

MAJOR CHALLENGES REGARDING THE DRAFT LAW ON 'TRANSPARENCY' IN PUBLIC LIFE

1. Public Information: Persistent Non-transparency

The draft opens another door to limit the right of access to information: government may refuse to disclose information if it deems the request has been filed in a 'persistent' manner and it would 'significantly burden the operation of the target entity'.

Access to information secured in the constitution of democratic state must never be restricted for reasons so broadly and unclearly defined as is the case here. Based on the sixteen years of experience with the law on access to public information there is a concern that the new limitation will be widely used by government. Note that it is the party requested to disclose information that will be in a position to assess whether the request is or is not 'persistent'. The proposed change reverses the nature of the right to information. The government office or agency will not be focusing on providing access to information but instead the requesting party will be wondering whether or not his or her request may be deemed persistent.

2. Public Information: Pay Before You Access

Under the draft legislation, access to public information may be provided subject to payment of a processing fee. A processing fee can be charged under the existing law as well but failure to pay or an appeal against the amount will not prevent access to information. The fee will be yet another method of stopping the disclosure of information by government.

Meanwhile, it is not reasonable to make access to information contingent upon a fee because government has other effective instruments of collection after the information has been disclosed. Amendments regarding the fee in the law may effectively discourage citizens from using their right to information.

3. Declaration of Assets: Total Transparency

The draft law has enlarged the group of people expected to declare their assets and stipulates that all such declarations, unless submitted by special force officers, will be published online. This requirement is to apply not only to members of parliament or local government officials but also driving licence examiners, municipal police officers, employees of the State Labour Inspection, the General Counsel to the Republic of Poland, members of the civil service and even firefighters and staff of the State Fire Service.

The transparency in public life and fight against corruption have been indicated by the legislators as the key goals of the proposed legislation. Needless to say, they are important values. However, to publish information about the assets of several thousand people who are not elected or make major decisions that have an impact on citizens seems an excessive, non-proportional and unnecessary strain on privacy. It is likely to undermine public trust given the very broad scope of information that will have to be disclosed, including private loans, property and income of the party at hand and of the spouse.

4. Administrative Proceedings: No Privacy Protection

Under existing legislation, any administrative body may refuse to disclose public information to protect the privacy of a natural person. The draft limits this protection in administrative cases. Files of administrative proceedings, particularly administrative decisions, will become public information available under the access to public information legislation.

This implies that anyone can obtain access to any decision, where the Inspector General for Data Protection rules the privacy of an individual has been breached. Such privacy data may be disclosed in such a decision. For example, you will be able to read a decision refusing the right to hold firearms on the grounds of an individual's mental profile or a decision on changing the surname or thousands of other decisions issued by the various government offices. Not only will the name of the interested party be disclosed but also other types of information about the individual, including medical conditions, family and estate. This information is sensitive.

5. Making the Law: Transparency and Openness Level Down

The draft does not offer any new transparency mechanisms in the legislative process. On the contrary, it lowers existing standards. With respect to public consultations, it has actually repeated the provisions of the currently applicable resolution of the Council of Ministers. However, unlike the resolution, it does not specify deadlines for comments. The Council of Ministers resolution sets a 14-day deadline and it stipulates the deadline may only be shortened under special circumstances. This bill offers no deadline.

Unlike the existing legislation, the bill has limited the obligation to publish documents on the legislacja.gov.pl portal exclusively to official documents. This implies that no comments made by parties other than public sector institutions will be published.

The bill fails to safeguard a very important aspect of legislative transparency, names the legislative trail. The public will not learn who has drafted the bill and who has changed the draft and how.

6. Making the Law: For Persistent People Only

Like the existing law on lobbying, the bill envisages two ways in which citizens can take part in the legislative process: lobbying and professional lobbying. However, unlike the existing laws, it requires that some parties to the consultation such as organisations, institutions and private individuals (but not companies) should disclose a wide range of details about them under a criminal sanction. Failure to disclose any such information results in no right to present any comments.

The bill is designed to show teeth to non-governmental organisations and ordinary citizens. NGOs will have to disclose the VAT number of donors, including the VAT number of a self-employed person who has made a donation above a very low threshold of PLN 2,000. There are serious concerns that this is designed to silence the voice of civil society organisations that receive grants from foreign sources, including EU institutions and private individuals. Private individuals will have to disclose their sources of income over the past two years. Any error or failure to provide up-to-date information may result in prosecution and a prison sentence. As a result the law will effectively discourage citizens and civil society organisations from contributing to the legislative process.

7. 'Whistleblowers' or an Important Concept Distorted

A whistleblower is an individual who is acting in public interest and is exposing abuse or threats in his or her workplace. If such an intervention is ineffective or when it cannot be performed safely the whistleblower will inform the media or law enforcement. For this reason, the individual should receive adequate legal protection.

In contrast, the bill limits the whistleblower status solely to individuals who report suspected corruption to law enforcement agencies. The whistleblower status is arbitrarily granted by a prosecutor and the individual at hand is fully at his or her mercy. If the prosecutor fails to grant protection there will be no right to appeal. Furthermore, the proposed law fails to grant any protection to individuals who wish to expose other threats that are no crimes per se, including work safety hazards, mobbing or harassment. It fails to motivate employers or trade unions to introduce policy that protects whistleblowers in the workplace. Instead, it proposes a mechanism that undermines public trust, may be abused by law enforcement to put employers under surveillance in violation of the principles of social co-existence and the freedom to engage in business.

The Non-transparent Process of Legislating for 'Transparency'

The bill has been drafted for many months by the co-ordinator of secret services without disclosing the general outline and in violation of the requirement to list the bill in the legislative pipeline. It was published on 24 October 2017, six business days were allowed for consultations and the law is to enter into force on 1 January 2018.

Contrary to earlier announcements, public consultations on draft law have been superficial, illusory and hasty. The minimum period for consultations of draft legislation specified in a resolution adopted by the Council of Ministers is 14 days. Meanwhile, the proponents of the this bill originally wanted the entire public consultation to be confined to a single meeting in Warsaw, which would naturally limit the opportunities for individuals outside the capital city and those who cannot attend on this one occasion for whatever reason. Finally, 6 days for written comments were allowed as a result of vast criticism. The deadline for comments is 3 November and they must be sent to: sluzby@kprm.gov.pl. Results will be summarised on 6 November.

1. Forum Darczyńców w Polsce
2. Fundacja Autonomia
3. Fundacja Centrum Cyfrowe
4. Fundacja ClientEarth – Prawnicy dla Ziemi
5. Fundacja e-Państwo
6. Fundacja Forum Obywatelskiego Rozwoju
7. Fundacja Frank Bold
8. Fundacja im. Stefana Batorego
9. Fundacja JAWNOŚĆ.PL
10. Fundacja Kształcenia Ustawicznego PERITIA
11. Fundacja Obywatel Rodzic
12. Fundacja Panoptykon
13. Fundacja Pole Dialogu
14. Fundacja Przestrzeń dla Edukacji
15. Fundacji Rodzić po Ludzku
16. Fundacja Stabilo
17. Fundacja Stańczyka
18. Fundacja Wolności
19. Helsińska Fundacja Praw Człowieka
20. Instytut Edukacji Ekonomicznej im. Ludwiga von Misesa

21. Instytut Spraw Publicznych
22. INPRIS - Instytut Prawa i Społeczeństwa
23. Lambda Warszawa
24. Pracownia Badań i Innowacji Społecznych Stocznia
25. Sieć Obywatelska Watchdog Polska
26. Stowarzyszenie Amnesty International
27. Stowarzyszenie Aktywności Obywatelskiej Bona Fides
28. Stowarzyszenie im. prof. Zbigniewa Hołdy
29. Stowarzyszenie Interwencji Prawnej
30. Stowarzyszenie Klon/Jawor
31. Stowarzyszenie Ludzi z Inicjatywą "Chmielno NON-STOP"
32. Fundacja Pozytywnych Zmian
33. Stowarzyszenie przeciw Antysemityzmowi i Ksenofobii Otwarta Rzeczpospolita
34. WWF Polska

Other reviews and position papers on the draft law can be found here:

<http://obserwatoriumdemokracji.pl/ustawa/projekt-ustawy-o-jawnosci-zycia-publicznego/>

Contact: kontakt@obserwatoriumdemokracji.pl