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*Access to files in criminal proceedings in Poland*

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The current legal status of access to files for the parties and the defense counsels in Poland sets more than satisfactory standard from the right for the fair trial and a right of defense standpoint. Such satisfactory standards had been introduced due to the recent developments, and only few years back the guarantees of access to files had been completely different and the position of the accused and his defense counsel much more difficult. Current, satisfactory status of the parties and defense counsels had been introduced as a results of two factors: jurisprudence of the Polish Constitutional Tribunal, that challenged previous legislation on the subject matter and big criminal procedure reform that had been entered into force on July the 1<sup>st</sup> 2015<sup>1</sup>. The reform introduced completely new philosophy of criminal proceedings, that changed the proceedings model from inquisitorial (with a significant evidence initiative of the judge) to contradictory (where judge has no evidence initiative and all the evidence is presented by the parties and the judges role is to issue the verdict. The other significant change that had been introduced with the Reform is much greater role of consensual methods of concluding the proceedings (plea bargain). This fundamental changes in the philosophy of the proceedings had been taken into account in the provisions of law related to access to files.

***Access to files in the judicial proceedings***

In judicial proceedings parties, defense counsels, attorneys and legal representatives are granted access to the files of a court case and given the possibility of making copies thereof. Upon the consent of the president of the court, access to court files may also be granted to other persons. (Article 156 § 1 of the Code of Criminal Procedure). Aforementioned provisions seem clear, but they show how accessible the files are. The defense counsels need no explanation, but the parties include not only the accused, but the victim as well. Legal representatives mean for example parents of the minor, who is the victim of the crime. Provision that grants other persons' access to gives upon the consent of the president of the court is important for example for the press. But not only press would benefit from that provision. It can be used by the defense counsel to grant access to files of another case, where his or her client is not a party to, but witnesses give testimony relevant to the client's case.

Article 156 §1a constitutes very important provision due to the aforementioned Reform. It states that § 1a. In the course of judicial proceedings, the individuals specified in § 1 are granted, on their request, access to the files of preparatory proceedings, to the extent to which these files have not been handed over to the court, also with the purpose of recording them in the electronic form. After the Reform, introducing contradictory proceedings, the public prosecutor is no longer obliged to send to court all the files and evidence that had

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<sup>1</sup> Law of the September 27th 2013 on amending Code of criminal proceedings and other legislation (Journal of laws No 1247)

been collected during preparatory proceedings. The prosecution hands over the files in that scope only, that is relevant for proving the guilt. It is up to the defense counsel to decide whether to use some additional material that had been completed during preparatory proceedings in the judicial proceedings. The aforementioned provision on access to files is crucial from the right to a fair trial standpoint.

### ***Photocopies***

At the request of the accused or his defense counsel, paid for photocopies of case file documents can be obtained. Paid for photocopies may also be issued, upon request, to other parties, attorneys and legal representatives. An order concerning the request may also be issued by a court referendary. Photocopies made by the parties themselves are free of charge.

In the case of a justified need, the president of the court or a court referendary may order the issuance of paid for certified copies of case files.

### ***Classified information***

In case of the danger of secret information classified as "confidential" or "strictly confidential" being disclosed, the files may be reviewed and certified copies and photocopies made only in accordance with the restrictions imposed by the president of the court or by the court itself. Certified copies or photocopies may not be issued unless the law provides otherwise. The most common examples of classified information and classified files in the criminal proceedings all evidence gathered during operational activities by the Police, e.g. electronic surveillance (telephone tapping), so called Police provocations, and the work of undercover agents.

### ***Access to files in preparatory proceedings***

In the course of preparatory proceedings, the access to files is more limited, but still it should be regarded as pretty free. The correct course of the proceedings and important State interest limit the access to files in preparatory proceedings. Article 156 § 5 of the Code of criminal proceedings states that If there is no need for ensuring the correct course of proceedings or protecting an important state interest - in the course of preparatory proceedings - parties, defense counsels, attorneys and legal representatives are allowed to review case files, make certified copies or photocopies or may obtain certified copies or photocopies of case files; this right is also vested in the parties after the conclusion of preparatory proceedings. The agency conducting preparatory proceedings rules with respect to granting access to case files, making certified copies and photocopies by issuing orders. In exceptional cases, with the consent of the public prosecutor, access to the files of preparatory proceedings may be granted to other persons.

The limitations do not apply to the access to files that contain evidence on which the motion for detention in preparatory proceedings is based. Article 156 §5a states that If in the course of preparatory proceedings, the request for applying or extending detention on remand has been filed, the suspect and his defense counsel is immediately granted access to case files in the part containing evidence indicated in the request. It must be emphasized that evidence discovery by the public prosecutor for the detainee and his defense counsel must be immediate.

The access to files in the detention proceedings is not granted automatically thought, nut on request. It is essential that the defense counsel requests the access to files. Article 249a of the Code of criminal proceedings states that the order on imposition or extension of detention on remand may rely exclusively on circumstances established on the basis of evidence known to the accused and his defense counsel. The court takes into consideration ex officio also those circumstances, which have not been disclosed by the public prosecutor, after their disclosure at the hearing, if they are favorable to the accused.

### ***The role of Constitutional Tribunal regarding access to files in the detention proceedings***

The current standards of access to files in the preparatory proceedings and detention proceedings have not always been there. Constitutional tribunal in the judgment of June the 3<sup>rd</sup> 2008 (K 42/07) stated that article 156 § 5 of the Code of criminal proceedings in extend to which grants arbitral right to deny access to files containing evidence on which the motion for detention is based is unconstitutional.

After this ruling the article was amended, but still access to detention files could have been denied.

In another ruling of May 20<sup>th</sup> 2014 Constitutional Tribunal confirmed that arbitrary denial of access to files regarding the decision on imposing other than detention temporary measures was unconstitutional.

### ***Access to files related with the consensual methods of concluding the proceedings***

Popularization of plea bargain and consensual methods of concluding the proceedings should encourage public prosecutors for granting the accused and his defense counsel access to files on the early stage of proceedings. Article 335 § 3 of the Code of criminal procedure states that with the plea bargain motion (motion to sentence the accused for a summary offence without holding a trial, to a penalty or a penal measure agreed with him) the parties, defense counsels and attorneys are entitled access to files and they must be informed about this right accordingly.

### ***Challenging prosecutor's decision on denying access to files***

Prosecutor's decision on denial access to files can be challenged. Article 159 of the Code of Criminal proceedings constitutes that The parties who were denied access to the files of

preparatory proceedings may appeal against this decision. Interlocutory appeal against the decision of a public prosecutor is submitted to the court. That is an important change, since in the previous legal state, such appeal could have been filed not to the court but to the Public Prosecutors Office of higher rank.