FOI Chapters of the Annual Reports – 2021

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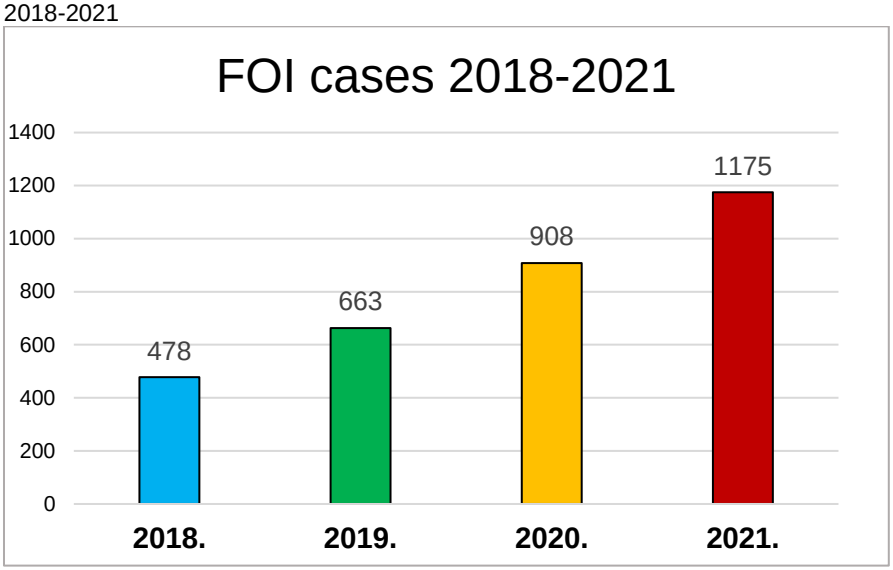
1. Introduction

The annual number of cases handled by the Freedom of Information Department has increased again: in 2021, we handled nearly 1,200 cases (not counting notifications of so-called rejected requests).[1]

Cases of the Freedom of Information Department
2018-2021



A large percentage of data requests were on the pandemic, but there continued to be vivid interest for old “hot topics” such as the cost and mode of travel by public officials, or the cost of exhibitions and other events organised using public funds.

Unfortunately, it happens frequently that it is difficult to identify the public authority handling the data even in cases of genuine public interest.[2] This is evidenced by a NAIH report where the requested organisation declined to forward the requested data even to the Authority in the case subject to the report, stating that NAIH was not authorised to access them.[3]

The most important "undertaking" in the life of the Supervisory Authority and the Department in 2021 (and 2022) is the launch and implementation of the Freedom of Information project. As beneficiary of the EU-funded priority project KÖFOP-2.2.6-VEKOP-18-2019-00001 “*Mapping out and improving the efficiency of the Hungarian practice of the freedom of information*” actual research work could begin at last in January 2021.

The contractors involved in the implementation of the project work under the professional guidance of NAIH, mobilising a team of around 60 experts. The research methodology and tools include: website analysis, pilot data request, online questionnaire, in-depth interviews, *desk research* and other background analysis (e.g. organisational analysis, international benchmarks, etc.). Situation assessment has been carried out in 2021 in each of the research areas and the results will be used as a basis for the research design and results. The four identified research areas are:

A. Access to information on municipalities

The full survey of the freedom of information practices of the roughly 3,200 local governments (of settlements and regions) operating in Hungary, as well as of the 13 national self-governments of ethnic minorities will be carried out;

[1] Pursuant to the second sentence of Article 30(3) of the Privacy Act, the controller keeps a register of rejected requests and the reasons for such rejections and it informs the Authority of the information contained therein by 31 January each year.
[2] When asked who decides, and on what basis, on the additional corrective supplementary pension increase the amount of which is determined by a government decree, the complainant received the answer from four government bodies that they are not competent, and when contacted by NAIH, the Pension Payment Directorate of the Hungarian State Treasury could only inform them that they are only executors. Factual data on general consumer price increases and pensioner price increases for the first eight months of the year under review are contained in the September bulletin of the HCSO for the month of September of the year under review, and the annual general and pensioner price increases expected on the basis of these data are included in the forecast provided by the Ministry of Finance. All these figures are included in the government's proposal drafted for the autumn of the year under review, prepared by the Minister without portfolio responsible for families in the Prime Minister's Office and the predecessor Ministry of Human Resources. Eventually, NAIH referred the data request to the Minister without portfolio responsible for families (*NAIH-1017/2021*)
[3] https://naih.hu/files/Infoszab_jelentes_NAIH-5567-8-2021.pdf

in addition, summary statements will be made for the 61 regional and 2,197 local level self-governments of ethnic minorities.

B. Access to information on central public administration

In accordance with NAIH's expectation, the most important research subjects are the agencies of central governmental administration including the ministries, but hospitals and vocational training centres as well as other agencies of the judiciary and the representations abroad are to be separately examined. The sector-specific focus areas were also designated (including the use of public funds, the transparency of applications, the transparency of legislation, the transparency of health care, and the enforcement of publication obligations related to typical employment relationships and public education.

C. Access to information on the activities of entities outside public administration, but managing public funds and/or discharging public duties

The research plan aims to review the websites of some 1,000 organisations, sending test data requests and online questionnaires to the target group with a uniform content and making at least 50 in-depth interviews. In addition, a series of focus group interviews are to be made involving citizens, NGOs and the representatives of the press experienced in data requests, and a detailed case study will be made, drawing deeper conclusions from the practice of several specific data request cases, with particular emphasis on the issues of trade secrets and copyrights and delineation of the range of subjects subject to the obligation of providing data.

D. And legal instruments and mechanisms which can facilitate (enforce) full access to data of public interest and data accessible on the grounds of public interest

The core issues of research include the provision of general information; the obligation of the parties to cooperate; self-reflection of agencies discharging public duties; the role of the press, NGOs and representatives; disclosure obligations; the private law elements of data requests; the content of data requests; the response of the controller; the rejection of fulfilment; the name and person of those requesting data; fulfilment of the disclosure of data and the issue of due dates; the mode of providing data; cost reimbursement; reasons for rejection; NAIH's organisation, role and powers, the provision of evidence and the outcome of litigation in court procedures, fora of legal remedy and their nature (civil or administrative litigation); court distraint; the role of and interpretation of the law by the Constitutional Court; systemic problems of legal regulation; international law harmonisation; special regulation concerning environmental information.

The research places great emphasis on the examination of the so-called proper exercise of rights. As stated in Section 30(7) of the Privacy Act, a comprehensive, account-level audit of the management of a public body constitutes a limitation on the request for data of public interest, by analogy, a series of data requests aimed at a systemic review of a public body or resulting in the impossibility of daily work are not compatible with the constitutional purpose of a request for data of public interest, since the legislator has assigned this task and competence to the body responsible for oversight of the legality of the exercise of public authority. International conventions, such as the Aarhus and Tromsø Conventions, apply a general rule of unreasonableness to such cases.

2. Access to information on the obligations of model-changing universities in relation to data of public interest

As from 1 August 2021, numerous Hungarian universities were transformed from a budgetary body into institutions maintained by foundations. Based on Section 4(1)(d) of Act CCIV of 2011 on National Higher Education (hereinafter: Higher Education Act), foundations, asset management foundations, public foundations or religious associations registered in Hungary may independently or together with another authorised entity found an institution of higher education. The transformed organisation is no longer a public university, but a private institution of higher education maintained by a foundation, which is maintained and owned by the foundation. Pursuant to Section 5(1) of the Higher Education Act, the institution of higher education and the organisational unit of the institution of higher education specified in Section 94(2)(c) are legal entities. Pursuant to Section 94(2)(c) of the Higher Education Act: "*The founding charter of the private higher education institution may pronounce the organisational unit of the private higher education institution – not including public education institutions and vocational training institutions operated as organisational units that are legal entities based on law pursuant to Section 14(3) – to be a legal entity. The organisational unit obtains its capacity as legal entity through the registration of the founding charter or its amendment by the Office of Education."*

A further consequence of the change of ownership is that the university is no longer directly part of the central subsystem of general government. Section 95(3) of the Higher Education Act also sets forth that: "*Private education institutions shall manage the assets placed at their disposal autonomously within the limits of their own budget as set out in their founding charters, or if public assets are at their disposal in compliance with the requirements applying to public finances".*" The transformation of financial management was concomitant with a number of

practical changes (including if a commercial bank became the account managing financial institution of the university concerned).

The primary purpose of the freedom of information is transparency of the operation of the state and the use of public funds. Section 3(5) of the Privacy Act states that the data concerning the financial management of an organ or person performing state or local government duties and other public duties defined by law qualify as data of public interest. Pursuant to Section 26(1) of the Privacy Act, any organ performing public duties shall allow any person to have free access to data of public interest and data accessible on public interest grounds under its control, if so requested, with the exceptions provided for in this Act.
Pursuant to Section 2(2) of the Higher Education Act, the state shall be responsible for ensuring the operation of the system of higher education, while the responsibility of ensuring the operation of higher education institutions shall lie with their maintainers.

The goals and principles of the Act on Public Interest Asset Management Foundations Discharging Public Duties (hereinafter: Public Interest Asset Management Foundation Act) include that:
"(1) The state recognizes the role of public interest asset management foundations discharging public duties in creating social value and supports them in discharging public tasks and the implementation of their goals.
(2) In order to enforce the provisions of paragraph (1), the state protects the legal institution of public interest asset management foundations discharging public duties as particular legal subjects of private law and their autonomy according to private law and ensures the legal environment needed for their operation, including their organisational, financial and operational independence.
(3) When establishing a public interest asset management foundation discharging public tasks, the founder and the joiner ensure the asset elements and means of funding needed for the discharge of the public task.
(4) When designing Hungary's budget at all times ensuring the financing conditions directly needed for the discharge of public tasks and by way of asset management by the public interest asset management foundations discharging public tasks shall always enjoy priority."

Within its powers granted by Section 1 of Act XIII of 2021 on the contribution of assets and Section 1 (1a) of Act LXV of 2006 based on Section 3 of the Public Interest Asset Management Foundations Act, Government Decision 1413/2021. (VI.30.) on ensuring the conditions and funding necessary for the operation of certain higher education institutions and certain public interest foundations discharging public tasks in force since 30 June 2021 established the various foundations assigned to the various universities.

Pursuant to Section 5(1) of the Public Interest Asset Management Foundations Act, a foundation subject to this act may only be established for a purpose in the public interest. Additional details are settled by independent legal regulations in the case of every foundation, but Section 1(1) of the individual legal regulations include that "*based on the Public Interest Asset Management Foundations Act, Parliament calls upon the Government to take the necessary measures to establish the foundation belonging to the university.*
(2) In the course of the establishment of the Foundation, the minister in charge of education with regard to responsibilities and powers related to higher education (hereinafter: minister) takes action to represent the state."

Pursuant to Section 4(1) of the same act, assets amounting to at least 600 million forints (minimum capital) must be contributed to the foundation for its establishment.

Based on the legal regulations presented, it can be established that the model changing universities qualify as bodies founded and maintained by public funds on the one hand, and they continue to qualify as bodies unambiguously discharging public tasks, on the other hand. Their maintainers are public interest asset management foundations discharging public tasks founded by the Hungarian State in accordance with the authorisation granted in the Public Interest Asset Management Foundations Act. The foundation is also founded by public funds, it manages public funds and discharges public tasks, hence it is an organisation subject to the Privacy Act.

It follows that there is a legal obligation to provide general information to publish the required information electronically and to respond to requests for data of public interest.

In view of the legal definition of public tasks, the number of students who pursue their studies at the university on a self-financed basis each year is irrelevant. If a university maintained by a foundation receives a request for data of public interest and the institution receiving the request processes the data, the university has to grant the request. If data are requested which can only be found in the possession of the foundation as maintainer, the university is expected to notify the person requesting the data of this.
NAIH has consistently underlined the above statements also in the course of international investigations addressing issues of the rule of law in Hungary.

3. Important decisions by the Constitutional Court

Constitutional Court Decision 4/2021. (I. 22.) AB: Members of Parliament requested the Constitutional Court to declare Section 5 of Act VII of 2015 on the Investment Related to the Maintenance of the Capacity of the Paks

Nuclear Power Plant and the amendment of certain acts related to it (Project Act) unconstitutional and its annulment with retroactive effect. This provision restricts access to both commercial and technical data and the data laying the foundations for decision related to this, whose access would infringe national security interests and rights to intellectual property for 30 years. The Constitutional Court did not find the motion well-grounded. Decision concerning the restriction of the freedom of information is made by the controller even in the most extreme cases, it does not set in by the power of the law; at the same time, a discretionary restriction of access is *ab ovo* anti-constitutional. The restriction of access intended to be achieved by the Project Act has a legitimate purpose justifiable because of international obligations and the nature of the investment. By the Project Act, the restriction of the freedom of information in order to protect national security interests and intellectual property rights is justified and necessary for the protection of the commercial and technical data. Provisions requiring blocking access for thirty years cannot be regarded as a disproportionate restriction as this is not an *ex lege* restriction, only a legal presumption. As the Project Act is to be interpreted in line with the Privacy Act, the controller has to carry out a "*public interest test*", thus the restriction may be applied, if it is of an overriding social interest.

Constitutional Court Decision 15/2021. (V. 13.) AB: The petitioner, a Member of Parliament, requested the Constitutional Court to declare Section 1 of Government Decree No. 521/2020 (XI. 25.) on derogation from certain data request provisions at times of emergency (Government Decree) unconstitutional and to annul it. Based on the contested provision, the organ discharging public task has to meet data requests within 45 days instead of the 15 days specified in the Privacy Act, or in the case of an extension within 45+45 days, if meeting the request within 15 days would jeopardize the discharge of its public duties related to the emergency. The Constitutional Court declared that the contested provision complied with the conditions of restricting fundamental rights: combating the corona-virus pandemic, the reduction of its health-related social and economic impact and the mitigation of damage were purposes which constitutionally justify the restriction of the fundamental right and as such, they are proportionate to the disadvantage that the person requesting the data can obtain the requested information only within 45 or 90 days. At the same, it is a constitutional requirement that, when applying the Government Decree, the controller has to record the reasons, which make it probable that meeting the data request within the period set forth in the Privacy Act would have jeopardized the discharge of its public duties related to the emergency. Accordingly, when extending the deadline, it is not possible to refer to the pandemic in general, but the public task, which may remain unperformed, must actually be named.

Constitutional Court Decision 3293/2021. (VII. 22.) AB The petitioner requested the declaration of the unconstitutionality of warrant 8.Pkf.25.611/2020/3. of the Fővárosi Ítélőtábla (Budapest High Court) and its annulment. In the base case, the petitioner submitted a request for data of public interest to the Prime Minister's Cabinet Office, from where he received an answer of refusal exceeding the period of 15 days open for this. Reacting to the submitted petition, the court terminated the procedure ex officio, stating that the petition was late because the period open for the petitioner to turn to the court begins when the controller falls into delay with meeting the data request. According to the governing judicial practice, the absence of a response is the first day of the period open for initiating a lawsuit and a subsequent response of rejection does not result in the reopening of the due date. The Constitutional Court rejected the petition because it could not examine whether the interpretation of the Privacy Act by the court was correct; as a result of the examination of constitutionality, however, it established that the petitioner's right to turn to the court was not violated by the fact that the court calculated the period open for initiating litigation from the day of failing to answer.

4. Important court decisions

Pfv.IV. 20.419/2021/6.: In its petition, the petitioner requested the issue of its own documents made available to the defendant for its earlier audits. The Curia deemed that this demand did not meet the requirements set for having access to data of public interest, it cannot be qualified as a request to access data of public interest, because the petitioner's demand for the issue of "documents" concerning itself does not and cannot serve the transparency of public affairs. In contrast to itself, through the data known to it, the purpose according to the Privacy Act cannot be interpreted, because it had already been obviously known to it how it used the public funds and other aid provided for its operation. So, the claim to be enforced in the course of the litigation cannot be reconciled with the social purpose of the fundamental right to access data of public interest.

Pf.20.053/2021/6.: The Ministry of Finance, having received the data request, called upon the person submitting it to clarify the request exceeding the 15-day period open for responding. Because of exceeding the period, the person requesting the data did not react to the call, but submitted a petition to the court of the first instance in due time, in which he requested that the court order the Ministry of Finance to issue the data. According to the judgment of the court of the first instance approved by the Fővárosi Ítélőtábla (Budapest High Court) the call for clarification was ungrounded as the data request was complete; also, the call was sent after the period open for this, hence the Ministry of Finance was ordered to issue the data according to the data request.

Pf.20.397/2021/4.: The controller charged the cost reimbursement beyond the 15-day deadline for response, thus it is considered late, hence the controller has to issue the data to the person requesting them without payment any cost, because missing the 15-day deadline for response according to Section 29(1) of the Privacy Act results in forfeiture of the right to charge cost reimbursement. Moreover, as the controller did not make use of the possibility to extend the deadline in accordance with Section 29(2) of the Privacy Act, one can justifiably draw the conclusion

that in the controller's view meeting the data request does not entail a disproportionate use of the labour resources necessary for the performance of core duties of the body entrusted with public tasks, hence it may not claim cost reimbursement with reference to this. The Fővárosi Ítélőtábla upheld the judgment of the court of first instance.

Pf.20.056/2021/7.: Pursuant to Section 29(2)(a) of the Privacy Act, if the request for data involves data generated by an institution of the European Union or its Member States, the controller shall contact the institution of the European Union or the Member State concerned without delay and it informs the requesting party thereof. The Fővárosi Ítélőtábla declared that failing to do so in itself cannot result in an obligation to issue the data.

Pf.420.2021/5.: According to the Fővárosi Ítélőtábla it cannot be a barrier to issuing the data, if the controller continuously reviews and modifies the data it processes in the course of its operation. If, the circumstances impeding the issue of the data subsequently cease to exist, the court may also order the issue of data of public interest, whose issue the defendant has previously refused on reasonable grounds.

Pf.50.050/2021/3.: According to the opinion of the Győri Ítélőtábla (Győr High Court), the defendant's activity, which is only directed towards the technical and architectural implementation of the infrastructural background of some public task within the framework of a general contract, does not qualify as a public task, hence the issue of these data cannot be required from the entrepreneur.

Pf.20.234/2021/5.: Section 29(1a) of the Privacy Act provides for the refusability of data requests submitted within a year for the same set of data; however, the Fővárosi Ítélőtábla pointed out that as data of public interest may have several controllers, it is not an irregular exercise of rights, if the same person applies to several controllers with requests of the same content even simultaneously.

Pf.20.147/2021/6.: The information as to who drafted the information material of the ministry in question provides an opportunity for evaluating the work of a particular person. Data pointing to any special significance in the personal data requested to be disclosed with regard to the public activities of the persons concerned and their assessment did not arise in the course of the litigation, whereby public interest in disclosure would outweigh the individual interest in the protection of the privacy of the data subjects, therefore the Fővárosi Ítélőtábla did not order the controller to fulfil the data request.

Pf. 20.057/2021/7.: When the defendant controller refuses to fulfil a data request with reference to data compiled as part and in support of decision-making, regulated in Section 27(5) and (6) of Privacy Act, it must provide adequate justification. The total number of merit points obtained by applicants in the course of announced and adjudged job applications for judges and the obtained and opened merit points by the appointed judges constitute information on the data subject applicants qualifying as personal data. The argument that the number of merit points evaluates professional aptitude and is directly related to the discharge of public duties and hence data are accessible on the grounds of public interest cannot be substantiated by the final decision of the Fővárosi Ítélőtábla. The number of merit points received in the course of the job application for judges and the performance of judicial activity are not so closely related on the basis of which the number of merit points could be regarded as other personal data related to the discharge of public duties and therefore data accessible on the grounds of public interest.

Pf.20.351/2021/5.: Pursuant to the correct interpretation of Section 28(1) of the Privacy Act, the request for the disclosure of data of public interest can only be directed at the disclosure of data which exist at the time when the controller receives the request and data generated thereafter are conceptually excluded from its scope. This also applies in the case of this litigation, all the more so, because the petitioner did not request the issue of documents generated under a given case number, but any document generated or received by the defendant in relation to the report of the State Audit Office, this request can only be fulfilled by disclosing already existing documents containing the data processed by the defendant. In addition to the above, the Fővárosi Ítélőtábla shared the position of the court of first instance insofar that it is indeed the responsibility of the petitioner to prove that the requested data exist and they are processed by the defendant, however, the person requesting the data is usually not capable of proving this beyond reasonable doubt, given that he is obviously not in possession of the information and has no overview of the internal administrative practice or document management by the controller, otherwise he would not make the data request. Therefore, the courts consider the existence of a convincing probability of the existence of data of public interest to be sufficient to order the disclosure of data for the purpose of Section 1 of the Privacy Act.

Pf.20.390/2021/4.: The Fővárosi Ítélőtábla shared the position of the court of first instance that the restriction of access to data of public interest can only be imposed for reasons indicated in the Privacy Act, taking into account the specific data and the reason for the restriction, while a general formal reference to the reason for restricting public access is unfounded.

Pf.20.009/2021/4.: The Fővárosi Ítélőtábla upheld the judgment of the court of first instance, which stated that reference to trade secrets without any specificity is unacceptable. According to the facts of the case, the petitioner requested the disclosure of contracts by way of request for data of public interest, which the defendant concluded with two external companies with the subject matter "*Transfer for further processing of fresh frozen plasma not needed for the purpose of transfusion*". The defendant did not dispute that it was an organ discharging public tasks

and acknowledged that the requested data were data of public interest with respect to which it was the controller; at the same time, it failed to substantiate what the proprietary information or business strategy was in the contracts and their annexes requested to be disclosed (indicating the precise section of the contract and the provision), whose disclosure would violate or jeopardise its market interests, it only referred to "*unusual contractual conditions more stringent than general*". According to judicial practice, where reference is made to a reason as ground for refusal to disclose data, such as trade secrets or data for decision support, the person making such a reference must allow the court to examine the merits of such a reason.

Pf.20.188/2021/9.: The fact in itself that the data of public interest requested to be disclosed is also used in a criminal procedure does not render the refusal to disclose the data lawful. The statement of the investigating authority may prove that the requested data are of such significance in the criminal procedure that it justifies a restriction on the disclosure of the data.

2.Pf.20.641/2021/4/II.: The court ordered the controller to provide detailed epidemiological statistical data in the format of an Excel table for the given day (e.g. altogether, how many confirmed SARS-CoV-2 cases were there in Hungary, what was the change relative to the preceding day; from how many districts were new cases reported over the preceding 7 days; number of symptom-free infected persons; number of patients with mild symptoms; number of patients with severe symptoms; number of patient on ventilators; number of patients in intensive care; total number of hospital beds reserved for the treatment of the Covid-19 disease; of this, intensive beds; number of free reserved beds and reserved beds in use; of these intensive, etc.). The defendant did not dispute that it was an organ discharging public tasks, nor that the data requested to be disclosed by the petitioner were data of public interest and that they were processed by it in an "*bulk format*", at the same time, there were no grounds for its reference that meeting the petitioner's data request would have placed an expressly major workload on its employees, in view of the fact that this is not a reason for refusal under the provisions of the Privacy Act. In the case under litigation, the data to be disclosed should be compiled using simple mathematical operations or systematic grouping out of the existing set of data, which does not mean the generation of qualitatively new data. The fact that this takes longer does not mean that the systematised data would be qualitatively new or different data. There are no public sources on the internet, where the data requested to be disclosed by the petitioner could be accessible in a daily breakdown. The fact that the petitioner could have requested some of the data of public interest even from the county government offices, also does not provide a basis to refuse the disclosure of the data, in view of the fact that these data were available to the defendant as an organ discharging public tasks.

5. Public access to data on the corona-virus pandemic

The Authority regularly updates its information to respond to any changes in legislation on requests for data of public interest in the light of the emergency. [4] At present, the rules of Government Decree 521/2020 (XI.25.) continue to apply to certain requests for data of public interest [the Constitutional Court examined this legislation in its Decision 15/2021 (13.V.) AB, already presented).
Important information:
1. A request for access to data of public interest may not be made orally, and it can be fulfilled in a form that does not involve the personal appearance of the data subject.
2. If it is likely that fulfilling the request within 15 days would jeopardise the performance of the public tasks of the public body performing the public task in relation to the emergency, the deadline for fulfilling the request may be extended by 45 days, and the applicant must be informed of this within 15 days of receipt of the request.
3. The 45-day time limit may be extended once for a further 45 days if meeting the request within 45 days would still jeopardise the performance of the public tasks of the public body performing the public task in relation to the emergency. The applicant must be informed of this before the first 45 days expire.
4. In the case of the assessment and payment of a fee, the request for data must be fulfilled within 45 days if it is likely that the fulfilment of the request within 15 days would jeopardise the performance of the public tasks of the body in relation to the emergency. In this case, the information shall be provided within 45 days on the following:
− the fulfilment of the data request would involve a disproportionate use of human resources necessary for the performance of the basic activities of the public sector body, or
− the document or part of a document for which a copy is requested is voluminous, and
− the extent of reimbursement and the possibility of providing the service without the need for copies.
5. In the cases mentioned, the deadline for filing a judicial remedy under Section 31(1) of the Privacy Act is also amended (45+45 days).
6. The provisions described above had to be applied also to requests for access to data of public interest already pending at the time of the entry into force of the Decree.

In all cases of complaints where the 45-day time limit was invoked, the Authority called on the public body to justify its reasons, and on several occasions the Authority did not consider the invocation to be justified because the body concerned did not have a direct epidemiological mission justifying the extension.

[4] https://naih.hu/dontesek-informacioszabadsag-tajekoztatok-kozlemenyek?download=473:tajekoztato-a-kozerdeku-adatigenylesek-teljesitesere-iranyado-rendelkezesek-jarvanyugyi-veszelyhelyzet-miatti-valtozasarol-2021-12-20-tol

Since the spring of 2020, the Authority dealt with issues related to the pandemic in over 200 cases in the form of investigation, consultation, data request or its procedure. As evidenced by the complaint cases related to the freedom of information, most of the time those requesting data wish to access data concerning the number of infected, vaccinated, recovered and deceased persons, those in quarantine, those requiring hospital care, intensive therapy or ventilation, the number of those no longer ventilated and their distribution in many cases in a breakdown by having been vaccinated or not, and in a breakdown by vaccine type and the number of vaccinations.

NAIH also issued a communiqué concerning public access to the corona-virus infection data of settlements, which underlined that there was a substantial public interest in accessing the infection data of any settlement, the number of these figures was necessary for both mayors and residents in order to be able to make informed decisions concerning their defence against the epidemic. Mayors are important actors in the defence against the epidemic, hence it is the obligation of the competent government office to provide them with the relevant statistical data.

It is our frequent experience that those requesting data would have liked to learn from NAIH concrete information about the epidemic and its management and changes. In these cases, the Authority informed the persons requesting the data which organ discharging public tasks they can turn to (such as the National Public Health Centre, the National Hospital General Directorate or the various ministries).

In many cases, complainants objected to the fact that they did not receive a medical explanation to the professional health-related issues bothering them. Since the conceptual element of data of public interest is the fact that it is recorded and that the organ in question must handle such data, in these cases the organs discharging public tasks lawfully rejected the data requests, because they are not obliged to provide professional justification for their decisions or to express their professional opinion in the context of a data request of public interest.

A great deal of interest was expressed also with respect to the vaccine contracts. According to the statement of the Ministry of Foreign Affairs and Trade, the contract in question was concluded by the National Public Health Centre, the contract itself was not in their possession, at the same time, they saw no reason for restricting public access to the contract. Finally, the minister in charge of the Prime Minister's Office published the purchase and sale contracts concerning the vaccines stemming from Eastern sources (on its Facebook page[5]). (*NAIH-2963/2021*)

It should be noted that the issue of public access to the contracts concerning the procurement of vaccines by the EU was also a subject of criticism in 2021. The European Commission headed the negotiations on the procurement of the vaccines based on the negotiating principles approved by the Member States, which finally published a number of contracts with the agreement of the companies concerned, although the companies insisted on blocking out certain confidential business data.[6]

Another notifier wished to learn from the Ministry of Human Resources (hereinafter: EMMI), inter alia, who represented the Hungarian Government in the steering committee supervising vaccine procurements and whether the representative of the Hungarian Government raised any objection to the content or any part of the EU framework contract in the course of the procedure. The Authority called upon EMMI to disclose the requested data, because the name of a person discharging public tasks cannot qualify as data on which a decision is based. The data concerning the adoption of the preliminary framework contract is considered data of public interest, the requested contracts need to be disclosed, while information qualifying as trade secret, whose violation would constitute a disproportionate injury to the business activities of the contracting party, is to be blocked out. The ministry has not fulfilled the data request ever since and the Authority issued a report on the case[7].

There were objectionable examples also of disclosing health-related special category personal data in the social media. A mayor disclosed the full name of the notifier and the positive result of his Covid-19 test in the parents' closed Facebook group of a kindergarten. The Authority called upon the mayor to erase all the personal data in the Facebook group on the basis of which the data subject concerned in the comments shared in the group could be identified either directly or indirectly. (*NAIH-3418/2021*).

A person requested the issue of a copy of the certificate on the vaccine administered to the President of the Republic showing the name, but "*blocking any other personal data*". In the data request, he expressly underlined that the President of the Republic was a public actor, who had earlier "*disclosed by way of the MTI (Hungarian News Agency) that he was vaccinated with the Chinese vaccine*". The "*other personal data related to the discharge of public duties*" mentioned in the Privacy Act can only refer to the set of data closely related to the discharge of the constitutional tasks of the President of the Republic and this definitely does not include the content of the vaccination certificate. Unless the data subject voluntarily and freely decides otherwise, access to his vaccination certificate may be lawfully rejected in the context of a request for data of public interest. (*NAIH-3356/2021*)

[5] https://www.facebook.com/permalink.php?story_fbid=2853863864870374&id=1443632629226845

[6] https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/public-health/eu-vaccines-strategy_en#transparency-and-authorisation-mechanism-for-exports-of-vaccines

[7] https://naih.hu/files/Infoszab_jelentes_NAIH-694-1-2022.pdf

6. Administrative Procedures Act vs. Privacy Act

The 2018 annual report[8] already disclosed the problem of law interpretation, whose main question is whether the restriction stipulated in Section 27(2)(g) of the Privacy Act ("the right to access data of public interest or data accessible on public interest grounds may be restricted by an Act, if considered necessary for the purposes of court proceedings or administrative authority procedures*") can be applied to the accessibility and publicity of the documentation of administrative authority procedures, i.e. whether Act CL of 2016 on General Administrative Procedures (hereinafter: Administrative Procedures Act) and CLXXXV of 2010 on Media Services and Mass Communications (hereinafter: Communications Act) govern as lex specialis.*

According to NAIH's position, this restriction does not apply to administrative authority proceedings that have already been concluded, all the more so as both the Administrative Procedures Act and the Communications Act require restrictions only in the case of personal and classified data, and no legal regulation has provided for the anonymisation of data of public interest or data accessible on public interest grounds.

In 2021, the civil lawsuits finally came to a final and binding end, which, *inter alia*, provided an answer – in line with the NAIH's position – to the question of the procedure and legal provisions under which third parties other than the clients may access the official documents of the authority generated in the proceedings related to the authorisation to provide media services. In a litigation launched to request disclosure of data of public interest, Fővárosi Törvényszék taking action in the first instance ordered the controller in its judgment 28.P.20.997/2019/8. to issue the full text of the requested media authority decisions to the petitioner within 15 days, but the remaining part of the petition was rejected. As a result of the examination of Section 33 of the Administrative Procedures Act and the Privacy Act, the court arrived at the conclusion that Section 33 of the Administrative Procedures Act narrows down the set of accessible data relative to the provisions of the Privacy Act and documents generated in official proceedings may be inspected only by the person entitled to do so, the client, in the context of the right of access to documents, but according to Section 33(5) of the Administrative Procedures Act, the decision is accessible to anyone without restriction. It drew the conclusion from this that, in the case of a request for a decision, there is no need for identification , the identity of the person requesting the data is irrelevant, hence the defendant cannot deny access to the decision even on the basis of the provisions of the Administrative Procedures Act it referred to. The Fővárosi Ítélőtábla taking action in the second instance in the litigation partially reversed the judgment of the court of first instance in its judgment 32.Pf.21.108/2018/8 and also ordered the controller to issue the submissions supporting the decisions related to the aforementioned decisions, since the request for issuing data of public interest in that litigation is to be adjudged exclusively in accordance with the provisions of the Privacy Act. In its judgment Pfv.IV.20.656/2020/4 adopted in a review procedure, the Curia annulled the final judgment – on procedural grounds – with regard to issuing the submissions, but otherwise upheld the judgment of the court of first instance.

7. On requests for data of public interest submitted to the NAIH

In 2021, the Authority received 58 submissions containing requests for data of public interest from 44 petitioners, which altogether contained 139 requests for data (in 2020, the 72 requests from 43 petitioners contained altogether 187 data requests). Similarly to the trend observed since 2015, it occurs that certain individuals pose several questions in their submissions.

According to our statistics, the data requests were concluded with the following results:

- 100 requests granted,
- 9 requests partially granted,
- 28 requests rejected,
- 2 requests not fulfilled for reasons attributable to the petitioner.

The most frequent reasons for rejections were the following:

- the data intended to be accessed were not data of public interest or data accessible on the grounds of public interest,
- the requested data were not available to the Authority,
- the requested data supported the option of a decision.

The most frequent subject matters of the data requests included requests for data concerning the Authority's activities in the context of the corona-virus pandemic (number and content of the relevant statements, investigations, etc.). Similarly to the past year, requests for data related to data protection procedures, data breach notifications and fines imposed were also typical. In addition, the petitioners submitted numerous questions to obtain information on the Authority's internal rules, practice of imposing fines and the application of the GDPR.

[8] pp. 118-119

8. Reimbursement of costs

A proper implementation of the freedom of information requires transparency of the procedures for determining the reimbursement of costs (in addition, let us add that in rule of law investigations against Hungary, criticism if often made for the cost reimbursement charged for fulfilling requests for data of public interest). According to the statistics for this year, the Authority dealt with 27 such cases which – in addition to complaints – included consultation questions as well as cases left over from 2020 (altogether 6 cases). The controllers under investigation included municipalities, government offices, mayor's offices, various welfare institutions, ministries, police departments and foundations.

The number of relevant cases continues to be relatively low (2018: 39, 2019: 32, 2020: 23, 2021: 27) and as a result of NAIH's intervention, the organs discharging public tasks concerned issued the requested data in most cases free of charge, at the same time, because of certain high amounts, the positive trend of the previous years came to a halt. In 2021, the amount of the highest cost reimbursement was HUF 500,000 (in this case, it would have been necessary to manually examine over 11,000 files kept by a welfare institution of a municipality according to specific criteria), however, cost reimbursement set in amounts below HUF 100,000 were more typical.

There were two occasions when NAIH accepted substantial reduction in costs, in view of all circumstances of the case. In one case, the data were available partly electronically and partly in hard copy, so the data in the electronic system (file number, report) had to be reconciled with the hard copy documents in order to obtain the correct data. In view of this, we regarded the calculation reduced from 317,209 forints to 158,000 forints as acceptable. (*NAIH-2651/2021*)

A case that had begun in 2020 was successfully closed when following NAIH's call, the government office issued the data requested free of charge. The petitioner requested data on the guardianship authorities belonging to the territorial government office and was then informed that the time required to complete the data request was 22 hours and the labour cost/working hour was 2,202 forints, i.e. a total of 48,444 forints. Then, the petitioner requested the government office to provide details of the content of the cost reimbursement which, however, was never met. According to NAIH's position, they calculated amount for fulfilling the data request can be regarded as excessive and it is unrealistic that the government office does not store the documents electronically. (*NAIH-734/2021*)

A municipal executive asked for NAIH's position concerning a case when data requests are received from a petitioner daily on the same subject matter, could they be aggregated in terms of the number of working hours with regard to the cost reimbursement. According to NAIH's interpretation of the law, if the person of the petitioner and the subject matter of the data request are identical or there are only minimal differences in the subject matter in the case of data requests submitted within 15 days, a legitimate interest can be foreseen, on the basis of which the controller aggregates the data requests in order to improve their administrative efficiency. NAIH emphasized that in the absence of the coexistence of these conditions it is not possible to aggregate the data requests under the legal regulations currently in force. (*NAIH-2450/2021*)

Partly related to the case presented above is the unlawful practice of a rural municipality which automatically attached cost reimbursement to fulfilling data requests. It is highly important to call attention to the fact that this practice is contrary to the spirit and the regulation of the fundamental right. Reacting to the practical problems of the application of cost reimbursement, NAIH published detailed guidance on its website[9], which could assist organs discharging public duties in considering whether to charge cost reimbursement. The guidance discusses the calculation of due dates, the identification of the main cost elements and the applicability as well as the obligation to provide information and to anonymize. In addition, the obligation to cooperate is highly important on the part of both the petitioner and the organ discharging public tasks. Appropriate communication from both directions makes it simpler and easier to fulfil data requests and an accurate description of the subject matter of the request could greatly reduce the costs that may be incurred.

Additional cases concerning cost reimbursement will be presented in the subsection on *The transparency of environmental information.*

9. The transparency of municipalities

According to the Authority's case law, the organs of the body of representatives constitute a unit from the viewpoint of ensuring freedom of information, which means that when a request is submitted for data of public interest, the municipal executive cannot rely on the fact that request for data affecting the municipality was not submitted to him by the petitioner. The petitioner must not suffer a disadvantage and his request must not be rejected with reference to the absence of data, because his request was addressed to the appropriate organ of the body of representatives. If there are internal rules on fulfilling a data request, incoming data requests must be forwarded right away to the

[9] https://naih.hu/dontesek-informacioszabadsag-tajekoztatok-kozlemenyek?download=392:tajekoztato-a-kozerdeku-adatigenyles-koltsegteriteserol

person obliged and authorised to evaluate and fulfil it, i.e. the appointment of an expert dealing with the rights to information in charge of freedom of information cases can provide a solution for such a situation.

The basis of an investigation on the valuation of municipal assets as a basis for decision was that the meeting of representatives of the municipality had a valuation made with a view to potentially purchasing a real estate, but the preparatory work did not reach the stage of drafting the decision in terms of the purchase and sale of the real-estate in question. The real-estates were sold, but the meeting of representatives did not make a decision on the purchase of the property and did not submit an offer to buy. According to the Authority's position, a restriction, which prevents the public to access data in the case of a legal transaction, which has already been closed citing that the data may be used at an unspecified date cannot be regarded as being in line with the Fundamental Law in view of the enforcement of the right to access and disseminate data of public interest. (*NAIH-5801/2021*)

Linked to the meeting of the municipality' property management committee, a municipal representative requested access to general construction contracts, review protocols, valuer's opinions within the framework of requesting data of public interest. The investigation pointed out the "bad" practice pursued by municipal bodies, according to which a so-called general vote is held on discussing the points of the agenda in open or private meetings, regardless of their content. In its notice on the issue of business data and trade secrets, the Authority underlined that the data relating to decision-making on municipal assets are data accessible on public interest grounds, and they can only be classified as trade secrets within a narrow range of exceptional cases. (*NAIH-1170/2021*)

Last year, the Authority received several notifications concerning the infringement of the right to the protection of personal data without any intent to cause harm. In one case, an employee of the office of the municipality published an a local closure order for the bees of a local beekeeper on his private social networking site in a manner that made the personal data of the beekeeper accessible causing him damage. As a result of the investigation, the municipality created an official social media page which is edited and the content published there is monitored by the head of the local office, who has also required the civil servants of the office to participate in a data protection training course. (*NAIH-7586/2021*)

Section 29/A(3) of Government Decree 314/2012. (XI. 8.) on the conception of urban development, integrated urban development strategy and the instruments of settlement planning and certain specific legal institutions of settlement planning requires that preliminary proposals under partnership reconciliation must be published on the website of the municipality; this, however, does not mean the publication of the records of partnership proposals. The names and addresses of those stating their opinion on the preliminary proposals are personal data, their publication on the municipality's website qualifies as processing personal data.

Section 37(5) of the Privacy Act requires organs discharging public tasks to invite the opinion of the Authority, if an organ acting as a body corporate, entitled to disclosure (typically these include the bodies of representatives of local governments) seeks proactively to ensure wide-ranging access to data of public interest or data accessible on public interest grounds processed by them. Municipalities have defined the data to be disclosed in specific publication lists as data to be published for the registration of the statements of assets made by members of the municipal bodies (body of representatives and their committees), contracts of less than 5 million forints and tenders of less than 5 million forints. The accessibility of the data in the statement of assets of municipal representatives – in particular, the data concerning the occupation, place of work and monthly taxable income of the representative from his employment – arises as a recurrent question of consultation year after year. In this respect, the Authority has consistently represented the position that the data in the part on the statement of income are data to be provided mandatorily, hence these data may not be blocked when the statement of assets is accessed by a third person.

We also wish to call the attention of the municipalities to the fact that the purpose of the service provided through the e-mail address *@mail.lgov.hu* is to enable the Government to communicate with municipal executives and mayors through a uniform separate channel, thus this address cannot be indicated as a form of maintaining contact with citizens. (*NAIH-2650/2021*)

9.1. Personal data accessible on grounds of public interest in connection with the performance of public tasks

Last year, the Authority conducted several investigations into cases, in which the subject matter of the request for data of public interest was access to the *job description* of a manager in the employment of an institution of a municipality or public body. As the legal regulation governing employment does not contain specific provisions, therefore the controller discharging public tasks decides on these at its own discretion on the basis of Section 26(2) of the Privacy Act. According to the general definition, the job description covers the work processes and activities, tasks, functions and network of contacts of the employee, including the objectives, primary areas of responsibility, as well as the conditions under which the employee performs his work. The job description is indeed the detailed specification of the job. The employer lists in this document the tasks to be carried out and the tasks for which the employee is responsible. These include the powers and responsibilities, which may be exercised by the employee and which relate exclusively to the public task discharged by him, thus, in Authority's view, these are data accessible on public interest grounds. (*NAIH-1147/2021*)

In another case concerned in an investigation, the subject matter of the data request was the job description and remuneration of the secretary of an organ discharging public tasks, operating in the form of a public body. According to the Authority's position, even though the secretary's employment relationship is based on the Labour Code and his remuneration is not paid from public funds, but from other revenues of the public body, his primary task as a senior officer is to ensure the performance of the public tasks of the public body set forth in law at the highest possible standard, hence the data concerning his remuneration qualifies as other personal data related to the discharge of his public task, which is accessible to anyone through a request for data of public interest. (*NAIH-3655/2021*)

According to the position of the Authority, pursuant to Section 179 of Act CXCIX of 2011 on Public Service Officers (Public Service Officers Act), in addition to the data accessible on public interest grounds listed therein, the set of data on pay should be interpreted broadly, in view of the requirement of equal treatment set forth in Section 13 of the same Act, as it includes other dues and benefits received in connection with the public service relationship or in relation to it. Taking these into account, the jubilee award is a benefit linked to the public service relationship, which is financed out of public funds not with regard to events and life situations listed in Section 152(1) of the Public Service Officers Act associated with privacy. (*NAIH-4045/2021, NAIH-5224/2021*)

A petitioner requested access to documents generated in relation to the appointment, remuneration and bonus payments of a municipal executive retroactively for 13 years. In terms of disclosing the data retroactively to 2008 – with reference to the decision of the Supreme Court BH.2007/1/14. – in accordance with the Authority's interpretation of the law, the Privacy Act does not have retroactive effect. In addition, it is warranted to reasonably delineate the period concerning the municipal executive's remuneration (such as, for instance, the period of a given municipal cycle). On account of this case, the Authority drew attention of the evolution of a trend contrary to the original goal of the legislator with regard to the enforcement of the freedom of information, because the request to access the data concerning pay and other benefits of a single person retroactively for 13 years, raises the possibility of creating an itemised list of the personal data of the person concerned in bulk, accessible on public interest grounds, and creating a new quality of data, a database. (*NAIH-3344/2021*)
Based on the argumentation, presented in Constitutional Court Decision 3145/2018. (V. 7.) AB, the name and the employment contract of the mayor's consultant, chief of cabinet, chief of protocol (while blocking protected personal data) are data accessible on public interest grounds. The persons, whose work is related to the responsibilities and powers of the municipality as an organ discharging public tasks, and hence their activity is capable of influencing managerial decisions, particularly those of the mayor and they have influence over changes in local public life, are identifiable by way of requesting data of public interest. According to the Authority's statement issued when contacted for consultation, the mayor's office is not authorised to have access to the data and documents of payments made to the employees of a business organisation owned by the municipality processed by that business organisation in a manner enabling the individual identification of the data subjects. As a business organisation manages its assets and the human resources it employs independently within the limits of the legal regulations and its deed of foundation, it qualifies as an independent controller with regard to the data processed by it, hence a relationship of controller and processor between the two organs is not applicable. In addition, legal regulations governing financial management also do not provide an appropriate legal basis for the lawful forwarding of personalised data. (*NAIH-3136/2021*)

9.2. Transparency of the operation of national minority self-governments

Last year, several notifications were received, so the Authority – jointly with the deputy commissioner in charge of the protection of the rights of ethnic minorities in Hungary – launched an investigation with a view to assessing the transparency of the operation of national minority self-governments and their improvement, if needed, the results of which are expected in 2022.

According to information provided by the secretary of state of the Prime Minister's Office in charge of regional public administration, there were no extraordinarily severe violations of the law in the period from the elections in the autumn of 2014 to 20 July 2021. In terms of the freedom of information, A common problem with meetings of the body [of representatives] is the misunderstanding of the issue of closed meetings.
The mandatory disclosure according to the Privacy Act is a highly important instrument of transparency. In relation to this, the information included that all the national ethnic minority self-governments have their own websites; this, however, does not hold for the ethnic minority self-governments at regional and local level. Characteristically, ethnic minority self-governments publish their data of public interest and data accessible on public interest grounds on the websites maintained by local governments or national self-governments; the range of these data is typically minimal, covering mostly the basic data of the representatives and of the self-government only; in some cases, additional data, such as protocols, rules of organisation and operation are also accessible, but these data are rarely updated. (*NAIH-3383/2021*)

9.3. Disclosure of personal data during online public hearings

Many municipalities provided a possibility for citizens and the local community to participate in local affairs and the development of decisions even during the emergency and they held online public hearings using the live streaming function of social media.

Similarly to public hearings in person, in the course of the preparation of the online public hearing, interested persons could submit their questions and proposals to the mayor's office in writing, requesting a serial number. The complainant acted as described, but had not reckoned with the fact that in the course of the online public hearing, when his submission was read and discussed, his name and address was continuously displayed on the screen. He requested the erasure of these data from the video recording, as well as the protocol, but the municipality rejected his request on the grounds that the public hearing is a public meeting of the body of representatives, constituents – present there upon prior registration – state their names and their personal observations on local public affairs and they also indicate the area where they come from and eventually they provide their address. The lawfulness of the processing of personal data in the course of a public hearing is provided by GDPR Article 6(1)(e). A protocol is drawn up on the meeting, which is accessible to the public. According to the Authority's position, the fact that some personal data are mentioned at a public meeting of the body of representatives does not result in the personal data becoming accessible on grounds of public interest merely because of this fact.

Earlier in his statement issued under ABI-1332/A/2006-5, the Data Protection Commissioner explained that even their (formally) given consent does not provide a basis for the recording and disclosure of the personal data of data subjects interested in and present at the meeting of the body of representatives, as the processing of data does not comply with the principle of purpose limitation.

At the same time, a contributor concerned, if given the floor, has the right to decide whether they wish to speak anonymously or otherwise, and he needs to be informed in advance that his contribution will be recorded in the protocol. If the response to his contribution is sent in writing, it is not expedient to record and to store the name and address of the data subject in the protocol accessible to the public. According to the position of the Authority, the accessibility of the public hearing is assessed the same way as a public meeting of the body of representatives. Taking this into account and fully ensuring the protection of privacy, private secrets and personality rights, there is no obstacle to the live streaming of this special form of the meeting of the body of representatives whether through the official website of the municipality or on a social media page. The Authority shared the opinion of the municipality according to which there is no fundamental difference between the processing of data related to traditional public hearings with presence in person and online public hearings. However, the Authority underlined: a citizen participating in a public hearing in person can give his consent or object to displaying and disclosing his personal data in the protocol in person, while participants in the online space cannot enforce their right to informational self-determination or can do so only with difficulty. With regard to the processing of data related to an online public hearing, it is the express opinion of the Authority that the controller must act more carefully with regard to the enforcement of the right to informational self-determination, because citizens are in a much more exposed position in the online space than in the case of a traditional public hearing in terms of the processing of their personal data; it follows that information by the controller concerning the processing of the data and guaranteeing data subject rights are more important and have greater significance. (*NAIH-4447/2021*)

9.4. Electronic disclosure

In 2021, about 30% of the notifications sent to the Authority in cases related to the freedom of information concerned inadequate electronic disclosure by organs discharging public duties; most of the time, the websites of local governments and the websites of business organisations in municipal ownership were involved: the vast majority of the notifications concerned problematic disclosure of data related to the activities, operation and financial management of the organ (documents of the body of representatives, municipal decrees, contracts, public procurements, applications, etc.). In the course of its investigation, the Authority contacts the organ concerned in every case and whenever necessary calls upon it to immediately remedy the established infringement of the law, which is generally complied with sooner or later. It should, however, be mentioned that in view of the emergency caused by the virus, the bodies of representatives had no meetings for months in most settlements in 2021. In such cases, the municipalities notified the Authority that no meetings of the body of representatives took place in the period indicated, instead decisions by the mayor brought during the period of the emergency[10] are accessible on the websites.

10. Access to documents seized in criminal proceedings

[10] Pursuant to Article 46(4) of Act CXXVIII of 2011 on Disaster Management and the Amendment of Certain Related Acts, *"in an emergency, the duties and powers of the body of representatives of the municipal government, the metropolitan and county assemblies shall be exercised by the mayor, the Lord Mayor or the President of the county assembly. In this context, he may not take a position on the reorganisation, closure, scope of supply or services of a local government institution if the service also affects the municipality."*

A complainant objected to the fact that the National Tax and Customs Administration (hereinafter: NAV) did not fulfil his request for data of public interest when he wished to access documents seized in relation to the financial management of a municipality. When contacted by the Authority, NAV presented that with regard to the documents and data requested by the petitioner, the controller is the municipality, while NAV is the authority conducting the investigation in the case, and holds the documents as documents seized as evidence in accordance with the rules of Act CX of 2017 on Criminal Procedures (hereinafter: Criminal Procedures Act). Pursuant to Section 110(1) of the Criminal Procedures Act, information can be provided to whoever has a legal interest in the conduct of the procedure or its outcome; according to their position, the request for data of public interest by the petitioner cannot be regarded as a legal interest. Pursuant to Section 110(2) of the Criminal Procedures Act, permission to access the documents of the case or disclose of the requested information is authorised by the head of the public prosecutor's office before indictment and by the chair of the court acting in the case thereafter, once legal interest is verified. In view of this, even if the petitioner verified his legal interest, NAV would not be authorised to issue the documents, of which only the head of the public prosecutor's office could decide. NAV also explained that based on Section 313(3) of the Criminal Procedures Act, the municipality subject to the seizure is entitled to access the documents seized in the course of the criminal procedure in part or in full and to produce copies thereof to the extent and for the time necessary for the discharge of its tasks. In view of this, there is an opportunity for the municipality to request the investigative authority to access documents and to prepare copies, if it does not hold the hard copies or electronic copies of the documents constituting the subject matter of the procedure for the purpose of meetings its obligation to issue data of public interest. This means that the controller municipality is authorised to issue the data of public interest or data accessible on public interest grounds included in the documents, but the municipality has to contact the investigative authority to see whether the issue of the requested data violates the public interest in successfully completing the criminal procedure. In the given case, the investigative authority stated that with respect to a certain part of the data, the interests of the investigation in progress would be substantially jeopardised based on the Privacy Act and Section 109(1)(e) of the Criminal Procedures Act, if the public was informed earlier of the relevant data than the persons affected in the criminal procedure. With regard to another part of the data (the contracts concluded by the municipality), the public interest in successfully completing the criminal procedure would not be violated by access to the data of public interest.

According to the governing court case law (Pfv. IV. 20.455/2015/4., 2.Pf.20.559/2011), the mere fact in relation to the data of public interest processed in the course of a criminal procedure that the investigation report requested to be issued containing data of public interest undisputedly processed by the organ discharging public duties was requested by the investigative authority and thus it became part of the criminal file may not automatically mean a restriction of access and the rejection of the request for data of public interest. The documents requested to be issued through the request for data of public interest were obviously not generated in the criminal procedure, instead they were the basis for lodging a report. The quality of independent data processed by the controller should not be influenced by the fact that they were used in a procedure. At the same time, they do not have the uniqueness, that would preclude disposal over these data because of their use in criminal proceedings.. The controller may not refer to the interests of a procedure conducted by a third person in relation to documents containing information in the public interest, because there is no legal regulation that would prohibit the issue of documents used in the given procedure but not generated in the same procedure by the original controller in response to a request for data of public interest. Therefore, the mere fact that simply because the data of public interest requested to be issued was seized and used in a criminal procedure does not mean that the data would lose its character of being in the public interest, hence it is not possible to restrict access to them and to reject their request for data by automatic reference to this,.

As according to NAV's statement, public interest in the successful completion of the criminal procedure would not be violated by public access to the contract requested by way of the request for data of public interest, these data can be accessed by the public and the municipality may request the investigative authority to make copies of the seized documents, the Authority called upon the municipality concerned to make the requested data available to the petitioner, unless there are other factors lawfully restricting public access. Having asked for copies of the documents requested in the request for data of public interest, the municipality sent the documents to the petitioner. (*NAIH-4003/2021*)

11. Public disclosure of environmental information

In the case of data on the environment, the protection of trade secrets is a highly frequent reference for restricting access. An association for the protection of the environment requested the documents *Noise map* and *Action plan to reduce noise* of the local gigantic plant from the county government office. Fulfilling the data request was rejected with reference to the protection of trade secrets (the cover sheet of the *Noise map* says that "*The documentation contains information qualifying as trade secrets*" and the header of each page included that "*For use by the authorities only*"), at the same time, nobody disputed that the Noise map contained data of public interest or data accessible on public interest grounds. According to the principle set forth in Section 30(1) of the Privacy Act and the consistent practice of the Authority and the courts, declaring entire documents automatically as trade secrets is unacceptable, instead the document must be examined and it must be established exactly which data count as trade secrets. Based on Article 4(4) of the Aarhus Convention promulgated with Section 2 of Act LXXXI of 2001 on the Promulgation of the Aarhus Convention, a request for environmental information may be refused, if the disclosure would adversely affect the confidentiality of commercial and industrial information where such

confidentiality is protected by law in the light of a legitimate economic interest, in this context, however, information on emissions, which is relevant for the protection of the environment, must be disclosed, or the interests of a third party, which has supplied requested information without being under a duty or legal obligation to so , or giving consent to the release of the material.

However, these reasons are to be interpreted *stricto sensu,* taking into account the public interest in accessibility, as well as to what extent the information requested relates to emissions to the environment. The government office has therefore to consider the collision between the protection of the interest of the public and the protection of private interest. Section 30(5) of the Privacy Act states that the grounds for refusal must be interpreted restrictively and the request for access to data of public interest shall only be refused, if the underlying public interest outweighs the public interest of allowing access to the data of public interest (overriding public interest test). Therefore, the government office violated the right of the notifier to access data of public interest and data accessible on public interest grounds, when it failed to fulfil the request for the action plan and furthermore when it automatically qualified the entire Noise map as a trade secret without its detailed examination, hence it could not possibly have carried out the assessment of data qualifying as trade secrets as required in Section 30(5) of the Privacy Act; for these reasons the Authority called upon it to immediately send the Action plan to the notifier and establish exactly which data of the Noise map qualify as trade secrets, if necessary, invite the statement of the company concerned and carry out the assessment as required in Section 30(5) of the Privacy Act, and comply with the request for data for which, as a result of the foregoing assessment, it concludes that disclosure cannot be restricted. The government office complied with the Authority's call and issued the Action plan to the notifier together with the public version of the Noise map, which is almost identical with the original version. (*NAIH-4011/2021*)

The Authority took successful action in two cases where environmental NGOs objected to the cost reimbursement charged for fulfilling their data requests. In the first case, the fact that the NGO requesting the data asked for environmental information from the competent government office paid an important role. The Authority found the cost reimbursement of 185,321 forints unjustified for several reasons. By far the greater part of the requested documents contained information concerning emissions to the environment, access to which according to Section 12(5) of Act LIII of 1995 on the General Rules of the Protection of the Environment cannot be refused on the grounds of being trade secrets. Furthermore, the 47 working hours calculated for filtering out inaccessible data in the documents requested by the petitioner was unjustified because the requested documents in actual fact contained very few pages where personal data could occur (they included largely tables, measurement data and protocols and the examination of such pages could not possibly take about 4 minutes per page). Finally, *even in the case of expending 47 working hours as alleged, the disproportionate use of labour necessary for the discharge of the basic activities of the government office would not take place in view of the huge headcount of the government office. In its call, the Authority explained that if responding to data requests to be fulfilled causes disproportionate difficulties for an organisational unit while carrying out its basic activities, then first – if possible, particularly in the case of larger organisations – a solution to discharging both the basic activities and the free fulfilment of data requests has to be resolved through reorganisation within the organ.* (*NAIH-5797/2021*)

In the case just presented, as well as in another case launched on the basis of the notification of another environmental NGO, unlawfully charging cost reimbursement was due, *inter alia*, to the wrong interpretation of the law according to which "*if fulfilling a request for data of public interest exceeds 4 working hours that can be regarded as disproportionate*". In its investigations, the Authority consistently underlines that the time taken to carry out a task qualifies as disproportionate not because it exceeds 4 hours, it is also necessary to make use of labour needed to discharging the basic activities to fulfil the data request and that should take place to a disproportionate extent. The use of labour is disproportionate, if it renders the discharge of the basic activities of the organ discharging public tasks substantially more difficult or impossible. (*NAIH-4508/2021*)

12. Publicity of applications

In 2021, there was a large number of complaints related to the transparency of investments and grants for the purposes of tourism. In the Authority's experience, the grounds for restricting access to applications was the recurrent reference to trade secrets or support for a decision.

12.1. Trade secret

the full application documents of the projects on its funding commitment list that have been awarded over HUF 1 billion and the winning projects on the decision list for the development of existing hotels with high capacity and the establishment of new hotels
A journalist requested from Kisfaludy2030 Turisztikai Fejlesztő Nonprofit Zrt. the entire application documentation of the winning applications on the decision list of projects winning grants in access of 1 billion forints and the development of high-capacity existing hotels and the establishment of new hotels. The company did not issue the data declaring them to be trade secrets. The company did not issue the list of the non-winning applications, not included in the decision list of *Kisfaludy accommodation development construction – Development of high-capacity existing hotels and the establishment of new hotels* (name of applicant, the identification of the project and the

requested amount) to the notifier because in its view, no commitment according to Annex 1. Section III.4. of the Privacy Act took place.

According to the consistent practice of the Authority and of the courts, the requested documents of the application must be examined one by one and established exactly which are data qualifying as trade secret, whose disclosure would give rise to disproportionate violation of interest. There is a substantial public interest in the transparency of hotel development and hotel establishment applications and the application procedures involving substantial public funds are of great interest to the public, hence the public has a legitimate demand to have access to at least the basics on what taxpayers' money is spent, and whether the submitted applications meet the expectations published in the invitation to apply. The data requested on non-winning applications are also either data of public interest or data accessible on the grounds of public interest based on Section 3 of the State Aid Transparency Act.

Upon the Authority's call, the company finally asked the beneficiaries to provide information on which data of their application they qualify as trade secrets. In general, it was found that a very large number of the beneficiaries regarded the application datasheets, the executive summary of the business plan, the situation assessment, the objectives, the results expected, the section concerning the current status from the part presenting the project, the main figures of the project's budget and the scheduling of the project as accessible. In other words, the range of data assessed to be issuable by the beneficiaries was much wider than the range of data originally assessed as accessible to the public by the company – this was particularly spectacular in the case of the business plan.

As to fulfilling data requests in the future, the company has to draw the conclusion that instead of excluding public access to their full application documentation, the data thereof have to be examined in detail, statements of the beneficiaries have to be obtained, which is the only way to declare on reasonable grounds, public access to which data qualifying as trade secrets would result in disproportionate injury to commercial activities and all this has to be substantiated towards those requesting data with detailed justification. Finally, the company complied with the Authority's calls, however, the data never reached the person requesting them as his e-mail address changed in the meantime. The company did not send the data to the new e-mail address, because of this the Authority recommended that the person requesting the data submit the request again. (*NAIH-653/2021*)

There was another journalist, who submitted a request for data of public interest concerning the requests of specific companies sent to the invitation to participate in the Baross-19-NMG/2 project and their detailed documentation to CED Közép-európai Gazdaságfejlesztési Hálózat Nonprofit Kft. The company declared about all the application documentation that "*they are not accessible to the public with regard to any of their parts*". In its call, the Authority underlined that in addition to explaining which data of the requested application materials qualify as trade secret and why, it is also necessary to explain the disclosure of which of the data qualifying as trade secret would cause disproportionate injury to the holder of the secrets. (*NAIH-6850/2021*)

12.2. Data for decision support

Organs discharging public duties frequently restrict access to data related to the evaluation of applications with reference to Section 27(5)-(6) of the Privacy Act, without giving adequately detailed justification for the refusal of the data request.

The mayor's office of a large rural town refused a data request on the application documentations, the number of those receiving personnel-related benefits in the projects and the amount of such benefits, justifying its refusal by referring to the relevant provision of the legislation only. In spite of being called upon by the Authority, they justified the restriction of access with regard to the blocked data as "not relevant to the project" in the documents subsequently sent to the person requesting the data. (*NAIH-1338/2021*)

The Authority called the attention of Emberi Erőforrás Támogatáskezelő (Human Resources Support Manager, hereinafter: EET) to the fact that the information provided to a person requesting data in relation to refusing to grant the request for data must contain the factual and legal reasons substantiating it. These reasons should be the results of examinations of form and content. A refusal supported with the appropriate reasons greatly contributes to the person requesting data becoming genuinely aware and understand why his request was not fulfilled. In addition, based on such information, he will be able to bring the right decision concerning an eventual legal remedy as well. The Authority established that EET did not act appropriately in refusing the request for data of public interest when it failed to provide a detailed justification. (*NAIH-272/2021*)

The Authority called the attention of the Ministry of Innovation and Technology (hereinafter: ITM) to the same issue in the case when the notifier complained that ITM did not fully meet his data requests related to OTKA applications submitted and evaluated in 2020. The data request concerned the list of applications reflecting the recommended order, submitted by OTKA main advisory board to ITM; also, the notifier requested the letters, memos and meeting protocols, which played a role in that the list of applications reflecting ITM's decision did not correspond with the list of applications submitted to ITM by the OTKA main advisory board. ITM justified the restriction of public access (already in the course of the investigation) by claiming that a public discussion on the collective professional opinion of expert groups would jeopardize the purity of future procedures and access to the internal correspondence

concomitant with day-to-day operational work would jeopardise ITM's discharge of its tasks and exercise of its powers specified by law, free from unauthorized external influence and at the same time, the free expression of opinion by ITM employees when preparing for decisions, as well as the efficiency of the work in the future.

ITM failed to comply with the Authority's call; because of this, a NAIH report was published on the case[11], which underlined: access to the data on which decisions are founded can be restricted in properly justified cases; in the present case, however, substantial public interest was vested in the accessibility of the requested data, because the alteration of the order recommended by OTKA's main advisory board – and the usual procedural order – was of major interest to the public, as well as to the scientific community and the requested data were indispensable sources of the transparency of the procedure in this application procedure, particularly with regard to the protocols of meetings. Of the documents on which the decision was based, only the data concerning the methods of evaluation, the criteria of evaluation and the evaluation of the winning applications have to be issued and only those which would explain the differences from the order recommended by OTKA's main advisory board. The employees of organs discharging public tasks, acting within the responsibilities and powers of these organs, have good reason to expect that, since it is a principle laid down in the Fundamental Law, data concerning the method of evaluation of applications financed by public funds, the criteria of evaluation and the evaluation of the winning applications may be made accessible in the documents produced by them, particularly if they are the only sources of the requested information. (*NAIH-2329/2021*)

12.3. Disclosure of data concerning applications

A county self-government published a contract of support related to an EU application procedure, in which the name, position, signature, sign of the person signing the contract and the name, working place, phone number and e-mail address of the contact person were disclosed to the public. In its request for consultation, the self-government requested the Authority's statement whether the data subject signing the contract who was otherwise a senior employee of an organ discharging public tasks could request the blocking of the above data.

The person signing the contract representing an organ discharging public tasks carried out a public task when he signed the contract, hence the name, position, signature and sign of this person qualifies as personal data accessible on public interest grounds.

The name, working place, phone number and e-mail address of the contact person acting on behalf of the self-government can be regarded as data accessible on public interest grounds if he has a legal relationship of public service.

The publication of the contract containing personal data accessible on public interest grounds took place in accordance with the requirements of the Privacy Act, consequently the data subject may not request the blocking of these data. Act CXXII of 2009 on the More Economical Operation of Business Organisations in Public Ownership (hereinafter: Economical Operation Act) specifies the data, which the Széchenyi Programiroda Tanácsadó és Szolgáltató Nonprofit Kft. has to disclose. Based on Section 2(1) of the Economical Operation Act, the names, positions and signatures of the senior managers of this company are also data accessible on public interest grounds, while the data of the company's contact person have to be disclosed, if they were generated in relation to the discharge of public tasks, such as in this case in the course of concluding the contract. The Authority does not consider it necessary to display the contact data of the company's contact person on the website as. (*NAIH-6645/2021*)

A municipality intended to publish the records of contracts and applications of less than 5 million forints on the city's website in the form of individual disclosure and requested the Authority's position about its lawfulness. The Authority expounded that it greatly supports the decision of the municipality, regards it as exemplary from the viewpoint of enforcing the fundamental right to access data of public interest, and thinks that other municipalities should follow it. At the same time, it called attention to the fact that in the course of the disclosure, personal data, which do not qualify as data accessible on public interest grounds, classified data, data according to Act LIV of 2018 on the Protection of Trade Secrets and other data subject to restricted accessibility must be blocked. The Authority recommended that the decision be made by the municipality in the form of a municipal decree, perhaps within the same framework as the rules mandatorily enacted in accordance with Section 30(6) of the Privacy Act. (*NAIH-5630-2/2021*)

In another investigation, the complainant objected to the fact that the data concerning the Széchenyi 2020 project can only be downloaded in a limited way extending to 300 hits and not for the entire database on the website www.palyazat.gov.hu in the supported project search function, hence he requested specific data of all the Széchenyi 2020 projects (operative programme, sub-measure, name of the applicant, project name, project description, settlement, date of the decision to support, brief summary of the project, aid awarded, source, country, intervention

[11] https://naih.hu/files/Infoszab_jelentes_NAIH-2329-2021.pdf

category, EU co-financing rate, total cost of the project, commencement and end of implementation) to be sent in .csv format.

The Prime Minister's Office refused to fulfil the request, because according to their position, the data request was governed by a statement in Constitutional Court Decision 13/2019 (IV.8) AB, according to which the controller is not under an obligation to create a new set of data filtered according to specific criteria and the person requesting the data may not demand that somebody else should collate the accessible data for him. According to the position of the Authority, however, Section 33(1) of the Privacy Act stipulates that access to data of the public interest, the publication of which is mandatory, shall be made available to the general public without personal identification on the internet website, without any restriction, in digital format, suitable for being printed or copied, without any partial loss or distortion of data, free of charge including perusal, downloading, printing, copying and transmitting through a network. (*NAIH-4539-13/2021*)

A Member of the European Parliament submitted a data request to Magyar Turisztikai Ügynökség Zrt. on which providers of accommodation benefited from the aid provided pursuant Government Decree 523/2020. (XI. 25.) on the partial compensation to accommodation providers for loss of revenue arising from to cancelled reservations and to what extent.

The company indicated the accessible source of the data, which is a list of beneficiaries, which included the beneficiaries of other applications also. The company gave the criteria of collation to the person requesting the data as follows: *"The data requested by the person can be collated from the list concerning the circle of applicants, objective and amounts of other support provided by Kisfaludy 2030 Turisztikai Fejlesztő Zrt., taking into account that the data that can be read from the invitations to apply published also on the website referred to"*.

In its call, the Authority underlined that it is not an obligation for the person requesting the data to search for the document, in which he may find the criteria on the basis of which, he may collate the requested data. If the person requesting the data is directed to a public data set, he must also be given unambiguous criteria for collation whereby he can select the requested data from the data set without consideration, simply and unambiguously. The Authority also emphasized that the accessibility of information concerning who gets public funds and how much as "basic data" relating to the spending of public funds is above any dispute. Finally, the company issued the requested data to the person who requested them in accordance with the Authority's calls. (*NAIH-2361/2021*)

13. Preparation for legislation

In 2021, NAIH received a group notification from a complainant, who objected to the practice of ten ministries in fulfilling data request on the one hand, and the 45-day deadline for providing information applicable during the period of the epidemic, on the other hand. Originally, the notifier requested the various ministries to disclose impact assessment reports concerning legal regulations relating to the 2014-2018 governmental cycle, as well as other impact assessment documents. Based on Decree 2/2016. (IV. 29.) MvM by the Prime Minister's Office on preliminary and subsequent impact assessments, an impact assessment is a process of collecting and analysing information whose primary goal is to improve the efficiency of regulation, including the examination of the likely consequences of the regulation, in sufficient detail adjusted to the assumed impacts of the regulation over a relevant time horizon and then summarising the results with a view to facilitating informed decision-making.

The ministries did not make the requested documents accessible. In their respective responses to being contacted by the Authority, it can be established that the Ministry of Human Resources, the Ministry of Justice, the Prime Minister's Cabinet Office and the *Ministry of Foreign Affairs and Trade* did not have the data of public interest requested by the notifier as they did not compile impact assessment reports.

The Ministry of the Interior argues that, based on the balancing of the public interest in the disclosure of the data and the public interest in the exclusion of disclosure, the content of the impact assessment reports also influences the decision-making processes of the legislator concerned, the Minister and the Government, and the processes cannot be considered closed at the end of a year, because in such cases, an informed decision can only be made through the comparison of several years of data and experience, and therefore the data cannot be disclosed even in numerical terms.

The Ministry of the Interior argues that, based on assessing public interest in accessing the data and in excluding their accessibility, the content of the impact assessment reports also influences the decision-making processes of the legislator concerned, the minister and the Government, and these processes cannot be regarded as closed by the end of a year because in such cases, an informed decision can only be made through the comparison of data over several years and experiences, hence the data cannot be made available to the public even in their quantitative aspects. NAIH did not accept this justification as the impact assessment reports only contain aggregated statistics for the given year, the practical experiences concerning the preparation, use and utilisation of impact assessments and recommendations concerning the improvement of impact assessment activities. Therefore, they should not be

considered as a basis for one or more government decisions, particularly since the statistics are not used as a basis for decision-making or legislation.

The Prime Minister's Office refused to issue the impact assessment reports claiming that the data in the impact assessment reports qualify as data supporting the decisions related to the operation and improvement of the impact assessment system.

The Authority issued a report in the case based on Section 59(1) of the Privacy Act, particularly in view of the fact that the contacted ministries exhibited substantially different practices as learned in relation to the case under study.[12]

[12] https://naih.hu/files/Infoszab_jelentes_NAIH_1227_7_2021.pdf