

**TRANSPARENCY IN PUBLIC ADMINISTRATION:
FREE ACCESS TO PUBLIC INFORMATION.
A TOPICAL COMPARATIVE ANALYSIS
OF SEVERAL JURISDICTIONS
FROM CENTRAL AND EASTERN EUROPE**

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Many expected freedom of information laws to be among the first priorities of the new governments of countries in transition after the 1989 changes, but instead there was little public pressure to adopt general sunshine laws relating to all categories of information. After adopting the laws, however, there are still many powerful forces that are working against extensive access to information – they can be static - opaque administrative practices, general inaptitude or the lack of sufficient human and material resources - or active – agents that resist openness due to private interests, or agents that use institutional scenarios to prevent public scrutiny over corruption and incompetence. The paper approaches the jurisdictions from Hungary, Poland, Czech Republic and Romania, emphasising aspects like: different models in regulating freedom of information regimes, obstacles in the implementation of the law, public bodies that should apply the law, timeframes, etc.

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Introduction

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

It was expected freedom of information laws to be among the first priorities of the new regimes from Central and Eastern Europe, in transition after the 1989 changes. Although pressure to open archives and secret police records increased, there was little public pressure to adopt general sunshine laws relating to all categories of information (Brown, Angel and Derr 2000). This is why the majority of these countries adopted such legislation only around year 2000. A major factor that slowed post-1989 development of laws and practices for government transparency was the preoccupation of many Central European and former Soviet countries with reviving their own national legal traditions. Adopting and integrating Western European

or international practices and trends were of secondary interest. Because of this approach, in many ways, regulating public access to government-held information in these countries was certainly more difficult than in countries that are establishing entirely new systems of government. Even after a right of access to information is established, remain questions about the timing, accurateness and worth of the information disclosed, especially due to the fact that the experience of these nations had led to a genuine distrust of the citizens in their governments (Brown, Angel and Derr, 2000).

Freedom of information regime in Hungary

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

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

The number of cases addressed by the Commissioner's office has been increasing steadily and sometimes dramatically: since 1995, when the office was set up, the number of investigations has multiplied to reach a thousand in a single year. The distribution of the requests among different seekers for information remained though consistent. Most of them concern data protection, while only 10 % freedom of information issues. In terms of complaints filed, the share of freedom of information cases is only 7 %. On the other hand, matters regarding freedom of information are mostly high-profile cases receiving intense public attention and wide publicity. As such, "their significance far outstrips their share in the total number of cases investigated" (Commissioner's Report, 2004).

In a recent development towards modernizing means of access to public information, the Hungarian Parliament has passed the 2005 *Law on Electronic Freedom of Information*, which according to the Ministry of Informatics and Communication, makes Hungary "one of the most progressive countries in the world with regard to the publicity of public interest information"¹. The law imposes the on-line publication of draft bills, laws, and - partially - the anonymous form of court decisions, while a search system that makes the published data searchable and retrievable is to be created simultaneously. Another important betterment regards the creation of the Electronic Collection of Effective Laws, which shall contain the effective text of all laws in force on a given calendar day in

¹ Press release, E-Strategies On-Line, Issue 15, 26.10.2005, <http://www.britishpublishers.com/ezine/ezine15.htm>

a unified structure. The law on electronic freedom of information has been programmed to enter into force in several steps: the Electronic Collection of Effective Laws is to become operational as of 1 January 2006, while public authorities' obligation to publish information on-line is scheduled for January 1st 2007 respectively January 1st 2008.

Freedom of information regime in the Czech Republic

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

The experiences with the application of the Free Access to Information Act enabled the conclusion that the Act basically serves the purpose for which it had been generated, because in the majority of cases the citizen gained the information requested (Open Society Fund Prague, 2002). The fears of misusing the law were not fulfilled, and the authorities were not swamped by the grumbler's requests more than before. Nevertheless, if the compulsory subjects are reluctant to grant information, they use a wide range of evasive tactics contradicting the spirit of the law and in many cases also its letter, like demanding of steep charges for seeking information hold by the authority; excessive using of the commercial secret institution for the withholding of information that either is not a commercial secret or can not be protected since it concerns the using of public means; excessive using of the personal data protection institution for the withholding of an information about an public activity of an individual; refusals of the request for granting information with the explanation that the office is not the compulsory subject under the Act; refusals of granting an segregable part of information whose other part constitutes the protected information; ignoring the law presuming that no sanction for his violating will be taken. In such cases not every refused applicant appeals to the court, but when they do, the jurisdiction mostly vindicates the applicants of information. In the cases of information with the up-to-date bearing the very lengthening of the process leads to the obstruction of the purpose of the Act (Open Society Fund Prague, 2002).

In the light of other doctrinarian assessments, the phenomenon of the access to information seems to be "nearly a detective discipline" (Kužílek 2004). The concrete implementation of the freedom of information provisions to specific situations, especially in villages, is suggesting that the level of unjustified withholding information at the Czech authorities, the unawareness of the legal provisions and their secretiveness is still very high.

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

Freedom of information regime in Poland

In Poland, before the new Constitution was enforced (October 17, 1997) Poles were able to claim the right to information under the Convention for Protection of Human Rights and Fundamental Freedoms of 1950. Then, article 61 of the Constitution established rights to collect, receive and disseminate information and specifically stated the right of access to government-held information².

In order to expand the constitutional provisions but also due to the pressure from European Union integration process, NGOs and media, Poland adopted rather late, on September 6, 2001 (binding from January 1, 2002) the Law on Access to Public Information, whose purpose is to guarantee to everyone the right to public information which includes the right to: 1) obtain public information, including

² http://www.uni-wuerzburg.de/law/pl00000_.html

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

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

Poland has signed the Aarhus Convention on Access to Information in June 1998 and ratified it in February 2002; as a consequence, the Act of 9 November 2000 on Access to Information on the Environment and Its Protection and on Environmental Impact Assessments implements the Convention³.

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

The main line of criticism regarding Freedom of Information Act in Poland concerns the lack of a specific public authority (like the Information Commissioner or Ombudsman in Hungary or United Kingdom) responsible for ensuring that the provisions of the law are properly implemented. Other important weakness of the law is considered to be the whole construction of it, which may give impressions that secrecy is more important than access to information. This is the consequence of earlier adoption of law concerning limitations of the right to information on the basis defined in regulation on protection of secret information and about other secrets protected by law, for example privacy of individuals. As in other Central and Eastern European countries, implementation of an electronic version of the Bulletin on Public Sector Information constitutes a challenging task, due to the large number of public authorities required to provide information by use of this Bulletin (over 100 000 in Poland). Finally, it was argued that the procedure of judicial review is time consuming and may be a real obstacle for citizens. From 1989 to 1995 an average time of legal proceedings on criminal cases increased three times and in economic matters more than twelve times (Sakovicz, 2002).

³ http://www.mos.gov.pl/mos/akty-p/dostep_eng.html

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

Freedom of information regime in Romania

The state of the art in Romania provides for a set of regulations, adopted in recent years, regarding a framework Law on free access to public information (Law no.544/2001) but also on classified information (Law no.182/2002), transparency in decision making (Law no.52/2003), and, finally, regarding transparency in public office, in commercial transactions and in debts to the state (Law no.161/2003). Also, for public’s access to environmental information, a special Governmental Decision was adopted (878/2005), applying the Aarhus Convention.

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

In 2003 the Pro Democracy Association published a report (PDA 2004) after monitoring for a year the way in which Romanian authorities were applying the law. The project targeted central authorities as well as local authorities. One of the findings was that the number of the requests for public information was still quite low, because of the lack of knowledge among citizens and companies about the very existence of the law. A major contribution to this situation have had also public authorities which, working against the efforts of some NGO’s to popularize the law and its benefits, demonstrated lack of capacity and willingness to apply it properly.

On the other hand, knowing well the shortcomings of the law helped some public authorities to avoid disclosing public information. Thus, the law does not provide for the amount of money which could be charged as cost for reproducing the public information requested. Consequently, public authorities charged in some cases large amounts of money in order to discourage applicants.

Surprisingly, central authorities were in a greater extent assaulted with requests for public information than the local ones. The monitoring activity regarded three aspects: a) the stage of setting up a special office charged with receiving and coordinating the implementation of the law at the each public authority level; b) the way in which public information is provided *ex officio* by publishing it on the internet or at the public authorities’ premises; c) the way in which public authorities were responding to requests for public information.

The general conclusion of the study was that the mentality of public employees and public officials, the lack of institutional management and the weak knowledge of the regulations regarding this matter are impeding the proper implementation of the 2001 law. The law was just starting to achieve its goal of opening up the public administration to the citizens.

The average time necessary for responding to a request for public information was 12 days, and it can be considered too long when taking into account the provision of the law which imposes responding in 10 days and only in exceptional circumstances in 30 days and the complexity of the request, which was very low. From 90.7% (average) public authorities who have registered the request for public information, only 58.4% on average have responded to it. Another conclusion of the study was that elected deliberative public authorities (local councils) have responded in a smaller number than appointed authorities (ministries, for instance) or executive authorities (mayors).

It is not sufficient to respond to a request for public information, but also to respond by providing the information requested. In this respect, from 957 requests, only 400 have received a complete answer, which is a 42% percentage.

Among the matters most affected by the secrecy, *public contracts* and the *decision-making process* stand out. Public employees and public officials are mostly the subjects targeted by requests for public information, and data regarding their performance in office or affecting this performance should be always disclosed, as opposed to considering it personal data.

It has also to be mentioned a solution that in my opinion should be extended to all jurisdictions, that is setting up an Information Commissioner (present now only in United Kingdom and Hungary), which can positively influence the implementation of the freedom of information laws and their interpretation, but also, more important, would be able to confirm or infirm the public authorities' classification of information as secret.

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

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

Who has the right to access public information?

As a liberal approach rule, *any person* should be granted with the right to request information from a public authority. Consequently, citizens, non-citizens and legal entities can benefit equally from these provisions of the law. Even public authorities, themselves subject to the law, can be applicants.

Birkinshaw (2001) argues that if individual access to public information is too costly, or too sensitive, or not worth the effort because of public apathy, or because there is little public feedback or views or ideas to inform specialists or decision makers, this is not an argument against freedom of information. Contrarily, this has to be an argument for making the government accountable to the public, even if this is done through the activity of other public or private bodies, which the public trusts. What can be seen as unreasonable request from an individual, can be considered perfectly reasonable when it comes from another public body or from a nongovernmental organization.

Looking at specific provisions in comparative jurisdictions, it can be noticed that Romanian 2001 Freedom of Information Act gives the right to information to “any person” (art.6), while the 2001 Freedom of Information Act of Poland uses the word “anyone” and the 1999 Freedom of Information Act from Czech Republic specifies that the laws can be used by “any natural person or legal entity”, which has to be interpreted wide, as including also the persons functioning under other jurisdictions. The Czech doctrine pointed out that the right to information is not connected to any personal characteristic of the applicant, and the public authority cannot require any excess personal data that does not relate to the application, nor does it have to verify if the person asking for information is truly the representative of a legal entity (Kuzílek 2004).

No discrimination is made between citizens and other applicants in Hungary as well, where the right to access public information is granted to “everyone” (Act LXIII of 1992). The Annual reports made available by the Data Protection and Freedom of Information Commissioner of Hungary for the period 2000-2004, show that the main category of applicants for advice and investigations at the Commissioner is private individuals with an average of 29.8% of the requests, closely followed by data controllers (public authorities) with 28.4%, in third place civic organizations (NGO’s) with average 11.6% (in 2002 was the highest rate – 20% and in 2003 the lowest – 4%) and journalists with an average of 9% (3% in 2003 but raising to 16% in 2004). The interesting fact is that business organizations counted only for 3% of the requests in 2000, none in 2001, 5% in 2002, 9% in 2003 and dropped back to 1% in 2004.

Entities which are bound by the law – the concept of “public authorities”

The definitions of the “public authority” concept can follow two approaches. The *first* one, according to which public authorities are characterized by the fact that they perform public duties and have public competences, uses a general wording in order to assure that newly established authorities fall within the category of public authorities. This method excludes the need for updating the definition upon the development in time of the administrative structure, but creates difficulties when trying to characterize a certain legal entity as public authority. In the *second* approach, a list of the public authorities is provided as an appendix to the law, which means that newly established public authorities would have to be inserted into the list by an administrative decision or by law. This system implies regularly updating the appendix or the list of public authorities, but it is more accurate when trying to determine if a certain body is a public authority bound by the Freedom of Information Act or not. The answer to the question “is this legal entity bound by the Act?” is very simple in this case: only those bodies included in the list are public authorities and have the duty to disclose public information. The downside is that in the period between two updating decisions newly established public authorities are not under the duty to provide access to information.

The jurisdictions analyzed here have opted for the first method of defining public authorities. Thus, the Hungarian law has a very short description of the public entity: “the organ or person performing state or local government function, or other public function determined by a rule of law”. The conclusion that rises from the definition is that only the executive branch has to apply the law, not the Legislative and the Judiciary. The law applies on the other hand to private entities performing

a “public function”, which is a commendable provision due to the fact that these structures are sometimes avoiding the disclosure of public information even if they manage public funds.

In the Hungarian Commissioner’s Annual Report for 2003 a great importance was conferred to the transparency of supervisory organs overseeing the public sector, as it was considered “a crucial element of freedom of information” (Commissioner’s Report, 2003). Furthermore, the report observed that in 2004 there was a significant increase in the number of cases concerning the disclosure of information on the operation of consumer protection inspectorates. For instance, the Conscious Consumers’ Alliance, a public benefit group, lodged a complaint against four inspectorates that refused to release the names of companies on which they had imposed a fine. Reconfirming his position elaborated in connection with similar cases, the Commissioner declared that consumer protection inspectorates, as organs of the government, were subject not only to consumer protection legal provisions, but also to the 1992 Freedom of Information Act, whose provisions they clearly violated by withholding the information sought. In addition to that, the Commissioner dismantled the argument of one of the inspectorates’ head that it was legitimate to cite business secrets as grounds for withholding fine-related data concerning certain energy providers. Keeping the violation secret in this case could not be supported by any appreciable interest (Commissioner’s Report 2004).

In the Czech Republic, the law is applying to state authorities and communal bodies (art.2 of the 1999 Act). Furthermore, the doctrine considers that an institution receiving contributions from the State Budget is bound to provide information on its management (Kužílek 2004). Such bodies are, for instance, trade companies established by local public authorities according to the Communities Act, in fields like housing, health care, transport, training and education, general cultural development and public order. The understanding of the heads of such companies is often that transferring public means into private area means disengaging from all the rules typical for public sphere, but this is not an admissible interpretation of the law. A special issue still under debate in Czech legal system regards the duty of the private and church schools to provide public information. However, in case of information related to the admission to a school, all schools without any exception have the duty to provide with all the information relating to the applicant’s entrance exams, including the form of a completed test (Kužílek 2004).

According to the Section 18 of the Freedom of Information Act, each public entity is obliged to publish until March 1 of every year a report on its activities relating to provision of information in the previous year. Each such report shall include the following data: a) the number of submitted applications for information, b) the number of submitted appeals, c) a copy of essential parts of each court judgment, d) results of proceedings on sanctions for failure to comply with this act, not including any personal data, e) all other information relating to the application of this act. In 2002, only 43% of the obliged entities had published the reports on the web, and only half of them were complete (Open Society Fund Prague, 2002). Among them, 30% were from district and regional towns, 20% from other towns, 17% from municipal sub-divisions and only 5% from villages without town status. The conclusion of the research was that institutions - including the key government and municipal bodies (in the cities) - have not created mechanisms for Act’s consistent fulfilment yet. Some villages learned of the duty to write the annual report (and of the very existence of the 1999 Act) as late as from the request addressed by the non-governmental organization conducting the research - so it is obvious that the informational system of public administration failed in its duty to implement the law. The requirement of publishing annual reports it is considered by the public authorities as a burden imposed by the superior authorities, not as a way of opening or enabling office communication with public.

Romanian Law no.544/2001 states that by *authority* or *public institution* it is understood “any authority or public institution, as well as any state company (*régie autonome*), which uses public financial

resources and carry on its activities on Romania's territory, in accordance with the Constitution". The definition has drawn much criticism, because it uses the same word (public authority) to define the public authority concept. Moreover, it doesn't include the private companies which provide public services, under state or local authorities' supervision. The easy way in defining this notion should have been to describe the public authority as a body which performs public tasks (like in the Polish model), because this way the definition would have included private companies which are involved in providing public services.

"Public information" versus "public document"

It is evident that the widest scope of the Freedom of Information Act from the applicant's standpoint is better assured by granting access to "public information", not to "public documents", because in this way the public authority is required to provide the public information even when it is enclosed in a document not entirely open to the public, or, more important, search for information not enclosed in a single document or make a new document for the purpose of the request. The information should be, in principle, recorded in some way (paper, sound, video or electronic devices) to be provided to the applicant; therefore, requests cannot be made to public functionaries in order to provide information within their own or some other's personal knowledge unless it has been recorded.

Amongst the jurisdictions analyzed, the 2001 Polish Act, the 1999 Czech Republic Act and the 2001 Romanian Act provide access to "public information", while the 1992 Hungarian Act provides access to "data of public interest" which is explained as being information that is not "personal data".

When deciding how to deal with the substance of the "public information" concept, as seen above, some jurisdictions, like Romanian and Hungarian ones, have adopted the solution of a generally wording definition, while others (Polish) have opted for a more extended definition, with lots of examples. The Polish solution seems preferable if we take in consideration the numerous attempts of public authorities from the former communist countries to keep their ancestral secrecy and refuse to consider certain information as public, but nevertheless has its downfalls. Having a blocked list of data that is considered public information, the law could fall short of covering the whole spectrum of public information, given that the society and the public administration is evolving. Another minus could be the fact that in the process of applying the law, the public functionaries would try to interpret narrowly the concepts enclosed in the list, depriving some public information from such rightful qualification. The advantage is on the other part that is harder to exclude certain public information from disclosure by administrative decisions. For instance, in Romania, some contracts concluded by public authorities are constantly declared, by administrative decisions, as "classified" contracts on the basis that they take the form of private contracts. In this case, contracting activity was considered as a private activity, not a public one.

Access to final documents or decisions versus access to preparatory information

A very important issue that has to be discussed in this context due to its effect in practice is that of "internal documents" or "drafted documents". The Freedom of Information Act should usually include provisions which require, if the decision is likely to have substantial impact over a wider area or on the circumstances of several people, that the public should be informed of the matter pending. Access to information pertaining to issues of general importance is a prerequisite for the social debate that precedes decision making. Thus, the democratic principle should be that all the preparatory documents relating to the decision making come into the public domain, at the very latest when the decision has been made. Within these preparatory documents, of a great importance are the studies, statistics and other research related to a project of general interest. Access to projects should be available on the basis of a "project register", updated with all the projects pending, whether they are drafted legislation or administrative decisions (Holkeri, 2002). Only the secret documents should be exempted from this rule, but with the condition that they always relate to a final secret document.

The Polish Act provides that *intentions* of legislative and executive authorities regarding internal or foreign policy and draft legislation is considered public information (art.6), which means that any internal documents, that are considered for approval, are also public information.

The Romanian law has no specific provisions regarding draft decisions and intentions of the public authorities, but it makes an exception from disclosure for “the debates of public authorities” (s.12 of the 2001 Act). This concept allows for a wide interpretation, meaning all the preparatory work in order to issue a decision or conclude a contract, and a narrow interpretation, meaning only the sessions of the deliberative authorities. The proper implementation of the concept has to consider, in my view, the narrow interpretation, which is the only one in line with the scope of the law and with the provisions of another complementary law, on transparency in decision making (Law no.52/2003), which states that draft normative decisions and individual decisions of public interest should be made publicly accessible. On the other hand, it should be observed that information intended to be withheld from disclosure needs to be classified first, according to the Law on classified information no.182/2002 - that is by a formal decision issued by the head of the public authority.

Other legislations are not as permissive, stating that only *definitive* decisions or documents can be considered for disclosure under the law. Is the case, for instance, of Hungary, where the data prepared or recorded in order to make a decision is to be withheld from disclosure for 10 years after its creation, irrespective of the fact that a decision has been made or not. The head of the organ processing the data has the right to override this prohibition by permitting access to the preparatory work on the basis of a public interest test, before the final decision was taken or after it. It should be noted, thus, that even after the decision is made, the disclosure is up to the head of the department, on the basis of a public interest test with regard to the likelihood that data would endanger the lawful operational order or the performance of the public authority due to the external influence. Shorter periods than 10 years may be ruled for by a rule of law (art.19A of the Freedom of Information Act).

The explanation for this approach allegedly lies in the fact that the exclusion of publicity from the decision-making mechanism could be justified “no matter how democratically it is run by the administration”, and decision-making processes cannot be exposed to the pressure of public opinion at every step. It was argued also that Governments forced to make unpopular decisions have an acceptable interest in being able to consider undisclosed plans. Moreover, “the disclosure of preliminary drafts not yet given professional shape could make the office look ridiculous even if has not actually done anything worthy of such reaction, while if contradictory alternatives come to light the official hierarchy could be undermined. For all these reasons, the restricted publicity of such documents represents a tolerable limitation“(Majtényi 2004). The only aspect that needs objecting is, in the opinion mentioned, the time period established for the restriction of disclosure of documents used internally and in preparing decisions, which is considered too long, especially compared with the longest expiration period of official secrets which is *twenty years*.

In a Decision from 2004 (no.12) the Hungarian Constitutional Court admitted that the freedom of information section of the law has an unconstitutional omission, since the legislator failed to provide rule-of-law-guarantees which ensure access to data of public interest defined in S. 5 of Article 19: „unless an Act provides otherwise, data generated for internal use and in connection with the preparation of decisions shall not be public within twenty years following their inception (*ten years according to the last version of the law, found on the Commissioner’s website*). At request, the head of the organ may permit access to the data even within the above time limit”. Parliament was obliged to pass the adequate legislation until December 31, 2004, the draft law is under preparation, but has not been passed yet (Halmai 2005). The petitioner argument was that concepts like „data generated for internal use or data generated „in connection with the preparation of decisions” are so vague that their application might easily result in barring access to any data of public interest. The

Court further argued that right of access to data of public interest is directly and essentially violated if uncertain statutory concepts authorize state organs to classify data as secret, and in this way the obligation of the state to provide institutional protection to fundamental rights, conferred by the Constitution, can easily be circumvented. Moreover, the legislator also has to guarantee the judicial review with regard to the formal and substantive requirements of restricting public access. The concept of “data generated for internal use” read separately from the concept of „data in connection with the preparation of decision” grant wide discretionary power for the head of the data handling organ, since the relevant data are not protected according to its substance, but according to the intent of who generated them. The Constitutional Court pointed out that restricting most of the data generated in connection with the preparation of the decision cannot be justified after the decision has been taken. From this point on, granting access to data in connection with the preparation of the decision poses no obstacle for the high-quality, undisturbed and uninfluenced operation of the state administration. The Constitutional Court also emphasized that the restriction of access cannot be justified with the possibility that, at request, the head of the organ handling data may permit access to the data even within the time limit (Halmai 2005).

Placing itself slightly on the same restrictive level, the Czech Freedom of Information Act states that the information which has originated during the preparation of a decision can be withheld by the public authority from disclosure, but only if the preparation will end with a decision (Art.11). It can be noticed the discretionary power granted to public authorities, who, in the spirit of openness, can nonetheless decide freely to disclose the information. The problem remains though the concrete appreciation of the “intention for future decision” concept, which can give a large space of manoeuvre to the public authority, especially when in the end the proper decision was not taken, even if on the basis of some preparatory work it should have been taken. The discretionary power ends when a special law states expressly that preparatory information is to be disclosed to the public.

In the practice of freedom of information regime of the Czech Republic, controversial interpretations have been raised regarding the problem of incomplete decisions or drafts. The law states that the work materials for public session of the local councils are provided to the regional press about 10 days before the session. Thus, the question raised was whether a citizen has the right to ask for these drafts in the same time as the press, knowing that they are already available, and not wait until the meeting of the council to receive that information. The citizens were told by the council representatives that they are not entitled to ask for the materials until the session. The doctrine though argues justly that “as soon as the information is provided to the press, it is impossible to refuse it to anybody else” (Kužílek 2004). Nevertheless, the disclosure should observe the time-limits set in the Freedom of Information Act - within 15 days from the request at the latest.

On the other hand, it was avowed that it is possible (after agreement with editors) to impose embargo on a prepared speech of the President of the State, because only through its presenting it can be considered as a “complete information”. In another case, the same author argued that the obligation to provide drafts of amendments to a regulation is evident in the case when those drafts were already presented to some non-governmental organizations for comments. The question raises also the aspect of the person competent to decide who is to be invited to such proceedings and who not, and on the basis of what criteria. Consequently, the obligation does not survive when the consultation procedure is organized within the public administration system (Kužílek 2004). This opinion is endorsed by the provisions of other law: the Act N. 2/1969 Coll. to regulate the constitution of ministries and other central bodies of the state administration of the Czech Republic states that “the Ministries (...) inform the public in an adequate way on the drafts of crucial regulations” (s.22). This provision is annulling the possible use of the section 11 of the Freedom of Information Act regarding withholding the preparatory information, due to the fact that the section itself makes possible other arrangements

by special law (“the compulsory subject can restrict providing of information in case:...b) it is a new information that came to rise during the preparation of the decision of a compulsory subject, *in the absence of a contrary provision*”).

Requirements for the application

As a general rule, the request can be verbal or in writing, should merely mention the name of the applicant, the address for correspondence and, most important describe as precisely as possible the information solicited. Any corrections to the application should be admitted, and public authorities need to adopt a positive attitude over this issue. Thus, the Czech Freedom of Information Act requires that when the application is unintelligible, it is not apparent what kind of information is requested or the wording is too general, public authority should ask the applicant within a period of seven days from submission of the application to make the application more accurate, and if the applicant does not send a more detailed application within 30 days it will decide about refusal of the application. Kužílek (2004) observed though that in case of an oral application (over the phone), even if the public authority has the obligation to respond, it is impossible to appeal and there are no deadlines set for response.

A special requirement in some jurisdictions is that the applicant should mention the request is made under Freedom of Information Act, so that the public authority can process the application as such; if the request fails mentioning under which Act is made, and the correct nature of the request does not appear evident, public authorities have discretion in deciding which law applies, because some jurisdictions have separate laws dealing with petitions and access to public information. Is the case of Romania, where the Governmental Ordinance no.27/2002 regarding the activity of answering petitions provides for distinct time frames and conditions for response as opposed to 2001 Freedom of Information Act. Thus, a request under Freedom of Information Act has to be processed in 10 days with a maximum extension of another 20 days in exceptional cases, while a regular petition has to be processed in 30 days with an extension of 15 days in exceptional circumstances. Nevertheless, the public authority has an obligation to make efforts in determining the scope of the request and to make sure that the request is treated respectfully.

Most jurisdictions unequivocally recognise, as assimilated with written application, the *electronically transmitted* application (Hungary, Romania, Czech Republic), while others implicitly admit this form of application (Poland). When the request is made via e-mail, and the information is held in hard copy only, disputes may arise from the fact that the public authority is usually reluctant to scan the document and to send it electronically. Moreover, the cost of the information granted via e-mail is more difficult to be calculated. Taking into consideration these aspects, according to Macdonald and Jones (2003), when requesting public information, the “address” requirement should be approached by applicants as a classic place for communication, a real address, not a virtual one. In this way, the document requested by e-mail could be transmitted either by electronic means or by postal service at the address indicated in the message.

Nevertheless, when no address is specified in the request transmitted via e-mail, the public authority should make an effort and inform the applicant about the situation occurred and propose a solution for communication. In some cases, this duty is imposed by law: the Freedom of Information Act in Poland states that “accessing public information on application shall occur by the method and in the form compliant with the application, unless technical means at the disposal of the public authority do not enable such access”. Where public information may not be accessed by the method and in the form set down by the application, the public entity has the duty to notify the applicant in writing on the reasons for impossibility of accessing the information pursuant to the application and shall indicate by which method and in what form the information may be accessed immediately (art.4).

The Czech Freedom of Information Act states that from each submitted application it must be apparent to which subject it is assigned and who is applying. Applications by electronic means should provide relevant identification of the applicant, and it is worth mentioning the very liberal approach adopted by this regulation, as the *electronic address* is considered enough. If the application does not include these data, it is not considered a submission in the meaning of the law and it is set aside (art.14). Following the same liberal approach, in Hungary, the law requires that claim shall be granted in an easy to understand way and by a technical device or by the way required by the claimant if this does not entail disproportionate expenses (art.20).

Looking at these legal provisions seems that some jurisdictions have accepted that a request via e-mail should be answered in the same way. However, the practical consequences are not foreseen by the legislation, as shown above.

In Romania, the written request for the information of public interest contains the following elements: a) the public authority or institution to which the request is addressed; b) the requested information, so that it would allow the public authority or institution to identify the information of public interest; c) the solicitor's surname, first name and signature, as well as the address on which the answer is requested (art.6 of the 2001 Freedom of Information Act). An e-mail request is also acceptable, but only if "the necessary technical conditions are met" (art.7 sect.3), which is a setback from the imperative that all public authorities should have a well organised and functional web page and digitally means of dealing with public's needs. In an IT-driven society, the modern evidence requirements have to acknowledge that an e-mail message storied in "Sent" file of the internet address can be used as proof of sending a freedom of information application, as regards the date of the application and the recipient. Also, the public authority can do the same thing, if the document is appropriate for electronic transmission. The advisable thing for petitioner remains, however, in this period of transition to a professional government, to make the request in writing, and to keep a copy certified by the public authority with a date from the register, so that the evidence of filling a request could be easier to do.

In all jurisdictions analyzed here, no *motivation* has to be provided when requesting information. This is expressly forbidden in Poland, while in Romania, Czech Republic and Hungary it results implicitly from the requirements for request.

Applications erroneously addressed to a non-competent public authority

The discussion regards possible solutions for a frequent situation when the petitioner addresses the request for public information to a public authority that does not possess that information.

Several options can be considered in this case: a) the application is set aside as wrongly addressed; b) the petitioner is informed about the fact that the information is not in the possession of the public authority, but without giving him/her an exact indication of the authority that is competent to answer the request; c) the petitioner is informed about the competent authority for accessing information, but the obligation to file a new application lies with the petitioner; d) the petitioner is informed about which is the competent authority for accessing information, and the application is send by the "incompetent" public authority to the competent one (transferring the request).

The most satisfying legal option from the point of view of the applicant is the last one, preferred by the Romanian legislation. Thus, even if Freedom of Information Act doesn't provide for a solution in case the application is wrongly addressed, the gap is covered by a more general piece of legislation, Governmental Ordinance no.27/2002 on petitions, according to which a petition addressed to an authority that doesn't have the competence to solve it should be directed by this authority to the competent authority. The provision is very "citizen oriented", because it is easier for a public authority to find out which other public entity has the competence in the respective case than to leave this matter to the petitioner.

Other options are not as good for the applicant, but they are accommodating very well the public authority, who doesn't have to worry about the issue too much. Thus, according to the Czech Freedom of Information Act, in the event that the requested information does not fall under the sphere of public authority's activities, it will set the application aside and will convey this justifiable fact within three days to the applicant. There is no provision regarding an obligation to announce the applicant of this occurrence. It does not even impose (as it is e.g. in case of complaints) to transfer the application to the subject relevant for its handling. The professional literature in this country considers for good reason that "the most reasonable would be to transfer his /her application to the correct place" (Kužílek 2004). The explanation for this lack of provisions can be found, in the same author's opinion, in the conception that lies behind the creation of the freedom of information law in Czech Republic, namely that access to public information was considered more of a right connected with the principles regarding the good functioning of a democratic state than with practical immediate impacts on the lives of individuals. Moreover, it was argued that requiring public authorities "to find out where it is possible to obtain some information, would be (at least in some cases) unsuitable and it could lead to the misuse of the public administration" (Kužílek 2004).

Hungarian and Polish Acts don't have any provisions in this matter.

Applications for information already published or otherwise made public

When the public information that applicant is seeking has been already published on-line or in paper format, public authorities shouldn't be required to provide the information directly to the applicant, taking into consideration the cost of such an endeavour. Nevertheless, a rule of law stating an obligation for public authority to indicate the location of the information is necessary.

Some jurisdictions have gone though a little further, bearing in mind the interest of the private persons facing administration. Thus, according to Czech legislation, if the application is directed at providing already disclosed information, the public authority can, as soon as possible, but within seven days at the latest, instead of providing the information, give the applicant data that will enable looking up and gaining the disclosed information. Nevertheless, if the applicant insists on direct provision of the disclosed information, the *public authority is required to provide it to him/her*. The only consequence of this new request is that the timeframe for response is starting to run again, the persistence being considered as a new submission of the application.

The Romanian Freedom of Information Act does not have a provision on this issue, consequently public authorities have a mandatory responsibility in directing the applicant to where the information was published or to provide it if the applicant insists in this direction. From the applicant's perspective, this is the most satisfying solution.

In no situation availability of the information can be considered as assured by the way of attending sessions of deliberative public authorities. For instance, several cases brought in front of the Administrative Court in Poland, the refusal of mayors to disclose information on the basis that the matters were clarified during municipal sessions was considered illegal. Sakowicz (2002) considers that these cases are relevant for the problems journalists encounter when they request information from local authorities, due in part to the fact that in many municipalities there is no spokesperson or official entitled to contact the press. The Polish regulations obligate only institutions of central government administration to have spokespersons, consequently territorial self-governments are obliged to disseminate ex-officio through a spokesperson only information concerning execution of central administration tasks delegated to them.

Timeframes for answering the requests

The timeframes regime reflects a balance between three types of interests. First, there is the interest of applicants, who would like a rapid and complete disclosure, effective penalties and sanctions applied to public authorities reluctant to implement the provisions of the Freedom of Information Act. Secondly, there are public authorities, which are interested in more time for complying with requests for public information and speculate every chance to refuse disclosure. Thirdly there are the third parties, interested at their turn in the procedure of consultation before disclosure.

In the Czech Republic, public authorities are required to provide the requested information within 15 days at the latest from acceptance of the submission or from receiving the detailed application (in case the application was incomplete or too general). The set period for providing the information can be lengthened for significant reasons by 10 days at the utmost, and the applicant has to be announced about it (Kužílek 2004). Significant reasons are considered to be: a) searching for and collecting the required information in other offices, that are separate from the office attending to the application, b) searching and collecting a great volume of separate and different information requested in one application, c) consulting another obliged entity who is significantly interested in the decision about the application, or between two or more units of the obliged entity, who have a consequential interest in the subject of the application. The applicant must be evidently informed about the extension of the time period and the reasons for it in time before expiration of the term for providing information.

The remarkable thing of the Czech regulation is that the timeframe for response cannot be prolonged without a justifiable reasoning and the reasoning for that is clearly provided for in the law.

In Hungary the claim shall be granted by the organ processing the data, as soon as possible after being notified of the claim, but at the latest within 15 days. The refusal, on the other part, shall be notified in 8 days, accompanied with a motivation.

In Romania, public authorities and institutions are bound to answer in writing in 10 days' time, or, depending on the case, in maximum 30 day's time since the filling of the request, depending on the difficulty, complexity, volume of the documentary researches necessary and on the urgency of the request. In case that the duration necessary for identifying and disclosing the requested information exceeds 10 days, the answer shall be communicated to the petitioner in maximum 30 days' time, on condition that the petitioner would be informed in writing about this situation in 10 days' time. The refusal of communicating requested information, on the other part, shall be justified and communicated in 5 days' time since the receiving of the request (Art. 7). This last provision means only that the refusal is recommended to be communicated within 5 days from request. It doesn't mean that a refusal is impossible after 5 days, because even the lack of answer in 30 days is considered a refuse. Nevertheless, a judicial action for damages on the ground that the decision of refusal was issued overrunning the 5 days term can be filled with great chances of success, if the claimant proves damage related with this overrun. Another issue that needs discussing is the motivation for prolonged period of response. In the absence of some guidelines for cases when prolonging the term is necessary (like in the Czech Act), in Romania the practice showed numerous examples of misreading of the law, leading to abuse in prolonging the term.

The Romanian practice of applying the law raised the question of the applicable regime in cases when several laws are qualified of applying at the same time (for example, the Ordinance on petitions, which sets a timeframe of 30 days, and the Freedom of Information law, which establishes a timeframe of 10 days), in situations where the petitioner does not specify on what basis is asking the information, and the information is one of public interest. The solution is to consider the shortest term, because in this way the interpretation is taking into account the citizen's interest.

Short terms are regulated also in Poland, where the principle is that accessing public information on application shall occur without undue delay, not later than within 14 days from the date of application

filing. When public information may not be accessed by this date, the public entity shall inform the applicant on the reasons for the delay and the date by which the information shall be accessed, but the new date cannot be set later than 2 months from the date of the application (Art. 13). Another reason for prolonging the term for response can occur when the applicant insists on receiving the information by the means indicated in request and the costs incurred by that activity are higher than of the normal disclosure process. In this case, the applicant has two options: to renounce the method of receiving the information indicated in request, or to stick with that method and pay the additional fees incurred by disclosure. Consequently, the term for disclosing the information is prolonged with the period necessary to notify the applicant and receive accept for charging extra fees.

Access to un-exempted portion of a document

An important aspect of all countries' legal framework of providing access to public information is the restrictions or exceptions where the information is not provided to the public.

The simply existence of some exempt information in a document should not impede the applicant to access the other information from the document, information that is not exempted. In most of the jurisdictions analyzed here, the principle is that disclosable information contained in a document requested under Freedom of Information Act should be extracted and released to the applicant even though some other parts of the document or other information within it is exempt from disclosure. Thus, in Hungary, according to Art.20 (4) of the 1992 Act, if the document containing data of public interest contains data not accessible by the claimant, such data shall be made unrecognizable. Similarly, in the Czech Republic, the public authority is bound to provide requested information including accompanying information after expelling information set forth by the law (s.12).

Unfortunately, other jurisdictions (Romania) do not provide for such specifications, leading to abusive practices. Thus, some requests for public information have been rejected on the basis that the document containing them contains also personal data which is exempted by law from disclosure.

Concluding remarks

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

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

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