

FREE ACCESS TO INFORMATION OF PUBLIC INTEREST IN THE ROMANIAN OBJECTIVE LAW

Jur. drd. **Laura Lazăr**

Facultatea de Științe Economice și Gestiunea Afacerilor
Universitatea „Babeș-Bolyai” Cluj Napoca

Av **Florian Gheorghe**

Societatea civila de avocați „GHEORGHE SI ASOCIAȚII” București

Asist. univ. drd. av. **Ioan Lazăr**

Facultatea de Drept și Științe Sociale
Universitatea „1 Decembrie 1918” Alba Iulia

Avocat Baroul Alba

Summary: The premise of any democracy is the free access of its citizens to the information of public interest. The citizens should know the reason why, in a given situation, the public authorities decided in a certain way, because only being aware of this they could exercise their right to vote. Bureaucratic monopoly on public information gives exceptional powers to the public authorities and generates the lack of transparency in the administrative activity and creates an environment in which corruption flourishes. Thus, an essential condition for a good administration is to guarantee the access of citizens to the public information, characterized by the opening towards citizens.

Keywords: Free access to information of public interest, information of public interest, public service, public authority.

Introductory aspects

In Romania the right to information is enshrined in the fundamental law in Article 31 of Title II – The fundamental rights, freedoms and duties¹. In Paragraph 1 of Article 31 of the Constitution it is stipulated the principle of not restricting this right. However, according to Paragraph 3, the exercise of this right can sometimes be restricted, to protect young or the national security.

The constitutional provisions establish correlative obligations to this right being left in the public authority's obligation and the means of mass information. Thus, according to the provisions of Paragraph 2 of the same article, the public authorities are required to inform correctly the citizens regarding the public affairs and matters of personal interest. The representatives of the means of mass information have the duty to inform correctly the public's opinion. Another obligation of the public services of radio and television is the right to aerial for major social and political groups. Thus, from the economy of the Constitution provisions we can deduce that, the right to information reeferes only to the information of public interest and does not involve the publication of classified information².

¹ For other comments regarding the provisions of this article please also see M. Constantinescu, A. Iorgovan, I. Muraru, E.S. Tănăsescu, *op. cit.*, p. 64 and next.

² *Ibidem*, p.65.

This study presents and try to outline the provisions of the Law No. 554 from 2001 regarding the free access to information of public interest³ and the methodological norms of application⁴; in the end I'll give some improving proposals to the current provisions, where I consider it is the case.

Common provisions regarding the free access to information of public interest

Previous the passing of the Law No. 554/2001, regulating the right of access to information of public interest was not unitary, contained in different normative acts that refer to this right⁵. The consequences have been the arbitrary decisions coming from the public authorities consisting of abusive refusal to divulge information of public interest and the lack of coherence. All these things led to a lack of confidence of the population in the public authorities, one reason being, as I mentioned, the systematic lack of information of the citizens.

The Article 1 of the Law No. 544/2001 provides that the right of access to information of public interest is a fundamental principle of the relations between people and public authorities.

Regarding the definition given to the concept of public authority, we can see that the provisions of amending the Law No. 371/2006 have made a positive change, extending the applicability of the Law No. 544/2001 from the authorities, public institutions and autonomous entities to national companies and commercial enterprises that are under the authority of a central or local public authority where the Romanian state or an administrative territorial unit is the exclusive or majority shareholder. However, perhaps the Romanian legislator had to go further assimilating to public authorities in what concerns the applicability of the law, also the private law category of persons who, by law, have obtained the status of public utility or authorized to provide a public service under public power regime and also the category of people who use public financial resources and other public goods according to the law⁶. Following the example of the European countries

³The Law No. 544 of 12 October 2001 regarding the free access to information of public interest, the Law was published in the Official Gazette of Romania, Part I, No. 663 of 23 October 2001. For a detailed presentation of the provisions of the Law please also see R. N. Petrescu, *Drept administrativ*, Ed. Accent, Cluj-Napoca, 2004, p. 280-282. Ever since its passing, the provisions of the Law have suffered some changings. Thus, in 2006 the provisions of the Law have been modified by the Law No. 371 of 5 October 2006 for the changings brought to the Law No. 544/2001 regarding the free acces to information of public interest that changed the Article 2, Paragraph A from the Law (published in the Official Gazette No. 837 of 11 October 2006) and by the adopting of the Law No. 380 of 5 October 2006 for the changing and completing the Law No. 544/2001 (published in the Official Gazette No. 846 of 13 October 2006), normative act which has introduced a new Article of the Law, the Article 11 Paragraph 1 and changed the introductory thesis of the Article 12 Paragraph 1. The last change of the provisions of the Law dates of 19 Jun 2007, and was made by the Law No. 188/2007, this change made possible the introduction of a new Paragraph to the Article 5.

⁴ The Government Ordinance No.123 of 7 February 2002, published in the Official Gazette, Part I, No. 167 of 8 March 2002.

⁵ We also take into account: the ex Law of local public administration No. 69/199, abrogate by the adoption of the Law No. 215/2001 regarding the local public administration; The Law No. 47/1992 regarding the Constitutional Court; The Law No. 92/1992 concerning the judicial authority; The Law No. 47/1994 regarding the Romanian president; the Law 73/1993 regarding the Legislative. For other details please also see R. E. Iordache, C. Fartusnic, *Studiu SAR*, p. 4.

⁶ Please see the definition given to the notion of public authority in the Article 2, Paragrph 1, Letter B of the Law No. 554/2004 on the administrative contentio, modified. According to the mentioned provisions, *by public authority we should understand any state organ or organ of the territorial administrative unit, which actions having public power to satisfy a public and legitime interest. To public authorities are assimilated (...) the juridic persons who, acoding to the law, have obtained the public utility status or are authorized to perform a public service as public power.* The authors of the study made by the Romanian Academic Society (RAS) in 2001 proposed an even wide definition, proposing to be assimilated to the public authorities, from the perspective of the

mentioned above, by expanding the applicability of this law will ensure the effective exercise of the right to information and, in the same time, a greater transparency in the public administration.

Regarding the definition given to the “information of public interest”, we note that this refers to any information concerning the activities or that results from the activities of a public institution or authority, regardless the medium, the form or the way of expressing the information. Thus, the Romanian legislator took also into consideration the information that is stored by electronic means⁷. If we take into account today’s definition of the concept public authority, we see that the information sphere that may be considered of public interest is restricted. In this regard we mention that, in certain situations, the information concerning the activities of a private person could present public interest. Thus, some funds may go to the private sector in the form of grants, aids, state-funded programs, or the spending way of funds so obtained may present public interest. Also we noticed the fact that our legislator speaks about *information* but the term *documents* is not used, this gives the possibility of avoiding any abuses which could regard the refusal of publishing certain information on the grounds that the information doesn’t enter in the content of some documents. Unlike the legislation in our country, in the Freedom of Information Act (2000), the British legislator refers to documents; in practice the disclosure of information is sometimes refused on the grounds that the information is not provided in a formal document.

Regarding the organization and access to information, methodological norms for the application of the Law No. 544/2001⁸, consacrate the principle of the autonomy of authorities and public institutions, which are entitled to develop their own rules of organization and functioning of the departments of information and public relations to be established within them⁹. The law provides the possibility that in the villages the attributions and tasks performed by these departments should be carry out by specially designated persons by the local councils of those localities. The departments of information and public relations can be organized in the form of offices, services, directions or general directions being at the orders of the leader of the authority or public institution or at the orders of the designated person for that purpose. The compartments should have two essential components which to handle first, to inform the press and on the other hand, the public information, the direct information of the persons. In addition to these components may be set components to deal with internal information of the staff or the information between institutions¹⁰. Alongside of these compartments, at the authorities or public institutions place there should be made points of information and documentation.

The Law No. 544/2001, Article 3 regarding the free access to information of public interest stipulates that the assurance by the public authorities and institutions of the access to information of public interest shall be done ex officio or on request. In Article 5 Paragraph 1 of the Law No. 544/2001 are listed the documents that are communicated ex

provisions of the law, the juridical persons who by law are allowed to take decisions concerning the rights and obligations of fizic and juridic persons and all the private agents who have public information concerning the environment protection, public health, the consumer’s protection.

⁷ As example we say that only in 2005, by adopting a special law, Hungary enlarged the applicability field of the provisions of the Law on the right to information regarding the information stocked by electronic means. Please also see the *supra* section regarding Hungary.

⁸ Government Ordinance No. 123 of 7 February 2002, published in the Official Gazette, Part I, No. 167 of 8 March 2002.

⁹ Please also see Article 4 from the Law together with Article 3 – methodological norms for application of the provisions of the Law.

¹⁰ Please see Article 4 from the methodological norms for application of the provisions of the Law.

officio¹¹. The access to the information is achieved by: publication in the Official Gazette, or by means of mass information, in their own publications, as well as in the personal web page, or bill sticking at the headquarters of the public authority or institution, or consulting them at the headquarters of the public authority or institution, in spaces especially meant for this purpose. (Article 11 - the methodological norms for application). In the case of the territorial administrative unities, where a certain minority has minimum 20% from the population's number, the information is also communicated in the language of that minority.

According to the changes of the Law No. 544/2001, made by the Law No. 188/2007, among the information communicated ex officio are included the privatization contracts concluded after the entry into force of this law, the access to them is made through consultation at the headquarters of the public authority or institution. This change is welcomed, helping to achieve transparency in performing these operations.

Regarding the access to the information, the public authorities and institutions have the obligation to provide the persons, on their request, the information of public interest requested orally or in writing. To facilitate the exercise of this right, in the annexes of the methodological norms for the application of the Law No. 544/2001 are shown models of application form, patterns of complaint, demand or patterns of response to the complaint, model of register for recording and the points that there should contain the annual report on the activities of the public authority in enforcing the law¹². The forms are provided to the applicant free of charge. The written request of information of public interest includes the following elements: the public authority or institution to which the application is addressed, the requested piece of information, the name, first name and signature of the applicant, as well as the address to which the receiving of the answer is requested. Unlike our regulation in Czech Republic, the request of information is not submissive to any conditions. However, establishing the sphere of information that should contain the requested piece of information is a good one, as it can allow the public authority or institution, to identify the information of public interest. For the information requested orally, the employees within the departments of information and public relations may supply the requested information on the spot. The request and obtaining of the information of public interest, if the necessary technical conditions allow, may also be achieved in electronic format.

Regarding the time limits for the exercise of this right, we underline that these respect the principle of celerity. The information of public interest, orally requested by the means of mass information shall be communicated, as a rule, immediately or within 24 hours. The information requested in writing by persons who are not representatives of the means of mass information, the public authorities and institutions have the obligation to answer to the request within 10 working days from the registration of the application¹³, with the condition that the information is identified in this term. If the time needed to identify and provide the requested information exceeds 10 days, the answer shall be communicated

¹¹In this category of normative acts that reglement the organisation and function of the public authority and institution are also included the organigrama, the functioning programme and audiences, the names of the leaders of the departments, contact details, financing sources, the way of contesting the acts of the public authority etc.

¹² The obligation to prepare these reports is stipulated in Article 5 Paragraph 3 of the Law and also in the Article 27 Paragraph 1 from the Methodological norms for application of the Law.

¹³ We observe that the Romanian legislator stipulated a shorter term to solve the requests of information than the community legislator, the provisions of the regulation (EC) No. 1049/2001 provides a longer term, namely 15 working days from the application. In Finland, the requests are solved in the shorter term possible and maximum 1 month from the application, this term can be prolonged with another month. Similar terms are also stipulated in the federal german regulation.

to the applicant within maximum 30 working days from the registration of the application. The provisions of the Law stipulates: the refusal to provide the requested information shall be motivated and communicated within 5 working days from receiving the petitions¹⁴. (Article 7 from the methodological norms and Article 16 from the Law No. 544/2001).

If the request of information implies the making of copies of the documents held by the public authority or institution, the cost of the copying services are incumbent on the applicant, under the provisions of the law. From the provisions of the Article 9 Paragraph 1 from the Law No. 544/2001 we can conclude that consulting the information on the spot and obtaining information in electronic format is free of charge. Maybe it would have been indicated that, similarly to the provisions of the EC Regulations No. 1049/2001 to be established a minimum limit of copies of the pages free of charge. According to the provisions of the Article 9 Paragraph 2 from the Law No. 544/2001 if after receiving the information, the applicant asks for new information regarding the documents held by the public authority or institution, this request shall be treated as a new application.

The Article 12 Paragraph 1 of the Law No. 544/2001 provides information excepted from the free access to the information. This is information in the field of the national defence, public safety and order¹⁵ (paragraph 1 point. A), the information regarding the deliberations of the public authorities, as well as the one regarding the economic and politic interests of Romania, if it falls under the category of classified information, according to the Law.

Through the provisions of the Law No. 380/2006 have been completed the provisions of Article 12 Paragraph 1 Point C of the Law No. 544/2001. Thus can be excepted from publishing the information regarding commercial or financial activities, if their publicity prejudices the intellectual or industrial property rights or the principle of loyal competition. We consider this welcome. It is also excepted the information regarding personal data, those regarding the procedure during the penal or disciplinary inquiry, if it jeopardises the outcome of the investigation, if confidential sources are revealed, or the corporal integrity and health of a person are endangered, as a consequence of the investigation carried out or underway, the information regarding the judicial procedures, if its publicity prejudices the assurance of a fair trial or the legitimate interest of any of the parties involved in the process, the information whose publication is prejudicial to the measures for youth protection.

Concerning the information regarding the citizen's personal data¹⁶ may become information of public interest only as far as it affects the capacity of exerting a public function, the public information of personal interest cannot be transferred among public authorities unless on the grounds of a legal obligation or with the previous written agreement of the person that has access to that information. We conclude that in the case of these information were took into consideration the ideas crystallized in the Strasbourg

¹⁴ In Poland the term is 3 working days from the application.

¹⁵ Regarding the constitutionality of these provisions, the Constitutional Court declared by the Decision No. 462 of 4 December 2003 (published in the Official Gazette No. 63/26 January 2004) that the provisions are according to the provisions of the Constitution, Article 31 Paragraph 3 and Article of the Constitution. According them, the right to information doesn't have to harm the national security, the rights from the Constitution could be restricted for the protection of the national security. Please see *Curierul Judiciar*, No. 2/2004, p. 28.

¹⁶ According to an opinion expressed in a study it would have been indicated to use the phrase: "dates concerning aspects from the intim, family or private life". Please see V. Dabu, *Discuții referitoare la Legea nr. 544/2001 privind liberul acces la informațiile de interes public*, in *Revista Dreptul*, no. 4/2004, p. 154-160. We consider that the phrase used by the Romanian legislator is more suitable, being a wider concept that includes aspects regarding the intim, family and private life.

Court, where it was held that giving away the personal information should be made with a proportionality test concerning the personal interest and public interest in finding information.

We can say that there are many exceptions, but their enumeration is a limitative one. We see that in our law no distinction is made between the values that must always be protected and the values where a proportionality test should be conducted, based on the power of appreciation of the authorities or institutions which have the information.

The Article 13 of the Law No. 544/2001 provides that the information that favours or hides the infringement of the law by a public authority or institution cannot be included in the category of classified information and shall be considered as information of public interest. Thus, even if there are classified information, the access to them may be obtained under the provisions named. However, it might be necessary that the legislator would establish some objective criteria in order to be possible a demarcation of documents that may be included in this category. The law mentions as being responsables with the protection of such information, the persons and authorities who possesses such information or who, by law, are responsables to guarantee the security of the information¹⁷.

The explicit or implicit refusal of the appointed employee of a public authority or institution to enforce provisions of this law shall be considered as a violation and shall entail disciplinary responsibility, the applicant having the possibility to address, in such cases, directly to the public authority's chief. If after the administrative investigation, the complaint proves to be wellgrounded, the answer shall be sent to the wronged person, within 15 days from the lodging of complaint and shall contain both the initially requested information of public interest, and the mention of the disciplinary sanctions taken against the guilty person¹⁸.

Analyzing the provisions of Chapter IV from the methodological norms for application of the provisions of the law concerning the procedure for solving the requests for access to information of public interest, we conclude that this is a fair one. Thus, at the record of his application, the applicant receives a written confirmation containing the registration date and number of the application. If the information is part of the publication ex officio or excepted, the applicant is informed within 5 working days from registration of the request. Also, if the request is not of the competence of the authority or public institution, in the same short term of 5 working days, the request is sent to the competent, authority and the applicant is informed about it.

If a person considers his/her rights, provided in this law, were damaged, he/she may lodge a complaint with the section of administrative contentious of the court, in whose territorial area the residence or the headquarters of the public authority or institution is located, the complaint shall be done within 30 days from the date of the deadline.

Special provisions regarding the acces of the means of mass information to the public information

According to the Article 15 of the Law, the access of the means of mass media to the public information is guaranteed, their activity being a materialization of the right of citizens to have access to any information of public interest.

¹⁷ Please see Article 12 paragraph 2 from the Law.

¹⁸ The provisions of the Article 21 from the Law were contersted on the base that they do not stipulate the possibility to sanction the chief of the public authority or institution. The Constitutional Court said that the sanction only for the employee was an option of the legislative power and that the spreading of the provisions of the Law to other unexpected situations in text is the exclusive attribute of the legislator. Please see the Decision of the Constitutional Court No. 19/25.03.2004, published in the Official Gazette No. 408 of 6 May 2004, in Curierul Judiciar, No. 6/2004, p. 60-61.

The exercise of this right involves a series of obligations for the public authorities. Thus, the public authorities are required to designate a spokesman to hold monthly press releases and to inform the means of mass information regarding them and other actions and on other public actions organized by them, to allow the media access to specific activities developed in front of the public. The methodological norms, specify that, the information should be quick and complete and it should be made in useful time.

Conclusions

The premise of any democracy is the free access to public information. The citizens should know why, in a given problem, the public authorities have decided in a certain way, and only in this way they can express their right to vote with knowledge. Bureaucratic monopoly on public information gives exceptional powers to the public authorities, generates the lack of transparency in the administrative activity and creates an environment in which corruption flourishes. Thus, the access of citizens to public information is an indispensable condition to realize a good administration, characterized by the opening towards citizens.

The right to information is a fundamental and complex right, as enshrined in several normative instruments adopted to ensure the respect of human rights. At the European community's level, the provisions of the Regulation (EC) No. 1049/2001 settle the access of the community citizens and not only to documents of the three EU institutions (the European Parliament, the European Commission and the European Council).

Most EU Member States have specific legislation; in many of them the right to information is stipulated in the fundamental Law. The legislations of the Member States have common principles (the principle of free access to information of public interest and the necessity to motivate the denials of divulging the information), although the settlements are different in what concerns the way of defining the concepts such as public authority or information of public interest, in the deadlines set for solving the applications, and the way in which the decisions of the public authorities can be appealed.

Regarding the last aspect we say that the Member States have established a procedure in two stages against the authority's refusal to divulge certain information. Thus, in a first phase the applicant should dispute the decision to the issuing authorities (graceful appeal) or to the superior hierarchically authority (hierarchical appeal), or has the opportunity to address directly to an independent administrative authority, which has control over the way the right to information is respected by the public authorities. The role of this authority can be carry out by a collective body (eg in France) or by a chosen person or named in this function, as it is the example of the officers of information from England, Hungary and Germany (at federal level).

The officers can have the role of a mediator or can have real enforcement powers, having the power to issue binding orders for public authorities. In the second phase, the unhappy persons with the response received in the first phase, can address to the court. They are specialized courts (such as the Information Tribunal in the United Kingdom), administrative contentious court (eg in Romania) or the common law courts (in Scotland). Regulation of appeal before the court as the only way to contest the decision of the public authorities may be, for some people, a deterrent factor because it involves costs. However, given the fact that in the case of the appeals exercised before the administrative authorities, they are not often objective and the autonomous administrative authorities usually, have only the role of a mediator, exercising the action in the courts constitutes the best procedural way to ensure the respect of this fundamental right.

BIBLIOGRAPHY

I. BOOKS

- Kužilek, Otto, *Another 106 Answers to Your Questions (With Judgements). A Handbook for Citizens on the Free Access to Information and the Transparency of Public Administration*, Praga, 2004, available on-line at <http://otevrete.cz/files/>.
- Micu, Doina, *Garantarea drepturilor omului*, Ed. All Beck, Bucharest, 1998.
- Petrescu, Rodica Narcisa *Drept administrativ*, Ed. Accent, Cluj-Napoca, 2004.
- *** *Documente de bază ale Comunității și Uniunii Europene*, Ed. Polirom, Iași, 1999.
- *** The European Ombudsman, *The European Ombudsman at a glance*, Office for Official Publications of the European Communities, Luxemburg, 2006.
- *** The European Ombudsman and the authors, *The European Ombudsman. Origins, Establishment, Evolution – Commemorative volume published on the occasion of the anniversary of the institution*, Office for Official Publications of the European Communities, Luxemburg, 2005.

II. ARTICLES AND STUDIES

- Catană E.L., *Discuții în legătură cu accesul la documentele Parlamentului European, Consiliului Uniunii Europene și Comisiei Europene*, in Revista Dreptul No. 5/2008.
- Cobârzan B.V., D.C. Dragoș, B. Neamțu, *Free acces to public information : enforcement, appeals and judicial review. A comparative perspective from CEE countries* în Transilvanian Review of Administrative Sciences, No. 24E/2008.
- Dabu V., *Discuții referitoare la Legea nr. 544/2001 privind liberul acces la informațiile de interes public*, in Revista Dreptul, No. 4/2004.
- Dragoș, D. C., B. Neamțu, *The rise and evolution of freedom of information legal regime in the European Union*, in Transilvanian Review of Administrative Sciences, No. 16E/2006.
- Iordache, R.E., C. Fartusnic, *Propuneri pe marginea proiectului liberal privind liberul acces la informațiile de interes public*, SAR Study, March 2001.

III. COMMENTED JURISPRUDENCE

- The Decision TPICE, of 25 April 2004, cauza T-264/04 WWF European Policy Programme c. Consiliul UE, presented in Revista Română de Drept Comunitar No. 4/2007.
- The Decision CJCE, of 1 February 2007, cauza C-266/05, P. H. Maria Sison c. Consiliul UE, par.66 and its comment in Revista Română de Drept Comunitar No.4/2007.
- The Decision No. 462 of 4 December 2003 (published in the Official Gazette No. 63/ 26 January 2004) in Curierul Judiciar, No. 2/2004.
- The Decision of the Constitutional Court No. 149/25.03.2004, published in the Official Gazette No. 408 of 6 May 2004, in Curierul Judiciar, No. 6/2004.

IV. INTERNET SOURCES

- <http://www.acces-info.org/>, <http://www.aitel.hist.no/>.
- <http://en.wikipedia.org/>, <http://www.omi.fi/>
- www.suomi.fi/english/.
- <http://www.sweden.gov.se/>.
- http://www.youchoose.net/campaign_447 .