

Dissenting opinion by Supreme Court Justices Oliver Kask and Nele Siitam in case No 5-25-7, joined by Villu Kõve and Ivo Pilving

We do not agree with the position adopted by the Supreme Court *en banc* in its judgment of 18 December 2025 that declaring the National Electoral Committee (NEC) meeting on 12 June 2025 closed to the public and, consequently, removing the applicants from the meeting was unlawful. The complaints should have been denied in their entirety.

1. The Court *en banc* is right that the requirement of public accessibility of NEC meetings laid down by § 12(3) of the Riigikogu Election Act serves compelling objectives: it reduces the risk of fraud and ensures transparency, inter alia increasing voters' confidence that the elections would be conducted in accordance with the electoral principles set out in §§ 60 and 156 of the Constitution (see para. 31 of the judgment). However, overemphasising public access or treating it as an absolute rule from which no exceptions can be made, may begin to work against the very objectives that public access serves. This is also the case here.

Within the frame of the agenda item of the NEC meeting in question, the NEC had to decide on the colour of the text and security features of the ballot paper. Under the current law, the power to decide on this lies solely with the NEC (§ 43(1) of the Municipal Council Election Act, clause 2 of the NEC resolution No 31 of 3 April 2025). On the basis of § 35(1) clause 9 of the Public Information Act, a restriction on access to the draft decision had been established on security grounds. None of the participants in the proceedings, including the applicants, nor the Court *en banc*, questioned that the information contained in the draft decision needed protection.

Premature disclosure of the colour scheme and description of the security features used on the ballot paper creates an opportunity to produce fake ballot papers and thereby facilitates the commission of election fraud. Disclosure of such information endangers compliance with the principle of uniformity of elections (§§ 60 and 156 of the Constitution). If electoral fraud were to be committed, not every vote actually cast would have equal weight and the voting and election results might not correspond to the will of the voters. While there are other ways to combat electoral fraud, ballot paper security features are one of the easiest ways to identify the correct ballots based on which votes should be counted. This solution protects against the need for repeated voting if fraud is committed. However, the choice to prevent electoral fraud by introducing security features on the ballot paper is effective only if the NEC draft decision and the final decision are not made available to observers or the public.

It follows from the above that public accessibility of an NEC meeting and the possibility of declaring it closed to the public protect different conflicting aspects of §§ 60 and 156 of the Constitution, between which the legislator must find an appropriate balance.

2. It follows from the judgment of the Court *en banc* that public accessibility of an NEC meeting, as laid down by § 12(3) of the REA, is a requirement from which the current law provides no exceptions, and that no possibility of declaring a meeting closed arises from the above-mentioned § 35(1) clause 9 of the Public Information Act either (see para. 37 of the judgment). In our opinion, the provision in question is a sufficient basis for declaring a meeting closed to the public.

The REA is a constitutional law (§ 104(2) clause 2 of the Constitution) and the Public Information Act is, according to its title, an ordinary law (§ 73 of the Constitution), but the provision in question was passed with 76 votes in favour, as the Court *en banc* itself notes (see para. 35 of the judgment). In matters falling within the scope of the laws referred to in § 104(2) of the Constitution, an exception may be made by another law if the law providing for the exception was also adopted by at least 51

votes in favour (see, however, also Supreme Court *en banc* judgment of 8 June 2009, 3-4-1-7-08, para. 30). Making an exception to the requirement of public accessibility of an NEC meeting can be limited only to narrowly defined situations that occur quite rarely in practice. Section 35(1) clause 9 of the Public Information Act restricts the possibility of declaring a meeting as closed to a rather limited number of cases.

The reasoning of the Court *en banc* – that the Public Information Act does not regulate the public accessibility of an NEC meeting, but rather specifies what type of information a document must contain to be deemed for internal use only (see para. 38 of the judgment) – is not convincing. A legal order is a system in which different legal acts form a logically coherent whole through their interrelationships. What is regulated in one legal act does not have to be repeated in another. Thus, for example, all measures to ensure cybersecurity of elections need not be duplicated in electoral laws in addition to the Cybersecurity Act.

In para. 36 of the judgment, the Court *en banc* correctly lists the legal consequences that result from imposing an access restriction on a document:

- disclosure of information intended for internal use is subject to misdemeanour liability (§ 54(1) Public Information Act);
- the information holder must implement organisational, physical and IT security measures to protect internal information (§ 43(1) Public Information Act), e.g. such documents must not be publicly accessible with a simple click in the document register (§ 12(4¹) Public Information Act), a request for such information must be refused (§ 23(1) clause 1 Public Information Act);
- an official may not, either during their term of service or after leaving service, disclose information designated for internal use that has become known to them in the course of their service (§ 55 Civil Service Act);
- an administrative authority is obliged to keep confidential the information designated for internal use (§ 7(3) Administrative Procedure Act).

The judgment of the Court *en banc* does not provide a convincing answer to the question why § 35(1) clause 9 of the Public Information Act, in conjunction with the aforementioned norms, does not imply the right of the NEC to declare the discussion of an agenda item at a meeting closed to the public, if necessary. All the more so because, as stated above, the need to declare a discussion closed to the public may also be required under the Constitution, depending on the circumstances of a specific case.

3. An unfortunate result of the judgment of the Court *en banc* is that the NEC must find an appropriate balance between public accessibility and the countervailing interest in a way that may end up in “playing” public access to the meeting. There are situations where it is indeed possible to conduct a public meeting in accordance with the rules while holding a meaningful discussion without needing to talk about the information subject to access restrictions contained in the preparatory materials for the meeting. The present case did not involve such a situation – it is not possible to discuss the colour and security features of ballot papers in a meaningful way in public. This means that the actual discussion between the NEC members and other meeting participants moves to other channels, whether in the form of informal correspondence or meeting behind closed doors. The idea of the law cannot be to divert actual discussions away from official NEC meetings. The transparency of the NEC’s work is much better ensured if the public is at least aware when and what issues NEC members discuss, rather than NEC meetings being merely a “show”.

4. Another possible approach is that the NEC must essentially hold all discussions completely in public, regardless of the question how compelling the interest behind some of the clauses under

§ 35(1) of the Public Information Act is. However, such an interpretation ignores the fact that the result might not only be miscommunication between the NEC members, because they would have to express themselves in a way that hides their thoughts, but also an unconstitutional situation. As stated above, declaring a meeting closed to the public may be required under the Constitution. The interpretation of the Court *en banc* may prove to be particularly problematic in a situation where the NEC must discuss security risks associated with electronic voting.

(signed digitally)