

## CITIZEN PARTICIPATION FACING THE TRANSPARENCY CHALLENGE

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In Hungary, one of the most important purposes of the 1989 rule of law revolution was to guarantee the right of everyone to exercise control over their personal data and to have access to public data. As regards the latest Hungarian constitutional reform, the legislature left informational rights basically unchanged, and only the institutional background was 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. Its responsibilities include both the state and the business sector.

Freedom of information guarantees transparency regarding the activities of public authorities and the spending of public funds. Citizens can only be active participants if they are informed – 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’. Freedom of information is one of the most sensitive rights in a democracy because the political forces always try to control the flow of information. When in opposition, politicians seek greater openness and transparency. When they are in power, they like to control the flow of information to their own advantage.

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

### § 1 – ACCESS TO THE LISTS OF ALL PUBLIC SERVANTS OF A PUBLIC BODY

One eternal challenge involves transparency in the public sector and the management of conflicts of interest. The initial case involved the list of teachers who work 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 for certain legally defined categories that can be kept secret.

In the broadest sense, one 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, all data, that is not personal data, processed by a person or body exercising public functions, are considered public information irrespective of their disclosability. Consequently, not all public information can be disclosed.

Other categories of information that are accessible by anyone is 'information of public interest'. This category includes 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 narrow circumstances, precisely defined in the law, when personal data may be made public on grounds of being in the public interest.

The law requires that the agency's response include 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.

This 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 specific laws governing the various types of legal status of employees. 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 can be accessed by anyone.

These types of public personal data are regulated by the DP&FOI Act. Accessible information includes: 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.

An example regarding the declarations of assets illustrates the idea. Local representatives and members of the Hungarian Parliament must publicly declare all their assets. Their spouses, common-law spouses and their children living in the same household are also required to declare their assets, but their declarations are not made public. These documents include – among others – all information pertaining to their assets, real estate, chattels of great value

(vehicles, works of art), savings, liabilities, income, economic interest, souvenirs, subsidies.

So, since all of this data is considered to be in the public interest, anyone is entitled to access it. However, there are exceptions for example relating to protection of the privacy of teachers.

Listing personal information regarding a whole profession may affect inequality in the labor market. Therefore, the Authority must effect a balance between protecting the privacy of teachers and the public's right to know. The goal of freedom of information is not to provide the public with a complete database regarding personal information, but to allow them to be informed about public affairs and the expenditure of public funds.

## **§ 2 – COMPANIES OWNED BY THE STATE FOR 50 PERCENT OR MORE FALL UNDER THE SAME TRANSPARENCY REGULATIONS AS PUBLIC BODIES**

The next challenge relating to openness regarding the expenditure of public funds involves a gap in the enforcement of FOI: State-owned enterprises behave like private business entities 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) fulfill 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 fill this important gap in society. 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 in terms of access to information of public interest.

Since the constitutional revolution of 1989, there have been two periods when legislation provided for greater transparency regarding national assets: in 2003 when the “Glass pocket Law” was adopted, and in 2012 when the Fundamental Law, following the constitutional revolution, decreed transparency regarding national assets.

The new Hungarian Fundamental Law in its preamble – entitled *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”. The new Constitution provides a strong basis of freedom of information: the Fundamental Law declares that the right to know is a fundamental right; and it creates the national constitutional foundation for transparency regarding public funds and public property.

In 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 wide transparency regarding the government, local governments, and public finances. The FOI Act obligates all public body to disclose a wide range of public information on their home pages and to reveal information in response to requests.

The Hungarian FOI Act does not specify the requirements for ensuring the publicity of actions and assets, but obligates to process public officials to release information regarding any request. A fundamental question in Hungary involves the need to define entities that are regarded as performing public duties. The law is relatively clear regarding certain persons and institutions that are covered by the law. However, there are institutions about which there is uncertainty regarding the law’s application; these include companies established, directly or indirectly, by public funds.

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

This broad definition of the term “public body” motivated that Hungarian Authorities give guidance regarding the borders of the meaning of “business secrets” and “freedom of information.” Our conclusion was that these state-owned business players – within strict conditions – could justify keeping management data secret, but they must still provide enough data so that the public can monitor and control the use of the national assets.

Given 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.