

# E-administracja

**Wyzwania  
dla cyfrowych  
usług publicznych  
w Unii Europejskiej**

# E-Government

**Challenges  
for Digital  
Public Services  
in the EU**

REDAKCJA / EDITED BY

**Sławomir Dudzik · Inga Kawka · Renata Śliwa**

Krakow Jean Monnet Research Papers





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**3**

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MONIKA KAWCZYŃSKA<sup>1</sup>

## THE ACCESS TO OPEN DATA AND RE-USE OF PUBLIC SECTOR INFORMATION THE POLISH PERSPECTIVE

**ABSTRACT:** This article presents legal regulations applicable in Poland regarding the reuse of public sector information and access to open data. The right to reuse public sector information is a subjective right conferred upon individuals by the European Union, which is a law that the national authorities of the member states must ensure to its full effectiveness. It was first introduced into the Polish legal order in 2011 as a marginal addition to the already existing act on the access to public information. Currently it is regulated by the elaborated Act of 11 August 2021 on open data and the reuse of public sector information, which goes beyond the minimum set of requirements provided by Directive (EU) 2019/1024. An empirical study of the application of the new act, within a year of its entry into force, was carried out for the purpose of this article. The focus of the research was the practical application of the new regulations in various public institutions, libraries, museums, archives and companies performing public tasks. The statistical research also dealt with the appeals procedure to the minister of digitalisation, who was designated as the single appeal authority for the entire national territory in disputes concerning the reuse of public sector information. In addition, the practicalities of making public sector information available on the official open data portal were assessed.

**KEYWORDS:** right to information, open data, reuse of public sector information, access to public information, data portal, Directive (EU) 2019/1024

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## DOSTĘP DO OTWARTYCH DANYCH I PONOWNE WYKORZYSTANIE INFORMACJI SEKTORA PUBLICZNEGO

**ABSTRAKT:** Artykuł przedstawia obowiązujące w Polsce rozwiązania prawne dotyczące ponownego wykorzystywania informacji sektora publicznego i dostępu do otwartych danych. Prawo do ponownego wykorzystywania informacji sektora publicznego jest prawem podmiotowym, przyznanym jednostkom na mocy prawa Unii Europejskiej, a władze krajowe państw członkowskich muszą zapewnić jego pełną skuteczność. Po raz pierwszy zostało ono wprowadzone do polskiego porządku prawnego w 2011 r. jako marginalne uzupełnienie już istniejącej ustawy o dostępie do informacji publicznej. Obecnie prawo to zostało uregulowane w rozbudowanej Ustawie z dnia 11 sierpnia 2021 r. o otwartych danych i ponownym wykorzystywaniu informacji sektora publicznego, która wykracza poza minimalne wymagania przewidziane w dyrektywie (UE) 2019/1024. Na potrzeby artykułu przeprowadzono badania empiryczne dotyczące stosowania nowej ustawy w ciągu roku od jej wejścia w życie. Badania koncentrowały się na praktycznym zastosowaniu nowej regulacji w różnych instytucjach publicznych, bibliotekach, muzeach, archiwach czy spółkach realizujących zadania publiczne. Badania statystyczne dotyczyły także procedury wnoszenia odwołań do Ministra Cyfryzacji, który został wyznaczony jako jedyny organ odwoławczy dla całego terytorium kraju w sporach dotyczących ponownego wykorzystywania informacji sektora publicznego. Ocenie poddano również praktyczne aspekty udostępniania informacji sektora publicznego w ramach oficjalnego portalu otwartych danych.

**SŁOWA KLUCZOWE:** prawo do informacji, otwarte dane, ponowne wykorzystywanie informacji sektora publicznego, dostęp do informacji publicznej, portal danych, dyrektywa 2019/1024

### 1. The constitutionalisation of the right to information

The right of access to public information in Poland has the character of a constitutionally guaranteed subjective right that was introduced in the 1997 constitution.<sup>2</sup> It is as a consequence of a constitutional principle – not directly expressed but derived from the provisions of the Constitution – the principle of openness of public authorities or transparency of the system of governance. Its counterpart is the obligation of state authorities to provide individuals with reliable information about the public activities of the institution. The right to information, according to Article 61(1) of

<sup>2</sup> The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997, no. 78, item 483.

the Constitution, includes the citizen's right to obtain information on the activities of organs of public authority as well as persons discharging public functions. Such right shall also include receipt of information on the activities of self-governing economic or professional organs and other persons, or organizational units relating to the field in which they perform the duties of public authorities and manage communal assets or the property of the state treasury. Article 61(2) of the Constitution provides for two forms of access to public information: access to documents and entry to sittings of collective organs of public authority formed by universal elections, with the opportunity to make sound and visual recordings. Thus, the right to public information acquired the character of a constitutional subjective right, providing the citizen with the possibility to effectively request certain behaviour from public authorities, enforceable through appropriate procedural institutions.<sup>3</sup> The constitutional beneficiaries of the right to public information are citizens, but at the statutory level the scope of the right has been extended to "everyone," meaning natural persons, legal persons, as well as organisational entities without legal personality, such as social organisations.<sup>4</sup>

The right provided for in the Article 61 of the Constitution focuses on access to information, which is associated with the control of public institutions in the performance of their duties and functions. However, this cannot be regarded as an exhaustive indication of all possible forms of providing public information. In addition, the Constitution provides for the right to acquire and disseminate information within the framework of the freedom of expression (Article 54[1]) and the right to obtain information on the quality of the environment and its protection (Article 74[3]). The specific rules governing categories and access to information are further developed in statutory provisions. It is necessary to clarify the characteristics and the entities obliged to provide the information, as well as the content of this information and the manner in which it is to be obtained. As the right to public information is of a constitutional nature, the provisions defining it should be interpreted in such a way as to be a guarantee of a wide range of rights for citizens and others, and any should be narrowly construed.<sup>5</sup>

The concept of the reuse of public sector information, which mainly has an economic aspect, did not exist when the constitutional provisions were drafted. For the

<sup>3</sup> W. Sokolewicz, *Komentarz do art. 61 [in:] Konstytucja Rzeczypospolitej Polskiej. Komentarz*, L. Garlicki (ed.), vol. 4, Warszawa 2005, s. 5.

<sup>4</sup> Judgment of the Supreme Administrative Court of 18 February 2016, I OSK 2259/14; Judgment of the Supreme Administrative Court of 7 March 2018, I OSK 1794/16.

<sup>5</sup> Judgment of Constitutional Tribunal of 7 June 2016, K 8/15, Judgment of Constitutional Tribunal of 18 December 2018, SK 27/14.

first time, the right to reuse public sector information was introduced into the Polish legal order in 2011 as a fulfilment of the obligation to transpose an EU directive. Therefore it should be considered as a right conferred upon individuals by EU law that the member states must ensure its full effectiveness. The right to information is recognised as a fundamental right safeguarded by Article 11 (1) of the Charter of Fundamental Rights,<sup>6</sup> guaranteeing everyone has the right to freedom of expression, including the freedom to hold opinions and receive and impart information and ideas without interference by a public authority, regardless of frontiers. Pursuant to Article 52(3) of the charter, the meaning and scope of this right are the same as those guaranteed by Article 10 of the European Convention of Human Rights.<sup>7</sup> The charter and the convention, as well as the constitutional traditions of the member states, set a high level of protection for fundamental rights in the EU. It must be based on the presumption of a common axiology of supranational and national legal systems of the member states. Therefore the right to reuse public sector information also should be covered by the Polish constitutional provisions as the broadly interpreted subjective right of an individual to obtain information from public institutions or entities acting in a public capacity and utilise it for commercial or non-commercial purposes.

## **2. The right to reuse public sector information in the Polish legal order**

The history of Polish legislation on the right of reuse of public sector information did not have bright beginnings. It started with a judgment of the Court of Justice issued in infringement proceedings brought by the commission, declaring that Poland violated EU law. Member states were obliged to implement Directive 2003/98/EC on the reuse of public sector information into national legal orders by 1 July 2005.<sup>8</sup> In Poland there were no general regulations on the reuse of public information or any other type of information processed by entities performing public tasks. The notion of the “reuse” of public information lacked a normative definition in legislation. The Polish authorities forwarded to the Commission the texts of the acts that, in their view, ensured the transposition of the directive into the national legal order, namely the text of the act on access to public information, the act on freedom of economic activity, the code of administrative procedure and the Constitution. The commission brought an

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<sup>6</sup> The Charter of Fundamental Rights of the European Union, OJ 2012, C 326, p. 391.

<sup>7</sup> European Convention on Human Rights, Rome, 4 November 1950.

<sup>8</sup> Directive 2003/98/EC of the European Parliament and the Council of 17 November 2003 on the reuse of public sector information, OJ 2003, L 345, p. 90.

infringement action,<sup>9</sup> arguing that the acts primarily dealt with access to documents, administrative procedure and constitutional norms, but do not regulate the reuse of public sector information in the manner prescribed by the directive. The Commission pointed out that the right of access to public sector information is not equivalent to the right to reuse it. By harmonizing the rules for the reuse of documents, the directive seeks to achieve an effect of an economic nature, while national legislation on access to public sector information realizes the political rights of citizens and is intended to enable the public to control the activities of public authorities and the state of public finances. In addition, the lack of a definition of “reuse” in the Polish legal order is an incorrect transposition of Article 2 of the directive, which undermines the effectiveness of the other provisions closely related to the concept of reuse.

The ruling was delivered at a time when Poland held the presidency of the Council of the European Union. The CJEU agreed with the commission that national regulations on access to public documents are not in themselves capable of implementing the provisions of the directive with sufficient detail, precision and clarity to satisfy the principle of legal certainty, and to enable natural and legal persons intending to reuse such documents to become fully acquainted with their rights. Thus, the provisions of the Polish law on access to public information, which do not contain any indication proving that they also apply to the reuse of public sector information, cannot constitute a correct transposition of Directive 2003/98/EC.<sup>10</sup>

The CJEU ruled that by failing to adopt, within the prescribed period, all of the legislative, regulatory and administrative provisions necessary to transpose the directive on the reuse of public sector information into national legal order, Poland has failed to fulfil its obligations arising from EU law. It should be noted that not only Poland had problems with the transposition of Directive 2003/98/EC. The CJEU issued similar judgments in the infringement proceedings against Austria, Spain, Luxembourg and Belgium.<sup>11</sup>

The judgment rendered in the infringement procedure is declaratory in nature and does not specify what measures shall be required to comply with the judgment of

<sup>9</sup> Action brought on 20 July 2010 in case C-362/10, Commission versus Poland, OJ 2010, C 301, p. 4.

<sup>10</sup> Judgment of the Court of Justice of 27 October 2011 in case C-362/10, Commission versus Poland, ECLI:EU:C:2011:703, para. 55-56.

<sup>11</sup> Judgment of the Court of Justice of 18 July 2007, C-517/06, Commission versus Austria, ECLI:EU:C:2007:460; judgment of the Court of Justice of 27 September 2007, C-465/06, Commission versus Spain, ECLI:EU:C:2007:556; Judgment of the Court of Justice of 27 September 2007 C-529/06, Commission versus Luxembourg, ECLI:EU:C:2007:557; Judgment of the Court of Justice of 13 December 2007, C-528/06, Commission versus Belgium, ECLI:EU:C:2007:794.

the court. Although Article 260(1) TFEU does not specify the period within which a judgment must be complied with, it follows from settled case law that the importance of immediate and uniform application of EU law means that the process of compliance must be initiated at once and completed as soon as possible.<sup>12</sup> The provisions of the directive were incorporated into the Polish legal order by the addition of a new chapter entitled “2a. Reuse of public information” to the existing act on access to public information.<sup>13</sup> The amendment of 16 September 2011 introduced for the first time a distinct right from access to public information, namely the right to reuse such information.<sup>14</sup> This right was defined as the use of public information, or any part thereof, held by the obligated entities (in the directive named as “the public sector bodies”), regardless of the way it is recorded (on paper, electronic, audio, visual or audiovisual form), for commercial or non-commercial purposes other than the initial public purpose for which the information was produced, and other than its original public purpose of use for which the information was created. Unlike the directive, the definition adopted in Poland focused on the reuse of information, not the reuse of a document, even though the directive stipulated that a document means “any content whatever its medium.” The explanatory statement to the bill pointed out that until then, Poland has not had general regulations on the reuse of public information or other types of information processed by entities performing public tasks.<sup>15</sup> Only a few specific statutes contained a fragmentary regulation, intended for limited categories of data, specifying rules for the use of information by entities not performing public tasks. For example, the act on freedom of economic activity provided for paid access to the data of the Central Register and Information on Economic Activity for “commercial and non-commercial use.”

Due to the significant increase of the new types of public data generated and collected in member states, there was a necessity to amend the directive. In particular, it involved significant differences in laws and practices relating to the use of public cultural resources held by libraries, museums and archives. Having regard to the proposal from the European Commission, the European Parliament and the council

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<sup>12</sup> Judgment of the Court of Justice of 12 November 2019, C-261/18, *Commission versus Ireland*, ECLI:EU:C:2019:955, para 123.

<sup>13</sup> Act of 6 September 2001 on access to public information, *Journal of Laws* 2001, no. 112, item 1198.

<sup>14</sup> The statute amending the act on access to public information and certain other laws of 16 September 2011, *Journal of Laws* 2011, no. 204, item 1195, which entered into force on 29 December 2011.

<sup>15</sup> Explanatory statement to the government bill on amending the act on access to public information and certain other laws, *Sejm paper* no. 4434, 6th term, p. 1.

adopted on 26 June 2013 Directive 2013/37/EU, amending Directive 2003/98/EC on the reuse of public sector information.<sup>16</sup> Due to lack of notification of the relevant national implementation measures, in September 2015 the commission started formal infringement proceedings against 17 member states, including Poland.<sup>17</sup>

With the enactment of the amendment, Poland was considering the appropriate legislative method for its implementation. The question arose whether it would be appropriate to enact a separate act regulating the right to reuse public sector information. An analysis conducted by the European Commission indicated that a separate statutory regulation defining reuse was the more common legislative solution in EU countries. On 26 February 2016 a statute dedicated exclusively to this subject was introduced, namely the act on the reuse of public sector information.<sup>18</sup> The explanatory memorandum to the bill indicated that the new method of implementing the amended directive in the Polish legal order “would provide more transparent and easier-to-apply solutions for reuse.”<sup>19</sup> The act specified the rules and procedure for making available and providing for reuse of public sector information, entities which make available or provide such information, conditions for reuse and rules for determining charges. Thus, since 2016, the right to public information and the right to reuse public sector information have been regulated in Poland in two independent legal acts. The research conducted one year after introducing the new statute on the reuse of public sector information revealed that it did not revolutionize the way public resources are used, including cultural heritage resources.<sup>20</sup>

Five years after the adoption of Directive 2013/37/EU the European Commission evaluated and reviewed the functioning of Directive 2003/98/EC in the framework of a regulatory fitness and performance programme.<sup>21</sup> The proposal for a new directive

<sup>16</sup> Directive 2013/37/EU of the European Parliament and the Council of 26 June 2013, amending Directive 2003/98/EC on the reuse of public sector information, OJ 2013, L 175, p. 1.

<sup>17</sup> Letter of formal notice under Article 258 TFEU of 23 September 2015, INFR(2015)0472. The proceedings were closed on 29 September 2016.

<sup>18</sup> Act of 25 February 2016 on the reuse of public sector information, Journal of Laws 2016, item 352, with English translation: European Commission, *Implementation of the PSI Directive in Poland*, <https://digital-strategy.ec.europa.eu/en/library/implementation-psi-directive-poland> (25.07.2023).

<sup>19</sup> Explanatory statement to the government bill on reuse of public sector information, Sejm paper no. 141, 8th term, p. 1.

<sup>20</sup> Fundacja ePaństwo, Centrum Cyfrowe, *Report 2017: Reuse of Public Sector Information Act – One Year After Coming into Effect*, Warszawa 2017, <https://centrumcyfrowe.pl/wp-content/uploads/2017/09/e-1.pdf> (25.07.2023).

<sup>21</sup> Commission Staff Working Document Evaluation Accompanying the document Proposal for a Directive of the European Parliament and the Council on the reuse of public sector information, Brussels, 25.04.2018, COM(2018) 234 final.



was presented as part of a package of measures aiming to facilitate the creation of a common data space in the EU. The European Parliament and the council adopted on 20 June 2019 Directive (EU) 2019/1024 on open data and the reuse of public sector information, repealing Directive 2003/98/EC with effect from 17 July 2021.<sup>22</sup> The directive was implemented in the act on open data and the reuse of public sector information, which entered into force on 8 December 2021.<sup>23</sup> The explanatory memorandum to the bill highlighted the introduction of new solutions beyond the minimum set by the directive, which will improve the reuse of data. The primary goal of the proposed regulations was to increase the supply of open data, including information resources of significant value and the potential for creating new services and products, as well as to create an optimal regulatory environment for the effective use of public sector information in Poland.<sup>24</sup> The statute marked the first implementation of the directive concerning the reuse of information in the Polish legal order, which did not require the intervention of the European Commission regarding the lack of timely transposition.

The statute introduced a definition of open data, which was recognised as a category of public sector information distinguished by the way it was made available or transmitted in electronic form. Open data is to be available in an open and non-proprietary machine-readable format for free reuse on the same basis by any user, without the user having to prove their identity. New developments provided by the act involved the possibility to request public sector information from public undertakings, including those acting as public passenger road or rail transport operators, air carriers and EU shipowners fulfilling public-service obligations. In order to increase the supply of valuable data available for reuse, new categories of data have been identified among public sector information, i.e., dynamic data, research data as well as high-value datasets. The regulation of an open data portal (a central repository of public information),<sup>25</sup> and the possibility for private sector entities to voluntarily make information resources in their possession available on the portal, were additional solutions envisaged in the Polish legal order. Furthermore, statutory authorisation was provided for the minister of digitalisation to draw up the Data Opening Programme to be adopted by a resolu-

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<sup>22</sup> Directive (EU) 2019/1024 of the European Parliament and the Council of 20 June 2019 on open data and the reuse of public sector information, OJ 2019, L 172, p. 56.

<sup>23</sup> Act of 11 August 2021 on open data and the reuse of public sector information, consolidated text: Journal of Laws 2023, item 1524.

<sup>24</sup> Explanatory statement to the government bill on open data and the reuse of public sector information, Sejm paper no. 1138, 9th term, p. 1.

<sup>25</sup> Data Portal, <https://www.dane.gov.pl> (25.07.2023).



tion of the Council of Ministers for a seven-year period. The document sets out the priorities of the government administration in opening access to data. According to the Polish Open Data Programme for 2021-2027, the value of the open data market in Poland is expected to oscillate between PLN 33.7 billion and PLN 51.2 billion by 2025.<sup>26</sup> The statute also introduced the position of Plenipotentiary for Data Openness, appointed on a mandatory basis in various ministerial departments, the Chancellery of the Prime Minister, the Central Statistical Office, and on an optional basis in other public institutions required to provide data openness. The main objective of the plenipotentiaries is to ensure the proper implementation of the open data programme in the institution where they are appointed and to obtain public sector information that can be made available on the open data portal of the public sector body. The act designated a single appeal body – the Minister of Digitalisation – for the whole territory of Poland against decisions to refuse permission to reuse public sector information, against decisions on the conditions or on the level of charges for reuse. Such a solution may help to maintain uniformity of decision-making and expertise of the authority in reuse cases, but may also lead to an overload of the Minister of Digitalisation in the event of a large number of appeals and delayed processing times.

### **3. The relationship between public information and public sector information**

In the Polish legal order there are currently two ways of acquiring public information by individuals, which are the embodiment of a citizen's constitutional right to information. On one hand there is historically earlier regulated access to public information, and on the other hand the reuse of public sector information first introduced in 2011 as an implementation of EU law. However, it is important to point out the differences regarding definitions, the conditions under which the information is made available and the objectives for which it is used. Such differences are most visibly reflected in the jurisprudence of the Polish administrative courts, which deal with complaints concerning access to public information.

Article 1 (1) of the Act of 6 September 2001 on access to public information defines public information very broadly, as “any information about public affairs.”

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<sup>26</sup> Resolution no. 28 of the Council of Ministers of 18 February 2021 on the Data Opening Programme for the period 2021-2027, Official Gazette of the Republic of Poland “Monitor Polski” 2021, item 290.

According to well-established views of the case law, it is any information created or referred to public authorities, as well as created or referred to other entities performing public functions within the scope of their performance of tasks of public authority and management of communal property or property of the state treasury. The status of public information is granted only to such information that is connected with the functioning of a public law community – the state.<sup>27</sup> According to Article 2 (8) of the Act of 11 August 2021 on open data and the reuse of public sector information, public sector information means “any content or any part thereof, regardless of the method of recording, in particular written on paper, or stored in electronic form or as a sound, visual or audiovisual recording, held by the obliged entities.” An analysis of both of the above definitions provided by the statutes reveals that the concept of public sector information is broader and also incorporates public information. The reuse of information may include public information that has already been made available in electronic form as open data or is subject to being made available upon request, as the idea underlying the legislation is its commercial or non-commercial reuse. This understanding was consolidated under the former statute, which referred to public sector information produced for its initial purpose as a part of public task.<sup>28</sup> However, it can be argued that the view regarding the wider scope of the concept of public sector information has also remained valid under the new statute. Entities such as museums, libraries, archives as well as companies carrying out public tasks that also hold nonpublic data have been included among those obliged to make available or ensure the reuse of public sector information. Furthermore, the new categories of data provided for in Directive (EU) 2019/1024, including research data, dynamic data and high-value data may remain outside the sphere of public information.

In some cases, nevertheless, there may be ambiguity as to which procedure should be applied to access the relevant type of information. The main difference highlighted by the administrative court decisions is the purpose for which the information is to be used. Synthesising case law, the objective of access to public information is to “control public life,” whereas the reuse of public sector information has “a market and economic purpose.”<sup>29</sup> Thus, the aim of access to public information is the concern for the public good, which is the right to a transparent state, its structures, the observance of the law by the subjects of public life and the openness of the administration and other bod-

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<sup>27</sup> Judgment of the Supreme Administrative Court of 17 March 2023, III OSK 2587/21; Judgment of the Supreme Administrative Court of 24 May 2023, III OSK 494/22.

<sup>28</sup> Judgment of the Supreme Administrative Court of 16 April 2019, I OSK 1719/17.

<sup>29</sup> Judgment of the Supreme Administrative Court of 26 June 2013, I OSK 605/13; Judgment of the Supreme Administrative Court of 26 June 2013, I OSK 520/13.

ies. The intention of access to public information is not to satisfy individual (private) needs in the form of obtaining information that is admittedly public but intended for purposes other than those mentioned above.<sup>30</sup> In contrast, the objective of the reuse of public sector information is to achieve a broad “benefit” for the applicant. It thus goes further than ensuring the transparency of the state’s decision-making process and actions and creating real opportunities for citizens to exercise and defend their constitutional rights against public authority.<sup>31</sup> The distinction regarding objectives remains valid despite the increasing emphasis on the non-commercial purposes of the reuse of public sector information, such as promoting social engagement, developing information society, accelerating access to cultural heritage, improving the quality of data, enhancing the quality of scientific research, as well as speeding up scientific progress and innovation.<sup>32</sup>

In some cases, public bodies themselves have a problem in determining what type of information a citizen is requesting and how it should be provided. It is apparent from case law that the obliged entity may not deprive the applicant of the right of access to public information by determining on its own that the application concerns the reuse of public information unless such a circumstance is directly apparent from the content of the application. It is the applicant who decides whether to request public information or whether to request its reuse. This is because it is the applicant who is liable, if anyone, for using public information contrary to the provisions of the act on reuse of public sector information.<sup>33</sup> Therefore, if the authority has any doubt as to the applicant’s true intentions regarding the nature of the public information, adequate clarification should have been sought directly from the applicant.<sup>34</sup> It should therefore be considered that access to public information and reuse of public sector information are two independent subjective rights. These rights may be exercised at the applicant’s choice to pursue different objectives, either to foster openness and transparency of public authorities or utilising them for commercial, educational or professional purposes.

<sup>30</sup> Judgment of the Supreme Administrative Court of 11 May 2023, III OSK 181/22.

<sup>31</sup> Judgment of the Provincial Administrative Court in Warsaw of 17 September 2019, II SAB/Wa 341/19.

<sup>32</sup> Recital 14-16, 27 and 49 of the preamble of the Directive (EU) 2019/1024 on open data and the reuse of public sector information.

<sup>33</sup> Judgment of the Provincial Administrative Court in Kraków of 31 October 2016, II SAB/Kr 141/16.

<sup>34</sup> Judgment of the Supreme Administrative Court of 26 June 2013, I OSK 605/13.

#### 4. Open data and practical aspects of providing public sector information in open access

According to a recital, 16 of the preamble of Directive (EU) 2019/1024, “open data as a concept is generally understood to denote data in an open format that can be freely used, reused and shared by anyone for any purpose.” Despite inclusion in the title of the referenced directive, the provisions do not provide a legal definition of open data. Transposing the directive, the Polish legislator decided to introduce the term *open data* in the title of the implementing act, as well as establish its normative definition. It is defined as “a public sector information made available or transmitted in electronic form, unconditionally or subject to the conditions referred to in the statute, complete, up-to-date, in source version, in open and non-proprietary machine-readable format, which is intended for free reuse on the same basis by any user, without the user having to prove his or her identity.”<sup>35</sup> Thus, open data is a form of public sector information distinguished by the specific conditions and manner in which it is made available to the public.

The right to information can be exercised in open access through the use of official information websites. Depending on the type of published information, websites maintain the duality described in section 3 above and are regulated accordingly by two different statutes. To provide access to public information universally available, an official tele-information service – the Public Information Bulletin (*Biuletyn Informacji Publicznej*) – was launched.<sup>36</sup> On the website, public authorities and bodies of economic and professional self-government are required to post information concerning, inter alia, the principles of their operation, object of their activity and competencies, bodies and persons holding public functions, ownership structure, public assets at their disposal, methods of enacting public legal acts and adopted official documents. In turn, the data portal (*portal danych*) provides public sector information of particular importance for the development of innovation in the country or the development of an information society.<sup>37</sup> The service has been in operation since May 2014 and is being systematically developed. As of May 2020, private entities also have the ability to share their records in the data portal. In August 2023, there were 33,552 collections uploaded to the data portal by 315 providers, including 142 government administration bodies, 98 local self-government bodies and 75 private entities. The Polish site ranked third

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<sup>35</sup> Act of 11 August 2021 on open data..., article 2 (11).

<sup>36</sup> Act of 6 September 2001 on access..., article 8; *Biuletyn Informacji Publicznej*, <https://www.gov.pl/web/bip> (25.07.2023).

<sup>37</sup> Act of 11 August 2021 on open data..., article 32; Data Portal...

among national data portals from 35 European countries and was listed among the trendsetters in Open Data Maturity Report 2022, carried out within the framework of the Official Portal for European Data.<sup>38</sup> The study analysed the features and advanced functions of the portal, the extent to which portal managers use web analytics tools to better understand their users' needs, open data coverage across different domains and the measures to ensure the portal's sustainability.

Within the framework of the Polish Open Data Programme 2021-2027, the major issues and weaknesses facing Poland in providing open data were identified.<sup>39</sup> On the basis of studies conducted among open data plenipotentiaries, entrepreneurs, representatives of NGOs and academics, it was indicated that open data made available in Poland is not the best quality in terms of completeness or timeliness and most often requires a lot of personal effort to be properly used. The government data is frequently incomplete and of low quality.

There is not much interest among local self-government entities in making open data available for reuse. Moreover, from May 2020, private entities also have the possibility to make data available in Data Portal, but businesses rarely publish open data because they fear losing competitive advantage. As of August 2023, out of the 315 providers, 75 are private entities (companies and enterprises), which mainly publish data collected in the framework of publicly funded research.<sup>40</sup> There is a small amount of data in the Data Portal using an application programming interface (API). In assessing the adequacy of this study for August 2023, it should be pointed out that out of 33,609 items, only 578 are provided through an API. Building application programming interfaces to databases or systems by public sector bodies is insufficient and not widespread. This results in nonoptimal use of dynamic data from the public sector for creating services.

In the context of the portal's total resources, there are also not many collections of new types of valuable data available for reuse – high-value datasets (2,987 items), dynamic data (1,989 items) and research data (1,419 items). A number of data resources made available in a format with a low degree of openness are still overused – 1,120 items in first degree and 9,593 items in second degree. The most datasets are uploaded in the third degree of data openness – 19,408 items, whereas only three datasets are uploaded in the highest fifth degree. A comparison of the popularity of the different formats

<sup>38</sup> European Commission, *Open Data Maturity Report 2022*, [https://data.europa.eu/sites/default/files/landscaping\\_insight\\_report\\_n8\\_2022.pdf](https://data.europa.eu/sites/default/files/landscaping_insight_report_n8_2022.pdf) (25.07.2023).

<sup>39</sup> Resolution no. 28 of the Council of Ministers of 18 February 2021...

<sup>40</sup> Comparative survey carried out as at 14 August 2023, based on resources available in the Data Portal: *Data*, <https://dane.gov.pl/pl/dataset> (25.07.2023).

indicates that the CSV and XLSX formats are the most commonly used formats by data providers, involving 19,937 and 10,993 datasets, respectively. Data published with a high level of openness, such as RDF, are not very popular (only 12 datasets available).

In the context of data validity only 778 datasets included in the Data Portal are updated daily, 1,006 weekly, and 5,530 monthly. As for international availability, only 35 datasets out of a total of 33,552 have been made available in English. Therefore, it is essential to improve the knowledge and skills of public employees in the field of openness and data management, and to raise citizens awareness of the potential of open data, which is one of the main factors influencing the efficiency and usability of the reuse of public sector information.

## **5. Practical evaluation of the new act on the reuse of public sector information and open data one year after its entry into force**

The new act on open data and the reuse of public sector information implementing Directive (EU) 2019/1024 into the Polish legal order entered into force on 8 December 2021. The focus of the research was the practical application of the new law in various public institutions, libraries, museums, archives and companies performing public tasks. The scope of requested information concerned the year 2022 so that reliable data could be obtained on the practice of application of the law during the one year after its entry into force. Therefore, on April 2023, I addressed 35 various entities under the Act on Access to Public Information with questions on the extent to which citizens use the request procedure for the reuse public sector information. For the comparison, I also asked questions about citizens' use of their constitutional right to public information concerning the activities of public authorities. The first three questions related to access to public information: (1) How many applications to access public information were received in 2022? (2) How many applications in 2022 were refused on the grounds that the information requested lacked the status of public information? (3) How many applications in 2022 were refused on the grounds that the public information may not be provided due to statutory limitations? Four further questions related to the reuse of public sector information: (4) How many requests for the reuse of public sector information were received in 2022? (5) How many requests in 2022 concerned the provision of real-time access to dynamic data via adequate technical means? (6) In how many cases in 2022 was the applicant notified that the obliged entity was not in possession of requested public sector information? (7) How



many requests in 2022 were refused on grounds that the public sector information may not be provided due to statutory limitations?

The questions were addressed to central government authorities (the Chancellery of the Prime Minister, Ministry of Culture and National Heritage, Ministry of Education and Science, Ministry of Climate and Environment, Ministry of Digitization, Ministry of Infrastructure), local government authorities (Małopolska Voivodship Office) and local self-government authorities (Marshal's Office of the Małopolska Region, Municipal Office in Gdańsk and Municipal Office in Krakow). Moreover, the questions were directed to central bodies of state administration (the Head Office of Geodesy and Cartography, Central Statistical Office, Energy Regulatory Office and the State Water Holding Polish Waters), National Research Institutes (the Institute of Meteorology and Water Management, National Information Processing Institute and Polish Geological Institute) and national courts (the Supreme Administrative Court, the Supreme Court and District Court in Warsaw). Responses were also provided by museums (the Historical Museum of the City of Krakow, National Museum in Warsaw, Emigration Museum in Gdynia, Museum of Photography in Krakow and Museum of Contemporary Art in Krakow, MOCAK), archives (the State Archives in Warsaw and National Archives in Krakow) and libraries (the National Library, Krakow Library and Municipal Public Library in Gdańsk). Questions were also addressed to public undertakings referred to in Article 1 (b) of Directive (EU) 2019/1024, providing public passenger transport services by rail and road (Polish State Railways S.A. in Warsaw and Municipal Transport Company S.A. in Krakow), with the restriction that the decision on making information available for reuse should rest with the relevant public enterprise. These entities are not bound to follow the request procedure, but they are still obliged to allow the reuse of the public sector information they publish in the Public Information Bulletin or the Data Portal.

The results of the survey indicate that public institutions exercising state authority are leading the way in terms of applications submitted for access to public information. This relates to the objectives of access to public information to control the exercise of public authority and the transparency of the system of governance. In this respect, a substantial number of applications were received by local government authorities: the Municipal Office in Krakow – 2,904, Municipal Office in Gdańsk – 786, Małopolska Voivodship Office – 473 and Marshal's Office of the Małopolska Region – 324. This corresponds to almost no requests made throughout the year for the reuse of public sector information for municipal offices (1 request each) and local government offices (0 requests). Similarly in the case of central government authorities, a large number of requests for access to public information corresponds to a small number of requests

for the reuse of public sector information: the Chancellery of the Prime Minister (1,373 applications and 25 requests), Ministry of Digitization (1,321 applications and 23 requests), Ministry of Infrastructure (525 applications and 5 requests), Ministry of Education and Science (496 applications and 0 requests), Ministry of Culture and National Heritage (444 applications and 0 requests) and Ministry of Climate and Environment (370 applications and 0 requests).

Similarly, the courts received applications for access to public information in significant numbers, while applications for the reuse of public sector information were not submitted. The District Court in Warsaw received 1,979 applications, while the Supreme Administrative Court 238 applications. This state of affairs may be the result of the wide availability of administrative and common court rulings made accessible electronically in the form of the Central Database of Administrative Court Rulings (*Centralna Baza Orzeczeń Sądów Administracyjnych*) and the Portal of Common Court Rulings (*Portal Orzeczeń Sądów Powszechnych*).

The largest number of requests for the reuse of information was received by research institutes: the Institute of Meteorology and Water Management – National Research Institute (4,273 requests) and the National Geological Institute – National Research Institute (1,935 requests). The first of the institutes also received an incomparable number of 2,691 requests for real-time access to dynamic data via adequate technical means, while the second of the institutes received only 5. These institutions received correspondingly fewer requests for access to public information, 29 and 114, respectively. It is also worth noting that both of the above institutions are mentioned by designation in the act on open data and reuse of public sector information as entities that are required to provide information by way of exception, which can generally be used by higher education and scientific institutions.<sup>41</sup>

Entities obliged to provide public sector information as an exception to cultural institutions that are explicitly listed in the law are state museums, local government museums, public libraries, scientific libraries, educational libraries and archives.<sup>42</sup> The research indicates that citizens do not submit many requests to these institutions, despite the goal outlined in Directive (EU) 2019/1024 of facilitating the valuable use of cultural collections and accelerating access to cultural heritage for members of the public. The largest number of applications was submitted to the National Museum in Warsaw – 620 and the Historical Museum of the City of Cracow – 137, but in the case of museums with very specialised collections the number of applications is incom-

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<sup>41</sup> Act of 11 August 2021 on open data..., article 4 (3).

<sup>42</sup> *Ibidem*, article 4 (2).



parably lower, i.e., the Emigration Museum in Gdynia – 3, Museum of Photography in Cracow – 0 and Museum of Contemporary Art in Cracow, MOCAR – 0. Also, the exercise of the right to reuse public sector information in archives and libraries is very limited. The State Archives in Warsaw received 6 requests, whereas the National Archives in Krakow, National Library in Warsaw, Krakow Library and Municipal Public Library in Gdańsk received none. Similarly, public enterprises, as new entities that are able to make public sector information available for reuse, did not receive many enquiries. Polish State Railways S.A. in Warsaw and the Municipal Transport Company S.A. in Krakow did not receive any requests for the reuse of public sector information during 2022, while they received 235 and 31 requests, respectively. for access to public information.

To the detailed questions on the refusal of public information and the underlying reasons, most entities could not provide answers, indicating that such detailed statistics are not collected. Many institutions further demonstrated that applications for access to public information are carried out on the basis of other statutes. For instance, the Head Office of Geodesy and Cartography received 7,099 applications for access to data from the State Geodetic and Cartographic Resources, while the National Geological Institute – National Research Institute received 114 applications on the basis of the Geological and Mining Law.

Due to the fact that the new statute designated a single appeal body – the minister of digitalisation – for the entire territory of Poland against decisions to refuse permission to reuse public sector information, against decisions on the conditions or on the amount of fees for reuse,<sup>43</sup> in June 2023 I addressed the following six questions under the public information access procedure: (1) How many appeals against decisions on the reuse of public sector information were received in 2022? (2) How many appeals were successful in 2022? (3) How many appeals against decisions on the reuse of public sector information were received in 2023? (4) How many appeals were successful in 2023? (5) Were statistics kept from 2022 to 2023, and how many appeals were related to particular issues, i.e., refusal to consent to reuse, conditions for reuse and the amount of fees for reuse. The reply reveals that in 2022 the minister of digitalisation received three appeals, of which he granted one. As of August 2023 the minister had received five appeals. Of these, he granted two, in one case an order of inadmissibility was issued, and for the remaining two appeals proceedings are pending. The appeals submitted in 2022 and 2023 related only to the issue of refusal of

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<sup>43</sup> *Ibidem*, article 43.

permission to reuse public sector information. They were not related to the conditions or the amount of fees for its reuse.

The research proves that for almost two years during which the new act was in force, the minister of digitalisation received only eight appeals. Given that the minister was designated as the sole appellate authority in cases concerning the reuse of public sector information, there were not many appeals submitted. This could be attributed to the low overall number of requests for the reuse of public sector information in Poland, which in most cases seem to be concluded successfully. It is difficult to assign the low number of appeals to the complexity of this measure, since in Polish administrative proceedings appeals are not an overly formalised remedy. An appeal requires no detailed reasons to be stated and to be drafted by a professional attorney. It is sufficient if it is evident from the appeal that the party is dissatisfied with the decision issued. It follows that concerns regarding overloading the minister of digitalisation in the event of a large number of appeals and delayed processing times were not confirmed.

## **6. Concluding remarks**

The right to information is constitutionally guaranteed and includes both access to information concerning the activities of public authorities and the reuse of public sector information for commercial and non-commercial purposes. The right to reuse public sector information is a subjective right conferred upon individuals by the EU law that the national authorities of the member states must ensure its full effectiveness. It was first introduced in the Polish legal order in 2011 as a marginal addition to the already existing act on the access to public information. Currently it is regulated by the elaborated Act of 11 August 2021 on open data and the reuse of public sector information, which goes beyond the minimum set of requirements provided by Directive (EU) 2019/1024.

Despite more than 10 years of presence in the Polish legal sphere, the right to reuse public sector information is still not widely recognized by citizens and private entities. This is indicated by the relatively low number of requests addressed to public sector bodies compared to the number of applications filed to access public information. Occasionally, public authorities themselves have difficulty determining what type of information is requested and in which procedure it should be provided. This occurs even when the legislator adopted a relevant conflict-of-law rule excluding the application of the provisions on the reuse of public sector information in a situation where the procedure and rules for access to public information have been regulated

differently in other legal acts.<sup>44</sup> The overall low number of requests for the reuse of public sector information in Poland is followed by the insignificant number of appeals filed with the minister of digitalisation.

According to research conducted for the present publication, the new act, one year after its entry into force, has not lived up to its expectations. In the case of public authorities, the submission of requests for the reuse of public sector information is marginal, as citizens favour the public information access procedure they are more familiar with. This also corresponds to the premise that the submission of applications for public information is dictated by concern for the public good and is intended to serve the purpose of ensuring public control of state institutions in the context of the exercise of power and the expenditure of public funds. The low number of requests for the use of public sector information is directed to cultural institutions, with the notable exception of large museums with comprehensive collections, such as the National Museum in Warsaw and the Historical Museum of the City of Krakow. State museums, local government museums, public libraries, scientific libraries, educational libraries and archives hold a significant amount of valuable public sector information resources that represent cultural heritage collections. The reason for the modest interest in submitting requests is citizens' low awareness that they are able to address such requests to cultural institutions.

Moreover, many of Poland's cultural heritage collections are freely available in digital form via websites. The Ministry of Digitization has created the National Repository of Science and Culture Objects KRONIK@, which brings together more than 16 million items of Polish national heritage in the fields of science, culture and administration. In addition, the National Library in Warsaw and six other libraries provide access to their collections in Poland's largest digital library, POLONA, which has nearly two million records available online. Unsurprisingly, the largest number of requests for the reuse of information was received by scientific institutions holding dynamic data, research data as well as high-value datasets, i.e., the Institute of Meteorology and Water Management – National Research Institute and the National Geological Institute – National Research Institute. This corresponds to the objective of reusing research data resulting from scientific research activities subsidized by public funding to create new products and services.

The new act provided for data-opening solutions that go well beyond the requirements of Directive (EU) 2019/1024: the normative definition of open data, statutory regulation of the data portal, the Data Opening Program, defining the government's

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<sup>44</sup> *Ibidem*, article 7 (1).

priorities for opening access to data, and the position of plenipotentiary for data openness, appointed in various state institutions. Despite ranking third in Europe in terms of open data maturity, the Polish Data Portal has not shied away from certain flaws. It still faces low interest of local self-government institutions and private enterprises in publishing open data, a small amount of data using an application programming interface (API), insufficient collections of new types of valuable data and publishing data in a format with a low degree of openness. Analysing the accessibility of open data in Poland, it is important to improve the knowledge and skills of public administration employees in the area of openness and data management and to raise public awareness to the potential of open data, which is one of the main factors influencing the effectiveness and ease of using public sector information.

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Przedstawia ona analizę wdrożenia i funkcjonowania cyfrowych usług publicznych w Polsce i w Europie ze szczególnym uwzględnieniem związanych z tym wyzwań. Dotyczą one m.in. rozwoju infrastruktury teleinformatycznej, zapobiegania wykluczeniu cyfrowemu oraz zapewniania ochrony prywatności i bezpieczeństwa obywatelom.

Książka adresowana jest do badaczy zajmujących się administracją, prawem administracyjnym i europejskim oraz do praktyków w wymienionych dziedzinach. Mamy nadzieję, że publikacja poszerzy wiedzę czytelników na temat cyfryzacji usług publicznych oraz zachęci środowisko naukowe do dalszych badań w tym zakresie.

This monograph is the third in the Krakow series of Jean Monnet Research Papers and was written as part of the Jean Monnet Module project, carried out by the Chair of European Law at the Jagiellonian University, “E-government — European Challenges for Public Administration in EU Member States and Partner Countries/eGovEU+.”

The book presents an analysis of the implementation and functioning of digital public services in Poland and Europe with a particular focus on the challenges involved. These include the development of ICT infrastructure, preventing digital exclusion and ensuring privacy and security of citizens.

The monograph is addressed to researchers in administration, administrative and European law as well as to practitioners in the mentioned fields. We hope the publication will broaden the readers' knowledge of the digitization of public services and encourage the scientific community to further research in this area.



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