



**Organization for Security and Co-operation in Europe
Office of the Representative on Freedom of the Media**

**Analysis of Amendments to Hungary's Law on Right to Informational Self-Determination
and on Freedom of Information (Act CXII of 2011)**

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Overview

This analysis of Hungary's Law on Right to Informational Self-Determination and on Freedom of Information (hereinafter "Freedom of Information Act" or "FOIA"), is based on comparative and international standards on the right of access to information.

It is noted at the outset that the right of access to information is a fundamental human right linked to the right to freedom of expression, something which has been confirmed by a series of international human rights instances, including the Inter-American Court of Human Rights (2006) and the European Court of Human Rights (2009) as well as the United Nations Human Rights Committee (2011).

Hungary has played a special role in the development of this right. Hungary was the first country in the former Soviet bloc to adopt a freedom of information law, as early as 1992, in line with a ruling by Hungary's Constitutional Court, which confirmed that "*the publicity and accessibility of data of public interest is a fundamental right guaranteed by the Constitution.*"¹ It was also a case involving Hungary that resulted in the first recognition by the European Court of Human Rights of a right of access to public information linked to the right of freedom of expression protected by Article 10 of the European Convention on Human Rights.² The judges arrived at this conclusion using the logic that when a public body holds information and refuses to release it, it is exercising the "censorial power of an information monopoly" and hence the interference with freedom of expression.³

It is therefore of great concern that on 6 July 2015, the Hungarian Parliament adopted changes to the Freedom of Information Act that are regressive and that represent a violation of international standards on the right of access to information which Hungary helped to develop.

This analysis is based on the 2015 revisions to the Freedom of Information Act and the draft Government Proposal on the rate of cost reimbursement for fulfilment of requests for public data produced in compliance with Section 29(6) and with the modified Section 72.b of the FOI Act. The analysis focuses on two primary concerns and a pair of additional concerns:

1. Charges for the work of public officials in answering information requests.
2. Broad decision making exception
3. New grounds for refusing to respond to requests
 - Data has already been provided
 - Failure to provide a name

1. Charges for Fulfilling Information Requests

The Hungarian FOIA previously provided for the cost of copying and delivering information to be charged to the requester. This is acceptable under international standards as detailed below.

¹ Decision 32/1992 (V.29) AB, 183–84 (as translated by the Office of the Hungarian Parliamentary Commissioner for Data Protection and Freedom of Information). In 1994, the Hungarian Court struck down a state secrets law, ruling that it imposed impermissible restrictions on the right to information. In so doing, the Court found that free access to data of public interest, including those held by the state, is one of the preconditions for the exercise of the right to free expression (Decision 34/1994 (VI.24) AB).

² Case of *Társaság a Szabadságjogokért v. Hungary* (App. No. 37374/05), ECHR, 14 April 2009, para. 36, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92171>. Paragraphs 36 and 38.

³ *Ibid*, Paragraph 36.

The significant change in the revisions to the Freedom of Information Act is to introduce a fee for the time dedicated by public officials to responding to requests. This is something that is completely unacceptable and out of line with international standards as well as with the legal regimes of the majority of the countries, in Europe and globally, that have freedom of information laws.

The amendments are designed in such a way to provide a double-layered protection against any requests that are deemed to be burdensome for public authorities.

In the first place, the amendments expand Section 29(2), which is the provision on extensions of the time frame for answering requests. They do so by adding a new consideration of whether “the fulfilment of the request for data results in disproportionately high workforce requirements for the basic activities of the body providing public services.” Such a consideration permits the public body to invoke an extension of the time frame.⁴

This extension in itself is not unreasonable, and many freedom of information laws permit public bodies to extend the time period in the case of voluminous requests. The wording does however rather imply that requests will be perceived as an interference with the basic activities of the body. This is regrettable as responding to requests should be seen as part of the basic services of any modern public administration, whether or not it take time to do so.

Next, there are a series of edits to Sections 29 (3), (4) and (5), which have the effect of restructuring the charging regime to make it possible to charge requesters a fee when it is deemed that the request entails a “disproportionate use of the workforce” and which permit charging for such “use of the workforce.” As required by Section 29(6) these charges are laid out in the draft Government proposal on the rate of cost reimbursement. Section 29(3a) provides that the requester be notified in advance of the amount to be charged.

These new grounds for charging requesters are in addition to the pre-existing provisions in the law that permitted the direct costs of making and delivering hard copies to be charged to the requester.

There follows an analysis of the international standards on charging for freedom of information requests, followed by an evaluation of the Hungarian provisions and charges.

1.1 International Standards on Charging

The right of access to information is a fundamental right linked to the right to freedom of expression, something that has been confirmed by various international human rights tribunals (European Court of Human Rights, Inter-American Court of Human Rights) as well as the UN Human Rights Committee, and relevant bodies such as the UN Rapporteur on Freedom of Expression and the OSCE Representative on Freedom of the Media.

⁴ The provision also amplifies the period for extensions from eight to fifteen days. Although this is not an unreasonable time frame, and remains in line with European averages, for example the EU has a 15 working day extension, it is noted that this is yet another way in which these amendments reduce the high protection for the right of access to information previously enjoyed in Hungary.

As such, and as with all fundamental rights, there is a positive obligation on governments to ensure that it may be exercised with minimal obstacles by all members of the public. A charging regime for accessing information threatens to be a serious obstacle for many people, and as such risks constituting a violation of the right of access to information.

1.1.1. UN Human Rights Committee

The UN Human Rights Committee recognised the right of access to information as a fundamental right in its General Comment 34 (29 July 2011), linking this right to the well-established right to freedom of expression set out in Article 19 of the International Covenant on Civil and Political Rights.⁵ In other words, the right to free expression is contingent on information and when this information is held by public bodies, governments much ensure that the public has a right to access it, with only limited exceptions.

The Human Rights Committee further specified (General Comment 34, paragraph 19) that there is an obligation on governments to ensure that there are no undue obstacles to access to information: “*States parties should make every effort to ensure easy, prompt, effective and practical access to such information.*” The same paragraph links this requirement to the question of costs: “*Fees for requests for information should not be such as to constitute an unreasonable impediment to access to information.*”

Other international standards and comparative law make clear that it is reasonable to charge real costs for access but no other costs; any other charges constitute an “unreasonable impediment” and hence an interference with exercise of the right.

1.1.2 Council of Europe Convention on Access to Official Documents

The most important reference on this question is the Council of Europe Convention on Access to Official Documents, which was signed by Hungary on 18 June 2009 and ratified on 5 January 2010.⁶

The Convention contains a specific provision, Article 7, which defines the fees that may be charged for access to public information:

Article 7 – Charges for access to official documents

- 1. Inspection of official documents on the premises of a public authority shall be free of charge. This does not prevent Parties from laying down charges for services in this respect provided by archives and museums.*
- 2. A fee may be charged to the applicant for a copy of the official document, which should be reasonable and not exceed the actual costs of reproduction and delivery of the document. Tariffs of charges shall be published.*

The Explanatory Report to the Convention confirms that the actual costs of reproduction are understood to be photocopying costs or, in the case of use of other formats, the cost of the

⁵ UN Human Rights Committee General Comment No. 34 - Article 19: Freedoms of Opinion and Expression CCPR/C/CG/34, Paragraphs 18 and 19.

⁶ Council of Europe Convention on Access to Official Documents CETS No. 205, <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=205&CM=1&CL=ENG> Signed by 14 countries and ratified by 7 countries; the treaty will enter into force when there are 10 ratifications.

material used (for example a disk). Delivery costs are postage costs (or a courier or other method of delivery if offered and if selected by the requester).

The Explanatory Report makes clear that “the public authorities should not make any profit” and hence there is an obligation to ensure that tariffs are based on a genuine assessment of real material costs, with no other costs taken into account.

In ratifying this Convention, Hungary has made a commitment under this Convention to ensure that charges for copies of official documents are reasonable, and do not exceed the actual costs of reproduction and delivery of the documents.

1.1.3 Comparative standards

In most European countries (and indeed in most of the 105 countries around the world that have access to information laws) it is not permitted to charge for anything other than the direct costs of delivering the information in hard copy. The same is true for the European Union.

Until recently, Ireland was the only country in Europe with a regime for charging requesters for making requests, but this was abolished in 2014. One of the impulses for this reform was when for Ireland to bring its system into line with the prevailing standards when it joined the Open Government Partnership, a global alliance of democratic countries committed to advancing openness in government activities and to increasing participation and accountability. Hungary has been a member of the OGP since 2012 and hence has made a commitment to promote the highest standards of transparency and to ensure that it has a strong legal framework for access to information.

As recently as 14 December 2015, one of Hungary’s neighbouring countries, Slovenia, saw a parliamentary proposal to charge for the time of public officials for answering withdrawn in the face of a strong national and international reaction and out of recognition that such charges would be contrary to international standards.

In the UK requests may be refused if they would take more than the equivalent of about three days of a public official’s time. In a country like the UK with a strong tradition of effective information management, taking a significant amount of time to compile information means that the information does not exist and is akin to creating new information. Nevertheless, this provision has been criticised as being out of line with the international and comparative standards. One of the concerns in the UK is that it makes it harder to access information from inefficient public bodies. In practice, it is relatively rarely invoked, and when it is there is always the possibility to renegotiate to reduce the scope of the request.

When it comes to the amounts charged, access to information laws generally require that these be at costs price. For some of the countries that neighbour Hungary, the costs per page are:

Slovenia: Black and white € 0.06, Colour € 0.63
Croatia: Black and white € 0.03, Colour € 0.13
Poland: Black and white € 0.05

Monitoring from across many European countries by local and international NGOs, and reports from bodies such as information commissioners and ombudsman, reveal that costs are rarely

imposed in practice. Furthermore, with the increasing digitization of information, so much delivery is electronic that the issue of costs never arises.

Indeed, in some countries the law specifically provides that charges may not be imposed if the cost of collection would outweigh the amount of money recuperated. This is out of recognition that it is inefficient for public authorities to waste time and money collecting very small sums from the public. Indeed, in at least one country, the information must be provided even if the funds have not yet been collected (Poland).

1.2 Hungarian regime for charging for direct costs

The draft Government proposal on the rate of cost reimbursement in Section 1 sets out the amount that may be charged for making copies in black and white (HUF 5/page or €0,02) and in colour (HUF 25/page or €0,08) as well as the cost of using other media (HUF 580/data media). Postage costs shall be charged at actual cost.

These amounts appear to be entirely reasonable, and can be presumed to reflect real costs. They are certainly in line with regional comparative costs as set out above.

Section 1(2) of the draft Government proposal also provides that the first ten pages are free of charge. This is not a very large number of copies but is positive. The EU standard is that the first 20 pages should be free of charge, as is the case in Estonia. In the US, for non-commercial use, the first 100 pages are free of duplication costs, something that is also applied for the first 100 pages in Poland.

A recommendation for the Hungarian authorities is to increase the number of free pages, both in order to ensure full enjoyment of the Constitutional right of access to information as well as to increase the efficiency in information delivery and not to burden public authorities with the collection of trivial sums.

1.3 Hungarian regime for charging for the time of public officials

The charging for the time of public officials to answer requests is unacceptable. As made clear in the analysis of international standards above, it is out of line with the recognised framework for exercise of the right of access to information.

Even if time may be charged when the time to be dedicated represents over 8 working hours, this is still an unacceptable provision.

Permitting public bodies to charge for the time they spend searching for information is of particular concern in any country where there is inefficiency in information management in at least some sectors of the government structures. What this means, in effect, is that less efficient public bodies will also be less transparent as charges are a huge disincentive to requesting information. Less transparency means less public scrutiny and less pressure to improve efficiency and information management, leading to a vicious circle that tends towards and informational black hole.

It is positive that in any appeal to the courts or the Authority overseeing the FOI Act, there is a burden on the public body to demonstrate that it appropriately calculated the charges, but it is unlikely in many instances that requesters will have the time or resources to take cases to the

Authority, and even less so to court, and hence there is likely to be little control over abuse of the charging regime as a mechanism for denying information.

The Hungarian government should amend the law so as to abolish any charges for the time of officials for answering requests. This should be done through a modification of the law and in the meantime the draft Government proposal on the rate of cost reimbursement should make clear that no charges can be made for the time of public officials in processing and responding to requests. The law should emphasise the right of requesters to access information cost-free, either by inspection of original copies or through receipt of electronic copies.

2. Refusing to provide original copies of financial documents

Section 30(7) of the FOI law was already problematic as it provided that other laws regulate access to financial information. An amendment to Article 30(7) on information about accounts and financial management information now provides that rather than issuing original copies of the documents requested, a public body may provide details of the data contained. Hence, for example, if invoices of spending by public officials is requested, then the data on the type and amount of the spending may be provided in lieu of the original invoices.

This is a highly problematic provision because the right of access to information should always include right of access to the original documents. Such a right is confirmed not only by comparative law and practice, but also by the Council of Europe Convention on Access to Official Documents which establishes the different forms of access to documents.

Article 6.1 of the Convention makes clear that “When access to an official document is granted, the applicant has the right to choose whether to inspect the original or a copy, or to receive a copy of it in any available form or format” leaving no room for doubt that access to full documents is an integral part of the right.

The Explanatory Memorandum confirms this, by explaining that if any information is to be redacted from a document, then the full document should be provided indicating where redactions have been made and on which grounds:

57. If a limitation only applies to some of the information in a document, the rest of the document should normally be released. It should be clearly indicated where and how much information has been deleted. Whenever possible, the limitation justifying each deletion should also be indicated in the decision.

58. As regards paper documents, deletions could be made on a copy, deleting or blacking out the parts to which the limitation applies. If the original document is electronic, a new document or a paper copy should be provided, giving a clear indication of which parts have been deleted (for example, by leaving the relevant sections blank).

The Convention on Access to Official Documents does recognise that where providing a copy in a certain format would be unreasonable (for example, because of the technical challenges or costs of converting the material to another format such as conversions of audio, video or electronic copies) then the public authority may be justified in refusing access in the preferred format. Similarly, inspection of originals may be limited in the case of very fragile documents (historical documents contained in archives, for example). Such scenarios would likely not

apply to information on the current or recent financial management of a Hungarian public body.

It is therefore recommended that section 30(7) of the law be abolished in its entirety, to bring the right all financial management information within the scope of the right of access to information and to ensure that requesters are able to get copies of original documents, with the only exceptions permitted being those in the Council of Europe Convention on Access to Official Documents, applied after consideration of both harm and public interest tests.

3. Protection of decision making

One of the recent amendments to the law is to Section 27(6), which relates to the grounds for refusing access to information that was “compiled or recorded by a body with public service functions as part of, and in support of, a decision-making process for which it is vested with powers and competence” as set out in Section 27(5).

There were already serious concerns about Sections 27(5) and 27(6) for being out of line with international standards in that they provide an overbroad protection of the decision making process.

Section 27(5) provides that:

Any information compiled or recorded by a body with public service functions as part of, and in support of, a decision-making process for which it is vested with powers and competence, shall not be made available to the public for ten years from the date it was compiled or recorded. Access to these information may be authorized by the head of the body that controls the information in question upon weighing the public interest in allowing or disallowing access to such information.

In the first instance, this exception is problematic because rather than requiring harm to a specific decision-making process, it provides for the exclusion from public access the documents related to the process. Such class exceptions are contrary to the requirement in Article 3(1) of the Council of Europe Convention on Access to Official Documents, which establishes that exceptions must be “set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting” one or a series of specific interests, which may include decision making.

An even more serious problem with Section 27(5) of the Hungarian FOIA is that it mandates that information linked to decision making processes be kept confidential for a period of ten years from the date of creation. In comparative law and practice this is an excessive period for protecting the majority of government decision-making processes, given that the potential for harm (to the extent that it ever existed) is likely to have expired long before ten years have elapsed.

It is positive that access to the requested information “may be authorized by the head of the body that controls the information in question upon weighing the public interest in allowing or disallowing access to such information” something that is consistent with the provision in Section 30(5) of the Hungarian FOIA establishing a requirement to take public

interest into account provided that “the data controller is granted discretionary authority by law.”

International standards, however, require that there be a clear harm and public interest test, which must always be applied to any refusal, including a refusal on the grounds of protection of decision making. This requirement is set out, *inter alia*, in the Council of Europe Convention on Access to Official Documents Article 3(2), which establishes both a harm test and requires consideration of the existence of “an overriding public interest in disclosure.” Hence Section 27(5) could and should require a balancing of interests whenever information relating to a decision-making process is requested.

With respect to the considerations that may be taken into account with the harm test, these were set out in Article 27(6):

A request for disclosure of information underlying a decision may be rejected after the decision is adopted, but within the time limit referred to in Subsection (5), if disclosure is likely to jeopardize the legal functioning of the body with public service functions or the discharging of its duties without any undue influence, such as in particular free expression of the position of the body which generated the data during the preliminary stages of the decision-making process. (2011 wording)

These considerations are broadly in line with international standards on protection of decision making and of the “space to think” within government (the “free expression of the public body ... during the preliminary states of the decision-making process”). It is regrettable however that they are framed in a way which tends to encourage rejection of requests rather than encouraging disclosure in all but limited circumstances. It is also regrettable that there is a conflation of the need for the space to think with all the information underlying a decision. After all, much information underlying a decision are likely to be neutral, factual, or statistical data, whose publication would not in any way jeopardise free expression within the authority.

Be that as it may, the amendments introduce another consideration, namely that “the data serves as the basis for further future decisions.” This consideration weakens the harm test because it does not require any damage to current, past or future decisions, and vastly expands the potential for refusing information about decision making. Given the nature of public administration, in many instances information relating to one decision will relate to many others as well.

Transparency of decision making is essential for both participation in and accountability of decisions made by public bodies. As confirmed by Hungary’s Constitutional Court in 1992, “Free access to information of public interest promotes democratic values in elected bodies, the executive power, and public administration by enabling people to check the lawfulness and efficiency of their operations.”⁷

The Court of Justice of the European Union has also underscored the importance of access to information about decision making. In 2011, the Court stated that “If citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process” and that they should “have access to all relevant information.”⁸

⁷ Decision 32/1992 (V.29) AB, 183–84

⁸ Council of the EU v. Access Info Europe, Final Judgment in Case 280/11 P, available at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-280/11>.

Shutting off access to decision-making information constitutes a broader interference with the democratic rights of citizens. There should be a review of Section 27(5) and 27(6) to ensure that they are brought into line with international standards on protection of decision making, through establishment of a clear and mandatory harm test, a mandatory public interest test, and by reframing the provisions so that they encourage broad disclosure of the majority of information relating to decision making.

4. Other new grounds for refusing to fulfil requests

The amendments to the FOI Act introduce two new grounds for refusing to fulfil information requests in the form of additions to Section 29 paragraph 1. These are analysed here.

4.1 Data has already been provided

Article 29 paragraph (1a) provides that if information has already been provided and has not changed, it does not need to be provided again:

Bodies providing public services and handling the data are not obligated to fulfil requests for the disclosure of data for the parts of the data which it has already disclosed to the same party requesting data within one year, on condition that no changes were made to these data.

Although this may seem reasonable, it is a rather unusual provision. It is very unlikely that requesters will ask for information repeatedly if it has not been changed. Repeat requests may rather be designed to verify whether the information has in fact changed and in such cases it should be provided again.

A number of laws have provisions on vexatious requests. To be vexatious in the context of Article 29(1a) a requester would, for example, have to be sending the same request every day. The mere repetition of a request once after a few months have elapsed is not sufficient to justify a public body invoking this provision, which should be reviewed and either made more reasonable or simply abolished.

4.2 Failure to provide a name

The new Section 29(1b) permits public bodies to require the name of the requester:

Bodies providing public services and handling the data are not obligated to fulfil requests for the disclosure of data if the requesting party fails to provide its name or, in the case of non-natural persons, its company name, as well as the contact information where any information regarding the data request can be provided and notices can be submitted.

This provision is broadly acceptable under comparative standards provided that the name is only to be provided as part of the request and that there is no other process for identifying who is the requester (particularly no process that requires complex verification of identification).

It is noted that the Council of Europe Convention on Access to Official Documents encourages the states parties to permit anonymous requests. The reason for is that, given that access to information is a universal right, it really doesn't matter who is requesting the information. The only important consideration for the public body is whether the information may or may not be made public.

It is therefore recommended that the Hungarian government ensure that there is no abuse of this identification requirement and that they replace it in a future revision of the law with the provision that provision of an electronic or postal address is sufficient for processing requests.