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À PROPOS DE NOUS

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IMODEV est une organisation scientifique internationale, indépendante et à but non lucratif créée en 2009 qui agit pour la promotion de la bonne gouvernance publique dans le cadre de la société de l'information et du numérique. Ce réseau rassemble des experts et des chercheurs du monde entier qui par leurs travaux et leurs actions contribuent à une meilleure connaissance et appréhension de la société numérique au niveau local, national ou international en analysant d'une part, les actions des pouvoirs publics dans le cadre de la régulation de la société des données et de l'économie numérique et d'autre part, les modalités de mise en œuvre des politiques publiques numériques au sein des administrations publiques et des gouvernements ouverts.

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ABOUT US

The **International Journal of Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

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IMODEV is an international, independent, non-profit scientific organization created in 2009 that promotes good public governance in the context of the information and digital society. This network brings together experts and researchers from around the world who, through their work and actions, contribute to a better knowledge and understanding of the digital society at the local, national or international level by analyzing, on the one hand, the actions of public authorities in the context of the regulation of the data society and the digital economy and, on the other hand, the ways in which digital public policies are implemented within public administrations and open governments.

IMODEV regularly organizes conferences and symposiums on these topics, and in particular every year in November the Academic days on open government and digital issues, whose sessions are published online [ISSN: 2553-6931].

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PROTECTION OF FUNDAMENTAL RIGHTS IN THE LIGHT OF FREEDOM OF INFORMATION IN HUNGARY

by **Attila PETERFALVI**, President of the National Authority
for Data Protection and Freedom of Information, Hungary.

Information is the currency of democracy – This phrase is often attributed to US President Thomas Jefferson (although there is no evidence that Jefferson has ever used this phrase, rather, the quote first appeared in 1971 connected to Jefferson in a speech by US consumer advocate Ralph Nader.)

Within the modern state administration concepts of good governance and fair administration the transparency of the public sphere is an essential element. The free flow of information is based on the right to freedom of information. Why is it important? Freedom of information (FOI) is not only a democratic demand but also an important tool against corruption. That's why all the knowledge and practical impact of this constitutional right has to find its place in the legislation, public administration and education of the civil servants and other decision makers since they will be the responsible persons making decisions on whether to open or shut the door in front of the requests for the disclosure of public information.

The protection of fundamental rights in the light of freedom of information in Hungary attracts great attention at international level nowadays.

§ 1 – THE HUNGARIAN DEMOCRATIC CONSTITUTIONAL REVOLUTION

The totalitarian communist regime followed the policy of “*no transparent government and transparent citizen*”. The Hungarian democratic constitutional Revolution in 1989-1990 was characterized by the fact that FOI and data protection played a crucial role in the democratization of the legal system. So was the policy transformed to “*transparent government and no transparent citizen*”.

In 1991, the Hungarian Constitutional Court declared the division of information power as a constitutional principle and adopted

important decisions for example the prohibition of the use of the all-purpose personal identification number¹.

The Court also clearly stated that:

“The Freedom of Information is closely linked to freedom of expression, which is the basic ‘mother right’ of communication rights and part of the fundamental values of a democratic society in Hungary. These two fundamental rights guarantee freedom of discussion of public affairs, collectively allow an individual to participate in social and political processes... 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”².

Thus, FOI is one of the most sensitive rights because the political forces always like to follow their own trend to communicate their vices and virtues. They urge a larger publicity, whereas as governing force they prefer to communicate according to their own perceptions.

Since 1989, there were two governmental periods in Hungary when the legislation opened more transparency on national assets: the first one was in 2003 when the left-wing coalition adopted the “Glass Pocket Law”, the second one was the right-wing coalition in 2012, when through a constitutional revolution, the Fundamental Law itself decrees the transparency on national assets. The new Hungarian Constitution in its preamble – called National Commitment and Belief – proclaims that “*true democracy exists only where the State serves its citizens and administers their affairs justly and without abuse or bias*”.

In 2011, the new Privacy and FOI Act was created and the new DPA – National Authority for Data Protection and Freedom of Information (NAIH)³ – was set up. The NAIH has a dual set of tools, ombudsman and authority-like. The ombudsman-like tools are carrying out investigations, providing legislative opinions, intervening or participating in court proceedings, annual reports, issuing non-binding recommendations and strong international representation functions.

As an authority on the cases of serious infringements the Authority initiates data protection administrative proceedings, imposes sanctions e.g. administrative fines, may initiate special administrative proceedings for the control of classified data (“State Secrets”) and maintains a data protection register.

¹ See Decision 15/1991 (IV. 13.) CC on the use of personal data and the personal identification number.

² See Decision 34/1994. (VI. 24.) CC.

³ <https://www.naih.hu/general-information.html>.

§ 2 – POWERS AS ORGANIZATIONS SUBJECT OF THE DISCLOSURE OBLIGATION

The Hungarian Privacy and Freedom of Information Act (FOIA) guarantees 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 Act does not specify the types of public duties 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. However, there are institutions by which the categorization is predominantly questionable; these include typically companies established, directly or indirectly, by public funds.

In the case 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.

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.

The main dilemma we have to deal with is how far can FOI go without harming justifiable interests? Here you find some problematic areas:

– *State actors with market functions e.g. state-owned companies, funds:* public duty and profit-oriented activity. However, if legitimate economic interest can be proved FOI might be proportionally restricted.

– *Business secret:* the basically civil-law instrument seems inappropriate to be interpreted and used by these actors. The same applies to the information related to decision-making process in the private sphere.

– *Political parties (transparency of the financial management)* but from legal point of view they are not bodies with public service functions! A 1994 Constitutional Court decision says that parties, which have reached 1 percent of the votes in the elections may receive financial support because their activities are linked to the representation of the people, based on the expression of popular

will. So, it is clear that some of the tasks which are closely linked to political parties are related to public interest and public services. According to the current regulatory environment, classification of political parties as bodies with public service functions does not seem feasible. This affects the financial management of political parties in such a way, that this data cannot be made available as data of public interest. However, using other legal solution for the sake of accessibility of the information is the determination of data public on grounds of public interest.

§ 3 – AN ADEQUAT ANSWER

In Article 39 the new 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.”

However, transparency of public funds shall be weighed against other legitimate interest. This means that in certain instances information concerning the management of these funds may not be disclosed. In some instances, the limitation of FOI is regulated by legislative acts. However, in relation to its constitutional duties, the Authority may issue soft-law documents discussing certain legitimate interests of public bodies that need to be balanced against FOI. Specific examples are the following:

- *A separate act regulating the restriction of publicity* (e.g. Act on the investment related to the maintenance of capacity of the Paks Nuclear Power Plant, or Act on the public services)
- *Detailed FOI regulation built in the relevant act* (e.g. in the Act on the Transparency of Public Finances)
- *Issuing and following specific NAIH recommendations.* Our main message is that only those state-owned companies could recall on business secret against transparency, whose activity or function is a traditional profit-oriented business activity, and has no public duties provided for by the relevant legislation. If these market players can prove legitimate economic or market interest, within narrow limits (ex. preliminary documents, business plan), FOI can be proportionally restricted.

The wide interpretation of public body motivated our Authority to issue a recommendation on the borders of business secret and freedom of information. The 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.

The main rule is the transparency of every data in connection with public functions and public funds. Nevertheless, in each case, in every law-making process we have to face the same questions: the transparency of managing public funds and “the moral and economic purpose according to the common sense and public good” should stay in balance. Based on the already developed constitutional cornerstones we recommend the application of a public interest test, which corresponds to the protection of legitimate and fair market interests, but does not make effectiveness of the basic legal requirement of management of public funds impossible, and it reflects the constitutional requirement, which is set out in Section 30 (5) of the Privacy and FOI Act.

