Access to data of public interest

Article VI (3) of the Fundamental Law of Hungary states that everyone has the right to access and disseminate data of public interest. Pursuant to Article 26(1) of Act CXII of 2011 on the Right to Informational Self-Determination and Freedom of Information (hereinafter referred to as the "Privacy Act"), any body or person performing a state or local government function or other public function as defined by law (hereinafter collectively referred to as "public function body") shall enable any person to have access to data of public interest and data accessible on public interest grounds in its possession, subject to the exceptions provided for in this Act, upon request. The provision of data from public registers is governed by separate laws [Privacy Act, Section 27 (8)].

Legal restrictions of the freedom of information

Freedom of information as a fundamental right is not absolute. This means that access to data of public interest or data accessible on public interest grounds may be restricted or, in certain cases, even excluded.

General rules of the restriction

The Constitutional Court has ruled in several decisions, putting emphasis on principle, that laws restricting freedom of information must be interpreted restrictively: "*in a democratic society, public access to data of public interest is the general rule; in comparison, restrictions on public access to data of public interest should be considered an exception". "The convenience of bodies and persons exercising public functions must not take precedence over a fundamental right." [Decision 12/2004 (IV. 7.) AB].* The public sector body must carry out a content analysis of the document which is the subject of the public interest request. *"A restriction [...] which places a document, irrespective of its content, under a restriction on disclosure in its entirety cannot be regarded as being in conformity with the Fundamental Law."* [Decision 6/2016. (III. 11.) AB]. This is known, in short, as the *data principle*. If a document containing data of public interest also contains data that must not be known to the applicant, the data that must remain unknown must be made unrecognisable. [Privacy Act, Section 30(1)].

Pursuant to Article 30(5) of the Privacy Act, where the law allows the *controller's discretion* to refuse to comply with a request for access to data in the public interest, the basis for refusal shall be interpreted narrowly and the data request may be refused only if the public interest underlying the refusal outweighs the public interest in disclosure.

The cases of restricting access

The main cases of restricting access are set out in Sections 27 and 30 of the Privacy Act. The legal limits to the freedom of information lie in data protection (personal data not declared by law to be in the public interest); the protection of classified data [Privacy Act, Section 27(1)] and the protection of certain interests defined by law [Privacy Act, Section 27(2)]. Examples of the latter include, among others,

- interests of defence and national security;
- the prosecution or prevention of criminal acts;
- judicial or administrative proceedings;
- intellectual property rights (in such a case, the law only allows a stricter performance rule for the manner in which the claim is satisfied, if the work otherwise contains public interest/public data, access must be granted).

This also includes data that cannot be disclosed on the basis of an EU legal act due to the protection of a significant financial or economic policy interest of the European Union [Privacy Act, Section 27(4)], and data requests for comprehensive, account-level or itemised audits of the management of a public body [Privacy Act, Section 30(7)]. The two most frequently invoked restrictions are described in detail below.

Trade secrets – the most common reason for restricting public access by business entities

The rules on trade secrets and protected knowledge (know-how) are set out in Act LIV of 2018 on the Protection of Trade Secrets.

Pursuant to Section 27(3) of the Privacy Act, data relating to the use of the central and local government budgets and European Union aid, budget-related benefits, discounts, the management, possession, use, utilisation, disposal, encumbrance or acquisition of any rights in state and local government property, and data the disclosure or publication of which is ordered by a special law in the public interest, shall not be considered business secrets.

As a general rule, therefore, public interest in the disclosure of information on public funds and the management of public assets takes precedence over the protection of business secrets. Only if the disclosure of the trade secret would cause disproportionate harm to business, but even this should not prevent the possibility of obtaining public interest information, should a request for such information be refused.

For public bodies, the most commonly cited restriction is the data on which the decision is based

In order to ensure that the work of civil servants is free from influence, working documents, memos, drafts, outlines, proposals, correspondence exchanged within the organisation, and documents created in the course of decision support in general, are typically not made public.

To ensure that public tasks are carried out without undue influence, the data on which a decision is based and the documents containing them may be withheld from the public for a maximum of ten years from the date on which they were created. However, this is only possible if the exclusion of the public does not lead to a lack of transparency in the decision-making process or if there is a stronger public interest in keeping the data confidential than in making them public. According to the Privacy Act, information that is actually part of the decision-making process and whose disclosure would jeopardise the success of implementation or, for example, would give undue advantages to certain market players, may be justifiably excluded from the public as data on which a decision is based. Protection should also apply to information *after the decision has been taken*, the disclosure of which would jeopardise the legitimate functioning of the body concerned or the exercise of its functions and powers free from undue outside influence.

If the information used for decision support is part of a set of data, some elements of which have been decided upon, but other elements of which are still subject to further decision-making, the first decision does not result in the loss of the public interest in disclosure. For this restriction to meet constitutional requirements, the link between the data on which the decision is based and the future decision must be *concrete and direct*. Indeed, individual pieces of information may serve as a basis for any future decision. However, an abstract relationship with an uncertain decision cannot be a sufficient ground for a restriction on freedom of information.

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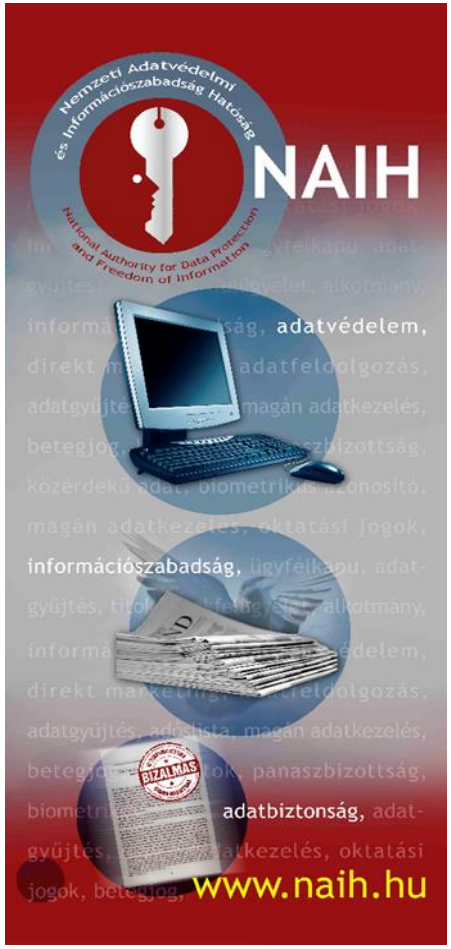
GUIDE ON THE RESTRICTIONS OF ACCESS TO DATA OF PUBLIC INTEREST



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