

Access to public information – legal regulations and parliamentary practice in Poland

I. Access to information regarding the work of the parliament is immanent in modern democracy. The access to public information by the participants of the democratic process is a *sine qua non* of conscious participation in that process. It was James Madison – one of the Founding Fathers of the United States of America – who reflected that “*a people who mean to be their own governors must arm themselves with the power that knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both. Knowledge will forever govern ignorance: and a people who mean to be their own governors, must arm themselves with the power which knowledge gives*”.¹

The right to access public information about the work of the parliament is inextricably connected to the public nature of its proceedings and is considered an integral part of its operation. The rule of public, open, and nonclandestine proceedings developed as a result of the evolutionary process of the development of the parliament as a representative body. In France, rules regarding the public nature of the proceedings were introduced in 1789, but they became a permanent element of that parliamentary system only in the 1870s. Different countries and different times have considered the rule of open, public proceedings as being of varying importance. An interesting case would be England, where until the end of the 19th century there was a rule in the parliamentary regulations that read as follows: “strangers are not to be admitted while the houses are sitting”.²

Within the Polish legal system, the parliament has almost always conducted its meetings while open to the public. Moreover, in Poland in the 17th and 18th centuries, the presence of the audience – the so-called *arbiters* – was a form of exercising the right to a direct, passive participation in the proceedings of the Sejm granted to each and every member of the nobility. Members of parliament (*posłowie*) represented the nobility and participated in the proceedings while the role of the arbiters (*the witnesses*) was to observe. They could directly influence neither the decisions themselves nor the manner in which they were being made.

The first written Standing Orders of the Polish Sejm from 1764 and 1768 reaffirmed the principle of open parliamentary proceedings. The rules stated that only the

¹ James Madison to W. T. Barry, 4 Aug. 1822, Writings 9:103–9

² Thomas Erskine May, *Treatise on the Law, Privileges, Proceedings, and Usage of Parliament*, 1873, p. 206.

election of the Speaker (*marszałek*) and validation of the mandates were to be conducted with no arbiters present (*remotis arbitris*). The rule of open proceedings was so absolute that not only the citizens had the right to witness the work of the Parliament but also representatives of foreign powers, sometimes even enemies, were often part to the proceedings – all according to the rule of “For God and the Poles there is nothing secret” (“*dla Boga i dla Polaków nie ma nic tajnego*”). The proceedings of the Four-Year Sejm of 1788-92 which adopted the Constitution of May 3, 1791 – the second written constitution in the modern world, right after the American one from 1787 – were also conducted according to a policy of accessibility³.

The evolution of Polish parliamentary system was stopped short by the Partitions which initiated a period for Poland where for 123 years it was no longer to be found on the maps of Europe. The Polish state was reborn in the fires of the First World War in 1918. The two constitutions that followed, the first from 1921 and the second from 1935, specified that the proceedings of the Sejm and of the Senate were open to the public, leaving the houses with a possibility to vote in favour of non-public sitting.

Similar rules regarding open deliberations were being used by the constitution of the Polish People's Republic (*PRL*) adopted after World War II in 1952. It remained binding throughout the entire duration of the Communist regime. However, the Sejm of that time was only superficial in nature and the rules of open proceedings were used as a disguise that kept hidden the centralist single-party dictate.

Two of the 21 demands issued by the emerging Solidarity (*Solidarność*) movement in the Gdańsk Shipyard in 1980, talked of “*Compliance with the constitutional guarantee of freedom of speech*” and “*making public complete information about the social-economic situation [of the country]*”. The process of democratic change that was then initiated led to the Round Table talks (*Obrady Okrągłego Stołu*) and the eventual collapse of the old regime in 1989. That event, together with the collapse of the Berlin Wall, was the driving impulse of the Autumn of the Nations and led to the dislodging of Communism from this part of the world.

The adoption of the binding Constitution of the Republic of Poland that took place in 1997 was a final act of the democratic changes initiated in 1989.

All the above demonstrates that a strong republican trend is imminent in the Polish parliamentary system. At the heart of the idea that all citizens should be participating in the life of the community was the law that assumed that representatives of that community would be acting in a transparent manner. The openness of the proceedings of the body which decides state affairs is at the same time a historical prototype of the modern idea of civic access to public information.

³ A. Gwiżdż, *Uwagi o jawności postępowania parlamentarnego*, Państwo i Prawo 1967, no 1, p. 7.

II. The legal framework in which this right to information is based is set by several legislative acts of different ranks. The most important of them is the Constitution⁴. Not only does it guarantee the openness of the proceedings of the Sejm and of the Senate (Art. 113, in relation to Art. 124), but it also declares the civic right to access public information (Art. 61). Poland, together with countries such as Sweden, Finland, Greece, Switzerland, the Netherlands, Portugal, and most countries of Central Europe, is part of a political system where the rule governing the access of the citizens to public information is stipulated by the Constitution⁵. The rules described in the Constitution from April 2, 1997 are made more specific by the act of September 6, 2001 on Access to Public Information⁶. The procedure of exercising this right is further explained in the regulations of the Sejm and of the Senate.

The constitutional guarantee of the openness of the proceedings of the Sejm and of the Senate (Art 113 in relation to Art. 124) specifies that parliamentary deliberation be conducted in a public manner with a chance of a direct observation of the proceedings, through individuals in the audience, as well as through journalists and other representatives of the media. Moreover, it clearly states the openness of presented motions, submissions, conducted votes, and adopted resolutions. The openness rule also extends to documents that are part of the deliberations of the Sejm, as well as to the resulting accessibility of information describing the sessions of the houses, especially when it comes to verbatim reports and other Sejm papers.⁷

The Standing Orders of the Sejm⁸ describe the fundamental forms of exercising the rules on openness by saying that it is provided through means such as: 1) prior informing of the public about parliamentary sessions, (2) allowing the press, radio, and television to conduct reports from parliamentary sessions, and 3) allowing the members of the public to observe the proceedings from the gallery located in the Plenary Chamber of the parliament, while observing the provisions for the maintenance of order set up by the Speaker of the Parliament [Art 172(1)]. The regulations of the Senate are limited to declaring that the proceedings are open (Art 36⁹).

⁴ The Constitution of the Republic of Poland of 2nd April 1997; *Dziennik Ustaw* 1997 No. 78, item 483 with subsequent amendments.

⁵ M. Wild, 'Commentary to article 61', M. Safjan, L. Bosek (ed.), *Konstytucja RP, Komentarz do art. 1-86*, t. 1, Warszawa 2016.

⁶ The Act of 6 September 2001 on Access to Public Information; *Dziennik Ustaw* 2016, item 1764.

⁷ L. Garlicki, 'Commentary to article 113', L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. 2, Warszawa 2000.

⁸ The Standing Orders of the Sejm of the Republic of Poland; Consolidated text of the Resolution of 30 July 1992 as published in *Monitor Polski*, item 32, with subsequent amendments.

⁹ Rules and Regulations of the Senate; Consolidated text of the Resolution of 23 November 1990 as published in *Monitor Polski* 2015, item 805, with subsequent amendments.

The openness of the proceedings of the Sejm and of the Senate is not an absolute rule. Each house can, through a resolution adopted by an absolute majority of votes when at least half of its statutory members are in attendance, declare the sitting non-public. It can be done if the State interest demands it (Art. 113, second sentence). The exact meaning of State interest is made more specific through activities of the Sejm or Senate. Each issue can be considered during a *non-public* sitting if State interest would explain it. According to the meaning of the phrase “State interest” is applied to the protection of the basic constitutional rights connected to the institution of the state itself. It is in particular understood as the protection of values such as sovereignty, independence, state security, inviolability and integrity of its borders and territory, as well as uninterrupted operation of its constitutional bodies.

Art. 61(1) of the Constitution defines the common civic right to access information about the activities of public authority bodies, as well as to that about persons carrying out public functions. It also extends to obtaining information about the activities of economic and professional self-government bodies, as well as other persons and organisational units within the scope in which they are performing their duties and managing communal or State Treasury assets. A correlative of that right is the duty to provide citizens with a particular set of data regarding the activities of institutions – a duty that rests mainly on the shoulders of public authority bodies. Therefore, the aforementioned duty is not only an issue of accessibility of particular pieces of information to a potential recipient, but also, at least in principle, it implies the necessity of actions on the part of the organ supplying the information – there needs to be a method of delivering information to an interested party that requested the information.

According to Art. 61(2) the right to information encompasses not only the access to documents but also the right to observe the proceedings of collegiate bodies of public administration chosen in general elections, together with a possibility of making sound and visual recordings. This is something that makes the Polish legislation stand out from the others. Therefore, the openness of parliamentary proceedings is doubly protected under the Constitution. On the one hand through Art. 113 that directly specifies the openness of parliamentary proceedings, and on the other hand through Art. 61(2) that guarantees the citizens the right to observe the deliberations of each of the houses together with an additional permission to make visual and sound recordings.

The scope of the right to information is determined by the Constitution itself. Art. 61(1) and (2) describe the elements that form this right in detail, as well as identify the entities that are obliged to act in order for the public to exercise that right. Moreover, Art. 61(3) of the Constitution sets the permitted boundaries of limiting the right to information. Such a course of action can only be the result of a, mentioned in various acts of law, desire to protect the freedom and rights of other persons and economic entities, as well as be the outcome of decisions protecting public order,

state security, or safeguarding national economic interests. Art. 61(4) establishes that the way of granting access to public information is described in detail by acts of law. Additionally, pertaining to the Sejm and the Senate, the regulations of the houses are also in force. Therefore, the right of the citizens to public information is not absolute and the legislator – who limits the accessibility of public information through issued ordinary laws – has to respect the necessity of weighing the right to access to public information and the values expressed in Art. 61(3) as permissible criteria for the limitation of the right of accessibility.

The authenticity and effectiveness of the civic respect of the accessibility of public information depends in such a situation on the correct weighing of proportions between the constitutional right to access and the scope of limitations and exclusions described by ordinary laws, procedures and guarantees that make sure that the right to information remains in the place it deserves. It is important not to hollow it out through created exceptions. On the level of ordinary laws it is permissible to make the rule described in Art. 61(1) of the Constitution more specific. It is also possible to set exceptions to the limitations expressed in Art. 61(3)¹⁰.

“The procedure of the provision of information” mentioned in Art. 61(4) of the Constitution is a group of procedural directives that set the method of implementation of the content of that law. As regards the Sejm and the Senate, the procedures for the provision of public information are expressed in the regulations of each of the houses.

The constitutional right to public information took shape in the act of September 6, 2001 on Access to Public Information. According to Art. 1(1) of that act “any information regarding public affairs is considered to be public information within the meaning of the law”. The general definition of “public information” is made more specific in Art. 6 which lists, among a wide array of items, the types of accessible public information. However, the list of public information types enumerated in Art. 6 is not exhaustive. When creating the catalogue the legislator left it open on two levels. Firstly, the enumerated groups of public information are only examples (the list is prefaced with the word “specifically”). Secondly, the items in the catalogue within each of the categories also do not constitute a closed set.

Within the list of items mentioned in Art. 6(1) there are certain terms that – from the perspective of the Parliament – have a particular meaning. These terms are related to the work of public authority bodies. According to Art. 6(1), the information on internal and external policy, in particular the information about the “intentions of the legislative branch” and “bills of normative acts” (Art. 6 paragraph 1 item 1 letters a and b) is shared with the public. Public information also encompasses “public data”, in particular the “content and form of official documents” (Art. 6 paragraph 1 item 4

¹⁰ The judgment of the Constitutional Tribunal of 15 October 2009 – ref. no. K 26/08

letter a) as well as “standpoint in public matter taken by public authorities and public officials”, together with “content of other addresses and assessments made by public authority bodies” (Art. 6 paragraph 1 item 4 letters b and c).

Within the scope of the jurisprudence of Polish administrative courts it is assumed that “public information is constituted by any missive created by the broadly-understood public authorities, as well as persons performing public functions, together with other entities which execute that authority or manage communal or State Treasury assets within the scope of their competences. Information created by entities other than public entities but pertaining to these entities is also considered public.”¹¹

The Act on Access to Public Information, when compared to the Constitution, extended the list of persons eligible for the provision of public information. The Constitution only grants the right to the “citizen”, but in accordance with Art. 2(1) of the Act, the right to public information is granted to “anyone”, and no demand as to the factual or legal interest can be made of the person requesting the information. “Anyone” in this sense should be understood as any natural or legal person.

The extent and scope of limitation of the right to public information is based on the rules detailed in the provisions on the protection of classified information or other statutory-protected secrets (Art. 5(1) of the act). In the current legal framework the limitations on the access to public information are spread out in various parts of the legal system and the provisions on statutory-protected secrets are contained in nearly 250 legal documents.

The right to public information can also be limited due to the privacy of the natural person. However, that limitation does not extend to information about persons acting as public officials, including the terms of appointment to the office and the execution thereof. Moreover, the protection is not granted if the person in question renounces it (Art. 5(3) of the act).

The method of providing information about the activity of the parliament was regulated in chapter IVa of the Standing Orders of the Sejm “Access to public information” (Art 202a-202c), together with Art. 37 of the regulations of the Senate. Both regulations – despite some differences – describe a similar procedure.

It could be said in general that the regulations of both houses consider three basic forms of public information provision: (1) uploading the information to a website, (2) making the information public in a written form in a place that is publicly accessible and (3) providing the information upon request from an interested party.

¹¹ Judgment of The Supreme Administrative Court of 30 October 2002 – ref. no II SA 1956/02.

In practice, making information public through uploading it to the website – together with the distribution of the electronic form of the document – is the main form of presenting the information about the activity of the parliament to the citizens. The regulations of both of the houses offer the option of proliferating information through physical copies laid out in publicly accessible spots in the parliament. Even though the usage of this form of providing information has been decreasing recently, together with the depreciation of the written form of documents, the Sejm Library has remained extremely important in the context of information provision. It is where all the archived documents created during the previous parliamentary terms of the Polish Sejm are deposited.

Public information not yet made accessible on the websites of the houses or laid out in a public area is provided to interested entities upon request. All the inquiries regarding access to public information from the Sejm should be addressed to the Head of the Sejm Chancellery. The processing of such a request should be done without undue delay, no later than 14 days from receiving the request. If the processing of the request would incur additional expenditures because of the requested method of delivery or the necessity of transferring the information to a format of choice of the entity requesting it (digitization, for example) then the Sejm Chancellery may ask the person requesting the information to pay for covering these costs. A refusal to provide public information takes form of an administrative decision of the Head of the Sejm Chancellery which can be appealed by the requesting party to an administrative court. The Senate's procedure is fairly similar, with the exception that the request should be addressed to the Head of the Senate Chancellery instead.

III. Internet websites are today the chief way of provision of information regarding the activity of the parliament. It is done, among other forms, as broadcasts of the sessions of the Sejm and of the Senate allowing the citizens to watch the proceedings in real time. Internet also serves as a tool to broadcast the sessions of the committees and subcommittees, together with press conferences organized by parliamentary parties, as well as briefings of the Speaker (*Marszałek*) of the Sejm who presents the planned daily agenda to the journalists before the beginning of the session. The website is also the location of stenographic records of the houses' sessions. These verbatim reports are an official document representing the course of the session as well as documents presenting the lawmaking process. The citizens can get to know the subject matter of the bills and resolutions being considered, reports from committees and subcommittees showing the legislative process, as well as individual reports on votes and contents of drafted parliamentarian's statements. Moreover, information regarding the activities of the committees of the Sejm and the Senate (verbatim reports from committee sessions and resolutions taken by the committees) is also proliferated this way. Data about the activities of individual members of parliament is also available, in particular information about interpellations made publicly during sessions, information about how an individual has voted when resolving a bill, as well as the content of parliamentary questions. The website is also

the location where the asset declarations of the members of the houses are hosted, together with personal data of their assistants.

Not all information about the activities of the parliament and its bodies is made public in electronic form via the Internet. The websites of the houses do not include, for example, protocols from the sessions of the Sejm or Senate Presidiums (the management bodies of the houses consisting of the Speaker and Deputy Speakers), nor do they include written reports on the activity of the Council of Seniors (bodies responsible for co-operation of the different parliamentary parties connected to the activity of the parliament and its agenda where most important political arrangements are reached). Access to these documents can therefore be exclusively obtained by requesting it.

There are however some practical shortcomings connected with provision of public information on parliamentary activities. Three problems can be mentioned as examples.

The first issue concerns the fundamental paradox connected to access to public information: in order to ask a question one needs to know how to ask it correctly. Because of technological limitations it would be impossible to make all information publicly accessible. What is made available by the parliament – naturally – is the outcome of a particular selection process performed by the entity providing the information. Only information that has been deemed important enough by the public authority is then provided to the public opinion. The judgement as to what information should be made public in the “interest of the public” is, in its nature, a political one. A good example of the problem could be the access to experts’ opinions. The Polish parliament makes the access to expert’s opinions that accompany legislative acts and other resolutions very broad. However, these documents are not all the documents that influence the deliberation process prior to coming to a resolution. It is only a chosen selection of such documents that the entity publishing it has deemed worthy of publishing. The procedure of providing information upon request, information that is otherwise not made public, apparently guarantees that a citizen can receive any and all information simply by requesting it. However, in order to request access to a document that has not been made public, one needs to know about the existence of said document. In order to ask the correct question, one needs to know what to ask about.

The second shortcoming is connected to the issue of protection of personal data of private persons that was recorded in documents subject to parliamentary deliberations. The rules at work in the Polish parliamentary legal system, at least until today, do not consider it a necessity to make those data anonymous. The data is therefore provided together with the content of the documents that compose public information. Naturally, the rights of a private person can be adversely affected as a result of making their personal data public. This issue is an element of a broader spectrum connected with the necessity of reaching equilibrium between making

public information as accessible as possible to the average citizen and the necessity of protecting the privacy of the individual. These dilemmas are particularly important when it comes to the work of the parliament because of its almost universal scope of competence.

The third issue is connected to the access to information about public activities of an individual member of parliament. The information about the activities of members of the Sejm and of Senators are very widely distributed on the web pages of the two houses. No information regarding what the MPs and Senators are doing in their districts can be obtained in such a way, however. The chancellery of neither house possesses such information as it is not within their scope of activity. Individual parliamentarians are not entities which are subject to the obligations arising from the Act on Access to Public Information, despite their activities in the field undoubtedly having all the characteristics of participation in the execution of public office. Through this the shortcomings of the currently binding Act are clearly visible – the citizen is in fact stripped of the possibility to exercise his constitutional right in regard to an important sphere of activities of their representatives...

The history of the Polish parliamentary legal system justifies the conviction that it will develop appropriate legal instruments which will eliminate the visible limitations in exercising the right to access public information. It is precisely this tool that exacts the basic principle of democratic constitutionalism – the sovereignty of the People. Knowledge about public affairs is, on the one hand, a necessary prerequisite of conscious participation of the citizens in taking binding resolutions, and on the other hand it allows for an effective civic control of the activities of public authorities. Common access to public information is therefore an integral element to the existence of a civic society which, in turn, is an important guarantee of a democratic rule.