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## OBLIGATIONS OF PUBLIC ADMINISTRATION TO PROVIDE INFORMATION FROM THE CASE FILE

### OBOWIĄZKI ORGANU ADMINISTRACJI PUBLICZNEJ W ZAKRESIE UDOSTĘPNIANIA INFORMACJI Z AKT SPRAWY

**Summary:** The obligations of public administration to make case file available to parties to proceedings are regulated in Art. 73-74 of the Code of Administrative Procedure. The access to the file includes the form of insight into the case file, make notes based on them, make duplicates or copies and authenticating duplicates or copies of the case files or to issue certified copies from the case files, if it is justified by the important interest of the party. In turn, the refusal of access to the file is justified by the protection of classified information or important interest of the state. Based on these issues, many discussions and theories have appeared in doctrine and jurisprudence, which are analyzed in this article.

**Keywords:** access to administrative case file, classified information, obligations of public administration, act authentication, refusal of access to the case file

**Streszczenie:** Obowiązki organu administracji publicznej w zakresie udostępnienia akt sprawy stronom postępowania zostały uregulowane w art. 73-74 kpa. Dostęp do akt obejmuje wgląd w akta sprawy, sporządzanie z nich notatek, kopii lub odpisów oraz uwierzytelnianie odpisów lub kopii akt sprawy lub wydania z akt sprawy uwierzytelnionych odpisów, o ile jest to uzasadnione ważnym interesem strony. Z kolei odmowa dostępu do akt jest uzasadniona ochroną informacji niejawnych oraz ważnym interesem państwa. Na gruncie tych zagadnień powstało w doktrynie i orzecznictwie wiele dyskusji i teorii, które w niniejszym artykule zostają poddane analizie.

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**Słowa kluczowe:** dostęp do akt administracyjnych, informacje niejawne, obowiązki organu administracji publicznej, uwierzytelnianie akt, odmowa dostępu

The right of access to information is materialized on the basis of the constitutional right of access of every person to documents and data sets concerning this person<sup>1</sup>. This right is closely related to the openness of administrative proceedings, especially the so-called internal disclosure, i.e. relating to parties and participants of proceedings with the rights of a party, which results from the general principles of the party's active participation in the proceedings (Article 10 § 1 of the Code of Administrative Procedure), awakening the trust of participants in the proceedings to public authority (Article 8 § 1 of the Code of Administrative Procedure), information (Article 9 of the Code of Administrative Procedure) and the principle of objective truth (Article 7 of the Code of Administrative Procedure)<sup>2</sup>. And it is in this first and foremost that the issue of access to information is seen and analyzed – as a right of a person, one of the fundamental human rights belonging to the civil and political catalog. Meanwhile, the obligation to provide information is inseparably connected with the implementation of this right – the right of access to the file will not be realized otherwise than through making it available by a public administration body. The latter, in turn, is obliged to act within the limits of the law, which – in the discussed scope – are not always uniformly understood and interpreted, which in turn creates the basis for scientific research.

## PROVIDING INFORMATION FROM THE CASE FILE PURSUANT TO ARTICLE 73 OF THE CODE OF ADMINISTRATIVE PROCEDURE

Access to the case file is the exercise of the right to information. It is restricted to the parties to the administrative procedure and the corresponding obligation of the public administration body to disclose this information. The files of the individual administrative case do not contain public information<sup>3</sup>, which makes the purpose and the mode of their access different. However, this does not change the fact that access to them plays an important role in the context of the openness of public administration bodies' activities, which – apart from the adopted restrictions and exclusions – cannot evade the obligation to disclose the files of a specific case to the parties to proceedings.

<sup>1</sup> Cf. The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, No. 78, item 483, art. 51 (3).

<sup>2</sup> H. Knysiak-Sudyka, Art. 73, No I.1, [in:] H. Knysiak-Sudyka (ed.), *Kodeks postępowania administracyjnego. Komentarz*, II edition, WKP 2019.

<sup>3</sup> Although in the jurisprudence one can meet the position that the case files as created in the course of public administration bodies constitute public information in the broad sense of the word. – Cf. judgment of Provincial Administrative Court in Warsaw of 7 May 2004, II SA/Wa 221/04, LEX No. 146742; judgment of Supreme Administrative Court of 11 May 2006, II OSK 812/05, LEX No. 236465.

This obligation was regulated in Article 73 of the Code of Administrative Procedure. The legislator specified in it who and to what extent such right is entitled, as well as how it should be exercised. Thus, they pointed out to the obligations of the public administration body towards the parties to the proceedings who have the right to inspect the case file, make notes, copies or excerpts thereof, and may request authentication of copies of the case file and the issue of certified copies from the case file, two recent rights are conditional on the existence of an „important interest of the party”.

The case files, although not defined in the administrative procedure code, have been subject to numerous definitions in the doctrine. They all seem to emphasize that they are all documents that the authority conducting the proceedings has collected for the purposes of resolving a given case<sup>4</sup>, by documenting the activities of the parties and the activities of the authority in matters relating to the page, its procedural position and course of proceedings, and which may affect the content of the decision, ordering them into one collection for easier storage, arranging chronologically, numbering, stapling and marking<sup>5</sup>. Such files of the case are to be made available by the public administration body to the party, and they should do so „at the premises of a public administration body in the presence of an employee of that body,, (Article 73 § 1a of the Code of Administrative Procedure). It seems that although this provision imposes additional obligations on the authority (for example, regarding the provision of space in the premises, preferably a separate room in which the person reviewing the files will be able to read the collected case files in peace<sup>6</sup>), it is due to the necessity of ensuring document security<sup>7</sup>. Moreover, the definition of this place, made by the legislator in 2011<sup>8</sup>, is important in one more aspect, namely in the matter of the possible disclosure of files by the authority outside its headquarters. Judicial decisions are not consistent in this matter. There are judgments allowing the possibility of sending files of administrative proceedings to be read by a party to the headquarters of the administrative body in the place of residence of the party<sup>9</sup>, there are also those that allow the possibility that „the Inspector

<sup>4</sup> All, and only those. The literature states that a party has the right to see the files collected in proceedings in a given administrative case, and not to any files held by a public administration body. Cf. A. Wróbel, Art. 73, No. 5, [in:] M. Jaśkowska, M. Wilbrandt-Gotowicz, A. Wróbel, *Komentarz aktualizowany do Kodeksu postępowania administracyjnego*, LEX/el. 2019.

<sup>5</sup> W. Taras, *Udostępnianie akt sprawy w postępowaniu administracyjnym*, Lublin 1992, p. 286; B. Sygit, *Akta sprawy administracyjnej i ich znacznie*, „Casus” 2001, No. 21, p. 25; J. Wegner, Art. 73, No. 1, [in:] A. Chróścielewski, Z. Kmiecik (ed.), *Kodeks postępowania administracyjnego. Komentarz*, WKP 2019; P.M. Przybysz, *Kodeks postępowania administracyjnego. Komentarz aktualizowany*, LEX/el. 2019, art. 73, No. 1; H. Knysiak-Sudyka, Art. 73, No. III. 6; Z.R. Kmiecik, *Zakres udostępniania akt sprawy w postępowaniu administracyjnym*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2008, Year LXX, b. 2, p. 97.

<sup>6</sup> P. Artymionek, *Dostęp do akt administracyjnych w postępowaniu administracyjnym w świetle orzecznictwa sądów administracyjnych*, „Przegląd Naukowy Disputado” 2013, Vol. XVI, p. 96.

<sup>7</sup> H. Knysiak-Sudyka, Art. 73, No. 9.

<sup>8</sup> Act of 3 December 2010 amending the act – Code of Administrative Procedure and the act – Law on proceedings before administrative courts, Journal of Laws of 2001, No. 6, item 18, art. 1 (14b)

<sup>9</sup> Cf. judgment of Supreme Administrative Court of 1 December 2009, I OSK 385/09, LEX No. 582475;

General for Personal Data Protection will photocopy the case file and send it to the penitentiary institution in which the party is serving a prison sentence”<sup>10</sup>.

However, there is also the opposite position, justified in the doctrine by the possibility of appointing, in a highly informal manner<sup>11</sup>, a representative in administrative proceedings, which a party may authorize to exercise his/her rights under Article 73 of the Code of Administrative Procedure<sup>12</sup>.

It seems that an indirect opinion is right, which does not liberalize the provisions in the discussed scope, but at the same time allows for exceptional situations, justifying, in the scope of making files available to the parties, application of Article 52 of the Code of Administrative Procedure. „An exceptional situation can be considered a situation in which, due to the inability to personally read the case files, caused by objectively existing obstacles, the party will be deprived of the opportunity to defend his/her rights in the proceedings. In such a situation, a public administration body may avail of the opportunities provided by Article 52 of the Code of Administrative Procedure, and enable a party to review a case file in a competent government administration body or a local government body”<sup>13</sup>.

In this aspect, the obligation of the public administration body to provide access to the case file includes the need to enable the party to view files, take notes from them, and make copies, as well as request to authenticate copies of case files and to issue certified copies from the case files. First of all, it should be pointed out that to review files, take notes, copies and transcripts is one thing and to authenticate them is another. In the first case, the party reads the case files, i.e. reviews the documents attached to them, reads their content, saves their observations, copies the documents in whole or in part, etc. In turn, authentication consists in providing a party with a certified true copy of the case file, or only by that authority placing an annotation on compliance with the original of a copy or a copy made by a party<sup>14</sup>. In connection with the above, however, a question arose, both in theory and in practice, regarding the preparation by the authority of

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judgment of 11 May 2010, I OSK 693/10, LEX No. 595477.

<sup>10</sup> Judgment of Provincial Administrative Court in Warsaw of 17 September 2010, II SA/Wa 1130/09, LEX No. 755076. Cf. Judgment of Provincial Administrative Court in Białystok of 24 November 2011, II SA/Bk 558/11, LEX No. 1095645.

<sup>11</sup> Cf. Judgment of Supreme Administrative Court of 6 December 2011, I OSK 11/11, LEX No. 1135308 („A party to proceedings may not, however, require such photocopies to be made and supplied by an administrative authority”); judgment of Provincial Administrative Court in Olsztyn of 5 August 2008, II SA/Ol 332/08, LEX No. 509391 („A party may not require the authority to provide him/her with unauthenticated copies of documents in a case file”); judgement of Supreme Administrative Court of 3 June 1997, I SA/Ld 302/96, LEX No. 29358 („The procedure of administrative procedure provided for in Article 52 of the Code of Administrative Procedure may not apply to the act of reviewing, in accordance with Article 10 § 1 of the Code of Administrative Procedure, by a representative of a party running a law office in another city with all the evidence gathered before making a decision”).

<sup>12</sup> Cf. H. Knysiak-Sudyka, *Art. 73*, No. 9.

<sup>13</sup> Judgment of Supreme Administrative Court of 11 May 2010, I OSK 693/10, LEX No. 595477; Cf. also judgment of Supreme Administrative Court of 1 December 2009, I OSK 385/09, LEX No. 582475.

<sup>14</sup> Cf. P.M. Przybysz, *Kodeks postępowania administracyjnego...*, art. 73, No. 4.

a copy of the documentation stored in the case file, in a manner resulting from its technical and organizational capabilities, at the request of a party. The question of this content was sent by the Ombudsman<sup>15</sup> to the Supreme Administrative Court on 14 March 2018, broadly substantiating his request by divergence of administrative courts in the application of art. 73 § 1 of the Code of Administrative Procedure. He pointed out that legal literature is very poor<sup>16</sup> in this matter, and in case law two different interpretative lines can be seen: one literal, the other expanding and systemic. Indeed, the analysis of the case-law confirms the existence of these two interpretations, the dominant one being that the copying of the file belongs to the party, regardless of the technical means used by it, and it has no right to demand the authority, that it fulfill its obligation to provide access to files by making copies of them for a party<sup>17</sup>. Nevertheless, especially in recent years, the position taking into account the purpose of Art. 73 of the Code of Administrative Procedure and the currently existing technical possibilities of exercising the party's

<sup>15</sup> *Pytanie prawne RPO do NSA ws. kopiowania akt postępowania administracyjnego*, 14 March 2018, <https://www.rpo.gov.pl/sites/default/files/Pytanie%20prawne%20RPO%20do%20NSA%20ws.%20kopiowania%20akt%20post%C4%99powania%20administracyjnego.pdf> [access 6.12.2019].

<sup>16</sup> One can indicate, for example, the considerations contained in the publication of S. Gajewski, *Dostęp do kserokopii z akts prawy administracyjnej*, [in:] A. Skóra (ed.), *Dostęp do informacji publicznej a kodeks postępowania administracyjnego*, Poznań 2015, in which the author cites numerous and detailed arguments in this regard, especially on pp. 100-104.

<sup>17</sup> Cf. Judgment of Supreme Administrative Court of 12 October 2010, II OSK 104/10, LEX No 746399; Judgment of Supreme Administrative Court of 21 June 2012, I OSK 769/12, LEX No. 1214188; Judgment of Supreme Administrative Court of (till 31 December 2003) in Warsaw of 29 March 2001, II SA 2580/00, LEX No. 520140055; Judgment of Supreme Administrative Court of 21 October 2011, II OSK 1462/10, LEX No. 1070340; Judgment of Supreme Administrative Court of 24 July 2013, II GSK 507/12, LEX No. 1377937; Judgment of Supreme Administrative Court of 5 July 2005, GSK 898/04, LEX No. 190721; Judgment of Supreme Administrative Court of 22 January 2016, II OSK 1249/14, LEX No. 2067246; Judgment of Supreme Administrative Court of 20 May 2014, II OSK 2997/12, LEX No. 1579468; Judgment of Supreme Administrative Court of 13 February 2014, I OSK 1772/12, LEX No. 1449863; Judgment of Supreme Administrative Court of 3 February 2014, I OSK 1806/12, LEX No. 1449865; Judgment of Supreme Administrative Court of 15 March 2018, II OSK 2290/17, LEX No. 2483027; Judgment of Provincial Administrative Court in Lublin of 14 February 2012, II SA/Lu 895/11, LEX No. 1121430; Judgment of Provincial Administrative Court in Lublin of 12 January 2012, II SA/Lu 728/11, LEX No. 1109803; Judgment of Provincial Administrative Court in Lublin of 23 February 2012, II SA/Lu 923/11, LEX No. 1125579; Judgment of Provincial Administrative Court in Lublin of 27 May 2010, II SA/Lu 157/10, LEX No. 674274; Judgment of Provincial Administrative Court in Olsztyn of 5 August 2008, II SA/Ol 332/08, LEX No. 509391; Judgment of Provincial Administrative Court in Poznań of 16 July 2009, IV SA/Po 228/09, LEX No. 553437; Judgment of Provincial Administrative Court in Rzeszów of 22 September 2017, II SA/Rz 723/17, LEX No. 2391699; Judgment of Provincial Administrative Court in Warsaw of 25 May 2012, VII SA/Wa 78/12, LEX No. 1359980; Judgment of Provincial Administrative Court in Warsaw of 11 January 2017, IV SA/Wa 1890/16, LEX No. 2357375; Judgment of Provincial Administrative Court in Warsaw of 27 April 2006, II SA/Wa 1734/05, LEX No. 520967525; Judgment of Provincial Administrative Court in Warsaw of 24 November 2011, II SA/Wa 1665/11, LEX No. 1153518; Judgment of Provincial Administrative Court in Warsaw of 16 December 2016, VIII SA/Wa 785/16, LEX No. 2205340; Judgment of Provincial Administrative Court in Wrocław of 11 December 2008, II SA/Wr 324/08, LEX No. 528060; Judgment of Provincial Administrative Court in Wrocław of 30 January 2013, II SA/Wr 831/12, LEX No. 1298644; Judgment of Provincial Administrative Court in Wrocław of 27 September 2017, II SA/Wr 399/17, LEX No. 2402245; Judgment of Provincial Administrative Court in Wrocław of 20 April 2017, II SA/Wr 78/17, LEX No. 2283642.

rights enshrined in this provision<sup>18</sup>, and consequently aiming at the conclusion that the authority is obliged to create all conditions necessary for the implementation of its right to participate actively in the proceedings.

The specification of this obligation will be, for example, „setting up a photocopier or other device in a paid office, with the help of which a party could record evidence, and if it is impossible to secure such an opportunity for various reasons, then the authority should prepare such photocopies, imposing the costs on the party”<sup>19</sup>.

The aforementioned request of the Ombudsman, who is in favor of a broad interpretation of Art. 73 of the Code of Administrative Procedure, has been extensively justified. After examining it, on 8 October 2018 the Supreme Administrative Court composed of seven judges, adopted the following resolution: „As part of providing access to the file pursuant to art. 73 § 1 of the Act of 14 June 1960 Code of Administrative Procedure (consolidated text, Journal of Laws of 2017, item 1257, as amended), a copy of the documentation collected in the case file is drawn up by the authority in a manner resulting from its technical and organizational capabilities, at the request of a party”<sup>20</sup>. In the justification of the resolution, however, he pointed out that on the one hand, it is difficult to find arguments supporting the use of only the literal interpretation of Art. 73 of the Code of Administrative Procedure, which on its canvas turns out to be very formalistic, on the other hand, rejected the necessity of binding the authority with the demand of a party to issue photocopies of documents from the case file. He considered that there were at least several situations justifying the refusal of the party’s application in the subject matter, including: specific difficulties resulting from the lack of necessary equipment, a large number of documents to be copied and obvious and deliberate abuse by a party of the right arising from art. 73 § 1 of the Code of Administrative Procedure<sup>21</sup>.

Therefore, the above resolution put an end to all discussions in this aspect and imposed the need to harmonize judicial decisions and the practice of individual administrative bodies. However, regardless of this solution, the possibility provided for in art. 73 § 3 of the Code of Administrative Procedure, providing the parties with access to files

<sup>18</sup> Cf. P.M. Przybysz, *Kodeks postępowania administracyjnego...*, art. 73, No. 7.

<sup>19</sup> Judgment of Provincial Administrative Court in of 28 January 2013, II SA/Op 527/12, LEX No. 1274585. Cf. also Judgment of Supreme Administrative Court of 8 April 1998, I SA/Gd 1657/97, LEX No. 35920; Judgment of Provincial Administrative Court in Gdańsk of 11 September 2013, II SA/Gd 331/13, LEX No. 1381155; Decision of Supreme Administrative Court of 19 January 2010, II OSK 2043/09, LEX No. 600096; Judgment of Supreme Administrative Court of Judgment of Supreme Administrative Court of 16 July 2015, II OSK 3043/13, LEX No. 1796275; Judgment of Supreme Administrative Court of 8 April 1998, I SA/Gd 1657/97, LEX No. 35920; Judgment of Provincial Administrative Court in Białystok of 21 August 2014, II SAB/Bk 24/14, LEX No. 1506446; Judgment of Supreme Administrative Court of 13 May 2014, II OSK 1602/13, LEX No. 1766593; Judgment of Provincial Administrative Court in Bydgoszcz of 27 May 2015, II SA/Bd 216/15, LEX No. 1852003; Judgment of Provincial Administrative Court in Wrocław of 21 June 2016, II SA/Wr 148/16, LEX No. 2102853.

<sup>20</sup> Resolution of Supreme Administrative Court of 8 October 2018, I OPS 1/18, I OPS 1/18, LEX No. 522670598.

<sup>21</sup> Ibidem.



in the ICT system, which seems to fully correspond to modern technical possibilities and social expectations. The development of new technologies, on the one hand, and on the other, the increasingly widespread use of electronic identification means by citizens (especially the trusted profile), demanded that legal provisions be also included in this aspect. And indeed, the option introduced for the first time in 2010, amended several times since, ensures „providing the parties with the activities referred to in § 1 in their ICT system”, making this option only subject to proper authentication of the website and referring to in this aspect to the provisions of the Act on computerization<sup>22</sup>.

Regardless of the possibility of accessing the case file, making notes, copies or excerpts from them, a party may also request „authentication of copies or copies of the case files or the issue of certified copies from the case files, if this is justified by the important interest of the party” (Article 73 § 2 Code of Administrative Procedure). This provision therefore creates an obligation on the part of the public administration authority to authenticate and issue certified copies, from which the authority will be able to free itself only if, in its opinion, the party does not have a valid interest justifying the issue of such a document. This seemingly clear wording, however, causes some controversy in jurisprudence, because the „important interest” remains an indeterminate phrase, subject to the individual assessment of the authority conducting the proceedings, and as a consequence creating the risk of different treatment of persons in the same legal or factual situations<sup>23</sup>.

There is no doubt about the belief that the phrase „important interests of the party” refers to those cases in which „the party cannot read the case files itself and make appropriate notes or copies thereof”<sup>24</sup>. However, the question arises as to whether the above justification is the only one possible or whether there are other situations arguing that an important interest exists. Analyzing judicial decisions in this regard, some examples (without doubt this is an open catalog) of reasons that justify the refusal of the certified body to issue certified copies may be indicated. Therefore, it will be „the desire to avoid the probable costs of making a copy and deduction that making this copy by the authority will be cheaper for the party”<sup>25</sup>,

<sup>22</sup> Act of 17 February 2005 on the computerization of the activities of entities performing public tasks, Journal of Laws of 2019, item 700. A special procedure for providing access to electronic documents is provided for in the provisions of the Regulation of the Council of Ministers of 14/09/2011 regarding the preparation and delivery of electronic documents and access to forms, templates and copies of electronic documents, Journal of Laws of 2018, item 180.

<sup>23</sup> Attention should be paid to the unanimity of the doctrine that the „important interest” referred to in Art. 73 § 2 of the Code of Administrative Procedure, is a category broader than the legal interest, i.e. it may cover not only the legal interest, but also the actual interest, which in certain circumstances may speak for the need to consider the party’s request in the scope of issuing certified copies or authenticating those which the parties made themselves. – Cf. J. Wegner, Art. 73, No. 3; J. Malanowski, Art. 73, [in:] R. Hauser, M. Wierzbowski (ed.), *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2018, p. 637.

<sup>24</sup> Judgment of Provincial Administrative Court in Poznań of 11 July 2013, II SA/Po 576/13, LEX No. 1347488.

<sup>25</sup> Judgment of Supreme Administrative Court of 20 November 2015, II OSK 693/14, LEX No. 2002225.

or „the desire to have certified copies of documents collected in the case files or to verify them with the collected evidence”<sup>26</sup>.

Therefore, it can be concluded that there are circumstances which certainly constitute an important interest of the party and those which certainly do not justify it. However, there remains the questionable issue which in the case-law has not been unanimous. Namely, the use of certified and issued copies to the party outside the pending proceedings, i.e. in other legal proceedings.

Negative position in this regard is justified in the case-law by the fact that a party, even if he does not have a certified copy of the document, may still rely on its existence in other proceedings and demand, pursuant to Art. 250 of the Code of Administrative Procedure, taking evidence from the administrative case files<sup>27</sup>. However, as the doctrine rightly points out, this position seems very strict. First of all, „it contains a hard-to-accept suggestion that the use of copies in itself creates a risk of abuse”, secondly, it limits the party’s evidence initiative in proceedings; finally, it leads to unnecessary prolongation of proceedings in cases where the creation and use of certified copies is a tool allowed by the legislator<sup>28</sup>. Therefore, the more convincing view seems to be that the mere need for a party to have certified copies of documents that can be used by a party in a given administrative matter or outside its scope can be considered as an important interest of the party<sup>29</sup>. Therefore – in accordance with the above – a public administration body will be obliged to issue certified copies to a party also when, in the justification of its request, he refers to the intention to use these documents in other proceedings.

## RESTRICTING ACCESS TO THE CASE FILE PURSUANT TO ART. 74 OF THE CODE OF ADMINISTRATIVE PROCEDURE

Although the parties’ right to full access to the case file is one of the most important procedural guarantees, the legislator stipulated significant restrictions<sup>30</sup> in art. 74 of the Code of Administrative Procedure, also due to the need to protect

<sup>26</sup> Judgment of Provincial Administrative Court in Poznań of 11 July 2013, II SA/Po 576/13, LEX No. 1347488.

<sup>27</sup> Judgment of Supreme Administrative Court of 17 January 2012, II OSK 2063/10, LEX No. 1138055; Judgment of Provincial Administrative Court in Wrocław of 13 January 2010, IV SA/Wr 399/09, LEX No. 554255; Judgment of Provincial Administrative Court in Gdańsk of 14 January 2009, II SA/Gd 686/08, LEX No. 481502.

<sup>28</sup> Cf. J. Wegner, *Art. 73*, No. 3.

<sup>29</sup> Cf. Judgment of Supreme Administrative Court of 2 September 2009, II GSK 19/09, LEX No. 596684; Judgment of Supreme Administrative Court of 4 February 2014, II OSK 2118/12, LEX No. 1497906; Judgment of Provincial Administrative Court in Wrocław of 20 February 2018, II SA/Wr 835/17, LEX No. 2475504; Judgment of Supreme Administrative Court of 23 January 1998, I SA/Łd 770/96, LEX No. 31771; Judgment of Provincial Administrative Court in Warsaw of 5 November 2010, II SA/Wa 965/10, LEX No. 755512.

<sup>30</sup> Cf. J. Wegner, *Art. 74*, No. 1.



other values<sup>31</sup>. Namely, the legislator decided that Art. 73 of the Code of Administrative Procedure does not apply to the case file in three situations: firstly, if they contain classified information classified as „secret”; secondly, if the information has been given the „top secret” clause; and thirdly, in relation to all other acts, which the public administration body excludes on grounds of important state interest.

The grounds for granting the relevant security classifications were specified in the Act of 5 August 2010 on the protection of classified information<sup>32</sup>. Pursuant to the provisions contained therein, the „top secret” clause is given to information whose unauthorized disclosure will cause extremely serious damage to the Republic of Poland due to the real threats listed in Art. 5 (1) of this Act, whereas „secret” means information whose unauthorized disclosure will result in serious damage to the Republic of Poland due to the circumstances listed in Art. 5 (2) of the Act. It is worth adding that in Article 5, in paragraph 3 and 4, „confidential” and „restricted” clauses shall also be introduced, but not listed in Art. 74 of the Code of Administrative Procedure as a basis for refusing access to the file. Nevertheless, the doctrine draws attention (though unanimously) that access to files may be restricted with reference to the premise of an important state interest – that is, the third of those indicated in Art. 74 of the Code of Administrative Procedure<sup>33</sup>. And indeed, from a formal and legal point of view, there are no obstacles to such action, because the analyzed Art. 74 of the Code of Administrative Procedure does not exclude a priori the application of Art. 73 of the Code of Administrative Procedure with respect to other types of classified information than those listed therein. Moreover, it would be difficult to assume that a party had access to information, the disclosure of which could cause damage to the Republic of Poland or for tasks performed by public administration bodies or other organizational units<sup>34</sup> – and this is how „confidential” and „restricted” clauses are defined. Moreover, the nature and type of this information clearly indicates their direct or at least indirect relationship with the important state interest<sup>35</sup>. On the other hand, it is noted that the failure to include in the content of Art. 74 of the Code of Administrative Procedure

<sup>31</sup> Speaking of restrictions, one should also mention the provision of article of 4 May 2019. 73 § 1b of the Code of Administrative Procedure, according to which a public administration body may not allow a party to see personal data of the person lodging a complaint. This article was added by the Act of 21 February 2019 amending certain acts in connection with ensuring the application of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46 / EC (Journal of Laws of 2019, item 730).

<sup>32</sup> Journal of Laws of 2019, item 742.

<sup>33</sup> Cf. A. Wegner, Art. 74, No. 1; A. Wróbel, Art. 74, No. 4.

<sup>34</sup> Cf. P.M. Przybyś, *Kodeks postępowania administracyjnego...*, art. 74, No. 1; H. Knysiak-Sudyka, Art. 74, No. 1.3.

<sup>35</sup> Cf. H. Knysiak-Molczyk, *Granice prawa do informacji w postępowaniu administracyjnym i sądowniczym*, Warszawa 2013, p. 163; Ł. Kierznowski, *Ograniczenie dostępu do akt sprawy w postępowaniu administracyjnym na gruncie art. 74 k.p.a.*, „Studia Prawnicze i Administracyjne” 2015, 14 (4), p. 41-42.

the relevant wording, which – like the „secret” and „top secret” clauses – would allow restricting access to files containing also other classified information. It indicates the intention of the legislator not to exclude the application of Art. 73 of the Code of Administrative Procedure in relation to files marked „confidential” or „restricted”<sup>36</sup>.

Therefore, it seems right to say that the solution to this issue is possible only in the context of an appropriate interpretation of the „important state interest”<sup>37</sup>. That „important state interest” is an indefinite phrase which requires specificity in each individual case and against the background of the circumstances of the case, with simultaneous administrative discretion. However, it cannot be abstract and disregard completely fundamental references to security, defense or public order considerations<sup>38</sup>. In the judgment of the Supreme Administrative Court in Katowice of 8 September 1997, it was emphasized that „the concept of «important state interest» (Article 74 § 1 of the Code of Administrative Procedure) requires individualization and specificity in each case when considering the party’s right to inspect the case file. Its interpretation must take into account the fact that the content of the provision occurs in the singular, and therefore it is not about all important state interests, but one specific indicated. Relying on the protection of the interests of the citizen-author of the anonymous letter whose personal data the authority does not know, and on this basis, classifying this letter as confidential, seems a misunderstanding”<sup>39</sup>. A refusal of access to the file, irrespective of the reasons for which it is entered, is always an exception to the general rule. That is why the public administration body is obliged to indicate higher values because if which it refuses access to the file and why they support the exclusion of these files. This is very important because it constitutes, in essence, a violation of the general principle of openness of proceedings, and everything must be done to ensure that the principles of equity and justice are not infringed. Specifically, the Supreme Administrative Court commented on this subject in its judgment of 22 June 2017: „Refusal based on Art. 74 § 1 of the Code of Administrative Procedure enabling the party to view the case files in the course of administrative proceedings, limits the party’s right to actively participate in these proceedings. This restriction, however, does not constitute unjustified interference with the rights of the parties, because it is dictated by the importance of information contained in the files of the case (classified) of a qualified nature - material for the interest of the state”<sup>40</sup>. Therefore, what is important, pursuant to Art. 74 of the Code of Administrative Procedure, a public administration body may not limit a party’s right of access to the entire file, but only to what is necessary, i.e. to that part of the

<sup>36</sup> A. Wróbel, *Art. 74*, No. 4.

<sup>37</sup> Cf. *ibidem*.

<sup>38</sup> Cf. A. Wegner, *Art. 74*, No. 1.

<sup>39</sup> Judgment of Provincial Administrative Court in Katowice (till 31 December 2003) of 8 September 1997, I SA/Ka 298/96, LEX No. 520124036.

<sup>40</sup> Judgment of Supreme Administrative Court of 22 June 2017, II OSK 2271/16, LEX No. 2342039.

file that contains the information specified in Art. 74 § 1 of the Code of Administrative Procedure. However, it should be emphasized that if there are documents in the case files that have been given the „top secret” or „secret” clause, then the public administration body is not entitled, but obliged to exclude these documents from the case file, i.e. to refuse sharing them with parties<sup>41</sup> (however, the exclusion of classified documents due to an important state interest is discretionary and depends on the decision on this matter by the public administration body conducting the proceedings<sup>42</sup>). The protection of classified information is a statutory obligation of a public administration body<sup>43</sup>, and access to it is possible on the principles set out in the Act of 5 August 2010 on the protection of classified information.

In accordance with the art. 74 § 2 of the Code of Administrative Procedure, each refusal to provide access to a file to a party takes place by means of a decision which may be appealed against. This seemingly clear wording, however, proved to be debatable, at least on two issues. Firstly, when analyzing individual rulings, one can notice an interpretation discrepancy in relation to the situation in which a person who is not a party to the case or an entity with the rights of a party asks for access to the file. According to one interpretation, in such a case the proceedings regarding access to the file are discontinued pursuant to Art. 105 § 1 in connection with art. 126 Code of Administrative Procedure<sup>44</sup>, i.e. because of the lack of subject matter of the proceedings. On the other hand, according to the second position, also in such a situation the authority is obliged to issue an appropriate decision, because otherwise „a significant dispute regarding whether a given entity is a party to the proceedings would not be subject to control in administrative court proceedings and in proceedings before an administrative court”<sup>45</sup>.

On the other hand, another issue concerns the scope of the situation in which the authority is obliged to issue a relevant provision, namely whether it should issue it only in the event of refusal to make access to the files in principle, or also when,

<sup>41</sup> Cf. Judgment of Supreme Administrative Court of 19 July 2002, V SA 3341/01, LEX No. 1693458; judgment of Provincial Administrative Court in Warsaw of 21 December 2005, V SA/Wa 1632/05, LEX No. 19087; J. Chlebny, *Odmowa dostępu do akt w sprawie administracyjnej*, „Państwo i Prawo” 2014, 69, No. 10, p. 98-99; Ł. Kierznowski, *Ograniczenie dostępu do akt sprawy...*, p. 40; R. Kędziora, *Kodeks postępowania administracyjnego. Komentarz*, 5th ed., Warszawa 2017, p. 451-452.

<sup>42</sup> A. Gronkiewicz, *Udostępnianie informacji przez urzędnika*, [in:] A. Ziółkowska, A. Gronkiewicz, *Organizacja pracy biurowej w administracji. Zagadnienia prawne*, Katowice 2014, p. 98.

<sup>43</sup> Cf. Judgment of Provincial Administrative Court in Warsaw of 21 December 2005, V SA/Wa 1557/05, LEX No. 190881.

<sup>44</sup> Cf. Judgment of Supreme Administrative Court of 8 May 2013, II OSK 2679/11, LEX No. 1343892. Cf. also B. Adamiak, Art. 74, [in:] B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, 16th ed., Warszawa 2019, p. 422.

<sup>45</sup> Judgment of Supreme Administrative Court of 5 September 2001, II SAB/Gd 127/00, LEX No. 520148690. Cf. Also Judgment of Provincial Administrative Court in Wrocław of 11 December 2008, II SA/Wr 324/08, LEX No. 528060; Judgment of Provincial Administrative Court in Warszawa of 19 August 2009, VIII SA/Wa 199/09, LEX No. 553632; Decision of Supreme Administrative Court of 10 October 2008, I OSK 1081/08, LEX No. 516765. Cf. Also P.M. Przybyś, *Kodeks postępowania administracyjnego...*, art. 74, No. 4.

for various reasons, it does not take into account the requested form of access to the file. Decisions in this matter are different and also differently justified, and two decisions of the Supreme Administrative Court, of 19 January 2010<sup>46</sup> and 12 October 2010<sup>47</sup> seem representative and most often cited in this matter. In the first of them we find a firm position that any refusal to provide access to the file, including failure to include the requested form of access, should be reflected in the relevant decision of the authority. This is because it reflects the need to ensure a high standard of protection of individual rights, expressed in the obligation to justify the decision and the possibility of initiating its judicial review, pursuant to the provision of Art. 3 § 2 item 2 Act - Law on Proceedings before Administrative Courts<sup>48</sup>.

However, in the second of the judgments cited, the Supreme Administrative Court made a distinction between legal obstacles and technical and organizational issues that prevented access to the case file and making copies and copies from them in the form requested by the party, and decided that only in the first situation (i.e. legal obstacles) the authority was obliged to issue a decision pursuant to Art. 74 § 2 of the Code of Administrative Procedure. It explained that „no legal provision imposes an obligation on the administration body to satisfy the request of a party to make available its files in a specific form, if this exceeds the technical and organizational capabilities of the body. In the decision referred to in Art. 74 § 2 of the Code of Administrative Procedure, the authority may only express its position as to the legal obstacles to providing access to the case file, and not as to technical issues enabling the party to view the case file or to make copies thereof”<sup>49</sup>. Would the legislator really mention in art. 74 § 2 of the Code of Administrative Procedure, individual forms of access to files if they wanted to limit the necessity to issue an order only to the situation of refusal of access to files as such?

The solution adopted in Polish legislation regarding the restriction of access to the case file is criticized in the doctrine due to the provisions of the already cited Art. 51 section 3 of the Polish Constitution, according to which „everyone has the right to access official documents and data collections concerning him. The limitation of this right may be specified by law”<sup>50</sup>. Therefore, there are numerous *de lege ferenda* conclusions, opting for the introduction of such procedural mechanisms that would reconcile conflicting interests arising from the parties’ right to read the full files, and the need to protect classified information<sup>51</sup>. These postulates, although noteworthy, due to the scope of the above study regarding the obligations of the

<sup>46</sup> II OSK 2043/09, LEX No. 600096.

<sup>47</sup> II OSK 104/10, LEX No. 746399.

<sup>48</sup> Cf. A. Wegner, Art. 74, No. 3; P. Fajgielski, *Informacja w administracji publicznej. Prawne aspekty gromadzenia, udostępniania i ochrony*, Wrocław 2007, p. 71.

<sup>49</sup> Judgment of Supreme Administrative Court of 12 October 2010, II OSK 104/10, LEX No. 746399.

<sup>50</sup> Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, item 78, No. 483.

<sup>51</sup> J. Chlebny, *Odmowa dostępu do akt...*, p. 103-110.

public administration body in providing information from the case file, can no longer be considered.

## CONCLUSIONS

The obligation of the public administration body to provide access to the case file should be understood broadly. Not only as an obligation to enable the party to view these files, but also as permission to make notes and copies and copies thereof, as well as to authenticate copies of the case files and to issue certified copies from files. However, this is not an absolute obligation, as the law also provides for restrictions in this respect, due to the protection of classified information and an important state interest. Such a scope of duties of a public administration body, as it turns out, requires interpretation. It is a multi-faceted issue, and various positions and opinions have emerged against the background of its individual aspects. Can the case file be made available outside the seat of the authority? Is the authority obliged to provide the party with technical conditions enabling it to make a copy of the file? Or should they do it themselves and issue it to the party at their request? What is the „important interest of the party” obliging the authority to authenticate copies and issue certified copies? Can access to information classified „confidential” and „restricted” be refused on the grounds of „important state interest”? And finally - in every case of refusal of access to the file, is a public administration body obliged to issue an appropriate decision in this regard?

The above issues have become the subject of consideration because their settlement could not be achieved either based on a legal provision or on the basis of very extensive judicial decisions in this matter, nor through the analysis of doctrine. The above study also does not end all doubts, but it remains to express the hope that it becomes a voice in the discussion and a contribution to carrying out quick, correct and necessary reforms in this matter.

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