Case number: NAIH/2019/5557/3.

Resolution of the Nemzeti Adatvédelmi és Információszabadság Hatóság

on the publicity of public procurement data

The Nemzeti Adatvédelmi és Információszabadság Hatóság (Hungarian National Authority for Data Protection and Freedom of Information, hereinafter: Authority) received several questions for consultation and submissions concerning access to the data of closed public procurement procedures.
Having obtained the position of the Public Procurement Authority concerning this issue, the Authority summarises its opinion on the publicity of public procurement data as follows:

Pursuant to Article VI(3) of the Fundamental Law of Hungary (hereinafter: Fundamental Law), everyone has the right to access and disseminate data of public interest. The primary purpose of the freedom of information is to ensure the transparency of the state. In its decision 32/1992. (V. 29.) AB, the Constitutional Court declared that this fundamental right "*enables the control of the legality and efficiency of the elected representative bodies, the executive power and public administration and it stimulated their democratic operation*". Social control over decision-making by the public powers and the spending of public funds can be successful and efficient only if citizens can have access to the necessary information.

1. The relationship between the Public Procurement Act and the Privacy Act

In its report on its 2018 activities, the Authority published an analysis[1] of the relationship between Act CL of 2016 on the Code of General Administrative Procedure (hereinafter: Administrative Procedures Act) and Act CXII of 2011 on the Informational Right of Self-Determination and the Freedom of Information (hereinafter: Privacy Act) analysing the issue of access to public data in administrative procedures. The essence of this is as follows: the interpretation of the procedural and document inspection rules of the Administrative Procedures Act fall within the Authority's powers only to the extent that they affect the two information-related fundamental rights, while the possibility of restricting the fundamental right related to access to data of public interest must in every case be interpreted strictly. The fact itself that the data requested to be issued are otherwise used in a procedure of an administrative authority does not deprive these data of their character as data of public interest.

By analogy to this approach, the Authority interprets the provisions of Act CXLIII of 2015 on Public Procurement (hereinafter: Public Procurement Act) and the Privacy Act ensuring access to data as follows, taking into account the professional arguments of the Public Procurement Authority:

One instrument for exercising the fundamental right of freedom of information as guaranteed by the Fundamental Law is the possibility to submit a **request to access data of public**

[1] https://www.naih.hu/files/Beszamolo-2018-MR.PDF, pp. 118.-119.

interest, while another proactive form is the **obligation of electronic publication**, which provides access to data without limitation for all without identification.

The right to request data is a **subjective right**, according to which the person requesting the data has the right to access data of public interest and to submit his request to the body discharging a public task, managing public funds (hereinafter jointly referred to as: body discharging public task). According to Constitutional Court decision 13/2019. (IV. 8.) AB *„[28] 3.1. The content of freedom of information and the legal relationship of a fundamental right based on it constitute an obligation for bodies and persons discharging public tasks to proactively publish certain data related to their public tasks, or characterising them, or if so requested, to make them accessible*".
The purpose of the Public Procurement Act as specified in its preamble is to ensure the transparency and the public's ability to control the efficient use of public funds and, with a view to establishing the conditions of fair competition in public procurement, regulation in line with the international agreements signed by Hungary and the directives of the European Union.

Public procurement procedures are launched by organisations managing public funds and certain undertakings outside the competitive sector (such as energy or water suppliers, public transportation companies, postal service providers) to procure services, goods or works **above a certain value limit**.[2] In the case of public procurements, "*the notion of **economic actor** must be interpreted broadly, so that it includes every person and/or legal subject, who offers to carry out construction works and/or the building of edifices, the supply of goods or the provision of services in the market, irrespective of their company form*"[3].

In relation to inspecting offers or applications to participate submitted by other economic agents to the Public Procurement Arbitration Board, the Public Procurement Act stipulates that an economic agent may request inspection of documents only in warranted cases and he must indicate the alleged concrete breach of the law owing to which the request is submitted and which part of the offer or application to participate he wishes to inspect. This is needed because the contracting authority must allow inspection only to the extent necessary for the enforcement of rights related to the alleged breach of the law indicated by the economic agent. It should be underlined that a full review of the offer or application to participate is not possible under document inspection.

The Authority studies the interpretation of the rules of the Public Procurement Act regulating inspection of the documents of the public procurement procedure and the rules of the Privacy Act ensuring access in the case of a conflict between the two fundamental rights; as a main rule, **however, the possibility of limiting the fundamental right related to access to data of public interest must in all cases be interpreted strictly.** The fact itself that the data requested to be accessed are used in a public procurement procedure or are generated in the course of it does not deprive them of their character as data of public interest, moreover according to definition precisely the data generated in the course of this procedure will become data of public interest.

According to the position taken by the Authority, the legal institution of the right to inspect documents guaranteed in the course of the legal remedy procedure in a public procurement procedure cannot be identified with the request for data of public interest submitted in order to have access to the data of a closed public procurement procedure; the submission of a letter

[2] https://europa.eu/youreurope/business/selling-in-eu/public-contracts/public-tendering-rules/index_hu.htm

[3] DIRECTIVE 2014/24/EU (26 February 2014) on public procurement and repealing Directive 2004/18/EC, recital (14)

and the application of the relevant general rules may not be excluded with reference to the former.

2. Ensuring access under the Public Procurement Act

The Public Procurement Act indicates access to data as one of the principles of the public procurement procedure[4], which is incorporated in the rules pertaining to mandatory publication. With respect to ensuring access, the Authority underlines that both the acts of the contracting authority and the documents submitted by tenderers in public procurement procedures **fundamentally contain data of public interest**, and only exceptionally data accessible on grounds of public interest. It should be noted that in practice it is very rare that tenderers are natural persons.

Pursuant to the Public Procurement Act in the course of implementing their public procurements - designing and conducting public procurement procedures and performance of the contracts concluded - the contracting authorities must publish specific data and documents in a manner specified by law.

Section 42(1) of the Public Procurement Act provides for the mandatory drafting of the annual public procurement plan and its publication.
"*Public Procurement Act, Section 42(1) Contracting authorities defined in Section 5(1), with the exception of central purchasing bodies, shall draw up, at the beginning of the budgetary year, by 31 March at the latest, an annual overall public procurement plan (hereinafter referred to as 'public procurement plan'), which shall outline all public procurements envisaged for the given year. The public procurement plan shall be retained by the contracting authority for a period of at least five years. Public procurement plans shall be made publicly available*."

Section 43 of the Public Procurement Act requires mandatory publication on the homepage of the Public Procurement Authority (CoRe) or in the Public Procurement Database (EKR):

"Public Procurement Act, Section 43(1) The contracting authority shall publish the following in the public electronic contract registry (hereinafter: CoRe) operated by the Public Procurement Authority and if the legal regulation enacted pursuant to the authorisation granted by this act renders it mandatory with respect to certain documents and data also in the electronic public procurement system (EKR)
*a) the **contracts concluded** in accordance with Section 9(1) h)-i) and Section 12(1)-(5) and any **amendments** to the contract without delay upon the conclusion or amending of the contract;*
b) the contracts concluded on the basis of a public procurement procedure and any amendments to such a contract without delay following the conclusion or amending of the contract;
c) the following data concerning the performance of the contract:
*ca) reference to the **notice launching the public procurement procedure** (in the case of procedures launched without an notice, **the invitation**),*
*cb) **the names of the contracting parties**,*
*cc) **whether the performance was in compliance with the contract,***
*cd) **date of the acknowledgement by the contracting authority of the performance of the contract,***

[4] Public Procurement Act, Section 2(1) In procurement procedures contracting authorities shall ensure and economic operators shall respect the fairness, transparency and public nature of competition.

ce) ***the date of the payment of the consideration and the value of the paid consideration*** *within thirty days following the fulfilment of the contract by each party or in the case of public procurement carried out using subsidies following fulfilment by the entity, which is obliged to make payment.*

(2) The contracting authority shall publish ***in EKR***
a) the ***public procurement plan****, and its amendment without delay following its acceptance;*
b) ***the data concerning preliminary dispute settlement*** *according to Section 80(2) without delay following receipt of the request for preliminary dispute settlement;*
c) ***a summary concerning the evaluation of request to participate and the evaluation of tenders****, simultaneously with sending them to the applicants or tenderers;*
d) the documents according to Section 103(6) and Section 115(7).“

In relation to this, the Authority wishes to underline that according to the rules of the Privacy Act limiting access[5] the data of procedures in progress constitute data laying the foundation for the decision as long as the decision is made, i.e. the winning tenderer is selected. Relative to this restriction, the Public Procurement Act[6] provides for access to certain data and documents in a public-friendly manner when it qualifies these data as data accessible on grounds of public interest, hence accessible in the process of the public procurement procedure and because of this, granting access to them cannot be refused with reference to trade secrets. To this regulation, more detailed data can also be accessed on the public procurement procedure, reinforcing the possibility of control by the general public. The fundamental purpose of this provision is to ensure that the data declared to be trade secrets by economic operators should only be information whose publication would give rise to disproportionate injury to the business activities of the economic operator, and restricting access to them would render the transparency of the spending of public funds impossible. It is important to emphasise that “*the provisions concerning protection of confidential information do not in any way prevent public disclosure of non-confidential parts of concluded contracts, including any subsequent changes*”.[7]

Over and above the regulation provided for in the Public Procurement Act, the obligation to publish the summary of tender evaluations can also be found in publication units III/4 and III/8 of the general publication schedule of the Privacy Act.

Based on all this, it cannot be stated that the public procurement data, whose publication the Public Procurement Act does not provide for, could not qualify as data of public interest in a given case. According to the position taken by the Authority, the practice on the basis of which only the winning tender (or according to the opinion of the Public Procurement Authority not even that) would be accessible following the closure of the public procurement procedure which would put an end to the transparency of the public procurement procedure and the

[5] Privacy Act, Section 27(2) The right to access data of public interest or data accessible on public interest grounds may be restricted by an act with the specific type of data indicated, if considered necessary for the purposes of:
a) national defence;
b) national security;
c) the prosecution and prevention of criminal offences;
d) environmental protection and nature conservation;
e) central financial or foreign exchange policy;
f) external relations, relations with international organisations;
g) court proceedings or administrative authority procedures;
h) intellectual property rights
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[6] Public Procurement Act Sections 42, 43

[7] DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, recital (51)

management of public funds. It should be underlined that every tenderer has the right granted by law, as well as the opportunity to qualify the data whose disclosure would have a negative influence on its economic activities as trade secrets with the appropriate justification.

In relation to whether or not a request for data of public interest can be met, a question whether the person requesting the data wishes to access data concerning a procedure in progress or a procedure already closed with a decision is of paramount significance. A request for data of public interest related to the data of a public procurement procedure in progress must be refused by the controller, i.e. a body performing public tasks with reference to Section 27(5) of the Privacy Act in view of the fact that the data support the decision-making process with regard to data whose publication is not required by the Public Procurement Act itself.

The phases of the public procurement procedure:

I. Preparatory phase: planning public procurement procedures, annual public procurement plan, drafting the rules of public procurement
II. Launching the public procurement procedure - invitation to tender
III. Supplementary information
IV. Preliminary dispute resolution, inspecting documents
V. Opening of the tenders received
VI. Bid evaluation (summary of tender evaluation)
VII. Request to make up for deficiencies
VIII. Notification of the tenderers about the results of the procedure (eventually legal remedy procedure, inspection of documents)
IX. Conclusion of the contract with the winning tenderer, performance

According to the position taken by the Authority, the closing of a public procurement procedure is implemented with the decision on the selection of the winning tenderer and the conclusion of the contract. From then on, the data of the public procurement procedure can no longer be qualified as data supporting decision-making and they can be accessible through request for data of public interest with the exception of the protected data.

3. Inspection of public procurement documents - transparent use of public funds

In view of Section 8(2) of the Administrative Procedures Act, the procedural rules of this act apply to the public procurement procedure and the administrative procedure of the public procurement Arbitration Board. With respect to the latter, action has to be taken in accordance with Sections 33-34 of the Administrative Procedures Act, the relevant rules of the Public Procurement Act and the different rules permitted under Section 33(6) of the Administrative Procedures Act. Section 34(1) and (2) of the Administrative Procedures Act stipulates the general restrictions of exercising the right to inspect documents enforced in every case.

Access to the documents of a public administration procedure means, however, not only the exercise of the right to inspect documents, but in certain cases also access to data of public interest pursuant to the Privacy Act. In relation to this, the Authority underlines that the data and information incorporated in the documents of the procedures of authorities are subject to the general scope of the Privacy Act and Section 27(1) specifies restrictions concerning access

to such data. The Authority agrees with the position, according to which [8]*"[…] As a general rule, the right to access data of public interest is broader than the right to inspect documents.*".

The Public Procurement Authority expanded its position in detail concerning the inspection of documents without a request of data of public interest, which restricts not only the range of accessible data, but also the personal circle of those inspecting them. Such a document inspection takes place not requiring a request when **tenderers** have access to one another's name and address and the main quantifiable data to be evaluated based on the evaluation criteria when the tenders or applications to participate are opened.

Pursuant to Section 45(1) of the Public Procurement Act, the **tenderer** participating in the public procurement procedure may request to access the part of the tender of another economic operator, which contains trade secret after sending the summary drawn up on the evaluation of the tenders. Such inspection may not extend to the review of the entire tender.

The Public Procurement Act also provides an opportunity to inspect the documents generated in the course of the legal remedy procedure conducted in front of the Public Procurement Arbitration Board in a legal remedy procedure; the **client** has thirty days to inspect the documents from the launching of the procedure.

The opinion of the Public Procurement Authority on the issue of unrestricted access to the documents of public procurement applies exclusively to the inspection of documents in the course of the legal remedy procedure. In this respect, the Authority shares the view that the inspection of the documents of public procurement in the course of legal remedy procedures is possible with some restrictions. However, the Authority wishes to emphasise that the right to access information on the grounds of public interest guaranteed in the Fundamental Law and the Privacy Act is not the same as the right to legal remedy for the enforcement of the rights of data subjects in the course of the procedure.

In its decision 13/2019 (IV.8) AB, the Constitutional Court expanded the principle, also supported by the Authority, according which "*[32] Freedom of information is enforced not at the cost of the efficient operation of the bodies concerned, but in principle, to the contrary: although ensuring transparency may in the given case involve time, the use of labour resources and costs, this is in fact one of the guarantees of democratic and efficient operation.* ***The fact that data related to the discharge of public duties are ab ovo public or can be accessed if so requested, is one of the instruments of the social control of operation and thereby one of the guarantees of (more) efficient operation."***[9]

What is public interest? What makes data, a piece of information of public interest? The European Court of Human Rights (hereinafter: ECHR) formulated the answer to the question in detail in its judgment in the case of Magyar Helsinki Bizottság v. Hungary: "*The public interest relates to matters, which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community.*"[10] Pursuant to the justification of the ECHR judgment, projects financed by public funds typically affect the life of a smaller or larger community, in the given case even the entire society serving its well-being - out of public funds in the interest of the public. Based on this finding, the enhanced

[8] Commentary to the Administrative Procedures Act Section 33

[9] Constitutional Court Decision 13/2019. (IV. 8.) AB

[10] Magyar Helsinki Bizottság v. Hungary [GC] (18030/11), 8 November 2016. paragraph 162.

interest on the part of citizens in the data of public procurements and closed public procurement procedures and the demand for having access not only to the winning tender, but also to the data of all the valid tenders supporting decision-making, which are not business secrets can be clearly deducted, thus all such data provide a basis for comparison to the citizens.

4. Access to public procurement documents following the closure of the procedure

First and foremost, the Authority call attention to the fact that the public procurement dataqualified as data accessible on public interest grounds in the course of the public procurement procedure by the Public Procurement Act retain their quality of being public on grounds of public interest after the closure of the procedure.

In relation to access to the data of **closed public procurement procedures**, the Authority represents the principle of publication in accordance with the Privacy Act as the general rule. The Authority regards it important to underline that the accessibility of data of public interest is restricted in the public procurement procedure with a view to fairness of competition prior to the decision of the contracting authority closing the decision, thus until the decision is made, the decision supporting nature of the data is enforced. (There are exceptions to this, however, thus pursuant to Section 27(3) of the Privacy Act in view of the Authority the names of the tenderers are data accessible on grounds of public interest after the expiry of the period open for bidding following the opening of the tenders.) On account of the transparency of the management of public funds, the business organisations, which are winning tenderers in public procurement procedures, must tolerate access to their data generated in the course of the public procurement procedure with the exception of protected data.

The Constitutional Court has interpreted the provisions of the Fundamental Law and the relevant legal regulations pertaining to the transparency of public funds in several cases. In its decision 21/2013 (VII. 19.) AB, the Constitutional Court declared that the purpose of the Fundamental Law qualifying information related to public funds and national assets as data of public interest is **to ensure the principles of transparency and integrity in public life.** "*In view of the provisions of the National Avowal, this principle governs not only the processing of the data related to public funds and the national assets, but also in general data related to the discharge of public duties.*" Transparency and integrity in public life are requirements of the Fundamental Law related to the entirety of the operation of a democratic state serving its citizens, in general related to the discharge of public duties and the fundamental right to access and disseminate data of public interest are called inter alia to enforce this.

Pursuant to Article 38(1) of the Fundamental Law, the property of the state and local governments are national assets, while its Article 39 raised the requirement of transparency in the management of public funds and the qualification of data pertaining to public funds and national assets as data of public interest to a constitutional rank:
"(2) Every organisation managing public funds shall be obliged to publicly account for its management of public funds. Public funds and national assets shall be managed according to the principles of transparency and the purity of public life. ***Data relating to public funds and national assets shall be data of public interest."***

Pursuant to Section 1(2) of the Act on National Assets, the following qualify as national assets:
"a) things in the exclusive property of the state or local governments,

b) things held by the state or the local government not subject to point a),
c) financial assets held by the state or local governments and holdings in companies held by the state or local governments,
d) any right of pecuniary value to which the state or local governments are entitled, which are named by legal regulation as rights of pecuniary value, […]".

In line with the Fundamental Law, Section 7 of the Act on National Assets declares that the primary purpose of national assets is to ensure the performance of public duties. National assets must be managed in a responsible manner in accordance with their purpose. The task of national asset management is to operate national assets in accordance with their purpose adjusted to the loadbearing capabilities of the state and the local governments, primarily as needed for the discharge of public duties and the satisfaction of social needs at all times based on uniform principles in a transparent, efficient and economical manner to safeguard their value, to protect their condition, to use them so as to increase their value, to utilise and augment them and to alienate the assets that become superfluous from the viewpoint of the discharge of the tasks of the state or of local governments.

4.1. The issue of the accessibility of concrete data and documents

- The invitation to tender and the public procurement document drafted by the contracting authority[11];

  Pursuant to Section 37(1) b) of the Public Procurement Act, the contracting authority must publish the invitation to tender launching an open procedure by way of a notice. The public procurement document is a material drafted by the contracting authority providing information on the public procurement procedure, which contains essential data for the tenderer to draw up the tender. Section 3(21) of the Public Procurement Act provides for the content of the public procurement document.

According to the position taken by the Authority, the invitation to tender and the public procurement document is accessible to anyone.

- The tenders of all the tenderers:

  With respect to the accessibility of all the tenders submitted in the course of the public procurement procedure, the Authority underlines that distinction should be made in the data content of the winning and not winning tenders: as a general rule, the winning tender is of public interest in full (with the exception of trade secrets), not winning tenders are public only to the extent their content was taken into account by the contracting authority in the course of evaluation to determine the order of the tenderers.

Based on the above, there is public interest in awarding the contract to the economic operator submitting the most optimal tender with respect to the price-quality ratio, and this social expectation requires that the essence of the tenders both winning and not winning(excluding protected data), be accessible and comparable. The range of data accessible in EKR to be detailed below, if they are truly uploaded, is presumably actually suitable for allowing this comparison. This, however, will have to be weighed by the controller when meeting requests

[11] Public Procurement Act Section 3(21) "**procurement document"**: any document produced or referred to by the contracting authority to describe or determine the subject matter of the procurement or the concession, the procurement procedure or the concession award procedure, in particular the contract notice announcing the producer, the prior information notice used to announce the procedure, the technical specifications, the descriptive document, additional information, proposed conditions of contract, models for the presentation of documents by economic operators, detailed price chart or the unpriced budget

for data of public interest from case to case and in the case of an eventual refusal, the justification must extend to this in detail.

Pursuant to the Directive of the European Union on public procurement: "*Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment with a view to ensuring an objective comparison of the relative value of the tenders in order to determine in conditions of effective competition, which tender is the most economically advantageous tender. It should be set out explicitly that the most economically advantageous tender should be assessed on the basis of the best price quality ratio, which should always include a price or cost element."*[12]

- The full tender of the winning tenderer (statements, price offer, technical documentation):

  The winning tenderer will use public funds when implementing the tender submitted in the course of the public procurement procedure. When managing public funds, economic operators must ensure transparency. Hence the position taken by the Authority is that the winning tender represents data of public interest with the exception of the protected data and if a request is submitted, access to it must be granted.

- Invitation to make up for deficiencies issued in the course of the procedure and the answer to it; supplementary information and the answer to it; documents related to preliminary dispute settlement;

  The Public Procurement Act provides several instruments to the contracting authorities to have eventual errors in the tender corrected; one of these is making up deficiencies. The set of expectations related to the invitation to make up for deficiencies was developed by the Court of the European Union in case C-599/10. SAG ELV Slovensko et al. Accordingly, the invitation to make up for deficiency
  - may serve to submit actually missing or erroneous documents,
  - making up for deficiencies may only aim at rendering the tender appropriate and to that extent, it may modify and supplement the tender,
  - the invitation to make up for deficiencies must accurately indicate the deficiency, the reasons for making up for the deficiency and the parameters of its appropriate performance,
  - the invitation to make up for deficiencies must be sent in full to all tenderers and applicants to participate,
  - any number of invitations to make up for deficiencies may be sent out, but a deficiency indicated earlier may not be corrected subsequently when making up for other deficiencies[13].
  - the submission date must be set so as to take into consideration the time requirement of obtaining the document(s) to be submitted,
  - in terms of the technical content of tenders, Section 71(8) of the Public Procurement Act states that only insignificant errors concerning individual partial issues may be corrected whose change does not influence the total bid price or its sub-amount subject to evaluation and the order of the tenderers evolving in the course of evaluation.

The invitation to make up for deficiencies aims at verifying, modifying, eventually supplementing the data of an **otherwise valid** tender. The invitation to make up for

[12] DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, recital (90)

[13] Public Procurement Act Section 71(6) last sentence

deficiencies shares the legal destiny of the submission of the tender, while the submission of this information shares that of the tender. Because of this, the accessibility of the invitation to make up for deficiencies, or of the data submitted in response to that, are not subject to restriction.

The applicant (the tenderer or the person entitled to participate or any interested economic operator) indicates the element of the written summary or other document or procedural act deemed to be an infringement in the request for preliminary dispute settlement submitted to the contracting authority. In addition, he must include his recommendations, documents, data and facts substantiating his observations in the request submitted in EKR. The contracting authority notifies all the tenderers and persons entitled to participate of the request for dispute settlement and the answer given to it also in EKR.

Data and the uploaded documents, such as the data of the contracting authority, the detailed data of the public procurement procedure, data concerning due dates, the notices of the procedure, the public procurement documentation (invitation to tender/participate, statements, technical documentation, tender documentation, professional CVs), protocol on dismantling, publication of economic operators invited to tender, summary of the evaluation of tenders, contract related information are kept in EKR (for 5 years following the performance of the contract[14]) with respect to the procedures launched.

The Authority highlights the fact that the summary of the evaluation of tenders accessible to anyone in the EKR[15] website, including the procedures launched, contains, inter alia, the following in detail:

- the number of tenders submitted, the data of public interest concerning valid tenders;
- the method of evaluating tenders, the elements of content of the tenders according to evaluation criteria;
- the evaluation of the tenders - including the bottom and top limits of the scores that may be given, the scores awarded to the tenders in the course of the evaluation of the elements of content according to sub-criteria;
- the evaluation scores of the tenderers multiplied by weight (number);
- information concerning the use of subcontractors (name and address of the subcontractor and the parts of the procurement for the performance of which the tenderer wishes to use the subcontractor).

The contracting authority must retain the data in EKR for at least a period of five years[16]. Based on the above, the position of the Authority is with respect to the documents in EKR that these documents and the data therein are accessible to anyone not only from EKR, but also after the period (five years) specified in the Public Procurement Act.

- pursuant to Section 115(7) of the Public Procurement Act, the name and address of economic operators invited to tender and the protocol on the opening of the tenders:

  Pursuant to Section 43(2) d) of the Public Procurement Act, the documents according to Section 103(6) and Section 115(7) of the Public Procurement Act must be published by the contracting authority in EKR. These documents are the following:

[14] Public Procurement Act, Section 43(5) and 46(2)

[15] https://ekr.gov.hu/portal/kozbeszerzes/eljarasok/lista

[16] Public Procurement Act, Section 46(2) last sentence

- on the starting date of the negotiated procedure without notice, all the documents sent to the Public Procurement Authority (except for the information on the estimated value of the procurement and the name and address (seat, residence) of the economic operators invited to tender), and the public procurement documents and the protocol on tender opening. The information on the estimated value of the procurement and on the name and address (seat, residence) of the economic operators invited to tender) is to be published after the opening of the tenders together with the protocol on tender opening [Public Procurement Act Section 103(6)];

- simultaneously with launching the procedure, the notice launching the procedure, the public procurement documents the name and address of economic operators invited to tender and the protocol on the opening of the tenders must be published immediately after tender opening, [Public Procurement Act Section 115(7)].

The position taken by the Authority concerning the data of the protocol on tender opening is as follows:

Section 68(6) of the Public Procurement Act[17] specifies the data[18], which must be disclosed upon opening the tenders and of which a protocol is to be drawn up. The website www.palyazat.gov.hu[19] assists contracting authorities by providing a protocol template,[20] which can be downloaded for the protocol to be drafted upon tender opening.

Accordingly, the minutes contain the following data:

Description of the data	**Data of public interest/data accessible on grounds of public interest/protected data (personal data, trade secret)**
Name of the tenderer upon expiration of the tender submission date, simultaneously with tender opening.	As a general rule, these are data accessible on grounds of public interest pursuant to Section 27(3) of the Privacy Act (also supported by Public Procurement Act, Section 103(6) and Section 115(7)).
Name of the contracting parties	Data accessible on grounds of public interest pursuant to Public

[17] Public Procurement Act, Section 68(6) The contracting authority shall draw up minutes of the opening of the tenders and requests to participate, as well as the provision of the data specified in paragraphs (4)-(5) and it shall send those minutes to all tenderers and candidates within five days from the day of opening. The submission of tenders or requests to participate received after the expiry of the time limit shall also be recorded by drawing up minutes and those minutes shall be sent to all tenderers and candidates including the belated ones.

[18] Public Procurement Act, Section 68(4) Upon opening the tenders, the names and addresses (seat, residence) of the tenderer, as well as the main quantifiable particulars to be assessed according to the award criteria shall be announced. Before the opening procedure of the tenders is started, the amount of the funds available for the performance of the contract may be disclosed.

(5) Upon opening the requests to participate, the names and addresses (seat, residence) of the candidates shall be announced.

[19] https://www.palyazat.gov.hu/download.php?objectId=64551

[20] Description of the information material: “Minutes of the opening of tenders according to Public Procurement Act, Section 68(6) - document template”

	Procurement Act, Section 43(3) and Privacy Act, Section 27(3).
Name of the contact person	If it is accessible to all from the registry according to Public Procurement Act, Section 44(2) a), then it is accessible on grounds of public interest.
E-mail address	If it is accessible to all from the registry according to Public Procurement Act, Section 44(2) a), then it is ccessible on grounds of public interest.
Name and seat of the contracting authority	data of public interest
Subject matter of the public procurement procedure	data of public interest
Registration number of the public procurement procedure	data of public interest
Date of opening tenders / final tenders	data of public interest
Place of opening the tenders/final tenders	data of public interest
Persons present: according to the enclosed attendance sheet	if he/she takes action representing an economic operator, and is accessible from the registry according to Public Procurement Act, Section 44(2) a), then it is accessible on grounds of public interest.
Number of regularly submitted tenders/final tenders by the submission date for tenders/final tenders: …….	data of public interest
Amount of financial coverage available for the performance of the contract: net HUF	data of public interest
Name and seat of the tenderer	data accessible on grounds of public interest
Total net bid price	data of public interest
Name of the applicant and the person reviewing the fiches of the tenderer(s). Name of the applicant and the person reviewing the document and the name of the bidder whose fiche was reviewed.	not accessible, personal data

5. Trade secret - the limit to accessibility

Pursuant to Section 3(5) of the Privacy Act "***data of public interest*** *means information or data other than personal data, registered through any method or any form pertaining to the activities of and processed by the organ and person performing state or local government duties and other public duties defined by law, irrespective of the method or form in which it is recorded and regardless of its singular or collective nature; in particular, data concerning material competence, territorial competence, organisational structure, professional activities and the evaluation of their performance, the type of data held and the laws governing its operation, as well as data concerning financial management and concluded contracts*."

Pursuant to Section 3(6) of the Privacy Act "***data accessible on public interest grounds*** *means any data, other than data of public interest, the disclosure, availability or accessibility of which is prescribed by an Act for the benefit of the general public".*

Pursuant to Section 27(3) of the Privacy Act, as data accessible on public interest grounds, the following shall not qualify as trade secret: the budget of the central government and the local governments; furthermore, data related to the use of European Union funds, to benefits

and allowances involving the budget, to the management, possession, use, utilisation and the disposal and encumbering of central and local government assets, and the acquisition of any right in connection with such assets, as well as data, the accessibility or publication of which is prescribed on public interest grounds by a specific Act. Disclosure, however, shall not entail access to data, to know-how in particular, the making available of which would cause disproportionate harm with respect to the performance of business activities, provided that this does not prevent the possibility of access to data accessible on public interest grounds.

Section 1 of Act LIV of 2018 on the Protection of Trade Secrets (hereinafter: Trade Secrets Act) defines the notion of trade secrets:
"(1) Trade secret means facts, information, other data and an assembly of the foregoing, connected to an economic activity, which is secret in the sense that it is not, as a body or as the assembly of its components, generally known or readily accessible to persons dealing with the affected economic activity and therefore it has pecuniary value, and which is subject to steps made with the care that is generally expected under the given circumstances, by the person lawfully in control of the information, to keep it secret.
(2) Protected knowledge (know-how) means technical, economic or organisational knowledge, solution, experience or the assembly of the foregoing, classified as trade secret and recorded in an identifiable manner.

The Authority summarised its position taken in relation to the collision of trade secrets and the freedom of information in its recommendation NAIH/2016/1911/V.

Accordingly, facts, information, solutions or data qualified as trade secrets are of paramount importance for a business organisation functioning within the framework of market competition because they base their corporate and economic plans and strategies on them, this information is the basis of their decisions, which ensure their place in the market, thus disclosure of such information may result in them being driven out of the market.[21]

As the Constitutional Court established in its Decision 165/2011. (XII. 20.) AB "*transborder economic relationships but at least the context of the single European market, the fact that economic decisions are made in European market dimensions even within the media sector lend a greater perspective to the significance of trade secrets. In its practice to date, the Court of the European Union endorsed the protecton of business secrets as a fundamental principle*".[22]

Resolving the conflict between trade secrets and the freedom of information, Section 27(3) of the Privacy Act qualifies "quasi" trade secrets related to the budget of the central government and the local governments; the use of European Union funds, benefits and allowances involving the budget, the management, possession, use, utilisation and disposal and encumbering of central and local government assets, and the acquisition of any right in connection with such assets, as data accessible on public interest grounds with a view to ensuring the transparency of managing public funds.

The last sentence of the same paragraph - with a view to proportionality - sets forth that "*disclosure, however, shall not entail access to data, to know-how in particular, the making available of which* ***would cause disproportionate harm*** *with respect to the performance of*

[21] Constitutional Court Decision 165/2011. (XII. 20.) AB

[22] Section 28 of the judgment in case C-53/85, AKZO Chemie and AKZO Chemie UK v. Commission brought on 24 June 1986, Section 37 of the judgment brought in the case C 36/92, SEP v. Commission on 19 May 1994, Section 49 of the judgment brought in the case C-450/06, Varec SA v. State of Belgium on 14 February 2008.

business activities, ***provided that this does not prevent the possibility of access to data accessible on public interest grounds***". That is to say, the data according to Section 27(3) of the Privacy Act are public, even if they qualify as trade secrets according to Section 1 of the Trade Secrets Act. As said before, the exception among these data should be interpreted stricto sensu for two reasons:

1) In the case of protected knowledge (know-how) the legislator recognizes - has always recognized - the special value, which requires particular protection within trade secrets.
2) Data other than know-how (a strategic, etc. data referred to tend to be in this range) may be exempted only after thorough examination in the case of a high risk of infringing on interest.

With respect to access to the data of closed public procurements, the Authority highlights the judgment of the Court of the European Union of 14 March 2017 in the case Evonik Degussa[23], when it comes to examining trade secrets as it emphasizes the issue of the **age of trade secrets** (past, recent, future), and its examination in relation to the publication of information, which may qualify as trade secrets.

The data of the services and works constituting the subject matter of public procurement procedures (largely procurement data) are generally current within a given time interval, as time passes this kind of information tends to lose currency. Because of this, according to the position taken by the Authority, the body discharging public duties, who is also the controller, must notify the economic operator concerned in writing of the request for data of public interest and requests written observations in relation to information qualified as protected earlier, while setting a deadline for this.

Beyond protected knowledge, such as technological procedures, technical solutions, manufacturing processes, methods of work organisation and logistics, and know-how, it is also necessary to weigh the public interests related to having access to the information and restricting such access on a case by case basis. "*The rightful financial, economic or market interests*" of companies managing national assets, which are also market agents may confront the fundamental right to freedom of information.

The definition of the trade secret makes it clear that only those data can be qualified as trade secrets, whose unauthorized disclosure or use would infringe upon the interests or rights of the holder of the secret. The subject matter of the trade secret is information. Accessing the information by a third person jeopardises the rightful financial, economic or market interests of an economic operator if that provides him competitive advantage. The Constitutional Court also stipulated this in its decision 165/2011. (XII. 20.) AB: the indispensable condition of qualifying data as trade secrets is that "*obtaining, utilising the data, disclosing them to others or publishing them by unauthorised persons would infringe upon or jeopardise the rightful financial, economic or market interests of the holder of the secret*".

According to the consistent practice of the Authority, the controller is responsible for deciding which documents and which data can be issued upon a request for data of public interest and access to which should be restricted. It is clear that in the case of trade secrets, it is the task and interest not of the body discharging public duties, but of the holder of the secret to bring up the appropriate reasons to substantiate why the data qualify as trade secrets. The Authority recommends the accurate delineation of the data or range of data affected by restriction in the

[23] Sections 64-66 of the judgment brought in case C-162/15 P., Evonik Degussa v. Commission on 14 March 2017.

document. That is, if there is acceptable justification for restricting access, the controller may refuse to meet the request for data.

If, however, the tenderer failed to indicate which of his data are to be handled as trade secrets when submitting his tender to the public procurement procedure allows one to draw the conclusion that data to which access is requested is not handled by the tenderer as particularly protected data; in such cases qualifying the data subsequently as trade secrets is ab ovo excluded.

The illustrative list of Section 27(3) of the Privacy Act restricts the transparency guaranteed in Article 39(2) of the Fundamental Law and the right to have access and to disseminate data of public interest declared in Article VI of the Fundamental Law and regulated in detail by the Privacy Act. The expression "*thus in particular*" provides an opportunity for those applying the law to refer to other "*rightful financial, economic or market interests*" to restrict access, when such access would harm the business organisation managing public funds, which is also a market agent. Naturally, in the course of eventual court proceedings, furnishing truth about the possibility of disproportionate harm would be the obligation of the market agent managing public funds. Such grounds for reference could, for instance, be that the publication of the business strategy may contain data which, if known to third persons, would render the competitive position of the market agent managing public funds impossible, should this information be made available to its competitors.

6. The accessibility of the data of defence and security procurements

Act XXX of 2016 on Defence and Security Procurements (hereinafter: Defence Procurement Act) provides for the procurement procedures for defence and security purposes and the rules of the related legal remedy[24].

As public funds are used in the course of defence and security procurements (hereinafter jointly referred to as defence procurements), the data generated in the course of the procedure are as a general rule data of public interest. Following the closure of the procurement procedure, in addition to the general rules of the Privacy Act, the special provisions of the Defence Procurement Act must be applied to the accessibility of the data of defence procurements.

The Privacy Act lists the restrictions on access to data of public interest and data accessible on grounds of public interest in Section 27(1)[25] and (2)[26], where it provides for the exclusion of access to qualify data and the possibility of restricting the right of access to data of public

[24] Defence Procurement Act 1(1)

[25] Privacy Act, Section 27(1) No access to data of public interest or data accessible on grounds of public interest shall be provided, if it has been classified under the Act on the protection of classified data..

[26] Privacy Act, Section 27(2) The right to access data of public interest or data accessible on public interest grounds may be restricted by an act with the specific type of data indicated, if considered necessary for the purposes of:

a) national defence;
b) national security;
c) the prosecution and prevention of criminal offences;
d) environmental protection and nature conservation;
e) central financial or foreign exchange policy;
f) external relations, relations with international organisations;
g) court proceedings or administrative authority procedures;
h) intellectual property rights.

interest for reasons of defence and national security. The Defence Procurement Act does not include provisions, of which one could conclude that the data generated in the course of defence procurements would not be data of public interest as a general rule.

Several provisions of the Defence Procurement Act provide opportunities for the contracting authority to restrict access to certain categories of data if access is requested to them. Such is, for instance, Section 2(10) of the Defence Procurement Act, according to which the contracting authority having weighed the public interest linked to accessing the data and excluding access to them, may restrict access to data of public interest or data accessible on grounds of public interest processed in relation to procurements according to Section 7(1) of the Defence Procurement Act with reference to the interests of national security or defence for max. ten years from the generation of the data. Another provision restricting access is Section 32(2) of the Defence Procurement Act[27], which provides an opportunity to waive the publication of a notice as specified in Section 32(1).

7. Summary

The constitutional right to access data of public interest is not a fundamental right that cannot be restricted, but it enjoys particular constitutional protection as one of the conditions and part of the exercise of the right to freely express an opinion. This means that the acts restricting freedom of information must be interpreted stricto sensu because the freedom of information the transparency of the exercise of public powers, the transparency and controllability of the activities of the state and of the executive power are preconditions of the right to censure, the freedom of criticism, the freedom of expressing an opinion. The open, transparent and controllable activity of the public powers, generally the operation of state bodies and of the executive power open to the public is one of the cornerstones of democracy and a guarantee of the rule of law.

Pursuant to Section 5(1) and (2) of Act CVI of 2007 on State Assets, all data that are not data of public interest are data accessible on public interest grounds that relate to the management of state assets and disposing over them, and the body or person managing or disposing over state assets qualify as a body or person discharging public duties according to the act on the accessibility of data of public interest.

With a view to freedom of information and ensuring transparency, the Privacy Act regulates three ways of rendering data of public interest accessible: the general obligation to inform (Privacy Act, Section 32), the provisions of data based on individual data requests (Privacy Act, Sections 28-31) and publication without individual data request that is proactive provision of data (Privacy Act, Sections 33-37). Irrespective of meeting the publication obligation, individual data requests must also be met.

In its position papers, the Authority has underlined several times and it highlights it this time as well that with regard to the enforcement of the freedom of information **not the document**

[27] Section 32(1) The contracting authority shall publish a notice on the results of the procurement procedure as specified in the EU regulation concerning the sample notice within forty-eight days from the conclusion of the contract or framework agreement.

(2) The publication of certain information concerning the conclusion of the contract or framework agreement may be waived, if the disclosure of this information would impede the enforcement of rights or would be contrary to public interest in other ways, thus in particular would infringe defence of national security interests, or the lawful business interest of an economic operator, or fair competition among economic operators.

principle but the data principle is enforced with respect to individual documents. Because of this, the restriction for accessing data of public interest and data accessible on public interest grounds cannot be general, i.e. it may not apply to all the documents and data of a closed public procurement procedure.

Naturally, there might be personal data, qualified data, protected knowledge within a document, but meeting a data request aimed at a full document may not be rejected, but pursuant to Section 30(1) of the Privacy Act **the protected data must be rendered illegible on the copy.**

Based on the above, the Authority does not see any impediment to the body discharging public duties conducting the public procurement procedures making data of public interest and data accessible on public interest grounds available to the applicant in the case of a data request aimed at access to the data of closed public procurements under the condition of rendering protected, non-accessible data illegible with a view to ensuring the transparency of decisions on public funds.

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