

**GLOSS ON THE JUDGEMENT  
OF THE SUPREME ADMINISTRATIVE COURT  
OF 21 OCTOBER 2022, III OSK 4468/21\*  
(CONCERNING THE PROVISION  
OF PUBLIC INFORMATION BY A FOUNDATION)**

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ABSTRACT

In its judgment of 21 October 2022, III OSK 4468/21, the Supreme Administrative Court considered that a foundation is obliged to provide public information because, in accordance with Article 1 of the Act on Foundations, it should accomplish socially and economically useful objectives that comply with the interests of the Republic of Poland. These are objectives that should also be accomplished by public administration; thus, they are, in fact, the State's objectives. In such a situation, the Court decided that the informative obligation of foundations that are not public law entities applies, in fact, to every aspect of their activities. This should be recognised as correct, because the constitution-maker specified in Article 61(1) of the Constitution of the Republic of Poland a very broad range of entities obliged to provide public information, ensuring that every field of the State's activity is transparent.

Keywords: Supreme Administrative Court, public information, foundation, obligation to provide data

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- I. Whether a given entity is obliged to provide information depends on the prior determination of whether its actions meet the criteria of ‘performing public tasks’.
- II. To establish the existence and scope of public tasks, it is necessary to find in the provisions of law a relevant task norm addressed to an administrative body, i.e., one that determines the conduct of an administrative body necessary to carry out a specified state aim.
- III. Article 1 of the Act on Foundations is a legal norm that constitutes grounds for assuming that a foundation carries out public tasks.

The glossed judgment concerns the subjective scope of the Act of 6 September 2022 on Access to Public Information.<sup>1</sup> It was issued by the Supreme Administrative Court as a result of hearing the cassation complaint about the judgment of the Voivodship Administrative Court in Warsaw of 13 November 2020, II SAB/Wa 121/20, which recognised the Foundation’s inaction in dealing with the complainant’s request to provide public information concerning the Programme for Non-Governmental Organisations in Poland, carried out in the financial perspective of 2009–2014 by means of answering questions asked in the request. It should be added that the Foundation requested to provide information had not been founded by public administration bodies or state-owned companies obliged to provide public information.

The Foundation responded that it does not perform public tasks in relation to the Programme and does not possess public assets; therefore, it is not obliged to provide public information concerning the subject matter.

In this situation, the claimant filed a complaint to the Voivodship Administrative Court in Warsaw, which recognised that the complaint was well-founded. The first instance court explained that the addressee of the request to provide public information is the Foundation that the Financial Mechanism Office (FMO) in Brussels had chosen as an operator of the above-mentioned programme within the Fund for Civil Society. The operators are responsible, inter alia, for programme preparation, intake of applications, selection of projects, monitoring of the implementation, and promotion of the programme. In the Court’s opinion, the allocation of funds obtained by Poland, including the funds spent on the development of civil society, undoubtedly constitutes the performance of public tasks within the meaning of the Act on the Provision of Public Information.

Being an operator appointed to carry out the programme for Non-Governmental Organisations in Poland, the Foundation is an entity performing public tasks referred to in Article 4(1)(5) of the AAPI and, within this scope, is also an entity obliged to provide public information in accordance with Article 6(2) of the AAPI. Taking into account the fact that the Foundation performs public tasks, it is not important whether it possesses public assets or funds. Thus, it is sufficient for a given entity to perform public tasks to recognise that it is obliged to provide public information. In light of the above, the Foundation was obliged to deal with the claimant’s request to provide public information.

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<sup>1</sup> Journal of Laws of 2022, item 902, hereinafter ‘AAPI’.

The Foundation filed a cassation complaint about the judgment of the Voivodship Administrative Court in Warsaw, alleging that the first instance court had violated the provisions of substantive law, i.e., Article 1(1) in conjunction with Article 3(2) in conjunction with Article 6(2) in conjunction with Article 4(1)(5) and Article 4(3) of the AAPI in conjunction with Article 61(1) of the Constitution of the Republic of Poland in conjunction with Article 149 § 1 subsections 1 and 3 in conjunction with Article 151 of the Act of 30 August 2002: Law on the procedure before administrative courts,<sup>2</sup> by their incorrect interpretation reflected in the recognition that the request concerned public information subject to provision by the Foundation although it is not included in the group of entities carrying out public tasks (performing tasks of public authorities) or possessing public assets, which excludes it from the governance of the regulations of the Act on access to public information and, moreover, by the arbitrary and incorrect determination of the scope of the concept of public tasks by the Court of first instance.

The Supreme Administrative Court dismissed the cassation complaint. It was raised in the justification that the subjective scope of the right of access to public information is only partly regulated by Article 61(1) of the Constitution of the Republic of Poland. The provision stipulates that:

‘A citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions. Such right shall also include receipt of information on the activities of self-governing economic and professional organs and other persons or organisational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury.’

Therefore, Article 61(1) of the Constitution of the Republic of Poland determines the subject of the right of access to public information (information about activities of the entities indicated in the provision) and who has the right (a citizen). However, the wording of the provision does not answer the question of what entity is obliged to provide public information. It does not also indicate that the concept of public task is identical to exercising public authority and performing the tasks of public authorities. In particular, it does not result from the regulation contained in the provision concerning the subject matter of the right of access to public information (and not the subjective scope of the right), in accordance with which the right of access to public information covers ‘information on the activities (...) of other persons or organisational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury.’

Entities obliged to provide public information have been directly specified in Article 4(1) of the AAPI, which states: ‘entities obliged to provide public information are public authorities and other entities performing public tasks, in particular (...).’ The construction of the provision does not raise any doubts that, firstly, entities obliged to provide public information include entities performing public tasks in which the legislator also includes public authorities and, also, secondly, taking into account the phrase ‘in particular’ used in the provision, that other entities performing public tasks include entities indicated in the open catalogue of entities

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<sup>2</sup> Journal of Laws of 2002, item 329, as amended.

listed in Article 4(1)(1)–(5) of the AAPI. Therefore, the content of Article 4(1)(1)–(5) of the AAPI means that within the meaning of the AAPI, it is sufficient to determine that a given entity is one listed in the open catalogue of Article 4(1)(5) of the AAPI. At the same time, recognition that a given entity is not listed in the open catalogue of Article 4(1)(5) of the AAPI does not mean that it is not obliged to provide public information. The absence of a given entity in the open catalogue of Article 4(1)(5) of the AAPI does not mean that this entity does not perform public tasks. Thus, essentially, the answer to the question whether a given entity is obliged to provide public information depends on the prior determination of whether its activities meet the statutory criterion of ‘performing public tasks’.

The concept of public tasks, in turn, is a legal term understood as tasks addressed by the legislator to the bodies administering this normative designation of the conduct of the administrative apparatus that is necessary to accomplish a specific State objective using designated means and forms of action. It is a normative obligation of the administration to implement the defined goal of the State through specified application of the designed means. Public tasks result from special norms, the so-called task norms, which means that in order to recognise the existence and determine the scope of a public task, it is necessary to find an adequate task norm addressed to the administrative body in legal provisions, i.e., one that determines the administrative body’s conduct necessary to accomplish a specific objective of the State. Determination of the task and the aim of action of the public administration body is tantamount to the imposition of an obligation to perform a given task or an obligation to achieve a set target on this entity. This results from the assumption that a specific state of things, the achievement of which the task norm orders, is to be achieved regardless of the existing circumstances. That is why in the case of norms of this kind the circumstances surrounding performance of a given task are usually not determined. The characteristic feature of task norms is that the obligation set in them cannot be implemented by means of one activity, but its implementation consists in the performance of a series of mono-generic or multi-generic, legal or actual activities. The category of tasks is also connected with citizens’ legal situation. The existence of a given public task enables a citizen to demand that it be performed. The guarantee that a given task will be carried out with the use of public funds is not a necessary element of the classification of a given norm as a task norm and, as a result, a necessary element of the classification of a given task as a public task. The type of competence and the planned forms of the performance of a public task (including civil law forms) do not influence the classification of a given task as a public one. The determination of tasks does not automatically result in the ability to undertake specific activities.

Moreover, one forms of decentralisation of public administration as well as an expression of the principle of subsidiarity and the requirement of bringing administration closer to the citizen, is the privatisation of public tasks. This entails, inter alia, that these tasks, while retaining their public character, are carried out by entities other than public authorities’ entities. Thus, the entities performing public tasks are not exclusively the State and public authorities’ entities in a broad sense, as in the process of privatisation of public tasks, they can be delegated to private entities. It should be emphasised that tasks performed by public authorities are also

public tasks. The legislator's use of the concept 'public tasks' in the construction of Article 4(1)(1)–(5) of the AAPI justifies the thesis already established in administrative case law according to which performing public tasks as a determinant of the list of entities obligated to provide public information is not an exclusive attribute of public authorities. Such tasks may be performed by various entities that are not the authorities' bodies, and their characteristic features include commonness and usefulness for the community as well as being conducive to achieving the objectives laid down by the Constitution or statute.

The performance of public tasks by a given entity should be related to and result from specified statutory norms or resolutions based on statutory norms that entrust (commission) specified public tasks to specified entities. However, one cannot preemptively exclude the performance of public authorities' tasks by specified entities as a result of activities of public authorities' bodies that are not clearly anchored in the provisions of law. A comprehensive assessment of the legal state and the activities of a given entity is necessary in every case to determine whether this entity performs public authorities' tasks (public tasks).

The Act of 6 April 1984 on Foundations<sup>3</sup> stipulates that 'A foundation may be established for the purpose of accomplishing socially or economically useful objectives that comply with the interests of the Republic of Poland, in particular such as: health protection, development of economy and science, education and upbringing, culture and art, social care and aid, environment protection, and care of antiquities' (Article 1), and 'Foundations may be founded by natural persons regardless of their citizenship and place of residence or legal persons that have their head offices in Poland or abroad' (Article 2(1)). Against this background, the criterion regarding, *inter alia*, the aim of a foundation is distinguished in the doctrine for public (public utility) foundations, which 'are established for the purpose of accomplishing public objectives, serve general interests and an indefinite number of people', and private foundations, which serve the 'interests or good of a particular group, e.g., a family'. The division is not identical to the division of foundations into civil law foundations and public law foundations based on the criterion concerning the method of their establishment, where private law foundations are established based on private law acts, and public law foundations are established based on public law acts (statutes, international agreements, administrative acts). This means that a private law foundation also has the features of a public foundation. Therefore, at present, in the light of Article 1 of the Act on Foundations (the requirement of a socially and economically justified aim in compliance with the fundamental interests of the Republic of Poland), only public foundations may be established.

Therefore, it should be assumed that Article 1 of the Act on Foundations is a legal norm that constitutes grounds for recognising that a foundation performs public tasks. Although the statute uses a general phrase: 'socially or economically useful objectives in compliance with the fundamental interests of the Republic of Poland', it provides examples of those aims, such as 'health protection, development of economy and science, education and upbringing, culture and art, social care and aid, care of antiquities'.

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<sup>3</sup> Journal of Laws of 2020, item 2167.

These are objectives which also public administration is appointed to accomplish. In fact, these are basic objectives of the State, which results from the provisions of the Constitution, e.g., Article 5, Article 6, Article 68(3–4) or Article 70(4) and (5).

Thus, Article 1 of the Act on Foundations determines normative obligations of a foundation to accomplish the set objective of the State, and this activity matches the above-mentioned specification of public tasks. Therefore, the Court of first instance, assuming that the concept of public tasks is broader than the concept of public authorities' tasks and has the features of commonness and usefulness for the community as well as is conducive to achieving aims determined by the Constitution or statute, rightly interpreted the concept referred to in Article 4(1) of the AAPI. It was also correct to assume that it is sufficient for a given entity to perform public tasks to recognise that it is obliged to provide public information.

The judgment of the Supreme Administrative Court concerns determination of conditions for recognising that, in accordance with Article 4(1) of the AAPI, a specific entity may be classified as another 'entity performing public tasks'; thus, it is obliged to provide public information. In line the stance of the Voivodship Administrative Court in Warsaw, the Cassation Court assumed that classification within this group is sufficient if two requirements are met jointly. Firstly, such an entity performs public tasks, and secondly, the performance of those tasks is based on statutory provisions. It should be emphasised that the adoption of this stance means that foundations, regardless of who established them or whether they possess public assets, in the same way as public authorities, are always obliged to provide information about their activity. This is a radical opinion, but it seems to be correct. However, it should be pointed out that the stance expressed in the glossed judgment of the Supreme Administrative Court causes many more informative obligations to be imposed on foundations than, for example, on building societies (cooperatives), which, in accordance with the resolution of the Supreme Administrative Court of 11 April 2005, I OPS 1/05, are not classified as entities referred to in Article 4(1)(5) of the AAPI. Passing the above resolution, the Supreme Administrative Court stated that the provisions of the Act of 16 September 1982: Law on Cooperatives<sup>4</sup> cannot be used to draw a conclusion that

'the activity of a building society is identical to the performance of public tasks within the meaning of Article 4(1) of the Act on Access to Public Information because the activities of building societies are limited to the accomplishment of their basic aim, i.e., satisfying the housing needs of their members and their families, thus a limited number of people associated in a given cooperative. At the same time, it is necessary to draw attention to the fact that in order to become a member of an association such as a building society, a person joining it is obliged to submit a declaration in writing, i.e., a membership declaration, under the threat of invalidity. It is required by law to indicate the number of shares and pay an entry fee. It should also be added that only the members of a cooperative decide on the scope of its activities, the duration of operations, liquidation, division, etc. Therefore, a building society is an organisational unit that has a strictly determined circle of persons and is not of a common nature.'<sup>5</sup>

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<sup>4</sup> Journal of Laws of 2021, item 648, as amended.

<sup>5</sup> *Orzecznictwo Naczelnego Sądu Administracyjnego i Wojewódzkich Sądów Administracyjnych*, 2005, No. 4, item 63.

Thus, the Supreme Administrative Court recognised that the provisions of the Law on Cooperatives do not determine that building societies accomplish public tasks. Just the opposite, the cooperatives of this type act only in the interest of their members who voluntarily associate to achieve their individual aims because 'cooperatives are organisational units that are not of a common nature (as administrative courts used to assume), but have a strictly determined circle of persons. As a result, they are not in possession of public information and are not obliged to provide information, i.e., are not subject to the requirements laid down in the Act on access to public information.'<sup>6</sup> Resolution of 11 April 2005, I OPS 1/05 clearly indicates that the performance of public tasks should stem from legal provisions. Therefore, an entity performing public tasks, even though it is not authorised to do so by the law, will not be obliged to provide public information pursuant to Article 4(1) of the AAPI. This was the case, for example, in early 2022, when associations, religious organisations, and even *ad hoc* groups of citizens were performing public tasks by providing assistance to war refugees from Ukraine, as state services proved to be to be inadequate in this regard.

However, it is indicated that

'The constitution-maker, in Article 61(1) second sentence *in fine*, listed the most numerous group of entities obliged to provide information within this scope. These are other persons and organisational units, thus entities that in some situations perform the so-called delegated functions within the scope of public tasks, and accomplish public tasks on a larger scale. Those entities include: foundations, administrative organisations (e.g., museums, hospitals, schools, detoxication centres) and non-governmental organisations. These organisations do not change their legal nature due to the functions delegated to them and their performance then. For this purpose, it is necessary to distinguish between activities performed within the scope of public tasks and those that are those entities' own activities'.<sup>7</sup>

Article 61(1) of the Constitution of the Republic of Poland stipulating the right to public information does not mention foundations as entities directly obliged to provide public information and, thus, it should be considered that, like in the case of other non-governmental entities, they are obliged to provide public information only within the scope in which they perform public tasks or manage public assets. The public law foundations are the only exception, because 'what determines the public law status of those foundations is only the fact that they were established by force of special legal acts.'<sup>8</sup> It is obvious that foundations established through special laws are a kind of direct extension of the execution of the state authority tasks, although in a particular form. Therefore, it there should be no doubt that in their case, the obligation to provide public information applies to every scope of their activity. However, the issue arises regarding the scope of information disclosure by other 'private' foundations, i.e., those not established by public entities.

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<sup>6</sup> Sarnecki, P., 'Glosa do uchwały NSA z dnia 11 kwietnia 2005 r., I OPS 1/05', *Przegląd Sejmowy*, 2005, No. 6, p. 203.

<sup>7</sup> Chmaj, M., *Komentarz do Konstytucji. Art. 61, 62*, Warszawa, 2020, p. 80.

<sup>8</sup> Przybysz, P., *Institucje prawa administracyjnego*, Warszawa, 2020, p. 175.

In the glossed judgment, the Supreme Administrative Court ruled that the obligation to provide information for foundations not classified as public law foundations essentially applies to every area of their activity. Thus, it is not limited to situations where, for example, as a result of performing a task entrusted to them by 'public authorities', the obligation to disclose information concerns the scope of this task or public funds expended on it. The Cassation Court derived its stance from the former judgments of the Supreme Administrative Court, which recognised that, in accordance with Article 4(1) of the AAPI, 'public tasks is a concept broader than the concept of public authorities' tasks' (Article 61 of the Constitution of the Republic of Poland). The concepts differ concerning the subjective scope; public authorities' tasks may be performed by authorities' bodies or entities entrusted with those tasks based on specific statutory norms. The concept of 'public tasks' used in Article 4 of the AAPI instead of the concept 'public authorities' tasks' used in Article 61 of the Constitution of the Polish Republic ignores the subjective element and means that public tasks may be performed by various entities that are not authorities' bodies, with no necessity for handing those tasks over. Interpreted this way, 'public tasks' have the features of commonness and usefulness for the community as well as are conducive to achieving the objectives laid down by the Constitution or statute. The performance of public tasks is always connected with exercising citizens' basic public rights.<sup>9</sup> Thus, 'public task' has two elements distinguishing it from other 'non-public' tasks: firstly, it can be performed by any entity, and secondly, the nature of the tasks being performed indicates that they serve the common good, and therefore not just particular goals.

Thus, in the glossed judgment, the Supreme Administrative Court derived from the content of Article 1 of the Act on Foundations that the accomplishment of public tasks results from the essence of the foundations activities. In line with the above-mentioned provision, 'a foundation may be established for the purpose of achieving socially and economically useful aims that comply with the basic interests of the Republic of Poland.' A foundation cannot be established and it cannot act for a purpose different than the one determined in Article 1 of the Act of 6 April 1984, and 'in accordance with the norm laid down in the discussed Article, the aim of a foundation should be of a socially and economically useful nature. The group of socially useful aims includes those that are accomplished in the interest of society.'<sup>10</sup> The aim of establishing a foundation corresponds to public tasks as a necessary element obliging to provide public information. Therefore, if foundations 'as a whole' are established to perform tasks that are public in nature, every aspect of their activities should be subject to revealing regardless of whether they are performed based on a commission or with the use of public assets.

Thus, in the judgment of 21 October 2022, III OSK 4468/21, the Supreme Administrative Court continued the adjudication line of administrative courts existing from the beginning of the functioning of the Act on Access to Public

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<sup>9</sup> Cf. judgements of the Supreme Administrative Court of: 18 August 2010, I OSK 851/10, 14 November 2016, I OSK 900/15 and 18 May 2021, III OSK 306/21, CBOSA.

<sup>10</sup> Gura, G., *Ustawa o fundacjach. Komentarz*, Article 1, Legalis 2021.



Information consisting in its broad interpretation so that access to public information in subjective and objective terms would be as wide as possible,<sup>11</sup> which should be recognised as correct because it corresponds to the constitution-maker's intention expressed in Article 61(1) of the Constitution of the Republic of Poland, which defines entities obliged to provide public information in a broad manner, because 'it is in the public interest to ensure openness of the activities of all entities statutorily authorised to perform the functions of public authorities, beside the state, self-governmental and any other entities, as, for example, social organisations';<sup>12</sup> thus, the political right of access to public information is always applicable where the State's tasks are performed, regardless of the entity performing those tasks.

It is worth emphasising that the opinion expressed in the glossed judgment implies that all, even the smallest foundations are obliged to provide public information on every aspect of their activities. Furthermore, they are to fulfil a series of organisational obligations, including, first of all, the obligation laid down in Article 8(2) to develop and update *Biuletyn Informacji Publicznej*. It is a serious organisational challenge, which small foundations may fail to meet. On the other hand, it cannot be denied that the extension of the subjective and objective scope is undoubtedly conducive to social control over the subsequent segment of social life.

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<sup>11</sup> Cf. Trzeciński, J., 'Sądownictwo administracyjne gwarantem konstytucyjnego praw dostępu do informacji publicznej', in: *Dostęp do informacji publicznej – rozwój czy stagnacja. Materiały z konferencji zorganizowanej 6 czerwca 2006 r. w Warszawie przez INP PAN, NSA i RPO*, Warszawa, 2008, pp. 22–29.

<sup>12</sup> Sokolewicz, W., 'Komentarz do art. 61 Konstytucji RP', in: Garlicki, L. (ed.), *Konstytucja RP. Komentarz. Tom IV*, Warszawa, 2005, p. 32.