

FREE ACCESS TO PUBLIC INFORMATION: ENFORCEMENT, APPEALS AND JUDICIAL REVIEW. A COMPARATIVE PERSPECTIVE FROM CEE COUNTRIES

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Abstract

FOIAs were adopted in Central and Eastern Europe rather late after the regime changes. After adopting the laws, however, there are still many powerful forces that are working against extensive access to information – they can be static - opaque administrative practices, general inaptitude or the lack of sufficient human and material resources – or active – agents that resist openness due to private interests, or agents that use institutional scenarios to prevent public scrutiny over corruption and incompetence. The paper approaches the jurisdictions from Hungary, Poland, Czech Republic and Romania, emphasizing the topic of enforcement mechanisms provided by the FOIAs. It is a follow up of an article published two years ago in the same journal.



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Introduction

While the importance of good governance receives increasing recognition, increased transparency and accountability are seen as much-needed antidotes to the corruption that otherwise undermines good governance (Osborne, 2004). The issue *openness and transparency* is tightly connected with the *free access to public information*, as the second is a condition for the first. The concept typically means having access to files, or to information in any form, in order to know what the government is up to (Birkinshaw, 2003). Together, they are a key element of reform in public administration, much needed especially in former communist countries.

It was expected freedom of information laws to be among the first priorities of the new regimes from Central and Eastern Europe, in transition after the 1989 changes. Although pressure to open archives and secret police records increased, there was little public pressure to adopt general sunshine laws related to all categories of information (Brown, Angel and Derr 2000). This is why the majority of these countries adopted such legislation only around year 2000. A major factor that slowed post-1989 development of laws and practices for government transparency was the preoccupation of many Central European and former Soviet countries with reviving their own national legal traditions. Adopting and integrating Western European or international practices and trends were of secondary interest. Because of this approach, in many ways, regulating public access to government-held information in these countries was certainly more difficult than in countries that are establishing entirely new systems of government. Even after a right of access to information is established, remain questions about the timing, accurateness and worth of the information disclosed, especially due to the fact that the experience of these nations had led to a genuine distrust of the citizens in their governments (Brown, Angel and Derr, 2000).

Freedom of information regime in Hungary

Rather than adopting a brand new constitution, as has been done in most countries of Central and Eastern Europe, or revitalizing an old one, as has been seen in the Baltic States, Hungary has chosen to continue its pre-transition constitution (1949) in force, although thoroughly amending it in 1990. Recognizing the shortcomings of this process, however, the political forces shaping the country have discussed drafting an entirely new constitution, with a goal of adoption soon after mid-decade, but this intention was never materialized. Article 61 of the Constitution establishes a right to access and distribute information of public interest, and by a majority of two-thirds of the votes the legislative can pass the law on the public access to information of public interest and the law on the freedom of the press. Thus, Hungary adopted in 1992 the *Act on the Protection of Personal Data and the Publicity of Data of Public Interest*. The purpose of the Act is first and foremost to guarantee that everybody may dispose of his personal data himself, and secondly that everybody may have access to data of public interest. Regarding this common regulation of data protection and freedom of information, the former Data Protection and Freedom of information Commissioner observed that Hungarians tend to be much more sensitive to violations of their privacy than to secrecy over data of public interest. In 2004, the Commissioner received 30

submissions that had to do with the boundary separating privacy from the public sphere (Commissioner's Report, 2004).

In Europe, Hungarian legislation stands alone in having opted for the rather common-sense solution of enacting a single law to regulate freedom of information in conjunction with the protection of personal data. Again pioneering in Europe, the Hungarian Act has assigned the protection of freedom of information and of personal data to the very same specialized ombudsman, the *Data Protection and Freedom of Information Commissioner* (Majtényi, 2004). This solution has been recently adopted also in the 2000 Freedom of Information Act in the United Kingdom.

In a recent development towards modernizing means of access to public information, the Hungarian Parliament has passed the 2005 *Law on Electronic Freedom of Information*, which according to the Ministry of Informatics and Communication, makes Hungary "one of the most progressive countries in the world with regard to the publicity of public interest information"¹. The law imposes the on-line publication of draft bills, laws, and – partially – the anonymous form of court decisions, while a search system that makes the published data searchable and retrievable is to be created simultaneously. Another important betterment regards the creation of the Electronic Collection of Effective Laws, which shall contain the effective text of all laws in force on a given calendar day in a unified structure. The law on electronic freedom of information has been programmed to enter into force in several steps: the Electronic Collection of Effective Laws is to become operational as of January 1st, 2006, while public authorities' obligation to publish information on-line is scheduled for January 1st, 2007, respectively January 1st, 2008.

Freedom of information regime in the Czech Republic

In the Czech Republic, prior to 1999 the right of information was regulated briefly by the Constitution and the Charter of Rights and Freedoms ratified in 1991 (articles 17 and 35), but were not rare the cases of this right being ignored and abridged. The need for a Freedom of Information Act was clear acknowledged. The Freedom of Information Act passed in 1999 entered into force in January 1st, 2000 and has 22 articles that set forth the basic conditions by which the information is provided.

In a recent development, the Czech legislative body adopted the Act no. 412/2005 on classified information, which sets forth a very elaborate system of protecting state secrets, confidential documents and sensitive information.

Freedom of information regime in Poland

In Poland, before the new Constitution was enforced (October 17, 1997) Poles were able to claim the right to information under the Convention for Protection of Human Rights and Fundamental Freedoms of 1950. Then, article 61 of the Constitution established rights to collect, receive and disseminate information and specifically stated the right of access to government-held information.

In order to expand the constitutional provisions, but also due to the pressure from European Union integration process, NGOs and media, Poland adopted rather late, on September 6, 2001 (binding from January 1, 2002) the Law on Access to

Public Information, whose purpose is to guarantee to everyone the right to public information which includes the right to: 1) obtain public information, including obtaining information processed in the scope, in which it is particularly significant for the public interest, 2) examine official documents, 3) access to sessions of collective public authority agencies elected by ballot. There are exemptions for official or state secrets, confidential information, personal privacy and business secrets. Appeals are made to a court. At some point, the Parliament discussed amendments that would have created an independent commission to enforce the Act (Banisar, 2004), but no result came out of it. Public bodies are required to publish information about their policies, legal organization and principles of operation, contents of administrative acts and decisions, public assets. The law requires that each public authority should create a Public Information Bulletin to allow access to information on-line.

Right to information derives also from Press Law and other statutes and codes. In particular, the role of the Press Law in enlargement of the openness is significant as it endorses the citizen's right to information and participation in public affairs (Kaminski, 2000). Under article 4 of the Press Law Act, provisions of which are applicable also to audio-visual media, all state institutions, economic entities and organizations have the obligation to disclose information concerning their activities to the press. Only when it is required by the interest of keeping state, official or other secret protected by law these subjects may refuse to provide information. In such a situation the refusing institution or person must specify in written and within three days which are the reasons justifying the refusal. However, the doctrine has emphasized that the right to information is primary the right of citizen, and rights of mass-media are only part of problem concerning regime of the right to information (Kaminski, 2000).

Poland has signed the Aarhus Convention on Access to Information in June 1998 and ratified it in February 2002; as a consequence, the Act of 9 November 2000 on Access to Information on the Environment and Its Protection and on Environmental Impact Assessments implements the Convention².

Due to pressure exercised by the conditions required in order to join NATO, by the time of the enactment of the Freedom of Information Act, the Polish legal regime had already been endowed with a Law on Protection of Classified Information, adopted in 1999. Other exceptions from access to public information are regulated by the Act on Protection of Personal Data; on the other hand, under this act, individuals can obtain and correct records that contain personal information about themselves from both public and private bodies. The Act is enforced by the Bureau of the Inspector General for the Protection of Personal Data.

Freedom of information regime in Romania

The state of the art in Romania provides for a set of regulations, adopted in recent years, regarding a framework Law on free access to public information (Law no. 544/2001) but also on classified information (Law no. 182/2002), transparency in decision making (Law no. 52/2003), and, finally, regarding transparency in public office, in commercial transactions and in debts to the state (Law no. 161/2003). Also,

for public's access to environmental information, a special Governmental Decision was adopted (878/2005), applying the Aarhus Convention.

The Freedom of Information Act adopted in 2001 has proven to be incomplete, and the discretionary power that is given to public authorities is not used properly. On the other hand, shortly after the enactment of the Law on access to public information was enacted another law, on classified information, that gives to the head of the public institution the right to decide if some information is confidential. The difficult issue here is that there is no control over this illegal decision, and the petitioner has no alternative but to go to the courts against the lack of disclosure.

Enforcement. Appeals and Judicial Review

This study is focused on the enforcement provisions of the laws that guarantee the right to access information in the jurisdictions analyzed.

An appropriate legal framework is clearly needed as a condition for transparency, but it will not be sufficient, a wide array of factors should be in place to ensure that these legal provisions are in fact implemented. Among these, the doctrine has identified the condition that the existing legislation should provide not only responsibilities, but also the consequences of non-compliance (Abramo, 2002, p. 146).

From a comparative perspective, the enforcement regime can be structured around three procedures: a) The administrative internal review addressed to the public authority that refused the access to public information, as a mandatory precondition for judicial review or just as a mediation procedure; b) A review by an Ombudsman-type authority, which can have the power to enforce the legislation or just to mediate the conflict; c) A right to judicial review against the refusal by the courts.

Jurisdictions studied here have opted for two major systems of control over the implementation of the freedom of information regime: a) the specialized Commissioner (Ombudsman) system complemented with the judicial review in front of the courts (Hungary), respectively b) the judicial review in front of the courts, preceded by administrative internal appeals (Romania, Czech Republic).

It has been argued that an excess of procedural stages leads to expense and delay in making information available, but in the same time a right of recourse to the court only is likely to deter applicants from challenging refusals because of expense (Macdonald and Jones, 2003, p. 222). The existence of a Commissioner makes the procedure for challenging decisions of public authorities cheaper and more readily available.

It has to be mentioned, though, that even in countries that do not have a specialized Ombudsman specialized on freedom of information matters, the "ordinary" Ombudsman can intervene in such issues, but only in the same manner and with the same powers as in other administrative conflicts.

The main line of criticism regarding Freedom of Information Act in Poland concerns the lack of a specific public authority (like the Information Commissioner or Ombudsman in Hungary or United Kingdom) responsible for ensuring that the provisions of the law are properly implemented. Other important weakness of the law is considered to be the whole construction of it, which may give impressions that secrecy is more important than access to information. This is the consequence

of earlier adoption of law concerning limitations of the right to information on the basis defined in regulation on protection of secret information and about other secrets protected by law, for example privacy of individuals. As in other Central and Eastern European countries, implementation of an electronic version of the Bulletin on Public Sector Information constitutes a challenging task, due to the large number of public authorities required to provide information by use of this Bulletin (over 100 000 in Poland). Finally, it was argued that the procedure of judicial review is time consuming and may be a real obstacle for citizens. From 1989 to 1995 an average time of legal proceedings on criminal cases increased three times and in economic matters more than twelve times (Sakowicz, 2002).

In 1999 and 2000, the Polish Ombudsman, which is the public authority entitled to hear complaints in civil rights cases, took upon itself the initiative to examine also the regulations of municipal deliberative and executive bodies regarding the implementation of the right to access public information. The Ombudsman investigation aimed to investigate the manner in which protocols of board meetings are disclosed, local decisions concerning public procurement and financial performance of executive boards are made publicly accessible. Most of the cases brought before Ombudsman targeted the “no reply” approach or delays in disclosing information, lack of trustworthiness of local officials and violation of constitutional right to information. In his evaluation, the Ombudsman indicated that: territorial self-government units usually do not regulate in their statutes the implementation of the right to information. By contrast, municipal authorities very often refer to law which allows them to act under the veil of secrecy: in one case, a citizen was forbidden to record on tape municipal council sessions (Sakowicz, 2002). Withholding the information usually occurs when it regards financial aspects of municipal companies or access to protocols from sessions or committee meetings. It was also noted that not only citizens, but also members of the local councils or members of board of control commissions are treated in the same restrictive manner (Sakowicz, 2002).

As a best practice imperative, the possibility of a review procedure must be notified to the applicant together with the decision on a request for information. The importance of internal administrative appeals should also be noticed, as they provide a quick, cheap and simple mechanism for resolving the conflict. Nevertheless, an internal appeal will never be impartial and fair, so the judicial review has the important role of covering the situations where the applicant does not find justice with the public authority. On the other hand, the principle is that while an erroneous decision of refusal can be overturned by way of internal administrative appeal, an erroneous decision of disclosure cannot be overturned in this way.

According to the Romanian FOIA (art. 21, 22), the explicit or tacit refusal of the employee appointed by an authority or a public institution to carry out the provisions of the law constitutes a breaking of the law and brings about the disciplinary responsibility of the culprit. Against the refusal, an internal administrative appeal addressed to the manager of respective public authority or of the respective public institution can be handed in, in 30 days since the harmed person has taken note of the respective refusal. If, after the administrative investigation, the complaint proves well-grounded, the answer shall be communicated to the harmed person in

15 days since the complaint has been handed in, and the answer shall contain both the initially requested information of public interest and the disciplinary penalties taken against the culprit.

Furthermore, in case that a person considers that his/her rights recognized by the law have been harmed, the person can bring a complaint to the administrative section of the Court within the jurisdiction of which the respective person live or the headquarters are located, or within the jurisdiction of which the headquarters of authority or public institution are. The deadline for this procedure is 30 days since the answer (express or implicit) to the internal appeal was received.

Although there are not many non-governmental organizations active in the field of freedom of information, those who are active make a lot of difference and impact positively the implementation process of the law. Thus, in 2003 upon a complaint of the Association for the Defense of Human Rights in Romania – Helsinki Committee (APADOR-CH), a Bucharest court fined Prosecutor-General of Romania for refusing to disclose how many people his office has allowed to be wiretapped. The problem in this case is that the fine is too small, and there is no instrument to adapt these fines to the rate of inflation. Eloquently enough, in the case presented above the fine was only 500 lei (\$.015) per day until the information was released.

Another court action initiated by the non-governmental organizations regarded an internal document of the central government. In July 2004, the Romanian media reported the existence of a secret government decision imposing on all executive agencies to obtain the Prime Minister's approval as a pre-requisite for concluding advertising contracts. Shortly afterwards, two non-governmental organizations (Initiative for Justice and Center for Independent Journalism), which were researching the abuse of government advertising as a tool for restraining media freedom in Romania, filed a freedom of information request regarding the existence and content of the decision. In response to the silence of the Prime Minister's office, a complaint was brought to the Administrative section of a Court. In 2004, the Court ordered the government to provide the requested information. The newly elected government that took office in early 2005 quickly put an end to the quarrel and agreed to settle the case by providing all available information.

Romanian experience shows that due to the fact that judicial review is the only real chance to enforce the freedom of information legislation, public authorities are typically reluctant to disclose information and use judicial review as a delay in implementing the law. This happens in the context in which Romanian administrative practice still allows public authorities to pay from public budget damages imposed by court decisions, without really bringing about the disciplinary responsibility of the person which refused the access to public information. Even though there are provisions in this direction, in practice they are not respected, and the public auditors go along with this practice.

In Hungary, article 21 of the Act no. LXIII of 1992 provides the right to institute court proceedings within 30 days from the refusal to disclose public information.

The lengthy judicial process is considered a factor that deters applicants from seeking review in the courts. The doctrine noted that, although "promptness is an

essential element of the exercise of the right to have access to information of public interest”, the case-load on the courts prevails sometimes (Halmai, 2005, p. 44).

In the Czech Republic, the law provides for an administrative appeal at the same authority that refused granting access, then judicial review at Administrative Court according to the Act no. 150/2002 on Judicial Rules of Administrative Procedure. In the first stage the Court from the region where the public authority functions is competent. An appellate review (remedy against the Regional Court decision) is decided by the Supreme Administrative Court in Brno (Kužílek, 2004).

The action must be filed within two months from the delivery of the decision on the administrative appeal. The applicant can represent himself in the first stage of the suit, but in the Supreme Administrative Court it is compulsory to be represented by a solicitor.

The administrative appeal can be sent only by e-mail, if it is necessary for meeting a deadline, but within 5 days there is compulsory to supply it in written form or in electronic format with guaranteed electronic signature, or orally into the protocol (Rules of Administrative Procedure, § 37 par. 4).

A research conducted in 2000 (OSF Prague, 2002) shows that in the Czech Republic there were few appeals against the refusal of public institutions to provide information. Thus, 55% of the institutions scrutinized on Internet and 80% of the municipalities did not report even a single appeal. On the one side, the low numbers of appeals against the decision of an office not to grant an information can reflect satisfaction of the applicants, but, on the other side, it could be also the evidence of not sufficient courage of some citizens to continue the process of gaining information or of the resignation at the very first refusal. If the compulsory subject gives only the obligatory information, it is not possible to learn from the register how many requests were withheld. The law does not explicitly order to itemize the results of appeals in the register, although the numbers of appeals are obligatory and so the estimate is based only on the part of reports - about three quarters of appeals were dismissed. There was also small number of lawsuits concerning the right of information (12). Finally, there were no officers sanctioned for breaking the N. 106/ 99 Act.

An important method of enforcement of freedom of information regimes, especially regarding the ex-officio publication of public information, is represented by the reports drafted by public authorities or by supervising public bodies. Thus, in most jurisdictions, the periodical reports of the implementation level of the Freedom of Information laws play a very important role in drawing the attention of the public on the issue of transparency, and in the same time make public authorities aware of the public scrutiny of their openness.

Most countries have a single national Ombudsman (Romania, Czech Republic), but Hungary appointed three parliamentary commissioners: a general commissioner, a commissioner on the protection of minorities, and a data protection and freedom of information commissioner, who is competent for all the rights related to data protection and freedom of information. The other commissioners are entitled to examine only the institutions of the state – first of all public administration – but the Data Protection and Freedom of Information commissioner has the right to examine every person, institution or organization if they are processing personal data both in

the state and in the private sector. The Commissioner is elected by the Parliament from the Hungarian citizens with a college degree, a clean criminal record and an outstanding academic knowledge or at least 10 years of professional practice, who are widely esteemed persons with significant experience either in conducting or supervising proceedings involving data protection or in the scientific theory thereof; its mission is to safeguard the constitutional right to the protection of personal data and to public access to data of public interest. The statute of the Commissioner is regulated by the provisions of the Act on the Parliamentary Commissioner for Civil Rights, which are applying accordingly.

The Information Commissioner has among its competences investigative powers regarding complaints brought to him. He is in charge with promoting an uniform application of statutory provisions on the processing of personal data and on public access to data of public interest, and can issue a recommendation within his field of competences generally or for a specific data controller; the recommendation issued in a specific case, is not officially binding for that case, but it has to be considered as a way of interpreting the law. In addition to these competences, the Commissioner has the right to form opinion in connection with the activity of an institution performing state or local government functions. Considering the fact that the Commissioner does not possess binding powers over the controlled public authorities, its strength and best weapon are independence, professional knowledge and the publicity (Péterfalvi, 2005).

The main attribution of the Commissioner is to observe the implementation of the Data Protection and Freedom of Information Act and other laws on data processing, to examine complaints and to ensure the maintenance of Data Protection Register. He makes proposals for the adoption or amendment of legislation on access to data of public interest and gives opinion on such draft legislation. A very important competence regards the initiation of narrowing or broadening of data categories classified as state or service secrets.

Anyone may report to the Data Protection Commissioner if he thinks his rights have been violated, or that there is an imminent danger of such a thing to happen, in connection with the processing of his personal data or with the exercise of his right to have access to data of public interest, except when judicial proceedings are already pending concerning the case in question. No one shall suffer any prejudice on grounds of his reporting to the Data Protection Commissioner. In performing his tasks, the Data Protection Commissioner may request the data controller to supply information on any matter related to personal data or public information, and he may examine all such documents and request a copy of and have access to all such data processing operations. The public authority shall reply to the recommendation issued in relation with its activity within 30 days. If the data controller or technical data processor fails to discontinue the unlawful processing (technical processing) of data, the Data Protection Commissioner orders the blocking, deletion or destruction of unlawfully processed data, prohibits the unlawful processing or technical processing of data, and suspends the transfer of data to foreign countries. The classifier may, within 30 days, go to the Metropolitan Court of Justice to have it established that the

demand has not been well-founded. Until a final court decision, the data concerned may not be deleted or destroyed; the processing of data, however, shall be suspended and the data shall be blocked.

State and official secrets shall not prevent the Data Protection Ombudsman from exercising his rights stated in the Act, but the provisions on secrecy shall bind him as well.

The solution of having the Information Commissioner dealing also with data protection issues is controversial. It is evident that the two philosophies are opposed and may lead to inconveniences in applying the legislation. On the other hand, this dual position precisely could make things go better when trying to balance the right to know with the right to privacy. In this context, such a solution is to be considered at the next revision of the Romanian Constitution.

Concluding remarks

Reforming former communist public administrations is a daunting task, and it takes more than a decade until the first signs of success can be observed. The process is a painful one and it has to be further approached with great care so that new mistakes would not draw it back. The developments presented in this paper are the expression of initial stages of the reform, while considering at any time the resistance of the political parties and of the old mentalities entrenched in public officials' mind to this endeavor.

There are many things to be done in the future in order to make the regime of transparency to function properly, besides adopting new regulations inspired by Western European models. It is known that *implementation* is the "missing link" in reforming public administration in Central and Eastern Europe (Dunn, Staronova and Pushkarev, 2006).

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¹ Press release, E-Strategies On-Line, Issue 15, 26.10.2005, <http://www.britishpublishers.com/ezone/ezone15.htm>

² http://www.mos.gov.pl/mos/akty-p/dostep_eng.html