

DEPUTIES AND ACCESS TO PUBLIC INFORMATION

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ABSTRACT

The article discusses deputies' information-related rights and obligations. It also analyses administrative courts' judgments in cases concerning access to public information, in which deputies were requesters or addressees of requests. Administrative courts admit the possibility of exercising the right of access to public information by deputies, but without invoking the performance of the mandate. At the same time, deputies are not classified as entities obliged to provide public information. The article presents two theses. Firstly, deputies may exercise their right of access to public information, revealing their special status. Secondly, deputies are entities obliged to provide public information, because they exercise public authority, perform public tasks and manage public property. The theses are justified by the linguistic and functional interpretation of constitutional provisions, as well as the Act on Access to Public Information and the Act on the Performance of the Mandate of the Deputy and the Senator. The paper uses the method of dogmatic and legal analysis and the analysis of Polish administrative courts' case law, and it presents *de lege lata* comments and *de lege ferenda* proposals.

Key words: public information, deputy, performance of the mandate, rights to information, access to public information, obliged entities, public authorities, public tasks public information, deputy, performance of the mandate, rights to information, access to public information, obliged entities, public authorities, public tasks

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INTRODUCTION

Deputies shall be representatives of the nation and shall take an oath to perform their duties diligently and conscientiously.¹ The conditions necessary for the effective performance of parliamentary duties and the protection of the rights arising from the exercise of their mandate are laid down in the Act of 9 May 1996 on the Performance of the Mandate of the MP and Senator.² Deputies shall perform their mandate for the well-being of the Nation and are obliged to inform the electorate about their work and the activity of the body to which they have been elected.³ By virtue of their mandate, they also have special powers. They have the right to obtain information and explanations or to intervene, *inter alia*, in government administration or local government bodies.⁴ These powers and obligations raise the question of whether deputies can simultaneously exercise the right of access to public information and whether they themselves are obliged to provide public information. In accordance with Article 61(1) of the Constitution, each citizen shall have the right to obtain information on the activities of organs of public authority, as well as persons discharging public functions. In accordance with Article 2(1) and Article 4(1) of the Act of 6 September 2001 on Access to Public Information,⁵ everyone shall have the right of access to public information, and public authorities and other entities performing public tasks are obliged to provide public information.

This article examines deputies' powers and obligations to provide information under the Access Act. It analyses administrative courts' case law concerning access to public information either requested by or from deputies. Administrative courts allow deputies to exercise the right of access to public information, however without invoking their mandate. At the same time, deputies are not classified as entities obliged to provide public information. This is justified by the fact that deputies are not members of public authorities and do not perform public duties. The article presents arguments against this stance. I argue that the linguistic and functional interpretation of constitutional provisions, as well as the Act on the Mandate and the Access Act, lead to the conclusion that deputies may exercise the right of access to public information while disclosing their special status. Deputies may also be classified as entities obliged to provide public information, as they exercise public authority and perform public tasks while managing public assets.

¹ See Article 104(1) and (2) of the Constitution.

² Journal of Laws of 2024, item 907, hereinafter referred to as 'the Act on the Mandate'.

³ See Article 1(1) and (2) of the Act on the Mandate.

⁴ See Article 16(1), Article 19(1), and Article 20(1) of the Act on the Mandate.

⁵ Journal of Laws of 2022, item 902, hereinafter referred to as 'AAPI' or 'Access Act'.

DEPUTIES' INFORMATION RIGHTS BY VIRTUE OF THE PERFORMANCE OF THE MANDATE

As part of their activities, deputies may exercise their powers under the Act on the Mandate and submit requests for information and materials to a specific group of entities, which does not include all public authorities or judicial bodies. In accordance with Article 16(1) of the Act on the Mandate, deputies shall have the right to obtain information and explanations on matters resulting from the performance of parliamentary duties from:

- (1) members of the Council of Ministers;
- (2) representatives of state bodies and institutions;
- (3) representatives of relevant local government bodies and institutions.

It is beyond doubt that members of the Council of Ministers, as well as the Council of Ministers in general, are obliged to provide information. Some doubts may concern other bodies. Firstly, the obligation to provide information applies to representatives of relevant state bodies and institutions. The scope of this concept is broader than that of government administration. The obligation also applies to other state entities that, although outside the structure of government administration, perform public administration tasks. This applies to representatives of the National Council of Radio Broadcasting and Television or the Supreme Chamber of Control, which is organisationally and functionally subordinate to the Parliament. However, there are no grounds for extending this obligation to all public authorities. It would be unjustified, e.g. due to the potential violation of their independence, which might occur in relation to the judiciary or members of the prosecution office.⁶

Pursuant to Article 19(1) of the aforementioned Act, in the performance of their mandate, deputies have the right to obtain information and materials, enter premises where such information and materials are kept, and inspect the activities of:

- (1) government administration bodies;
- (2) local government bodies;
- (3) companies with State Treasury shareholding;
- (4) state-owned facilities and enterprises;
- (5) local government-owned facilities and enterprises.

The right to request access to or obtain information or materials must be related to the performance of the deputy's mandate, and therefore should apply to information necessary for the performance of parliamentary duties, including duties involving contact with the electorate. The exercise of the right must also be in compliance with the provisions on legally protected confidentiality and must not violate the personality rights of others. These are specific restrictions, only partially overlapping with those on access to public information.⁷ Based on this, deputies cannot obtain information, e.g. from private entrepreneurs, commercial

⁶ See P.J. Uziębło, in: Grajewski K., Stelina J., Uziębło P.J., *Komentarz do ustawy o wykonywaniu mandatu posła i senatora*, Warszawa, 2014, LEX, Article 16(3).

⁷ Cf. Article 5 AAPI; for more see J. Róg, 'Dostęp posłów i senatorów do informacji o spółce z udziałem Skarbu Państwa', *Przegląd Prawa Handlowego*, 2014, No. 5, pp. 46 et seq.

enterprises without State Treasury shareholding, or professional self-government bodies. Also, the Act does not grant deputies the right to obtain information from judicial authorities: the Supreme Court, as well as common, administrative and military courts, which includes access to files on ongoing proceedings.⁸ Deputies' rights are also subject to specific material limitations, such as the connection of the requested information with the performance of the mandate, or the protection of personality rights, and the necessity to maintain legally protected confidentiality. For example, neither the Act on the Mandate, nor the Access Act, nor, all the more, the right to submit parliamentary interpellations, grants deputies access to business secrets. Only limited access to such secrets is granted to deputies who are members of parliamentary investigative committees.⁹

In addition, in accordance with Article 20(1) of the Act on the Mandate, while performing their parliamentary duties, deputies shall have the right to intervene and familiarise themselves with the course of the proceeding in:

- (1) government administration bodies;
- (2) local government administration bodies;
- (3) state-owned facilities or enterprises;
- (4) social organisations;
- (5) non-state economic units

in order to resolve the matter they submitted on behalf of themselves or the electorate. In this case, apart from the entities listed in Article 16(1) and Article 19(1) of the Act on the Mandate, the legislator also lists social organisations and non-state economic units. The former group includes associations, foundations, political parties, trade unions, employers' organisations, trade chambers and other similar entities. The latter group includes all companies, both capital companies and partnerships, as well as cooperatives and other similar entities, regardless of their capital structure or type of business activity.¹⁰

DEPUTIES' RIGHTS TO PUBLIC INFORMATION

At the same time, deputies, like any other person, have the right to public information. Neither constitutional nor statutory provisions impose any restrictions in this regard. Therefore, deputies may submit requests for access to entities obliged and listed in Article 4 of the AAPI, and not only to entities indicated in the provisions of the Act on the Mandate. This applies, e.g., to courts or any other bodies of public

⁸ See I. Galińska-Raczy, 'Uprawnienia posłów do uzyskiwania informacji', in: *Status posła. Część I. Wybór ekspertyz prawnych do art. 1–24 ustawy z 9 maja 1996 r. o wykonywaniu mandatu posła i senatora* (Dz. U. z 2003 r. nr 221, poz. 2199, ze zm.), Warszawa, 2007, pp. 370–371.

⁹ I. Galińska-Raczy, 'Opinia prawna w sprawie interpretacji pojęcia „tajemnica handlowa” w kontekście udostępniania posłom informacji na podstawie art. 19 ustawy o wykonywaniu mandatu posła i senatora oraz w ramach interpelacji poselskich', *Zeszyty Prawnicze Biura Analiz Sejmowych*, 2013, No. 4(40), p. 243.

¹⁰ P.J. Uziębło, in: Grajewski K., Stelina J., Uziębło P.J., *Komentarz...*, op. cit., Article 20(3), LEX.

authorities and entities performing public tasks. Access-related requests do not have to be related to the performance of the mandate. Deputies cannot be required to demonstrate a legal or factual interest,¹¹ with the exception of the right to obtain processed information.¹²

Against this background, inconsistent case law has emerged, aiming to distinguish different modes of deputies' activities. In some judgments, courts have held that when deputies submit requests for access and invoke their status, and the questions are closely related to their mandate and parliamentary function, such requests cannot be dealt with based on the Access Act, even if this legal act is referred to. In such a case, deputies do not act as 'anyone' under the Access Act, but as deputies, i.e., public officials exercising the rights provided for in the Act on the Mandate. The provision of Article 1(2) of the AAPI indicates the priority of special procedures, and the procedure provided for deputies is precisely of this nature, thus excluding the general access procedure. However, if the request is not subject to proceedings based on the provisions of the AAPI, there are no grounds for determining that the authority has remained inactive when it fails to respond to the request. This assessment is not changed by the fact that the request was addressed to an obliged entity or that the request may concern public information. The status of deputies requires that their request be processed in accordance with the access to information procedure laid down in the Act on the Mandate, especially if the deputy refers to those provisions in the request.¹³ Therefore, there is a risk that a deputy's request may be deemed to imply a specific procedure provided for in the Act on the Mandate, excluding the Access Act. This may significantly limit the deputies' rights to obtain information, and the mere fact of holding the deputy's status would exclude them from the group of persons entitled to request public information. That is why, while distinguishing between the procedures, courts have indicated in their rulings that a deputy's special status does not exclude them from the catalogue of entities that may request access to public information under the general rules laid down in the AAPI. At the same time, however, it has been stipulated that they cannot refer to their specific deputy's status.¹⁴ In such a case, when deputies submit a request for access, they exercise their rights based on the Act on the Mandate. The other legal basis referred to in the request is irrelevant if the mandate is also invoked. Therefore, if the request is submitted by a deputy using parliamentary forms and a parliamentary stamp or providing a deputy's office address for correspondence, such a request, as one related to the performance of a deputy's mandate, requires evaluation in terms of the performance of tasks arising from the mandate.¹⁵ More liberal rulings indicate that if the request is based on the Access Act, the mere

¹¹ See Article 2(2) AAPI.

¹² See Article 3(1)(1) AAPI.

¹³ See judgment of the Voivodeship Administrative Court in Warsaw of 19 June 2019, II SAB/Wa 81/19, CBOSA.

¹⁴ See the Supreme Administrative Court judgment of 3 March 2023, III OSK 2330/21, CBOSA.

¹⁵ See judgment of the Voivodeship Administrative Court in Gliwice of 11 January 2017, IV SA/GI 911/16 and of 29 November 2016, IV SA/GI 852/16; judgment of the Voivodeship Court in Opole of 22 May 2014, II SA/Op 175/14, CBOSA.

graphic form of the letter, the Sejm's imprints, or the deputy's designations cannot determine the content of the request. If deputies do not invoke their rights and ask questions that 'anyone' can ask, such a request should be dealt with under the provisions of the AAPL.¹⁶

The above-mentioned line of case law has practical consequences. Before selecting the procedure for dealing with the request, the obliged entity must determine whether a deputy acts as a natural person exercising the right of access to public information, or as a member of parliament/public official exercising the rights provided for in the Act on the Mandate.¹⁷ Such additional procedural requirements for the obliged entities raise doubts, especially as they may lead to excessive demands concerning the nature of the deputy's request, while the Access Act explicitly prohibits requiring the applicant to demonstrate a legal or factual interest.¹⁸ Moreover, in the case of the issuance of a decision on refusal to provide public information or discontinuation of proceedings, the obliged entities apply Article 64 § 2 of the Act of 14 June 1960: Code of Administrative Procedure.¹⁹ The provision sets out a procedure for remedying formal deficiencies in an application, under penalty of dismissing it without examination. If a deputy fails to clarify their capacity, their application, even if based on the provisions of the Access Act and concerning public information, will remain unanswered. Instead of providing public information, the obliged entity will be able to multiply formal barriers in the form of doubts as to whether the applicant is acting as a deputy or a natural person, i.e. anyone. There is also a risk that deputies may conceal their status. In cases concerning disclosure of public information, the provisions of the CAP are applied only to decisions. In cases that do not require the issuance of a decision, a request for access can be anonymous, so a deputy does not have to provide basic information such as their name, sign the application, or, all the more, invoke the mandate.²⁰

SEEMING CONFLICT BETWEEN ACCESS RIGHTS

The discussed formal issues and classification of deputies' requests would not be so significant if the statutory rights under the Act on the Mandate provided for effective mechanisms of their enforcement. However, the procedure for accessing public information is more favourable to deputies and often chosen in practice. Deputies' rights to information provided for in the Act on the Mandate require

¹⁶ See the Supreme Administrative Court judgment of 15 March 2023, III OSK 2503/21, CBOSA.

¹⁷ See judgment of the Voivodeship Administrative Court in Gliwice of 18 January 2017, IV SA/GI 979/16, CBOSA.

¹⁸ See Article 2(2) AAPL.

¹⁹ Journal of Laws of 2024, item 572, hereinafter referred to as 'CAP'. Also see Article 16(2) AAPL.

²⁰ J. Czerw, 'Dostęp do informacji publicznej w Polsce', *Przegląd Prawa Publicznego*, 2013, No. 11, p. 11.

that the connection between the requested information and the performance of their mandate be demonstrated. This raises numerous interpretation-related problems that result in the withholding of the information. The provisions of the Act on the Mandate also lack procedural regulations. Above all, however, a request for information in accordance with the Act on the Mandate does not initiate an administrative case. Such a request takes the form of a motion referred to in Article 241 of the CAP. Failure to process it merely opens the door for a deputy to initiate a complaint procedure – a general complaint regulated in Article 237 § 2 of the CAP. Complaints and motions protect a deputy's actual interests, and proceedings in such cases are not subject to judicial review. In this respect, only the rules of political, business or disciplinary responsibility may be applied to an entity that fails to respond to a request for information under the Act on the Mandate.²¹ The right of access to public information is a subjective public right, and judicial review may lead to a finding of a body's inaction and obliging it to respond to the request. Likewise, in the case of a refusal to provide information, the Act on the Mandate does not provide legal instruments facilitating effective supervision. In the case of access to public information, refusal must take the form of an administrative decision, which is subject to review by administrative courts. The Act on the Mandate does not contain provisions that would allow for the enforcement of deputies' rights, therefore the application of the Access Act is a more effective solution, often recommended in the opinions of the Sejm Research Bureau of the Chancellery of the Sejm of the Republic of Poland.²² The doctrine also highlights systemic, compensatory and penal regimes for the potential enforcement of representatives' rights to information. However, one should agree with the general conclusion that while there are opportunities for holding a body accountable for failure to fulfil obligations to provide information in relation to deputies' rights, there are no procedures or instruments that would make it possible to exercise these rights.²³ At the same time, the Act on the Mandate does not contain any provisions that constitute *lex specialis* in relation to the provisions of the Access Act. Both these statutes constitute separate bases for obtaining public information. In the case of the Access Act, deputies exercise constitutional rights to information, and they do this within the framework of the constitutionally granted subjective right, while they exercise rights to information as representatives of society within

²¹ See the Supreme Administrative Court judgment of 7 March 2019, I OSK 2911/18; judgment of the Voivodeship Administrative Court in Gliwice of 20 February 2018, IV SA/GI 1131/17; and ruling of the Voivodeship Administrative Court in Opole of 13 May 2021, II SAB/Op 6/21, CBOSA.

²² See E. Wojnarska-Krajewska, 'Opinia prawna na temat prawa dostępu do informacji i materiałów od organów administracji samorządowej w trybie ustawy o wykonywaniu mandatu posła i senatora i ustawy o dostępie do informacji publicznej', *Zeszyty Prawnicze Biura Analiz Sejmowych*, 2014, No. 1(41), pp. 349 and 351; W. Odrowąż-Sypniewski, 'Zakres obowiązków organów samorządu terytorialnego związanych z realizacją poselskiego prawa do informacji (wybrane zagadnienia)', *Zeszyty Prawnicze Biura Analiz Sejmowych*, 2017, No. 4(56), p. 178.

²³ B. Wilk, 'Uprawnienia informacyjne posłów, senatorów i radnych jednostek samorządu terytorialnego a dostęp do informacji publicznej', *Przegląd Prawa Publicznego*, 2019, No. 7–8, p. 79.

the framework of competences granted to them.²⁴ In accordance with Article 1(2) of the AAPI, its provisions are not to violate the provisions of other statutes laying down different rules and modes of access to public information. This does not exclude the possibility of reconciling the Access Act with the Act on the Mandate. It is considered inappropriate to automatically exclude the provisions of the AAPI wherever a deputy exercises other rights to information.

The rights granted to deputies in the Act on the Mandate are even broader in scope than those under the Access Act, primarily with respect to the right to 'obtain materials' (which is a broader concept than 'obtaining information').²⁵ Therefore, if deputies, invoking their mandate, may exercise more rights to obtain information under the Act on the Mandate, all the more so they may exercise their rights under the Access Act (*argumentum a maiori ad minus*). Moreover, the status of a deputy should be an additional advantage, especially when legal provisions provide for specific conditions for access to information that hinder access for an 'ordinary' citizen. This is the case with public information that is processed, i.e. information requiring collection and additional analysis, conducted 'at the request of' the requester. Processing is evidenced by the need for the obliged entity to generate qualitatively new information based on simple information already in its possession. This may involve additional workload for the authority. That is why, in accordance with Article 3(1)(1) of the AAPI, the right to processed public information is granted only to the extent that it is particularly important to the public interest. The requirement of 'particular importance to public interest' is met when obtaining given information and publicising it is in the interest not only of the requester but also of other citizens. The idea is that the provision of processed information should have a real impact on the functioning of specific public structures in a specific area of social life, and should improve or streamline the performance of public tasks for the common good of a given community. Performance of the mandate of a deputy is a public service, in which one is guided by a shared concern for the common good. In accordance with Article 104(2) of the Constitution, deputies solemnly swear to perform their duties to the Nation diligently and conscientiously. It is therefore inadmissible to limit deputies' rights based on doubts as to whether the information they obtain will actually be used in the public interest. In such a case, refusal to provide public information requires a detailed explanation.²⁶ Thus, a deputy's status itself should be subject to analysis and argumentation in the course of dealing with the request for processed information, but for this to happen, deputies must disclose their status in the request.

²⁴ Ibidem, p. 81.

²⁵ See E. Wojnarska-Krajewska, *Opinia prawna...*, op. cit., p. 349.

²⁶ See judgment of the Voivodeship Administrative Court in Gliwice of 23 November 2016, IV SA/GI 807/16, CBOSA.

SIMILARITIES OF LOCAL COUNCILLORS' RIGHTS

As in the case of deputies, councillors at all levels of local government have been granted supervision powers.²⁷ These rights were introduced by analogy to the rights of deputies and senators, with the only difference that they are limited to the local self-government unit in which the councillor was elected. Therefore, similarly, it is recognised in case law that councillors' rights are not exercised by means of acts or activities subject to administrative court review. Exercising their rights, deputies, senators, and councillors act 'performing their mandate' or 'performing their deputies' or senators' duties', and not in their own name as natural persons subject to rights and obligations, with respect to whom the authority has the right or obligation to authoritatively and unilaterally rule on requests for the provision of information and materials. Therefore, in such cases, the activities of an administrative body are not subject to appeal due to the lack of jurisdiction of an administrative court.²⁸

It is noticed in the doctrine that there is a lack of regulations regarding the refusal to provide information requested based on the self-government statutes and, similarly, the Act on the Mandate. One of the views expressed is that the provisions of the Access Act should be adequately applied to all councillors' requests. According to another stance, those provisions should apply only to the extent that the requested information constitutes public information.²⁹ Also in this case, administrative courts recognise that self-government statutes constitute *lex specialis* in relation to the Access Act. In order to recognise that councillors are subject to a different access procedure, it is sufficient that this procedure, within their status, provides them with access to the information they are interested in. Such a procedure is provided for in the self-government statutes, thus the Access Act is only supplementary in nature.³⁰ Likewise, in relation to councillors, it is assumed that when a requester acts as an entity holding a special status, the provisions of the AAPI should be excluded, because self-government statutes lay down different rules and procedures for providing information.³¹ These observations may analogously apply to deputies, and although courts do not deny representatives the right of

²⁷ See Article 23(3b) of the Act of 5 June 1998 on Voivodeship Self-Government, Journal of Laws of 2024, item 566; Article 21(2a) of the Act of 5 June 1998 on County Self-Government, Journal of Laws of 2024, item 107, Article 24(2) of the Act of 8 March 1990 on Commune Self-Government, Journal of Laws of 2024, item 609, hereinafter also referred to as 'Self-Government Statutes'.

²⁸ Ruling of the Voivodeship Administrative Court in Kielce of 30 April 2020, II SA/Ke 423/20, ruling of the Voivodeship Administrative Court in Warsaw of 18 June 2014, IV SAB/Wa 106/14, CBOSA.

²⁹ See J.J. Zięty, 'Przyczyny odmowy udzielenia radnym gminy informacji o działalności spółki komunalnej', *Zeszyty Prawnicze Biura Analiz Sejmowych*, 2021, No. 3(71), pp. 69–70 and the publications referred to therein.

³⁰ See the Supreme Administrative Court judgment of 4 April 2018, I OSK 1852/16, CBOSA. Also see A. Piskorz-Ryń, 'Zasady udostępniania informacji publicznej. Katalog podmiotów zobowiązanych i uprawnień', in: Wyporska-Frankiewicz J. (ed.), *Dostęp do informacji publicznej na wniosek w praktyce jednostek samorządu terytorialnego*, Warszawa, 2019, pp. 53–57.

³¹ See ruling of the Voivodeship Administrative Court in Gorzów Wielkopolski of 8 February 2024, II SA/Go 707/23, CBOSA.

access to public information, in some cases they prevent them from invoking their special status when exercising this right. However, it is worth emphasising that the application of the provisions of the AAPI is not consistently excluded when councillors submit requests. This would limit their constitutional rights as citizens. Interested citizens, even those holding public office, do not have to state the purpose for which they need the requested public information, nor do they have to explain whether they perform public functions. The circumstance that the person submitting a request for public information is also a councillor is legally irrelevant.³²

SPECIAL SITUATION OF DEPUTIES COMBINING FUNCTIONS

In the context of the exercise of the right of access to public information by deputies, attention should be paid to the specific situation of combining the functions of a deputy and a member of the Council of Ministers or a Secretary of State in the government administration. It was emphasised in case law that the Access Act does not authorise a public administration body to request information from another entity obliged under Article 4 of the AAPI. The aim of the Access Act is to inform citizens about the state of 'public affairs', not to obtain information by public administration bodies from other entities.³³ Using the term 'anyone' in Article 1(1) of the AAPI, the legislator clarifies the civil right laid down in the Constitution, indicating that everyone may exercise it under the terms specified in this statute. 'Anyone' should be understood as every person or a private law entity. The word 'anyone' cannot be understood otherwise, given the aim and meaning of the Access Act, adopted to implement the concept of public authority transparency.³⁴ The aim of the Access Act is to ensure 'public supervision' of public authority bodies, and transparency of their operations. The right to information about public authorities' activities is an important element of public scrutiny of the activities of entities entrusted with public tasks. It is justified to grant such rights exclusively to private law entities, and the term 'anyone' cannot refer to public administration bodies.³⁵ The provisions of the AAPI are not a legal instrument intended to serve public administration bodies for the exchange of information. In such cases, constitutional provisions and administrative systemic regulations apply. By contrast, the Access Act serves the purpose of enabling public scrutiny of public authorities by society. The spheres of administrative work organisation and public supervision cannot be combined,

³² See the Supreme Administrative Court judgment of 23 June 2022, III OSK 4901/21, judgment of the Voivodeship Administrative Court in Poznań of 10 April 2024, II SAB/Po 10/24, *CBOSA*.

³³ Ruling of the Voivodeship Administrative Court in Warsaw of 18 February 2010, II SAB/Wa 197/09, *CBOSA*.

³⁴ See the Supreme Administrative Court judgment of 30 January 2014, I OSK 1982/13, judgment of the Voivodeship Administrative Court in 13 December 2012, II SAB/Wa 386/12, *CBOSA*.

³⁵ See judgment of the Voivodeship Administrative Court in Gdańsk of 5 November 2014, II SA/Gd 589/14, *CBOSA*.

because this would lead to legal chaos and destabilisation of administrative functions.³⁶

Thus, the Access Act does not provide for authorisation of a public administration body to request information from another obliged entity. Its aim is to inform citizens about public affairs, not to obtain information by public administration bodies from other bodies of that administration. Therefore, government administration bodies are not obliged to provide public information to local self-government bodies, and a commune body is not authorised to request access to, e.g., parliamentary correspondence related to deputies' interventions.³⁷ Thus, deputies may exercise the rights resulting from access to public information, provided that they act as representatives of their electorate within the scrutiny of public authorities performed by society. A deputy who is a member of the Council of Ministers or a deputy who is a Secretary of State in the government administration should not exercise citizen access rights to obtain information about the activities of other public authorities, because it would be contrary to the objectives of the Access Act. With respect to requests for access addressed to the judiciary, this could also be in conflict with the constitutional principle of separation of powers.

DEPUTIES AS ENTITIES OBLIGED TO PROVIDE INFORMATION

Deputies have the right and obligation to actively participate in the work of the Sejm and the National Assembly, as well as their bodies.³⁸ The internal organisation and agenda of the Sejm, as well as the procedures for appointing its bodies and their operations, are laid down in the Sejm's Statute.³⁹ In accordance with this document, the Sejm Chancellery, not deputies, shall provide public information by means of publication of documents and other information in the Sejm Information System.⁴⁰ The Access Act explicitly obliges only political parties operating through their bodies to provide public information.⁴¹ At the same time, obliged entities are specified only as examples, and decisive criteria include membership in public authorities and the performance of public tasks.⁴² In such circumstances, a question should be asked whether a deputy is an entity obliged to provide public information. Administrative courts adopted a stance that deputies are not such entities. It was argued that deputies do not exercise public authority because they lack statutory rights to enforce specific tasks and objectives. In turn, a public task is any action of

³⁶ P. Szustakiewicz, 'Glosa do postanowienia Naczelnego Sądu Administracyjnego z dnia 28 X 2009, Sygn. akt I OSK 508/09', *Ius Novum*, 2010, No. 2, p. 197.

³⁷ See I. Galińska-Raczy, 'Udostępnienie przez organ administracji rządowej – w trybie ustawy o dostępie do informacji publicznej – korespondencji w sprawie interwencji poselskiej organowi gminy, którego dotyczy ta interwencja', *Zeszyty Prawnicze Biura Analiz Sejmowych*, 2018, No. 3(59), pp. 186–187.

³⁸ See Article 3 of the Act on the Mandate.

³⁹ Monitor Polski of 2022, item 990, hereinafter referred to as 'the Sejm's Statute'.

⁴⁰ See Article 202a(1) of the Sejm's Statute.

⁴¹ See Article 4(2) AAPI.

⁴² See Article 4(1) AAPI.

the administration carried out under statutory provisions. Deputies are not members of public administration within the meaning of the state organisational structure consisting of self-government administration of three levels, central government administration, and state administration not subordinate to the government (e.g. the President, the Supreme Chamber of Control, the Commissioner for Citizens' Rights, the National Council of the Judiciary, the National Bank of Poland). Although Article 61 of the Constitution stipulates that a citizen shall have the right to obtain, *inter alia*, information on the activities of organs of public authority as well as persons discharging public functions, in accordance with paragraph 4 of that provision, the procedure for providing information shall be specified by statute, and regarding the Sejm and Senate, by their rules of procedure. The delegation under Article 61(4) of the Constitution contains the authorisation (obligation) to establish the procedural mode of handling matters of access to public information solely by statute. The catalogue of entities obliged to provide public information is laid down in Article 4 of the Access Act and it is open-ended. The exemplary list of obliged entities under Article 4(1) of the AAPI is preceded by a general definition that these are 'public authorities and other entities performing public tasks', which do not include deputies as individuals.⁴³

The Constitutional Tribunal addressed the discussed issue, pointing out that the essence of the problem concerns the restrictive interpretation of Article 4(1) of the AAPI and not the subjective scope of this provision. As court rulings show, the fact that deputies are not obliged to provide information under this statute does not result from the legislator's failure to include deputies in the group of entities obliged to fulfil this obligation, but rather from the interpretation of the provision, in particular the concepts of 'public authorities' and 'entities exercising public authority'.⁴⁴ Therefore, this is a matter of legal interpretation. The above legal interpretation excluding deputies from the list of entities obliged to provide public information may raise significant objections.

Primarily, in the light of Article 61(1) of the Constitution, a citizen shall have the right to obtain information on the activities of persons discharging public functions. Such a right shall also include receipt of 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. While the delegation under Article 61(4) of the Constitution authorises the ordinary legislator to specify the procedure for the provision of information, statutory provisions should not be interpreted in such a way that could limit access

⁴³ The Supreme Administrative Court ruling of 6 December 2012, I OSK 2843/12; judgment of the Voivodeship Administrative Court in Warsaw of 14 February 2014, II SAB/Wa 522/13; rulings of: the Voivodeship Administrative Court in Rzeszów of 7 September 2011, II SAB/Rz 58/11, the Voivodeship Administrative Court in Warsaw of 29 November 2013, II SO/Wa 92/13, the Voivodeship Administrative Court in Poznań of 23 February 2022, IV SO/Po 2/22, the Voivodeship Administrative Court in Warsaw of 23 November 2022, II SAB/Wa 470/22, the Voivodeship Administrative Court in Gorzów Wielkoposki of 25 August 2023, II SAB/Go 71/23, CBOSA.

⁴⁴ The Constitutional Tribunal ruling of 9 October 2013, Ts 98/13, OTK, Series B, 2014, No. 1, item 57.

to information about constitutionally determined entities. Deputies, as public officials, are undoubtedly persons discharging public functions.⁴⁵ Therefore, they should be obliged to fulfil their reporting obligations concerning their activities, which results directly from the constitutional provision. Applying the technique of interpreting a statute in accordance with the Constitution should be given priority, as it corresponds to the presumption of constitutionality of statutes.⁴⁶

At the same time, there is no obstacle to interpreting Article 4(1) of the AAPI in accordance with Article 61(1) of the Constitution. Referring to the concepts of 'public authorities' and 'other entities performing public tasks' used in the statute, one should fully agree that deputies, by virtue of their mandate as representatives, participate in the exercise of state authority.⁴⁷ Deputies' tasks are not only to represent (and therefore determine) the will, interests and well-being of the nation, but also, pursuant to Article 4(2) of the Constitution, to exercise power on behalf of the nation. That is why activities undertaken by deputies within the performance of their parliamentary mandate should be treated as the exercise of public authority. From the grammatical point of view, the constitutional phrase 'the duties of public authorities' does not mean the same as 'public tasks' referred to in Article 4(1) of the AAPI. Public tasks have a broader scope and may be characterised by the same features as analogous activities performed by a specific public authority: universality, utility for the public, and achievement or contribution to the achievement of goals deemed desirable or mandated by the Constitution or statutes.⁴⁸ Public tasks also mean more than simply tasks of public administration, to which deputies do not belong. This is confirmed by case law, which indicates that the concept of 'public tasks' ignores the subjective element and means that public tasks can be performed by various entities other than authority bodies and without the need to delegate these tasks. 'Public tasks' within this meaning are characterised by universality and utility for the public, as well as contribution to the achievement of goals specified in the Constitution or statutes. The performance of public tasks is always connected with the exercise of fundamental public rights of citizens. Any entity that manages even a small part of public property is obliged to disclose information about it. It can be said that the right to information follows public property, and authorised persons may request information from anyone who manages or uses such property.⁴⁹ For this reason, a private joint-stock company repairing a municipal road under a public procurement contract was considered an obliged entity. On another occasion, in

⁴⁵ See Article 115 §§ 13 and 19 of the Act of 6 June 1997, Criminal Code, *Journal of Laws* of 2024, item 17.

⁴⁶ The Constitutional Tribunal judgment of 28 April 1999, K 3/99, OTK ZU, 1999, No. 4, item 73.

⁴⁷ W. Odrowąż-Sypniewski, 'Zasady udostępniania informacji o posiedzeniach zespołu parlamentarnego', *Zeszyty Prawnicze Biura Analiz Sejmowych*, 2021, No. 4(72), p. 216.

⁴⁸ See M. Bernaczyk, 'Konstytucyjne prawo do informacji o działalności posłów i senatorów a zakres podmiotowy ustawy o dostępie do informacji publicznej', *Przegląd Sejmowy*, 2012, No. 3, p. 61.

⁴⁹ See the Supreme Administrative Court judgment of 8 October 2019, I OSK 4113/18, CBOSA. See critical comments by Ł. Nosarzewski, 'Obowiązek udostępniania informacji publicznej przez podmioty prywatne', *Informacja w Administracji Publicznej*, 2020, No. 2, pp. 49 et seq.

the case of a director of a community culture centre, it was pointed out that bodies within the meaning of the AAPI may include not only bodies performing public administration tasks (i.e. those considered to be typical public administration bodies), but also other entities, even those subject to private law, not belonging to public administration structures.⁵⁰

Deputies not only perform public functions but also manage public funds. They receive public funds and have them at their disposal to perform their mandate. Deputies are entitled to financial resources to cover expenses incurred while performing their mandate in the country (parliamentary allowance).⁵¹ They establish MP's or MP-Senator's offices to support their local activities. For this reason, they are entitled to a lump sum to cover the costs of their offices' operations under the terms and in the amount determined jointly by the Marshal (Speaker) of the Sejm and the Marshal of the Senate.⁵² Within this lump sum, deputies determine the remuneration of office staff, who are also entitled to an additional annual salary, a bonus for long-term service, and severance pay, and the funds for these purposes are allocated in the budget of the Chancellery of the Sejm and the Chancellery of the Senate respectively.⁵³

In addition, the axiology of access to public information is based on the provision of information on one's own activities by entities to which the law grants *imperium*. Representative democracy involves, on the one hand, delegation of power by the sovereign to representatives, and on the other hand, submission to the authority of those representatives, embodied in the law they enact. The right to information serves to enforce political accountability by voters, and the exclusion of deputies from the obligation to provide public information actually means a limitation of knowledge that underlies conscious and rational electoral acts.⁵⁴ Although deputies' basic duties include participation in voting during Sejm sessions and in parliamentary committees, they perform their mandate based on public law, possessing special public rights and obligations, as well as significant limitations on their private activities. Deputies cannot take additional employment or receive donations that could undermine voters' confidence in their performance of the mandate. They are obliged to submit declarations of their financial status and have limited ability to do business.⁵⁵ Thus, the representation of the sovereign in the exercise of public authority is a deputy's specific restricted task. These arguments, rooted in the concept of representative democracy, support the view that the exercise of a parliamentary mandate constitutes a unique public task performed by a deputy holding an elected office.⁵⁶

Deputies should also inform the electorate about their work and the activities of the body to which they were elected.⁵⁷ In the opinion addressing the issue of

⁵⁰ Ruling of the Voivodeship Administrative Court in Gorzów Wlkp. of 28 March 2024, II SO/Go 3/24, CBOSA.

⁵¹ See Article 42(1) of the Act on the Mandate.

⁵² See Article 23(1) and (2) of the Act on the Mandate.

⁵³ See Article 23(5)–(9) of the Act on the Mandate.

⁵⁴ For more see M. Bernaczyk, *Konstytucyjne prawo do informacji do informacji...*, op. cit., pp. 63–64.

⁵⁵ See Articles 33–35 of the Act on the Mandate.

⁵⁶ See M. Bernaczyk, *Konstytucyjne prawo...*, op. cit., p. 64.

⁵⁷ See Article 1(2) of the Act on the Mandate.

electioneering, it was pointed out that during the election campaign it is especially difficult for persons holding public office, including deputies, to perform public duties. In the case of deputies, the obligation to inform voters about their work and the activities of the body to which they were elected is not suspended by electoral law.⁵⁸ Therefore, from this perspective, the activities of deputies within the framework of the performance of the mandate are treated as public tasks. Also in the context of personal data protection and grounds for their processing, when the condition for disclosing personal data – if it is necessary in order to perform legally defined tasks carried out for the good of the public – was indicated, it was argued that this condition may be used by entities performing public duties in non-authoritative forms, e.g. municipal utilities, the Chancelleries of the Sejm and the Senate, and deputies' offices.⁵⁹ Deputies' offices are organisational units operating under the direction of deputies, composed of both material and personnel components (office staff). A lump sum is granted to deputies to 'cover costs connected with the operation of the offices', meaning the operation of both components: material assets and those who operate the material component of the offices, i.e. their staff. The legislator pays the lump sum for office operations to deputies from the State Budget (the Chancellery of the Sejm).⁶⁰ Deputies' offices serve to support deputies' local activities and perform tasks assigned by deputies. If one considered that deputies' offices perform public tasks, then deputies, as entities representing their offices, would be obliged entities under Article 4(1)(5) of the AAPI.

It is also important to distinguish between the sphere of deputies' individual activities and their activities performed during plenary sessions or within the framework of the Sejm committees they are members of. Although the Chancellery of the Sejm is obliged to inform about a deputy's activities, it performs organisational, technical and advisory tasks related to the activities of the Sejm and its bodies.⁶¹ Therefore, it provides public information related to the activities of the Sejm and its bodies, and what information the Chancellery has about individual activities of deputies depends on what information they themselves provide to the Chancellery of the Sejm. Only entities possessing public information are obliged to disclose such information.⁶² Therefore, there is a gap in the obligations to provide information regarding individual activities of deputies within the framework of the performance

⁵⁸ K. Skotnicki, 'Opinia prawna dotycząca realizacji praw i obowiązków posła i senatora w czasie wyborów', in: *Status posła w opiniach Biura Analiz Sejmowych (2007–2015). Tom 1. Wybór opinii prawnych do artykułów 1–24 ustawy z 9 maja 1996 r. o wykonywaniu mandatu posła i senatora (Dz.U. 2011, nr 7, poz. 29, ze zm.)*, Warszawa, 2015, pp. 9–10.

⁵⁹ A. Mednis, *Ustawa o ochronie danych osobowych. Komentarz*, Warszawa, 1999, p. 67. Also, under the GDPR, personal data may be processed if it is necessary for the purpose of the legitimate public interests, which can be identified with the performance of public tasks. See Article 6(1)(f) of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1.

⁶⁰ J. Mordwiłko, 'Opinia prawna w sprawie możliwości ubezpieczenia posłów od odpowiedzialności cywilnej związanej z prowadzeniem przez posła biura poselskiego', in: *Status posła w opiniach Biura Analiz Sejmowych...*, op. cit., p. 649.

⁶¹ See Article 199(1) of the Sejm's Statute.

⁶² See Article 4(3) AAPI.

of the mandate, which are financed from public funds and encompass specific public tasks resulting from the nature of the representative mandate. The claim that deputies are obliged to provide the electorate with information about their activities based on their own choice and decision and not pursuant to the Access Act is unfounded.⁶³ This makes deputies' information provision activities towards voters-citizens entirely discretionary, which is unacceptable in a democratic state governed by the rule of law, which is characterised by transparency in public life. Deputies are an emanation of this public life as representatives of the Nation that shall exercise the supreme power. Therefore, deputies, as persons performing public functions, should be directly obliged to provide public information, regardless of the information about them provided by other bodies, including the Chancellery of the Sejm.⁶⁴ Deputies belong to public authorities, perform public duties, and within the scope of their mandate, they produce or obtain public information. The construction that gives rise to the right of access to information directly from deputies is already present in the law. The essence of the issue concerns the interpretation of Article 4(1) of the AAPI, and not the subjective scope of the provision. Therefore, the provision of public information by deputies should take place in accordance with the Access Act and be subject to review by administrative courts. Alternatively, deputies' obligations regarding the provision of public information should be formulated in the Act on the Mandate; however, this would require legislative intervention. Access to public information is a tool of public scrutiny of authorities and is a political right. The characteristics of the parliamentary mandate as a free mandate that does not bind deputies by any instructions of the electorate is a guarantee of deputies' legal independence, which cannot mean, however, that these representatives are exempt from accountability to those they represent. Independence from any orders and instructions, which constitutes the essence of the representative mandate, cannot be understood as a release from all dependence of a deputy on voters or a complete elimination of their assessment.⁶⁵ Individual obligations imposed on deputies to provide public information would not create dependence on the electorate. Such a dependence does not arise in the case of other entities: public authorities. However, the imposition of this obligation would broaden access to knowledge concerning deputies' activities and influence the formulation of assessments.

CONCLUSIONS

Within the performance of the mandate, deputies may exercise their rights under the Act on the Mandate and submit requests for information and materials to government and self-government administration bodies, as well as companies with State Treasury shareholding, and state-owned and municipal facilities and

⁶³ Cf. J.M. Karolczak, 'Opinia prawna dotycząca obowiązku udzielania informacji przez posłów', in: *Status posła w opiniach Biura Analiz Sejmowych...*, op. cit., pp. 35–36.

⁶⁴ See I. Kamińska, M. Rozbicka-Ostrowska, in: Kamińska I., Rozbicka-Ostrowska M., *Ustawa o dostępie do informacji publicznej. Komentarz*, Warszawa, 2016, LEX, Article 4.

⁶⁵ See Z. Czeszejko-Sochacki, *Prawo parlamentarne w Polsce*, Warszawa, 1997, p. 63.

enterprises. The established administrative courts' case law confirms that deputies, like all citizens, have the right to public information. At the same time, two modes of deputies' activities are distinguished. When they invoke their status, the request should be dealt with in accordance with the Act on the Mandate. However, when deputies ask questions as 'anyone' and do not reveal their status, the request should be processed pursuant to the Access Act. The differentiation of the procedures is important from the perspective of the rule of law, in particular when deputies simultaneously request information on the grounds of both the Access Act and the Act on the Mandate. However, this may result in additional restrictions on deputies' rights to public information. The inability to effectively exercise the rights under the Act on the Mandate causes the Access Act to often remain the last legal 'tool' of deputies, who have to perform their duties diligently and conscientiously, and above all, effectively. Therefore, *de lege lata*, it is proposed that the provisions of law should be interpreted in such a way that would grant deputies at least the same right of access to public information as 'anyone' has, and the status of a deputy would be legally insignificant for the case. Otherwise, the legal position of deputies would be weaker than that of 'anyone', and this was certainly not the legislator's intention. Deputies should not avoid revealing their status, as it is contrary to the essence of the representative mandate. Deputies may use two separate modes independently of one another, as independent bases for obtaining information. The Act on the Mandate is not *lex specialis* in relation to the Access Act. In accordance with Article 1(2) of the AAPI, efforts should be made to reconcile the Access Act with the Act on the Mandate, and not to exclude the application of one of them. In addition, a deputy's mandate cannot automatically determine the activities of the obliged entity. The legal basis for dealing with deputies' requests should result solely from the substantive content of the request. In case of doubts, the will of the 'host' of the case, i.e. the requester and not the addressee of the request, is decisive.⁶⁶

As part of *de lege ferenda* proposals, deputies' rights of access to public information should be regulated separately in the Act on the Mandate, with possible relevant and supplementary application of the Access Act. It is also advised to introduce judicial review of the fulfilment of duties to provide information towards deputies acting under the Act on the Mandate and to establish formal requirements for a refusal to provide them with information or materials. Stronger deputies' powers should encourage them to exercise their rights to information primarily on the basis of the Act on the Mandate. The Access Act should not constitute a surrogate for ineffective detailed rights. The inadequacy of the Access Act to the political position of deputies, especially those combining their mandate with other functions, may result in doubts as to who must provide deputies with information and to what extent.

At the same time, the Access Act lacks precisely defined entities obliged to provide public information. The current catalogue of these entities is open-ended and exemplary. This problem is highlighted by the fact that the Access Act covers private entrepreneurs fulfilling public procurement contracts, in a situation where

⁶⁶ See the Supreme Administrative Court judgment of 7 June 2024, III OSK 1600/23, CBOSA.

the catalogue of obliged entities does not include deputies, who are persons performing public functions, fulfilling public tasks and managing public property. Deputies should inform the electorate about their work and the activities of the body to which they were elected. However, they should not do this solely based on their own discretion, but pursuant to the Access Act. *De lege lata*, it is proposed that Article 4(1) of the AAPI should be interpreted in such a way that deputies are included in the catalogue of entities obliged to provide public information. Deputies' obligation to provide public information could also be formulated in the Act on the Mandate, which is to determine conditions necessary for the effective performance of deputies' duties, and thus also obligations to provide information. When deciding on the amendment, the legislator should reconcile these obligations with the tasks of the Chancellery of the Sejm, which provides public information related to the activities of the Sejm and its bodies. Deputies' duties could relate in particular to information concerning their individual activities within the scope of the mandate, which is available to the Chancellery of the Sejm.

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