



Universal Periodic Review (Fourth Cycle)

Submission by the Citizens Network Watchdog Poland

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Introduction

About the Citizens Network Watchdog Poland

The Citizens Network Watchdog Poland is an independent, apolitical and non-profit organization in the form of a watchdog and think-do-tank organization for the public benefit, established in 2003. Over the last nineteen years we have been working for transparency in the public realm, good government and the accountability of power in Poland. We have been working with the key partners in Poland and we also belong to thematic international networks or organizations, such as CASE (Coalition Against SLAPPs in Europe), EU-Russia Civil Society Forum, Freedom of Information Advocates and RARE (Recharging Advocacy for Rights in Europe).

We defend the right to information, regarding it not only as the condition of a good state, but above all, as an inviolable human right which safeguards human dignity, allows freedom of expression and ensures protection from the abuse of power.

To protect the right to information we oversee how it works in practice, run litigations, advocate for better legal solutions and educate the public. Our submission to the Fourth Cycle of the Universal Periodic Review is addressed to enhance the level of protection of the right to know. In the previous cycle we have not submitted a contribution but examined how the previous National Report was being consulted with other stakeholders and how citizens were informed about the Universal Periodic Review process by the Minister of Foreign Affairs. It revealed the deficiencies in transparency and exposed the problem that we touch upon in this submission, namely narrow interpretation of the institutions and national courts regarding access to documents such as contributions of relevant ministers to the National Report.

The Access to Information Act in Poland is over 20 years old. Its practical implementation proved to have several deficiencies and every year the level of protection decreases. Working with other human rights defenders in Poland and running an informal coalition we identified several problems that should be addressed. As freedom of information is inseparable from freedom of expression, we also advocate for better regulations for the latter. Both freedoms are covered by the current submission to the Forth Cycle of the Universal Periodic Review.

I. Transparency in the National Report preparation process as an example of insufficient protection of the right to information

1. The National Report should include a description of the methodology and the extensive consultation process conducted, including consultations with civil society [A/HRC/DEC/17/119, Chapter II, 2, A; Guidance Note on the National Report for the UPR 4th cycle, p. 2].

It is indicated in the National Report that the initial draft was consulted with NGO representatives [A/HRC/WG.6/27/POL/1, I, 1, p. 2]. The Report of the Working Group on the Universal Periodic Review shows that in preparing the National Report, Poland sought to make the whole process as transparent as possible, including by organizing an information meeting with NGO representatives [A/HRC/36/14, I, A, 6]. Under views expressed by the State under review, the Deputy Representative of the Permanent Mission of Poland in Geneva thanked the Polish NGOs that decided to meet and share their comments, views, and concerns regarding the Government's report [A/HRC/36/2, 882., p. 131].

2. Contrary to the above, the Ministry of Foreign Affairs did not ensure either transparency in the process of drafting the National Report or a proper consultation process with NGOs.

2.1. Firstly, the Ministry's Public Information Bulletin did not contain any information about the work on the National Report, nor about the results of this work. As such, no information from the Ministry reached the public.

2.2 Secondly, the NGOs that were supposed to participate in the consultation process were not aware of the schedule for the preparation of the National Report and for the consultation of the document. Citizens Network Watchdog Poland had to submit a request to the Ministry for any and all information - even basic information - and then passed the answers on to other NGOs. Unfortunately, it proved difficult to obtain two key pieces of information: the planned date of the NGO consultation meeting and the draft National Report that was to be the subject of this consultation. The Ministry was asked about the date of the consultation meeting five times over the course of several months, and yet the NGOs only learned of the date less than two weeks before the meeting. The Ministry has also not released a draft of the National Report, claiming that it is only a 'working document'. The case for access to the document went to court, but eventually the Supreme Administrative Court ruled unfavourably, sharing the Minister's arguments [attachment 1]. NGOs have thus been prevented from accessing the document on which they are supposed to consult. The entire consultation process is described in the Citizens' Network Watchdog Poland report [attachment 2].

2.3 Thirdly, the consultation itself was illusory. Questions from representatives of civil society organisations as to whether the final version of the draft National Report would be subject to further consultation were answered in the negative. During the consultation meeting, questions as to whether the organisations would receive feedback regarding the inclusion of their comments in the National Report were not explicitly answered. In turn, when asked whether meetings with NGOs on the implementation of recommendations were held after the previous review of Poland, the Ministry answered that such meetings were not held, but that it was open to establishing such a custom [attachment 2, p. 5]. Unfortunately, a request for information submitted by the Citizens' Network Watchdog Poland in February 2022

received an answer that such meeting had not taken place after the Third Cycle and that the Mid-term progress report by Poland had not been subject to consultation.

2.4 Fourthly, information about the Fourth Cycle was also not made public, although in response to a request from the Citizens' Network Watchdog Poland in February 2022, the Ministry indicated that it had already started work on the National Report. When asked whether information about the Fourth Cycle had been made public, it referred only to the OHCHR website. However, the Ministry added that as part of the consultations on the planned report, it is planned to publish information on its website and to publish a draft version of the document. At the moment, however, we do not know whether that will happen.

3. Recommendations of the Citizens' Network Watchdog Poland: The Ministry of Foreign Affairs should proactively keep the public informed about the Universal Periodic Review process and should ensure that the National Report is subjected to an extensive consultation process by publishing a schedule for work in the report, publishing and updating documentation related to the Fourth and subsequent cycles of the UPR, organising two-stage consultations with NGOs (enabling discussion at the draft stage and again before final approval of the National Report), providing feedback on whether or not NGOs' comments were taken into account, and consulting with NGOs on the mid-term report.

II. Implementation of the recommendations of the Third UPR Cycle

Fundamental freedoms and the right to participate in public and political life

Freedom of opinion and expression [A61, D43, SDG 16]

1. Right to information

1.1. In the National Report, freedom of expression appeared in relation to two recommendations [A/HRC/WG.6/27/POL/1, IV, A, 49-50] concerning the decriminalization of Article 212 of the Criminal Code [A/HRC/21/14, Second cycle, 90, recommendation 100, Norway] and ensuring access to means of communication for all sectors of society to fully exercise their right to freedom of expression [A/HRC/21/14, Second cycle, 90, recommendation 101, Holy See]. The document indicated that the Ministry of Justice is not carrying out legislative work to remove Article 212 from the Penal Code, and that the right to freedom of expression and the freedom of mass media are protected by the Constitution as well as the Broadcasting Act and the Press Law.

In the Report of the Working group on the Universal Periodic Review, freedom of expression appeared in relation to reducing political control over state media and ensuring media independence and pluralism, as well as promoting the right of access to information by protecting press freedom [A/HRC/36/14, II, 120, recommendations 104-108, Sweden, Germany, Switzerland, Holy See, Mexico]. All recommendations were accepted (one was partially accepted) and the Mid-term progress report by Poland ensured that they would be implemented (in most cases it was stated that legal protection was already ensured).

1.2. The context of the right to information appeared more narrowly in the recommendations [A/HRC/36/14, II, 120, recommendations 107, Holy See], but the Citizens' Network Watchdog Poland would like to point out that there is currently a general crisis with respect to the protection of this right in Poland.

At the national level, the right to information derives primarily from Article 61 of the Constitution of the Republic of Poland, and the procedure for making information available is regulated by the provisions of the Act on Access to Public Information. This right is protected by the administrative courts.

Unfortunately, in the period since the last UPR cycle, we have seen a consistent decline in judicial protection of the right to information, which also affects journalists who rely on access to public information on a daily basis. Over the years, public institutions have found ways to delay their responses to requests, with the result that a single case can result in several successive proceedings that take several years in total. Even when the case ends in favour of the applicant, the information is already outdated.

In addition, when deciding on the release of information, the administrative courts are reluctant to refer to the right to information as a human right. The courts do not refer to Article 19 of the International Covenant on Political and Civil Rights, Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, or even a constitutional provision, but instead allow the withholding of information on the basis of discretionary concepts that are not supported by the applicable law, such as 'internal document', 'working document', or 'abuse of the right of access to information'. One of many examples of such proceedings was the withholding of the draft National Report simply because it was not the final version of the document, although it should have been consulted with NGOs. Another problem is the development of a national line of jurisprudence according to which the schedules of public officials constitute an 'internal document'. In one case concerning the non-disclosure of the President of the Constitutional Tribunal's schedule, the Citizens Network Watchdog Poland filed a complaint with the European Court of Human Rights and the case was communicated to Poland in 2021 [attachment 3].

The right to information is also consistently restricted via the introduction of further provisions in separate laws preventing its realisation. For example, in 2021, Article 156 of the Code of Criminal Procedure was amended, making the decision to provide access to the files of completed pre-trial proceedings the exclusive purview of the prosecutor (previously, at least some documents could be obtained via a request for information). At the same time, in 2021, the First President of the Supreme Court submitted a request to the Constitutional Tribunal to examine the constitutionality of a significant part of the provisions of the Access to Public Information Act. Unfortunately, a petition by more than 100 NGOs and almost 10,000 citizens to withdraw this proposal was rejected. The hearing to consider the application has already been scheduled twice and cancelled twice. The adjudicating panel in this case has been changed three times and the case has now been referred to the full bench, on which some judges are sitting in the Tribunal as a result of improper selection (i.e., 'double judges'). If the Constitutional Tribunal rules that the provisions of the Access to Public Information Act are unconstitutional, access to this information will be severely restricted. The Watchdog Poland website describes the background to this case in more detail [attachment 4].

The right to information was also restricted when it was reliable information that was most important for society. Indeed, the right to information was one of the first rights to be curtailed by a provision of ordinary law after the outbreak of the pandemic, when deadlines in administrative proceedings were suspended, including deadlines for the release of information. At the same time, local authorities began restricting citizens' access to the

meetings of their bodies, which are constitutionally public. In turn, in connection with the migration situation on the Polish-Belarusian border, a state of emergency was declared in parts of Poland, under which journalists, among others, were prohibited from accessing the area and access to public information was restricted. In parallel, the Act on the Construction of the State Border Security was also issued, which stipulates that information on the parameters of the 'border wall' does not constitute public information and is not subject to disclosure. Restricted access to the area along the border with Belarus is still in force, except that it is now based on a provision of the ordinary law and the accompanying regulation.

2. Recommendations of the Citizens' Network Watchdog Poland: respect the right to information as a human right when drafting legislation at the national level, be guided by the standards arising from Article 19 of the International Covenant on Civil and Political Rights, Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the indicators set out in the 16th Sustainable Development Goal, reform the procedure for the judicial protection of access to information, take action for the proactive provision of information.

3. Pressure on information users

3.1. One of the questions put to Poland in the Third Cycle concerned the measures taken to revise the provision criminalising defamation and what impact these measures had on ensuring the right to freedom of expression [Advance questions to Poland, Mexico]. The question referred to the previously mentioned recommendation concerning the decriminalisation of article 212 of the Penal Code [A/HRC/21/14, Second cycle, 90, recommendation 100, Norway].

3.2. This criminal provision is still in force and is being used, despite the fact that the Civil Rights Ombudsman has consistently called for its removal, pointing out that even the mere threat of criminal proceedings against a journalist can be an effective way of discouraging him or her from investigating certain issues.

The Citizens' Network Watchdog Poland shares this argument and would like to simultaneously draw attention to the deepening problems related to the pressure exerted by public institutions on both those seeking information and those disseminating the information obtained. This 'freezing' effect is a threat not only to journalists but to citizens in general.

The legal advice of the Citizen's Network Watchdog Poland provides negative examples in which some people (including Watchdog activists and local journalists), usually those who regularly seek information in a given area or from a given public institution, are considered to be 'abusing the right of access to information'. This concept does not derive from a legal provision but has been sanctioned by the practice of administrative courts. As a result, those found to be abusing the law are denied access to information based on non-statutory, discretionary criteria. There have also been cases where simply asking questions of local authorities leads to threats of criminal prosecution on the grounds of 'harassment of officials.' At the same time, we are familiar with a case in which the authorities refused to initiate criminal proceedings against a representative of a municipal authority, where articles were published online ridiculing the person who had been seeking information on the case and disseminating such information through a local portal.

There is also no shortage of examples of attempts to limit the freedom to disseminate information without respecting the aforementioned provisions of the International Covenant on Civil and Political Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 54 of the Constitution of the Republic of Poland, which confirms such rights. Sometimes, public institutions take disproportionate legal measures against people who share the information they receive on their websites, blogs, or social media. In most cases, it comes down to a call to cease the infringement of personal interests on the sole ground that such information was made available only to the enquirer. There are SLAPP lawsuits against those who criticise the actions of government representatives, of which examples are described in the report 'SLAPPs against journalists across Europe Media Freedom Rapid Response' [attachment 5].

4. Recommendations of the Citizens' Network Watchdog Poland: repeal Article 212 of the Penal Code, ensure the freedom of the information dissemination resulting from Article 19 of the International Covenant on Civil and Political Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 54 of the Constitution of the Republic of Poland.

Warsaw, 31 March 2022

Annexes:

1. Judgment of the Supreme Administrative Court confirming that Ministry of Foreign Affairs could refuse access to the draft National Report prepared for the Third Cycle of the UPR.
2. The report of the Citizens Network Watchdog Poland from the monitoring of preparations of the National Report under the Third Cycle of UPR: "Transparency of consultation in the Universal Periodic Review (UPR) process"
3. The article that describes the complaint of the Citizens Network Watchdog Poland to the European Court of Human Rights regarding the failure to provide access to the calendar of the President of the Constitutional Tribunal.
4. Explanatory memorandum by prof. Michał Bernaczyk on the application submitted to the Constitutional Tribunal regarding the provisions of the Act on access to public information.
5. Article 19's report: 'SLAPPs against journalists across Europe Media Freedom Rapid Response'; 'Country case studies. Poland' (p. 58).