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ACCESS TO PUBLIC INFORMATION IN THE FORM OF DOCUMENTS OF THE SUPREME AUDIT OFFICE AUDIT PROCEEDINGS

PRZEMYSŁAW SZUSTAKIEWICZ*

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Abstract

Access to public information, regulated in Article 61 of the Constitution of the Republic of Poland and the Act of 6 September 2001, is an element of public scrutiny of public authorities that enables the public to supervise public entities on a regular basis. The Supreme Audit Office (NIK), as the chief organ of state audit, is obliged to provide public information. The application of the Act on Access to Public Information to NIK's audit results raises doubts, particularly in the context of other acts specifying different rules of access to information. Article 10 of the Act on the Supreme Audit Office establishes the obligation of the President of NIK to disclose certain documents; however, this does not preclude the application of the Act on Access to Public Information to other documents after the conclusion of audit proceedings. Audit programmes and subject matters are protected by audit confidentiality, but they may be disclosed once the audit has been completed, provided they are not deemed internal documents. These documents are crucial for assessing the integrity of NIK's activities. Although audit proceeding files may not be considered public information as a whole, individual documents contained within the files constitute public information.

Keywords: Supreme Audit Office, Supreme Chamber of Control, public information, internal document, audit files

* Professor, LLD hab., Department of Administrative Law, Constitutional Law and Employment Law, Lazarski University in Warsaw (Poland), e-mail: przemyslaw.szustakiewicz@lazarski.pl, ORCID: 0000-0001-9102-9308

The right of access to public information, enshrined in Article 61 of the Constitution,[1] is of a supervisory and political nature. Firstly, as an element of public transparency, 'it is part of the entire set of legal mechanisms that allow for the exercise of social control over the exercise of public authority',[2] and thus, through access to public information, society gains a tool for the actual and continuous supervision of entities exercising public authority and spending public funds. Secondly,

> 'in the Polish legal system, in which the constitutional right of access to public information is a public subjective right of a positive nature, the legislator has not clearly indicated anywhere what values underlie the construction of such a right. This is especially true of the Act on Access to Public Information, which contains no such indication. However, it is determined that the right of access to public information is a political right, because Article 61 of the Constitution, which establishes this right, is placed among the provisions concerning political freedoms and rights. This provides a clue to the interpretation of the values underlying this right. If we assume that the right of access to public information, as a political right, is based on values that underpin the exercise of power in the state system, within which transparency holds a significant position, it would be an abuse of the right of access to public information to invoke the openness of public life by using it to undertake illegal actions (not based on and within the limits of the law), undermining the efficiency and reliability of public institutions, and aiming at disregarding the inherent and inalienable dignity of the human being or obtaining, gathering and disclosing information about citizens other than that necessary in a democratic state governed by the rule of law.'[3]

Therefore, access to public information is a key element in building a democratic, civic society that takes an interest in public affairs not only every four years during election periods, but also actively participates in political life on a daily basis, exercising ongoing civic oversight of public entities. In accordance with Article 61(4) of the Constitution of the Republic of Poland, the procedure for the provision of information shall be specified by statute. The statute implementing this provision is the Act on Access to Public Information of 6 September 2001.[4] However, this Act is not merely a technical regulation specifying the procedure for disclosing public data; it also defines the subjective and objective scope of access to public information. This naturally raises doubts regarding the principles of applying the provisions of the Act, especially in relation to other acts, including the Act of 23 December 1994 on the Supreme Audit Office (NIK).[5] At the same time, the nature of NIK's competences naturally arouses public interest, and the Office's activities, also reported in the media, further encourage citizens to observe NIK's work.

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1 Act of 2 April 1997: The Constitution of the Republic of Poland, Journal of Laws No. 78, item 483, as amended.

2 M. Chmaj, *Komentarz do Konstytucji RP. Art. 61, 62*, Warszawa, 2020, p. 40.

3 The Supreme Administrative Court judgment of 18 October 2024, case No. III OSK 42/23, *CBOSA*; similarly, the Supreme Administrative Court judgments: of 30 August 2012, I OSK 799/12; of 7 September 2019, I OSK 2687/17; of 11 July 2022, III OSK 2851/21; of 26 January 2023, III OSK 7265/21, *CBOSA*.

4 Journal of Laws of 2022, item 902, as amended, hereinafter referred to as 'AAPI'.

5 Journal of Laws of 2022, item 623, hereinafter referred to as 'ASCC'. As regards the NIK itself, it is worth mentioning that the previously used English translation of the institution's name was 'Supreme Chamber of Control'.

There is no doubt that the Supreme Audit Office is an entity obliged to provide public information. In accordance with Article 4(1)(1) AAPI, public authorities are entities obliged to provide public information. Article 202(1) of the Constitution of the Republic of Poland explicitly defines the Supreme Audit Office as 'the chief organ of state audit', which 'means that the Chamber constitutes a functionally separate, professional state body with a leading role in the implementation of audit tasks in the state'.[6] NIK is a public body entrusted with crucial powers to audit the activities of the state in its broadest sense, in particular the expenditure of public funds and the functioning of the audit system in Poland.[7]

However, doubts may arise regarding the application of the AAPI to the disclosure of audit results. In accordance with Article 1(2) AAPI, its provisions do not affect the provisions of other acts specifying different principles and procedures for accessing information that is public. Therefore, this provision establishes the principle that 'in the event of a conflict between the principles and procedures for accessing information classified as public in the Act on Access to Public Information and those provided for in other acts, the Act on Access to Public Information shall not take precedence, in accordance with the legislator's intention'.[8] Thus, the AAPI provisions are not applied when another act specifies the rules for access to public data. In this regard, attention should be drawn to Article 10 ASCC, under which the President of NIK is obliged to make public such documents as analyses of the implementation of the state budget and monetary policy assumptions; opinions concerning the vote to approve the accounts for the preceding fiscal year presented by the Council of Ministers; information on the results of audits requested by the Sejm or its bodies; information on the results of audits conducted at the request of the President of the Republic of Poland or the President of the Council of Ministers; information on the results of other important audits; motions submitted to the Sejm to consider issues related to the activities of bodies performing public tasks; statements containing allegations arising from audits concerning the activities of members of the Council of Ministers, heads of central offices, the President of the National Bank of Poland, and heads of institutions referred to in Article 4(1) ASCC; analyses of the use of conclusions resulting from audits concerning the enactment or application of law; and annual reports on the Office's activities. This provision may be regarded as a special one in relation to the provisions of the AAPI and, consequently, it could be argued that only the documents listed therein may be made available, and only by the President of NIK.[9] However, this view is erroneous, because, as the Supreme Administrative Court emphasised in its resolution of 9 December 2013, I OPS 8/13,

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[6] M. Niezgódka-Medek, in: Jarzęcka-Siwik E., Liszcz T., Niezgódka-Medek M., Robaczyński W., *Komentarz do ustawy o Najwyższej Izbie Kontroli*, Warszawa, 2000, p. 16.

[7] Cf. the Supreme Administrative Court judgment of 6 December 2022, case No. III OSK5445/21, *CBOSA*.

[8] A. Piskorz-Ryń, J. Wyporska-Frankiewicz, in: Sakowska-Baryła M. (ed.), *Ustawa o dostępie do informacji publicznej. Komentarz*, Warszawa, 2023, p. 53.

[9] The Voivodeship Administrative Court in Lublin held so in its judgment of 24 February 2022, II SAB/Lu 3/22, LEX No. 3342370.

> 'other principles or procedures for disclosing public information exclude the application of the Act on Access to Public Information only to the extent expressly regulated by those specific acts. As emphasised in the legal literature, the provision of Article 1(2) of the Act on Access to Public Information means that wherever specific matters concerning the principles and procedures for accessing information that is public are regulated differently in the Act on Access to Public Information and differently in a special act on the disclosure of information, and the application of both acts cannot be reconciled, the provisions of the special act take precedence. However, where a given matter is only partially regulated or not regulated at all in a special act, the relevant provisions of the AAPI shall apply – in the former case, they are supplementary, and in the latter, they constitute the exclusive legal regulation in the given area.'[10]

Therefore, if a legal act under which an entity operates and to which a request for access to information has been submitted does not provide for any separate, specifically defined type of secrecy or procedure for disclosing information, then it cannot be interpreted in such a way as to effectively create a new type of secrecy or restriction preventing the receipt of the requested data. The AAPI is general in nature, and other procedures for disclosing information shall apply only when other normative acts expressly stipulate this. Therefore, one cannot 'interpret' procedures for disclosing public information or new types of secrecy in a manner inconsistent with the aforementioned Act of 6 September 2001. Hence, it should be recognised that

> 'Article 10 of the ASCC establishes the obligation of the President of NIK to make publicly available, in compliance with the provisions on statutorily protected secrets, the documents referred to in Article 7(1) and (1a), Article 8 and Article 9, as well as post-audit statements. Therefore, this provision does not lay down separate principles and procedures for access to public information, but only establishes the obligation of the body to publish the documents specified therein on the Public Information Bulletin (BIP) website administered by NIK.'[11]

Thus, the Act on the Supreme Audit Office does not establish separate principles for disclosing public information regarding documents relating to audit proceedings, and therefore the entire provisions of the AAPI shall apply in this respect.

The document prepared before the initiation of an audit is an audit programme (for planned audits) or an audit topic (for *ad hoc* audits). Both documents serve as a guide for auditors, specifying, *inter alia*, the scope of the audit and its subject matter. In accordance with Article 28a(3) ASCC, these documents are protected by auditor secrecy and may be disclosed only by the President of NIK. The wording of Article 28a(3) ASCC indicates that this provision constitutes *lex specialis* in relation to the solutions contained in the AAPI, as the legislator clearly defined both the documents covered by auditor secrecy (the audit programme and subject matter) and the grounds and procedure for their disclosure (a justified case and the consent of the President of NIK). There is no doubt that this provision applies to the programmes and subject matters of on-going audits. However, the question

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[10] *ONSAiWSA*, 2014, No. 3, item 38.

[11] The Supreme Administrative Court judgment of 27 September 2023, case No. III OSK 1367/22, LEX No. 3766689.

arises as to whether these documents may be disclosed on the basis of the AAPI once an audit has been completed and its results have been made public. It has been pointed out that 'an employee is not obliged to keep information secret if the information he or she acquired in connection with their work for NIK has already been legally published.'[12] Information contained in the audit programme and topic may be significant for the implementation of the audit function within the right to public information, as it allows for an assessment of the audit's assumptions and the extent to which they were actually implemented during the audit activities. Therefore, it seems that, after the completion of audit proceedings, there are no grounds for concluding that these documents may be disclosed only in accordance with the rules set out in Article 28a ASCC.

However, a question arises as to whether an audit programme or audit topic are considered internal documents and, consequently, whether they contain public information at all. It should be recalled that the Constitutional Tribunal indicated in its judgment of 13 November 2013, P 25/12,[13] that the broad scope of public information excludes the content of internal documents, interpreted as working information (notes, memos) that have been recorded in traditional or electronic form and represent a certain thought process, a process of deliberation, a stage in developing a final concept, and the adoption of a final position. In their case, one may speak of a certain stage in the process of creating public information. Thus, according to the Tribunal, internal documents serve to implement a public task, but they do not determine the direction of a body's activities. They do not express the position of the body and therefore do not constitute public information. The concept of internal documents has been widely adopted in the case law of the Supreme Administrative Court, which recognises that, in principle, internal documents or technical activities constitute a type of activity of an entity that does not serve as a carrier of public information. Therefore, internal correspondence, which serves the exchange of information and the collection of materials necessary to resolve a case, does not possess the features of such information. It neither contains information regarding the manner in which the case was resolved nor such that could be recognised as expressing the body's position[14] or as an official document, i.e. one possessing the features referred to in Article 6(2) AAPI, but is developed solely for the needs of the entity that prepared it and does not present its position externally.[15] The audit programme or topic appears to meet the characteristics of an internal document, as these are prepared solely for the purposes of audit proceedings and are addressed to the auditors conducting the audit. However, it should be noted that the significance of these documents, both for the audited entity itself and for the public's assessment of the reliability of NIK's performance of its tasks,

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[12] M.T. Liszcz, in: Jarzęcka-Siwik E., Liszcz T., Niezgódka-Medek M., Robaczyński W., *Komentarz do ustawy o Najwyższej Izbie Kontroli*, Warszawa, 2000, p. 199.

[13] *OTK-A*, 2013, No. 8, item 122.

[14] Cf. the Supreme Administrative Court judgment of 25 March 2014, case No. I OSK 2320/13, *CBOSA*.

[15] Cf. the Supreme Administrative Court judgments: of 8 March 2023, case No. III OSK 7293/21, and of 26 November 2024, case No. III OSK 1192/24, *CBOSA*.

seems to support the view that such documents may be disclosed after the audit has been completed, under the provisions of the AAPI. In this respect, it is worth quoting the stance contained in the reasoning of the judgment of the Voivodeship Administrative Court in Gdańsk of 9 July 2022, III SAB/Gd 74/22, in which it was stated, in the context of a case concerning the inspection of a body of the National Revenue Administration, that

> 'the information regarding the circumstances related to the instigation of searches of containers with medicine N. indicated by the authority falls within the concept of information on the rules of functioning of entities referred to in Article 4(1) of the AAPI (i.e. entities obliged to provide public information), including the mode of operation of these entities (public authorities), as well as the manner of receiving and handling cases by these entities (Article 6(1)(3)(a) and (d) AAPI).'[16]

Thus, the Court assumed that even the documents leading to the instigation of inspection proceedings constitute public information and should be made available. In this way, the public can assess whether the grounds for the audit were justified and how the audit body itself, having prior knowledge of potential irregularities, acted. However, this does not mean that the audit body is always obliged to disclose such data, as

> 'the limitations of the right to public information, as provided for in Article 5 AAPI, are a separate matter. In accordance with Article 5(1) AAPI, the right to public information is subject to limitation within the scope and under the principles specified in the regulations on the protection of classified information and on the protection of other secrets stipulated by statute; and fiscal secrecy, the scope of which is laid down in Article 293 of the Tax Law, is one of the secrets statutorily protected. However, these limitations cannot be regarded as a legal narrowing of the meaning of the concept of public information.'[17]

Therefore, in a situation where a request for information has been submitted and such information may reveal personal data of whistle-blowers or information subject to one of the statutory secrecy protection regulations, it is justified to issue a decision refusing to provide public information. However, it cannot be deemed that such data do not constitute public information at all.

In accordance with Article 35a(1) ASCC, an auditor shall document audit findings in the audit files. In turn, in the case of ongoing audit files, under Article 35(4) ASCC, audit files or individual documents comprising them may be made available to persons other than the head of the audited entity or a person authorised by them, in compliance with the provisions on statutory confidentiality, only with the consent of the President of NIK. This provision, like Article 28a ASCC, constitutes *lex specialis* in relation to the rules for disclosing public information specified in the AAPI. However, it does not apply to situations where a request for access to files concerns completed audit proceedings, since, as stated in the justification for the Bill amending the Act on the Supreme Audit Office, which introduced the current

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[16] LEX No. 3362043.

[17] The Supreme Administrative Court judgment of 27 October 2023, case No. III OSK 2285/22, *CBOSA*.

wording of Article 35a ASCC, 'it does not seem rational to disclose the auditor's documents before a final decision is made in a given case, because the assessment of the audited entity's actions may change as a result of appeals lodged.'[18] It should be noted that the Supreme Administrative Court indicated in its resolution of 9 December 2013, I OPS 7/13, that

> 'the files of a preparatory proceeding, as a whole, constitute a collection of various materials systematised by the body that gave them a specific form and uses them in the proceeding conducted. Therefore, the files are a specific object that is subject to specific provisions concerning their creation, recording, storage and disclosure. A request for disclosure of case files as a whole, as well as files of completed preparatory proceedings, is not a request for access to public information, but a request for access to a specific set of materials. A request formulated in this way does not indicate the public information that the applicant is seeking. It should also be noted that the right to information applies to information about a public case, i.e. information about something, and not the provision of a set of materials as such. Therefore, such a request does not contain one of the elements necessary for its consideration and cannot be processed under the provisions of the Act on Access to Public Information.'[19]

Administrative courts, guided by the aforementioned resolution of the Supreme Administrative Court, have found that it also applies to the files of other proceedings.[20] Thus, in the case of a request for public information in the form of access to entire files of an audit proceeding, such a request should be deemed not to concern public information. However, the situation is different when such a request concerns a document contained within the case files, as this constitutes a request for public information.[21]

Therefore, the Act on the Supreme Audit Office does not constitute *lex specialis* in relation to the Act on Access to Public Information. Documents from audit proceedings, including audit reports in particular, shall be made available in accordance with the rules laid down in the Act on Access to Public Information; however, its provisions should be interpreted in a way that makes it possible to disclose the greatest possible amount of data. It is clear that the public has the right to become acquainted with audit results in order to form an opinion 'on the state of public affairs' and thus make rational voting decisions. Moreover, it should be emphasised that limiting access to public information does not foster public trust in public institutions, including NIK. The atmosphere of a certain 'authorities' secrecy' creates the impression that public entities are not acting in the public interest and are attempting to conceal this. Obviously, this negatively affects the perception of the functioning of the state and, as a consequence, actually hinders its performance, since citizens are reluctant to submit to entities they do not trust. That is why it is so important that the Office's materials have the widest possible public reach,

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[18] *Uzasadnienie do projektu ustawy o zmianie ustawy o najwyższej Izbie Kontroli*. Sejm print No. 1349, 6th term of the Sejm, p. 4.

[19] *ONSAiWSA*, 2014, No. 3, item 37.

[20] Cf. the Supreme Administrative Court judgment of 7 November 2024, case No. III OSK 554/24, LEX No. 3780802, concerning access to administrative proceeding files.

[21] Cf. the Supreme Administrative Court judgment of 11 July 2024, case No. III OSK 2449/24, *CBOSA*.

especially as NIK does not possess authoritative powers. At the same time, the fact that NIK discloses detected irregularities to the public prompts the entities responsible for their removal to take appropriate action to correct them and to hold those responsible to account.

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