***XIVth INTERNATIONAL SYMPOSIUM ON THE LAW AND GOVERNANCE OF THE INFORMATION SOCIETY***

***«Citizen Participation and Collaboration in Promoting Open Government»***

4TH SESSION (15H15-16H30)

**IV/ CITIZEN PARTICIPATION FACING THE TRANSPARENCY CHALLENGE**

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 “Information is the currency of democracy” This phrase is often attributed to US President **Thomas Jefferson**. But there is no evidence that Jefferson ever used this phrase. Rather, the quote first appeared in 1971, attributed to Jefferson in a speech by US consumer advocate Ralph Nader.

In Hungary, one of the most important purposes of the rule of law revolution in 1989 was to guarantee the right of everyone to exercise control over his personal data and to have access to public data. As regards to the latest Hungarian constitutional reform, the legislature left the informational rights basically unchanged, only the institutional background have been transformed.

The Hungarian National Authority for Data Protection and Freedom of Information, as the defender of two human rights, is responsible for supervising and defending the right to the protection of personal data and to freedom of information.   Our responsibilities extend to cover both the state and the business sector.

Freedom of information guarantees the transparency of the activities of public authorities and of the spending of public funds. Citizens can only be active participants if they are familiar with the required information – appropriate information is fundamental to freedom of opinion.

As clearly stated by the Hungarian Constitutional Court: ‘*without being monitored by its citizens, the state becomes an unaccountable and unpredictable machine, and this is especially dangerous because a non-transparent state represents an increased threat to constitutional rights*’.

The freedom of information is one of the most sensitive rights in a democracy, because the political forces always would like to follow their own trend to communicate their vices and virtues. In opposition, they urge a larger publicity, whereas as governing force, they prefer to communicate according to their own perceptions.

In the field of data protection, the Hungarian DP&FOI Commissioner since 1995 could control both the public and private sector. But the obligation to safeguard FOI covered the entire state administration from the municipalities to highest state organs. From the beginning, there was a gap in the enforcement of publicity of public funds, because for example the contracting private party did not have to assure the publicity of the contractual relationship.

1. **The access to the lists of all public servants of a public body**

One of our so called eternal challenges is the personal data processing in the framework of activities related to transparency in the public sector and the management of conflict of interest. Our first case was about the list of teachers working as public servants.

Under Hungarian law, any information that is not personal in nature and is controlled by a state or local government authority must be considered data of public interest. Access to data of public interest is not subject to any restrictions except by legally defined categories of secrecy.

In the broadest sense, you can consider data to be of public interest if it is controlled by anyone carrying out public duties. This includes acts, decisions, orders, proposals, statistics, public tenders, contracts, photos, videos, and personal or business information that have been made public by law.

According to the law in force all data, *that are not personal data*, processed by a person or body exercising public functions, are public information irrespective of their disclosability. Consequently, not all public information can be disclosed.

Other category of information accessible by anyone is the ‘**information of public interest’**. It covers any data, other than public information, that are prescribed by law to be published, made available or otherwise disclosed for the benefit of the general public. Personal data in general cannot be considered to be of public interest. However, there are some narrow circumstances, precisely defined in the law, when personal *data may be made public on grounds of being in the public interest*.

The name of the person undertaking tasks within the scope of responsibilities and authority of the body undertaking public duties, as well as their scope of responsibilities, scope of work, executive mandate and other personal data relevant to the provision of their responsibilities to which access must be ensured by law, qualify as data of public interest.

These data may be disseminated in compliance with the principle of purpose limitation. Provisions on the disclosure of data of public interest can be found in Appendix 1 of the Freedom of Information Act (the public disclosure list), and the specific laws relating to the status of the person undertaking public duties.

In the Hungarian public sector there are more types of legal status of the employees, so there are more specific laws on their employment. For instance there are separate regulations regarding public service employees, civil servants (teachers, doctors), public servants, and workers of armed bodies.

These specific laws – on the basis of the DP&FOI Law – declare that certain types of personal data of employees under their scope can be accessed by anyone.

The integrant body of these public personal data is regulated by the DP&FOI Act. Accessible information are:

* the name,
* the job description and responsibilities,
* the title and
* all other personal data that may be of interest relating to the public function, as well as all other personal data that is to be made public by law.

Let me give you an example. This is the case of the declarations of assets.

Local representatives and members of the Hungarian Parliament shall make declaration of assets that are *public.* Their spouse, common-law spouse and their children living in the same household with them also have such an obligation, but their declaration is *not public.* These documents include – among others – all information pertaining to their assets, real estates, chattels of great value (vehicles, works of art), savings, liabilities, income, economic interest, souvenirs, subsidies.

So all data of the request was personal data of public interest, anyone can come to know about it, but as a data protection authority we must take into consideration the protection of privacy of all the teachers.

Listing a whole profession, the mapping of their salaries may affect inequality in the labor market. Therefore the Authority had to make the balance between the protection of the privacy of the teachers and the right to know of the public. The aim of the freedom of information is not that anyone could get a complete professional database, but to get informed about public affairs and public funds.

1. **Companies owned by the state for 50 percent or more fall under the same transparency regulations as public bodies**

The next challenge of total openness of public funds was a quiet organic gap in the enforcement of FOI: the state-owned enterprises behaved totally as a private business entity in the enforcement of FOI.

According to the 2007 CVI Act on State Ownership, the State may acquire (or dispose of) assets in order to: (1) execute State functions; (2) fulfil societal needs; and (3) realise government economic policy goals. In practice, some rationales for state ownership that have been put forward, in addition to the “general public interest” have included energy security, delivering country-wide, affordable mail services (the Hungarian Postal Service Co.) or fulfilling cultural facilitation functions (the Hungarian National Film Fund).

State-Owned Enterprises filled this important gap in the publicity of public funds. A body or person that is vested with powers to manage or control State property shall be treated as a person or body exercising public functions pursuant to the act on access to information of public interest.

Since the constitutional revolution of 1989, there were two periods when the legislation opened more transparency on national assets: the first one was in 2003 when the “Glass pocket Law” was adopted, the second one was in 2012, when by the constitutional revolution, the Fundamental Law itself decrees the transparency on national assets.

The new Hungarian Fundamental Law in its preamble – called NATIONAL COMMITMENT AND BELIEF – proclaims that “*true democracy exists only where the State serves it citizens and administers their affairs justly and without abuse or bias*”.

The new constitution provides a strong basis of freedom of information:

* first of all, the Fundamental Law declares the right to know as a fundamental right,
* in addition, it creates the national constitutional foundations of transparency of public funds, of public property.

In its Article 39, the Fundamental Law states that “*every organization managing public funds shall publicly account for the management of those funds. Public funds and national assets shall be managed according to the principles of transparency and of corruption-free public life. Data relating to public funds or to national assets shall be recognized as data of public interest*.”

The Hungarian Freedom of Information Act (FOIA) guarantees a relatively wide transparency regarding the government, the local governments, as well as public finances. The FOI Act obligates all public body to disclose a wide list of public information on their home pages and to provide information in reply to a request.

The Hungarian FOI Act does not specify the types of public duties which need to ensure the publicity of all the actions and assets, but obligates to process public information to any request. A cornerstone of creating the publicity in Hungary has always been the task of defining the circle of organs performing public duties. Classification of persons and institutions created and – as far as powers and competences are concerned – specified by the law was always clear. However, there are institutions of which the categorization is predominantly questionable; these include typically companies established, directly or indirectly, by public funds.

In the event of state-owned companies, the Act on State Property clarified the situation: all data that relates to management and disposition of State property, other than public information, shall be treated as information of public interest. A government which is quite active in the business sector, mostly in the public service sector, has to provide information on the use of the national assets as part of the state-owned companies. In my opinion, this legislative solution was a radical step towards the real transparency of national funds, but in the meantime, these state-owned companies need to face the challenge of publicity of all of their management even if they get in a competitive disadvantage.

This wide sense of public body motivated that our Authority gave a recommendation on the borders of business secret and freedom of information. Our conclusion was that these state-owned business players – within strict conditions – could justify the secrecy of their management data, but they have to provide enough data to the public to control the use of the national assets.

According to the Hungarian legal background, with the help of the Constitutional Court’s interpretation, a body or person that is vested with powers to manage or control State property shall be treated as a person or body exercising public functions pursuant to the act on access to information of public interest.

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