

Júlia Sziklay PhD: NAIH's Freedom of Information project

1. Antecedents

The project entitled “Review of the range of data subject to disclosure obligation stipulated in legal regulation” was approved by the amendment to Government Decision 1004/2016. (I. 18.) on the determination of the annual development budget of the Public Administration and Civil Service Development Operative Programme (KÖFOP) at the end of November 2018. As a beneficiary specified in the Government decision, NAIH submitted a grant application for the implementation of a priority project entitled “Mapping out the Hungarian practice for the freedom of information and the improvement of its efficiency” (hereinafter: Project) in August 2019. A grant application was positively assessed by the Managing Authority – the Prime Minister’s Office – responsible for the administration of KÖFÖP and the Grant Contract was executed for a grant amount of HUF 1 billion on 24 September 2020.

Because of administrative obligations, however, actual work on the project could only begin in January 2021. The undertakings participating in the technical implementation of the project include Ex Ante Tanácsadó Iroda Kft. and HBH Stratégia és Fejlesztés Kft., which mobilised an expert team of about 60 people to work under the professional direction of NAIH.¹

Another separate “branch” of the Project is the “Survey and regulatory review of the data sets concerning public data specified in legal regulations and other recorded data sets” which means taking stock of and surveying the data sets subject to disclosure obligations specified in Hungarian legal regulations and ensuring access to additional data sets carried out by a consortium consisting of the Ministry of Justice and Magyar Közlöny Lap- és Könyvkiadó Kft. The two projects converge at certain points and their results also support one another, at the same time, the analysis of the situation and, in particular, the research work is carried out independently.

2. The framework of interpretation and the objective of the project

One of the fundamental decisions of the Constitutional Court – Decision 34/1994. (VI. 24.) AB – assesses access to data in the public interest as a priority instrument of controlling public power and the transparency of public affairs, which also means that it is a guarantee of democratic operation.

¹ <https://www.naih.hu/kofop-2-2-6-vekop-18-2019-00001/kapcsolodo-szerzodesek>

The history of the fundamental constitutional right guaranteeing access to data in the public interest over the last 30 years in Hungary offers a wealth of experience. With a view to the rapid and accurate information of the public, pursuant to the current legal regulations (based on the constitutional authorisation by the Fundamental Law, primarily Act CXII of 2011 on the Right to Informational Self-Determination and the Freedom of Information – the Privacy Act) data in the public interest can be accessed in addition to the level of the media providing information to the public by way of submitting the relevant request and the (electronic) disclosure obligation of controllers. (In addition, the transposition and implementation of the Directive on the reuse of public sector information (PSI Directive) into Hungarian legal practice is currently underway separately.)

According to the holistic approach, freedom of information has three levels which are in fact closely related to one another. These are the levels of providing general information, electronic disclosure and individual requests for data in the public interest. If society's "hunger for information" is satisfied at the level of providing general information on public affairs, it is not necessary to make targeted searches on the Internet among the data in the public interest disclosed in the website of an entity discharging public tasks and applicant will resort to the relatively "exhausting" procedure of individual data requests only when he cannot find the information sought anywhere.

It is in the spirit of this concept that we interpret the "provision" of data in the public interest as a kind of public service. This interpretation fits well into the development trend emerging since the mid-19th century, which describes the expanding serviceorganising tasks of public administration in the fields of both human and infrastructural public services as "service provider public administration" (Forsthoff). Ensuring freedom of information is not necessarily related to the "exercise of public powers" by the state (see the definition by Hoffman²); it is much more related to ensuring the exercise of constitutional rights, which frequently has obvious direct economic benefits (let it suffice to think of the anti-corruption role of the public).

² According to the definition by István Hoffman quoted everywhere in the relevant literature "the most important public services are manifested in the constitutions of individual countries as fundamental rights. The service is legally qualified as a public service by the state through a specific procedure and this service is provided, financed or regulated by the state..., at the same time, these public services do not include the activities of the state carried out in possession of the public powers." in: István Hoffman: Önkormányzati közzolgáltatások szervezése és igazgatása. ELTE Eötvös Kiadó, 2009

The provision of information as a public services fits well into the concept of the service provider state and the re-thinking of the tasks of citizen-friendly public administration as these “governance-type models” do not see the user as consumers, but as citizens.

Although there were some forward-looking research projects on this subject matter in recent years, these were not comprehensive, typically were not national in scope, but focused only on a specific type of settlement or a given city. Although these research projects provide a good overview of the given conditions in the light of the current legal requirements; obviously, these were unable to provide general observations projected to the full multitude, broken down into subsamples and did not fully explore the causal relations underlying the deficiencies.

NAIH, the Hungarian constitutional protection body responsible for freedom of information in Hungary, has comprehensive knowledge and experience, which is accessible to anyone through its annual reports or website³, nevertheless, but this shows no more than a segment of the full picture.

The four specified research areas include:

- access to municipal information,
- access to information by central administration,
- access to information on the activities of entities outside public administration, but managing public funds and/or discharging public duties, and
- legal instruments and mechanisms, which can facilitate (enforce) full access to data in the public interest and data accessible on the grounds of public interest.

This much awaited research is important and complementary because its objective is to fully or almost fully survey the performance of the target groups as related to the current legal regulations, to explore deeper causal relations and through this, to provide guidance for efficient interventions and to create general benchmarks to measure performance related to the freedom of information enabling comprehensive control or self-assessment.

The above support the need for a situation assessment extending to the practice of processing data in the public interest by entities discharging public duties – mainly municipal and central public administration, as well as entities financed out of public funds and/or providing services whose use is mandatory or which cannot be satisfied in any other way – on a nationwide scale

³ www.naih.hu

under the guidance of the authority supervising the enforcement of the law, on the basis of which a reliable picture can be obtained of the domestic practice of the transparency of the operation of the public sector taken in a broader sense, the efficiency of the legal regulatory framework of the freedom of information, the difficulties and impediments as well as “good practices”.

A methodology and instruments of the research: website analysis, test requests for data, on-line questionnaire, in-depth interviews, desk research and other background analyses (such as organisational analysis, international benchmarks, etc.).

Based on NAIH’s request and guidance, in all four research projects, the obligations related to the freedom of information and the practice of their enforcement should be examined in a so-called holistic approach manifested in three closely-related levels of information.

Following the situation assessment and based on the findings of the research, the concepts, proposals and instruments to improve the legal and other service environment can be developed. The results of domestic and international research are summarised in practical solutions, proposals and recommendations addressed to the target groups of legislators and those applying the law, as well as citizens through the use and application of which we support the efficiency of the enforcement of the freedom of information. The results will become accessible from mid-2022.

All this helps to strengthen the social control function over the freedom of information in a way that is unique in international comparison, and at the same time directly serves the implementation of the transparency of the public sector and the principle of good governance, while constituting an indirect but powerful instrument for combating corruption.

3. Individual research areas

3.1. The transparency of municipalities

One of the stated principles of Act CLXXXIX of 2011 on the Local Governments of Hungary is transparency: *“local self-government expresses and implements local public will in local public affairs in a democratic manner creating a wide publicity”*⁴. In addition, several decisions of the Constitutional Court have underlined the role of local publicity: *“... it is indispensable*

⁴ Municipalities Act Section 2(2)).

for local government that citizens be able to obtain information on the decisions and the functioning of the municipality. The local government has the obligation to enable citizens to have access to the procedures and decisions of the municipal bodies, in particular, the body of representatives.”⁵

The Privacy Act specifically mentions local governments among the entities discharging public duties, which in matters within their competence are duty-bound to promote and provide accurate and rapid information for the public⁶ and enable anyone to have access to the data in the public interests and data accessible on the grounds of public interest processed by them (taking legal exemptions into account)⁷. In addition to the Municipalities Act, a number of sectoral laws require local governments to make disclosures, maintain publicity and keep records in relation to their functioning, discharge of public duties, and financial management and control activities.

Despite these legal obligations, the relationship of local governments to the freedom of information shows a highly varied picture in practice: one can find good examples of how to ensure wide publicity, even for the practice of voluntarily disclosing data over and above the legal requirements, but inadequate performance or non-performance of the obligations is also frequent. A substantial part of complaints seen by NAIH can be linked to local governments, and in consultation cases, local authorities also typically refer questions of interpretation to the Authority. Based on this, local governments constitute a priority target group of the Project.

According to the research plan, **a full assessment of the practices related to the freedom of information at the roughly 3,200 local governments (of settlements and regions) operating in Hungary and at the 13 national self-governments of ethnic minorities will be carried out; in addition, summary statements will be made in the cases of the 61 regional and 2,197 local self-governments of ethnic minorities.**

3.2. The transparency of central public administration

The research focuses on the comprehensive target group specific research of the disclosure and response obligations and compliance practices of entities subject to electronic disclosure obligations pursuant to Section 33 of the Privacy Act, which are primarily organs of central administration and other entities discharging public duties referred to in Section 33(2) of the

⁵ Constitutional Court Decision 32/1992. (V. 29.) AB, and Decision 21/2013 (VII. 19.) AB reaffirming it

⁶ Privacy Act Section 32

⁷ Privacy Act Section 26(1)

Privacy Act, mapping out the attitudes of data subjects related to freedom of information taken in a broad sense, exposing the factors impeding progress and the reasons and causal relations behind the problems experienced.

For years, omissions have occurred in large numbers in relation to the performance of the electronic disclosure obligations and no progress was perceptible in this field in the preceding years. The annual statistical data⁸ available to NAIH show that in addition to the continuously high number of requests for data in the public interest year after year, this target group has the highest ratio of rejections (close to a third of all the data requests) and the absence of a uniform practice constitutes a problem (various controllers tend to handle the same data requests differently in many cases), numerous anomalies could be seen in the practice of cooperation between the central administrative agencies and those requesting data, journalists, and even the Authority in the procedures concerned. The large number of related rectification procedures (for instance launching litigations) also substantiates the existence of the problem. In connection with the general (not necessarily positive) anomalies linked to transparency and also affecting organisational preparedness and awareness, the priority objectives of the research, in addition to exploring the background to the problems and the impeding factors, is to identify the attitudes and motivations of the data subjects related to the freedom of information interpreted in a broad sense. **In accordance with NAIH's expectations, the most important research subjects are the agencies of central governmental administration, including the ministries, but hospitals and vocational training centres, as well as other agencies of the justice system and the diplomatic missions abroad are to be separately examined (the indicative itemised list was expanded to 751). The sector specific focus areas linked to central administration were also designated (including the use of public funds, the transparency of applications, the transparency of legislation, the transparency of health care, the enforcement of the publication obligations, the specific publication obligations related to characteristic employment relationships and education, inter alia).**

Beyond all this, another objective is to identify good examples, whose sharing and adaptation in a wider range could successfully improve current practices.

3.3. Legal entities subject to the transparency obligation typically outside public administration

⁸ Pursuant to Privacy Act, Section 30(3), controllers have to inform NAIH about the rejected requests for data and the grounds for the rejected by 31 January every year.

The research subjects include the main types of private law organisations discharging public duty, such as:

- business organisations in public ownership;
- foundations backed by the state or municipalities;
- public bodies;
 - organisations required to be transparent pursuant to Section 26(3) of the Privacy Act (i.e. providers of mandatory services and the so-called monopoly service providers, the providers of postal, electricity, natural gas and electronic communication services);
 - legal relations subject to the first sentence of Section 27(3) and (3)(a) of the Privacy Act (and through this, the legal subjects) that is legal subjects establishing financial or business relationships with a person generally belonging to a subsystem of public finances concerned in the central or municipal budget, use of EU support, benefits or allowances affecting the budget, the management, possession, use or utilisation of state and municipal assets having disposal over them, or encumbering them, or the acquisition of any right affecting such assets, for instance beneficiaries of tax allowances, legal subjects that are winners of public procurement, legal subjects affected by the utilisation of national assets, beneficiaries of EU and other international aid or institutions of higher education operating as state budgetary entities.

It can be assumed that they have the lowest level of compliance in the field of the freedom of information among the target groups. Business organisations owned exclusively by the state frequently failed to meet their general disclosure obligations, moreover in the context of business secrets, the separation of market and non-market activities is an ongoing problem in the case of business organisations in public ownership, primarily state ownership.

The research plan aims at reviewing the websites of some 1,000 organisations, sending test data requests and an on-line questionnaire to the target group with a uniform content and making at least 50 in-depth interviews. In addition, focus group interviews will be made involving citizens with some experience in data requests, NGOs and representatives of the press and a detailed case study will be compiled, drawing deeper conclusions from the practice of several specific data request cases, with particular emphasis on the issues of business secrets and copyrights and the delineation of the range of the entities subject to the obligation of providing data.

Because of the change in the models of higher education currently in progress, the transparency rules and practices related to universities will also be analysed here.

3.4. The horizontal components and elements of the freedom of information, the operation and efficiency of the regulatory and corrective mechanisms

A corrective mechanism is any activity or rule that is intended or capable of forcing controllers of data in the public interest that refuse to comply voluntarily for any reason whatsoever to ensure freedom of information.

From the viewpoint of formal law, all mandatory rules of behaviour stipulated by legal regulation related to the freedom of information whose aim is to compel controllers, i.e. subjects discharging public duties and/or managing public funds, to disclose the data or grant the data request. It is important to note that there is no general mandatory legal act in the European Union in the field of the freedom of information as the General Data Protection Regulation (GDPR), which is mandatory and directly applicable in the case of data protection, at the same time EU and other European laws and interpretations of laws naturally orient Hungarian legislation as well as the application of the law.

With respect to individual legal regulations, provisions which create obligations for the controller and rights for the person requesting data operate as procedural, corrective and sanctioning mechanisms; they determine the powers of the body or person functioning as a corrective mechanism; they specify legal consequences, in particular sanctions and procedural rules; and they delineate data requests in terms of content and substantive law.

These include the decisions of the Constitutional Court having mandatory force for all; the legal principles set forth therein and the general considerations should in particular be taken into account when enforcing the freedom of information as well as the decisions and judgements of the courts brought in individual cases, which are to be implemented with mandatory force and state power.

Emphatically, these include the statements and recommendations adopted by NAIH, the supervisory body in cases of freedom of information, whose implementation is only recommended. (At the same time, decisions made in administrative matters can be enforced; typically in this area there is a clash of the two rights to information⁹.)

⁹ see: <https://www.naih.hu/index.php/hatarozatok-vegzesek/category/tag?tagid=27>

Similar importance is attached to other earlier acts related to the activities of the Supreme Court concerning the unification of the law, particularly statements analysing case law¹⁰ and the decisions of the European Court of Justice.

These corrective mechanisms function, on the one hand, in concrete cases in individual legal disputes between the controller and the person requesting the data, while, on the other hand, they also determine future practice: controllers take these into account provided that appropriate conditions and circumstances are met in order to be able to manifest compliant behaviour to avoid an eventual reprimand or other sanctions, if they have to be apprehensive of such.

Some of the entities mentioned are typically institutions that apply and interpret the law. These include the Hungarian National Authority for Data Protection and Freedom of Information, the former data protection commissioner, the courts hearing cases on the accessibility of data in the public interest, the Constitutional Court, the European Court of Human Rights and the Court of Justice of the European Union as well as the organisation of public prosecution and the independent bailiff and tangentially even other agencies (such as the State Audit Office, the Hungarian Competition Authority, Public Procurement Authority).

Certain NGOs specialised in the freedom of information and the press also operate as corrective mechanisms. Both corrective mechanisms are linked to the process of having access to and requesting data at several points. NGOs can themselves take action in the course of requesting data: they provide advice to those requesting data and request the data themselves instead of individuals because by virtue of their expertise, they are able to submit more accurate and more successful requests. Owing to the wide reach of the press, it can frequently facilitate data requests in certain concrete cases. In their other role, NGOs, like the press, generate public debates on general issues of public interest, typically of topical policy or of interest to the nation or a narrow community, using the means of public interest reporting to make it the subject of political discourse, i.e. they enforce transparency of the state through their role as 'watchdogs'.

The main topics of the research:

the provision of general information; the obligation of the parties to cooperate; self-reflection of agencies discharging public duties; the role of the press, NGOs and representatives; disclosure obligation; the private law elements of data requests; the content of data requests; the response of the controller; the refusal of compliance; the name and person of those requesting data; compliance with the release of data and the issue of due dates; the mode of

¹⁰ see: https://kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemeney_adatvedelem.pdf

providing data; cost reimbursement; reasons for refusal; NAIH's organisation, role and powers, the provision of evidence and the outcome of litigation in court procedures, fora of legal remedy and their nature (civil or administrative litigation); court distraint; the role of and interpretation of the law by the Constitutional Court; systemic problems of legal regulation; international law harmonisation; regulation concerning environmental information as a model.

Its methodology is primarily analysis, desk research and focus group and in-depth interviews with experts.

4. Other deliverables

In addition to the four research projects presented, the Project also intends to create two deliverables, of which the creation and future operation of an information portal is expected, while in the case of the governmental transparency site, the goal is no more than developing a concept (as the existence of such a website must be the matter of a government decision and undertaking, which is outside NAIH's competence).

4.1. Propagating knowledge related to the freedom of information - creating an on-line information portal

This is a deliverable whose objective is to popularise the topic of the freedom of information and to render this area as well-known among citizens as data protection (the entry into force and the stringent rules of GDPR "did a great deal of good" to data protection because in spite of its complicated legal nature it became a subject matter of public speech and commanded tremendous public interest).

Naturally, NAIH has its own website (www.naih.hu), which was renewed both in terms of form and content in 2021; important content concerning the freedom of information is regularly published on this platform in the form of decisions and guidances. At the same time, the Project offers a good occasion to develop a new, dedicated information website

- to provide renewed and up-to-date information on the topic of freedom of information for those concerned and other stakeholders. A non-exhaustive list of content could be presented here including, for instance, the terms and general procedures related to the freedom of information, changes in the regulatory and operational environment, specific performance indicators and indices, the presentation of specific priority cases, the practice of other countries related to the freedom of information, topical events or even online presentations;

- to provide opportunities for the acquisition of knowledge for those, who wished to immerse themselves more in the field of freedom of information;
- to present the results of the Project and of the individual studies in detail.

4.2. Concept plan to facilitate government transparency

The Project provides an opportunity to prepare the conceptual and theoretical groundwork for the development of a national online platform for accessing public data generated in the course of governmental activities, utilising modern technical possibilities, with the note that the actual development of the online platform with the work title “Government Transparency Platform” is clearly beyond the framework of the KÖFÖP project.

Performing requests for data in the public interest – primarily at the level of the central administration – is currently fragmented, there is no established uniform practice for granting requests, even though the processes specified by legal regulations are uniform. The main problem lies in the different level of knowledge and different attitudes of the obliges; at the same time, the roles of NAIH and of the courts is clear in the standardisation of granting requests for data in the public interest. While the scope of data in the public interest and data accessible on the grounds of public interest to be published in the course of their disclosure is well regulated, the practice of those obliged to publish data shows a number of anomalies in terms of the scope, the way of publication and the updating of data. In addition, the low-level and heterogeneous technological solutions applied in the course of publication practically prevent the possibility of obtaining, comparing and analysing data by automatic means and without significant manual work. Based on the international comparisons in the “The Open Data Maturity Report 2020”, a document published by the European Commission, the level of the publication of public data in Hungarian falls substantially behind the EU average.

The site kozadat.hu established to support the simple and efficient search for public data does not enable the automated search for and retrieval of data for technical reasons. In practice, there are no mechanisms ensuring the up-to-dateness and accuracy of data because of the absence of stringent accountability.

Solutions enabling the computerised processing of data, the widespread use of data describing data (metadata) and the application of data access and data formats based on open standards get increasing emphasis in state-of-the-art international practice.

This is also related to the concept of the reuse of the national data assets, at the same time it is important to clarify that access to data in the public interest and the reuse of public data are subject to two separate legal regimes, which have points of linkage but the relationship between them and the possible role of the government transparency platform in the reuse of the national data assets is going to be one of the tasks of the feasibility impact assessment.

Accordingly, the three main pillars of the online platform underlying government transparency would be the uniform support and facilitation of requests for data in the public interest; rendering the disclosure obligations transparent to support the publication procedures of the data in the public interest and data accessible on the grounds of public interest and supporting the standardized and efficient search for public data in cooperation with the controllers.

The goal is to develop an online portal, which

- supports the entire life-cycle of requests for data in the public interest submitted to government agencies and makes the management of the requests traceable,
- makes the results of earlier data requests accessible, and
- uses technological solutions for the publication of data in the public interest, which enables the search for the data and the actual machine analysis of the data by minimising manual intervention and could potentially contribute to the reuse of public data resulting in tangible economic impact.

This development will have to be carried out so as not to impose unmanageable bureaucratic burden on the agencies that must provide data; promotes the reuse of the results of earlier data requests and is gradually extended to an increasingly wide range of government agencies.

In this context, the envisaged platform wishes to assist all stakeholders to comply more effectively than is currently the case with regard to both citizens' requests for information (passive freedom of information) and the general information and publication obligations (active freedom of information) irrespective of the receipt of requests, in relation to the agencies subject to the publication obligation.