

MAJOR CHALLENGES REGARDING THE DRAFT LAW ON 'TRANSPARENCY' IN PUBLIC LIFE

Abstract

The new legislation on public transparency makes deep incursions into citizens' rights. Drafted by secret services, the bill intends to address issues regarding public transparency. It is not clear what issues it wants to address since no needs analysis has been presented. What is known is that secret services and enforcement agencies will gain more citizens' data and new powers to interfere in their privacy and exert pressure arbitrarily and without any safeguards. Paradoxically, the bill actually leads to less transparency. For example, information on how government-owned companies spend their money will be exclusively accessible to enforcement agencies.

Meanwhile, a wide spectrum of issues that have been red-flagged for years remain unresolved, including a genuine control over lobbying. Actual drafters of legislation will remain obscure under the proposed regime whereas public interest non-governmental organisations will now be subject to radically more stringent obligations than lobbyists acting on behalf of business. The doors have been opened to chaos in the established access to public information practice. No sufficient case has been made for the law and the legislative impact assessment is highly general and patchy. Nor is clear whether the draft was based on prior expert assessments.

1. Declaration of Assets: a New Tool for Secret Services to Surveil Citizens

a) "On Demand Asset Declarations"

According to the bill, the head of the Central Anticorruption Bureau may require a disclosure of assets from any individual in a public position at any time.

A public position is defined in the bill by reference to the criminal code. Hence, it will include any court-appointed expert, any member of academic staff, any physician at a public hospital, any attorney working for the bar, any employee of a non-governmental organisation (if such an NGO receives government funding) and maybe any journalist. The head of the Central Anticorruption Bureau may request that any such person should submit their asset declaration "in connection with the statutory business of the Bureau". The 'business' of the agency is not only investigating corruption crime but also "analytical work in the area of corruption investigation".

No individual summoned to file his or her asset declaration can appeal and has to make the submission within 14 days. This submission must include precise information on income, property, shares, loans.

CAB has full discretion to summon without any connection to a specific case. No legal means are available to challenge the decision. A vast and vague spectrum of positions are made subject to the

process. The above suggests that the law is adopted to create a pressure mechanism against individuals who may for one reason or another be inconvenient for the government, e.g. example lawyers in politically sensitive cases, leaders of civil society organisations critical of the government or experts appointed by courts to testify in cases involving individuals in power or those connected to them.

Combined with the power to publish its findings, CAB is given a powerful tool to put pressure on individuals in public positions as well as those only loosely linked to the public sector.

b) Categories of Persons Required to File Annual Declarations of Assets

The list of job positions subject to the asset disclosure requirement has been expanding with each new draft. It now comprises 151 categories, including not only executive or elected positions: assistant judges, all civil servants and local and regional government officials. Some of the asset declarations will be published online. It is conservatively estimated that over one million individuals will be subject to the asset disclosure requirement. Meanwhile, neither their supervisors nor the Central Anticorruption Bureau will be able to screen the disclosures because hand-written statements will still be acceptable despite recommendations expressed during public consultations. Machine readable asset disclosures are not mandatory.

Imposed on a large group of individuals, the obligation to disclose assets to supervisors or indirectly to the anticorruption service should indeed be a function of the job position level. This recommendation appears to be supported by research and international standards. The greater the power enjoyed by an individual the more privacy intrusion he or she should accept.

The drafters of the bill appear to miss the point since they apply an equal measure to government ministers and rank-and-file local officials alike. No debate had preceded the submission of the bill and no corruption risks associated to specific positions were ever reviewed and no effective mitigation measures that do not compromise privacy so strongly were ever introduced.

2. Lawmaking: Transparency and Openness One Level Down

Lawmaking is unlikely to become more transparent. Individuals who put forward specific proposals into government bills will not be disclosed. Only the name of the individual in charge of the process and the drafter will be disclosed. As demonstrated in the story of one critical phrase ("and/or magazines") secretly added to the media bill in the Rywin scandal in 2002, transparency is key in this area. Citizens have the right to know who makes specific proposals or submits amendments. A transparent system should be put in place to allow citizens to follow the legislative amendment process. The four drafts of the law on transparency in public life are the best illustration of the point at hand. It is not clear why each of the amendments has been made and by whom. The draft law contains nothing new in this respect. Some opinions and positions put forward in the drafting process in Parliament will still remain undisclosed and unpublished.

With regard to lobbying, the bill has created an unreasonable inequality of parties. Formal requirements imposed on parties that represent business are much more limited in contrast to those imposed on civil society organisations that act in public interest. No individual who is not a professional lobbyist but represents business interests needs to disclose the revenues or ownership

structure of the business. In contrast, citizens and civil society organisation are each time expected to provide detailed data, including information about their funding sources. Moreover, all private individuals who have donated more than the national monthly income to the civil society organisation at hand must also be disclosed. The proposal appears to try to weaken the contribution of non-governmental organisations and citizens to the legislative process and to discourage donors from giving larger contributions to organisations that are committed to public participation.

Private individuals who would like to contribute to the legislative process, e.g. parents of children with disabilities, are required to provide detailed income data and any error is subject to criminal sanctions.

If adopted, the proposed legislation will impede citizens' and civil society's involvement in the legislative process, which is against the proclaimed government's willingness to improve public participation.

3. Whistleblowers: Distortion of an Important Concept

A whistleblower is an individual who is acting in public interest and is exposing abuse of threats in his or her workplace. If such an intervention is ineffective or when it cannot be performed safely the whistleblower will inform the media or law enforcement. For this reason, the individual should receive adequate legal protection.

In contrast, the bill limits the whistleblower status solely to individuals who report suspected corruption to law enforcement agencies. The whistleblower status will be arbitrarily granted by a prosecutor and the individual at hand will be completely at his or her mercy. If the prosecutor fails to grant protection there will be no right to appeal. Furthermore, the proposed law fails to grant any protection to individuals who wish to expose other threats that are no crimes per se, including work safety hazards, mobbing or harassment. It fails to motivate employers or trade unions to introduce policy that protects whistleblowers in the workplace. Instead, it proposes a mechanism that undermines public trust, may be abused by law enforcement to put employers under surveillance in violation of the principles of social co-existence and the freedom to engage in business.

4. Information Unreasonably Restricted to the Attention of the Central Anticorruption Bureau (CAB)

The bill exempts citizens from access to information regarding government-owned companies and related parties. It requires that such companies keep records of contracts and submit them to CAB but prevents on-demand disclosure of such information to citizens. First, this will jeopardise public scrutiny over financial flows to individuals and companies linked to politicians as well as the use of public funds in political campaigning. Secondly, the provision restricts the transparency safeguards enshrined in the constitution. Thirdly, it leads to potentially selective use of files and records by secret services.

5. Transparency Law Drafted in Violation of the Principles of Transparency and Good Legislative Practice

The law will affect the constitutional rights and freedoms of citizens, i.e. the right to privacy and access to information. Any amendment of such caliber should be preceded by publicly accessible reviews, needs assessments and debates with experts and citizens.

The drafting has continued in secrecy for nearly 12 months whereas consultations have been limited to discussions regarding specific provisions rather than the overall goals and objectives of the law.

Several explanatory notes (no such note has been published for Draft 3 released on 12 December 2017) have not addressed all the proposed amendments so it is hard to understand the rationale behind some of the provisions. Neither is it clear whose amendments have made an impact on the proposed language of the bill.

While consultations were announced twice neither lasted at least 21 days, which is against the Rule of Procedure of the Council of Ministers. The latest drafts of the bill have not been subject to any consultations at all.

Citizens Network Watchdog Poland Association

E-Panstwo Foundation

Helsinki Foundation for Human Rights

Panoptykon Foundation

Polish Donors Forum

Stefan Batory Foundation