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Freedom of Information – Experiences from Eastern Europe

I.

1. The notion of freedom of information means that we have the right to get to know information of public interest, that we have the right to inspect official documents. The State, sustained on our own taxes, cannot hide its operations from society. *The shared purpose of data protection and freedom of information is to continue maintaining the non-transparency of citizens in a world that has undergone the information revolution while rendering transparency of the state.*

The principles of freedom of information habitually have their origins ascribed to the ideas of the Enlightenment. However, its first legal source can be found not in the French or American Enlightenment but in Sweden, which was the first country in the world to recognize, in the *Act of Freedom of the Press of 1766*, that every citizen has the right to inform himself on official documents (undoubtedly, this became possible for the sole reason that between 1718 and 1772 Sweden was under parliamentary rule with rivaling parties).

The 14th point of the human rights declaration of the French Revolution announced the transparency of the state's economic management: *"citizens have the right, exercised in person or through representation, to inspect and consent to the necessity of spending public funds and to control the ways in which those funds are put to use..."* It is not difficult to hear the same maxim behind the famous demand of the citizens of the British colonies in North America: *"No taxation without representation." One may perhaps reasonably paraphrase this as "No taxation without information on how those taxes are used."*

European Human Rights Convention
Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

2. East European examples

Poland: "(1) A citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions…..
(2) The right to obtain information shall ensure access to documents and entry to settings of collective organs of public authority formed by general elections, with the opportunity to make sound and visual records.[1]"

The Access to Public Information Act was enacted in September 2001 and went into effect in January 2002 gives anyone the right to access to public information (exemptions: official, state secrets, confidential, privacy information and business secret). The processor must respond within 14 days. There is not an independent commission or commissioner to enforce the Act yet.

In Romania the Constitution guarantees the right to access information of public interest:

"A person's right of access information of public interest cannot be restricted. The public authorities, according to their competence, shall be bound to provide for correct information to citizens on public affairs and matters of personal interest…[2]"

[1] Constitution of Poland 61.§
[2] Constitution of Romania 31.§

The Law on Free Access to information of Public Interest was approved in 2001. The public bodies must respond within 10 days.
There are exemptions too (national security, deliberations of authorities, personal, business interest, criminal, judicial proceedings…and so on)

Slovakia

"State bodies and territorial self-administration bodies are under an obligation to provide information on their activities in an appropriate manner and the state language."[3]
"Everyone has the right to timely and complete information about the state of the environment and the cause and consequences of its condition."[4]

The Act on Free Access to Information was approved in May 2000, enforced on January 1, 2001. The authority must respond not later then 10 days, free of charges, exception reproduction.

Czech Republic

In the Czech Republic The Charter of Fundamental Rights and freedoms we can read: "Freedom of expression and the right to information are guaranteed."[5]
The law on Free Access to Information was enacted in May 1999 (effected: January, 2000) (respond within 15 days).

On 5th of August 2004 the Czech Cabiner rejected a Senate- sponsored amendment to the law on free access to information under which people would have easier access to information. Under the rejected amendment, costs individuals have to cover for information demanded from civil servants would not have been allowed to refuse information on the grounds of protecting business secrets or personal data.

Albania

„1.The right to information is guaranteed.
2.Everyone has the right, in compliance with law, to get information about the activity of state organs, as well as of persons who exercise state functions."[6]

[3] Const. 26.§
[4] Const. 45.§
[5] Art. 17
[6] Art 23 of the 1998 Constitution

The Act on Right to Information for Official Documents was enacted in 1999. The authorities must decide 15 days and respond within 30 days. The Ombudsman is tasked with oversight the law. „Implementation of the law has been limited. The Act is not well known and there are a low number of requests." OECD report on anti-corruption effort: „There are no adequate mechanisms in place to provide full access to information."[7]

3. Hungary

"*In the Republic of Hungary, every individual is granted the right to free expression, as well as to access and disseminate data of public interest.*"[8]

One of the most important purpose, of the rule of law revolution is to guarantee the right of everyone to exercise control over his personal data and to have access to data of public interest in Hungary.

I believe that either and each of these two rights in itself may easily lead to a curtailment of freedom and that it is not only preferable to combine them as such in one Act but even that we place ourselves in the care of a joint protector. Besides general considerations, as we make the transition from a totalitarianism to a constitutional state founded on the principles of liberty, we have an especially good reason to grant equal and concurrent representation to freedom of information and informational self-determination founded on the notion of inviolable of privacy – if we do not, we will make it all the more difficult to face the past. But if we do, society will have a chance not only to get the informational redress that it rightfully demands but also to avoid a tyranny of freedom.

[7] See the country reports of David Banisar: Freedom of Information and Access to Government Records Around the World, Privacy International

[8] Constitution of Hungary. § 61 (1).

The model of informational rights in Hungary can be best appreciated as a follower of the Canadian model. Beside Canada, Hungary is unique in the degree to which the protection of personal data within its borders is linked with the constitutional values of freedom of information (see DP&FOI Act No. LXIII of 1992). In Europe, Hungarian legislation stands alone in having opted for the rather common-sense solution to enact a single law to regulate freedom of information in conjunction with the protection of personal data. Here it must be pointed out that exemplary European democracies, such as Germany, are still merely planning to pass their own comprehensive freedom of information laws. Again pioneering in Europe, the Hungarian Act has assigned the protection of freedom of information and of personal data to the very same specialised ombudsman. This apparently sensible solution has been featured in a number of countries' legislation in the draft form, but it has not, to the best of my knowledge, been put into practice anywhere except in Hungary, Canada and newly Great Britain and the provinces of Germany. In Canada both the provincial and federal levels demarcating the narrow path between mutually restrictive constitutional values (FOI&DP) that often seem to be in conflict is one of the most exciting tasks. While privacy and freedom of information are complementary imperatives, they also impose limits upon each other. Suffice it to mention the limited privacy protection enjoyed by those who hold public office or assume a public role.

The Hungarian freedom of information law can be described as radically liberal legislation, a fruit ripened by the 1989 rule of law revolution which created the constitutional state. As such, the FOI Act is a firm refutation of the single-party power structure which for decades used secrecy as the very foundation. Since the adoption of the law in 1992, a long enough period

has passed for us to realise the social limits of its enforcement and application. We must therefore exercise self-criticism and hasten to add that the Act promises more freedom than it has in fact enabled us to achieve.

The obligation to safeguard freedom of information extends to cover the entire Hungarian state administration from the lowest ranks to the highest levels of state power – both horizontally and vertically. Each state-wide or local governmental body, public organisation or person is under legal obligation to disseparate data of public interest in its possession. Freedom of information is a human rather than a civil right, and therefore it also extend to other than Hungarian citizens. (It is an interesting but not widely known fact that the law of the United States – a nation justly regarded as the yardstick of freedom of information – makes only *government agencies* liable to supply information, which means that the freedom of information principle does not apply to documents controlled, say, by the President.)

Under Hungarian law, any information that is not personal in nature and is controlled by a state or local government authority must be considered data of public interest. Access to data of public interest is not subject to any restrictions except by legally defined categories of secrecy (e.g. bank or insurance secrets, or confidential health-related information).

Freedom of information is limited in several ways. Access to data of public interest is restricted by the data protection act itself as a means of protecting personal data. I will not discuss the conflict between personal data and data of public interest. Basically adopting the ruling of the Council of Europe's Convention, the Act on FOI permits the restriction of

the right to publicity by order of the law for the following categories of data: restriction is allowed in the interest of national defence, national security, criminal investigation and prevention of crimes, the monetary and currency policy of the State, foreign and international relations, and of judicial procedure. In the sphere between the protection of personal data and state secrets, several categories of secret are identified and mostly regulated by law.

Both European law and national legislation such as the Hungarian Act on the protection of personal data and on the publicity of data of public interest grant an exception from the principle of the publicity of files for the category of draft documents used internally and in preparing decisions. The explanation for this 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. Decision-making processes cannot be exposed to the pressure of public opinion at every step of the decision-making procedure.

Governments forced to make unpopular decisions have an acceptable interest in being able to consider undisclosed plans. 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. 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. Hungarian law declares that *"Unless otherwise provided by law working documents and other data prepared for the authority's own use or for the purpose of decision making are not public within 20 years of their creation. Upon request the head of*

the authority may permit access to these documents or data." By contrast, we have good reason to object to the time period established for the restriction of disclosure of documents used internally and in preparing decisions, which is *twenty years* by effective Hungarian law. This is too long, especially when we consider that the longest expiration period of official secrets is *twenty years* only despite the fact that an official secret, as opposed to a document used in decision making, constitutes a "true" secret.

Enjoying the highest level of protection are the secrets of the State, which have been subjected to rigorous–but arguably not the most stringent – legal limitations in terms of procedure and substance (Act No. LXV of 1995). The Secrecy Act provides for two cases of secrecy law.

Data constitute a state secret when they belong to a category of data defined within the range of state secrets, and when, as a result of the classification procedure, the classifier has determined beyond doubt that their *"disclosure before the end of the effective period, their unrightful acquisition or use, their revelation to an unauthorized person, or their withholding from a person entitled to them would violate or threaten the interests of the Republic of Hungary in terms of national defense, national security, criminal investigation and prevention of crimes, the monetary and currency policy of the State, foreign and international relations, or in terms of jurisdiction."* The effective period for the category of state secrets is maximum 90 years.

Official secret means any data whose *"disclosure before the end of the effective period, unrightful acquisition or use, or access by an unauthorized person would interfere with the orderly operation of a body*

fulfilling a state or public function and would prevent it from exercising its official function and authority free from influence."

After requesting the Data Protection Commissioner for an opinion, the person authorized for the classification will publish the register of official secret categories in the *Magyar Közlöny ("Hungarian Bulletin").* Data qualifying as a state secret or an official secret have to be classified. If the data meet substantive requirements but for some reason have not been classified, they cannot be considered a state or official secret.

Upon request, the classifier controlling the secret may grant the permission to access the data. The petition to access is governed by the same rules and are subject to the same restriction periods that we have already explained in the context of data of public interest. If the request is refused, the classifier can also be sued as provided by *DP&FOI Act.*

Requests for data of public interest must be complied with in 15 days, and any refusal to supply such information must be communicated to the applicant within eight days, together with an explanation. Controllers of data of public interest are under obligation to inform the public periodically anyway. Whenever a request for information is denied, the applicant has the option to file for an inquest by the Commissioner for data protection and freedom of information, or to bring a court case. Such cases will be heard by the court with special dispatch, and the grounds for withholding information must be proved by the party refusing to give out the data.

Should the same plaintiff seek help from the DP&FOI ombudsman, he can count on a procedure that is substantially speedier and definitely free of

charge. The ombudsman will issue a recommendation in the case, which is not officially binding, but will be obliged as a rule.

These considerations notwithstanding, Hungarian law provides for an exception that is unheard of in other countries. Whenever the Commissioner for DP&FOI finds that a classification as state or official secret is without grounds, he is entitled in his recommendation to call on the classifier to alter the classification or to abolish it altogether. Such a decision empowers the "recommendation" with administrative force, leaving the addressee with the option to accept or to file a lawsuit against the Commissioner, requesting the court to uphold the classification. Such cases will be heard by the County Court at special dispatch. It is worth mentioning that to this date we haven't had a classifier risk a court procedure instead of bowing to the Commissioner's judgement.

And yet, law is not just mere normative form but also social reality. The Commissioner not only watches over freedom of information, but also lobbies for its recognition. To some extent, the institutions created to safeguard constitutional rights have the power to generate the very social demand to have these rights enforced. Legislators are mandated to submit bills with an impact on informational freedom rights to the DP&FOI Commissioner for evaluation, although they are not bound by law to accept the Commissioner's recommendation. This authority is an important tool in the hands of the freedom of information Commissioner, enabling him to shape the legal environment. And yet, we must give some credit to the voices which claim that freedom of information in Hungary – as in many other places of the world – generates more smokescreen than real flame. The statistics in the Commissioner's reports, submitted annually to

Parliament, lend themselves to forming a social diagnosis. Hungarians – certainly like other peoples in East Central Europe – have traveled a unique road to civil society, and age-old habits and traditions are not easy to change. Believers in the aphorism "*My house is my castle*," Hungarians tend to be much more sensitive to violations of their privacy than to secrecy over data of public interest. The ancient Latins who grew indifferent to an increasingly corrupt public sphere summed up their wisdom in the advice *"Go not to the Forum, for truth resides in your own soul."* Many in Hungary today subscribe to this view. At any rate, the Commissioner's case statistics provide valuable lessons. While the number of cases investigated by the Commissioner has been changing dramatically, the respective representation of the various informational branches show great consistency. Since 1995, when the Bureau was set up, the number of investigations has multiplied to reach a thousand in a single year. Most of them pertain to data protection, with only 10 percent concerning freedom of information issues. In terms of complaints filed, the share of freedom of information cases is only 7 percent. True enough, statistical figures add their own distortion. Matters involving freedom of information are typically high-profile cases receiving keen social attention and wide publicity. As such, their significance far outstrips their share in the total number of cases investigated.

As I have suggested before, one can point to a number of long-standing great democracies whose constitution and law do not spell out the constitutional right to freedom of information. Ours in Hungary do – but we have our own weaknesses to face in this area.

II. Cases

1. Judicial check on secret services

For a brief overview of this topic, it is essential to bear in mind that, in Hungary's constitutional system, neither the general ombudsman nor the Data Protection Commissioner[9] has the right to criticize court decisions (although the latter is vested with somewhat wider powers in this respect as well).[10]

These limitations notwithstanding, submissions by a Hungarian judge and a few claimants gave me the opportunity to examine constitutional problems caused by the limited access to the information practices of the national security services. In lawsuits over the way such services handle data, it should be essential for the courts to be familiar with the remonstrated activity that is at the crux of the civil litigation. In reality, however, the effective regulations do not guarantee for the courts the scope of inspection that would be needed in these cases. As a result, the lack of sufficient information prevents the courts from being able to decide such disputes.[11]

In a remarkable incident, the Commissioner was contacted for advice by the presiding judge of the Budapest Municipal Court as a second-instance venue. The judge explained that the plaintiff in the case–an ordinary citizen–had requested the Security Service's Information Office, the defendant, to allow him to inspect the files kept on him and to discontinue the unlawful processing of his data by deleting them from the records. The Office turned down the request, citing the interests of the interior and exterior security of the state as a justification recognized under the Data Protection and Freedom of Information Act (the DP&FOIA), and insisting that it "*is not engaged, nor has been engaged, in any illegal processing*" with regard to the claimant's data. The Information Office cited the Act on National Security Services[12] to support its refusal to release pertinent information to the court itself. Pursuant to the quoted provision, "*The police, the Border Guard, the prosecutor's office, and penal organizations shall be entitled to require data from the national security services, subject to specifying the purpose of using the data such as shall not be in excess of their tasks as ordered by law.*

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[9] Nonetheless, the Data Protection Commissioner is entitled to inspect the court's habits of processing information.

[10] The best counterexample is provided by the Scandinavian countries, where the ombudsman is normally authorized to critique the courts. Cf. László Majtényi, *Ombudsman: Állampolgári Jogok Biztosa* (Budapest: KJK, 1992); Al-Wahab, *The Swedish Institution of Ombudsman* (London: Greenwood Press, 1983); M. Hiden, *The Ombudsmen in Finland* (Berkeley: University of California Press, 1973).

[11] Cf. Case 800/K/1997.

[12] Act CXXV of 1995, § 44 (2) and (3).

The information thus released shall not lend itself to identifying its source, in particular the person collaborating with the national security services. The general directors of the national security services may impose restrictions on the use of the data supplied if so dictated by the interests of protecting covert intelligence methods and sources of information." The presiding judge contacted me with reference to § 26 of the DP&FOIA, under which the Commissioner's powers of document inspection are broader than those of the courts: "*In exercising his functions the Data Protection Ombudsman may request the data controller to furnish him information on any matter, and may inspect any documents and records likely to bear on personal data or data of public interest. [...] State and official secrets shall not prevent the Data Protection Ombudsman from exercising his rights stated in this Article, but the provisions on secrecy shall bind him as well. In cases affecting state or official secrets the Data Protection Ombudsman shall exercise his rights in person…*" The case raised a number of legal dilemmas:

- § 50 (1) of the Constitution declares that "*The courts of the Republic of Hungary protect and guarantee constitutional law and order as well as the rights and lawful interests of citizens, imposing punishment on the perpetrators of crimes.*"
- Identifying the tasks of the courts, § 141 (5) of Act III of 1952 on the Rules of Civil Procedure provides that "*the presiding judge shall refer to such documents and other information as may be available and proceeds, to the extent this is necessary for ultimately deciding the suit, to summon the parties and witnesses for the scheduled court date and to obtain further documents serving as evidence in the case.*" § 119 of the same Act generally prohibits parties, prosecutors and other participants in a court case from making copies or abstracts of documents barred from public inspection for reasons of secrets of the state, office, or business. In fact, the mere inspection of such documents is subject to special conditions established by the presiding judge. In contrast, the quoted provisions of the National Security Act in effect prevent the courts from fulfilling their constitutional and legal function by reaching a well-founded decision in the informational dispute between the citizens and the services.
- Based on the Act on Parliamentary Commissioners and the DP&FOIA itself, the Data Protection Commissioner may not legally conduct and investigation in a case already in court, whereas the court is unable to reach a verdict for lack of sufficient information. As the Commissioner in office then, I therefore declined to voice my position in this particular litigation. What I did was contact the minister without portfolio overseeing the national security services, who agreed that the

> lack of sufficient safeguards prevented the presiding judge from speaking out on the legality of the data processing in question, other than to conclude that the services had indeed acted within the law.[13]

In short, both the law and the policy of the national security agencies barred the acting judge from accessing the facts of the case. Under the circumstances, the intervention of the Commissioner had to be confined to warning legislators and appliers of the law of the unacceptable constitutional impasse. The problem has remained without a constitutional solution to this day. But, after all, the test of efficient legal protection is not words or goodwill but investigations that produce tangible results. Let us therefore look at a few cases.

2. What can an investigation accomplish?

Illegal surveillance of civilians (1990-1995)

The first significant debate with the central administration over the illegal data collecting practices of the secret services erupted in 1995, the year I was elected Commissioner. It was started by a member of parliament who requested an inquiry into security checks conducted by the Bureau of National Security (the Bureau) as part of an integrated process from 1990 to 1995. I concluded the investigation with a recommendation, which I sent to the minister without portfolio overseeing the civil secret services "the minister") in March 1996.[14]

Based on the submission, I examined the legality of security checks ordered between May 1, 1990, and March 31, 1995. I found that almost every one of the 797 checks conducted in this period were illegal. The services involved volunteered the information that the idea was to run background checks on persons nominated for public service, but these persons were not advised about the fact or the purpose of the checks. To make things worse, the cited purpose turned out to be a disingenuous one in a significant part of the cases.

The purpose of the checks went mostly without mention in the files, while in 138 cases the order for the check was issued verbally. In fact, it was frequently impossible to determine where the orders had come from. Although a few of the cases involved the suspicion of a felony having been committed, it remained unknown whether the Bureau forwarded such information to the investigative agencies. The orders for the checks were

[13] Case 800/K/1997.

[14] "Recommendation of the Data Protection Commissioner summarizing the investigation of national security checks performed since 1990" (7/A/1995).

also inconsistent, considering that some employees were subjected to them, while others of the same rank within the given organization were not.

The Bureau often ran a check on persons, including businessmen, journalists, and politicians, who clearly did not hold or ran for particularly important and confidential positions. The author of the submission suggested that the checks raised further concerns in terms of the Constitution, privacy, and criminal law, and wanted these issues clarified.

In a letter he chose to classify as a state secret, the minister answered my questions as follows:

The checks were founded on a regulation allowing that collecting information is legal if it "serves to protect persons holding particularly important and confidential positions, and provided that these persons are aware that information is being collected on them."[15] While it was impossible to say precisely how many of the 797 subjects were aware of the checks, it became apparent that they were *generally* not informed.

The checks were typically ordered–often verbally only–by the minister without portfolio, and on occasion by the cabinet chief or the general director of the Bureau. If the entity ordering the check prepared a transcript at all, these normally contained the data of the individuals to be checked upon, but did not say whether the person was informed about the check or what the purpose of the check was. According to the instructions of the general director, the documents were filed locally by the department conducting the checks.

The investigators went through all the files they could lay their hands on, including the operative records of the military and civil national security services, the population census database, and those criminal and alien records of the Ministry of the Interior and the National Police Headquarters that were accessible to the Bureau. They also made use of various open-access databases maintained by government agencies, and often compiled reports on the person's contacts as well.

In the assessment of the investigators, security risk factors included the lack of loyalty to the sovereignty and constitutional system of the Republic of Hungary, legal violations, major flaws and distortions of moral character, addiction, excessive debt, financial instability, deformities (*sic*) of sexual conduct, serious psychological disorder, and undesirable foreign relations.

Evidently, some of the checks were not motivated by considerations of national security. It was clear that many individuals were subjected to checks without a well-founded lawful reason, even though additional

[15] Decree of the Council of Ministers 26/1990 (III. 14.).

violations of procedure made it impossible to establish their numbers precisely in hindsight. Due to the limitation of the Commissioner's powers, the inquest was unable to explicitly identify the real intention of the security drive. The lack of certainty notwithstanding, plainly there were reasons to suspect *political motives* behind these illegal checks.

The violations brought to light were also related to shortcomings and gaps in the regulations, as well as to the lack of legal and political closure in the wake of the great transformation. However–as I pointed out–even the provisions in effect at the time stipulated the "awareness" of the subjects as a condition for using special tactics and methods. Consequently, the greatest wrong committed by the services was that they habitually neglected to inform the subjects, before or after collecting information on them.

First and foremost in my recommendation, I urged the minister to declassify his letter to me as it contained nothing to justify its categorization as a state secret. (Incidentally, the classification note was not signed by the classifier, and thus the letter could not have been regarded as a state secret to begin with under the provisions of the Secrecy Act.[16])

Next, I called on the directors of the secret services to inform the subjects of the security reports and the fact that information was collected on them, and to make an apology for the violation. This obligation could be waived only if it could be shown that the subject had been informed on a previous occasion. The information had to communicated in full respect the individual rights of the subject and any third parties that might have bee involved. I also suggested that the subjects be given the option to have their files destroyed, unless the check could be proven to have been legal.

The minister concurred with my recommendations, and all the subjects were eventually notified.

As another submission demonstrated, dispute did not escape the execution of security checks that had been ordered legally, within the scope of the national security law. In this case, the claimant was prevented from inspecting the security report–which made no mention of "security risks"–because his employer, the Ministry of the Interior, had allegedly–and perhaps not accidentally–destroyed the report and even notified the claimant of this act.[17]

[16] Act LXV of 1995, § 7 (5).
[17] Case No. 404/A/1995.

3. The publicity of secrets

On December 16, 1996, I received a request for a position from 37 representatives who protested the decision of the minister to classify as a state secret, for a period of 80 years, his letter answering questions posed by a parliamentary investigative committee.[18]

The representatives argued that "*The investigating committee can only make its findings public if the obtained information is prevented from being shelved in national security archives for generations.*" The petitioners–most of whom did not serve on the committee and had therefore no access to the letter–expressed their doubts as to the existence of any interest expressly defined under § 3 (1) of the Secrecy Act that might justify the classification of the letter, and requested the Commissioner to call on the minister to remove or at least alter the terms of the classification.

I asked the minister to explain his position as well as the reasons and legal grounds for his decision. In his response, the minister addressed issues pertaining to the legal grounds of the classification as well as its conformity in terms of both form and substance. He explained that, according to the Secrecy Act,[19] state secrets included data categorized in the groups specified in the appendix to the Act, the disclosure of which prior to the expiration of the validity period, as well as its unauthorized access, use or transfer to an unauthorized third party, would violate or threaten the national security interests of the Republic of Hungary. Based on the List of State Secret Categories,[20] the quoted appendix to the Act, the maximum period of secrecy classification is 80 years for data pertaining to the acquisition, analysis, processing and use of information necessary for the proper functioning of the government in the foreign policy, economic, defense or other crucial interests of the Republic of Hungary, as well as for data relevant to the organization and practice of activity enforcing the interests of the Republic of Hungary.

Act CXXV of 1995 assigns the duty of uncovering operations that threaten the economic interests of the country to the national security services. On account of its strategic importance, the oil trade had been monitored ceaselessly by the Bureau of National Security.

The minister also touched upon the assumption that, even if the act of classification itself might have been legal, its period was positively

[18] The committee's job was to investigate abuses related to deliveries of Russian oil as payments on Russia's outstanding national debt to Hungary.

[19] § 3.

[20] Clause 101 of the List.

unacceptable. The minister pointed out that the law invested him with a "rather broad scope of discretion," and that it was both his right and duty to protect data for as long as he saw fit. While the duration of the freeze often could not be correctly assessed at the time the classification was declared, once it had been specified it could not later be modified by the classifier in this category of information.

Nonetheless, § 10 of the Secrecy Act required the classifier to review the decision every three years and to declassify the document if the circumstances justifying the original classification no longer existed. Considering all this, the minister insisted that he had acted in the spirit of the law, satisfying both formal and substantial requirements. He also pointed out that the disputed classification could not be judged out of context as the letter was merely one in a series of documents. In support of his argument, the minister sent me a copy of the letter that had been classified as a state secret and pledged further information to help me better understand the case.

Some time later, the minister met with me in person. Following the meeting, he sent two further documents for my information, one containing the case history of the "*oil affair,*" the other being a copy of the letter sent earlier to the chairman of the investigating committee, also with a state secret classification, in which the minister had informed the chairman of national security considerations in the case. This was an important piece of prehistory to the document forming the object of the Commissioner's inquiry at hand.

4. Constitutional considerations

§ 61 of the Constitution declares that, in the Republic of Hungary, everyone has the right to access and disseminate data of public interest. Freedom of information legislation in Hungary requires a two-third majority vote of Parliament to pass, considering that what is at stake in such legislation is one of the pillars of constitutional democracy. The DP&FOIA of 1992 provides for the reach of freedom of information and the terms of its restriction. § 19 articulates the general mandate for agencies and officials of the central and local governments, as well as other institutions and individuals performing public functions, to promote the prompt and accurate information of the general public in matters under their jurisdiction. These agencies no doubt include the national security services and parliamentary committees, permanent or ad hoc. Like other public bodies, they must periodically publish the major data of their activities. As it derives from the Constitution itself, this universal legal obligation cannot be waived with reference to categories of secret or non-

public data–document for interior use, business secret, tax secret, bank secret etc.–whether defined by the Secrecy Act or other regulations. Freedom of information is not an absolute liberty, and as such it is subject to restrictions. This means that access to data of public interest may be restricted if ordered by law, for instance by a state secret classification–of course, without prejudice to the guiding principle of informing the general public. Although § 19 (3) of the DP&FOIA states that access to data of public interest may be restricted in the interest of national security, the question of up to what point that restriction may be lawful must always be answered on a case-by-case basis.

The relationship between the Secrecy Act and the DP&FOIA must be seen in light of the general rules of restricting a fundamental right, but also in terms of the rules of these two Acts themselves. *The right to secrecy vis á vis freedom of information must always be interpreted restrictively.* This follows from § 8 (2) of the Constitution and the interpretation of that paragraph by the Constitutional Court. A fundamental right may not be restricted in its essential substance even by an act of Parliament. The restriction cannot be lawful unless it meets the criteria of equity, is confined to a bare minimum of necessity, and allows for the exercise of the fundamental right. The interests of national security–although they are not spelled out as such in the effective language of the Constitution–are recognized as important constitutional interests by the DP&FOIA and in the Commissioner's appraisal. (This interpretation is supported by an analysis of the rulings of the Constitutional Court.[21]) These interests, however, must take second place to fundamental informational rights in the hierarchy of constitutional privileges. This reading in its turn can be demonstrated to be correct by comparing § 1-4 of the Secrecy Act with § 19 of the DP&FOIA. While the DP&FOIA orders the "prompt and accurate information of the public," the Secrecy Act merely talks about "data" or "types of data" that may be barred from public access.

Even if certain data may be legally concealed, this does not affect the universal mandate to inform the public. This interpretation is in line with the role of the national security services to protect the Constitution. In the lucid and rather precise usage of the Secrecy Act, the justification of a "state secret" is not the interest of the "state" so much as it is the interest of the "Republic of Hungary." And the meaning of the "Republic of Hungary" is not one agency or another, but the community of citizens.[22]

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[21] 34/1994 (VI. 24.) building on the argument of 30/1992 (V. 26.), and 60/1994 (XII. 24.).

[22] § 3 (1) "State secret means any data of the type defined in the Appendix to this Act (hereinafter: state secret categories), which has been classified in due procedure by an authorised person who has established beyond the shadow of a doubt that, before the lapse of the classification, the disclosure, unauthorised possession or use of the data, or its disclosure to an unauthorised person or withholding from a person

Considering all this, in my recommendation I begged to differ from the approach suggested by an aide to the minister, and proposed that the government's classifying practices and related individual cases could not properly be assessed based merely on two or three provisions taken out of the Secrecy Act, but only in the context of other laws and the Hungarian Constitution. It was therefore wrong, I argued, to construe the Commissioner's job here to hold this matter to the test of the Secrecy Act alone, rather than to examine it also in the light of the DP&FOIA, which incidentally provides for the tasks of the Commissioner as well. The Secrecy Act is part of the entire legal system as surely as the secret services and the ministry in charge of them are part of our democratic system of government.

If significant parts of a document contain data that can be regarded as a state secret, then the entire document may be legally classied. However, in case of a number of related documents, such as correspondence between various institutions, each document must be considered separately. In other words, a document cannot be legally classified simply because it was created, for instance, in answer to a letter that had been labeled, rightly or wrongly, as "Strictly confidential!" In short, each document must in itself meet the legal criteria before it can be properly classified.

§ 25 (1) of the DP&FOIA provides that "*The Data Protection Ombudsman shall monitor the conditions for protection of personal data and for disclosure of data of public interest [...] The Ombudsman may initiate a decrease or an increase in categories of data classified as state or official secrets.*" Under § 26 (4), "*The Data Protection Ombudsman shall call the authority who classified the data for alteration or deletion thereof, if he considers the classification unreasonable. The authority may apply to the Capital City Court against the warning within 30 days of the notification thereof. The Court shall conduct the proceeding in camera and with special dispatch.*" This latter provision vests the Commissioner with a power in excess of the rather "mild" authority normally accorded to ombudsmen.

Another circumstance that had to be considered in the case at hand was the period of the classification. The minister went clearly out of line when he claimed that the law conferred upon him "a rather broad scope of discretion" in defining the duration of the classification, for such scope of discretion could not be regarded as limitless within the time frame allowed by law.

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entitled to access, would violate or jeopardise the interests of the Republic of Hungary pertaining to national defence, national security, criminal investigation and prevention of crimes, monetary and currency policy, international relations, or judicial procedure."

The dialogue between the state and society serves to constantly renew the social contract between citizens and their government. The public bodies have no right to exempt themselves from public scrutiny. § 26 (3) of the DP&FOIA provides that the classification of a document may not hinder the Commissioner's investigation, but the confidentiality will be binding for him as well. As a matter of course, the Commissioner has no right to divulge the contents of the document even if he happens to disagree with its classification. For this reason, the recommendation published in the case at hand had to be confined to stating that the disputed, rather brief document was part of a longer process of communication, verbal and written, whose major elements had all been classified as state secrets. The classification seemed justified in view of a few words and phrases that cropped up in the text, but the document was unsuitable, in its unabridged or edited form, for the information of the general public. All things considered, I concluded that the classification itself remained within the law, even though I found the 80 years excessive. One could safely exclude the possibility that, at a remove of several generations, the Republic of Hungary will have any appreciable interest in keeping these data secret, just as it seemed safe to assume that the hydrocarbon fields in point that supplied Hungary's demand will have been long depleted by the time the proposed classification should expire.

Instead of calling for the abolishment of the classification, then, I urged the minister to meet the disclosure obligation with respect to those parts of the document that did not qualify as state secrets. Another legal alternative was to simply strip the document of these confidential data. I also pointed out that the information of the public had to be serious and genuine. If the document was nevertheless kept from disclosure, this had no bearing on the right of citizens and organizations who felt wronged by the hush-up to seek remedy from the National Security Committee of Parliament, the Data Protection Commissioner or–as another option available under the DP&FOIA–from the courts themselves.

While in my recommendation I stopped short of calling for the letter to be declassified altogether, I attached the following stipulations:

The classification of the letter for 80 years, the maximum period allowed by law, not only contravened the rules of both the Secrecy Act and the DP&FOIA, but also hindered the building of much-needed trust between society and executive power. I therefore urged the minister to review his decision and to reduce the validity period of the classification by a significant number of years.

Data could not legally be kept from society unless they met the criteria of state secrets as defined in the Secrecy Act, other provisions of

law, and in the interpretation advanced in the recommendation. The substantial findings of otherwise secret investigations were subject to disclosure, to the extent that they represented data of public interest. Those relations maintained by political decision-makers and business interests that might be in violation or jeopardy of the Constitution must be regarded as data of public interest. It was the constitutional duty of the government, the secret services, and the parliamentary committees, to inform society of such findings, to the extent this was feasible without divulging state secrets. First and foremost, this information had to take the form of opening up the document for public inspection. If this was not possible, in part or in full, for some lawful reason, the substance of the document still remained subject to disclosure. The overriding interests of transparency and probity in public affairs made it unacceptable to restrict the publicity of proven abuses. In closing, I pointed out that the negative outcome of the investigation or its lack of results also constituted information of public interest.[23]

5. How far and how long can government maintain secrecy?

Although the last case I am going to address here has no direct or visible implications of national security, it is tempting to see it as a symptom of the paranoia permeating constitutional democracy. As such, it is an apt illustration of the kind of perversion in government that may easily overflow the shadowy confines of the secret services to infect the whole apparatus of the state.

Government sessions: on or off the record?

Prompted by a submission of citizens, I launched a probe into the issue of documenting sessions of the government of the Republic of Hungary, including of the preservation and disclosure of such documents.

After the government's rules of procedure were modified in June 1998, government sessions were no longer audio-taped or otherwise recorded in verbatim minutes until the opposition emerged victorious from the 2002 elections.

A look at the history of documenting government sessions offers valuable lessons for the legal judgment of the case. As the director of the Hungarian National Archive told me, the Archive kept the documents of

[23] Case 618/A/1996.

governments that served in 1948-49,[24] 1867-1944, and 1944-1983. These records are now open for research, and the Archive receives nearly a thousand requests for data annually from researchers wishing to study them. Changes in government practices with regard to documenting government sessions and preserving those records can be traced with clarity over the years. The governments after the political transformation of 1990 returned to the habit of holding their sessions on the record. This constitutional routine was derailed by the quoted procedural change[25] instated by the government that formed in 1998, which abolished the rule of documenting government sessions.[26]

When I inspected the administrative premises of the Office of the Prime Minister on December 10, 1998, the official heading the department informed me that every single proposal to be discussed by administrative secretaries prior to convening a session of government was classified as "Strictly Confidential," "Confidential," or "Not Public." This latter stamp was affixed by the administrative department itself if the document had been submitted to the Office of the Prime Minister without one of these designations.

Democracies around the world employ various means to document the operation of their governments. Some countries insist on verbatim minutes, while others merely mandate abstracts of content. Accordingly, there are as many ways to regulate the process of recording and the handling of the documents thus created. In certain countries, freedom of information is a constitutional right; in others it is a privilege guaranteed by law only; in several countries, which lack proper legal regulations on this count, the need for this freedom right is acknowledged and legitimized by custom and an unwritten constitutional code of values. In some places the preferred solution is to remove a specified range of government papers from the effect of freedom of information. Starting in the 18th century, monarchs often made the solemn pledge that the affairs of the state would be conducted in full view of the public eye.[27] The age of enlightened absolutism heralded a period in which the citizens' rights to exercise control over government have gradually broadened, despite a number of

[24] The age of modern parliamentary culture in Hungary, understood as government reporting to parliament, began with the fall of Habsburg absolutism in April 1848. From 1949, when the revolution and war of independence were crushed, until the Compromise of 1967, power reverted to absolutist models.

[25] Government Decree 1090/1998 (VII. 15.)

[26] According to this regulation, which remained in effect until the ruling party lost the elections in 2002, "The abstract prepared of sessions of the government shall contain the names of those attending, the titles of the proposals discussed, the names of those contributing comments to the debate, the fact and for/against ratio of voting, if any, reference to the disagreement, if any, voiced by a cabinet member from the coalition party, as well as the decision itself."

[27] A case in point is the 1868 Imperial Oath of Japan's Emperor.

setbacks in the process. This right also implies the publicity of the government's papers and of its operations.

Hungary's Constitution declares that "*in the Republic of Hungary, every individual is granted the right to free expression, as well as to access and disseminate data of public interest.*"[28]
§ 8 (2) states that "*the rules of fundamental rights and obligations are set down in the law, which may not, however, restrict the essential substance of these fundamental rights.*"

Pursuant to § 2 (3) of the DP&FOIA, "*data of public interest means any information under processing by an authority performing state or local self-government functions or other public duties, except for personal data.*"

§ 19 (1) and (3) provide that "*[the authority] performing state or local self-government functions or other public duties ... shall, within its sphere of competence, including its management, promote accurate and prompt information for the general public. [...] The authority shall grant access for anyone to data of public interest processed by it, except for those data which are classified as state or official secret by authorities entitled to do so under provisions of law, furthermore provided that right to access of certain data of public interest is not specifically restricted by law in the interest of national defense, national security, criminal investigation and the prevention of crimes, monetary or currency policy of the State, international relations and relations to international organizations, or judicial procedure.*"

§ 19 (5) declares that "*Unless otherwise provided by law, working documents and other data prepared for the authority's interior use, or for the purpose of decision-making, are not public within 30 years of their creation. Upon request, the head of the authority may permit access to these documents or data prior to the expiration of this period.*"

Pursuant to § 6 (1), clause o) of the Secrecy Act, "*In their respective scope of responsibilities and competence, entitled to classify documents are the head of the Prime Minister's Office, the political secretary of the Office, and the head of the body operating according to the Rules of Procedure approved by the Government.*"

The matter under review is rife with the difficulties inherent in reconciling a number of mutually contesting constitutional rights and interests. The regulations that be must observe the constitutional right to access data of public interest. They must serve the cause of transparency in the work of

[28] § 61 (1).

the government, leave open the opportunity for the scholarly and scientific study of governments past or present, and they must be conducive to the smooth operation of the administration free of undue influence. In this sense, we have no constitutional grounds to demand full publicity extending to the entirety of the government's activities, concurrently with those activities, as a condition for the said smoothness of its operation.

The disclosure of data of public interest is a fundamental proof for the proper functioning of the democratic constitutional state which is declared in § 2 (1) of the Hungarian Constitution. The significance of this was recognized in the Council of Europe's 1982 Declaration on freedom of information, when it affirmed the goal of the member states to follow an informational policy of openness in the public sphere–including one of allowing access to information–in order to help their citizens better understand political, social, economic and cultural issues, and to improve their skills in freely discussing such topics. [clause 8. II. *c)*]. Nevertheless, the disclosure of data of public interest and the right to free research both encounter constitutional limits in those provisions of secrecy which comply with legal requirements and the rules governing the restriction of constitutional rights.

"The smooth operation of the administration free of undue influence" would obviously be thwarted if the law prescribed full publicity for the sessions of the government. Little wonder that this is not the custom in democracies around the world. Therefore, far from being illegal, provisional restrictions upon the freedom of information can be constitutionally well-founded when such restrictions are motivated by the above purpose. It could not properly be regarded as a constitutional exigency to prepare full documentation of government sessions–that is verbatim minutes, audio and/or video tapes. The manner in which the sessions are to be documented can be legislated in several ways. The thing to keep in mind is that the Government is not a congregation of private individuals but rather a body of officials which plays a crucial role in the system of political institutions. On account of its prominent legal and political position, it is indispensable to have its activities documented, not simply to the extent of publishing its resolutions, but in terms of content and substance. Seen in this light, Government decree No. 1090/1998 (VII. 15.) clearly broke with the traditions of 1848 which had held sway for a century and a half in Hungary. The total prevention of access in the interest of "the smooth operation of the administration free of undue influence" cannot be deemed inevitable or, for that matter, equitable.

As the Commissioner for Data Protection and Freedom of Information, I concluded the case with the following recommendation:[29]

- I called on the minister heading the Prime Minister's Office and the Minister of Justice to propose legislation documenting the substance of government sessions that would not only ensure the smooth operation of the Government free of undue influence but also guarantee the citizens' constitutional right to access data of public interest–granted that there may be delays in the enforcement of this right in individual cases;

- Documents classified with disregard for clause 13 of the Appendix to the Secrets Act could not properly be regarded as state secrets, because they were not specifically identified as such in the effective list of state secret categories.

The government declined to accept my recommendations.

[29] For a full English-language version of Recommendation 144/A/1996, dated July 16, 1996, see the home page of the Office of the Data Protection Commissioner at www.obh.hu.