



S U P R E M E C O U R T

CONSTITUTIONAL REVIEW CHAMBER

JUDGMENT

in the name of the Republic of Estonia

Case number	5-25-3
Date of judgment	11 April 2025
Judicial panel	Chair Villu Kõve, members Julia Laffranque, Vahur-Peeter Liin, Heili Sepp and Nele Siitam
Case	Complaint against removal from the meeting of the National Electoral Committee on 6 March 2025
Participants in the proceedings	Märt Põder National Electoral Committee
Manner of examination	Written procedure

OPERATIVE PART

To deny the complaint by Märt Põder.

FACTS AND COURSE OF PROCEEDINGS

1. Immediately prior to the meeting of the National Electoral Committee on 6 March 2025, Märt Põder (the applicant) expressed a wish to participate in it online. The National Electoral Committee granted him the requested electronic access. The Committee declared agenda item 4 “E-voting risk management plan and e-voting procedures” closed. The National Electoral Committee informed the applicant orally of the legal basis for declaring the meeting closed and removed him from the meeting for the duration of discussion of that agenda item. After the discussion of the relevant agenda item, he was allowed to rejoin the meeting electronically.

2. On 7 March 2025, the applicant sent a letter to the Chair of the National Electoral Committee, requesting clarification of the reasons for his exclusion from the meeting.

3. In a reply dated 10 March 2025, the State Electoral Office explained the following to the applicant. The e-voting risk management plan is a document classified for internal use under § 35(1) clause 9 of the Public Information Act. In the frame of the 4th agenda item at the meeting, the National Electoral Committee dealt with information which the law requires to be classified as internal. This precluded its discussion in the presence of external persons.

4. On 10 March 2025, the applicant submitted a complaint to the Supreme Court via the National Electoral Committee, seeking a declaration of the unlawfulness of his removal from the meeting of 6

March 2025. He also proposes that the Supreme Court review the constitutionality of § 35(1) clause 9 of the Public Information Act. The National Electoral Committee forwarded the complaint to the Supreme Court on 11 March 2025.

5. The applicant is of the opinion that partial closure of the meeting violated his rights under § 19⁴(1) in conjunction with § 12(3) of the Riigikogu Election Act and clause 7.4 of the Working Procedure of the National Electoral Committee. The applicant participated in the meeting as an observer and as a board member of the non-profit association Ausad Valimised that unites observers under one body. Since the law defines meetings of the National Electoral Committee as public, no legal basis exists to declare them closed.

6. Restricting access to the e-voting risk management plan contravenes § 19⁴(1) and § 1(2) of the Riigikogu Election Act. The applicant as an observer must be able to directly verify the correctness of e-voting operations, as required by the principle of direct elections. Practice has shown that auditors fail to detect major shortcomings in the organisation of e-voting and in ascertaining the results. So this is not a theoretical problem. Nor does the existing complaint procedure help to provide clarity.

7. Restricting access to information about electronic voting jeopardises the democratic system of governance and may lead to undetectable manipulation of election results. § 35(1) clause 9 of the Public Information Act contravenes §§ 1, 44, 56, and 60 of the Constitution of the Republic of Estonia, as it requires secrecy of all information concerning security systems and security measures for e-voting. In addition, keeping important information related to electronic voting secret from observers may be contrary to point 3.2 of the Venice Commission's Code of Good Practice in Electoral Matters.

8. The **National Electoral Committee** objects to the complaint and asks that it be denied. Meetings of the National Electoral Committee are public. So people can come and listen to them on site. Similarly to court hearings, public access does not mean a possibility to follow the meeting remotely. However, the National Electoral Committee has also enabled electronic participation in meetings concerning examination of election complaints. The applicant expressed his wish to participate in the meeting thirteen minutes before the start of the meeting and was allowed to observe the public part.

9. The applicant's access to discussion of the 4th item on the meeting agenda was restricted on the grounds that the risk management plan for e-voting is classified for internal use in line with § 35(1) clause 9 of the Public Information Act. Access had to be restricted in order to ensure security of the information systems used in organising elections. If unauthorised persons were to become aware of information related to security risks of electronic voting and measures to eliminate and reduce them, this could run the risk of an attempt being made to compromise the electronic voting system. Under § 7(3) of the Administrative Procedure Act, an administrative authority must keep confidentiality of information classified for internal use.

OPINION OF THE CHAMBER

10. The applicant seeks a declaration from the Supreme Court affirming the unlawfulness of his removal from the meeting of the National Electoral Committee on 6 March 2025 during discussion of the risk management plan for e-voting, which had been classified as internal information under § 35(1) clause 9 of the Public Information Act. The applicant is also of the opinion that the statutory obligation to classify documents related to security systems and security measures of e-voting as information intended for internal use may be unconstitutional.

11. The Chamber will first form an opinion as to whether adjudicating the complaint falls within the competence of the Constitutional Review Chamber of the Supreme Court or the administrative court (I). Next, the Chamber will deal with the admissibility of the complaint (II) and the applicant's claims concerning the constitutionality of § 35(1) clause 9 of the Public Information Act (III) and removal of the applicant from the meeting of the Electoral Committee (IV).

I

12. Under § 4(1) of the Code of Administrative Court Procedure, administrative courts have jurisdiction over disputes arising in a public law relationship, unless the law prescribes a different procedure. The procedures laid down by the Constitutional Review Court Procedure Act (CRCPA) are to be regarded as a "different procedure" within the meaning of the provision referred to in the Code of Administrative Court Procedure.

13. Complaints against a measure of an election organiser or a decision or measure of an electoral committee are adjudicated in line with the procedure laid down in Chapter 6 of the CRCPA. The competence of the Supreme Court Constitutional Review Chamber to adjudicate disputes concerning elections as the court of first and last instance is justified by the fact that issues related to elections enjoy special weight in a democratic society. The Chamber is of the opinion that the remedy laid down by § 37(1) of the CRCPA applies whenever the subject-matter of the dispute is related to the organisation of elections and the law does not prescribe a different procedure for resolving disputes (see, e.g. § 20(5), § 25(5) of the Riigikogu Election Act). The election appeal procedure in Chapter 6 of the CRCPA is not intended merely for contesting the decisions and acts of election organisers and electoral committees that are directly related to the conduct of elections. In other words, the legitimacy of the announced voting results or election outcome does not have to depend on the lawfulness of the contested act or decision. Above all, what is decisive is that the basis for a contested decision or act of the electoral committee and the organiser of elections must arise from the election laws or the Referendum Act.

14. Under § 12(1) of the Riigikogu Election Act, the working format of the National Electoral Committee is a meeting. Subsection (3) of the same provision gives rise to the requirement of the public nature of meetings of the National Electoral Committee. Taking into account the competence of the National Electoral Committee (see § 9 of the Riigikogu Election Act), its activities, including holding meetings between elections and thus also acts performed at meetings, relate to the organisation of elections. For the above reasons, adjudication of the complaint falls within the competence of the Constitutional Review Chamber of the Supreme Court on the basis of § 2 clause 10 and § 37(1) of the CRCPA.

II

15. The complaint is admissible. Section 37(1) of the CRCPA allows anyone who finds that their rights have been violated by a measure of the electoral committee to apply to the Supreme Court to declare the measure of the electoral committee unlawful. Under § 37(1) of the CRCPA, a complaint may be filed only by a person whose subjective rights are allegedly violated by the contested decision or measure (see Supreme Court Constitutional Review Chamber order of 4 July 2024, 5-24-23/2, para. 5, and Supreme Court Constitutional Review Chamber judgment of 27 March 2023, 5-23-11/2, para. 27). An observer may file a complaint only against measures and decisions that relate to their rights as an observer – in particular, as regards the conditions or obstacles set for observation (Supreme Court Constitutional Review Chamber judgment of 12 June 2024, 5-24-9/3, para. 25). The Chamber agrees with the applicant that, in the present case, the measure of the National Electoral Committee

by which the applicant was removed from the meeting of 6 March 2025, interfered with his subjective right as an observer. The complaint has been filed within the time-limit.

III

16. The applicant contends that § 35(1) clause 9 of the Public Information Act conflicts with §§ 1, 44, 56 and 60 of the Constitution to the extent that it allows restricting access to documents concerning security systems and security measures of e-voting. In response, the Chamber explains the following.

17. Section 44(2) of the Constitution imposes an obligation on all state agencies, local authorities and their officials to provide information about their activities to an Estonian citizen, at the citizen's request, in line with the procedure laid down by law. Under the same provision, the public authority is not required to fulfil this obligation if information is requested where its disclosure is prohibited by law, as well as information intended exclusively for internal use. It is a fundamental right subject to a simple statutory reservation, meaning that it may be restricted for any purpose not contravening the Constitution (cf. Supreme Court *en banc* judgment of 21 November 2023, 5-23-1/19, para. 77; Supreme Court Constitutional Review Chamber judgment of 2 December 2024, 5-24-22/16, para. 78).

18. Thus, § 44(2) of the Constitution empowers the legislator to lay down cases in which the information holder must or may restrict access to data. The bases for imposing a restriction on access are set out in § 35(1) and (2) of the Public Information Act. Under § 35(1) clause 9 of the Public Information Act, an information holder must restrict access to information related to description of security systems, security organisation or security measures. However, regardless of the imperative wording of § 35(1) of the Public Information Act, this does not mean that clause 9 of the above provision can be used to restrict access to all or any documents that have even the slightest relation to security systems and security measures of e-voting (cf. e.g. Supreme Court Administrative Law Chamber judgment of 28 March 2024, 3-21-1370/35, para. 16). Even in the event of information specified in the list in § 35(1) of the Public Information Act, an information holder has the duty to assess the need to impose a restriction on access on a case-by-case basis. Whether the information holder has correctly applied the basis for restriction is subject to judicial review. In addition, § 38(4) of the Public Information Act lays down a possibility under certain conditions to grant access to information classified for internal use even to persons outside the agency. The Chamber notes that in the present case the applicant has not contested refusal to transmit documents to him.

19. The applicant also sees a conflict with the principle of direct elections under § 1(2) of the Riigikogu Election Act. The principle of direct elections is laid down by the third sentence of § 60(1) of the Constitution. The purpose of this principle is to ensure that voters can carry out their voting decision directly, i.e. without interference and assistance from third parties. However, the principle of directness relates primarily to the right to vote but cannot be extended to the exercise of observer rights in the current circumstances. The Chamber also notes that one of the elements of the principle of free elections deriving from the second sentence of § 60(1) of the Constitution is indisputably that people should be informed about the organisation of elections. However, being informed does not mean that persons must have access to all documents concerning organisation of elections. The fact that citizens with the right to vote are not aware of the security risks of the e-voting system does not affect their ability to realise their will in the exercise of supreme state power (§§ 1 and 56 of the Constitution).

20. For the above reasons, the Chamber had no doubts about the constitutionality of § 35(1) clause 9 of the Public Information Act in the present case.

IV

21. A meeting of the National Electoral Committee is public and is recorded in minutes (§ 12(3) Riigikogu Election Act). The methods of holding a meeting are specified in the Working Procedure of the National Electoral Committee established on the basis of § 12(6) of the Riigikogu Election Act, which also allows a meeting to be held electronically or by means of information exchange (clauses 4.2 and 7.1). According to clause 7.2 of the Working Procedure, electronic meetings of the committee may be held partially or entirely electronically, by means of real-time two-way communication or by any other similar electronic means allowing a member of the committee to follow the meeting and speak and to vote when decisions are taken. If a meeting is held on site, clause 7.3 of the Working Procedure prescribes the obligation to enable a committee member to participate electronically at their request.

22. Neither the Riigikogu Election Act nor the Working Procedure of the National Electoral Committee expressly prescribe the right of persons who are not members of the Committee to always participate electronically in meetings of the National Electoral Committee. In the opinion of the Chamber, this is justified by the fact that electronic participation entails risks which the National Electoral Committee cannot fully mitigate. If external parties participate online, it is almost impossible to verify who is listening to the meeting in addition to the known participant and whether and how the meeting is being recorded. If information classified as internal is communicated at the meeting, the information holder is also obliged to protect it against careless disclosure. Although the law allows access to such information to be granted to external persons in certain cases (§ 38(4) Public Information Act), this can only be done on the basis of case-by-case discretion exercised by the information holder.

23. Whether a meeting should be held entirely electronically, partially on site or entirely on site, must be assessed by the National Electoral Committee on a case-by-case basis. If the meeting agenda includes discussion of more sensitive topics related to organisation of elections, it is possible to decide in favour of holding the meeting entirely on site or partially electronically. Having examined the e-voting risk management plan, the Chamber is of the opinion that the information related to it must be treated as such sensitive information. The document in question contains information which, if disclosed to external persons, could result in the risk of attacks on the e-voting system. Attacks on the e-voting system would jeopardise its orderly functioning and security, which are essential for the legitimacy of election results.

24. In its earlier case-law, the Supreme Court has affirmed the obligation of the National Electoral Committee to allow external persons to participate in an electronic meeting of the electoral committee (Supreme Court Constitutional Review Chamber judgment of 19 April 2023, 5-23-27/2, para. 26). However, the Supreme Court has so far not formed a unanimous position regarding the form of participation of an observer in a meeting of the electoral committee that takes place both electronically and on site. The Chamber is of the opinion that in such a case – if it is necessary for protecting the information discussed at the meeting and for mitigating the risks associated with online access – the National Electoral Committee may stipulate that external persons can participate only if they are directly present on site. It appears from the materials transmitted to the Chamber that the meeting of 6 March 2025 was not held entirely electronically. Taking into account the above and the content of item 4 of the meeting agenda, electronic removal of the applicant from discussion of the agenda item in question was lawful.

25. However, the Chamber considers it important to note that the Riigikogu Election Act does not expressly provide for the possibility to declare a meeting of the National Electoral Committee closed.

It is not clear whether the legislator's failure to regulate this option was a conscious choice or not. The requirement of the public nature of meetings of the National Electoral Committee fulfils a compelling purpose in a democratic system of government, ensuring that organisation of elections is transparent and the election process is legitimate.

26. On the basis of the foregoing and relying on § 46(1) clause 2 of the Constitutional Review Court Procedure Act, the Chamber denies the application by M. Pöder.

(signed digitally)