

# A Recent Exploration of Accessing Public Sector Information

Theoretical and Legal Background, with a Special Focus on Hungary

by **Gábor Szalay\***

**Abstract:** The rapid technological advancements we are witnessing have undoubtedly had a great impact on several aspects regarding freedom of information, and the concept of increased governmental transparency on a global scale seems to be inevitable. But how can certain states, governments and societies cope with these new possibilities and challenges? Do state authorities worry about the weakening of their information monopoly? The author wishes to introduce ideas related to these questions through providing an examination of the theoretical and legal background and case law related to the concept of freedom of information; more specifi-

cally, the right to access public sector information at international and European Union levels, as well as the development and current situation in Hungary. As a result of the regulatory attitude and policies shown in recent years, the right to access public sector information has been weakened in Hungary, thus the specific aim of the article is to highlight certain amendments that have been made to related laws and examine them in light of the theoretical foundations, as well as their possible adverse effects exerted on the pursuit towards increased governmental transparency.

**Keywords:** Governmental transparency; freedom of information; right to access public sector information; freedom of expression; fundamental rights; open government policies

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Recommended citation: Gábor Szalay, A Recent Exploration of Accessing Public Sector Information: Theoretical and Legal Background, with a Special Focus on Hungary, 9 (2018) JIPITEC 282 para 1.

## A. Introduction

- 1 The emergence of the right to access public sector information in the late twentieth and early twenty-first century can be characterised as a necessary tool in many ways. For example, it enables citizens to have sufficient oversight over their government's activities and monitor and participate in public affairs more efficiently, sheds light on possible government abuse of power, and increases the effective functioning of democratic systems in general, in addition to other related features and theoretical concepts aimed at increased governmental transparency, which will be introduced in detail by the paper.
- 2 Accessing public sector information is especially vital if the questions to which we seek answers include public entities exerting perceptible effects on our society and daily life through their activities and management of public funds. If we take into consideration the social contract theory, developed in the seventeenth and eighteenth centuries by scholars such as Jean-Jacques Rousseau, Hugo Grotius, Immanuel Kant, John Locke and Thomas Hobbes, and by virtue of which us, the people authorised such entities to act on our behalf and organise, regulate and manage our society and public funds, the role of implementing this fundamental right in practice increases even further.

- 3 Before assessing the situation in Hungary, the paper discusses the theoretical foundations and the regulatory development of the right to access public sector information, which resulted in it being implemented in core international human rights instruments introduced below. Despite this, however, if one follows the news on public affairs, it quickly becomes apparent that governments, government agencies and other state-affiliated entities are keen to protect sensitive information related to their activities and management of public funds. For example in the case of Sir Ed Davey, the former Energy Secretary of the United Kingdom, whereby he attempted to request the disclosure of an energy report on the costs of certain electricity sources, and accused the Government of the United Kingdom of abuse of power after his request was turned down, rendering the case headline news.<sup>1</sup>
- 4 More often than not - also in accordance with the general public's thinking - this behaviour from the government might presuppose the abuse of power occurring within such entities. With their negative connotation in public affairs, privacy and secrecy are likely to cause the distrust of people.<sup>2</sup> To a certain extent, this approach can be understood and accepted in the case of private entities, where competition plays an important role on the market and the disclosure of sensitive information (business secrets, etc.) can be damaging, as it can give the upper hand to competitors and therefore might distort competition.<sup>3</sup> On the other hand, however, companies holding a strong position on a given market while being managed without the necessary degree of transparency and prudent corporate governance policies are exposed to be the hotbeds of abusive market practices. If abusive market practices are followed by leading business participants with strong market positions, the consequences will most likely hurt competition as well.<sup>4</sup> As a result, the foundations of the free market and the right to free competition are shaken by these types of corporate conduct; not to mention the harm caused to the interests of certain individuals, be them natural or legal persons, being subjected to both financial and moral damage in such situations, hence the viability of their very existence might be endangered.
- 5 Within the aspect of accessing public sector information, the requirement to balance between the disclosure of information and the protection of individuals' personal data should be kept in mind as well. However, the public sphere shall serve the people, it should have no secrets to hide, thus a transparent and accountable functioning model is a basic requirement. A hopeful, but still naïve wish. In practice, the attempt to acquire rather sensitive public sector information from public entities has its strong barriers even in more advanced environments. However, it is especially burdensome in certain Eastern-European states, where the questionable activities of communist regimes prevailing prior to the fall of the Berlin Wall still echo in today's society and political environment, as expressing one's thoughts in such systems was clearly dangerous, therefore having access to public sector information was definitely out of reach.<sup>5</sup> The public sector fed people with what they believed would serve their ability to effectively control the masses and secure their hold on power. A phenomenon still relevant today, however, in a more subtle and unpredictable way.
- 6 Nevertheless, as a consequence of new trends in international law and in political and ideological tendencies, in the previous two decades the right to access public sector information became recognised even by certain non-democratic states; for example, the People's Republic of China, where the law related to open government information entered into force in 2008.<sup>6</sup> In part, this is likely to be the consequence of more substantial and clear international standards adopted in this key area in these previous decades, and the fact that the experience acquired from previous laws can be used in the creation of new laws. However, the implementation and precise scope of this fundamental right in practice is still a matter of debate and controversy. It is important to note in this context, that even though the concept of governmental transparency and the transparency of the public sector appears to be elevated to a level where it is recognised as a shared principle among democratic states, the way it is formed in constitutional and administrative law, and how efficiently it can be enforced in practice varies significantly from state to state, and the diversity of national laws and traditions play a crucial role.<sup>7</sup>

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1 Emily Gosden, 'Access denied: Government rejects Sir Ed Davey's request for energy report he ordered' *The Telegraph*, 5 November 2016.

2 Andrea Bianchi and Anne Peters, *Transparency in International Law* (Cambridge University Press, 2013, Cambridge, ISBN-13: 9781107453791) at 2-3.

3 Gábor Szalay, 'Arbitration and Transparency – Relations Between a Private Environment and a Fundamental Requirement' (2017) 6(1) *Slovenian Arbitration Review* 17.

4 Spencer Weber Waller, 'Corporate Governance and Competition Policy' (2011) 18(4) *George Mason Law Review* 849-850, 855, 859-860, 884-885.

5 Attila Péterfalvi and Balázs Révész, 'The Significance of Freedom of Information in the Function of Rule of Law in Hungary' (2017) (2) *Law Review of Kyiv University of Law* 292.

6 Regulations on Open Government Information of the People's Republic of China <<http://www.cecc.gov/resources/legal-provisions/regulations-of-the-peoples-republic-of-china-on-open-government>>.

7 Mireille van Eechoud and Katleen Jansen, 'Right of Access to Public Sector Information' (2012) 6(3) *Masaryk University*

## B. Theoretical Foundations

### I. Examination of the concept

- 7 In order to understand the nature of this multi-faceted right, it is essential to examine its characteristics in general and the theoretical justifications on which it was founded. According to the definition of Peled and Rabin, these justifications are: a) the political-democratic justification; b) the instrumental justification; c) the proprietary justification; and d) the oversight justification.<sup>8</sup> The first justification within the concept of the right to information as a fundamental constitutional right embodies its main role played in the appropriate representation of a state's democratic system. Basically, it represents the fundamental requirement based on which the general public is able to acquire information needed to evaluate, and if necessary, shape the democratic functioning of the state through participation in public affairs and political debates. As access to information is essential in the adequate functioning of a democratic state, many scholars, politicians and thinkers consider it a necessary component of democratic environments. James Madison, the fourth president of the United States, already pointed out in his often cited thoughts dated 1822, that a government acting without ensuring the means for access to public sector information is doomed to end in failure, and "people who mean to be their own Governors, must arm themselves with the power which knowledge gives".<sup>9</sup>
- 8 A related and prominent example also took place in the United States, where in 2006 a research institute of the George Washington University requested information from the Pentagon on the number of US troops on Iraqi soil at the time. According to the information provided, the military estimated a number of 5,000, while in reality 134,000 soldiers were still stationed in Iraq when the information was made public, and shortly afterwards President George W. Bush ordered the deployment of an additional 20,000 troops. This misleading information escalated the already fierce public debate in the United States surrounding the Iraq war, and had adverse effects on the reputation of the Bush administration.<sup>10</sup> As it is apparent, this attitude further distanced the people from their elected federal government, and

clearly did not contribute to an increased level of governmental transparency.

- 9 The second theoretical justification of the right to information is that of instrumental justification. In essence, this means that the right to obtain or access information is required for exercising other fundamental human rights. For example, if a government agency holds information in connection with an individual person's rights or obligations, the only way for that person to adequately assess the situation and protect his or her rights, or to become aware of his or her obligations, is the right to information. Therefore, it can be concluded that the right to information is a fundamental human right on which other such rights depend,<sup>11</sup> and thus also functions as an instrument needed to exercise other fundamental human rights.
- 10 The third theoretical justification Peled and Rabin emphasised is the proprietary justification, which in the author's point of view, relates strongly to the social contract theory mentioned above. The proprietary justification is based on the theory that information held by public entities in a given state is ultimately in the ownership of the citizens (and residents) of that state. The information stored and managed by public entities is collected or created by public officials whose activities are financed from different taxes paid to the state by the people. In accordance with this structure, individuals should have access to information belonging to their property, especially if we take into account the fact that the collection or creation of such information was financed from their pockets. Therefore, limiting the right of an individual to avail of his or her property; for example, limiting access to public sector information should only be justified if it is necessary for the protection of other owners' rights, i.e. the rights of other individuals in the general public with which the right to access information interferes.<sup>12</sup>
- 11 The fourth theoretical justification is the oversight justification, which can strongly be connected to the political-democratic justification. In this aspect, the constitutionality of the right to access information is not connected to it in terms of its nature as a fundamental right, but as an essential component of good governance in any state that wishes to function within democratic frameworks, since constitutions not only protect the rights of citizens and other persons falling within their scope, but also determine how the government has to be constructed. Therefore, constitutions have the obligation to limit the dangers of granting too much power to a government, and the right to

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*Journal of Law and Technology* 474, 483.

8 Roy Peled and Yoram Rabin, 'The Constitutional Right to Information' (2011) 42(2) *Columbia Human Rights Law Review* 360.

9 Gaillard Hunt (ed.), *The Writings of James Madison* (1910) 103. <<http://oll.libertyfund.org/titles/madison-the-writings-of-james-madison-9-vols>>.

10 Peled and Rabin, *supra* at 361.

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11 *Ibid.* at 363-364.

12 *ibid.* at 365.

information is an important device for the fulfilment of such an obligation. Peled and Rabin aptly grasp the concept under examination: “The public’s right to oversee those who serve it resembles the right of beneficiaries to monitor their trustees. Beneficiaries have no need to uncover or even suspect corruption to justify their oversight”.<sup>13</sup>

## II. Future tendencies

- 12 In the age of big data and quickly developing surveillance technologies,<sup>14</sup> where a vast array of tools are at the disposal of governments, government agencies and other public entities to collect, store, evaluate, create and use information related to the citizens and residents of a given state, the right to information, more precisely the right to access public sector information, is the primary instrument in developing and upholding appropriate ethics in connection with the management of such information. Which, in the author’s view, if not treated the right way, and apart from the democratic aspects of disastrous consequences of the public being excessively limited in accessing such information, might very well lead to the continuous and high-scale infringement of the right to privacy as well. Especially considering the curious nature of mankind<sup>15</sup> that facilitated the emergence of the right to information in the first place. Therefore, the principle of proportionality must play an important role.
- 13 A related example is the landmark case of *Volker*,<sup>16</sup> in which the Court of Justice of the European Union (CJEU) invalidated certain European Union regulations requiring the publication of information on beneficiaries of agricultural funds on the basis of failure to observe the principle of proportionality in its 2010 judgment. *Bavarian Lager*<sup>17</sup> is another case that can be viewed as decisive with respect to future tendencies. Namely, in 2010 the CJEU specified certain limits of the right to access to documents under the rules for the protection of personal data, as well as the 2011 case of *Scarlet Extended*,<sup>18</sup> where the CJEU had to strike a balance between the freedom of information and the rights to personal

data, intellectual property, and freedom to conduct a business. In *Scarlet Extended* the CJEU assessed issues in connection with certain obligations that can be imposed on Internet service providers in light of the protection of intellectual property rights, and specifically found that European Union law precludes the obligation to be imposed on Internet service providers requiring them to install systems for monitoring electronic communications passing through their services and to collect and identify users’ IP addresses for an unlimited period of time. Furthermore, in *Sweden v Commission*,<sup>19</sup> the CJEU specified certain restrictive conditions under which a Member State may oppose the disclosure of a document originating from its own state, while in *Technische Glaswerke*<sup>20</sup> it set the limits of access to documents in procedures for reviewing state aid.

- 14 The quick paradigm shifts by which the digital age affects our daily lives of course carry advantages; considering for example, the increased degree of transparency that cryptocurrencies and blockchain technology might evoke in connection with transactions occurring peer-to-peer,<sup>21</sup> and the subsequent effects it might have with respect to the disclosure of public sector information in relation to state-affiliated and high-volume transactions. On the other hand, in certain situations, blockchain technology and cryptocurrencies can have the opposite effect and might hurt transparency, originating also from their decentralised nature and the underlying technology. A prominent example is the case of two notorious darknet markets, AlphaBay and Hansa, which were closed down by authorities in 2017. Both used cryptocurrencies as means of payment during the trade of drugs and other illegal products, and ensured that their admins and users remained anonymous.<sup>22</sup> Therefore, the importance of the principle of proportionality rises again, and while it is important to embrace progressive concepts and exploit their advantages in every field possible, a necessary amount of caution and protective regulatory attitude seems advisable.
- 15 Furthermore, apart from accessing, the re-use of public sector information (i.e. the use of governmental data left unused by government entities for certain private or commercial

13 *ibid.* at 367.

14 Frank Konkel, ‘Sketching the Big Picture on Big Data’ *FCW*, 15 April 2013.

15 Vivian Hemmelder and Tommy Blanchard, ‘Why Humans Are Hard-Wired For Curiosity’ *Huffington Post*, 14 September 2016.

16 Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen*, judgment of 9 November 2010.

17 Case C-28/08 *Commission v Bavarian Lager*, judgment of 29 June 2010.

18 Case C-70/10 *Scarlet Extended SA*, judgment of 24 November 2011.

19 Case C-64/05 *Sweden v Commission*, judgment of 18 December 2007.

20 Case C-139/07 *Commission v Technische Glaswerke Ilmenau*, judgment of 29 June 2010.

21 Mark Fenwick, Wulf A. Kaal and Erik P.M. Vermeulen, ‘Legal Education in the Blockchain Revolution’ (2017) 20(2) *Vanderbilt Journal of Entertainment & Technology Law* 366.

22 Europol, ‘Massive blow to criminal dark web activities after globally coordinated operation’ Press Release, 20 July 2017 <<https://www.europol.europa.eu/newsroom/news/massive-blow-to-criminal-dark-web-activities-after-globally-coordinated-operation>>.

purposes) has also caught the attention of scholars and practitioners alike. Considering the possible conflicts of this phenomenon with privacy, data protection and intellectual property rights,<sup>23</sup> as well as its potential economic importance,<sup>24</sup> the attention paid to it is not surprising at all. The rapid and diverse technological advancements of the 21<sup>st</sup> century clearly affect and shape the development of the freedom of information, giving rise to new possibilities and of course new challenges as well. But will it turn out to be a concept that was rather facilitated or hindered by these new advancements?

## C. Overview of Development at International and European Union Levels

### I. Core International Instruments

- 16 Attempts towards the recognition of access to information as a fundamental right was first evoked by international law through certain human rights documents presenting it as part of the right to freedom of expression. In its Article 19, Paragraph 2, the International Covenant on Civil and Political Rights, adopted in 1966, establishes that “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information...”. However, it did not establish explicit provisions with respect to the right to information. The Council of Europe’s Convention on Access to Official Documents, adopted in 2009, spearheaded the progression of access to public sector information on the international level. Nevertheless, certain European Union legislation preceded the Council of Europe’s 2009 Convention. Approximately since the beginning of the 2000s, an increasing number of domestic legal systems also started to recognise the right to information as a fundamental right, and facilitated its incorporation by adopting related freedom of information acts and amendments. Without doubt, the international and European spread and achievements of the concepts of transparency, accountability, and open governance played a prominent role in positioning the right to information among those considered fundamental.<sup>25</sup>
- 17 The first comprehensive European Union attempt to promote access to public sector information was Recommendation No. R (81) 19 of the Committee of Ministers of the Council of Europe to Member States on the Access to Information Held by Public Authorities, adopted on 25 November 1981. However, related legislation was already passed beforehand, granting a fertile soil for the development of the right to information and certain of its sub-types. Article 10, Paragraph 1 of the European Convention on Human Rights (ECHR), entered into force on 3 September 1953, and in connection with the right to freedom of expression sets forth that “...this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority”. Following 1953, the outlines of the concept under examination became more and more visible, however, the real breakthrough had to wait almost until the beginning of the 2000s.
- 18 The Aarhus Convention<sup>26</sup>, signed on 25 June 1998 by the European Union, its member states, and certain other Asian states, was seeking to increase the importance of the right to access public sector information related to environmental issues and public participation in environmental decision-making. In accordance with the Aarhus Convention, Directive 2003/4/EC was adopted in 2003 and allows and regulates access to environmental information. The Charter of Fundamental Rights of the European Union, gaining full legal effect in 2009 following the entry into force of the Treaty of Lisbon, in its Article 42 titled “Right of access to documents” establishes that “Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents”.
- 19 It is important to emphasise that the first sentence of Article 15, Paragraph 3 of the Treaty on the Functioning of the European Union also relates to the topic, and sets forth that: “Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union’s institutions, bodies, offices and agencies...”. Including this right in one of the most influential laws of the European Union clearly indicated the willingness to strengthen its presence.

23 Bart van der Sloot, ‘On the Fabrication of Sausages, or of Open Government and Private Data’ (2011) 3(2) *JeDEM* 1, 3, 4; Furthermore see Heiko Richter, ‘Open Science and Public Sector Information – Reconsidering the exemption for educational and research establishments under the Directive on the re-use of public sector information’ (2018) 9(1) *JIPITEC* 51-52, paras 1-2.

24 Miriam Marcowitz-Bitton, ‘Commercializing Public Sector Information’ (2015) 97(3) *Journal of the Patent and Trademark Office Society* 424-425.

25 Maeve McDonagh, ‘The Right to Information in International Human Rights Law’ (2013) 13(1) *Human Rights Law Review* 26, 28, 53, 55.

26 United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998.

20 Further European Union directives and regulations adopted in the last two and a half decades and related specifically to the concept of the right to access public sector information, also had great impact in this regard. The creation of Regulation (EC) No. 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, adopted on 30 May 2001, further detailed this right and ensured greater access to official European Union documents. Directive 2003/98/EC on the re-use of public sector information additionally defines the rules to be followed for the purpose of exploiting public sector information. This directive was amended in 2013 by Directive 2013/37/EU. Directive 95/46/EC, more commonly known as the Data Protection Directive, was adopted in 1995 and establishes the protection of individuals in relation to the processing of their personal data and the free movement of such data. Even though the Data Protection Directive does not regulate the right to information explicitly, the degree of accountability and protection it evoked, as well as its spirit, have spread in the European legal environment during the 1990s, influencing the quality and directions of future legislation.<sup>27</sup>

21 The General Data Protection Regulation<sup>28</sup> (GDPR) of the European Union, adopted in 27 April 2016, became applicable as of 25 May 2018. The first striking new feature is that the GDPR is a regulation not a directive, as Directive 95/46/EC was the main instrument for the protection of personal data until the GDPR entered into force. The GDPR became directly applicable, thus member states are not required to pass legislation in that regard, however according to certain opening clauses they have room to manoeuvre in given situations. With respect to the topic of the present research, Article 85 of the GDPR should be examined. The GDPR does not regulate the right of access to information explicitly, but the mentality of Article 85 can very well have certain effects on the future development of the concept. Article 85, Paragraph 1 of the GDPR sets forth that member states have an obligation by virtue of law to reconcile the right to the protection of personal data, in accordance with the GDPR, with the right to freedom of expression and information. This provision also relates to the processing of personal data for the purposes of artistic, literary and academic expression, as well as journalistic

purposes. According to Wagner and Benecke, “Article 85 GDPR appears to be a regulatory task for the member states, rather than an opening clause”.<sup>29</sup> However, Article 85, Paragraph 2 allows member states to derogate from its provisions in certain situations, if it is required in order to reconcile the protection of personal data with the freedom of expression and information. Pursuant to Article 85, Paragraph 3, in the event of such derogation, the Commission has to be notified with respect to the provisions of domestic law derogating from the GDPR, as well as any further amendments made. There were numerous preparations for the entering into force of the GDPR, as many companies have structured their portfolio to fit it by the creation of data protection-friendly products and services, and also altered their operational structure for the purpose of compliance.<sup>30</sup>

22 The GDPR does not bring anything new to the table for the enthusiasts of accessing public sector information; but since it requires increased transparency from companies,<sup>31</sup> it further strengthens the international body of laws moving towards progressive dimensions, and further emphasises the importance of carefully and fairly upholding the balance between the protection of personal data and the disclosure of information.

## II. Decisive case law

23 Apart from the CJEU cases discussed in the previous section, certain landmark judgments delivered by the European Court of Human Rights (ECtHR) have also had a great impact on and shaped the development of the right to access information, guiding its path towards recognition. In the 1979 case of *Sunday Times v United Kingdom*, the ECtHR established that Article 10 of the ECHR, “guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed.”<sup>32</sup> In the 1987 case of *Leander v Sweden*, and also in light of ECHR Article 10, it found that “the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that

27 Alison White, ‘Control of Transborder Data Flow: Reactions to the European Data Protection Directive’ (1997) 5(2) *International Journal of Law and Information Technology* 230-232, 238-239.

28 Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, 27 April 2016.

29 Julian Wagner and Alexander Benecke, ‘National Legislation within the Framework of the GDPR – Limits and Opportunities of Member State Data Protection Law’ (2016) 2(3) *European Data Protection Law Review (EDPL)* 356.

30 Jan Philipp Albrecht, ‘How the GDPR Will Change the World’ (2016) 2(3) *European Data Protection Law Review (EDPL)* 288.

31 Axel Freiherr von dem Bussche and Anna Zeiter, ‘Implementing the EU General Data Protection Regulation: A Business Perspective’ (2016) 2(4) *European Data Protection Law Review (EDPL)* 581.

32 *The Sunday Times v The United Kingdom*, Application No. 6538/74, ECtHR, 26 April 1979, para 66.

others wish or may be willing to impart to him”.<sup>33</sup> In 2000, the ECtHR further strengthened the concept of accessing public sector information by ruling in *Özgür Gündem v Turkey* that the genuine effective exercise of the right to freedom of expression “does not depend merely on the State’s duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals”.<sup>34</sup>

- 24 Then in 2009, landmark decisions were delivered by the ECtHR in the *Hungarian Civil Liberties Union v Hungary* case, where it stated that in view of the interest protected by Article 10 of the ECHR, the law cannot allow arbitrary restrictions which have the potential to become a type of indirect censorship, should the authorities obstruct the gathering of information. Moreover, the ECtHR ruled that the role of the press also includes the creation of forums providing the possibility of public debate, and the real-life implementation of this role is not limited to the media or professional journalists. Thus, the Hungarian Civil Liberties Union exercised its public watchdog role through the creation of the forum, which served as a venue for public debate, and as such is essential in democratic societies.<sup>35</sup> Therefore, for the first time, a refusal of access to information qualified as a violation of Article 10 ECHR.<sup>36</sup> Further important cases include *Kenedi v Hungary*, where in 2009 the ECtHR held that a denial of access to information by the State constituted an interference with the right to freedom of expression,<sup>37</sup> and the 2012 case of *Gilberg v Sweden*, in which it assessed issues related to the applicability of access to information laws with regard to research material held by certain universities.<sup>38</sup>

### III. Hungarian Helsinki Committee v Hungary

- 25 One of the most recent and important cases, is the 2016 *Hungarian Helsinki Committee v Hungary* case. The Hungarian Helsinki Committee (hereafter “Committee”) is a non-governmental organisation founded in 1989. It monitors the practical implementation of international human rights laws in Hungary and provides legal representation

to victims of alleged abuses of human rights, as well as legal education in Hungary and abroad. The Committee is active in the following areas: the protection of the rights of asylum seekers and foreigners in need of international protection; and the monitoring of the human rights performance of state authorities and the court system.

- 26 The Committee focuses especially on access to justice, conditions of detention, and the enforcement of the right to defence. In 2008, as part of its examination with respect to the degree of transparency in the police’s method of appointing public defenders, the Committee requested - in accordance with the data protection law applicable at the time - the names of public defenders appointed in that year, as well as the number of assignments given to them.
- 27 In the summer of 2009, two police departments denied to give access to this information, stating that the names of public defenders were not to be disclosed under the applicable data protection law, since they are not members of an organ having public duties, nor does their name qualify as public sector information. As a result, the Committee filed an action against the police departments in September 2009, arguing that since public defenders perform a public duty, and are financed from public funds, the request to know their names and the number of their assignments qualified as public sector information subject to disclosure on the grounds of public interest. The Debrecen District Court ruled in favour of the Committee, and ordered the police departments to provide the information requested by the NGO. On the second-instance, the Hajdú-Bihar County Regional Court overturned the first-instance judgment, finding that public defenders appointed ex officio did not exercise public duties, irrespective of the fact that, ultimately, they were financed by the Hungarian state.

- 28 In September 2010, the Supreme Court of Hungary dismissed the petition for review regarding the second-instance judgment and observed that a prosecutor or an investigative authority indeed performs a public duty when it appoints a public defender, but that this duty ceases to exist with the appointment of the given public defender. Therefore, the Supreme Court of Hungary found that the activities of public defenders qualify as private activities, and the police departments do not have an obligation to provide the requested personal data in their possession under the applicable law. Subsequently, the Committee filed an application to the ECtHR, stating that its right to the freedom of expression pursuant to Article 10 of the ECHR was violated by the denial of information it wished to acquire.

33 *Leander v Sweden*, Application No. 9248/81, ECtHR, 26 March 1987, para 74.

34 *Özgür Gündem v Turkey*, Application No. 23144/93, ECtHR, 16 March 2000, para 43.

35 *Hungarian Civil Liberties Union v Hungary*, Application No. 37374/05, ECtHR, 14 April 2009, para 27.

36 McDonagh supra at 36.

37 *Kenedi v Hungary*, Application No. 31475/05, ECtHR, 26 May 2009.

38 *Gilberg v Sweden*, Application No. 41723/06, ECtHR, 2 November 2010.

29 As a result of the majority decision in *Hungarian Helsinki Committee v Hungary*, the Grand Chamber concluded that Article 10 of the ECHR had been violated in the case. The Grand Chamber first assessed if, and to what extent, the right of access to information held by the state is protected under Article 10 of the ECHR, considering that the specific provision does not refer explicitly to such a right, and found that the question of whether the denial of information in the present case can qualify as falling under Article 10 ECHR has been gradually clarified by the ECtHR's case-law. This question first emerged in the aforementioned *Leander v Sweden* case. In this case, the ECtHR established the so-called Leander Principle, meaning that the freedom to receive information prohibits governments from restricting individuals from receiving information that others wish to disclose to him.

30 Therefore, in accordance with *Leander v Sweden* and the subsequent approach of case-law that followed in its wake, the fundamental right to freedom of expression articulated by Article 10 of the ECHR did not oblige the government to disclose or grant access to such information.

31 The ECtHR assessed comparative international law in the case, and concluded that there had been willingness in the attitude of member states to recognise, under certain circumstances, the right to access information as an inherent element of the freedom to receive and impart information established in Article 10 of the ECHR. However, it relied on and accepted the Leander Principle as its position with respect to the right to access information under the ECHR, which means that the ECtHR was of the opinion that Article 10 ECHR did not ensure the individual's right to access information possessed by public entities, nor did it place an obligation on the government to grant access to such information. After that however, it assessed that such right or obligation may indeed arise, if the obligation to disclose information had been imposed by a final and binding court decision, or if the circumstances of the given case indicate that it is instrumental for the individual to get access to such information in order to exercise his or her rights arising from the freedom of expression, or if denial to such information interferes with the freedom of expression.

32 Afterwards, the ECtHR determined a threshold criterion, through which it established that the information requested by the Committee was necessary to exercise its right to freedom of expression (since it was unable to generate public debate due to the lack of a complete report on the appointment of public defenders). Furthermore, the ECtHR found that the nature of the information requested by the Committee met the public-interest

test as well, and that the Committee was unable to exercise its watchdog function by being denied the requested information.

33 Finally, the Grand Chamber of the ECtHR concluded that the information sought by the Committee should have been ready and available for disclosure; therefore, the Committee's rights under Article 10 of the ECHR had been violated.<sup>39</sup>

## D. Accessing public sector information in Hungary

### I. Remarks on the development and current situation

34 The recognition of the right to access and disseminate public sector information is one of the most important achievements of the Hungarian constitutional development. Prior to the system-change of 1989-90, the idea of "transparent citizen – impenetrable government" was forced by the political regime, the starting point of which was that state authorities were collecting as much information on citizens as possible. However, the government was disclosing very little regarding their functioning and activities, and by this behaviour they gravely violated the human dignity of the citizens.

35 Consequently, one of the greatest desires of the democratic system-change was to achieve the transparent functioning of the state and the constitutional establishment of the fundamental right of freedom of information, viewed as a tool in reaching the main aim.<sup>40</sup> From the perspective of legislation and practical implementation in connection with the freedom of information, Hungary was a leading force in the beginning of the 1990s, despite the fact that several scandals and court cases emerged in this context. Such scandals and cases could also be detected in democracies which were more developed than Hungary at the time.<sup>41</sup>

39 *Hungarian Helsinki Committee v Hungary*, Application No. 18030/11, ECtHR, November 8 2016. Furthermore, for the summary of the case see <<https://www.helsinki.hu/en/magyar-helsinki-bizottsag-v-hungary/>>.

40 Péterfalvi and Révész supra at 292. Furthermore see László Majtényi, 'Az információs jogok. (Information rights)' In: Gábor Halmai and Gábor Attila Tóth (szerk.): *Emberi jogok (Human rights)* (Osiris, Budapest, 2008).

41 Zsuzsa Kerekes, 'State of Play – Az információs szabadság Magyarországon 2015 őszén' (2015) 12(64) *Infokommunikáció és Jog* 137.

- 36 The right to request public sector information is enshrined in the Fundamental Law of Hungary, and secondarily in Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information (hereafter “Info Act”), however, the requirement towards public entities to disclose certain information is regulated only by the Info Act and certain sector-specific laws. It is important to distinguish between the two types of accessing and disseminating public sector information in Hungary. According to the Info Act, replacing Act LXIII of 1992 on the Protection of Personal Data and the Publicity of Data of Public Interest, the opportunity to access and disseminate public sector information can occur on the basis of the request of the citizen (and the reply given by the public entity), and secondarily, by way of proactivity. Proactivity in this context means the requirement of disclosure (through electronic means) of public information by public entities related to certain aspects of their functioning.
- 37 The main importance of proactivity is that information related to the functioning of public entities can be accessed easily and by anyone, without any procedure. However, the requirement of disclosure does not cover all aspects of related information, and is limited to the ones determined in laws, or by the head of the given public entity.<sup>42</sup> In the context of Hungarian legislation related to the freedom of information, Act LXIII of 2012 on the Re-Use of Public Sector Information should be noted as well, as it is intended for the implementation of Directives 2003/98/EC and 2013/37/EU mentioned in the previous section.
- 38 However, considering certain amendments passed in recent years, especially in 2013 and 2015, it can be stated that the rate of development has been broken compared to the period between 1990 and 2010. Since the Info Act entered into force, the provisions on freedom of information were amended more than ten times,<sup>43</sup> exceeding the number of amendments made to it in the preceding twenty years, which in itself can be considered as a warning sign. After discussing the related laws, the paper will focus on the more significant amendments and introduce and examine their negative effects exerted on the right to access public sector information and governmental transparency in Hungary.

## II. Introduction of related provisions in force

- 39 According to Article VI, Paragraph (2) of the Fundamental Law of Hungary, “Everyone shall have the right to the protection of his or her personal data, as well as to access and disseminate data of public interest”.<sup>44</sup> Below the Fundamental Law, the Info Act establishes detailed rules to be followed when accessing and disseminating public sector information. The Info Act determines two different types of public sector information, and specifies them as data of public interest and data public on grounds of public interest.
- 40 According to the definition of the Info Act, data of public interest means information or data other than personal data, registered in any mode or form, controlled by the organ or individual performing state or local government duties, as well as other public tasks determined by law, in connection with their activities or generated in the course of performing their public duties, irrespective of the method or format in which it is recorded, or its single or collective nature. In particular this includes: data concerning the scope of authority, competence, organisational structure, professional activities, and the evaluation of such activities covering various aspects thereof; the type of data held and the regulations governing the operations; as well as data concerning financial management and contracts concluded by the given public entity.<sup>45</sup> Data public on grounds of public interest means “any data, other than public information, that are prescribed by law to be published, made available or otherwise disclosed for the benefit of the general public”.<sup>46</sup>
- 41 The general rules set forth regarding accessing public sector information that any person or organ with state or municipal government duties, or performing other public duties determined in relevant laws, shall allow free access to data of public interest and data public on grounds of public interest under its control to any person, except for certain situations in the event of which it is provided otherwise by the Info Act.<sup>47</sup> The name of the person undertaking tasks within the scope of responsibilities and authority of the organ with public duties, as well as their scope of responsibilities, scope of work, executive

42 dr. Viktória Végh (ed.), *‘Információszabadság és Nyílt Kormányzás’*, National University of Public Service, Hungary, (2016) 4, 18. <[http://www.korrupciomegelozes.kormany.hu/download/9/6f/a1000/informacioszabadsag\\_szakanyag.pdf](http://www.korrupciomegelozes.kormany.hu/download/9/6f/a1000/informacioszabadsag_szakanyag.pdf)>.

43 Kerekes supra at 137.

44 Art. VI para. (2) Fundamental Law of Hungary (official English translation) <[www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf](http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf)>.

45 Sect. 3 (Definitions) point 5 Info Act <[http://www.naih.hu/files/Act-CXII-of-2011\\_EN\\_15.11.2016-003-.pdf](http://www.naih.hu/files/Act-CXII-of-2011_EN_15.11.2016-003-.pdf)>.

46 Sect. 3 (Definitions) point 6 Info Act.

47 Sect. 26 para. 1 Info Act.

mandate, and other personal data that is relevant in performing their duties, also qualify as data public on grounds of public interest. Such data may be disseminated in compliance with the principle of purpose limitation.<sup>48</sup>

- 42 The Info Act also lists situations in which access and dissemination of public sector information can be limited. Accordingly, “access to data of public interest or data public on grounds of public interest shall be restricted if it has been classified under the Act on the Protection of Classified Information”.<sup>49</sup> Furthermore, it specifies situations under which the right to access data of public interest or data public on grounds of public interest may be restricted. Granting access to public sector information can be denied by the competent authority for the following reasons: if it is considered necessary for safeguarding national defence or national security; if it is essential for the prevention and prosecution of criminal offenses; for environmental protection and nature preservation; for the purposes of central financial or foreign exchange policy; for external relations and relations with international organisations; for the purpose of court proceedings or administrative proceedings; and for the protection of intellectual property rights.<sup>50</sup>
- 43 In accordance with the Info Act, “data of public interest shall be made available to anyone upon a request presented verbally, in writing or by electronic means. Access to data public on grounds of public interest shall be governed by the provisions of the Info Act pertaining to data of public interest.”<sup>51</sup> Important elements related to proportionality and to the protection of the requesting party’s personal data are also formulated, setting forth that unless it is provided otherwise by law, the processing of the requesting party’s personal data in connection with any disclosure upon request is permitted only to the extent necessary for the disclosure, for the examination of the request, and for the collection of payment of charges needed for the disclosure. Following the deadline for disclosure and upon receipt of the payment, the personal data of the requesting party must be erased without delay.<sup>52</sup>
- 44 With respect to legal remedies, in the event of failure to meet the deadline for the refusal or fulfilment of the request for accessing public information, or the deadline extended by the data controller, the requesting party may bring the case before the court.<sup>53</sup> The burden of proof to verify the lawfulness

and the reasons of refusal, as well as the reasons for determining the amount of the fee chargeable for the fulfilment of the data request, lies with the data controller.<sup>54</sup> Actions have to be launched against the organ with public duties that has refused the request, within 30 days from the date of delivery of the refusal, or from the prescribed deadline, or from the deadline for payment of the chargeable fee.<sup>55</sup>

- 45 Furthermore, the Info Act lays down the foundations of proactivity, and lists the sphere of information to be included in the mandatory electronic disclosure in general. It sets forth that organs with public duties shall promote and ensure that the general public are provided with accurate information in a prompt manner in connection with the matters under the competence of the given organ. Such information may include for example, the budgets of the central and municipal governments and the implementation thereof, the management of assets controlled by the central and municipal governments, the appropriation of public funds, and special and exclusive rights conferred upon market actors, private organisations or individuals.<sup>56</sup>
- 46 Formal requirements and certain procedural behaviour to be shown by public entities during disclosure are also determined, as well as the organs having such duty. These organs include the Office of the President of the Republic, the Parliament, the Constitutional Court, the Commissioner for Fundamental Rights, the State Audit Office, the Hungarian Academy of Sciences, the Hungarian Academy of Arts, the National Office for the Judiciary, the Prosecutor General’s Office, central administrative authorities with the exception of governmental committees, national chambers, and county and capital government offices. In accordance with the provisions on mandatory disclosure, access to public sector information, the publication of which is rendered mandatory, shall be made available to the general public without any restriction and free of charge, through the internet and in a digital form, in a manner that prevents the identification of specific individuals, in a form allowing for printing or copying without any loss or distortion of data.<sup>57</sup> The mandatory disclosure obligation has to be fulfilled through a standard, special or ad-hoc disclosure list. The standard disclosure list can be found in the annex of the Info Act, while the special disclosure lists are determined by certain sector-specific laws. Ad hoc disclosure lists are determined by the head of a given organ with public duties, rendered mandatory with respect to that organ.

48 Sect. 26 para. 2 Info Act.

49 Sect. 27 para. 1 Info Act.

50 Sect. 27 para. 2 Info Act.

51 Sect. 28 para. 1 Info Act.

52 Sect. 28 para. 2 Info Act.

53 Sect. 31 para. 1 Info Act.

54 Sect. 31 para. 2 Info Act.

55 Sect. 31 para. 3 Info Act.

56 Sect. 32 Info Act.

57 Sect.33 para. 1 Info Act.

### III. Recent years' major amendments and their adverse effects exerted on the right to access public sector information

47 In April 2013 the Hungarian Parliament adopted an amendment that limited the scope of the Info Act. Surprisingly, the amendment was passed within less than two days from its proposal. Miklós Ligeti, the head of legal affairs for Transparency International Hungary noted that “this amendment is the first step down a slippery slope, at the bottom of which is full state control of public information... it heralds a dark age for democratic governance in Hungary”.<sup>58</sup>

48 Indeed, the amendment introduced limitations to the right to access public sector information, entitling certain public authorities as the only entities holding enough data to carry out so called large audits, as well as requiring the justification of a legitimate interest of requests for information on, among others, decisions of public authorities, personal information of public officials, or court cases, which until then were accessible in the public domain. However, the amendment did not define large audit or legitimate interest, therefore it allows a great extent of discretionary powers to public authorities in deciding whether to reject requests for information by labelling them abusive, being contrary to the principle according to which the people have the right to be informed in connection with the spending of public funds.<sup>59</sup>

49 As a result of the 2015 amendment of the Info Act, the content of Section 29 limits the right to access and disseminate public sector information to a certain extent, but definitely to the benefit of the state. According to Section 29 Paragraph 1, “the body with public service functions that has the data of public interest on record must comply with requests for public information at the earliest opportunity within not more than fifteen days.”<sup>60</sup> However, Paragraphs 1(a) and 1(b) are the result of the aforementioned 2015 amendment, and establish that the organ with public duties that has the data of public interest on record is not obliged to comply with requests for public information, whereby the request is identical to that which was submitted by the same requesting party within one year and with respect to the same dataset, provided that there were no changes in the

dataset concerned.<sup>61</sup>

50 Furthermore, the organ with public duties that has the data of public interest on record is not obliged to comply with requests for public information, if the requesting party does not provide his or her name; or in the case of a legal person, its description and contact details through which the requested dataset or any other information can be provided.<sup>62</sup> Therefore, information related to an identical dataset cannot be requested twice within one year, and the times of anonymous requests for information have passed as well. Two factors indeed weakening the concept of freedom of information.

51 Section 29, Paragraph 2 gives additional space to manoeuvre for public entities, as it sets forth that if a request for information is substantial in terms of size and volume, or requires a disproportionate workforce, the deadline may be extended by 15 days on one occasion, of which the requesting party shall be informed within 15 days of receiving the request.<sup>63</sup> Pursuant to Section 29, Paragraph 5, accessing public sector information in Hungary is not free of charge. Another rule which clearly does not contribute to the more effective implementation of freedom of information. When calculating the fee for access to public sector information, the cost of the data storage device containing the requested information and the delivery fee of the data storage device to the requesting party should be taken into account, and if the fulfilment of the request for information requires a disproportionate workforce, additional labour costs should be considered as well.<sup>64</sup>

52 In order to summarise the detrimental effects of the 2015 amendment to the Info Act, the following changes should be pointed out:

- possibility of anonymous request for public sector information ceased to exist;
- possibility of a repeated request for public sector information has been narrowed down;
- public servant employees dealing with requests get separate remuneration for this type of activity, increasing the overall costs of the procedure;
- rendering higher fees and longer response times in general.<sup>65</sup>

58 Transparency International, 'Hungary: Government Closing Down Freedom of Information' 8 May 2013. <[https://www.transparency.org/news/pressrelease/20130508\\_hungary\\_government\\_closing\\_down\\_freedom\\_of\\_information](https://www.transparency.org/news/pressrelease/20130508_hungary_government_closing_down_freedom_of_information)>.

59 Zsuzsa Kerekes, 'Az Információszabadság Kálváriája' 2013(2) *Fundamentum*. Furthermore, Zsuzsa Kerekes, 'Az Információszabadság a szakadék peremén' 2014(1) *Fundamentum*.

60 Sect. 29 para. 1 Info Act.

61 Sect. 29 para. 1(a) Info Act.

62 Sect. 29 para. 1(b) Info Act

63 Sect. 29 para. 2 Info Act.

64 Sect. 29 para. 5 Info Act.

65 Kerekes supra at 139-141.

- 53 It is also important to mention that in 2016 the Hungarian Parliament granted new disclosure exemptions for the state-owned postal service and for foundations established by the National Bank of Hungary. It is apparent that embracing the concept of granting access to all information qualifying as public under Hungarian law is not in the interests of entities financed from public funds or having a contractual relationship with the public sector. However, this is not typical to Hungary only, as there are other states of rule of law having to deal with similar issues.<sup>66</sup> What raises awareness in Hungary is the fact that it is paired with other features aimed at weakening certain fundamental rights, considering for example the 2010 media law and the controversy that followed, as well as the more recent restriction on the freedom of assembly.<sup>67</sup>
- 56 Therefore, a general increase of openness in the functioning of entities availing of public funds would be welcome, one that could be interpreted not just in a legal, but in a sociological sense as well, and would be able to reduce the communicational and interactional distance existing between the people and the government. The concept of increased governmental transparency, especially taking into account the technological achievements of the 21<sup>st</sup> century, has to be embraced by governments on a global level, as the further increase of opening up public sector information is inevitable to reach transparent and accountable public entities not just in part, but in full, as well as to facilitate the participation of private individuals in public affairs, therefore making it accessible not just to a narrow group of people.

## E. Concluding remarks

- 54 Even though at the European Union level it did not receive the necessary amount of attention so far, based on the examinations conducted in the paper it is evident that the current regulatory attitude and governmental policies in Hungary adversely affect the right to access public sector information as well. Instead of withholding increased governmental transparency, it would be welcome if legislation policy would place more emphasis on proactive disclosure, as well as relieving the additional pressure created by the 2015 amendment in particular.
- 55 From the perspective of the theoretical justifications of Peled and Rabin, the direction towards which Hungary seems to be heading is definitely contrary to open governance and governmental transparency. This is exactly what Hungarian and international NGOs working for the transparency of governments are protesting against. The level of corruption in public entities is high,<sup>68</sup> not to mention the attitude of society and the current political environment's unwillingness to embrace the concepts of open governance and governmental transparency that reflects in the regulatory attitude discussed above.<sup>69</sup>
- 57 Nevertheless, the situation in Hungary in recent years reflects certain negative examples from which legislation policies should refrain when assessing the right to access public sector information. Moreover, instead of withholding increased governmental transparency, the further opening up of public sector documents and databases, in light of the principle of proportionality, seems to be the advisable path to take in upholding democratic principles and exploiting the opportunities the digital age has to offer to the fullest.

### Acknowledgements

The research was supported by the Hungarian State Scholarships of the Tempus Public Foundation (<https://tka.hu/english>).

66 Péterfalvi and Révész *supra* at 295.

67 For comprehensive English language summary see Hungarian Spectrum, 'Hungary's New Law Restricting Freedom of Assembly' 2 October 2018 <<http://hungarianspectrum.org/2018/10/02/hungarys-new-law-restricting-freedom-of-assembly/>>.

68 European Commission, *Hungary - EU Anti-Corruption Report*, COM/2014/38, 3 February 2014 <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_hungary\\_chapter\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_hungary_chapter_en.pdf)>.

69 Mihály Tóth, 'A Few Remarks about Criminal Corruption in Hungary' 2014(1) *Journal of Eastern-European Criminal Law* 78-79.