

REGULATING AND IMPLEMENTING FREEDOM OF INFORMATION REGIMES IN THE NEW EU MEMBER STATES: A COMPARATIVE ANALYSIS OF ROMANIA, HUNGARY AND THE CZECH REPUBLIC

Dacian DRAGOȘ
Bogdana NEAMȚU

Abstract

This article addresses the issue of free access to public information in some of the new European Union member states from a comparative perspective and tries to highlight some of the best practices in this field that were incorporated or adapted by these countries. It is noted that very often the choice of policy of national governments was determined by past experiences and existing mentalities (see, for example, protection of business data). A sizable part of the analysis is dedicated to exceptions from the rule of free access to public documents. This aspect is important because some of the exclusions leave room for the abuse of public bodies already reluctant to disclose public data. Some considerations regarding the ways in which appeals against the refusal of access are organized were also presented as being relevant to the topic discussed. The last section of the paper focuses on an issue related to free access to public information—namely, the commercial reuse of public data. A distinction needs to be made between the two concepts, because they are usually governed by different regimes and regulations. The authors conclude that, although the jurisdictions examined have relatively progressive legislation regarding free access to public sector information, most challenges occur in practice with regard to implementation.

Dacian DRAGOȘ

Associate Professor, Public Administration Department, Faculty of Political, Administrative and Communication Sciences, Babeș-Bolyai University, Cluj-Napoca, Romania
Tel.: 0040-264-431361
Email: daciandragos@apubb.ro

Bogdana NEAMȚU

Lecturer, Public Administration Department, Faculty of Political, Administrative and Communication Sciences, Babeș-Bolyai University, Cluj-Napoca, Romania
Tel.: 0040-264-431361
Email: bogdananeamtu@apubb.ro

1. Introduction

Professional literature highlights that transparency and openness are instruments promoting increased efficiency and effectiveness, by forcing governance to be more careful so as to withstand public scrutiny (Dror, 1999, p. 62). The issue of openness and transparency is tightly connected with the free access to public information, as the latter is a condition for the former. 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, 2001, p. 1). Together, they are a key element of the reform in public administration, which is much needed especially in the former communist countries.

This paper looks at three new members of the European Union – the Czech Republic, Hungary and Romania. The first two are consistently placed at the forefront of the movement of reformist countries in Central and Eastern Europe, while Romania, which joined the EU in 2007, is struggling to incorporate into its legislation and practice examples of best practices from the other member states and elsewhere. The approach of issues regarding the regime of freedom of information is located in comparison with the regime established at the European Union level and envisages, where applicable, the influence of accession to the EU over these regimes.

2. Freedom of Information Regimes in Central and Eastern Europe

2.1. Legal Framework

In Central and Eastern Europe, the goal of providing citizens with access to public information has faced several unique issues and obstacles. Many expected freedom of information laws to be among the first priorities of the new governments of countries in transition after the 1989 changes. Although pressure to open archives and secret police records increased, there has been little public pressure to adopt general ‘sunshine’ laws relating to all categories of information. This is why the majority of these countries adopted such legislation only around the year 2000. Even after a right of access to information is established, questions remain about the timing, accuracy and worth of the information disclosed, especially due to the fact that the experience of these nations had led to a genuine distrust on the part of citizens in their governments (Brown *et al.*, 2000).

Hungary was the first to adopt such legislation. The purpose of the 1992 Act on the Protection of Personal Data and the Publicity of Data of Public Interest (hereinafter ‘the Hungarian Freedom of Information Act’) is, *first and foremost*, to guarantee that everybody may dispose of their personal data themselves; 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 thirty submissions that had to do with the boundary separating privacy from the public sphere (Hungary Data Protection and Freedom of Information Commissioner, 2005).

In Europe, Hungary is unique. It has 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.

In the Czech Republic, the right to access to information is, on a constitutional level, laid down in Article 17 of the Bill of Fundamental Rights and Freedoms (BFRF) as a part of the right to free speech and expression¹ (see also Hradilek, 2005). A Freedom of Information Act (FOIA) entered into force on 1 of January, 2000 and has twenty-two articles that set forth the basic conditions according to which the information is provided² (hereinafter “the Czech Freedom of Information Act”). The experiences with the application of the FOIA 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). Because FOIA was quite new in the Czech Republic and because it brought some new legal instruments into Czech law (such as a fictional decision), it is understandable that there were many uncertainties concerning the use of this act in practice. Most of these decisions focus mainly on three distinct issues: a) the procedure of disclosure of information; b) the relation between FOIA and other acts; and c) the reasons for non-disclosure of information (Hradilek, 2005). Since 1999, there have been a growing number of court decisions in disputes concerning access to information.

A new amendment to the Freedom of Information Act came into force in the Czech Republic on 8 of March, 2006. This amendment brought several changes. *First*, among other minor changes, it brought the following significant changes in the FOI legislation. The procedure of disclosure of information was adjusted to new Rules of Administrative Procedure. Fictional decisions on refusal to disclose information in case of failure of governmental bodies to issue a real decision were abolished and replaced by a new complaint against inactivity of governmental bodies. *Second*, a really important change concerns the judicial review of FOI decisions. Upon the amended FOIA, the cassational principle of judicial review was abandoned and the courts shall now not only cancel wrong decisions but shall directly order disclosure of information as well. This means of judicial review of administrative decision is quite unique in the Czech Republic and it shall apply only in cases of FOI decisions (see Section 4.9. below). Also, in response

¹ Zakon o vyhlášení Listiny základních práv a svobod, Law no. 2/1993, signed 16 December 1992, *Sbírka Zákonů* (1998) no.16. In English ‘Charter on Fundamental Rights and Freedoms’. Although contained in a separate document from the Czech Constitution, the Charter on Fundamental Rights and Freedoms has the same force as the former.

² Zakon o svobodném přístupu k informacím, Act no. 106/1999, signed 11 May 1999, *Sbírka Zákonů* (1999) No.39.

to situations that occurred in practice, governmental bodies' right to demand payments for disclosure of information was limited to payments for costs of copies, costs of data carriages, costs of dispatch of information and costs of extraordinary extensive search of information (Hradilek, 2005).

Finally, in Romania, there is a set of regulations, adopted in recent years, regarding a Framework Law on Free Access to Public Information,³ as well as on Classified Information,⁴ Transparency in Decision Making⁵ and Transparency in Public Office, in Commercial Transactions and in Debts to the State.⁶ Also, for the public's access to environmental information, a special Governmental Decision was adopted (no. 878/2005), applying the Aarhus Convention.⁷ Finally, an embryonic protection for whistleblowers was established by Law no. 571/2004.⁸ All these laws were 'suggested', directly or indirectly, by the European Commission in its regular reports regarding Romania's progress towards accession.

The FOIA 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 Free Access to Public Information, another law was enacted, on Classified Information, which gives to the head of the public institution the right to decide if some information is confidential without setting up a legal control over this decision prior to a court action. Consequently, the petitioner has no alternative but to go to the courts against the lack of disclosure.

2.2. Issues regarding the Implementation of these Laws – Short Considerations

While all the countries analyzed seem to have adopted state-of-the-art legislation in the field of free access to public information, emulating in most cases Western models and best practices, challenges occur when it comes to implementation.

In Hungary, the focus is on protecting personal data and less on access. The number of cases addressed by the Commissioner's office has been increasing steadily and

³ Legea privind liberul acces la informațiile de interes public, no. 544/2001, signed 12 October 2001, *Monitorul Oficial* (2001) no. 663/23. In English 'the Romanian Freedom of Information Act'.

⁴ Legea privind informațiile clasificate, No.182/2002, signed 12 April 2002, *Monitorul Oficial* (2002) no. 248. In English 'the Classified Information Act'.

⁵ Legea privind transparența decizională, no.52/2003, signed 3 February 2003, *Monitorul Oficial* (2003) no. 70. In English 'the Transparency in Decision Making Act'.

⁶ Legea privind unele măsuri pentru asigurarea transparenței în exercitarea demnităților publice, a funcțiilor publice și în mediul de afaceri, prevenirea și sancționarea corupției, no. 161/2003, signed 19 April 2003, *Monitorul Oficial* (2003) no. 279.

⁷ Hotărârea de Guvern privind accesul publicului la informația privind mediul, Government Decision no. 878/2005, signed 22 August 2005, *Monitorul Oficial* (2005) no. 760. Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted 25 June 1998, entered into force 11 July 2000.

⁸ Legea privind protecția personalului din autoritățile publice, instituțiile publice și din alte unități care semnalează încălcări ale legii, Law no. 571/2004, signed 17 December 2004, *Monitorul Oficial* (2004) no. 1214.

sometimes dramatically. Since the office was set up in 1995, 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 consistent. Most of them concern data protection, and only 10% involved 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” (Hungary Data Protection and Freedom of Information Commissioner, 2005).

In the Czech Republic, from the very beginning, public officials expressed a fear of having the law’s provisions misused (in the sense of a drastic increase in the number of applications). The authorities were, however, not swamped by requests any 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 steep charges for seeking information held by the authorities; excessive usage of the commercial secret institution for withholding information that either is not a commercial secret or cannot be protected since it concerns the use of public funds; excessive usage of the personal data protection institution for withholding information about a public activity of an individual; refusals of the request for information with the explanation that the office is not the compulsory subject under the Act; refusals to grant access to items of information that are part of a document that constitutes protected information; and, even, ignoring the law, presuming that no sanction for its violation will be imposed. In such cases, not every refused applicant appeals in court, but, when they do, the jurisdiction mostly vindicates the applicants of information. In the cases of information with an up-to-date bearing, the very lengthening of the process leads to the obstruction of the purpose of the Act (Kučílek, 2004).

In the light of such situations, the phenomenon of the access to information seems to be “nearly a detective discipline” (Kučílek, 2004). The concrete implementation of the freedom of information provisions to specific situations, especially in villages, suggests that the level of unjustified withholding of information by the Czech authorities, the lack of awareness of the legal situation and their secretiveness is still very high.

In Romania, two major national NGOs have tried to assess the implementation stage of the FOIA legislation. In 2003, the Pro Democracy Association published a report after monitoring for a year the way in which Romanian authorities were applying the law (Pro Democracy Association Romania, 2004). The project targeted central authorities, as well as local authorities. One of the findings was that the number of 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 can be attributed also to public authorities, which, working against the efforts of some NGOs to popularize the law and its benefits, have demonstrated a lack of capacity and willingness to apply it properly. In 2007, a follow-up study was conducted; there were

some improvements, but most of the challenges noted in 2003 were still present (Pro Democracy Association Romania, 2007).

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

Surprisingly, the central authorities were assaulted to a greater extent with requests for public information than local authorities. 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 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; and c) the way in which public authorities responded 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 citizens.

The second major study on this issue was made available only recently, by another non-governmental organization, the Romanian Academic Society (Romanian Academic Society, 2006). It targeted 500 public institutions from 96 localities, among which were 40 cities that were county seats, the second largest cities from the region, 2 localities with more than 30,000 inhabitants from each region, and also several towns with less than 30,000 people. The research involved interviewing the officer in charge with providing public information, but it was supplemented by the personal observations of the person doing the research.

The results of the study show improvement at the level of compliance with relevant legislation. Thus, every public institution functioning in a county seat has a person or department in charge of providing public information.

As citizens are becoming more aware of their right to information, the internal administrative appeals have also grown in number, as a result of the refusal to disclose public information. Unfortunately, they are not solved properly by the public institutions, leading to many court cases. The number of court cases has increased from 1.6% in 2002 to 10% in 2006. The motive for refusal is usually related to an administrative procedure, not to the exemptions provided by the law. The percentage of public entities able to provide a list of public information *ex officio* has increased from 16% in 2002 to 73%—that is, 71% of the municipalities and 87% of the county administrations. It has to be noted, however, that there are very few public institutions providing a list on their websites.

Comparing different levels of public administration as regards implementing the law, it can be noted that the highest rate is in Bucharest (77%), followed by cities that serve as county seats (74%), and by towns (62%).

Notwithstanding the improvements, after five years of implementation of the law there are still problems with the list of public information provided *ex officio*. For instance, information regarding the organization and functioning of the public authority is missing in many cases (contact data, the organizational chart, internal rules and regulations, etc.).

3. The European Union Model in Regulating Freedom of Information Issues

Most European Union member states now have freedom of information legislation. However, general access to information is not regulated at the level of the European Union (as applying to all member states), due to the fact that the Europeanization of public administration is not yet finalized.

The European Union, thus, has distinct regulations on this issue, applicable only to the European institutions. After a great effort carried out by journalists, open national governments and even European institutions, the results begin to confirm that the struggle was not in vain. Whether or not transparency can be counted among the general principles of EC law remains open to debate but it is undeniable that its importance and status has increased considerably, in particular since the Maastricht Treaty. The European Union system of access to documents, regulated now by Regulation 1049/2001 on Access to Documents⁹ is similar to systems of access to documents or information in force in most countries that have legislation in this field and tries to respect the Recommendation of the Council of Europe on Access to Official Documents and the Aarhus Convention (European Commission, 2004).

Regulation 1049/2001 has introduced a number of innovations that have considerably changed the regime of access to public information in place before that: the right of access has been extended to all documents held by the institutions concerned—including documents from third parties—thus excluding the ‘originator rule’, under which only documents issued by the public authority could be disclosed upon request. Another novelty, this time not in the interest of applicants, was the insertion of a new specific exception intended to cover defense and military matters. A very important provision allows exceptions to be overridden as a result of a public interest test—the protection of certain interests must be balanced with the public interest in disclosure, and if there is an overriding public interest in disclosure, the document must be made accessible even if an exception is applicable to the right of access. Each institution must establish a public register of documents that can be consulted on the Internet, and the objective is that documents should, where possible, be made directly accessible in electronic form. Finally, the Regulation imposes shorter time limits for replies: the one-month time limit

⁹ Regulation regarding Public Access to European Parliament, Council and Commission Documents, no. 1049/2001, adopted 30 May 2001, *Official Journal of the European Communities (OJ)* (2001) L145/43. Council of Europe Recommendation on Access to Official Documents, Rec. (2002) 2, adopted 21 February 2002.

for reply has been cut to fifteen working days, with the possibility of an extension of fifteen working days in duly justified cases.

4. Key Concepts and Provisions Regarding Free Access to Public Information Regimes

4.1. Who Has the Right to Access Public Information?

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

Looking at specific provisions in a comparative manner, it can be noticed that all of the regimes examined allow 'any person' to access public information, which has to be interpreted widely as including 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 (Kužílek, 2004).

The Annual Reports made available by the Data Protection and Freedom of Information Commissioner in Hungary for the period 2000-2004 show that the main category of applicants for advice and investigations of the Commissioner comprise private individuals, at an average of 29.8% of the requests, closely followed by data controllers (public authorities) at 28.4%, in third place civic organizations (NGOs) at an average of 11.6% (the highest rate was in 2002, at 20%, and the lowest in 2003, at 4%) and journalists at an average of 9% (3% in 2003 but rising to 16% in 2004). An interesting fact is that business organizations accounted for only 3% of the requests in 2000, none in 2001, 5% in 2002, 9% in 2003 and dropped back to 1% in 2004.

The approaches taken by the jurisdictions analyzed here are concordant with the European trend. At the level of European institutions, Article 255 of the EC Treaty and the 2001 Regulation guarantee free access to citizens and residents of the European Union and to all legal persons whose registered offices are located in a member state. Since more and more applications are being lodged by email, it was observed that it is not always possible to check whether applicants are citizens of the Union or whether they are resident or have their registered offices on Community territory. However, the Regulation allows the institutions to extend the right of access to other categories of persons. Taking advantage of this permission, the Council and the Commission have extended in their implementing rules the right to access documents held by European institutions to *all natural persons and legal persons*, the relevance of this being the inclusion of non-European Union residents or legal entities not established on the Union territory. The European Parliament has provided for a similar extension of access in its rules of procedure, but emphasizing that this should be provided "where possible". The Commission, in its 2004 Evaluating Report (European Commission, 2004), notes that,

although this wording gives the Parliament discretionary powers, the institution has in practice responded to applications from citizens from non-European Union countries who are not resident in the European Union. On the other hand, most of the agencies have not yet adopted their implementing rules. The Economic and Social Committee and the Committee of the Regions, which voluntarily apply the principles in Regulation 1049/2001, have not provided for the extension of the right of access to citizens of third countries and to people who are not resident in the European Union.

In the special area of environmental information, on the other hand, the situation is clearer, since the Aarhus Convention does not allow the right of access to be limited to citizens and residents of the European Union (European Commission, 2004).

In the doctrine, it has been argued that the freedom of information laws should address as an inherent issue special conditions for the mass media's access to public information (Sanchez, 2002). This issue is treated differently by the jurisdictions analyzed here. For instance, in Hungary, the Data Protection and Freedom of Information Acts do not differentiate between the right of ordinary citizens and other persons (for example, journalists) to access governmental information.

In Romania, on the other hand, the law pays special attention to journalists and to their role in informing the public. Thus, pursuant to special provisions of the law (arts. 16-20), public authorities are bound to establish means of treating the mass media requests under the Freedom of Information Act with maximum efficiency and in a timely manner:

- a) Information of public interest requested verbally by the mass media shall be communicated, as a rule, immediately, or at a maximum within twenty-four hours, not in ten days like any other request for public information.
- b) Special rules are provided for press conferences and relations with the press: public authorities and institutions are required to appoint a spokesperson, who shall belong, as a rule, to the information and public relations compartments; they are required to organize periodically – usually once a month – press conferences, in order to inform the mass media about information of public interest, and within which the public authorities are bound to answer questions relative to any information of public interest. Nevertheless, the mass media are not bound to publish the information provided to them by the public authorities.

4.2. Entities that are bound by the Law: The Concept of 'Public Authorities'

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 administrative structures, but creates difficulties when trying to characterize a certain legal entity as a 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 a 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 functions, or other public function determined by a rule of law”. The conclusion that arises 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 sometimes avoid the disclosure of public information even if they manage public funds.

In the Commissioner’s Annual Report for 2003, great importance was conferred upon the transparency of supervisory organs overseeing the public sector, as it is considered “a crucial element of freedom of information” (Hungary Data Protection and Freedom of Information Commissioner, 2005). 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, consumer protection inspectorates, as organs of the government, are subject not only to consumer protection legal provisions, but also to the 1992 Freedom of Information Act; the Information Commissioner dismantled the argument of one of the inspectorates’ heads that it was legitimate to cite business secrets as grounds for withholding fine-related data concerning certain energy providers.

In the Czech Republic, the law applies to state authorities and communal bodies. 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 include, 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 areas 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 the Czech legal system regards the duty of the private and church schools to provide public information. However, in the case of information related to admission to a school, all schools, without any exception, have the duty to provide all the information relating to the applicant’s entrance exams, including the form of a completed test (Kužílek, 2004).

According to Section 18 of the Czech Freedom of Information Act, each public entity is required to publish by March 1st 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 applications for information submitted; b) the number of appeals submitted; c) a copy of essential parts of each court judgment; d) the results of proceedings on sanctions for failure to comply with this act, not including any personal data; and e) all other information relating to the application of this act. In 2002, only 43% of the entities obliged had published the reports on the web, and only half of them were complete (Kužílek, 2004). 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 yet created mechanisms for the Act's consistent fulfillment. Some villages learned of the duty to write the annual report (and of the very existence of the Act) as late as from the request addressed by the nongovernmental organization conducting the research. The requirement to publish annual reports is considered by the public authorities to be a burden imposed by superior authorities, not as a way of opening or enabling office communication with the public.

The Romanian Freedom of Information Act in its art. 2 states that an 'authority' or 'public institution' is understood to be "any authority or public institution, as well as any state company (*regie autonomă*), that uses public financial resources and carries on its activities on Romania's territory, in accordance with the Constitution". This definition has drawn much criticism because it doesn't expressly include private companies that provide public services, under state or local authority supervision. The easy way to define this notion should have been to describe the public authority as a body that performs public tasks. In this way, the definition would have included private companies that are involved in providing public services.

Art. 2 of the 2001 EC Regulation provides that it applies to all documents held by an institution—that is to say, to documents drawn up or received by it and in its possession, in all areas of activity of the European Union. The European Parliament has specified in its Rules of Procedure what must be understood by a 'parliament document': documents drafted or received by the members holding a mandate, by the bodies, committees and delegations, and by the Secretariat. The documents drafted by other members or by political groups become parliament documents when they have been lodged in accordance with the Rules of Procedure. The European Parliament therefore considers that documents drafted by members or by political groups that have not yet been lodged, and documents by third parties held by members do not come within the scope of the Regulation. Other institutions have not followed the same pattern. Thus, the Council has not defined in its Rules of Procedure what should be understood by a 'council document'. However, it has clarified the distinction between proper council documents and member state documents, consequently refusing the disclosure of state documents without the respective state's permission, an approach affirmed by the courts. The Commission has not given any definition of 'commission document' in its implementing rules; nevertheless, in its report, it suggested that any document

held by the president, by a vice-president or by a member of the Commission, or by a member of a cabinet, is to be regarded as a commission document in the same way as documents held by one of its departments (European Commission, 2004). Moreover, in accordance with the case law of *Rothmans International v. Commission*¹⁰, the documents drafted by the committees that assist the Commission in the performance of its duties are regarded as commission documents.

A case study of the implementation of this regulation is worth noting. In October 2002, a civic organization, European Citizen Action Service, made a complaint to the European Ombudsman against the European Convention (charged with drafting the Constitution of the European Union) and the Council concerning the refusal of an application for access to the agendas and minutes of the Presidium of the Convention. The Ombudsman's decision¹¹ established that the Convention is a community body that falls within the scope of the access to documents Regulation, extending thus the scope of rules on public access to documents as a matter of good administration beyond the institutions (Ferguson, 2003).

4.3. 'Public Information' versus 'Public Document'

It is evident that the widest scope of a 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 with information even when it is enclosed in a document not entirely open to the public, or, more importantly, search for information not enclosed in a single document or make a new document for the purpose of the request.

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

Placing itself on the opposite side, the European Union regime allows access to the institution's 'documents'. A 'document' means any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility. It was nevertheless stated that, "bearing in mind the principle of partial access, as it was first defined in judicial decisions and then incorporated into Regulation 1049/2001, the right conferred by the Regulation is in fact a right of access to the content of any existing document" (European Commission, 2004). The Court of First Instance and the Court of Justice established the principle of

¹⁰ Court of First Instance, Case No.T-188/97, *Rothmans International v. Commission*, judgment of 19 July 1999.

¹¹ The decision of the Ombudsman is available at <<http://www.euro-ombudsman.eu.int/decision/en/021795convention.htm>>.

access to the elements of information contained in the documents that are not covered by an exception to the right of access¹².

Furthermore, the Regulation does not require European institutions to create new documents to respond to an application. Consequently, when the information requested is not contained in one or more existing documents, or when it requires searching different sources, drafting new documents and/or collation of data, the application is considered to go beyond the scope of the Regulation. Nevertheless, the request may be handled as a request for information in line with the administrative rules of the institution concerned. Parliament, the Council and the Commission have adopted codes of good administrative conduct comprising rules relating to the handling of requests for information. In practice, however, it is not always easy to distinguish a request for information from an application for access to documents (particularly in the case of databases)¹³.

The annual reports released by the institutions raise a concern regarding partial access to documents. The proper conduct is to release the parts of documents that are not affected by an exemption (art. 4, Regulation 1049/2001). Nevertheless, the concern of independent observers is that the partial release of documents is being misused in order to *not release* the whole of a document that should be available to citizens (Ferguson, 2003). In this way, the implementation of the Regulation may be used to hinder citizens instead of benefiting them.

4.4. Applications Erroneously Addressed to a Non-competent Public Authority

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 sent 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, which is preferred by the Romanian legislation. Thus, even if the Romanian Freedom of Information Act doesn't provide for a solution in the case that the application is wrongly addressed, the gap is covered by a more general piece of legislation, Governmental Ordinance no. 27/2002 "On Handling Petitions", in accordance with which a petition addressed to an authority that does not 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.

¹² Court of First Instance, Case No.T-14/98, *Hautala v. Council*, judgment of 19 July 1999

¹³ *Ibid.*

Other options are not as good for the applicant, but they accommodate very well the public authority, which 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 the public authority's activities, it will set the application aside and will convey this justifiable fact within three days to the applicant. It does not require, however, announcing the applicant of this occurrence. It does not even impose (as is, *e.g.*, the case for complaints) an obligation 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 [course] 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 Act in the 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" (Sakowicz, 2002).

At the level of the European institutions, there are no rules for transferring incorrectly addressed requests. On the other hand, in environmental matters, the Aarhus Convention applies. In cases when a public authority does not have the relevant information, it must promptly inform the requester and either transfer the request to the appropriate agency or inform the requester which authority may have the requested information.

4.5. Applications for Information Already Published or Otherwise Made Public

When the public information that the applicant is seeking has already been published online 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 endeavor. Nevertheless, a rule of law stating an obligation for a public authority to indicate the location of the information is necessary.

Some jurisdictions have gone a little further, however, bearing in mind the interest of the private persons facing the administration. Thus, according to the Czech legislation, if the application is directed at providing information that has already been disclosed, 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 him/her to look up and obtain 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 begins to run again, the persistence being considered to be 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 to direct the applicant

to where the information was published or to provide it if the applicant insists on this. From the applicant's perspective, this is the most satisfying solution. In no situation can availability of the information be considered to be assured by means of attending sessions of deliberative public authorities (Sakowicz, 2002).

Other laws that are more citizen-oriented (or maybe more vigilant in respect to situations not covered by specific provisions) take a different approach, as they require public authorities either to disclose the information regardless of the fact that it was already published (Romania), or to indicate the location of the published information and means to access it (Czech Republic). This solution is in line with EC Regulation 1049/2001, which provides that if a document has already been released by the institution concerned and is easily accessible to the applicant, the institution may fulfill its obligation of granting access to documents by informing the applicant how to obtain the requested document.

4.6. Timeframes for Answering Requests

The timeframes regime reflects a balance between three types of interest. *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. *Second*, there are public authorities, which are interested in buying more time to comply with requests for public information and speculate upon every chance to refuse disclosure. *Third*, there are third parties, interested in their turn at the procedure of consultation before disclosure.

The major line followed by the jurisdictions analyzed here is that of providing short terms, accompanied by the possibility of prolonging them in case of exceptional circumstances, when the answer to the request needs in-depth research.

In the Czech Republic, for instance, public authorities are required to provide the requested information within fifteen 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 ten days at the utmost, and the applicant has to be informed of this eventuality (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; and 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 explicitly informed about the extension of the time period and the reasons for it before the term has elapsed. The commendable thing about the Czech regulation is that the timeframe for response cannot be prolonged without a justifiable reason and the motives for that are 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 fifteen days. A refusal, on the other hand, must be communicated in eight days, accompanied with a justification.

Finally, in Romania, public authorities and institutions are bound to answer in writing within ten days or, depending on the case, within a maximum of thirty days from the filing of the request, depending on the difficulty, complexity, volume of the documentary researches necessary and on the urgency of the request. In case the duration necessary for identifying and disclosing the requested information exceeds ten days, the answer shall be communicated to the petitioner within a maximum of thirty days, on condition that the petitioner is informed in writing about this situation within ten days. In the absence of some guidelines for cases when prolonging the term is necessary (like in the Czech Act), in Romania practice has included numerous examples of misreading of the law, leading to abuse in prolonging the term. The refusal to communicate requested information should be justified and communicated in five days time following the receipt of the request (art. 7).

A study of an NGO active in this field (Pro Democracy Association Romania, 2007) showed that the average time necessary for responding to a request for public information is twelve days and, consequently, too long when taking into account the provision of the law. Of the 90.7% (on average) public authorities who have registered requests for public information, only 58.4% on average have responded to them. 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). On the other hand, it is not sufficient to respond to a request for public information, but also to respond by providing the information requested. In this respect, of 957 requests, only 400 received a complete answer, which is a 42% return rate.

At the European Union level, art. 7 of the Regulation 1049/2001 states that an application for access to a document shall be handled promptly and an acknowledgement of receipt shall be sent to the applicant. Within fifteen working days from registration of the application, the institution shall either grant access to the document requested and provide access, or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application (administrative internal appeal). In exceptional cases—for example, in the event of an application relating to a very long document or to a very large number of documents—the time limit may be extended by fifteen working days, provided that the applicant is notified in advance and that detailed reasons are given. In the event of a total or partial refusal, or in cases when the institution fails to reply within the prescribed time limit, the applicant may, within fifteen working days of receiving the institution's reply or from the expiration of the timeframe for such reply, make a confirmatory application asking the institution to reconsider its position.

4.7. Exceptions to the Freedom of Information Regime (Selected Issues)

An important aspect of all countries' legal framework of providing access to public information regards the restrictions or exceptions where the information is not provided to the public. Undeniably, achieving an informed citizenry is a goal often counterpoised against other vital collective aims. Society's strong interest in an open government can conflict with other important interests of the general public - such as the public's interests in the effective and efficient operations of government, in the prudent governmental use of limited fiscal resources and in the preservation of the confidentiality of sensitive personal, commercial and governmental information. Tensions among these often opposing interests are typical of a democratic society; their resolution lies in providing a feasible scheme that encompasses, balances and appropriately protects all interests, while placing primary emphasis on the most responsible disclosure possible. A freedom of information act seeks to achieve this accommodation of strongly countervailing public concerns, albeit with disclosure as the animating objective.

Bearing in mind such considerations, legislators have stated principles aimed at assuring the right balance between freedom of information and effective governance, but the problem is that principles do not always apply in practice. In Romania, for instance, the 2001 Act states in its art. 13 that "information favoring or hiding the breaking of the law by a public authority or institution cannot be included in the category of classified information and constitute information of public interest". Nevertheless, there are no juridical means of controlling the decisions by which certain information is classified other than through the courts, which does not usually raise the interest of persons not directly affected by those decisions.

At the European Union level, a similar debate has arisen in connection with the conflicting scope of the internal provisions of Regulation 1049/2001. In an independent study focused on the implementation of the Regulation (Ferguson, 2003), the most serious problem was considered to be the manner in which each institution applies the article on exceptions (art. 4) to the citizen's access to documents. Specifically, on many occasions, art. 4 is not applied in connection with art. 2, which enshrines the *right* to access information, meaning that, in many cases, art. 4 is treated as a *rule* rather than as an *exception* to the rule. The institutions use art. 4 as a protecting tool against disclosure, almost never applying the "public interest test" in determining whether "there is an overriding public interest in disclosure". Art. 4 of Regulation 1049/2001 does not even specify what a public interest test is or how such a test should be applied or performed; therefore, a part of the problem is the lack of procedures or standards in place to assist those working in the institutions to perform public interest tests, resulting in personal interpretations and inconsistency in performance in different institutions. The conclusion of the study was that the Commission should propose to revise art. 4 and allow for guidelines to be developed by each institution, including specific procedures or a concrete framework that those applying public interest tests can use to perform such tests accurately and consistently.

4.7.1. Disclosure of Non-exempted Parts of a Document

The simple existence of some exempt information in a document should not impede the applicant from accessing the other information contained in the document, *i.e.*, the information that is not exempted. In most jurisdictions analyzed here, the principle is that disclosable information contained in a document requested under the 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 are exempt from disclosure. Thus, in Hungary, according to art. 20(4) of the 1992 Act, if the document containing data of public interest includes 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 (§12). Unfortunately, other jurisdictions (Romania) do not provide for such specifications, leading to abusive practices.

The tendency to reject applications for documents partially exempted can be observed in all jurisdictions analyzed here, but also at the European Union level. Thus, the provisions of art. 4(6) of the 2001 Regulation—“if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released”—have been issued in order to put an end (at least theoretically) to the practice of refusing to partially release documents that contain secret information only to a limited extent, a practice sanctioned by the Court of First Instance in several law cases.

4.7.2. 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’. This issue is both an aspect of the scope of the freedom of information act and an exception from the freedom of information principle.

As a general approach, the freedom of information act should usually include provisions that require—if the decision is likely to have substantial impact over a wide 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 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 secret documents should be exempted from this rule, but under the condition that they always relate to a final secret document.

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” (§12). The proper implementation of the concept has to consider, in the authors’ opinion, the narrow interpretation, which is the only one in line with the scope of the law and with the provisions of another complementary law, the Transparency in Decision Making Act, which states that draft normative decisions and individual decisions of public interest should be made publicly accessible.

The other pieces of legislation analyzed here do not follow this approach at all, stating that only *definitive* decisions or documents can be considered for disclosure under the law. This is the case, for instance, in Hungary, where the data prepared or recorded in order to make a decision is withheld from disclosure for ten years after its creation, irrespective of whether 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, therefore, 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 release of the data would endanger the lawful operational order or the performance of the public authority due to external influence. Shorter periods than ten years may be ruled for by a rule of law (§19(A)).

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. For all these reasons, the restricted publicity of such documents represents a tolerable limitation (Majtényi, 2004).

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 that ensure access to data of public interest defined in art. 19(5). The Constitutional Court pointed out that restricting most of the data generated in connection with the preparation of the decision could not be justified after the decision has been taken. Parliament was recommended to pass adequate legislation by December 31st, 2004; the draft law is under preparation, but has not been passed yet (Halmai, 2005).

Placing itself slightly on the same restrictive level, the Czech Freedom of Information Act states that information that 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 that this grants a discretionary power to public authorities, which, in the spirit of openness, can nonetheless decide freely to disclose the information. The problem remains, however, the concrete appreciation of the “intention for future decision” concept, which can give much room for maneuver

to the public authority, especially when, in the end, a 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 the 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 sessions of the local councils should be provided to the regional press about ten days before the session. Thus, the question raised was whether a citizen has the right to ask for these drafts at 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 council representatives told the citizens that they are not entitled to ask for the materials until the session. Practitioners of the doctrine, however, justly argue 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 fifteen days of the request at the latest.

The exception is regulated narrowly also at the European Union level. Art. 4(3) of Regulation 1049/2001 provides that:

“[A]ccess to a document drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure. Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure”.

In its critical position on the draft Regulation, the Swedish Ministry of Justice expressed its country’s concern that the exemption is too wide, and though agreeing that documents that have not yet been finalized cannot always be made public, it stated that “a document that has been sent out to someone cannot retain the status of being internal” (Swedish Ministry of Justice, 2000).

European institutions have customarily refused applications requesting documents regarding legal opinions provided by internal legal services (legal advisors). Such categorical refusal was criticized as being in “direct opposition to the letter and spirit of Regulation 1049/2001” (Ferguson, 2003) The same author argued that, at the very least, such opinions should be publicly available once the subject matter addressed in the opinions have been resolved and decided.

In addition, a court case that was expected to bring a jurisprudential development that will favor disclosure of such documents has evolved in the opposite direction.

Thus, the Court of First Instance found in *Turco v. Council*¹⁴ the first opportunity to rule on both the “legal advice” exception expressly set out in Regulation 1049/2001, and on the “public interest override” that applies to a number of exceptions in that Regulation. Ruling against disclosure and for secrecy, the Court interpreted the “legal advice” exception broadly and placed the burden of proof regarding the “public interest override” on applicants, specifying also that the override could not be invoked in the general interest of transparency. It has to be mentioned that the applicant was a Member of the European Parliament and Sweden, Denmark and Finland intervened in the case for the applicant and, respectively, the United Kingdom and the European Commission for the defendant. Furthermore, the applicant and Sweden both appealed the case in 2005 separately. At the time of this article, the appeal is still pending.

4.7.3. Openness of Public Spending versus Protection of Business Secrets

For some people in countries from Central and Eastern Europe, the market economy and the restitution of private property are strong ideological beliefs, contrasting with the policies of previous regimes characterized by hostility toward the concept of private property. To them, commercial or trade secrets are worthy of protection. This observation, together with the public authorities’ reluctance to disclose information and with public authorities’ fear of being sued by persons whose interests are affected, results in a presumption that *any* information relating to a particular company is a protected commercial secret (Resources for the Future, 2001).

In all Central European countries, commercial (business, trade) confidentiality is considered to be a central piece in the freedom of information regime and is usually regulated by information laws, company laws, and commerce law or, as in Hungary, the principles of civil law. An article dealing with access to information in environmental matters identified certain common features of the trade secrets regime in countries from Central and Eastern Europe: a) typically, all private companies are bound to submit information to governmental agencies as required by law, whether they consider this information confidential or not; b) when submitting the information, companies can claim parts of it as confidential (following this claim, the receiving authority examines the company’s arguments for classification and either classifies the information or rejects the request for classification); and c) in several countries, there is a presumption in favor of openness, so a decision must be made using a balancing test between the commercial interest in withholding and the public interest in disclosure. Thus, even if information is regarded as confidential by a business entity, the authority can still release it on the grounds of the public interest. For instance, the Hungarian Commissioner, in a 1996 statement, argued that the trade secret exemption couldn’t be applied to business enterprises that breach the law.

¹⁴ Court of First Instance, Case No.T-84/03, *Turco v. Council*, judgment of 23 November 2003.

The exemption is regulated also in the Czech law, according to which the obligation to provide information pursuant to freedom of information applications ceases when information is marked as a business secret. The law also has a provision aimed at preventing secrecy in publicly-funded contracts concluded with private companies. Thus, when providing information related to the use of state budget means, community budgets or funds established by the law or use of property of these obliged entities, providing information about the amount and acceptor of these means is not considered to be a breach of a business secret (§9). According to Kužílek (2004) this obligation of openness expands naturally to commercial contracts between companies established and controlled by the municipalities and private entities; on the other hand, the public can inquire whether a public authority is a shareholder of commercial companies and of which companies, the information on value and amount of pieces of shares, on the appointment of a share administrator, but not about so-called 'dynamic information' – the intentions of selling or buying shares, because this information is the subject of protection under the Act to regulate securities. The public should know also the results of a vote that decided upon the most advantageous offer, the membership of the board competent to grant a contract and the name of the relevant person (though not the address).

Despite the openness promoted by the provisions in the law, Transparency International regularly ascertained in its rankings that the level of transparency in the allocation of public contracts in the Czech Republic is very low (Kužílek, 2004).

In Hungary, the Freedom of Information Act makes reference to the relevant provisions of the Civil Code, which regulates access to business secrets. An important opinion of the Data Protection and Freedom of Information Commissioner in 1998 stating that a concession contract of the Ministry of Transport for construction and operation of a highway was a public record and that the principle of publicity has priority over business secret protection since the use of public funds should be transparent was instrumental in developing a more open view on public contracts in this country. Nevertheless, the attitude toward disclosure varies from municipality to municipality, as local officials still hold the belief that public contracts concluded with private companies are not public records and therefore citizens do not have the right to access them (Baar, 1999).

In Romania, the law states only that information regarding economic or financial activities, when their publicity jeopardizes the principle of honest competition, is exempted from disclosure (§12). In the matter of public procurement and contracting information, however, the common perception is that private companies will not want to enter into contracts with governments if there is transparency involved, and this constitutes an important factor in officials' attitude towards releasing information about public contracts.

Finally, it has to be noted that Regulation 1049/2001 states in its art. 4, dedicated to exemptions, that institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property.

4.8. Fees and Costs

The content of a freedom of information law should address some issues that are considered to be inherent, such as the cost of printing and copying the information, which should be as low as the actual cost, and should not discourage the petitioner. In the cost can be included the research involved for retrieving the information, but this aspect could lead to a resistance to reforming the system of information archives (Sanchez, 2002). It was argued, on the other hand, that “charging for the distribution of information raises the consciousness and awareness of users about the real value of the information and gives providers a better basis for making rational information pricing decisions” (Horton, 1987).

In specific jurisdictions, the issue of ‘what the fee should cover’ is solved differently, ranging from charging only for the copies of the documents to charging for the cost of research and working time of public employees. A particular cause of controversy is the practice of charging for the decision-making process (‘review’, in the American doctrine)—in other words, the process of determining whether the information should be disclosed or not and searching for information, which is considered to be discretionary and, consequently, often abusive. In addition, the practice of asking for deposits at the time of filing the request for information is in most countries illegal because it infringes the fundamental right to information.

One of the problems that arise when applying the fee provisions in Central and Eastern European countries is giving inflated fee estimates and even directly inflated bills to deter access, especially coming from what the public authorities call ‘troublesome requesters’.

The fee provisions are anyway amongst the most criticized by both applicants and public authorities. The applicants resent any discretionary power given to public authorities in determining the cost of access, whilst public authorities complain that the fees do not come close to covering the actual cost of granting access. Nevertheless, in our opinion, this issue needs to be regulated in favor of the applicant, not for the benefit of the public administration, even if the fee covers no more than 1% of the actual cost of disclosing the information. Access to public information should be regarded as an ‘accepted loss’ for public authorities from a monetary point of view—in other words a ‘subsidized’ public activity.

In Hungary, expenses related to making the copy have to be paid by the applicant. The head of the authority processing the data may charge the applicant the expenses of communicating the public interest data. If the applicant so requests, he/she has to be informed about the amount of these expenses beforehand. The authorities performing state or local government functions have to prepare annual reports to the Data Protection Commissioner on rejected applications and the reasons for rejection. In his 2004 Annual Report, the Commissioner criticized the lack of provisions on the issue of bearing the costs of disclosure of public information. In this situation, the public authority receiving a request for disclosure has to choose between jeopardizing its own budget or risking criminal sanctions by violating the Freedom of Information Act.

Access to data of public interest becomes particularly problematic for government organizations funded only partially from the national budget, which tend to supplement their budget by selling public information in their possession to the public at large. Such a case involved in 2004 the National Meteorological Service, which was withholding public information on the environment because the requesters would not pay the price for purchasing such information. This case led the Commissioner to insist that the Minister of Finance review the rules of funding for the National Meteorological Service in order to guarantee the freedom of information regime.

In the Czech Republic, §17 of the 1999 Act provides that public authorities have the right to demand reimbursement of the disclosure costs, and the amount cannot surpass the costs related to searching for the information, making copies, obtaining technical bearers of the data and sending the information to the applicant. The law specifies also that the supposed amount of reimbursement must be acknowledged on the application of the applicant, and the public entity can condition the provision of the information by asking for payment or for an advance.

The doctrine (Kučílek, 2004) points out that public authorities cannot demand a downpayment at the time of submitting a request, only after the information is already prepared for disclosure. Consequently, public authorities can charge in principle only for 'material expenses' —that is, the price of copies, floppies, postage in case of sending information by post and, only exceptionally, in case of applications that are extremely long, they can require a payment for finding the information. The fee cannot cover overtime work of staff, and there is a price list according to which the requesters can orientate themselves. The explanation for this interpretation is said to be unfortunate amendments not properly explained by their authors that were adopted during the law's enactment process. Nevertheless, the wording of the text is bound to cause interpretation troubles, and is often used to discourage applicants. The solution should thus be the amendment of the law, not interpreting it in clear opposition to its wording.

On the other hand, in the same author's opinion, in no case can public authorities charge for the search and copying of information that, in the end, was withheld from disclosure. The same solution applies to information that does not satisfy the applicant's request (*i.e.*, which relates to other aspects than those inquired upon by the applicant).

A problem that has occurred in practice relates to cases in which fees are paid by applicants in advance for obtaining information prepared by the public authority, but instead the information is not responsive to the request, being either unrelated to the information sought after or related to the issue, but not responsive to the request. Should the applicant pay fees for such information? The answer should be negative, because such a response is equivalent to a lack of response, and the public authority should support the costs of it. A separate matter involves recuperating the fees after an advance payment at the time of which the applicant did not know the content of the authority's response.

In Romania, the law states that in the case of a request for information that involves the realization of copies of the documents belonging to the public authority or institution, the petitioner shall meet the expenses of the copying services, according to the law (art. 9). Unfortunately, the lack of specific provisions for the calculation of the costs has left room for abuse (Pro Democracy Association Romania, 2007).

Regulation 1049/2001 also has provisions on this issue. Thus, pursuant to art. 10, the cost of producing and sending copies may be charged to the applicant, but the charge shall not exceed the real cost of producing and sending the copies. Consultation on the spot, copies of less than twenty A4 pages and direct access in electronic form or through the register are free of charge.

In a case concerning this issue, *Commission v. Germany*, the European Court of Justice stated that the Federal Republic of Germany had failed to transpose properly Directive 90/313/EEC on Freedom of Access to Information on the Environment into its national legislation by regulating the possibility of charging administrative costs where a request for access to information to environment is refused. The argument was that art. 5 of the Directive permits member states to make a charge for “supplying” information and not for the administrative tasks connected with a request for information, and that “the purpose of the directive, which is to guarantee freedom of access to information on the environment and to avoid any obstacles to that freedom, precludes any interpretation which is liable to dissuade those wishing to obtain information from making a request to that effect”¹⁵.

4.9. Appeal against the Refusal to Grant Access

An appropriate legal framework is clearly a necessary condition for transparency, but it will not be sufficient; a wide array of factors should therefore also be in place to ensure that these legal provisions are in fact implemented. Among these, the doctrine has identified the condition that the existing legislation should provide not only the responsibilities of the public authority, but also the consequences of non-compliance (Abramo, 2002).

From a comparative perspective, the enforcement regime can be structured around three procedures: a) the administrative internal review addressed to the public authority that refused the access to public information, as a mandatory precondition for judicial review or simply as a mediation procedure; b) a review by an Ombudsman-type authority, which can have the power to enforce the legislation or simply to mediate the conflict; c) a right to judicial review against the refusal by the courts.

The jurisdictions studied here have opted for two major systems of control over the implementation of the freedom of information regime: a) a specialized Commissioner (Ombudsman) system complemented with judicial review in front of the courts (Hungary);

¹⁵ European Court of Justice, Case No.C-217/97, *Commission v. Germany*, judgment of 9 September 1999.

b) judicial review in front of the courts, preceded by administrative internal appeals (Romania, Czech Republic).

It has been argued that an excess of procedural stages leads to expense and delay in making information available, but, at the same time, a right of recourse to the courts is only likely to deter applicants from challenging refusals because of expense (Macdonald and Jones, 2003). The existence of a Commissioner makes the procedure for challenging decisions of public authorities cheaper and more readily available.

It has to be mentioned, however, that even in countries that do not have a specialized Ombudsman on freedom of information matters, the 'ordinary' Ombudsman can intervene in such issues, but only in the same manner and with the same powers as in other administrative conflicts.

As a best practice imperative, the possibility of a review procedure must be notified to the applicant together with the decision on a request for information. The importance of internal administrative appeals should also be noticed, as they provide a quick, cheap and simple mechanism for resolving the conflict. Nevertheless, an internal appeal will never be impartial and fair, so the judicial review has the important role of covering the situations where the applicant does not find justice with the public authority. On the other hand, the principle is that, while an erroneous decision of refusal can be overturned by way of internal administrative appeal, an erroneous decision of disclosure cannot be overturned in this way.

According to the Romanian Freedom of Information Act (arts. 21 and 22), the explicit or tacit refusal of the employee appointed by an authority or a public institution to carry out the provisions of the law constitutes a breaking of the law and brings about the disciplinary responsibility of the culprit. In case of refusal, an internal administrative appeal addressed to the respective public authority or to the respective public institution's manager may be lodged, within thirty days after the person harmed has taken note of the respective refusal. If, after the administrative investigation, the complaint proves to be well grounded, the answer shall be transmitted to the harmed person in fifteen days time after the complaint is handed in, and the answer shall contain both the initially requested information of public interest and mention of the disciplinary penalties taken against the culprit.

Furthermore, in the case that a person considers that he/she has been harmed respective to his/her rights recognized by the law, the person may lodge a complaint to the administrative section of the court within whose area the respective person's domicile or headquarters are situated, or within whose area the authority's or public institution's headquarters are. The deadline for this is thirty days from the answer (express or implicit) to the internal appeal.

Romanian experience shows that, due to the fact that judicial review is the only real chance to enforce the freedom of information legislation, public authorities are typically reluctant to disclose information and will use judicial review as a delay in implementing the law. This happens in the context in which Romanian administrative practice still allows public authorities to pay from the public budget damages imposed

by court decisions, without really bringing about the disciplinary responsibility of the person who refused access to public information. It is not that there are no provisions in this direction, but in practice they are not respected, and the public auditors go along with this practice.

In Hungary, art. 21 of the Freedom of Information Act provides the right to institute court proceedings within thirty days of the refusal to disclose public information.

The lengthy judicial process is considered to be a factor that deters applicants from seeking review in the courts. The doctrine noted that, although “promptness is an essential element of the exercise of the right to have access to information of public interest”, the caseload in the courts prevails sometimes (Halmai, 2005).

In the Czech Republic, the law provides for an administrative appeal to the same authority that refused to grant access, followed by judicial review at the administrative court, according to Act No. 150/2002 on Judicial Rules of Administrative Procedure¹⁶. In the first stage, the competent bodies are the court from the region where the public authority functions. An appellate review (as a remedy against the regional court decision) is decided by the Supreme Administrative Court in Brno (Kužílek, 2004).

The action must be filed within two months of the delivery of the decision on administrative appeal. The applicant can represent himself in the first stage of the suit, but in the Supreme Administrative Court it is compulsory to be represented by a solicitor.

The administrative appeal can simply be sent by email, if such transmission is necessary to meet a deadline, but within five days it is necessary to supply it in written form or by electronic form with guaranteed electronic signature, or orally into the protocol¹⁷.

Research conducted in 2000 (Open Society Fund Prague) shows that, in the Czech Republic, there were few appeals against the refusal of a request. Thus, 55% of the institutions scrutinized on the Internet and 80% of the municipalities did not report even one single appeal. On the one hand, the low numbers of appeals against the decision of an office not to grant information can reflect the satisfaction of the applicants, but, on the other hand, it could also be evidence of the insufficient courage of some citizens to continue along the process of gaining information and of resignation at the very first refusal. If the compulsory subject provides only the obligatory information, it is not possible to learn from the register how many requests were withheld. The law does not explicitly order itemization of the results of appeals in the register, although the numbers of appeals are obligatory and so the estimate is based only on the part of reports—about three quarters of appeals were dismissed. There have also been a small

¹⁶ *Zakon o soudním řízení správním*, Act no.150/2002, signed 17 April 2004, *Sbírka zákonů* (2002) No.150. In English ‘Judicial Rules of Administrative Procedure’.

¹⁷ §37(4), *Národního shromáždění o správním řízení (správní řád)*, Act no. 71/1967 Sb, signed 29 June 1967, *Sbírka zákonů* (1967) no. 27. In English ‘Rules on Administrative Procedure’.

number of lawsuits concerning the right to information (twelve in total). Finally, there were no officers sanctioned for breaking the Freedom of Information Act.

An important method of enforcement of freedom of information regimes, especially regarding the *ex officio* publication of public information, is represented by the reports drafted by public authorities or by supervising public bodies. Thus, in most jurisdictions, the periodical reports of the stage of implementation of the freedom of information laws play a very important role in drawing the attention of the public to the issue of transparency and, at the same time, in making public authorities aware of the public scrutiny of their openness.

Most countries have a single national Ombudsman (Romania, Czech Republic), but Hungary has appointed three parliamentary commissioners: a General Commissioner, a Commissioner on the Protection of Minorities, and a Data Protection and Freedom of Information Commissioner, who is competent for all the rights related to data protection and freedom of information. The other commissioners are entitled to examine only the institutions of the state—first of all, public administration—but the Data Protection and Freedom of Information Commissioner has the right to examine every person, institution or organization if they are processing personal data, both in the state apparatus and in the private sector. The Commissioner is elected by the Parliament from among Hungarian citizens with a university degree, a clean criminal record and an outstanding academic knowledge or at least ten years of professional practice, who are widely esteemed persons with significant experience either in conducting or supervising proceedings involving data protection or in the scientific theory thereof; the Commissioner's mission is to safeguard the constitutional right to the protection of personal data and to public access to data of public interest. The statute of the Commissioner is regulated by the provisions of the Act on the Parliamentary Commissioner for Civil Rights that are applied accordingly.

The Commissioner has among his/her competences investigative powers regarding complaints lodged with him/her. He/she is in charge of promoting a uniform application of statutory provisions on the processing of personal data and on public access to data of public interest and may issue a recommendation within his/her sphere of tasks generally or for a specific data controller; the recommendation issued in a specific case is not officially binding for that case, but has to be considered as a means of interpreting the law. In addition to these competences, the Commissioner has the right to form opinions in connection with the activity of an organ performing state or local government functions. Considering the fact that the Commissioner does not possess binding powers over the public authorities controlled, his/her strength and best weapon are independence, professional knowledge and publicity (Péterfalvi, 2005).

The main attribution of the Commissioner is to observe the implementation of the Data Protection and Freedom of Information Act and other laws on data processing, to examine complaints and to ensure the maintenance of the Data Protection Register. He/she makes proposals for the adoption or amendment of legislation on access to data of public interest and gives opinions on such draft legislation. A very important

competence regards the initiation of narrowing or broadening of data categories classified as state or service secrets.

Anyone may report to the Data Protection Commissioner if they think that their rights have been violated, or that there is an imminent danger of such a thing happening, in connection with the processing of personal data or with the exercise of the right to have access to data of public interest, except when judicial proceedings are already pending concerning the case in question. No one shall suffer any prejudice on grounds of reporting to the Data Protection Commissioner. In performing his/her tasks, the Data Protection Commissioner may request the data controller to supply information on any matter related to personal data or public information, and may inspect all such documents and request a copy of and have access to all such data processing operations. The public authority shall reply to the recommendation issued in relation with its activity within thirty days. If the data controller or technical data processor fails to discontinue the unlawful processing (technical processing) of data, the Data Protection Commissioner may order the blocking, deletion or destruction of unlawfully processed data, prohibit the unlawful processing or technical processing of data, and suspend the transfer of data to foreign countries. The classifier may, within thirty days, go to the Metropolitan Court of Justice to have it established that the demand has not been well founded. Pending a final court decision, the data concerned may not be deleted or destroyed; the processing of data, however, shall be suspended and the data shall be blocked.

State and official secrets shall not prevent the Data Protection Commissioner from exercising his/her rights stated in the Act, but the provisions on secrecy shall bind him/her as well.

The solution of having the Freedom of Information Commissioner deal also with data protection issues is controversial. It is evident that the two philosophies are opposed and may lead to inconveniences in applying the legislation. On the other hand, exactly this dual position could make things go better when trying to balance the right to know with the right to privacy.

5. 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 painful and has to be approached with great care so that new mistakes do not reverse any progress. The developments presented in this article are the expression of initial stages of reforming public administrations towards more open and effective ones, while considering at any time the possible resistance to this endeavor of the old mentalities entrenched in public officials' attitudes.

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

References

1. Abramo, C.V., 'Access to Information—A Long Way to Go', in OECD (ed.), *Public Sector Transparency and Accountability - Making it Happen*, Paris: OECD Press, 2002, pp. 145-150.
2. Act no. LXIII. In English 'The Hungarian Freedom of Information Act'.
3. Baar, K., *Enterprises in Local Public Utility Services: Transparency, Procurement and Price Setting Questions*, Hungarian Sub-National Development Program of the World Bank, Budapest, 1999.
4. Birkinshaw, P., *Freedom of Information. The Law, the Practice and the Ideal*, London: Butterworths, 3rd ed., 2001.
5. Brown, H.S., Angel, D. and Derr, P., *Effective Environmental Regulation: Learning from Poland's Experience*, Westport: Greenwood Publishers, Praeger, 2000.
6. Council of Europe Recommendation on Access to Official Documents, Rec. (2002) 2, adopted 21 February 2002, [Online] available at [http://www.coe.int/T/E/Human_rights/rec\(2002\)2_eng.pdf](http://www.coe.int/T/E/Human_rights/rec(2002)2_eng.pdf).
7. Dror, Y., "Transparency and Openness of Quality Democracy", in Kelly, M. (ed.), *Openness and Transparency in Governance: Challenges and Opportunities*, Maastricht: NISPAcee Forum, 1999.
8. Dunn, W.N., Staronova, K. and Pushkarev, S., *Implementation—the Missing Link in Public Administration Reform in Central and Eastern Europe*, Bratislava: NISPAcee, 2006.
9. European Commission, 'Report from the Commission on the Application in 2003 of Regulation (EC) No 1049/2001 regarding Public Access to European Parliament, Council and Commission Documents', COM(2004) 45 final, 30 January 2004, [Online] at http://europa.eu/eur-lex/en/com/rpt/2004/com2004_0045en01.pdf.
10. Ferguson, J., *Improving Citizens' Access to Documents: ECAS Recommendations to the European Commission and Other Institutions*, Brussels: ECAS, 2003.
11. Halmi, G., 'Report on the Situation of Fundamental Rights in Hungary in 2004', Report of the EU Network of Independent Experts on Fundamental Rights, 2005.
12. Holkeri, K., 'Public Scrutiny and Access to Information in Finland', in OECD (ed.), *Public Sector Transparency and Accountability - Making it Happen*, Paris: OECD Press, 2002, pp. 151-163.
13. Horton, F.W., 'Information Policy: the National Information Policy Chameleon', 1987, *Information Management Review*, no. 3, pp. 79-84.
14. Hotărârea de Guvern privind accesul publicului la informația privind mediul, no. 878/2005, signed 22 August 2005, published in the Official Monitor no. 760 from 2005.
15. Hradilek, S., 'FOIA in the Czech Republic—2005', [Online] available at <http://web.archive.org/web/20070920151416/http://otevrete.cz/index.php?akce=clanek&id=634>.
16. Hradilek, S., 'The New Amendment of the Freedom of Information Act', [Online] available at <http://web.archive.org/web/20070920151624/http://otevrete.cz/index.php?akce=clanek&id=630>.
17. Hungary Data Protection and Freedom of Information Commissioner, '2004 Report on FOIA', Budapest, 2005.
18. Kužilek, O., 'Another 106 Answers to your Questions (with Judgments). A Handbook for Citizens on the Free Access to Information and the Transparency of Public Administration', Prague, 2004, [Online] available at <http://www.otevřete.cz>.

19. Legea privind liberul acces la informațiile de interes public no. 544/2001, signed 12 October 2001 published in the Official Monitor no. 663/23 from 2001. In English 'The Romanian Freedom of Information Act'.
20. Legea privind informațiile clasificate no.182/2002, signed 12 April 2002, published in the Official Monitor no. 248 from 2002. In English 'The Classified Information Act'.
21. Legea privind transparența decizională, no.52/2003, signed 3 February 2003, published in the Official Monitor no. 70 from 2003. In English 'The Transparency in Decision Making Act'.
22. Legea privind unele măsuri pentru asigurarea transparenței în exercitarea demnităților publice, a funcțiilor publice și în mediul de afaceri, prevenirea și sancționarea corupției no.161/2003, signed 19 April 2003, published in the Official Monitor no. 279 from 2003. In English 'The Romanian Transparency in Public Office, in Commercial Transactions and in Debts to the State Act'.
23. Legea privind protecția personalului din autoritățile publice, instituțiile publice și din alte unități care semnalează încălcări ale legii, no.571/2004, signed 17 December 2004, published in the Official Monitor no. 1214 from 2004. In English 'The Romanian Whistle Blowing Act'.
24. Macdonald, J. and Jones, C. (eds.), *The Law of Freedom of Information*, Oxford: Oxford University Press, 2003.
25. Majtényi, L., 'Freedom of Information. Experiences from Eastern Europe', presentation by former Data Protection and Freedom of Information Commissioner of Hungary, 2004, [Online] available at http://www.osce.org/documents/html/pdftohtml/3441_en.pdf.html.
26. Národního shromáždění o správním řízení (správní řád), Act No.71/1967 Sb, signed 29 June 1967, *Sbírka zákonů* (1967) No.27. In English 'Rules on Administrative Procedure'.
27. Open Society Fund Prague, 'Free Access to Information in the Czech Republic Project', 2002, [Online] available at <http://www.otevrete.cz.html>.
28. Ordonanța de Guvern no. 27/2002 privind reglementarea activității de soluționare a petițiilor, published in the Official Monitor no. 84 from 2002. In English 'Government Decision regarding the Handling of Petitions'.
29. Péterfalvi, A., Presentation delivered at the British Institute of International and Comparative Law, 15 February 2005, London, [Online] available at <http://abiweb.obh.hu/dpc/index.php?menu=gyoker/event/london&dok=gyoker/event/London>.
30. Pro Democracy Association Romania, 'Report on the Implementation of the Law No. 544/2001 on Access to Public Information in 2003', Report of the "Transparent Government" Project, 2004, [Online] available at <http://www.apd.ro/files/publicatii/Monitorizarea%20modului%20de%20aplicare%20a%20legii%20544%20-%20Raport%20APD%20-%20versiune%20revizuita.pdf>
31. Pro Democracy Association Romania, 'Report on the Implementation of the Law No. 544/2001 on Access to Public Information. Comparative Analysis 2003-2007', Report of the "Transparent Government" Project, 2007, [Online] available at <http://www.apd.ro/files/publicatii/Raport%20privind%20liberul%20acces%20la%20informatiile%20de%20interes%20public%20in%20Romania.pdf>.
32. Romanian Academic Society, 'Transparency without Competence? Form, not Substance, Governs the Romanian Administrative Reform', SAR Policy Brief, 2006, [Online] available at <http://www.sar.org.ro/index.php?page=categorie&id=16>.

33. Regulation regarding Public Access to European Parliament, Council and Commission Documents, no. 1049/2001, adopted 30 May 2001, *Official Journal of the European Communities* (2001) L145/43.
34. Resources for the Future, Public Access to Environmental Information and Data: Practice Examples and Lessons from the United States, the European Union, and Central and Eastern Europe, Washington, DC, 2001.
35. Sakowicz, M., 'The Problem of Access to Information and Effective Communication at Local Level', Information Program Group Report, 2002, [Online] available at <http://www.policy.hu/document/200808/Sakowicz.pdf&letoltes=1>.
36. Sanchez, A.C., 'The Right of Access to Information and Public Scrutiny: Transparency as a Democratic Control Instrument', in OECD (ed.), *Public Sector Transparency and Accountability - Making it Happen*, Paris: OECD Press, 2002, pp. 163-167.
37. Swedish Ministry of Justice, 'The Swedish Approach to Public Access to Documents', Ministry of Justice Fact Sheet, 2000, [Online] available at <http://www.sweden.gov.se/sb/d/574/a/16287>.
38. Zakon o vyhlášení Listiny základních práv a svobod, Law no. 2/1993, signed 16 December 1992, Sbíрка Zákonů (1998) no. 162. In English 'Charter on Fundamental Rights and Freedoms'.
39. Zakon o svobodném přístupu k informacím", Act no. 106/1999, signed 11 May 1999, Sbíрка Zákonů (1999) no. 39. In English 'The Czech Freedom of Information Act'.
40. Zakon o soudním řízení správním, Act No.150/2002, signed 17 April 2004, Sbíрка zákonů (2002) No.150. In English 'Judicial Rules of Administrative Procedure'.