FREEDOM OF INFORMATION, DISCLOSURE, PRIVACY, AND SECRETS IN HUNGARIAN LAW

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The constitutional revolution in Hungary produced certain legislative innovations that were remarkable even in the international perspective. One of these was the regulation of information rights. With the possible exception of the instatement of the Constitutional Court, no other Hungarian legislative feat won greater praise in international literature. The Data Protection Act has been recognized as the first piece of legislation since King Saint Stephen whereby Hungary has provided a model and a trend for all of Europe to emulate. The innovation essentially consisted in regulating data protection and freedom of information reciprocally, and in entrusting both rights to the same guardianship. This solution, however, entails a number of legal complications.

Providing for the two rights at the same breath, while certainly useful, does create difficulties. True enough, in the field of information rights, we often find that the moment we have managed to solve a problem the solution itself generates further obstacles. This is not the case in other fields of law. The source of the difficulty here is the inherent tension between the two information rights, which we tend to view as a mere notional impasse, when the quandary goes much deeper than that. We talk about protecting privacy, when all we really know is the object of the protection: the human being as a legal subject. However, the language of the law can only speak to the manifestations of the individual’s personality, but not to the nature of that personality. I might also recall that, under the presidency of Mr. Sólyom, the Hungarian Constitutional Court, following the example of the German Constitutional Court in Karlsruhe, introduced the concept of informational self-determination, which helped us solve a number of problems that legal scholars in the U.S. had had limited success in dealing with (self-regulation, Lex Informatica, safe harbor etc.).

The notion of “data of public interest,” as used by the Hungarian Act, turned out to be a rather peculiar one. To begin with, any foreigner new to Hungarian law will be seriously challenged by the fact that közérdekű adat (“data of public interest”) and nyilvános adat (“public information”) are not synonymous terms. Moreover, data of public interest, while public as a rule of thumb, may be classified on certain conditions. In fact, a state secret may constitute data of public interest — and it typically does, unless it happens to be personal data. The same applies to business secrets.

I personally have not found the equivalent of the Hungarian concept of “data of public interest” in any other legal system. It is instructive in this regard to compare and contrast the notions of data of public interest/public information as respectively used in the U.S. Freedom of Information Act1 and the Data Protection Act of Hungary.

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A glance at the regulatory logic in the U.S.

By way of comparison, let us look at the schematic of privacy and freedom of information regulation in the United States. In my reading of that Freedom of Information Act, this shows the following pattern:

As can be readily seen, this model does not distinguish between data of public interest and public information. The collapse of the distinction means that, in this approach, personal data may become subject to freedom of information rules. At the same time, the concept of “public information” is drawn more narrowly than its Hungarian counterpart, as it applies explicitly to data held by “government agencies,” but not by certain other entities, such as the White House or Congress. Furthermore, the rules adopted in the U.S. disregard the existence of public information beyond the government’s own scope of operations, presumably because they are considered to be of no consequence or concern for the regulation.

In the American approach, unlike in Hungary, freedom of information may naturally apply to personal data — in other words, personal data may be contemplated by freedom of information regulations.

To put it in yet another way: It would amount to violating the doctrine of Hungarian information law to say that the concept of freedom of information as used in that law may encompass personal data.

As a counterpart to Hungary’s “data of public interest,” U.S. law employs the term of “public information.”

Up until its last adopted novella, Hungary’s Data Protection Act had consistently used the term “data” in all contexts, without once resorting to the word “information.” Even the
effective, amended version only uses “information” but once, and in quite a secondary context at that.

In the American law, “public information” is defined so as to include records (data carriers) as well as proceedings carried out in relation to those records. The data carrier or medium is termed “record” — a notion that, pursuant to the enshrinement of freedom of information by electronic means, should include all electronic data carriers. In fact, all that the U.S. law accomplished by incorporating electronic freedom of information was to extend the concept of originally paper-based “record” to apply to electronic data carriers and documents as well.

Australia and New Zealand have adopted an approach — one rather unusual to us — which derives the protection of personal data or, to be more precise, access by the data subject to the information held on him, from a component right common to both data protection and freedom of information, namely from the right of access to information. In this scheme, everyone has the right to access his own data as well as public information held by the state. In my opinion, the main downside of this approach is that it makes it difficult to justify access to personal data held by the “Little Brothers” of the private sector, and it makes little or no room for recognizing informational self-determination.

Another solution unique to Hungarian privacy and freedom of information law is that it replaces the notion of document or record, which the U.S. and other countries favor, by that of data, which can be personal or of public interest in nature. By adopting this terminology as early as in 1992, Hungary’s Data Protection Act hit upon one of the most modern answers possible to the fundamental challenge of the IT age.

I believe that the Hungarian law’s complete disregard for matters of medium or data carrier reflects an attitude that is positively modern and, which is just as significant, unbiased toward any technology. Furthermore, it neither defines the notion of data nor makes a distinction between data and information. Assuming that the law is applied in good faith and with common sense, this failure can hardly be held against it. In short, for purposes of Hungarian law, data may refer to everything that can be known, be it in raw or processed form.

For the American law, freedom of information essentially amounts to the regulation of public information or data related to the government.

Since by definition personal data cannot be of public interest, Hungarian legislators decided that further refinement of the nomenclature was in order and introduced the notion of data subject to disclosure due to overriding public interest, defined as “any data held by or related to a natural person, legal entity, or unincorporated organization that does not fall under the definition of data of public interest but the disclosure or making available of which is ordered by law in the public interest.”

Logical connections between data categories in Hungarian law

The Logical connections between data categories in Hungarian law can be illustrated as follows:

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2 The Freedom of Information Act: „§552. Public information; agency rules, opinions, orders, records, and proceedings”

3 To paraphrase the poet Attila József, one might say that law is logic but not quite science.
Data of public interest — personal data

The conjunctive logical class of data of public interest and personal data is empty, given the definition of data of public interest as “any information or knowledge, not falling under the definition of personal data, processed by an organ or person performing a state or local government function or other public function determined by a rule of law, or any information or knowledge pertaining to the activities thereof, recorded in any way or any form” [emphasis mine — M.L.]. This is seconded by a Resolution of the Constitutional Court, which declares that “Information may be regarded as not being of public interest if, and only if, it constitutes personal data.”

In any event, the law itself excludes any possibility for personal data to at once satisfy the definition of data of public interest. This may be illustrated as follows:

Data of public interest — public information

As a rule of thumb, data of public interest must be made public. Exceptions include state secrets as well as business, bank, and tax secrets held by public authorities, which are also regarded as data of public interest unless they happen to be personal data. The figure below is talkative inasmuch as it shows that the illustrated relationship remains true for both data categories even if we limit the set to records held by public authorities and disregard the existence of data beyond national borders.
As a rule of thumb, personal data is not public in nature, although its disclosure may be ordered by law. This latter category is known as data subject to disclosure due to overriding public interest.

For me, the most distinctive feature of the Hungarian regulation is that, as we have seen, personal data can under no circumstances qualify as public information in the broad sense of the term. However, the personal data of individuals acting in their official capacity on behalf of public agencies, as well as their personal data related to this official function, fall into the category of data subject to disclosure due to overriding public interest.
After these preliminary considerations, it is easy to draw up a schematic to illustrate the logical relationship among these three categories of data:
If we now wish to position classified information — state secrets — within this system, we will find the following:

Public interest may legitimately justify classification if information pertain to the Republic of Hungary’s
a) sovereignty and territorial integrity;
b) constitutional law and order;
c) operations involving national defense, security, criminal investigation and prevention;
d) administration of justice, central finance, and economic activities;
e) foreign/international relations;
f) prerogative to ensure the smooth operation of its government agencies free from undue influence.

“Smooth operation” as justification for classifying information would hardly pass a serious constitutional review, not least because it can easily be used as a pretext for classifying briefing documents (“data created during the preparation of a decision”), which should not normally be regarded as legitimate secrets.

**Business secret (insurance, bank, tax secret etc.) — data of public interest — personal data — public information**

Data not personal in nature that is held by a public authority or official is considered data of public interest, even if it is a business secret, although it is obviously not public information. The fact that a business secret that is also personal data should not be public is doubly self-evident.

The Civil Code defines “business secret” as “all of the facts, information, conclusions or data pertaining to economic activities that, if published or released to or used by unauthorized persons, are likely to jeopardize the rightful financial, economic or market interest of the owner of such secrets, provided the owner has taken all of the necessary steps to keep such information confidential.” This excludes information pertaining to national and local budgets and the management of European Community funds, allowances and benefits disbursed from budgetary funds, national and local public assets, as well as information the disclosure of which is mandated by separate statutory provisions due to public interest (“data subject to disclosure due to overriding public interest”).
Bank secret
Pursuant to the Banking Act, “bank secret” includes “All facts, information, know-how or data in the financial institution’s possession on customers relating to the person.” In this specific regard, “any person who receives financial services from the financial institution shall be considered a customer of the financial institution.”  

Professional and vocational secrets
Section 170 of the Civil Procedure Act waives the obligation to testify if the testimony would reveal a professional or vocational secret. Those subject to keep a private secret confidential by virtue of their profession or vocation must in fact refuse to testify. Pursuant to Act CXL of 2004 on the General Rules Of Public Administrative Procedures and Services, vocational secrecy applies particularly to information obtained by doctors, attorneys, notaries, church ministers and other members of the clergy.  

Statistical data — data of public interest — personal data — individual data — public data
The Statistics Act does not expressly define the notion of “statistical data,” but it is clear that it includes both individual and aggregate data collected and held for statistical

\[\text{§ 50 (1)-(2)}\]
\[\text{§ 172.}\]
purposes. The Implementation Decree accompanying the Act does offer a definition of “official statistical data” as a subset of the comprehensive term. The key term of the Act is “individual data” — data handled for statistical purposes that may be either personal or of public interest, and which is suitable for identifying the specific legal subject who supplied it. (The Act leaves open the interpretation that state and service secrets may be individual data as well.) 6. Individual statistical data at once personal in nature are not to be made accessible to the public, for an obvious twofold reason. It is illegal to publish individual statistical data except with the consent of the data subject. 7. Disclosure of individual data is permitted if it pertains to the public operation of a public agency, social organization, or a publicly funded organization. 8 Otherwise, individual data are to be regarded as private secrets, to be protected in accordance with certain rules at the responsibility of the entity in charge of the statistical operation. 9

Environmental data — data of public interest — public information

Act LIII of 1995 declares that “Everyone shall have the right to acquire knowledge about facts and information on the environment, thus, in particular, about the state of the environment, the level of environmental pollution, the environmental protection activities as well as the impacts of the environment on human health.” Furthermore, “State organs and local governments shall monitor within their scope of activities the state of the environment and its impact on human health, shall keep a record of the data thus obtained, and shall make them accessible - with the exceptions established by the Act on the

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6 Statistics Act, § 17 (2)
7 Statistics Act, § 17.
8 Statistics Act, § 18 (2)
9 Act XLVI of 1993and its Implementation Decree.
Protection of Personal Data and the Publicity of Data of Public Interest - and shall provide appropriate information.” In respect of the environmental use and the environmental stress and hazards caused, the disclosure obligation applies equally to entities outside the public sector. The Aarhus Convention defines “environmental information” as “any information in written, visual, aural, electronic or any other material form” concerning the environment.\(^\text{10}\)

The signatories also agreed to require their respective environmental authorities to disclose requested information and copies of original documents, without demanding to know the nature of the applicant’s interest in requesting such information.

Of course, the diagram below does not account for scenarios such as touring a nuclear power plant as a private individual, measuring and collecting radiation data. Data collected in this private capacity may be kept by the individual.

3.2.9. Summary chart

This is intended to illustrate essential logical connections, although considerations of clarity and ease of reference dictated to omit a few of the data categories.

The data categories shown serve to reveal some of the more important general logical correlations among them. Even though such logic-based charts often provide a schematic, simplified representation, in some way this one seems more complicated than the international alternatives I have mentioned. Perhaps surprisingly, the applicable Hungarian legal texts have turned out appreciably self-consistent and also coherent with the logic of law. This goes to suggest that simply destroying this edifice would be far less useful than properly understanding and operating it.

In conclusion, I might say that the legal construct of secrecy and disclosure in Hungary is without a doubt a curiosity, albeit not a provincial curiosity. As such, its ongoing application and comprehension seem to offer more benefit than shattering it in favor of something completely new.

**SZÓJEGYZÉK AZ ÁBRÁKHOZ**

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