and relative exclusion?

Under Article 61(3) of the Constitution of 1997 the right to obtain public information may be limited only by statute solely to protect freedoms and rights of other persons and economic subjects, public order, security or important economic interests of the State. Under Article 5 of the Act on access to public information of 2001 information is excluded from being made available if it is protected as statutory secret, classified information, confidential business information or an individuals’ privacy, save for individuals or entrepreneurs who have given up their right to privacy. Exclusion of access to information does not refer to public officials.

3. Are there any types of subjects governed by private law that have duty to provide information? If the answer is affirmative, what kind of subjects and what kind of information?

Under Article 4 (1) of the Act on access to public information of 2001 it is obligation of the public authorities as well as other entities performing public functions to make the public information available. It means that any entities which perform public functions or dispose of public property as well as legal persons, in which the State Treasury, units of local authority or economic or professional local authority hold dominant position may be obliged to make public information available.

For example, according to the SAC's case law, following subjects governed by private law are considered to obliged to provide public information: companies from energy sector (SAC judgment of 11 April 2014, Case No. I OSK 2494/13); companies from petroleum sector (SAC judgment of 5 September 2014, Case No. I OSK 2931/13); companies from telecommunication sector (SAC judgment of 10 April 2014, Case No. I OSK 2450/13 and Case No. I OSK 2421/13), municipal companies (SAC judgment of 16 March 2010, Case No. I OSK 1643/09; SAC judgment of 30 September 2015, Case No. I OSK 1773/14). Moreover, in Poland, associations, unions and universities also have duty to provide public (SAC judgment of 8 July 2015, Case No. I OSK 1514/14; SAC judgment of 7 October 2015, Case No. I OSK 1928/14; SAC judgment of 8 June 2011, Case No. I OSK 391/11).

4. Are the salaries of the employees of the public sector subject to the right to free access to information as well? Does this cause any application problems regarding the personal data protection?

Information on salaries of the employees of the public sector is unclassified and available *ex officio* or upon request. In the SAC case law, information which corresponds to the amount of the remuneration should be made available (see SAC judgment of 5 January 2016, Case No. I OSK 3087/14).

5. Is the trade secret excluded from the free access to information?

Trade secret excludes access to public information, if it constitutes business secret, and therefore has economic value for an entrepreneur (Article 5(2) Act on access to public information).

6. Are documents that are subject of intellectual property excluded from the free access to information?

Intellectual property cannot be made available, if it constitutes business secret.

7. Does the right to free access to information cover as well the parts of an administrative file that contain data related to individuals or are these data protected? In which areas of public administration does this cause problems ?

Article 1(2) Act on access to public information allows application of the different principles in relation to access to the administrative case files. Under Article 73 § 1 CAP (Code of Administrative Procedure) access to the administrative files of a case is available to the parties of an administrative proceeding only. Similarly, only the parties have access to files in the proceeding before administrative courts (Article 12a of the Law on the procedure before administrative courts).

A third party who is not a party to the proceedings can still obtain anonymized documents produced by public officers but the right to access to documents does not include private documents submitted to the file of administrative proceedings. The rules of CAP do not exclude application of Article 1(2) Act on access to public information (SAC resolution of 9 December 2013 r., Case No. I OPS 8/13).

8. Are data related to criminal proceedings or administrative delict proceedings or any data of quasi-criminal nature (typically files of secret police departments from the times of anti-democratic past) excluded from the right to free access to information?

Article 1(2) Act on access to public information allows application different principles in relation to access to the court case files in criminal or any other matters. In the course of a criminal preparatory proceeding (Article 156 § 1 of Criminal Procedure Code), files of a case are made available to the parties, defenders, attorneys and statutory representatives only upon consent of the prosecutor carrying out such preparatory proceeding. Upon the prosecutor's consent in exceptional cases the files can be made available to third parties. There is however a separate set of rules in the Act on Institute of National Remembrance according to which access to the files collected by the security service of the Polish People's Republic may be exercised by each person which the files concern. Files of the security service's officers and collaborators are publicly available with no restrictions.

In administrative proceedings of quasi-criminal nature, access to the administrative files of a case is available to the parties of the proceeding only (Article 73 § 1 CAP).

Part II

9. Public availability of decisions

9.1 Are there any sorts of decisions in your jurisdiction that are not published at all (e.g. decisions with classified status or other decisions with restricted access)? If so, please describe typical cases and give indicative statistic that can illustrate the frequency and relevance of such cases.

All court decisions are announced at the court session open to the general public save for cases decided in camera. If the case is decided in camera the court decision is sent to the parties only. The anonymized versions of the court decisions are available on the website. It is possible that on the website even anonymized versions are not available, for example in refugee cases or in security clearance cases.

Number of the SAC's decisions available on the website is 190 971. Only 1% of all decisions is not published on the website. In the official paper collection of the SAC's decisions, there is published about 120 rulings per year.

9.2 If a third person (not a party of respective case) wants to obtain your decision, what is the procedure? On-line availability of decisions is to be discussed below, so kindly describe here only other options (e.g. whether it is possible to ask for a decision by snail-mail, whether any fee apply etc.)

A third party can familiarize themselves with an anonymized decision upon request. It may be sent to the party by regular mail as well. All court decisions are available on the court website (anonymized versions).

9.3 Is there any official collection of selected decisions of you instance (apart on-line publication of decisions – see below)? If so, please describe in detail the procedure of its issue. In particular, please focus on the selection process of decisions that are to be published, the frequency of publication and the form of publication. Indicate, whether the collection is published directly by your instance, by some other public body or by an independent publisher. If the collection is published by an independent publisher, please describe the form of cooperation (i.e. whether the

publisher has exclusive rights to publish the collection, whether the publisher does any editing of published decisions etc.) Are decisions that are chosen for the publication regarded more relevant by your instance or by general public?

The SAC in cooperation with the Wolters Kluwer publishing house issues an official paper collection of its decisions: “Orzecznictwo Naczelnego Sądu Administracyjnego i wojewódzkich sądów administracyjnych” (Decisions of the SAC and of the regional administrative courts). The publishing rights remain with the SAC. Selection process is of internal character, inter alia the rapporteur judge may propose a judgment to be published. The ruling to be published is discussed first in the Chamber of the SAC, than it is presented to the committee of the judges that is chaired by the President of the SAC. When deciding on publication, it is taken into consideration its importance for the jurisprudence.

10. Editing and anonymization of decisions

10.1 Do you anonymize published decisions? If so, please describe in detail the procedure. In particular, please describe who is in charge of anonymization, whether there are any particular statutory or other rules governing anonymization (apart general privacy/ data protection rules) and what data are anonymized.

Court decisions are anonymized by law clerks and this process is ruled by a by-law passed by the President of the SAC. All data that may reveal identity of the party, such as for example, full names of the parties and their addresses should be anonymized.

10.2 If anonymization practice changes, does it affect already published decisions (i.e. are past decisions subsequently anonymized/ de-anonymized with every change of anonymization rules)?

There has been no change to the anonymization rules so far.

10.3 Describe any subsequent problematic issues that you noted in your jurisdiction regarding the anonymization (e.g. different practices of different supreme instances, strong public debates, impact of de-anonymization of decisions by media etc.)

The degree of anonymity in the Polish administrative courts is very high. For example, judgments of the Constitutional Tribunal are published with full names of the parties, whereas the SAC's does not.

10.4 Do you edit published decisions? If so, please describe in detail the procedure. In particular, please describe who is in charge of editing, what information is added/removed in the process of editing (incl. metadata).

The anonymization process does not include editing. However, limited editing process is often required for publishing a paper collection of the court judgments.

10.5 Has the development of the right to be forgotten affected in any way the anonymization or publication of your decisions? If not, is it a topic that is being considered in your jurisdiction with regards to the publication of court decisions?

No experience so far in this respect. It could be possible, upon request of the party, by the President of the SAC, who may decide on deleting the concerned decision from the court website.

11. On-line publication of decisions

11.1 Are decisions of your instance available on-line? If so, please indicate whether on-line all or only selected decisions are published on-line (if only selected decisions are published, please describe the procedure of their selection).

All decisions of the SAC are available at: <http://orzeczenia.nsa.gov.pl/cbo/search>, save for some exceptions, for example, judgments concerning refugees or security clearance.

11.2 Describe the form of on-line publication of you decisions. In particular, indicate whether your decisions are published through your own website or whether it is done through some different on-line service (e.g. through a common platform operated by a ministry of justice, by a judicial council etc.) Kindly add also sample screenshot(s) or link(s).

Decisions are published on a website maintained by the SAC (<http://orzeczenia.nsa.gov.pl/cbo/search>) which used also by commercial entities providing for legal information (LEX by Wolters Kluwer, Legalis by C.H. Beck).

11.3 What are available file formats in which your decisions are available on-line? Apart enumerating particular file formats, kindly indicate whether your instance systematically sticks to any commonly accepted open data policy. Also, please indicate whether your instance publishes on-line only individual decisions or whether whole datasets are available to the public for further re-use. If datasets are available for further re-use but not publically, please describe to whom and under what conditions such datasets are made available.

Rulings are available on-line in html and rtf formats. This pertains to both rulings in particular cases (judgments, orders), as well as to general rulings (resolutions). Rulings can be reused without any conditions.

12. Public availability of other documents

12.1 Are there published on-line personal information about members of your instance? In particular, please describe whether there are CVs available, in which length and form (e.g. on a court website) and eventually what information is regularly published (e.g. education, memberships, political beliefs, marital status etc.) Also, please indicate whether the publication of information about members of your instance is compulsory, whether the members of your instance are free to decide about the structure and content of such information and whether you noted any issues in that regards (e.g. there was a big debate in the Czech Republic over the publication of past membership of the judges in the communist party). Please add a sample link or a screenshot of how such personal information about a member of your instance looks like.

Names, official court functions of all judges can be found on the court website <http://www.nsa.gov.pl/sedziowie-nsa.php>. Similarly, basic information (cv, photo) concerning presidents and vice-presidents of the SAC can found at <http://www.nsa.gov.pl/en.php>.

12.2 Which case-related documents other than decisions of your instance are published on-line (e.g. dissenting opinions, advocate general submissions, submissions of parties, records of chamber deliberations etc.)? Please, describe how these documents are published, i.e. where and in which format (e.g. on a website through a search form, in open data formats, etc.). If your instance publishes these documents in open formats, kindly provide a sample link to a particular dataset.

No other documents apart from rulings of the SAC and of first instance administrative courts are published. Subject to publication are also dissenting opinions. Analyses of the Judicial

Decisions Bureau (Biuro Orzecznictwa) are also published in an internal database available to the Court employees.

12.3 Are the members of your instance allowed to publically comment or annotate on their own decisions or other decisions of your instance? If so, please describe common forms in which this is done (e.g. in law journal articles, in public debates on case-law organized by the respective instance etc.).

It is not a practice of the members of the judiciary to comment their own judgments, save for spokesperson of the court while making press release or informing media and it will be just information not comment. However, judges sometimes comment upon judgments rendered by others in scientific papers.

Part III

13. What trends, threats and challenges do you foresee to come in the field of freedom of information and protection of privacy during the next decade? What should be the role of supreme administrative jurisdictions in facing these trends, threats and challenges?

What can only be a problem is the increasing activity of Internet hackers who break into court systems, which are growing ever richer in information, and steal such information. Also the development of the right to be forgotten may implicate requests for rulings to be excluded from publication on the Internet. It might also be a problem to assure relevant staff (time) resources necessary for anonymization of rulings in the light of the increasing number of cases brought to the SAC. A challenge for the Polish administration judiciary will be further computerisation thereof, which will make it possible to publish on the Internet not only the rulings but also the entire court files of a case.