**Policy Papers**
**HCLU on Freedom of Information**

## Why Is Freedom of Information Important?

Freedom of information means that everybody has the right to access to and to disseminate data of public interest. There is no democracy without freedom of information. People cannot take part in meaningful public deliberation unless they know what is going on in their society and are familiar with the operation of public institutions and with the activities of their leaders.

In order that abuses of power can be prevented and exposed, citizens must be free to know and disseminate data of public interest. Nondisclosure of data of public interest is a hallmark of repressive and/or corrupt governments. However, even where governments honor the rules of democratic government, continuous checks are indispensable lest data of public interest should remain hidden from the public eye. Public institutions are run from taxpayers' contributions and their decisions affect broad sections of citizens. Hence they are supposed not to hide the data they keep. This presumption cannot be overruled but in a limited number of exceptional cases where secrecy is supported by overwhelming reasons.

## What Are the Principles of Freedom of Information?

### THE PRINCIPLE OF WIDEST POSSIBLE ACCESS

It is a basic constitutional right for citizens to have access to data of public interest. We can therefore take it as granted that, as a presumption, the data kept at public bodies are public, that is, that anyone may have access to them. It follows that the person requesting such information does not need to prove that it is in his rightful interest to have access to a document. As a rule, public bodies are duty-bound to grant access to data of public interest requested. Another consequence is that data users must keep a record of and preserve documents so that those asking for them should have access to them at any time.

Freedom of information applies to all data of public interest irrespective of their medium (written document, audio recording, photograph, digital information for computer use, etc.). The obligation to make data available covers all institutions that keep data of public interest. They include agencies of state power (Parliament, government, the judiciary) as well as agencies of public administration, local governments, and public or private institutions that discharge public functions (as for instance, health care facilities, cultural and social welfare institutions, and transport companies). There can be other affairs of public interest, those related to the state of the environment, to public health, etc. that may justify that industrial firms and other private companies should also disclose information about their activities.

### THE PRINCIPLE OF DUTY OF DISCLOSURE

As mentioned above, freedom of information mandates public bodies to satisfy requests for data of public interest. In addition, they must regularly disclose the most important information that covers their activities. The institutions must use for that purpose, among other things, official gazettes, press publications, information brochures and the internet. Members of the public have the right to have access to the following types of information without specifically asking for them:

- data related to the institution's organizational setup, operation, budget, finances, principal objectives and services;
- types of data of public interest kept at the institution;
- types of recommendations, applications and complaints that may be submitted to the institution;
- decisions of public interest (both their dispositive part and the reasoning provided for the dispositions) that have been passed at the institution, and the relevant information that served as basis for those decisions.

## THE PRINCIPLE OF LIMITED EXCEPTIONS

Public bodies must satisfy all requests for data unless they provide sufficient evidence to the effect that the information requested belongs to a restricted and clearly defined circle of exceptions. No public body or type of information can be treated as being exempted from the duty of disclosure in the first place. Refusal of access to data must follow from a separate decision; that decision must be special, and it must jointly satisfy the criteria below:

1. Secrecy of information must serve a legitimate purpose as defined by law. Only such reasons that are explicitly enumerated by the law can serve as legitimate justifications for the restriction of public access. Examples for such a reason can be the aim of protecting personal data, that of promoting the interests of national security and defense, respect for private commercial objectives, and securing the efficiency of governmental decision-making. Such exceptional reasons refer to the document's content rather than its type. Public access may only be restricted until the expiry of the period of protection defined by law.
2. It must be the case that the objective defined by law cannot be realized unless access to data is refused. The public body must prove that the interests of a public or private entity would suffer material damage if access were ensured to the data requested. Here is an example: it is impermissible to refuse access to data by claiming that disclosure of irregularities in the armed forces would weaken defense capabilities because it is the very termination of irregularities that would help strengthen the armed forces.
3. Even if conditions (1) and (2) obtain, refusal to disclose information is not justified if there is some competing interest of the public that requires disclosure and is stronger than the protected interest. Freedom of information must prevail even if public access does material damage to one of the legitimate objectives if public access presents the community with an advantage that is greater than the one that would be secured by avoiding the damage ensuing disclosure. For example: public access to certain private information can be justified if that can help expose corruption in government circles.

## THE PRINCIPLE OF DUE PROCESS

Public bodies must handle requests for data of public interest without delay and in an equitable manner. The law should strictly set time limits for administrative process, and

public bodies should be obliged to give written reasoning for decisions of refusal. Inquirers must have the right to sue administrative decisions they consider unjust.

The costs of procedure must not be set so high as to deter citizens from requesting data. Public bodies may only oblige inquirers to disburse them for their expenditure that is related to the communication of data (copying, postage, etc.).

THE PRINCIPLE OF OPEN MEETINGS

Freedom of information entails the right that citizens are present at the meetings where public affairs are discussed and related decisions are made. The requirement of public attendance refers especially to the following types of meetings: sessions of elected bodies and their committees, official deliberations of committees that prepare decisions and those of advisory and expert committees, and the decision-making forums of institutions that carry out public services. The public must be informed about the place, time and agenda of meetings where decisions are to be made about important public affairs.

Members of the public may only be excluded from forums that are to pass decisions about public matters only in a restricted number of cases where overriding reasons support the exclusion. Decisions on holding a closed session and their justification must be made public.

**What Are the Relevant Provisions of the Instruments of International Law?**

International documents on human rights declare that everyone has a fundamental right to access to and to disseminate information. Article 19 of the Universal Declaration of Human Rights provides that "everyone has the right to … seek, receive and impart information and ideas through any media and regardless of frontiers." The International Covenant on Civil and Political Rights – to which Hungary is a signatory – includes a similar provision. Its Article 19 provides for freedom of opinion and information, and its Article 25 provides for the right to take part in public affairs. Article 10 of the European Convention on Human Rights – which Hungary has also signed – provides for freedom of accessing and imparting information. In the "Open Door and Dublin Well Woman and Others" case the Strasbourg Court (the court supervising abidance by that convention) has condemned Ireland for banning the dissemination of information for pregnant women about clinics abroad that carry out abortion. The court has ruled that such a ban on information is tantamount to a disproportionately heavy restriction of a fundamental right.

In 1990, the European Union (then European Communities) adopted a directive on access to information related to the environment. The Maastrict Treaty of 1992 included a more general provision about the citizens' right to information. In the Carvel and Guardian v. Council of the European Union case, the European Court of Justice obliged the Council to drop blanket bans on making public draft texts of documents and procedural documents. The Court has ruled that the EU institutions must ensure the widest possible access to their documents.

The first country to guarantee lay down by law the principle of freedom of information was Sweden. Act 1766 on the Freedom of the Press provides that all Swedes have the right to access to official documents. Article 14 of the Declaration of the Rights of Man adopted during the French Revolution stipulates that citizens have the right to make sure, in their own person or through their representatives, that public expenditures are justified, and to approve such expenditures and inspect the way they are used.
In the majority of modern constitutional democracies a law ensures the right of access to data of public interest. The United States adopted their Freedom of Information Act in 1966. This law ensures access to the documents of the federal government. The Sunshine Act of 1976 ensures public attendance at sessions of certain public bodies. In Canada, it is the responsibility of the Parliamentary Commissioner for Information to make sure that the Access to Information Act of 1982 is respected. Under what has become known as the "Canadian model," an administrative official is appointed at each public body as local commissioner in charge of inspecting abidance by the Freedom Access to Information Act.

**Does the Hungarian Constitution Guarantee Access to Data of Public Interest?**

Under Article 61 of the Hungarian constitution everyone has the right to access and impart data of public interest. In its resolution 32/1992, the Hungarian Constitutional Court provides that "Public access to data of public interest facilitates the inspection of the legality and efficiency of the operation of elected bodies of people's representatives, of the executive and of the public administration, and contributes to their democratic functioning. Given the complexity of public affairs, civic control over the way public bodies pass decisions and handle affairs will only be effective if the competent agencies grant access to the relevant information."

The Hungarian National Assembly adopted Act LXIII on the Protection of Personal Data and Access to Data of Public Interest in order to ensure relevant provisions of the constitution are being enforced. Under that law public bodies must grant access to all inquirers to documents of public interest in their archives, with certain exceptions. The fact that such documents include data about persons who discharge public functions is not necessarily a ground for denying access to it. Moreover, the law mandates public bodies to provide the public with undelayed and precise information and to make available regularly the most important data about their activities.

**What Are the Hard Cases for Freedom of Information in Hungary?**

DOCUMENTS RELATED TO THE COMMUNIST PAST

In Hungary, those who have suffered legal injuries under Communism have not received "compensation in the field of information." A part of the documents of the secret services of the Communist regime have been destroyed, another part is still considered as state secrets, while only a fraction has become accessible. The relevant law, adopted in 1994, protects the interests of the successor agencies of the former State Security Service, and ignores both the right to informational privacy of the people persecuted under Communism and the right of every Hungarian citizen to access to the facts of the past. The Office of Historical Records

(*Történeti Hivatal*), set up in 1997, has given little help to citizens in uncovering wrongs done in the past. Even the few documents that have been made available for inquirers, have been made so with certain pieces of information deleted.

The position of the HCLU is that the people concerned have the right to full access to all the documents that the erstwhile secret services kept about them. The right to informational privacy of those persecuted overrules that of the former informers and secret agents to the protection of their personal data. What is more, members of the public have the right to know who among today's public personalities cooperated with the secret services and how. The right to have access to data of public interest must enjoy priority over the right of public personalities to the protection of their personal data.

## DOCUMENTS OF THE OPPOSITION ROUND TABLE

The Opposition Round Table – a coordination body that budding democratic organizations set up in spring 1989 with the aim of confronting the state-party of the old regime as a single negotiating partner in the course of the discussions on transition from Communism to democracy – played a key role in Hungary's adopting constitutional democracy and market capitalism. The sessions of the Opposition Round Table were recorded on videotapes. Until the end of the 1990s those tapes could not be shown in public because some former participants of the negotiations had refused to permit that. Acting at the request of the Club Publicity (*Nyilvánosság Klub*), the Parliamentary Commissioner for Data Protection and Freedom of Information (data ombudsman) has established that the documents related to the work of the Opposition Round Table are of essential importance for Hungarian history in the late 20$^{th}$ century. Consequently, the contributions and statements made there qualify as data of public interest. In the wake of the ruling of the Data Ombudsman, the proceedings of the sessions of the Opposition Round Table have been published in full in a book, entitled *The Scenario of Transition*. Also included in that book are the proceedings of the negotiations that took part under the auspices of the so-called National Round Table, that is, discussions between the opposition forces and the ruling party of the time.

## INTIMIDATION OF JOURNALISTS

Journalists have the responsibility for informing their readers about public affairs and for serving as public watchdogs that monitor the activities of the powers that be. Over the past few years it occurred several times that the government of the time initiated criminal procedures against journalists for their exposure of data of public interest in their articles. In early 1998, for instance, the Prime Minister's Office initiated criminal procedure against the editor-in-chief of a national daily for publishing the draft of a Hungarian-Slovak treaty on a hydroelectric power station on the Danube River. It became known in the summer of 1999 that Post's Bank (in which the state is a co-owner) had granted preferential loans (so-called VIP loans) to a number of public personalities and/or their family members. A business daily published the list of politicians, civil servants, artists, athletes and others that had allegedly received such loans. As initiated by several public personalities, criminal proceedings began against senior journalists of that daily with the charge of violating banking secrets. In the same year the National Police Command started a criminal investigation against the editor-in-chief of a weekly for publishing documents related to a public political debate on the alleged secret surveillance of certain politicians. In a related punitive action, the same person was dismissed from his job at the public television. Although no court sentence has condemned

any of the defendants involved in those cases, the very fact of criminal proceedings, repeated hearings and house searches are means to discourage journalists from publishing articles that expose acts of those in power positions.

## RECORDS ABOUT SESSIONS OF THE GOVERNMENT

Right after the transition, verbatim minutes and memoranda were made about the meetings of the first government (installed in 1990). The keeping of minutes stopped two years later. Written summaries and audio recordings were made about the sessions of the government that was installed in 1994. In 1995-96, for a period of a few months, the government suspended the production of audio recordings about its meetings. Then the government installed in 1998 passed a decision (still in force) to the effect that neither minutes nor audio recordings are to be made about its meetings, only memoranda that do not even list the topics discussed. In a related move and acting at the initiative of the government, Parliament amended the law on state secrets and public service secrets. Under the amended law, certain documents can be classified with the sole purpose of ensuring the "undisturbed operation of the government and its departments."

In the opinion of the HCLU, this legislation violates the constitution. The constitutional right of access to information of public interest condemns the practice that the government itself decides on how to record its own deliberations. The decision must be laid down in a law, and that law must ensure that the discussions of the government are covered either by minutes or at least by a thematic summary. The government is a public body that passes decisions on public affairs of a fundamental impact on the lives of the citizens. Consequently, it is impermissible to deny, to the members of the public, the opportunity to get reliable information about deliberations of the government. In many cases important public interests, as for instance those related to national defense, the protection of public order or financial considerations, may justify that the content of those meetings should not be made public immediately. But even in those cases, it would be necessary at least to record the themes discussed. After all, such documents are of invaluable importance for future historical research.

## CLASSIFYING DRAFT BILLS

Drafters of new legislation may have interest in preventing immediate disclosure of the working papers produced at various stages of the drafting procedure. However, feedback from the groups that are directly affected by the pieces of legislation in the making is absolutely necessary for legislation that aims to benefit the public. The law on legislative procedure compels the government to involve in the drafting work the social and professional organizations that have a stake in the issue under regulation. Hence, it can be expected that the ministries make public draft bills so that the largest possible circle of people could tell their opinions about them. This is not the general rule in Hungary, though. Occasionally, middle level government officials declare draft bills classified and thereby effectively prevent access to them by interested parties. The HCLU considers such a practice unacceptable, and calls for an amendment of the Data Protection and Access to Information of Public Interest Act. This Act provides that documents related to the preparation of decisions and that are meant for internal use only should be – depending on the decision of the head of the institution – classified for 30 years. This provision conflicts with the ruling of the European Court of Justice on the Carvel and Guardian case which mandates that no blanket ban should

be applied to granting public access to such documents. Freedom of information may only be restricted if the restriction is specifically justified by the content of the document concerned. Even in such cases, however, the inquirer should have the right to seek legal remedy at a court.

THE ROLE OF THE INTERNET

The internet is the most dynamically developing instrument in the field of information. However, the Hungarian government, rather than making use of the internet for providing the public with more up-to-date and more detailed information, is bent on restricting the freedom of the users of the internet. The National Assembly has extended the jurisdiction of the Penal Code on the internet. Moreover, Hungarian legislators are about to adopt a comprehensive law that seeks to restrict the freedom of expression and information on the internet.

The HCLU considers those endeavors unacceptable. It is our considered view that the internet should be used for improving the access to the data of public interest. The Electronic Freedom of Information Act of the United States (adopted in 1996) could serve as an example. It obliges public bodies to make available on the internet all those documents that they must promulgate in the official gazette or make public on the premises of their office and also those documents of public interest which they have issued at the request of an inquirer.

## In What Manner Can the Ombudsman Help?

Hungary's Act LXIII of 1992 defines the functions of the Parliamentary Commissioner for Data Protection. That commissioner is in effect the ombudsman for all information-related rights. He has the authority to act both to protect personal data and to promote freedom of information. Under that law anyone may turn to the commissioner if his rights were violated while attempting to access to data of public interest. In such cases, the commissioner launches an inquiry and then issues an opinion about that request for data. If the commissioner's inquiry establishes that a document was declared a state secret or a public service secret without a good reason, he calls on the official concerned to change or terminate that classification. In case the official disagrees with the appeal, he has to take the case to court to defend his position. In addition to acting on request, the commissioner may seek to protect the freedom of information *ex officio*. Besides, he has the right to issue opinion about draft legislation related to the handling of data of public interest. Moreover, data users must ask for his opinion about the draft lists of certain categories of public service secrets.

In Hungary, the Parliamentary Commissioner for Data Protection began his operation in 1995. Over the past five years he has played a seminal role in giving teeth to the rules of freedom of information. It was in the wake of the positions repeatedly taken by him that those concerned accepted once and for all that the data on the remuneration of senior public officials and the minutes covering the meetings of organs of people's representation are public. In addition, it was due to his efforts that budget-financed institutions cannot cite "business secrets" when it comes to checking the use of public moneys. He tends to protect fact-finding efforts of journalists and seeks to counter efforts to expand the scope of state secrets. He is committed to the principle according to which the operation of the state should be transparent for the citizens, while the private sphere of the citizens should remain opaque for the state.

**What Are the Chief Objectives of HCLU in the Field of Freedom of Information?**

- The members of the public should be informed about the rules related to freedom of information.
- Anyone should have unobstructed access to documents related to Hungary's Communist past.
- The government should discontinue penal proceedings that are meant to intimidate journalists.
- The government should be obliged by law to appropriately record its deliberations.
- Not even private institutions should be allowed to deny access to data of public interest.
- Public bodies should be mandated to publish on the internet the most important information of public interest.

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