

Judgment of 26th October 2005, [K 31/04](#)
**RESTRICTING ACCESS TO DOCUMENTS
 OF COMMUNIST SECURITY AGENCIES**

Type of proceedings: Abstract review Initiator: Commissioner for Citizens' Rights	Composition of Tribunal: Plenary session	Dissenting opinions: 0
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Legal provisions under review	Basis of review
Certain provisions of the Institute for National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation Act 1998, restricting access to archive resources of the Institute, read in conjunction with Article 3 of the Proceedings before Administrative Courts Act 2002 (administrative courts' scope of jurisdiction)	Principle of proportionality Principle of equality and prohibition on discrimination Right to court and prohibition on barring recourse to the courts in order to vindicate infringed rights and freedoms Protection of private life Rights of individuals referring to official documents and data collections concerning them [Constitution: Articles 30, 31(3), 32, 45(1), 47, 51(3) and (4), 77(2)]

Two statutes are of crucial importance within the field of citizens' access to information concerning the activities of Communist security agencies until 1989 as regards combating democratic opposition and the Church, as well as the use of secret co-operatives to monitor society through these organs: the Disclosure by Persons Holding Public Office of Work, Service or Co-operation with State Security Services During the Years 1944-1990 Act 1997 (hereinafter referred to as the Lustration Act 1997) and the Institute for National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation Act 1998 (hereinafter referred to as the 1998 Act). The Lustration Act 1997 has already been the subject of various Constitutional Tribunal decisions (in cases numbered: [W 5/93](#), [K 39/97](#), [K 24/98](#), [P 3/00](#), [SK 28/01](#), [K 7/01](#), [K 11/02](#), as well as decisions in cases [SK 10/99](#) and [K 44/02](#), summarised separately). This case was the first time that the Institute of National Remembrance Act 1998 was reviewed by the Constitutional Tribunal.

The Institute's tasks include storing and researching, inter alia, documents of the Communist State security agencies, created and compiled between 22nd July 1944 and 31st December 1989. The right of access to such documents is not general. Apart from access to such documents connected with proceedings regulated in other statutes (e.g. the Lustration Act 1997) or within the exercise of official duties, the operative law prior to the entry into force of the present Tribunal judgment identified several categories of persons permitted to access information concerning the content of such documents.

The first such category were "aggrieved persons" who, for the purposes of the 1998 Act, were defined by Article 6 as being persons about whom the Communist "State security agencies" gathered infor-

mation on the basis of intentionally-collected data, including data acquired secretly. Persons who subsequently became functionaries, employees or co-operatives within such security agencies were, however, excluded from this category. Upon the death of an aggrieved person, their rights passed to their “closest person”, within the meaning of the Criminal Code. The definition of a “State security agency” stems from Article 5 of the Act, containing an exhaustive list of a series of organisational units bearing particular responsibility for past human rights infringements.

Persons falling within the category of “aggrieved persons” have a series of rights. First, they shall be provided, upon request, with information concerning documents held and available that are related to them (Article 30(1) of the 1998 Act). Second, they have the right to information concerning the existence of documents in the Institute’s archives related to them and the means for gaining access thereto (Article 31(1)), together with the right to obtain copies of such documents (Article 31(2)). Third, they have the right to be informed of the names and other personal details of functionaries, employees and co-operatives of State security agencies who were responsible for collecting and evaluating data concerning them or who supervised such co-operatives (Article 32(1)). Fourth, they have the right to include their own supplements, corrections, updates, clarifications and supplementary documents or copies thereof in the collection of documents related to them, although no alterations shall be made to data already contained within the documents stored by the Institute (Article 33(1)). Finally, they have the right: to return of property which, at the time it was lost, was owned or possessed by them, provided that such property is in the Institute’s archives (Article 33(4)); to request that their data be made anonymous (Article 34(1)); and to request that any of their personal data which cannot be made anonymous shall not be made available for research purposes for a specified period, not exceeding 90 years from creation (Article 37(1)).

The second category of entitled persons are functionaries, employees and co-operatives of the Communist State security agencies. Persons within this category have the right to be informed about documents related to them, following prior submission of a declaration to the Institute regarding their service, work or co-operation with such agencies (Article 35(2)). Functionaries and employees may also obtain copies of service or work certificates and copies of their employer’s opinion on such service or work (Article 35(1)).

A further category consists of persons who, having obtained the approval of the President of the Institute of National Remembrance, are permitted to access documents containing data on aggrieved persons or third parties for the purpose of carrying out scientific research, provided that such access is limited to the extent absolutely necessary and is exercised in a manner which does not violate the rights of such persons (Article 36 point 5).

Given the practical application of the 1998 Act, and in light of arguments within the application of the Commissioner for Citizens’ Rights in the present case, it is possible to identify another category of entitled persons which, whilst not mentioned in the Act, is crucially significant from the perspective of the Commissioner’s application – namely, persons who question whether they are aggrieved persons but, for varying reasons, do not obtain confirmation of this status and cannot therefore be provided with information on documents concerning them, nor gain access to such documents.

Article 39 of the 1998 Act permits the separation of a secret collection of documents which is inaccessible by persons entitled on the basis of the aforementioned provisions. The Chief of the Internal Security Agency, the Chief of the Foreign Intelligence Agency, or the Minister of National Defence, may exclusively “reserve” the right to access specific documents, for a specified period of time, to their appointed representatives, provided this is necessary for State security. Such reservation does not, however, limit the rights vested in the Public Interest Commissioner (an organ nominated by the First President of the Supreme Court; competent, in particular, to initiate lustration proceedings before the lustration court, acting as the public prosecutor) and the lustration court as regards access to such secret collections.

It stems from Article 43 of the 1998 Act, also challenged in the present case, that proceedings regarding matters regulated in this Act shall be conducted pursuant to provisions of the Administrative Procedure Code, with the exclusion of the right to challenge matters specified in Article 39 of the Act (regarding secret collections) before the administrative court.

The Commissioner for Citizens’ Rights challenged certain of the restrictions stemming from the provisions of 1998 Act before the Constitutional Tribunal, submitting that that they are excessive and fail to conform to constitutional provisions. The relevant statutory and constitutional provisions are cited in the table at the outset of this summary.

RULING

1. Article 30(1) and Article 31(1) and (2) of the Institute of National Remembrance Act 1998, read in conjunction with Article 6(2) and (3) of the aforementioned Act and with Article 3 of the Proceedings before Administrative Courts Act 2002, do not conform to Article 47 and Article 51(3) and (4) of the Constitution, insofar as they deprive the concerned persons, other than aggrieved persons, of the right to be provided with information on documents held and available, which are related to them, as well as the manner of gaining access thereto.

2. Article 33(1) of the 1998 Act, read in conjunction with Article 6(2) and (3) and Article 36, as well as the first sentence of Article 43, of the aforementioned Act and with Article 3 of the Proceedings before Administrative Courts Act 2002, does not conform to Article 47 and Article 51(3) and (4) of the Constitution, insofar as it deprives the concerned persons, other than aggrieved persons, of the right to include their own supplements, corrections, updates, clarifications and supplementary documents or copies thereof in the collection of documents related to them.

3. Article 35(2) of the 1998 Act does not conform to Article 47 and Article 51(3) and (4) of the Constitution.

4. Article 36 of the 1998 Act (the right for public authority organs and other institutions or persons to use data on aggrieved persons and third parties, within the scope and for the purposes specified within this provision) and the first sentence of Article 43 of the 1998 Act (application of provisions of the Administrative Procedure Code), read in conjunction with Article 3 of the Proceedings before Administrative Courts Act 2002, conform to Articles 30, 31(3), 32, 45(1), 47 and 51(3) and (4) of the Constitution.

5. Article 39(2) and (4) of the 1998 Act (separation and special protection of secret collections, as well as enshrining reserved documents within such collections with the

status of State secrecy) conforms to Article 51(3), read in conjunction with Article 31(3), and to Article 51(4) of the Constitution.

6. The second sentence of Article 43, read in conjunction with Article 39, of the 1998 Act (preventing a complaint being brought before an administrative court on matters regarding secret collections) conforms to Article 45(1) and Article 77(2) of the Constitution.

PRINCIPAL REASONS FOR THE RULING

1. It is not task of the Constitutional Tribunal to assess whether the statutory definition of an “aggrieved person” (Article 6 of the Institute of National Remembrance Act 1998) and the statutory specification of the catalogue of rights vested in such a person adequately fulfil the aim indicated in the preamble of that Act (“the duty of our State to provide compensation to all persons suffering injury through State violation of human rights”). Nevertheless, it is beyond doubt that the gathering *per se* of information on persons by State security agencies on the basis of intentionally-collected data, including data acquired secretly, is such a significant feature as to distinguish this group from other categories of persons, primarily given the oppressive and sometimes repressive nature of actions undertaken against such aggrieved persons. Accordingly, the existence *per se* of a separate, particular status of aggrieved persons may not be deemed to infringe the principle of equality, nor to amount to discrimination within the meaning of Article 32 of the Constitution.
2. It is unjustified to claim that a certificate issued by the Institute of National Remembrance, stating that a particular person is not an aggrieved person within the meaning of the 1998 Act, is equivalent to an official finding that such a person was a functionary, employee or co-operative within the State security agencies (cf. Article 6(3) of the 1998 Act). A failure to find that someone is an aggrieved person may primarily constitute evidence that no information relating to this person, gathered “on the basis of intentionally-collected data, including data acquired secretly”, exists in the Institute’s archives. Such a situation should be reflected in an appropriate document, issued to the concerned person in order to avoid doubt that the sole reason for denying them aggrieved person status was the non-existence of such documents. Where other reasons for a refusal exist, the Institute must adopt a position on the merits of the case in a form capable of being challenged before an administrative court.
3. It stems from the essence of the right to court (Article 45(1) of the Constitution), an element of which is the right to a fair trial, that documents constituting the basis for court findings must be entirely accessible, both by the complainant and by the court. This concerns, in particular, documents reviewed by the Institute within proceedings to establish someone’s status as an aggrieved person.
4. Within the Polish legal system, the nature of administrative proceedings, including proceedings before the Institute of National Remembrance, assumes that a specialised administrative judiciary will supervise the administration of justice. Given points 1, 2 and 3 of the ruling in this judgment, where provisions of the 1998 Act conditioning enjoyment of the right of access to documents and correct information upon having previously obtained the status of an aggrieved person were found not to conform to the Constitution, it is no longer relevant to allege the formal nature of an administra-

tive court's supervision of proceedings initiated by a person seeking aggrieved person status, without a possibility to verify the authenticity or falseness of documents, amounts to an infringement of the constitutional right to court (Articles 45(1) and 77(2) of the Constitution).

5. The constitutional right of access to official documents and data collections refers exclusively to documents and collections relating to the concerned person (Article 51(3)), i.e. those documents whose subject is the concerned person. Accordingly, this right is not vested in persons indicated in Article 35(2) of the 1998 Act in relation to documents and data collections created by those persons themselves, or with their participation, regarding their activity as a functionary, employee or co-operative within State security agencies.
6. The 1998 Act does not define the notion of a co-operative within State security agencies, nor the term "co-operation" itself. The notion of co-operation with State security agencies was defined in the Lustration Act 1997 (Article 4 of the Disclosure by Persons Holding Public Office of Work, Service or Co-operation with State Security Services During the Years 1944-1990 Act 1997; cf. also point 2 of the Tribunal's ruling of 10th November 1998, [K 39/97](#)). The lustration court's final rulings concerning the existence or non-existence of co-operation must be recognised as binding on all other State organs, including the Institute of National Remembrance and the supervising administrative court, in particular when determining the circumstances enumerated in Article 6(3) of the 1998 Act. An alternative conclusion would threaten the legal order and involve dual assessments of the same events within the sphere of public law, which should not occur in a democratic State governed by the rule of law (Article 2 of the Constitution).
7. The assessment and subsequent determination of the veracity of persons submitting lustration declarations does not constitute the principal aim of the Lustration Act 1997 (as referred to in point 6 above). The aim thereof is namely to disclose the fact of work, service or co-operation with State security services during the years 1944-1990, or to determine the lack of such work, service or co-operation. This involves revealing the fact of service, work or co-operation by former functionaries, employees or co-operatives within State security services, for the reasons of transparency of the public life, as well as eliminating the risk connected, for example, with blackmail that could be used vis-à-vis such persons due to unrevealed facts from the past. The sanction in form of a prohibition on fulfilling certain functions and holding certain positions during a specified time period in the event of submitting an untrue lustration declaration constitutes one of the means for achieving this principal aim of the discussed 1997 Act.
8. The requirement, stemming from Article 35(2) of the 1998 Act, to submit to the Institute a declaration regarding the fact of co-operation by a person who was neither a functionary nor an employee of State security agencies but, concomitantly, does not possess the status of an aggrieved person, in order to be provided with information on documents relating to them, constitutes a limitation – contravening Article 31(3) of the Constitution – on an individual's right to access official documents and data collections concerning them, as guaranteed by Article 51(3) of the Constitution. In certain circumstances, this requirement renders enjoyment of the right impossible; such as where persons do not seek aggrieved person status and, concomitantly, do not con-

sider themselves secret co-operatives, in their deepest conviction justified by individual experiences and, *ipso facto*, are either unwilling and unable to submit the declaration mentioned in Article 35(2) of the 1998 Act (it must be borne in mind that the Institute's archives contain materials and documents collected, as a matter of fact, without any legal basis and, frequently, in a criminal manner). In light of Article 31(3), there is also no need to demand a declaration of co-operation with State security agencies where the concerned person does not deny the existence of such co-operation. Furthermore, use of the declaration referred to in Article 35(2) of the 1998 Act amounts to an unacceptable "game" with citizens, by assessing their veracity, which may subsequently be required and verified on the basis of the Lustration Act.

9. The wording of Article 51(4) of the Constitution, in comparison with Article 51(3) thereof, contains no authorisation to statutorily limit the right specified therein. This, however, does not signify that Article 31(3) of the Constitution is inapplicable to the right to information contained in the Institute's archives, as stemming from Article 51(4) of the Constitution. Given the dual status of the documents and data within the archives, being simultaneously information on individuals and documents of a historical nature containing data on the nature and methods of actions undertaken by a totalitarian State's security agencies, their destruction must be ruled out (cf. the second sentence of Article 33(1) of the 1998 Act).
10. The constitutional right to demand correction or deletion of incorrect or incomplete information, or information acquired by means contrary to statute (Article 51(4) of the Constitution), being a reference to the right to private life, as guaranteed by Article 47 of the Constitution, as well as an extension thereof, may not be statutorily limited to the category of aggrieved persons, within the meaning of the 1998 Act. On the basis of Article 31(3) of the Constitution, it should be recognised that no State interest may sanction and justify the retention of incorrect or incomplete information, or information acquired by means contrary to statute, within official documents and data collections.
11. The construction of point 1 of this ruling does not eliminate the provisions indicated therein from the legal order but – without curtailing rights previously acquired by aggrieved persons and their closest persons – creates the conditions necessary for direct application of Article 51(3) of the Constitution to other persons entitled on the basis of the latter provision (with the exception of the exclusion envisaged in Article 39 of the 1998 Act – cf. points 5 and 6 of the ruling and points 12-13 below). Enjoyment of this right does not require any special procedures: until appropriate legal regulations are adopted, access to information on the basis of Article 51(3) of the Constitution may be realised in a form analogous to that applicable to persons recognised as aggrieved persons, permitted to view documents under the procedure described within Articles 30(1) and 31(1) of the 1998 Act. Realisation of this right by a person other than an aggrieved person will, therefore, consist in being provided with information on documents held and available, which are related to them, as well as on the manner of gaining access to such documents. There is no analogy, however, as regards the rights of an aggrieved person under the 1998 Act, which do not stem from Article 51(3) of the Constitution, i.e. the right to: obtain copies of documents; to return of property previously owned or possessed; to request that data is made anonymous; and to request that data, which may not be made anonymous, is not made available.

12. The institution of reserved access to specified documents to the group of State organs indicated in Article 39 of the 1998 Act constitutes a serious limitation on enjoyment of the right specified in Article 51(3) of the Constitution. Nevertheless, the requirement to indicate the expiry date of such reservation, which alleviates the effects of this limitation, is decisive for the conclusion that no infringement of the essence of this right occurs, within the meaning of Article 31(3) of the Constitution. The reviewed limitation is justified by reasons of the common good and security of all citizens and is significant for the functioning of a democratic State.
13. Excluding the possibility of lodging a complaint before an administrative court (the second sentence of Article 43 of the 1998 Act), as challenged in the present case, solely concerns reserving access to documents, pursuant to Article 39(1) of the aforementioned Act, which results in the documents specified in such a decision being transferred to a separate, secret collection (Article 39(2)), and the President of the Institute's decision approving or annulling restrictions on access to such documents. Such an exclusion does not *per se* infringe the constitutional right to court (Article 45(1)), nor the constitutional prohibition on barring recourse to the courts in order to vindicate infringed rights and freedoms (Article 77(2) of the Constitution).

Provisions of the Constitution

Art. 2. The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

Art. 30. The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.

Art. 31. [...] 3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Art. 32. 1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.
2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

Art. 45. 1. Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.

Art. 47. Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life.

Art. 51. [...] 3. Everyone shall have a right of access to official documents and data collections concerning himself. Limitations upon such rights may be established by statute.

4. Everyone shall have the right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to statute.

Art. 77. [...] 2. Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.