II EXPOSÉ DES FAITS

STATEMENT OF FACTS

(Voir chapitre II de la note explicative)
(See Pt.II of Explanatory Note)

14.

30.10.2008 The Ministry of Internal Affairs and Administration (MIAA) announced that they were launching the proceedings leading to implementation of the European Parliament and Council's Directive 2003/98/WE from the 17th of November 2003 in the case of re-use of public sector information.
24.09.2009 The MIAA made public the draft guidelines to a bill for changes in the access to public information act as well as some other acts.
10.12.2010 The MIAA made public on the Public Information Bulletin website next version of draft guidelines to the bill for changes in the access to public information act as well as some other acts.
01.2011 The MIAA made available on the Public Information Bulletin website two further draft guidelines to the bill for changes in the access to public information act as well as some other acts.
05.05.2011 The MIAA made available (on the Public Information Bulletin draft guidelines to the bill for changes in the access to public information act as well as some other acts in a version sent for deliberation by the Council of Ministers.
16.05.2011 Political Assistant to the Minister-Member of the Council of Ministers sent on a closed discussion list led by a private subject a file containing the draft bill with the proposition of submitting comments: 'You will find in the attachment I am enclosing a draft of the amendment to the access to public information Bill with a request for comments. The Bill does not include two further essential changes which we agreed on, which are the changes concerning the unconditional right to re-use of the public sector information as well as the change limiting access to existing public information, e.g. in the case of judicial proceedings (I am referring here to those changes which the Prime Minister put forward during the last meeting). Both will of course, be introduced before the Council of Ministers accepts the draft bill. We would like to close the discussion on this subject during our next meeting, so please send your comments by e-mail as quickly as possible, so that we can already reach agreement on these on Monday.'
17.05.2010 The Council of Ministers accepts the changes to the bill. The next changes (to the bill) were again sent by the Political Assistant to the Minister-Member of the Council of Ministers in a closed Internet discussion list. The prepared changes concern the introduction of a new category of exceptions to access to public information through an additional article 1a. in the access to public information bill which excludes, amongst others; opinions, analysis and stances. Another amendment is sent by a member of the strategy advisory group to the President of the Council of Ministers.
30.06.2011 the access to public information bill was sent in the same manner – moreover, it was made clear that it is a project which the Council of Ministers will debate ('in the attachment I am enclosing the changes to the bill on access to public information in the form which is coming up for debate by the Council of Ministers', a quote from part of an e-mail of a member of the strategy advisory group to the President of the Council of Ministers.)
21.06.2011 our Association turned to the President of the Council of Ministers requesting

access to the correspondence (including e-mails) of the members of the Council of Ministers and their assistants in the case of the amendment to the access to public information bill.

04.07.2011 in response to our application the President of the Council of Ministers (the Prime Minister) stated that all requested information can be found in the Public Information Bulletin of MIAA. However, on the website there was no access to the correspondence (including e-mails) of neither Council of Ministers members nor their assistants in the matter of the amendment to the access to public information bill.

07.2011 in accordance with legal complaint procedures the Association submitted an action to the Voivodship Administrative Court for failure to act on the subject of not being able to access the requested correspondence.

05.07.2011 The Council of Ministers accepted the draft bill on a change to the access to public information bill. The draft bill was then sent to Parliament for urgent consideration.

16.09.2011 the amendment was finally accepted by the Parliament of the Republic of Poland with a modified correction, which was introduced during the last stage of government consideration, that that denies public access to information in specified documents.

06.12.2011 the Voivodship Administrative Court in Warsaw (ref. act II SAB/Wa 260/11) acknowledges the complaint of the Association regarding the unavailability of correspondence concerning the amendment to the access to public information bill. The court acknowledged that public information concerns the sphere of facts found in the contents of documents produced by organs of public government and subjects not being an organ of public administration, contents of addresses, speeches, opinions and assessments, irrespective of whatever subject they are addressing and whatever matters they concern. Public information constitutes any type of document relating to an organ of public government or subject not being an organ of public administration but connected in any way to public administration. These are both the contents of unproduced documents as well as those used during the implementation of anticipated legal objectives even if they do not directly derive from them. In the opinion of the Court, the President of the Council of Ministers did not share information in accordance with the application – the application in point 2 concerning access to the correspondence of the Council of Ministers members and their assistants in the matter of the amendment to the bill about access to public information (incl. e-mail correspondence), the organ replied that all documents in the process of receiving legislative amendments appear, in strict accordance with the law, on the Public Information Bulletin website of the Ministry of Internal Affairs and Administration, which is to say, in not complete form.

21.06.2012 The Supreme Administrative Court (ref. act I OSK 666/12) as a result of the cassation issued by the President of the Council of Ministers, changed the verdict of the Voivodship Administrative Court and dismissed the Association's complaint. The Court ruled that the correspondence, incl. e-mails of those working in public service and their associates does not qualify as public information even if in some part it is concerned with the work of those involved in public service. Civic oversight is not necessary at every stage of taking decisions. It is legitimate to state that such type of the control could impede its course as each of the propositions would be subject to a social and premature judgement. Meanwhile the process of drafting a bill, undertaking appropriate decisions as to its content and eliminating impractical or improper corrections which threaten the good of the constitution needs an atmosphere of deliberation and calm. The very same Supreme Administrative Court ruled out the possibility of access to specific information originating from administration, which in effect amounted to a denial of access to any kind of information.

III EXPOSÉ DE LA OU DES VIOLATION(S) DE LA CONVENTION ET/OU DES PROTOCOLES ALLÉGUÉE(S), AINSI QUE DES ARGUMENTS À L'APPUI

(Voir chapitre III de la note explicative)
(See Part III of the Explanatory Note)

15.

I. Violation of article 10 sec. 1 of the Convention on the Protection of Human Rights and Fundamental Freedoms:

One of the basic rights in democracy is the **right to know which also assumes the right to receive information about the work of public authority.** Of particular importance are the solutions guaranteeing this entitlement from possible limitations placed upon it. The Republic of Poland has implemented this regulation in art.10 sec.1 of the Convention on the Protection of Human Rights and Fundamental Freedoms as well as in the manner indicated by the High Court in its verdict from the 14th April 2009 in the case of TÁRSASÁG A SZABADSÁGJOGOKÉRT versus HUNGARY (motion no. 37374/05) in point 35 of the justification:."Nevertheless, the Court has recently advanced towards a broader interpretation of the notion of "freedom to receive information" (see Sdružení Jihočeské Matky c. la République tchèque (dec.), no. 19101/03, 10 July 2006) and thereby towards the recognition of a right of access to information"..

This regulation was violated as a result of the court ruling (Supreme Administrative Court from 12th of June 2012, I OSK 666/12).

In 2011 the draft regulations for changing the access to public information bill had originally been only in the framework of reusing public sector information, in accordance with Directive 2003/98/WE of the European Parliament and Council, but new restrictions to access of information, covering amongst others: stances, opinions, instructions and analysis (new art.5a) were introduced in the final Bill. Our Association received information that at the governmental stage **proceedings to add further restrictions** (art.5a) were decided upon through online correspondence of government members. . This concerns both inter-ministerial decisions as well as a possible discussion on the reasons of the introduced changes with social representatives selected by the government. **We managed to acquire part of this information from the official bulletins of specific ministries or as a result of answers received from replying to the FOI requests some of which, however, we received in an unofficial manner from those involved in the discussion on the subjects. However, the latter cannot constitute a bearing on the shape of public debate. Substantiated and proven reasons concerning the changes introduced in art.5a of the amended bill were not made public to neither public opinion nor parliamentarians who had to proceed urgently on the bill** so the whole process would be concluded before the parliamentary election in the autumn of 2011. Parliament subsequently received the bill on 13th July 2011 and finally accepted it on 16th September. Meanwhile, it seems that **doubts were already being raised at the governmental stage as to the need of introducing the regulation in art.5a.** One available letter from the Ministry of Finance indicates that a government member realised that the newly introduced restriction is not necessary in Poland since there are already such regulations governing the protection of confidential information allowing such information to remain restricted (Finance Ministry letter dated 21st June 2011 – www.rcl.gov.pl).

At the stage of passage in the lower house of the parliament the restrictions inserted in art.5a came in for criticism from constitutionalists, the Ombudsman and the National Council of the Judiciary of Poland. In the Polish Parliament new restrictions were deleted.

However, in the upper house – the Senate – this regulation was re-inserted in almost identical form, but put in the Bill as the art.5 sec.1a. It was already apparent at this stage that the established method of procedure could be regarded as unconstitutional. Despite experts' reservations concerning this type of conduct, the Polish Parliament, after introducing some corrections, accepted the solutions. The Polish President signed the bill on 28th of September 2011 but referred the manner of its procedure to the Constitutional Tribunal. On 18th of April 2011, the Tribunal gave the final verdict (K 33/11), stating the unconstitutional manner of the changes (art. 5 sec. 1a) introduced to the bill by the Polish Senate.

The manner of introducing the entire changes: l**ack of information made available to citizens during the bills entire introductory phase, curtailing access to information for selected subjects, curtailing debate and government representatives' attitude towards consultation and breaking legal procedures raise questions about the actual reasons presented in art.5a (and 5 sec.1a).** These reasons should be expounded upon in the e-mail correspondence which our Association requested to be made available but which the Supreme Administrative Court considered to be internal documentation and to which citizens cannot have access. **It is worth emphasising that the notion of an internal document does not appear in Polish law regarding access to public information, which states that a citizen has the right to information about the work of public bodies, incl. documentation and demands the clearly-defined wording of those limitations introduced at bill stage.**

Knowing the reasons for introducing the specified legal corrections is essential for public debate, especially in the sphere of access to information to which our organisation participates. It is also significant for the current proposition which may lead to similar limitations in other bills. So far, propositions have mainly appeared in the media – no source documents have so far been obtained despite persistent attempts. **Therefore, citizens must wholly rely on information provided in announcements as well as that published by the government – propounding only the benefits of any changes introduced. In light of the determination we could detect in introducing the changes, it gives rise to serious doubts about the actual reasons for proposed limitations. However, it is difficult to express an opinion without knowing all the facts as this was effectively blocked by the verdict of the Supreme Administrative Court – contravening art.10 sec.1 & 2 of the Convention.**

Receiving and sharing information is a basic right of freedom of expression as o**ne cannot express or have own opinions without accurate knowledge and essential facts.** Attaining information about draft changes to a bill on access to public information, including the e-mails of those people having influence on the proposed form of the regulations, would facilitate public debate based on factual knowledge of the legal process and primarily, about the actual reasons for the changes being introduced. They could then determine the ill-defined borders limiting the openness in the workings of public administration. **It would also allow citizens to assess methods of democratic procedures as well as the reasons for the decisions taken. The verdict of the Supreme Administrative Court limits this and is thus in violation of art.10 sec.1 of the European Convention on Human Rights.**

The mission of our Association, which is reflected in its statutory aims, is disseminating and implementing the idea of good governance resulting in the transparency and accountability of public institutions as well as strengthening citizens' awareness of their own rights and how to benefit from them. One of the basic elements for ensuring the accountability of the workings of power and empowering citizens in the process of government is the openness of public life. During the last seven years we have carried out public supervision of the completion of Article 61 of the Constitution of the Republic

of Poland and bills about access to public information within the framework of the Non-Governmental Centre for Access to Public Information (www.informacjapubliczna.org.pl). For three years we were monitoring the process of amending the bill on access to public information as well as publishing information on our website about every event connected with a change of law and all available documents (http://informacjapubliczna.org.p/18,nowelizacja_ustawy.html). We also promoted organising a public hearing in the Polish Parliament on the subject of the proposed changes – by encouraging citizens to meet parliamentarians (the governing coalition threw out the proposition of the public hearing after the resumption of votes that would have led to a disadvantageous vote for MP's of governing coalition). We introduced on our website the letters and appeals we had gathered concerning the withdraw of art.5a or the vetoing of the entire bill by the President of the Polish Republic http://informacjapublicznaorg.pl/18,579,rozne_apele_i_list_do_prezydenta_rp_w_srawie_nowelizacji_ustawy_o_dostepie_do_informacji_publicznej.html. We educated the public about the nature of the changes in the media, on our website and through social media. As a result of being denied access to any information we were deprived of the chance to show the public how to find out about one of the important changes introduced.

A similar violation of art.10 sec.1 was shown by the High Court in its verdict from 14th April 2009 in the case of TÁRSASÁG A SZABADSÁGJOGOKÉRT versus HUNGARY (motion no. 37374/05) and declared that 'the current case is rather about the intervention in the functioning of a social body (such as the press) which enjoys a strong censorial monopoly on information than a general legal denial of access to official documents.'

II. Violation of article 10 sec. 2 of the Convention on the Protection of Human Rights and Fundamental Freedoms:

In democratic countries some rights and freedoms can in specified situations be subject to limitations. In the case of our Association, which created the conditions for public debate about the change of law, the indicated reasons did not appear in art.10 sec.2 of the Convention due to the following conditions:

a) It should be in the interest of the state that citizens have knowledge about the how the law came into being as well as the reasons for the new solutions.

b) the actual reason for denying access, as indicated by the Supreme Administrative Court in its justifying the verdict, is not among the listed reasons in art.10 sec.2 of the Convention. The issued resolution excludes specific types of documents on the notion of public information. The judge's ruling in this case acknowledged in a press interview that the reasons indicated in this verdict result from an inconsistent ruling and not from legal regulations

c) the ruling leads to the admission that citizens cannot have access to any kind of information whatsoever found in the e-mail correspondence of government ministers . Therefore, it is an excessive limitation on the freedom of access to information and opinions and contravening electoral law

d) the legislative process by virtue of its own aims must be subject to civic control not only because of the possibility of extrajudicial influence on draft regulations but also due to the necessity of legitimising the conduct of power and accepting the given solutions. In the opposite case public debate will not be based on facts.

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