



Individual Advanced Research Opportunities Program

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Government in the Sunshine: Whether the U.S. Model of Public Access to Governmental Records (Freedom of Information) Could Take Root in a Post-Communist Democracy – the Case of Poland

Topic:

The identification and analysis of civic liberties developments in today's, post-communist Poland, with a view toward whether the prevailing legal climate and culture could/should more significantly buttress democratic institution-building if individuals were vested with public access to information rights more closely analogous to the US federal Freedom of Information Act (FOIA) and similar state statutory processes .

Within the context of this report, the term "post-communism" is utilized in a chronological-time sense, as referring to the historical progression of events following 1989 until the present, and does not seek to engage in the ongoing polemic as to whether post-communism itself is already a closed era. Notwithstanding, when conducting in-country research, interviewing scholars and activists as well as participating in conferences and colloquies in Poland, it proved prudent to proceed with some degree of reliance on the notion that "post-communism preserves democratic rights and liberties while obviously failing to meet the requirements of true democracy".

Relevance and contribution to field:

As Poland approached integration into the EU in the year 2004, and in the ensuing two-year time period, scholars have attempted to gauge whether it will be Europe or the US that over the longer term will exert the greater gravitational pull on the euphemistic hearts and minds of the

Poles . Some have posited that the Poles' traditional "instinctive Atlanticism" is presently susceptible to dilution and serious diminishment, attributable not only to recent alliances , or misalliances, with the U.S. in Iraq and Afghanistan , but by the inexorable procedural and administrative wheels of assimilation "in joining the European family" . In the larger canvas of continuing EU enlargement, analysts have expressed concern that a "European Dream" based on quality of life and peaceful community existence is quietly "eclipsing the U.S. equivalent". Others have posited, conversely, that Poland and the Czech Republic, among others, persist in keeping relations with the U.S. as a top priority, in effect, reinvigorating the "Atlanticist" camp for the foreseeable future. To date, the assessment seems to be that Poland continues to place high value on its traditional special relationship with the U.S. One can almost discern a paradigm wherein it is rather the EU that has acceded to Poland's self-perception of its national interest, rather than the reverse, wherein Poland, at times unceremoniously, pulls up a third chair for the EU --to a table where the U.S. already sits firmly ensconced.

From the miniscule vantage point of my two-month research-related stay in Poland, as well as well as extensive pre- and post-visit communications with Polish academic scholars, students and NGO personnel, albeit within the parameters of a relatively narrowly defined topic, I observed: an overwhelming interest on the part of Poles in the daily tools of the U.S. model of participatory democracy and how they are actually used by the American general public and the press; a tendency to place higher value on the evolution of the democratic experience of the U.S. than that of European countries; a firm belief in the viability of emulating many U.S. practices in the process of building democratic institutions; and an openness, both professional as well as personal, to acquiring greater familiarity with our processes at every opportunity. Awareness that IREX, for example, funded research on Polish law and administrative processes was extremely well received by diverse tranches of Polish society, ranging from high school students, who are too young to have first-hand familiarity with any system preceding post-communism, to notable legal scholars who continue to play a role in shaping legislation and jurisprudence.

It seems safe to say that, on this side of the Atlantic, demonstrable American interest in the democratic implementation and "cascading" processes of Poland's ambitious and far-reaching Constitution of 1997 down to national, regional and local grass-roots levels is relatively sparse. Scarcely perceptible is any systematic scholarly follow-up on how the comprehensive scheme of human rights and civic and political liberties, such as the right of public access to governmental information, as laid down by the Polish Constitution of 1997, are being transmuted into vigorous and effective, and/or, arguably spineless and inadequate, statutory and regulatory enactments. This phenomenon is far from being unique to Poland: the lack of systemic, post-reform assessments plagues most of the post-communist legal systems, as aptly pointed out by Cynthia Alkon:

Writing new laws and new constitutions generally was the first phase of foreign legal reform assistance in the newly post communist countries. In Western legal culture the assumption is that once a law is passed, or a new constitution comes into effect, the law will be followed. This assumption is far from true in most of the post-communist world, where the legacy of communism left, at best, a cynical attitude towards law, and at worst, outright disregard. (Citations omitted)

U.S. grant and research-funding institutions seem to be "moving on" and away from Poland and now rather sponsor efforts in countries further to the east of Poland. Admittedly, although a focused drang nach osten may appear warranted by deceptively facile geographic maps, that approach risks missing the boat that is daily plying the intellectual waters carrying Polish scholars' and activists' pro-democracy guidance and expertise directly to their counterparts in Moldova, Belarus, Ukraine, and other C.I.S. members. Polish-based entities in recent years have consciously assumed a spearhead role in "fomenting democracy" on the reformatted

geopolitical playing field. Just one example is the extensive outreach and educational networks built by the Helsinki Foundation for Human Rights in Warsaw and the program conducted by the Batory Foundation.

Polish experts opine that of particular value in the effort to buttress democracy in areas now under oppressive regimes, are the strategies and tactics refined during the “Solidarity” movement such as the establishment of a communications system with “western” press outside the official media and an active underground press. These initiatives support my assumption that, content-wise, much of what Polish-based and Polish-trained activists convey, even informally, to their C.I.S. and other regional counterparts cannot help but reflect Poland’s own still-evolving strategies to ensure freedom of information, freedom of the press, and transparency and accountability of governmental institutions. Accordingly, it seems clear that increased U.S. scholarly attention to the hurdles, barriers, and successes of the implementation of Poland’s 1997 pro-democratic constitutional guarantees and civil liberties, as well as pro-active support would not only be welcomed and well-received by Poles, but would result in the vital additional benefit of wending its way to those countries to the east, already test and vetted through the prism of a society that is uniquely well-disposed towards American input. An early suggestion along these lines was offered by Anne Applebaum as early as 2001: “Ukraine and Belarus are countries with deep cultural ties to Poland--and anyone desiring to dispense aid and advice to these countries should put those ties to use”. The intervening six years have adduced clear and convincing evidence that the “bridge” Applebaum described calls for the U.S. to use it as well.

The contribution that my project makes to the field of scholarship which, as indicated above seems to have “peaked” at the beginning of this decade, consists of as in-depth examination as was feasible within the two-month grant period, of how the concept of “freedom of information” or “FOI”, as a tool for ensuring governmental transparency and “sunshine” on public organs, has actually devolved into laws and practices, the degree to which Polish governmental authorities foster the increased accountability and comply with, or not,(as the case may be), with laws on the books. Special mention is made of the “lustration” laws as they are being applied in Poland.

In this regard, it hopes to demonstrate that further examinations of legal processes are worth supporting both on account of Poland’s continuing relations with the U.S. and the undeniable fact that Poland is transposing its own successes, as well as failures, further east.

Lastly, Poles are sensitive to press coverage from other areas of the world, both positive and negative, yet sometime fail to appreciate that what they themselves fully understand to be the machinations of local politicians, can transmogrify into an unflattering national portrait. When internationally-renowned Polish legal scholars speak out in the U.S. press about “witch hunting” in Poland, we, in the U.S, should take note.

APPROACH & OBJECTIVES

(A) To identify existing and potential Polish legal processes wherein a public right of access is/could be formulated and implemented as part of Poland’s ongoing adoption and adaptation of democratic institutions of government; (b) To identify cultural and political barriers/resistance to the concept of open access; (c) Synthesizing the foregoing two elements, engage in collaborative discussions with Polish legislators, legal scholars, political scientists, and lawyers, so as to (d) Formulate and propose a viable mechanism for suggesting certain proven American “good practices” of open government,via lectures at law schools; participating in public discussions; stimulating U.S. experts and scholars to greater focus on “post-cookie-cutter” realities.

RESEARCH METHODOLOGY

In the absence of formal affiliation with a particular institution, it was necessary to independently gather substantive legislative and legal materials, while concomitantly identifying entities in Poland that could play a role in meeting the above outlined objectives. I defined categories of constituencies in Poland that could provide a comprehensive perspective on how existing FOI processes are currently understood and implemented: academic legal scholars and policy analysts; national and regional governmental offices; civic and political leaders and activists; and supranational organs such as the EU and Council of Europe (COE). I compiled a mailing list targeted at each constituency, and in early August 2006, undertook mailing, via traditional, hard-copy postal communications, a cover letter (text in Polish) outlining my research goals and objectives, the dates I would be in Poland [November & December 2006], and requesting assistance. Enclosed with each cover letter was attached a copy of the “letter of introduction” from IREX, on IREX letterhead, in its original English version, as well as an IREX-approved Polish translation. Email replies commenced arriving in mid-August and I mapped out a detailed schedule of appointments, meetings, visits and consultations prior to departing for Poland. In those instances where the replies suggested further contacts and addresses, and/or invitations to conferences or institutions, these were followed up on and incorporated into the master schedule. A number of responses mailed via non-priority post arrived at my U.S. address in late November when I was already in Poland.

RESEARCH SITES VISITED

Seeking to maximize valuable collaboration in those locations which provided meaningful source materials and discussions, I spent roughly 80% of my time in Warsaw, where productive exchanges with Centrum Promocji Informacji Publicznej (Center for the Promotion of Public Information) of Transparency International - Polska and various Helsinki Foundation activities. The remaining time was spent mostly at the University of Wrocław, in southwestern Poland. Institutions visited in Warsaw included: the Stefan Batory Foundation; Institute of Public Affairs; Sobieski Institute; Fundacja Rozwoju Demokracji Lokalnej;

Office of the Commissioner for Civil Rights Protection; Gazeta Wyborcza; Transparency International - Polska ;Helsinki Foundation for Human Rights (Warsaw); University of Warsaw, Faculty of Law and Administration; National Archives; Constitutional Tribunal; Centrum Promocji Informatyki; Polish Academy of Sciences; “Law Every Day – Legal Education Clinical Seminar” sponsored by EQUAL, held at U of Warsaw.
Research Findings

PUBLIC ACCESS TO GOVERNMENTAL INFORMATION IN POLAND IS STILL A WORK IN PROGRESS

1. Persistence of a culture driven by secrecy rather than openness.

During the course of my research, a series of contemporaneous events were unfolding under the so-called “vetting” or “lustration” processes in Poland. It seemed apposite to include, in my mailing, the same standard inquiry to the government institution, known as the Instytut Pamięci Narodowej (the Institute of National Remembrance, or “IPN”) that as explained in significantly greater detail below, is the entity that has custody and control over the Polish “secret police files” dating back to the pre-1990 era.

The IPN responded with a three-page single space letter laying out a number of detailed reasons and citing a number of paragraphs and subsections of statutes that, reduced to their essence, advised me that there was actually very little, if any, substantive information that would

be disclosed to me, other than procedural matters, even if I were to ask for it. Particularly intriguing was the blanket statement that

The IPN can deny access to public information in cases involving the privacy of a natural person, or entrepreneur secrets unless the person or the entrepreneur waives that right (art. 5 para 2 of the law on access to public information). This exclusion includes contractors with whom the IPN has entered into contracts, meaning persons and entrepreneurs performing various kinds of services. The exclusion is based on protecting the personal privacy and personal assets of the contractors. Entrepreneur secrets that are not accessible to the public include technical, technological, trade or organizational enterprises which the entrepreneur has advised must be kept confidential. Examples of what the IPN will not make publicly accessible are the contents of these agreements, the rate of compensation, or any data concerning a contractor that is a natural person.

Such a blanket foreclosing of access to any information about personal services contracts entered into between a government entity and a contractor, using public funds, is astoundingly divergent from the U.S. where there are entire web sites that routinely post such information about government contracts. Under New York State's Freedom of Information Law such a stance seems unthinkable, New York being a jurisdiction where denial of information about a public contract based on a promise of "confidentiality" to the contractor is legally meaningless, and where each element of exclusion such as "trade secret" or "personal privacy" are the government's burden to prove.

As my project progressed, I determined to examine how it came about that, despite strong constitutional guarantees that ongoing governmental decision-making processes be fully open to public scrutiny in Poland, the daily mechanisms of government, of which the lustration phenomenon is one aspect, have likely spun out of the range of being transparent to the average citizen.

In Poland, I found a dearth of people fitting the concept of average citizen: lustration affects virtually everyone, by categorizing them as victim or victimizer, or if they are too young to have played either role, their uncles, aunts, priests and teachers are caught up by the process. Therein lies the paradox: that public scrutiny now may need to shift away from what people did pre-1990, to the here-and-now byzantine official decision-making processes and actions of the public servants now in control of the lustration train.

There do exist independent standards and guidelines for rational, rule-of-law based lustration that were developed by the Council of Europe as far back as 1996 which warrant dusting off and holding up as a score card. (See my recommendations for future research below). For purposes of the instant project, I limit myself to mentioning primarily those standards that bear on FOI questions.

(a) Lustration as the backlash of negotiated regime change.

The very recent implosion of a prominent Polish bishop's clerical career, based on documentation held by the Polish government which indicates that the bishop had collaborated with communist authorities, has served to focus U.S. and world news coverage on the Polish "lustration laws" and "vetting laws" processes now in full swing in Poland. Originally enacted in 1997, but recently reinvigorated by legislative amendments, and reinforced by parallel legislation, "lustration" (as used here, the aggregate existence and impact of these laws), may well represent, if not a regression in the democratizing process, then at least a prolonged and painful pit stop.

Under the IPN Act, a specially-created government entity, the IPN was tasked with amassing all remaining files of the communist secret police and using their contents, among other things, for

lustration purposes. “Inadvertently”, a list drawn up by the IPN of some 170,000 names of private citizens who allegedly “cooperated” with the communist authorities, found its way via a reporter into the public domain and onto the worldwide web.

The ease of digital access to what is now known as “Wildstein’s list”, coupled with reports that the list has been repeatedly “hacked” into and altered, presumably has a destabilizing impact on the lives of many lesser-known private individuals and their families and has raised issues of ex post facto application of the law. Bishop Wielgus is but the latest poster child in a struggle that illustrates the ways in which possession and control of “information” by a government dictates the uses to which it can be put.

Over the years a number of high-level public office holders who had lied or misstated their past ties to the former regime have lost their jobs, but overall estimates of the “universe” of people originally subject to lustration was in the vicinity of 13,000 people. Now, however, under the most recent amendments to the Lustration law, “500,000 to 1.5 million people could come under fresh scrutiny” and may take up to ten years to complete.

(b) Lustration may be trumping the Polish constitutional freedoms and rights, including the right to information

Purely as a legal matter, perhaps one key to understanding how this came about is to step back to 1997 and the adoption of the new, post-communist Polish Constitution and retrace those pertinent provisions which, in furtherance of a participatory model of democracy, created strong rights to scrutinize governmental activities, may be falling short of their goals. Looking at how the express mandates of the Constitution were later transmuted into practice, it could well be that a wrong turn was taken.

It appears to me that the relatively high standard of the “right to information” as was laid down by Article 61 Constitution of 1997 was later largely circumvented by the Polish legislative branch as regards the overall “freedom of information” law it adopted under the mandate of Article 61. This in turn resulted in a deficient FOI law as described further below, and has also produced what seems to be aberrant lustration a full 17 years after the changeover. Understanding what the “right to information” rests on in Polish law, and how it may have been distorted, necessitates a look at the master plan laid down in the Constitution of 1997.

2. “Checks and balances” on freedoms in the Polish Constitution - imbalance favoring secrecy?

The Constitution of 1997 took great pains to spell out a panoply of human rights and civil, political, and socioeconomic rights and unveils an ambitious menu of individual “freedoms, rights and duties” intended to guarantee “that there will be no rebirth of totalitarianism in Poland”. In addition to spelling these out, the Constitution restricts the Polish legislature from tampering with constitutional rights and freedoms” by neatly chaining nearly each such right and freedom to a specific directive as to whether it is to be effectuated by statute, and further imposes additional restrictions on the scope of any future statutes so as to rule out any abridgement of the particular right/freedom as constitutionally envisioned.

Not only is this a construct quite different from our concisely and broadly-framed U.S. Bill of Rights, but it is typically the approach taken by most post-communist constitutions, reflecting not only the more recent European constitutional approach, but more importantly, the premise that placing a tight leash on the legislative branch “offers a superior protection to citizens’ rights,”. In addition to freedom/right-specific instructions, the Constitution articulates a deliberate attempt at supervision by including a “catch-all provision”, commonly known as an “essence” clause, to further preclude the legislature from stripping away via statute the innermost nature of any freedom or right”.

It is within this systemic dynamic of tension and distrust that the four enumerated information-related freedoms/rights of the Constitution must be examined and assessed; each requires at least cursory mention as to its role in overall FOI attainments in Poland.

- The first provides each person with a right of access to official documents about himself.
- The second is more closely analogous to our “freedom of speech”, but also includes to right to gather information: The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone.
- The third, laid down in Article 61, is more closely analogous to a U.S. understanding of FOI, and provides in pertinent part that: A citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions.
- The fourth and last relates to information about the environment, and is not uniformly regarded by Polish scholars as a true FOI provision.

(a) How the Article 61 constitutional “right to information” was to be put into law.

The Polish Constitution permits the legislature to place some limitations on the Article 61 “right to information” by statute but “solely to protect freedoms and rights of other persons and economic subjects, public order, security or important economic interests of the State”.

Lastly, the Constitution directs that the “procedure”, (i.e., the actual FOI processes that both citizens and public entities from whom the information is sought would need to follow) is also to be by “statute”, except that as regards the legislature, the latter would enact its “own rules of procedure” in each house.

(b) Scope of Article 61 constitutional “right to information” protection

Setting aside some differences in approach to constitutional analysis between “civil law” systems such as in Poland “common law” jurisdictions such as the U.S. , it is possible to discern from the writings of Polish legal scholars how they understood and interpreted this new constitutional “right to public information” as it stood on its own, i.e., what it actually comprised before being transmuted into a “statute”.

Leading scholars describe the Polish constitutional guarantee of the Article 61 right to information as a strong reinforcement of an individual’s right to obtain information from and about his government, while at the same time precluding the government from ignoring requests for information and unilaterally or arbitrarily determining what information to disclose without violating the individual’s rights . More importantly, all of the Constitution’s rights and freedoms have direct applicability and govern even in the absence of legislative action. Taken in conjunction with the right to free expression and the right to gather information provided in Art. 54 of the Constitution, the right to information of Article 61 is viewed as a closely intertwined and indispensable element of democratic government. Whether analyzed as a right or a freedom, the concept of “freedom of information” in Article 61 builds on the duty of the state to not interfere with such right and in addition creates an affirmative obligation on the part of the state to create the conditions necessary to provide access to public information.

Also discussed by Polish commentators is the scope of Article 61’s prohibition that the legislature not place any limitations on the right of access other than in those five areas specifically allowed by Article 61 itself. Some experts opine that any of the permissible limitations on the right to information must be carefully formulated and should neither be static nor inflexible; rather they should be weighed and balanced within the context of the societal importance and purpose of the subject-matter about which information is sought. Others

express what we could call a “strict constructionist” view, and have opined that the right to information was not intended to be limited for any purpose other than was specifically enumerated, which would thus exclude the legislature from imposing any limitations on the right to information that is not strictly within the five named areas. There appears to be general agreement that the constitutional right to information is intended to serve as the means for citizens to judge how the government governs, how public servants perform their duties, and that this assessment would enable citizens to cast their ballots accordingly during elections.

(c) The adoption of the Law on Access to Public Information in 2001

Some four years elapsed from the adoption of the Constitution before the legislature adopted the “statute” that was to implement the guarantees provided in Article 61. At long last, agreement was reached on the contents of a statute which purported to fulfill the constitutional mandate of Article 61, and which became the Law on Access to Public Information of 6 September 2001, or “AAPI”.

After tortuous negotiations during which several consecutive, if not competing, groups of drafters presented recommendations to the legislators, the final version of the APPI came into being. During this four-year gap, other new laws were adopted, including one closely related to lustration, (the IPN Act of 1998) while various existing statutes, including the lustration law, were amended. The constitutional guarantee of the Article 61 “right to information” of course applied to such laws. Scholars note that the notion of public disclosure was not always well received by entities now subject to it in those new laws and the overall status was that despite Poland’s “many regulations on free access...they [did] not guarantee full access.” Still lacking was the definitive “FOI” statute, and hopes for its envisioned role in shining light into dark corners heretofore hidden from scrutiny by statutory “secrets” were still high.

Many legal experts tracked the permutations of the draft APPI as it progressed through the law-making process. Some expressed bitter disappointment with the final version and were quick to point out that, in essence, that the APPI is less of a “freedom-of-information” law than a technical norm that falls short of governing the full range of access provided by Article 61. What the APPI failed to do from the outset was to establish that access to information, as prescribed by the APPI, would in due course have “seniority”, if not exclusivity, as to the scope of information that the public is allowed to access vis a vis other statutes that contain different or distinct rights of access in their subject area.

The net result is that the APPI takes away with one hand what it purports to have given with the other. The first clause of the APPI on its face appears to be sweeping and comprehensive, and states that “[I]nformation on public affairs constitutes public information pursuant to this law and is subject to access on principles and by procedure set down by this law”. (The black hole ensuing from the “tautology” of this definition is discussed below).

So, having established that all information on public affairs comprises public information, the very next clause of the APPI, however, goes on to rein in that sweep by making it clear that the APPI actually defers to any other laws that take a different tack as to disclosing information: “Provisions of this law [the APPI] do not infringe provisions of other laws setting down other principles and procedures for access to information constituting public information.”

In other words, the AAPI was scrupulously drafted so as not to collide with any other legislative enactments that themselves exempt certain classes of records from public scrutiny. Polish experts conversant with the AAPI advised me that there are likely over one hundred laws now on the books which operate to effectively restrict public access.

This lacuna continues to elicit discussion in scholarly writings as do a number of the perceived shortcomings and problem areas of the APPI, which are addressed below.

(c) Everything is secret, unless it's not. Under the APPI, secrecy often trumps openness.

Polish commentators note that, among the 100 plus statutes standing alongside the APPI, there are at least some 43 categories of information statutorily defined as "secret" which operate to cut off public access to entire sectors of information. Many of these secrets have direct analogies in American and other FOI countries because state defense and security data is unfailingly sought to be protected. However, in the case of the APPI, as noted above, virtually every other statute on the books that protects information from public disclosure operates to take precedence over the APPI, with clearly anomalous results in some cases.

It should be noted that one of the vital areas in which the APPI is proving effective, with the active assistance of the Constitutional Tribunal, is establishing the importance of the right to information about the activities of persons performing public functions vis a vis the privacy rights of such persons. Less easy to access, however, is information about personal services providers who are not public employees; thus it remains problematic to ascertain the identity of persons hired on a contractual basis by the state, to perform services for the state, who utilize state resources, and who are paid with state funds, and whose work does not involve real issues of state security.

The question of whether the performance of such services, say, for example, "historians" who may be retained to review the IPN dossiers and extrapolate factual information from them, could be viewed as performing a public service is thus apparently not reached, because the laws protecting the individual privacy of the historians trigger a prohibition on disclosure. The historians are in theory able to waive to some degree their privacy rights, but access to the terms and conditions of the contract, such as compensation, could still be precluded under the privacy statutes and/or the "entrepreneur's secret" exclusion.

Left undefined by the APPI, the "entrepreneur's secret" in other contexts of Polish law is roughly analogous to "trade secrets" protection granted by U.S. law and other countries to ensure fair competition. Within the Polish APPI context, however, it apparently suffices for a contractor to indicate that information concerning the contract is confidential to make it binding on the state.

In my research, I encountered anecdotal evidence that state employees actually suggest to private contractors and vendors that the latter invoke the "entrepreneur's secret" clause at the time of entering into a contract with the government, because assertion of the existence of this "secret" becomes dispositive as to whether information in it is disclosable "public information". It seems to simply become non-disclosable; with the result that the accessibility to the public of information about the contract is, at least in the first instance, at the discretion of the contractor. Without in any way diminishing the concept of an individual's right to privacy, or the notion that protecting "trade secrets" deters unfair competition, at issue here are simply the identities of persons performing services for the state and what the state is paying and getting in return. Polish jurisprudence has clearly articulated the notion that a person who seeks public office must take into account the obligation to disclose some aspects of their lives; it is troublesome that it stops short of government contractors

(d) Lustration & related laws from the vantage point of the constitutional right to information under Article 61

The raison d'être of the lustration laws is the perceived urgency to disqualify former communists from holding (an exponentially increasing list of) jobs and positions, including university professors, secondary school principals and certain newspaper publishers, and editors. While fully acknowledging the access to information required by the Constitution, the lustration laws have until now failed to provide any viable public access or independent public review of the contents. As most recently amended, the lustration statute contemplates some increased but still tightly controlled public access in the future. Is the step by step progression of legislative amendments providing for an ever-widening sweep of lustration congruent with a desirable model of a participatory democracy?

It is abundantly clear from COE Resolution 1096 and Guidelines that lustration was intended as a transitional process to address any imminent threat that former human-rights violators be able to "block the democratization process." The Guidelines, perhaps over-optimistically, envision that lustration processes would be completed before 2000 "because the new democratic system should be consolidated by that time in all former communist totalitarian countries". The leitmotif of both the Guidelines and the COE's Resolution is expeditious action against those, and only those, whose public position enables them to potentially wreak future havoc with human rights and the progress of the rule of law.

As regards open public access to the dossiers, the Resolution provides as follows: The Assembly welcomes the opening of secret service files for public examination in some former communist totalitarian countries. It advises all countries concerned to enable the persons affected to examine, upon their request, the files kept on them by the former secret services. In Poland, however, the legislature took a diametrically opposite approach. A provision of the IPN Act whereby the IPN barred individuals from access to the dossiers unless they had first established their bona fides as "grieved persons", i.e., victims of communist repression rather than its agents or collaborators, was held unconstitutional by the Polish Constitutional Tribunal in 2003.

To date, the Constitutional Tribunal of Poland, while admittedly according the lustration laws "a separate place", has generally upheld the validity of the lustration process, although it is able to rule only piecemeal on the specific statutory provisions that are brought before it. In late 2003 (while the Kwaśniewski government was still power), the legislature enacted a provision that effectively narrowed the type of communist-era activities that public officials had to disclose. The Court found it in contravention of Article 61.1 because the public would be deprived of its right to information about what those officials did prior to 1989.

(e) Even if it's not secret, you can't get it. The IPN's letter of August 29, 2006.

Another pertinent portion of the letter addressed to me from the IPN reads as follows: Information obtained for scientific purposes and journalistic purposes based on documents of the IPN may not be used for other purposes or transmitted to other institutions, and similarly are not public information within the meaning of the APPI.

The argument can and should be made that the processes of how this massive collection of files and dossiers, amassed by and for the Polish ancien regime, is actually being put to use by the public servants now in power beg for greater transparency. The President of the IPN has the discretion, for example, to approve access to the files to a separate category of persons "for the purpose of carrying out scientific research". The inner workings of those public servants who are busily engaged in "cleansing" the ranks have far-reaching consequences, such as the IPN's plan to "make public all of its archive material related to people who collaborated with communist-era security services, except for so-called sensitive information related to morals in personal life." But the very exercise of discretion by the officials as they rummage through mountains of boxes to select and to determine what is "sensitive" and what relates to "morals" in

my view falls short of the Article 61 guarantee that “A citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions (emphasis added), all the more so if any portions of this work are being handled by private contractors.

It is to be hoped that, in the course of time, enhanced application of European and international human rights standards will resolve this issue. In its most recent report, Freedom House has unequivocally found that “the illegal and traumatic hunt for communist-era agents” is a new challenge to the rule of democracy”. The Helsinki Foundation in Poland has also expressed reservations as to whether elements of the Lustration law as it is presently constituted are in conformity with human rights and rule of law standards.

As regards open public access to the Polish secret police files now held by the IPN, there have been repeated calls by opinion leaders to simply throw the files and dossiers open and let everyone judge for themselves what they do or do not comprise. On the other hand, none of the Polish legal experts I consulted specifically endorsed untrammelled public access to the dossiers.

The full spectrum of excesses and abuses perpetrated by the communist regime as regards illicit information-gathering can only be grasped by directing bright “sunshine” at the records of that era. It is the very existence of these dossiers, i.e., the very accumulation of these hundreds of thousands of documents, as representing a tangible emanation of totalitarianism that citizens of a new democracy need to see. There is never likely to be a more cogent embodiment than these archives of the Polish Constitution’s affirmation that its citizens remain “[m]indful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland.”

3. “Freedom of expression”? Journalistic Information-gathering and reporting.

With the American public as the ultimate beneficiary, the U.S. press is an energetic user of federal and state freedom of information laws, and has often led the charge in expanding the jurisprudential fabric of open government. Well prior to, and to an extent irrespective of, the enactment of FOI laws, the American press pioneered our own grasp of the extent and application of First Amendment freedom of speech. By contrast, in Poland a truly free press is at best, a still-evolving phenomenon. As noted above, the Constitution of 1997 protects free speech as well as guarantees the right to gather and disseminate information (Article 54). How is it, therefore, that the U.S. State Department, in its human rights report issued in early 2006, identified a number of actual “restrictions on freedom of speech and of the press”?

One reporter from prominent national news daily, whom I met with explained, as did legal scholars, that the perils faced by Polish journalists arise less in connection with the information-gathering processes (discussed below), but rather with the publication and dissemination of information. Particular anxiety arises under several provisions of the Polish Penal Code, in particular Section 212 which provides for fines and prison time for defamation or “debasement” of other persons, groups of people or organizations. If the “debasement” act occurs via “means of mass communication”, such as is a daily paper, the potential prison time applicable to the perpetrator actually doubles from one year to two. The chilling effect of such provisions can safely be presumed, especially since there are other provisions of the penal code applicable to journalists. “Criminal prosecutions in defamation cases continue to be a serious problem in 2005” according to the report submitted to the E.U. Network of Independent Experts on Human Rights. Also lurking in the Penal Code is the prospect of up to 3 years imprisonment for “whoever insults the Nation or the Republic of Poland in Public or the President and, in descending degrees of penalty, lesser officials, although the most recent Freedom House report notes that these have not of late been invoked against journalists. The International Press Institute, however, underscores that Jerzy Urban, publisher of the *Nie* weekly magazine,

was fined in 2005 for insulting Pope John Paul II, under the statute that criminalizes insults aimed at foreign heads of state.

Newspaper owners have also been sued for enormous amounts of cash in civil law suits by infuriated politicians making use of a provision of the Polish Civil Code (Article 24) that protects an individual's assets, including his or her good name, from unlawful "violation", or libel, in journalist's reports. That the Polish appellate court ultimately interpreted Article 24 as exonerating reporters who have demonstrably taken pains to be accurate in their stories is not likely to tip the future editorial balance in favor of running risky articles.

Within the FOI context, the most perilous legal minefield for journalists writing about public officials (as distinguished from public figures, such as celebrities) lurks in the "Press Law of 1984", obviously originating in the communist era, although it has been amended post-1989. It means that although reporters have rights to obtain public information under the APPI, the right to widely publish the information so obtained about public officials, as opposed to persons performing public functions, lands the journalist in a prickly and sticky wicket of conflicting laws and their respectively inconsistent definitions. It is literally impossible to point to a coherent operative concept of who is a public official and who is performing public business. Again, the inaction, perhaps deliberate, of the legislative branch in ensuring workable clarity in the vital area of media coverage of public officials, not to mention the legislative duty of ensuring "legal certainty", falls short of constitutional goals.

The "Press Law" itself defines and regulates various other aspects of journalistic activities and imposes certain "fair reporting" obligations on journalists that may effectively abridge the constitutional right of free speech discussed above. Rounding out this dismal picture is that, as noted above, certain editors and publishers are subject to lustration.

The Press Freedom Monitoring Centre (CMWP), as one example of in-country journalistic activism, is acutely aware of the minefields they tread, and provides roadmaps and guidance from legal experts. The Centre also adopts position papers on relevant issues and lodges objections with the authorities on an ongoing basis.

4. The Law on Access to Public Information of 2001 – Additional Observations

As noted above, Poland included a "right to information" on environmental matters in Article 74 (3) of the Constitution, demonstrating its steady moving towards the *acquis communautaire* of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which Poland signed in 1998.

The Polish FOI statute, the AAPI implementing Article 61 of the Constitution, may also be best understood as one of the requisite types of legal measures that Poland needed to put in place as a tangible milestone on the road to democracy for the very specific purpose of meeting general EU standards of transparency and accountability prior to formal accession. Not coincidentally, the AAPI was adopted in Poland literally on the heels of the EU's "Regulation regarding public access to European Parliament, Council and Commission documents" which ushered in FOI-type public access to documents held by EU institutions.

Although Polish scholars generally tread prudently on the question of whether the APPI in fact lives up to its full constitutional obligations as an adequate vehicle for Article 61, others have been vocal about its inconsistencies with the Constitution and its susceptibility to serving as an obstacle to access rather than a gateway. Most commentators point to the tautology of the definition of "public information", and the fact that the APPI's definition may not in fact be reflective of the constitutional provisions, and above all, the myriad interpretative problems it has caused. There seems to be agreement that its very adoption was viewed as an end in itself

without undue worries as to its ultimate viability. Others imply that perhaps in view of the impenetrability of the APPI it might have been better to go without altogether and rely on the direct application of Article 61. The coexistence of multiple other statutes affecting public access to information further complicates matters.

Appealing a denial of access to information requires fortitude and not inconsiderable expertise in negotiating the bureaucracy to obtain the denial in a written format sufficient to meet the byzantine hurdles of the APPI; denials based on “privacy” trigger one set of requirements, other denials require other roads. The procedural paths for obtaining judicial review by information seekers of APPI requests that have failed to result in disclosure of information, are murky at best, and further complicated because the forum for judicial review turns less on the subject matter of the request than the way it is responded to (or not responded to) by the governmental entity it was submitted to, and in turn that drives whether the matter then goes before a regional “administrative” court rather than a “court of law”.

(a) The Virtual Bulletin (“BIP”)

The most ambitious undertaking of the AAPI is its creation of a virtual “bulletin of public information”, bearing the Polish acronym of BIP, designed to serve as an electronic reading room where nearly all “public” information, other than information emanating from the legislature is, in theory at least, promptly published online according to an elaborate scheme of numerous and detailed standards. Governmental entities were directed by the Minister of the Interior to establish and maintain BIP-compliant web pages under the authority delegated to him by the AAPI (As of this writing the number of visitors is some 5.7 million).

Information appearing in the BIP is then deemed to have been made accessible to the public. In other words, where a requester seeks information that has already appeared in the BIP, he is deemed to be asking for information already provided and as a practical matter is relegated to downloading or printing that information from the appropriate BIP site. As regards information that has consciously withheld from being made accessible via the BIP it is, in theory, to be identified on the BIP along with instructions on how to request access. Numerous other requirements, primarily technical, kick in as regards the publication of information on the BIP. In brief, the BIP is perhaps still unwieldy, but represents a well-intentioned attempt to impose openness and uniformity on a vast cross-section of governmental entities.

(b) The Commissioner for Civil Rights

In their waning years in power and sensing that real reform could at best be forestalled, the Polish communist authorities agreed to the creation of several Western-style institutions, including an ombudsman-type post known who was nominally vested with authority to ensure civil rights; to their surprise, the ombudsman’s office soon became a highly respected institution to which thousands of people voiced their complaints, and went on to play an important role during the transitional years preceding the adoption of the Constitution of 1997. So much so that the office of Commissioner for Civil Rights became formally enshrined in the new constitution wherein the Commissioner’s role is to “safeguard the freedoms and rights of persons and citizens specified in the Constitution and other normative acts” and vests the office with very broad authority of independent inspection and intervention. The Commissioner’s watchdog powers are sui generis and not directly comparable to any other created in the Constitution.

Access to information is but one of the multiple areas that the Commissioner is tasked with, and he has played an active part in shaping public as well as judicial awareness of the scope of the various constitutional rights to information (see recommendations for further research

below). His comprehensive web site includes plain language and Q & A concerning public accessibility.

Constitutionally-mandated annual reports serve to provide a running account of initiatives undertaken in connection with, among others, FOI issues including intervention in ongoing judicial proceedings, as well measures taken to ensure that local governmental organizations comply with the duty to disclose information.

While expressing support for the purposes of the Lustration law, the recently-appointed Commissioner has noted that “concern for the rights of collaboration suspects should not infringe on freedom of speech or the right to information.” Just recently, the Commissioner has taken the stance that Art. 37 of the Lustration Law, which imposes imprisonment of up to 3 years on “anyone who publicly imputes to the Polish Nation any participation in, organization of, or responsibility for communist or Nazi crimes” (author’s own translation) , may be violative of the free speech provisions of the Polish Constitution of 1997.

(c) The AAPI – Real-life obstacles to implementation and compliance.

Compliance by the governmental entities who are supposed to disclose information has proven spotty at best. Think-tanks and NGO’s in Poland are highly active, highly vocal, and perform regular assessments of various access-to-justice and transparency-related criteria. There are web sites specializing in covering information and internet developments. Polish journalists regularly avail themselves of the access provisions of AAPI; the CMWP is instrumental in publicizing the stumbling blocks they commonly run into. A comprehensive survey and assessment of FOI realities was released by TI – Poland on December 14, 2006 and received press coverage.

Among the common themes that emerge are the following:

- General lack of public awareness of the existence of, or means to, exercise the right to public information, due in large part to the opacity of the law for the average person.
- A pervasive “culture of secrecy”.
- “Inaction”, or failure on the part of government entities to respond to, and oftentimes even to acknowledge, properly formulated requests for access to information bedevils the effectiveness of the AAPI ; in large part this is because the AAPI “does not provide any clear instrument for combating inaction”. Although certain Polish courts have taken cognizance of legal complaints seeking redress for inaction, even prominent judges point to the existence of as many as four differing judicial views of their admissibility.
- Improper invocation of “privacy” rights of individuals as a basis for denying access to information that is unquestionably “public” is rampant and is likely the most-frequently mis-invoked and misapplied exemption. Senior legal staff of the Commissioner for Civil Rights openly state that that not only does the over-reliance on a third party’s ostensible privacy rise to the level of abuse, but often serves to shield deviations from scrutiny.
- Requests for information are also frequently denied on the grounds that the information sought contains “entrepreneur secrets”, which are specifically exempted from disclosure by the AAPI . There exists a direct analogy to various U.S. federal and state FOI laws that seek to protect the legitimate “trade secrets” of those who bid on government work or contracts, so as to

prevent unjust enrichment of competitors who could otherwise misappropriate proprietary commercial information. The Polish AAPI, however, provides no real control mechanism against which a claim of commercial secrecy can be tested short of expensive and time-consuming litigation, and it is not unusual for governmental agencies to do an end-run around disclosure requirements by “suggesting” to government contractors that the latter “declare” most elements of a transaction to comprise commercial secrets, thus ensuring in advance that requests for information will be denied.

(d) Principal APPI users to date.

Perhaps not surprisingly, there is less uniformity of purpose among those in Poland who avail themselves of the AAPI than FOI users in the U.S. From an overall standpoint, the public access mechanisms provided by the AAPI have been perceived and utilized by activists, and civic groups, and public interest advocates as but one of the arrows in their quiver, to be deployed in the seemingly never-ending struggle to expose governmental corruption. Non-governmental groups that monitor compliance with the AAPI, such as TI - Poland, (and is a participant of a larger Anti-Corruption Coalition of Non-Governmental Organizations) also are active in “mapping” and exposing pockets and methods of corruption; tracking the actual beneficiaries of vast quantities of EU structural funds; identifying gaps in the integrity of public procurement processes and the provision of health care, and avail themselves of the AAPI as part of a larger canvas.

Increasingly, however, FOI is being seen as a stand-alone mechanism. As of early 2006, TI's Center for the Promotion of Public Information represents a significant awareness outreach that includes educating the private sector about the availability and uses of FOI. Downloadable, online handbooks, prepared by lawyers, contain flow charts and detailed instructions, along with templates, are geared at enabling members of the general public to file their own requests and pursuing internal appeals.

5. Poland's FOI/ Access to Information Viewed through the Prism of Independent Model Standards

The exercise that follows below attempts to apply to Poland's FOI sector the criteria developed by the Open Society Justice Initiative for measuring FOI efficacy.

1. “Principle of Openness’. All information held by public bodies shall be publicly available unless subject to a legitimate exemption, as clearly defined in law, and subject to tests of democratic necessity and the priority of the public interest.”

The Polish AAPI, rather than granting a presumption of public access to all information held by a governmental entity, predefines what comprises “public information”. The AAPI's attempts to specify and illustrate in exhaustive detail the many types of information that are deemed to comprise “public information”, to some extent stands the “openness principle” on its head. However, Polish legal scholars on the whole have advocated a broad reading of the concept, and the Polish courts have largely followed suit, articulating a jurisprudential approach that has repeatedly resulted in an expansive, rather than restricted, interpretation of the term “public information”.

Another potential deviation from the model arises in that that while the AAPI provides the right to inspect all “official documents”, it strictly limits what documents are in fact “official” by defining officials documents as only those that comprise the “signed contents of the declaration of will or knowledge, recorded and signed in any form by a public functionary pursuant to provisions of the Penal Code, within the scope of his authority, directed to another entity or filed in case files.”

2. “All bodies performing public functions should be obliged to respond to Information requests.”

The “unitary” nature of the Polish Constitution of 1997 means that the AAPI and other laws governing public access to government records apply across the board to national, regional, municipal and local governmental entities. One example of the AAPI being perceived as “going above and beyond” the actual constitutional requirement of Art. 61 is the inclusion of trade unions and political parties in the scope of entities required to provide access to information (Art 4.2).

3. “Anyone may request information without having to specify grounds.”

The Polish AAPI meets this standard because it prohibits any requester from being asked to demonstrate any legal or factual reasons underlying the request for access.

4. “There shall be no discrimination in the provision of information.”

The newly-released TI Poland report indicates that the more rural the location of requester/provider, the greater the lack of understanding of what compliance with the law entails.

5. “Information shall be provided in a timely fashion.”

On its face, the AAPI lays down reasonable time periods for governmental entities to provide requested information that are not inconsistent with prevailing practices elsewhere. However, the results of the surveys conducted on this question, particularly the TI Poland report, are that that deadlines are more often honored in the breach or totally disregarded altogether.

6. “Requests can be made either orally or in writing.”

The AAPI specifically provides that “public information which may be accessed immediately shall be accessed in oral or written form without written application” , meaning that oral requests are acceptable if they involve a minimal response time on the part of the provider. This is arguably a reasonable limitation that ensures that any oral request which legitimately cannot be responded to on the spot, so to speak, be recorded in writing to preclude misunderstanding on the part of the state employee receiving or handling the request for access to information.

7. “Access shall be to information rather than to documents. Recent (‘Second Generation’) access to information laws generally refer to information rather than documents. “

The AAPI specifically allows requesters to seek access to information “processed in the scope in which it is particularly significant for the public interest, evincing a clear legislative intent to provide access to some such “second generation information” which, in theory, allows the requester to seek information that is aggregated rather than the records containing them. This means that government agencies can legitimately be asked to create essentially new information by summarizing or extrapolating or otherwise make compilations or perform calculations but only, if the result is, in the opinion of the agency, in furtherance of the nebulous concept of public interest. In actuality, not only does the existence of this alternate route cause confusion, it likely results in denials of requests that, worded differently, might result in the disclosure of documents.

For example, a requester seeking to ascertain the total amount of money expended by an agency on photocopying paper would likely run into a denial if the answer to the request requires a government employee identify, locate, and put together unbundled information from various sources unless the request were to be perceived as significant for the public interest.

Some commentators interpret the “processing” option as referring to those requests for information that require the employee processing the request to exercise some degree of judgment; others point to the existence of the provision as an invitation to arbitrary abuse. By contrast, the AAPI leaves the agency little room to deny access to records that comprise actual, authorized and signed purchase orders or receipts.

There is anecdotal research that university students and other academic researchers not infrequently seek a shortcut to carrying out their own analyses or syntheses and instead invoke a pressing public interest for the task to be performed by a state entity. Commentators note the frustrating absence of any definition of what was meant by “processed” information and the lack of standards for determining what is or is not in the public interest.

8. “Information shall be provided in the format specified by the requestor wherever possible”. As noted above, the AAPI attempts, via the virtual BIP process, to maximize disclosure of that information which has been found to be public. The AAPI also provides a mechanism for requesting access to information via written application and mandates that whenever possible the information is to be provided in the format specified by the requester. However, the AAPI also permits governmental organs to meet the information disclosure requirements “by presentation or posting in generally accessible places”, which is potentially problematic under this standard if a public posting on a building in Gdańsk were to result in a denial of a request for the same information in Kraków.

9. “Requests filed with an inappropriate institution shall be transferred or referred to the correct body, wherever this is known.”

The AAPI does not contemplate or provide for any internal transfers or referrals in the event a request is submitted to the wrong entity. The law’s stated processes for denial of a request operate to leave it to the discretion of the responding entity to indicate, or not, that another agency may have the information sought.

10. “The cost of access to information to the requestor should be limited to the supply costs and should in no instance be so high as to prove an obstacle to access.”

Although access is in theory free of charge, the AAPI does allow charging additional costs if any are incurred, especially when the information is requested in a “processed” format, and this has, on occasion, apparently resulted in such arbitrary imposition of high fees that it is tantamount to discouraging pursuit of access to the information.”

11. “Refusals to provide information must be grounded in law and must be made within the time frames specified by law.”

Although the AAPI does not lack for provisions that lay down deadlines for responding to requests and for processing requests for reconsideration in the event of a denial, what the Justice Initiative refers to as “mute refusals” and what in Polish law, as mentioned above, is known as “inaction” remain major hurdles, as does timely compliance where requests are substantively responded to.

12. “If exemptions apply, then there shall be partial access to relevant documents.”

Because, as explained above, the Polish APPI is structured around a broad but pre-defined of what information is “public”, it renders the analytical construct of this standard largely inapposite and serves well to highlight the shortcomings of the Polish approach. Firstly, the APPI primarily provides access to “information” rather than access to records or documents, and, as noted above, only to such information as is not otherwise excluded by the existence of some other

law, to which by virtue of its own provisions, the AAPI must defer. Secondly, it covers only to such information as meets its internal definition of comprising “public” information. The next hurdle is ascertaining whether such public information is not exempt from disclosure under one of the exemptions listed in the APPI (entrepreneur secrets, privacy). Accordingly, if a request were for public information that is not exempt that happens to be located within the four corners of a hypothetical document that further, hypothetically (for purposes of this example) contains non-public information, as well as information that may be public but is exempt from disclosure, the Polish APPI would permit the extraction and disclosure of the portion that is deemed to be “public information” and in itself would be considered as full, rather than partial access.

13. “There shall be a duty to assist requestors. FOI laws often provide for a duty to assist requestors.” & 14. “An office or officer shall be designated to handle requests for information.”

Neither of the foregoing standards is currently met by the AAPI. The statute currently does not even require the designation of a standard post office address for governmental organs to handle requests for access to information. Presumably, however, most entities are locatable via the BIP, and the BIP regulations require the designation of a personal responsible for BIP compliance.

15. “Every public body should publish certain routine information on a regular basis even absent any information requests.”

The AAPI’s provisions establishing the BIP process, discussed above, require each covered entity and to post and update a substantial amount of information on a routine basis irrespective of any requests for access.

Preliminary Conclusions

The AAPI comprises a functional FOI mechanism unfortunately held back by its own internal deficiencies, inconsistencies, as well as the legislatively-imposed restricted scope of its application, especially as regards the myriad of instances where as a matter of law, secrecy trumps open access.

What is so strikingly different about the Polish approach is the lack of any presumption of accessibility that characterizes our approach to FOI, meaning that in the US, governmental information is presumed to be fully disclosable unless it is specifically exempted. In Poland, there appears to be a presumption of inaccessibility compounded by a maze of laws that are unfathomable to the average person seeking information.

But this contrast may be related less to the country scrutinized during this project, or to its peculiar post-communist transition, than to it being, quite simply, more reflective of the overall European stance. The eminent jurist and former member of Poland’s Constitutional Tribunal, M. Safjan recently observed, in a not-unrelated context that

[O]n the one hand, the Anglo-Saxon (American) approach that – in respect to public figures – gives clear priority to the values connected with the right to information and freedom of speech over the right to privacy, on the other hand the continental legal approach that seems to balance the contrasting values in a more temperate manner.

That in no way detracts from my conclusion that by its very existence, the APPI in Poland is fostering inroads in the area of public awareness of rights of access to information. There are

positive developments in other areas, such as the enactment of a new Lobbying Act and new provisions for public hearings.

There is much interest in these issues on the part of legal scholars, NGO's and journalists and developments are followed carefully, and processes of objective assessment of how access to information actually takes place, as well as more purely scholarly debates are evident. There does appear to be general agreement among scholars, experts and NGO's in Poland that various provisions of the AAPI require amendment and reinforcement but not all are in agreement as to what should be modified and how. Most frequently underscored are: clarification of what comprises "public information"; adding a presumption of accessibility; and sorting out the hosts of statutorily-defined secrets and the procedures governing them.

Existing and future EU directives, including those that define the proper conduct of public servants in performing their assigned duties, will continue to impact how Poland implements and applies information standards, and in due course, should the Council of Europe adopt a convention that is binding, in whole or in part, on Member States, it may impel a major retooling of current thought and practices in Poland.

Recommendations

American FOI jurisprudence, on both federal and state levels, has been tempered and tested for nearly three decades. In contrast, FOI in Poland is still a relatively recent phenomenon and very much on a learning curve as measured both by international and U.S. standards. Of the specific elements in the still-developing Polish FOI paradigm that are demonstrably deficient, some require relatively uncomplicated adjustment. There are a number of "fixes" in the U.S. experience that could easily be adapted to Poland, and an apparent willingness on the part of Poles to consider such solutions. Such initiatives should be fostered and funded.

Suggestions for future research:

- Further developments in the lustration processes in the post-communist countries in general within the context of current international human rights standards.
- The role, in Poland, of the Commissioner for Civil Rights in the lustration processes and his counter-parts, if any, in other post-communist countries.
- The role, in Poland, of the Commissioner for Civil Rights in shaping judicial understanding of rights and freedoms in the Polish Constitution and compare with his counterparts in other post-communist countries..
- Future activities of the Council of Europe on Access to Information.
- The judiciary's role in shaping access to information is key, and warrants closer study.
- The impact of the recent ruling in *Chile v. Reyes* on the right of access to information in the Organization for American States (OAS).

Recommendations for the US policy community:

- Consider establishing an IREX presence in Poland.
- Include status of "freedom of information" and transparency in country and other reports done for US government and compile developments annually.
- Keep abreast of rule of law developments in countries such as Poland, the Czech Republic, Slovakia, etc. by performing periodic, rigorous, "vertical slice" analyses of present-day realities by appropriate specialists.
- Tap IARO alumni for nominations/recommendations of outstanding scholars and activists in host country who demonstrate cooperation and support of IREX activities; ascertain whether a

visit to the US hosted by an affiliated organization would further their activities in their home countries, and assist in arranging such visit, and publication of their reports thereafter.