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# Limiting the Right of Access to Public Information in the Age of COVID-19 – Case Study of Poland

**Abstract:** The right of access to public information is one of the most fundamental political rights granted to citizens under Art. 61 of the Polish Constitution. In the Act of 6 September 2001, not only was the procedure for providing the public information specified, but also some detailed rules on obliged entities. In practice, the right to access public information not only enables citizens to take mature political decisions, but also prevents the abuse, corruption, nepotism or waste of public funds. The transparency of public administration actions forces its representatives to behave by the book and to respect the rules governing a democratic state of law as well as human rights. Undoubtedly, the full implementation of the right of access to public information may not be possible in urgent and unexpected scenarios such as a state of emergency or martial law, but any restrictions should always be introduced in a proportionate manner and only to the extent necessary to protect other (more important) goods and values. The epidemic threat facing Poland in March 2020, followed by the state of the epidemic and the accompanying activities of the broadly understood legislator, have significantly impacted the implementation of the openness principle and the right to access public information in the country. Simultaneously, doubts were raised not only due to the scope and nature of these changes, but also because of their constitutionality. In order to obtain a full picture of these threats to the implementation of the law in question, one must take into account possible decisions of the Constitutional Tribunal (with positive or negative effects) in cases that will be ruled on soon. The analysis that we present is aimed not only at determining whether the functioning of the state in the epidemic regime justified the need to limit the constitutional right of access to public information, but also – in a broader systemic

context – at demonstrating that the transparency standards existing in our national model need to be strengthened, not weakened.
**Keywords:** democratic state of law, epidemic state, human rights, right to information

## Introduction

The right of access to public information is one of the most fundamental political rights granted to citizens under Art. 61 of the Polish Constitution.[1] In the Act of 6 September 2001,[2] not only was the procedure for providing the public information specified, but also some detailed rules.[3] According to its Art. 1, any information relating to a public matter is considered to be public information;[4] the entities obliged to disclose public information include, inter alia, public authorities (Art. 4 (1)(1) u.d.i.p.); and anyone can request access, without the need to demonstrate a legal and/or factual interest. Art. 2 u.d.i.p.[5] established how to effectively exercise the powers.

In practice, the right to access public information not only allows citizens to make mature political decisions, but also prevents the abuse, corruption, nepotism or waste of public funds. The openness of actions of public administration bodies forces their representatives to behave transparently and honestly, to respect the rules governing a democratic state of law and to respect human rights. Undoubtedly, the full implementation of the right of access to public information may not be possible in urgent scenarios such as a state of emergency or martial law, but any restrictions should always be introduced in a proportionate manner and only to the extent necessary to protect other (more important) goods and values.

The state of epidemic threat introduced in Poland in March 2020, followed by the state of the epidemic and the accompanying activities of the broadly understood legislator, significantly influenced the implementation of the principle of openness and the right to access public information in the state. At the same time, doubts are

1 The Constitution of the Republic of Poland of 2 April 1997, Dz. U. no. 78, item 483 with changes.

2 Act of 6 September 2001 on access to public information (Dz. U. 2020 item 2,176 with changes), further 'u.d.i.p.'.

3 I. Kamińska and M. Rozbicka-Ostrowska, Ustawa o dostępie do informacji publicznej, Komentarz, Warsaw 2015, p. 17 et seq.

4 In broad terms, the source of information is 'not only every document in the legal sense, recorded in any form, or official material, but also data recorded in any form, even if they do not take the formalized form of a document (e.g. an object). In this approach, the information can be obtained in any form (view, copy of the document, sending the document in the form of a file, photo scan, access to the item etc.), also through direct statements of persons belonging to public authorities or persons authorized or obliged to represent such a body and the staff providing its service, which means that from the point of view of information protection, it becomes necessary to distinguish between its components' – WSA in Warsaw, 3.01.2011, II SAB/Wa 264/10; NSA 18.09.2008, I OSK 315/08.

5 M. Jabłoński, Udostępnienie informacji publicznej w formie wglądu do dokumentu, Wrocław 2013, p. 47 et seq.

raised not only by the scope and nature of the changes, but also by their constitutionality. For a full picture of the threats to the implementation of the law in question, it is necessary to take into account possible (positive or negative) decisions of the Constitutional Tribunal in cases that will be ruled on soon.

The analysis that we present is aimed not only at determining whether the functioning of the state in the epidemic regime justified the need to limit the constitutional right of access to public information, but also – in a broader systemic context – at demonstrating that the standards of transparency existing in our national model need to be strengthened, not weakened. Even though the introduced during Covid epidemic law mainly changed procedural aspects of access to information, it could have potentially impacted its material parts, and as a result threaten other rights and freedoms, including freedom of press. It is worth remembering that democracy must be inherently related to the existence of a guarantee of the so-called transparency of public life, which should be identified with the principle of openness and transparency of a democratic state of law. The essence of this principle boils down to the assumption that the functioning of the state apparatus and all persons holding public functions connected with it should be disclosed, and exceptions, although possible and justified, should be treated as exhaustive exceptions to the rule. The main research hypothesis is that the restrictions on access to public information introduced in the state of epidemic cannot be considered justified (as they have not met the requirements of Art. 31 of the Polish Constitution) and have led to the degradation of the value of transparency in Poland. In this study, the authors try to prove that the motion for annulment of a number of provisions of the u.d.i.p., which is being examined by the Constitutional Tribunal, may lead to the inability to use the constitutional right of access to public information. Formal and legal research methods were used in the writing of this article. It aims to present a case study of the limiting of the right to access public information by changing the procedure of access during the COVID-19 pandemic in Poland only and is not a comparative study.

## 1. The Importance of the Principle of Openness in Extraordinary Situations

Openness is of particular importance in the context of deliberations on the principles governing a democratic state ruled by law. The importance of the openness rule for a political culture is highly recognized[6]. The level of exercise of citizens' rights to

6 A. Dylus, Aksjologiczne podstawy jawności i jej ograniczenia. Perspektywa etyki politycznej, (in:) Z. Cieślak and G. Szpor (eds.), Jawność i jej ograniczenia t. 2, Podstawy aksjologiczne, Warsaw 2013, p. 22.

obtain information is treated as a measure of the democracy's maturity level.[7] Some authors emphasize that the traditional role of citizens in societies based on ancient culture is related to the principles of limited trust, controlling power and, in exceptional situations, civil disobedience.[8] The freedom to obtain information is also described as controlled scepticism towards representative democracy, whose aim is to care for the common good[9]. The openness is also an inseparable element of the political education, directly pointing to the arguments for adopting specific, detailed solutions, efficient translation of the individual elements of political reality to citizens and the consequences of decisions made, not only affecting the acquisition of civic competences, but above all allowing a citizen to abandon utopian desires to create an ideal society.[10] The adoption of pro-transparency regulations leads to the empowerment of the citizen in relations with the public administration; the citizen becomes an equal partner of the administration, when exercising their powers of control[11].

The conscious citizens create the foundations of a civil society and, at the same time, an information society, i.e. the one in which the information becomes not only a source of knowledge, but the real tools for determining various types of processes, ranging from the political, social and controlling to economic and educational ones. Such a society bases its existence on knowledge, the foundation of which is access to information.[12] At the same time, such knowledge becomes the basis for modifying the existing importance of the state, economy, information processes, management systems etc.[13] serving the goal of deepening the democracy, including democratic law-making processes.

Ensuring the transparency and openness of public authority activities is particularly important in times of crisis and social unrest. The access to public information should be fully implemented, especially when the level of citizens' trust in the state

7 J. Pitera, Wkład Transparency International Polska w przezwyciężanie korupcji, (in:) A Dylus, A. Rudowski and M. Zaborski (eds.), Korupcja. Oblicza, uwarunkowania, przeciwdziałanie, Wroclaw/Warsaw/Cracow 2006, p. 152.

8 G. Skąpska, Głos w dyskusji nt. Etyka i polityka w społecznym odbiorze, (in:) G. Skąpska (ed.), Etyka w polityce, Cracow 1997, pp. 158–159.

9 M. Bernaczyk, Funkcje prawa do informacji w polskim porządku prawnym, (in:) M. Jabłoński (ed.), Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawny, Wroclaw 2014, p. 369.

10 A. Dylus, Aksjologiczne podstawy…, *op. cit.* p. 24.

11 A. Piskorz-Ryń, Dostęp do informacji publicznej- zasady konstrukcyjne ustawy, Kwartalnik Prawa Publicznego, 2002 v. 4, p. 185.

12 On the components of the concept of 'information society' with an indication of the important role of 'technical instruments' accompanying its functioning, see: T. Burczyński, Elektroniczna wymiana informacji w administracji publicznej, Wroclaw 2011, p. 15 et seq.

13 R. Raszewska-Skałecka, Edukacja jednostki wobec wyzwań społeczeństwa informacyjnego – kwestie wybrane, (in:) J. Blicharz and J. Boć (eds.), Prawna działalność instytucji społeczeństwa obywatelskiego, Wroclaw 2009, p. 464 et seq.

apparatus drops dramatically. As the Polish Ombudsman pointed out, 'In view of the current state of epidemic and numerous limitations of fundamental rights and freedoms (...) providing citizens with access to reliable information about the activities of public authorities should be considered particularly important'[14].

The SARS-CoV–2 epidemic also showed the importance of the rapid information flow in social behaviour. Guaranteeing the full implementation of the transparency principle in the state could have contributed to combating fake news and preventing social panic. The World Health Organization states that during the COVID-19 pandemic, one could observe an 'infodemic' in the majority of states.[15] An 'infodemic' may cause serious harm in the societies as it feeds on people's most basic anxieties. Considering the novelty of the virus and unusual situations we all had to face, gaps in knowledge have proven to be an ideal breeding ground for false or misleading narratives to spread.[16] To illustrate, one can recall the panic that broke out during the first wave of the SARS-CoV–2 epidemic in Poland in March 2020, manifested, inter alia, by the mass buying of products from stores, losses incurred by hotels and restaurants (introducing restrictions overnight on the entrepreneurs' functioning was associated with the loss of previously purchased food products), repeated rumours of the closure of cities, or uncertainties related to the ability to leave and return to the country.

A prudent information policy could contribute to a faster end to the pandemic by increasing the level of vaccination coverage in the society. The contradictory information provided by various government representatives with the introduced restrictions on access to public information led to increased fears amongst many citizens related to receiving the new COVID-19 vaccine. It also has to be emphasized that the lack of transparency of governmental bodies making impactful decisions leads to an infringement not only of the passive obligation to provide public information (which is broadly described further in the article) but also its active side.[17]

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14 Letter of the Polish Ombudsman to the Minister of Administration and Interior Affairs dated 15.04.2020, VII.6060.19.2020.MM.

15 The term has been used and described by the WHO: 'infodemics are an excessive amount of information about a problem, which makes it difficult to identify a solution. They can spread misinformation, disinformation and rumours during a health emergency. Infodemics can hamper an effective public health response and create confusion and distrust among people', https://www.who.int/docs/defaultsource/coronaviruse/situation-reports/20200305-sitrep-45-COVID-19.pdf?sfvrsn=ed2ba78b_4 (accessed 07.03.2022).

16 Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Tackling COVID-19 disinformation – Getting the facts right, dated: 10.06.2020.

17 See judgment of European Court of Human Rights from 19.02.1998 Guerra and others v. Italy, case no. 12967/89.

In its guidelines on freedom of expression and information in times of crisis,[18] the Committee of the Council of Europe listed among the recommendations guaranteeing free access to information, avoiding unclear wording when imposing restrictions on freedom of expression and information, and adhering to the highest professional and ethical standards when making available up-to-date, reliable and comprehensive information to the public. This is particularly important as any restrictions in access to public information may further lead to the infringing of other rights and freedoms, such as the right to freely communicate and receive information, the right to participate in public affairs (which was restricted through other means) and the freedom of assembly[19], ultimately leading to limiting the freedom of the press. This has been the subject of various ECHR cases, and included in the above-mentioned guidelines of the Council of Europe and communication from EU bodies and institutions.

The Secretary General of the Council of Europe in a document addressed to all member states[20] pointed out that even during the crisis caused by the COVID-19 pandemic, access to public information should be based on the rules guaranteed up to that point. The document also stressed that official announcements cannot be the only source of information regarding the pandemic, as it risks introducing censorship and disregarding legitimate concerns. Attention was also brought to the role of state information campaigns in combating disinformation, the duty of state authorities to counteract information manipulation and the prohibition of using the argument of fighting the pandemic to silence whistleblowers and opposition parties.

## 2. Restrictions to the Right of Access to Public Information during the Epidemic Threat and Epidemic State

Under the ordinance of the Minister of Health of 13 March 2020[21] starting from 14 March 2020, the epidemic threat was introduced in Poland, which lasted until 19 March 2020. Due to the worsening epidemic situation, with the use of next ordinance of the Minister of Health,[22] on 20 March 2020 the state of the epidemic was im-

18 Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis, Adopted by the Committee of Ministers on 26 September 2007 at the 1005th meeting of the Ministers' Deputies.

19 More about freedom of assembly see in A. Koman-Bednarczyk and N. Kurek, Freedom of Assembly in the Light of Polish Regulations and Selected Case Law Standards of the European Court of Human Rights, 'Studia Iuridica Lublinesia' 2021, vol. 30, no. 5, pp. 309–324.

20 Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis – A toolkit for member states. Information Documents SG/Inf(2020)11.

21 Ordinance of the Minister of Health of 13 March 2020 on the declaration of an epidemic threat in the territory of the Republic of Poland (Dz.U.2020.433 with changes).

22 Ordinance of the Minister of Health of 20 March 2020 on the declaration of an epidemic in the territory of the Republic of Poland (Dz.U.2020.491 with changes).

posed, which, despite the visible improvement in the epidemic situation, continues to this day. In order to reduce the number of SARS-CoV–2 infections and the deaths caused by them, it became necessary to introduce a number of restrictions on the exercise of individual rights and freedoms. Apart from the necessity to temporarily suspend certain types of economic activity (restaurants, gyms, hotels, bars, discos, cinemas, theatres and others), significant changes were also introduced in the functioning of the public administration.[23].

One such example was the introduction, through Arts. 15zzs (1)(6) and (10)(1) of the act of 2 March 2020 on special solutions related to the prevention and combating of COVID-19, other infectious diseases and crisis situations caused by them,[24] of changes to the procedure of public information access. The change provided by Art. 15zzs (1)(6) assumed that during the period of an epidemic threat or state of an epidemic announced due to COVID-19, the procedural and judicial deadlines in administrative proceedings would not start and the initiated ones were suspended. In turn according to Art. 15zzs (10)(1), during the period of an epidemic threat or state of an epidemic announced due to COVID-19, the provisions on the inactivity of the authorities and the obligation of the authority and entity conducting the proceedings or control, respectively, to notify the party or participant in the proceedings about failure to settle the case on time are not in force.

It should be noted that the time limit for making public information available specified in Art. 13 u.d.i.p. is not only of an instructional nature. As indicated in Art. 13 u.d.i.p., the disclosure of public information upon request is to take place without undue delay, but not later than 14 days from the date of submission of the request. If the public information cannot be made available within the time limit specified in section 1, the entity obliged to disclose it shall notify the subject within this period of the reasons for the delay and the date on which it will make the information available, which should not be longer than two months from the date of submission of the request. The exceptions to this rule are not only the situation in which, as a result of disclosing the information, the obliged entity is to incur additional costs,[25] but also those that will be a consequence of: the inability to meet the request by the obliged person

23 It is worth to notice, that a number of these changes have shown that in emergency situations, processes that previously had taken years could be carried out in just a few days (e.g. the online court hearings or city council sessions, e-education, e-studies etc.), but some of these restrictions could not be fully justified. See also P. Chmielnicki, D. Minich, R. Rybkowski, M. Stachura and K. Szocik, The COVID-19 Pandemic as an Opportunity for a Permanent Reduction in Civil Rights, 'Studia Iuridica Lublinesia' 2021, vol. 30, no. 4, pp. 77–109.

24 The act of 2 March 2020 on special solutions related to the prevention, counteracting and combating of COVID-19, other infectious diseases and the emergencies caused by them (Dz. U. item 374 with changes), further 'Covid act'.

25 In such a situation, the obligated entity shall notify the applicant of the amount of the fee within 14 days of the date of submitting the application. The disclosure of information in accordance with the application takes place within 14 days from the date of notification to the applicant, un-

as to the form and/or method (Article 14), or the determination that the request concerns the disclosure of processed information (Article 3 (1) (1))[26]. If the case is not resolved (by providing the information or by issuing a negative decision), the applicant has the right to lodge a complaint with the administrative court for the inactivity of the authority. However, the provisions of the Code of Administrative Procedure apply only to a limited extent when it comes to the procedure for public information disclosure, i.e. to issue negative decisions on providing information and decisions to discontinue the procedure of disclosure of information. At the same time, there are no grounds for considering that the time limit specified in Art. 13 u.d.i.p. should depend on the state of epidemic threat or state of the epidemic announced due to Covid.[27] Therefore, Art. 15zzs (1)(6) should not apply to proceedings for the disclosure of public information.

Additionally, in Art. 15zzs (2) of the Covid act, it is indicated that the suspension of the commencement and of the time limits referred to in para. 1 does not apply to the time limits in cases recognized by courts referred to in Art. 14a (4) and (5) of that Covid act, i.e. time limits recognized by the legislator as urgent ones. Pursuant to Art. 14a (5) of the Covid Act, the urgent cases are cases where the law specifies the time limit for their consideration by the court. It should be noted that Art. 21 u.d.i.p. specifies the deadlines within which, in the case of proceedings for access to public information, the files and replies to the complaint should be submitted (15 days from the receipt of the complaint) and the deadline for considering the complaint (30 days). Despite this legal background, the Regional Administrative Court in Łódź ruled that cases for disclosure of public information constitute a category of urgent matters and therefore Art. 15zzs (1)(6) shall not apply.[28] However, it seems that this conclusion has gone too far and is contrary to the intention of the rational legislator. The purpose of creating a category of 'urgent matters' was to ensure that specific administrative cases whose outcome may seriously impact individuals' ongoing matters are resolved in a timely manner. This category includes such cases as issuing ID cards, driving permissions, passports or others essentials for daily activities. Without doubt, access to public information is an important right, but this does not fall into the category of administrative cases/proceedings which are essential for individual daily living. Undoubtedly, the imprecise wording of the Covid act allowed for such a broad interpretation.

less the applicant changes the application within this period in terms of the manner or form of providing the information or withdraws the application.

26 On the specificity and various types of solutions that appeared in the jurisprudence due to the general provisions of the act on access to public information see: M. Jabłoński, Udostępnienie informacji publicznej w formie wglądu do dokumentu, Wroclaw 2015, p. 77 et seq.

27 VII.6060.19.2020.MM.

28 Judgment of the Regional Administrative Court in Łódź of 28 April 2020, II SAB/Łd 12/20, LEX no. 2974739.

Simultaneously, in the practice of exercising u.d.i.p., a complaint about inactivity is of a key nature. The expiry of the deadline for disclosing public information does not entail any material-legal consequences, but only allows for the introduction of measures aimed at disciplining the entities obliged to disclose public information which remained inactive. The jurisprudence of courts in cases concerning the inactivity of an authority led to a non-statutory definition of the scope and nature of public information. It is for this reason that the amendment introduced in Art. 15zzs (10)(1) of the Covid act was particularly important for access to public information.

The temporary suspension of the provisions regarding the inactivity of the authorities and the obligation of the authority and entity conducting the proceedings or control to notify the party or participant in the proceedings that the case has not been resolved within the deadline did not cover only the proceedings for access to public information. In order to apply the regulation in question to a specific proceeding, two conditions had to be met. The first is the existence of administrative deadlines for settling a specific case. This premise has undoubtedly been met in the case of public information procedures.

The second condition for applying the provision of Art. 15zzs (10)(1) requires an administrative case to be conditional upon legal protection being granted in front of a court or an authority. Given that the legislator has granted the tools to monitor and control the access to public information proceedings through the possibility of lodging a complaint for inactivity, lodging an appeal against the issued decision (as well as a request for reconsideration of the case) and also filing an appeal against the decision issued in the course of the proceedings, it should be considered that this premise has also been fulfilled. This means that Art. 15zzs (10)(1) should also be applied in the case of inactivity of the authority in the proceedings for disclosure of public information.

## 3. The Practice of Exercising Art. 15zzs (10)(1) of the Covid Act

Due to how the norm in question was construed, it has been causing significant interpretation problems. In Art. 15zzs (10)(1) of the Covid act, it is set out that during the period of an epidemic threat or state of an epidemic announced due to COVID-19, the provisions regarding the authorities' inactivity and their obligation to notify the party or participant about the failure to settle the case on time do not apply. Looking at how the norm was created, it is not clear whether the superior body (or in the case of access to public information the administrative court) could decide that the authority was inactive at the time of the state of epidemic threat or epidemic. It is also not clear whether such superior body (or a court) could rule on the inactivity, concerning the lack of action of an authority before the introduction of the state of epidemic threat or epidemic.

The Regional Administrative Court in Opole indicated that 'in the period of an epidemic threat or epidemic administrative bodies do not remain inactive, and therefore negative consequences in the form of penalties and fines cannot be imposed on them, or any sums of money awarded against them to the complainants for failure to issue decisions within the time limits specified by law cannot be ruled. Such consequences may apply only with regard to inactivity occurring in such periods (state of epidemic threat or epidemic)'.[29] It follows that the non-application of the provisions on inactivity concerns only the activities of the authority during an epidemic threat or epidemic. The court also noted that the wording of the provision in question was contrary to the general principle of declaring inactivity as of the date of the judgment, but that at the same time 'in the circumstances of this particular case, if the authority could not remain in inactivity, and the court could not impose a fine or order an appropriate sum, then the complaint must have been dismissed'.

Interestingly, it seems that the discussed norm only allows for the inaction of the authority to be stated during its validity, but does not preclude the imposition of a fine on the authority for its previous actions. The Supreme Administrative Court came to such conclusions twice.[30] The Supreme Administrative Court indicated that Art. 15zzs (10)(1) stating the non-application of the provisions on inactivity of an authority or failure to resolve the case may not be referred to inaction that occurred before the period specified in Art. 15zzs (1) of the Covid act. In its opinion it stated: 'The exclusion of the application of the provisions listed in Art. 15zzs (10) of the Covid act, in fact, boiled down to the exclusion of the obligation for the authorities to undertake activities during an epidemic threat or epidemic state announced due to Covid (and in fact during the period of this provision, i.e. from 1 April to 16 May 2020) within the time limits specified by law; however, it could not be equated with the inadmissibility of bringing legal remedies regarding inactivity or excessive length which existed before 1 April 2020.' This position should be considered as proper and correct. A different interpretation would lead to the suspension of all proceedings pending on the date of entry into force of the discussed provision and later causing further delays in administrative proceedings, including those related to access to public information.

The introduced restrictions were undoubtedly an abuse provided by the legislator. Any restrictions should be introduced only insofar as they are proportionate and necessary to protect the overriding value of public health. Furthermore, there are serious doubts as to whether the restrictions in the procedure for disclosure of

29 Judgment of the Regional Administrative Court in Opole of 30 June 2020, II SAB/Op 32/20, LEX no. 3034582.

30 Judgment of the Supreme Administrative Court of 5 May 2021, II GSK 399/21, LEX no. 3197679 and Judgment of the Supreme Administrative Court of 12 August 2021, II GSK 977/21, LEX no. 3229366.

public information were introduced in accordance with the Constitution, including in particular Art. 31 (3). As indicated in the doctrine, even in the case of a state of emergency (which is much more interfering in the sphere of rights and freedoms), restrictions on access to public information will not always be justified[31]. In the case of the Covid act, the justification for its draft in no way refers to the issue of openness, as it seems the project initiator did not specify why and for what purpose it was necessary to introduce restrictions on access to public information and what impact it would have on counteracting the epidemic or protecting public health.

The way in which the regulation in question is structured leaves too much freedom for the authorities applying the law. This could potentially lead to unequal treatment of citizens, shake the trust in the state apparatus and, as a consequence, weaken the constitutional guarantees contained in Art. 61 of the Constitution. The lack of precision in drafting the provisions of the Covid act, as well as the fact that the changes had been introduced too quickly, had a negative impact on the functioning of public administration bodies and the manner of implementing requests for access to public information. Notwithstanding the foregoing, the exclusion of the application of the provisions on the inactivity of the authority during an epidemic emergency or epidemic was one of the elements of the deepening crisis in the implementation of the constitutional principle of openness.

The controversial provision was repealed pursuant to Art. 46 of the Act of 14 May 2020.[32] This means that despite the continuing state of the epidemic, from the day the standard in question was repealed, the procedure regarding access to public information should be conducted in accordance with Art. 13 of u.d.i.p., and therefore if the authority remains inactive, there are currently no obstacles to its finding.

## 4. Proceeding Before the Constitutional Tribunal to Declare the Provisions of the Act on Access to Public Information Inconsistent with the Polish Constitution

A few weeks before the introduction of the state of epidemic threat in Poland, and later the state of epidemic, the Constitutional Tribunal received an application from the First President of the Supreme Administrative Court asking it to declare a number of provisions of the act on access to public information inconsistent with the Polish Constitution. This is not the first case concerning access to public information which is pending in the Constitutional Tribunal. The doubts as to the method

31 G. Sibiga, Stan dziurawy informacyjnie, https://www.rp.pl/inne/art18919981-grzegorz-sibiga-stan-dziurawy-informacyjnie (accessed 03.01.2022).

32 Act of 14 May 2020 amending certain acts in the field of protective measures in connection with the spread of SARS-CoV–2 virus (Dz. U. item 875 with changes).

of disclosing public information had arisen before the u.d.i.p. was implemented.[33] The issue of the constitutionality of individual u.d.i.p. provisions has already been resolved by the Constitutional Tribunal several times, including in 2006[34] and 2018.[35] The current interpretation of u.d.i.p. presented by the Constitutional Tribunal significantly contributed to the development of the right of access to public information and strongly preferred a pro-transparent approach, while at the same time trying to provide adequate protection to other freedoms and rights that could conflict with the principle of openness.

The application, addressed to the Constitutional Tribunal on 16 February 2021, concerns the potential inconsistency with the Polish Constitution of a number of provisions of u.d.i.p. The main objection raised in the present application is the use in u.d.i.p. of unclear and imprecise concepts and a significant extension of the catalogue of entities obliged to disclose public information in relation to the standards contained in Art. 61 of the Basic Law. Additionally, the applicant points out the lack of a detailed statutory definition of the catalogue of public information, which means that it is not possible to define the statutory features of a prohibited act, and therefore it is not possible, on the basis of the provisions of u.d.i.p., to adjudicate on the commission of a prohibited act (failure to disclose public information in breach of the binding obligation – Art. 23 of u.d.i.p.). Separate allegations have concerned the conflict between the exercise of the right to information and the right to privacy, but they can hardly be considered justified.

Without question, the provisions of the act on access to public information are in many cases formulated imprecisely and leave the room for free interpretation. The basic definition of 'public information' required multiple interpretations by the courts, and the jurisprudence on u.d.i.p. itself is vast. Against this background, there are still doubts as to the authorized and obliged entities, the procedure for disclosing public information, the processed information and the costs incurred in disclosing public information.[36] It must be admitted, however, that after more than 20 years of the u.d.i.p.'s operation, a relatively unified and constant practice of its application has developed. The Polish Ombudsman spoke in a similar vein, pointing out that: 'The practice of its [u.d.i.p.'s] application has changed along with the increase in social awareness and the natural changes that public life has undergone. The resulting rights and obligations are now known to both citizens and entities obliged to provide public

33 Judgment of the Constitutional Tribunal of 16 September 2002, K 38/01, OTK-A 2002/5/59; M. Jabłoński, Realizacja prawa dostępu do informacji publicznej w praktyce funkcjonowania samorządu terytorialnego – wybrane zagadnienia, 'Finanse Komunalne' 2008, no. 1–2, p. 7.

34 Judgment of the Constitutional Tribunal of 20 March 2006, K 17/05, OTK-A 2006/3/30.

35 Judgment of the Constitutional Tribunal of 18 December 2018, SK 27/14, OTK-A 2019/5.

36 See also: D.J. Kościuk and J. Kulikowska-Kulesza, The Right to Public Information. Selected Interpretation Doubts in the Doctrine and Jurisprudence of Administrative Courts, 'Studia Iuridica Lublinesia' 2020, vol. 29, no. 1, pp. 129–143.

information'[37]. In his position, the Ombudsman also argued that although the provisions of u.d.i.p. were formulated in a broad manner, it has not prevented the exercise of the right to access public information.

Although certain elements of the charges (considered in isolation from the practice to date and its systemic consequences) raised in the application of the First President of the Supreme Administrative Court should undoubtedly be treated as justified, the recognition of the unconstitutionality of the above-mentioned provisions would be 'throwing the baby out with the bathwater'. If a ruling was issued in accordance with the content of the application, it would de facto lead to the hollowing out of the tax ordinance from the content and impossibility of applying this act in practice. The justification analysis of the First President of the Supreme Court's application leads to the conclusion that the applicant's intention was in fact to challenge the previous jurisprudence of the Constitutional Tribunal, the Supreme Court and administrative courts regarding the application of the Act on Laws and Regulations, leading to a fundamental change (and in practice to eliminating the possibility of its application) of this act, and not a hierarchical control of standards within the meaning of Art. 188 of the Polish Constitution.[38] As a consequence of the issuance of a judgment declaring the unconstitutionality of the challenged provisions, we are threatened with a reality of returning to the state prior to the entry into force of u.d.i.p.

Although the right to public information is regulated directly in Art. 61 of the Polish Constitution, as experience so far has shown, it cannot be implemented without an appropriate statutory basis. The lack of an act (1997–2001) specifying the procedure for providing information (Art. 61 (4) of the Constitution) resulted in the actual limitation or even exclusion of the possibility of effectively obtaining the requested information directly on the basis of Art. 61 of the Constitution. The submitted applications were considered not on the basis of the content of Art. 61 sec. 1 and 2, but on the basis of separate statutory regulations, the most frequent of which were those defining the rules for exercising the right to access the case files, i.e. in principle relating only to the rights of the parties and participants in the proceedings.[39]

## Conclusions

The restrictions on access to public information introduced by the Covid act cannot be considered justified, taking into account both the content of Art. 31 (3) of the Polish Constitution as well as Poland's obligations on the international legal

37 K 1/21 – Letter of the Ombudsman of 17 June 2021 – justification of the position, Vll.6060.15.2021.MMIMKS.

38 Vll.6060.15.2021.MMIMKS.

39 A. Piskorz-Ryń, Prawo do informacji od podmiotów wykonujących administrację publiczną w polskim porządku prawnym, 'Samorząd Terytorialny' 2000, no. 7–8, p. 92.

arena. The legislator has not examined whether there are other, less invasive measures that could achieve the desired effect. Considering that the regulations discussed in this study were repealed despite the ongoing epidemic, it seems that they did not contribute to the fight against SARS-CoV–2. Therefore, it should be concluded that these restrictions were not necessary for the protection of public health, and that their introduction was a violation of the basic principles of the democratic state ruled by law.

The introduced restrictions led to the depreciation of the fundamental principle of transparency in the actions of the state authorities in the Republic of Poland. Given the direction of legal interpretation adopted by the Constitutional Tribunal in recent years and the restrictions on access to information introduced in the territory (near Polish-Belarus boarder) under the state of emergency in September 2021 which do not have sufficient justification, it seems that the actions taken by the ruling party are aimed at permanent limitation of the right specified in Art. 61 of the Polish Constitution.

The imprecise provisions of the Covid act in the scope of limitations related to the declaration of the authority's inactivity required in-depth interpretation by the bodies applying the law. Due to the relatively short duration of the discussed regulation, this led to the issuance of judgments stating inactivity after the repeal of Art. 15zzs of the Covid act, which in many cases led to a departure from the basic principle of declaring inactivity as at the date of the decision or judgment. Leaving wide discretionary powers to the authorities applying the law is of particular concern, given the repeated allegations (also included in case K 1/21) concerning imprecise and overly broad wording used in the act. The experience to date shows that the courts did not in all cases interpret constitutional provisions in a way that guaranteed the open operation of the state apparatus, an example of which may be the practice developed in cases concerning so-called internal documents. The introduction of such imprecise and highly questionable interpretative regulations is worrying.

The arrival of the epidemic in the territory of the Republic of Poland has contributed to a significant limitation of the rights and freedoms of citizens. Although the provisions of the Covid act did not refer directly to the proceedings regarding disclosure of public information, the principle of transparency in the operation of public authorities and the right under Art. 61 of the Polish Constitution was significantly limited and thus deprived citizens of the possibility to obtain the information on the current activities of public bodies. Such actions could have increased social unrest and contributed to the spread of disinformation or fake news. They were and are also a manifestation of the democratic state of law depreciation, which is based on the principles of civil society, subsidiarity as well as mutual respect and subjective treatment of partners.

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