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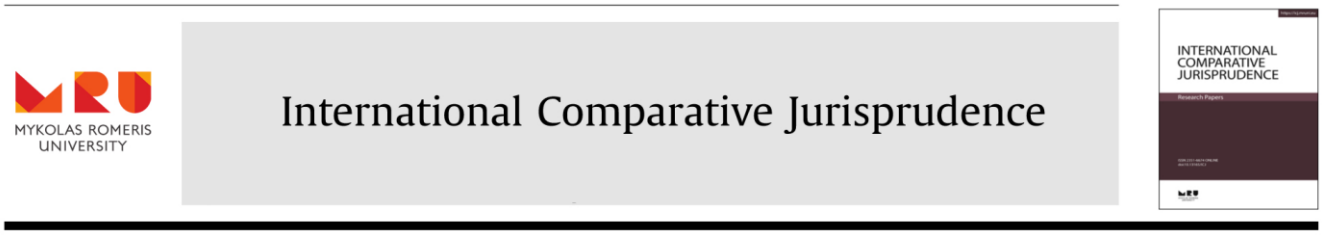

The Constitutional Right To Information In The Czech Republic: Theory And Practice

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Abstract. This article deals both with the legal regulation and practical experience with the right to free access to information in the Czech Republic. It presents basic features of constitutional and legal regulation. The issue of the effectiveness of the mechanisms available to an applicant for information in the event that the obliged entity does not want to provide said information, as well as the problem of conflict with the right to privacy (in the case of providing information on public employees' salaries are discussed in detail. The article illustrates how the right to free access to information is very widely used in the Czech Republic, in particular due to liberal legal regulation and the very friendly approach of administrative courts, without the need for a robust constitutional basis. However, maintaining this situation is also dependent on the Constitutional Court, which has recently become more restrictive when the right to free access to information conflicts with other rights.

Keywords: right to information; Czech Republic; open data; public employees; information order

Introduction

The purpose of this article is to introduce the legal regulation and practical experience with the functioning of the right to free access to information in the Czech Republic. Firstly, a relatively fragmentary constitutional framework governing this right is presented, followed by an overview of the basic parameters of the Act on Free Access to Information, including: a list of obliged entities; the definition of information; the provision of which can/cannot be requested; formal conditions an application must comply with; the issue of cost recovery; and review mechanisms available to an applicant if the application is refused. The next section deals with three specific practical issues encountered in the application process which have not yet been fully resolved: the length of the appeal process, the issue of disclosure of public employee salary information, and unclear boundaries between public institutions and institutions that are defined as private but are actually controlled by the government.

1. Constitutional framework of the right to information

The Charter of Fundamental Rights and Freedoms is the basic catalog of human rights in the Czech Republic. It was passed in 1991 by the former Federal Parliament as an amendment to the Czechoslovak Constitution of the Communist period which was still in effect at that time. One year later, the decision was made to split Czechoslovakia and as part of preparations for the establishment of an independent Czech Republic, the decision was made (influenced by relative time constraints) that the current catalog of rights would remain in effect (Broz & Chmel, 2016, p. 42-44). Thus, the Constitution of the independent Czech Republic - in effect since 1 January 1993 - in its Articles 3 and 112, incorporates the Charter of Fundamental Rights and Freedoms into the constitutional order of the Czech Republic, which means that it has the same legal force as the Constitution itself.

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Article 17 of the Charter, which introduces the § entitled "Political Rights" (Title Two, § Two), enshrines freedom of expression and the right to information:

> *(1) Freedom of expression and the right to information are guaranteed.*
> *(2) Everyone has the right to express his/her views and opinions in words, in writing, in print, in images or in any other way, as well as freely seek, receive and disseminate ideas and information regardless of national borders.*
> *(3) Censorship is inadmissible.*
> *(4) Freedom of expression and the right to seek and disseminate information can be restricted by law if it is a measure in a democratic society necessary to protect the rights and freedoms of others, national security, public security, public health and morality.*
> *(5) Public authorities and local authorities are required to provide adequate information on their activities in an appropriate manner. Terms and conditions are set by the law.*

Thus, the right to information is guaranteed in the first paragraph. Nevertheless, controversies still arise as to what this actually means. In a narrower definition the Charter merely includes the right to disseminate and seek information, but without a positive obligation on the part of the state. This interpretation is supported by the fact that the article is listed among the classical liberal freedoms that make up the first generation of human rights and, according to the traditional approach, they are negative in nature, i.e. they only protect against a state interference, but do not guarantee any right to fulfillment on the part of state. Another argument may also be a historical interpretation, working with the intention of the creators of the Charter (Pavlíček et al., 1999, p. 177-189). This is also supported by the fact that, for the period of the first eight years following the adoption of the new Charter, no law existed for free access to information, and there was no criticism put forward of this reality as an unconstitutional situation. The obligation to "provide adequate information on its activities", as set out in paragraph 5, does not require full access to information; it only sets the requirement to inform to the public, for example through press releases or annual activity reports.

On the other hand, a broader definition of the right to information guaranteed by the Article 17 (1) considers free access to information to be a component of this constitutionally guaranteed right (cf. Korbel et al., 2005, p. 32-42). This approach of using an evolutive interpretation of human rights catalogs may be an argument in favor of this idea; it requires the reflection on developments towards an information society, where information is essential both for the development of an individual and for the democratic process. The Charter itself, in Article 22, lays down an interpretative rule, according to which "the lawful regulation of all political rights and freedoms and its interpretation and application must enable and protect the free competition of political forces in a democratic society", which may lead to an analogous conclusion that in case of any doubt, it is necessary to favor a greater scope of political rights. Moreover, under the influence of the case-law of the European Court of Human Rights ("ECHR"), it is no longer possible to make a sharp distinction between rights with a negative and positive status, because according to this interpretation, which is also taken over by the Czech Constitutional Court[2], even classical liberal freedoms imply positive commitments on the part of the state (Kmec et al., 2012, p. 82-89). Thus, in the end this broader definition prevailed in the jurisdiction of the Constitutional Court (cf. Czech Constitutional Court judgment of 5 May 2010, file no. I.ÚS 1885/09).

In practice, however, this dispute is of little importance. It might manifest if a dispute arises as to whether legislation is in line with constitutional guarantees, i.e. whether it contains any disproportionate constraints, and therein would arise the fundamental question: are there any constitutional guarantees? However, such a dispute

[2] Although not explicitly stated in the Constitution, the Constitutional Court considers international treaties on human rights, by which the Czech Republic is bound, to be a part of the constitutional order and thus confers to them the same legal force as the Constitution, the Charter and other constitutional laws. This also logically strengthens the national significance of the ECHR jurisdiction-- if the Constitutional Court applies the European Convention on Human Rights, it must also take into account its interpretations by the ECHR.

has not yet occurred, obviously also thanks to the fact that legislation is relatively liberal and accommodating compared to the constitutional basis.

In addition to the general provision, the Charter of Fundamental Rights and Freedoms also guarantees "the right to timely and complete information on the state of the environment and natural resources" in Article 35, which is also implemented by particular legal regulation. However, this special right goes beyond the scope of this paper and will not be dealt with in detail.

2. Legal regulation of the right to information

A comprehensive legal regulation of the right of access to information is governed by the Act No. 106/1999 Coll., On Free Access to Information ("Act"), adopted in May 1999. For further interpretations it is worth mentioning that this act was based on a parliamentary, not governmental, bill. It was passed during the period of the so-called "opposition treaty", which at that time guaranteed the single-party minority government comprised of Social Democrats the tolerance of the strongest opposition party. It did not, however, guarantee the government control of the legislative process. This might give the impression that the law was adopted regardless of the will of the government, and could therefore be more liberal than similar laws created through the normal processes and under greater control of ministerial officials and government parties (and in turn resistant to greater control by the public). This is countered by the fact that the vast majority of government MPs supported this bill and it only was approved thanks to their votes.[3]

The Act came into effect on 1 January 2000, and therefore has been valid for almost 20 years. During this time, it has been amended 19 times; although this number of amendments appears high, the basic principles of the law and its helpfulness remained intact. To the contrary, most of the amendments, unless purely technical changes due to amendments to other laws, responded to the problems reflected in the application practice, attempting to remove them and tending to support the rights of the applicants for information. An obvious reason may be the relatively high importance attached to this Act by civil society and the media; any attempt to limit it causes an immediate negative reaction. Today, this Act also incorporates relevant EU legislation[4].

The personal scope of the Act is defined by the term "obliged entities" (§ 2). These are primarily "state authorities, local and regional authorities and their bodies and public institutions", which are "obliged to provide information relating to their competence". In addition to these, there are also other "entities entrusted by the law with decision making on the rights, legally protected interests or obligations of natural or legal persons in the field of public administration" such as notaries, who are obliged to inform "only within the extent of their decision-making activity". Any natural or legal person (§ 3 (1)), including a foreigner, may be the applicant for information.

The term information means "any content or any part thereof in any form, recorded on any medium" (§ 3 (3)); it is therefore irrelevant whether the information is in paper form or in electronic form and, in addition to written processing, it may also include an audiovisual record. However, it must be existing information: the law explicitly states that the obligation to provide information "does not concern queries about opinions, future decisions and the creation of new information" (§ 2 (4)).

An application for information can be both verbal and written; in both cases the obliged entity is obliged to process it. However, the review mechanisms offered by the law in the event that the applicant does not obtain the

[3] Altogether 124 out of 182 deputies present voted for it, including 70 deputies of the governmental Social Democrats, the remaining 4 being absent. A simple majority, i.e. 92 votes was needed for approval. Source: http://www.psp.cz/sqw/hlasy.sqw?G=13374.

[4] In particular, Directive 2003/98 / EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information and Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending the Directive 2003/98/EC on re-use of public sector information.

information or does not consider the reply to be sufficient can only be used in the case of a written application (§ 13 (2)). Therefore, the admissibility of an oral form can be considered primarily as an effort of the law not to thwart a possibility of informal procedure of applicants or obliged entities; in case of problematic or controversial applications, however, the written form is the rule in practice. This is also adhered to in case of the use of simple electronic mail, without the need to attach a recognized electronic signature, which is otherwise required when communicating with public authorities (but is not yet widespread, so that only a small number of people have it).

A natural person must state his name, surname, date of birth and address of permanent residence in his application; in the case of an application made by a legal entity the name, identification number of the entity and the address of the registered office are required (§ 14 (2)). The original wording of the Act contained a general requirement that the application must make it clear who filed it, but that the simple inclusion of an email address was sufficient to fulfill this requirement. In practice, this created problems, particularly in situations where the obliged entity issued decisions (e.g. on reimbursement of costs, or the rejection of applications) because the addressee was not sufficiently identified. Therefore, in 2006 this new regulation was adopted (Act No. 61/2006 Coll.). It is important to note that, the date of birth is used only for identifying purposes; the law does not bind the possibility of requesting information with reaching legal age or any other specific age restrictions.

The law contains an exhaustive list of reasons to refuse requests. The most common general reasons include the protection of classified information (§ 7), the protection of personal data (§ 8a and 10) and the protection of business secrets (§ 9). Furthermore, the law includes a list of more specifically identified reasons for rejecting an application (§ 11): for example, information on ongoing criminal proceedings and general decision-making activities of courts is not provided, with the exception of judgments, information on the preparation and conduct of Supreme Audit Office inspections, information protected by third party copyright, etc. If the request concerns a wider range of information and the reason for refusal can only be applied to some of them, the obliged entity must provide at least the remainder (§ 12). In practice this is addressed by redacting some of the data before a document is provided (cf. Furek et al., 2016, p. 626-627).

If any of these reasons are given the obliged entity shall issue a decision to reject the application or its part (§ 15). Otherwise, it is obliged to provide the requested information within 15 days (§ 14 (5) (d)). For serious reasons, especially when information is difficult to locate, this period may be extended by a maximum of 10 days.

In principle, the provision of information is free of charge, except for the cost of making copies, the technical data carriage, and the sending of information to the applicant. A specific exception is the possibility to claim payment "for an extremely extensive search for information" (§ 17 (1)). This provision is somewhat vague and has not been clarified by judicial practice (Antoš, 2012, p. 152-153). Nevertheless, the Supreme Administrative Court requires that the obliged entities do not apply this provision mechanically, e.g. purely according to time consumption, but in the context of their conditions, and that they always justify why searching for information in a particular case is so extremely extensive (Supreme Administrative Court judgment of 20 October 2016, file No. 5 As 35 / 2016-25). If the applicant does not pay the required costs, the application is suspended after 60 days (§ 17 (5)).

Review mechanisms are an essential condition for the efficient operation of the system as a whole. They are based on the possibility to approach the superior body of the respective obliged entity, either with the appeal (§ 16), if the decision to reject the complaint is challenged, or with a complaint about the procedure for processing the request for information (§ 16a), which may relate to other irregularity (inactivity, unjustified claims for reimbursement of costs etc.). The superior authority may cancel the decision to reject the application, order the obliged entity to process the request, change or cancel the required payment, etc. If the applicant fails, he may also apply to the court with an administrative action; in the first instance, it is decided by the regional courts, against decisions of which a cassation complaint to the Supreme Administrative Court is also admissible and, once all the remedies have been exhausted, even a constitutional complaint, which is decided by the Constitutional Court.

Relatively recently, the Act has also been extended to include the issue of open data. Now, obliged entities must actively publish in an open data form - preferably in a machine-readable format - the information contained in their registers, which is legally accessible to everyone and can be used for business or other gainful activities, for study or scientific purposes, or the public control of the obliged entities. Obviously there is a huge amount of such information, so the law stipulates that specific data sets to be published in this way are determined by the government in a regulation. At present, there are 24 areas on the regulation list, including information from public registers of legal entities and natural persons, information from the national timetable information system, and job vacancy records (cf. Government Order No. 425/2016 Coll., on a list of information published as open data).

3. Problem areas and how to resolve them

In my opinion, the adoption of the Freedom of Information Act can be considered one of the most significant milestones on the Czech path to liberal democracy, as it has provided a powerful tool for controlling public power both to individuals and journalists, as well as to non-profit organizations and other watchdogs of democracy. However, over the course of the 20 years of its existence, some weaknesses and bottlenecks have emerged, which is understandable. Many of these have been resolved in application practice, especially due to the jurisdiction of administrative courts, whereas others have resulted in legislative changes. But some still persist.

3.1. Information as “perishable goods”

As mentioned above, obliged entities are bound by relatively strict deadlines to ensure that an applicant obtains the requested information as soon as possible. This also applies to the subsequent appeal or complaint proceedings to the superior body, which must decide within 15 days of the moment when the case was submitted (§ 16 (3) and § 16a (8)). However, the problem is that if a superior authority finds that the obliged entity's decision to refuse the application has been unlawful, it can indeed annul its decision and order it to make a new decision, but cannot itself decide that the information will be provided. If the obliged entity is stubborn and decides to ignore the superior authority's legal opinion, this may lead to a procedural “ping-pong” between the two levels. Moreover, an applicant who becomes stuck in such an endless cycle of refusing and annulling decisions, would not, according to a literal interpretation of the law, be able to go to court because he will never obtain a definitive final decision that he could challenge with an administrative action. However, after certain fumbling, the Supreme Administrative Court's extended senate concluded that in these cases the applicant may “bring an action directly against the decision of the obliged entity, by which the obliged entity refused to provide the requested information again after the previous annulling decision of the appeal body” (Supreme Administrative Court judgment of 24 November 2018, File No. 7 As 192/2017-35).

In the Czech Republic the judicial review of public administration decisions is based on the cassation principle, which means the courts can, in principle, only quash the decision, not replace it with their own decision. However, in the case of free access to information the law provides for an exception. If the court concludes that there are no grounds for refusing the request, it will not only annul the decision of the obliged entity but also order it to provide information (§ 16 (4)). The endless loop is thereby terminated. However, this cannot be considered a fully satisfactory solution, because there is again a problem in the length of the proceedings. Unlike the previous stages, the courts are not bound by any deadline, and although the Supreme Administrative Court rightly points out that the purpose of judicial protection is to “provide information promptly and efficiently in cases where it is to be provided, but neither the obliged entity nor the appeal body has done so” (E.g. the Supreme Administrative Court judgment of 22 October 2014, file no. 8 As 55/2012-62), these general limits face the overloading of administrative courts. In particular, the situation at the Municipal Court in Prague is difficult; this is the court where, among other things, the lawsuits concerning almost all central administrative authorities are directed. The usual time of court proceedings exceeds two years, and in many cases it may be worthless for applicants to obtain information after such a long time.

The latest amendment to the Act, which has already been passed by the Parliament and is expected to come into effect on 1 January 2020 seeks to find a solution. Presently, the superior authority will have similar powers as the courts, i.e. to order the provision of information. This decision, informally referred to as an "information order", will be enforceable, as it currently is in the case in court decisions. Therefore, if the obliged entity ignores the order the applicant can ipso jure turn to a bailiff, who may impose fines on the obliged entity to enforce the obligation, even repeatedly until the obligation is fulfilled (§ 16 (4) in the new wording). The possibility of a review procedure has also been introduced. In the event that the applicant fails even with a superior body, he may - before filing an administrative action - apply to the Office for Personal Data Protection, which will also be empowered to issue information orders in cases where it finds unlawfulness in the previous proceedings (new § 16b)).

3.2. Salaries of public employees

In some cases, the right to free access to information may also conflict with the right to privacy. The Act addresses this problem by a general provision, according to which "the information on the personality, the manifestations of the personal nature, the privacy of an individual and the personal data shall only be provided by the obliged entity in accordance with the legal regulations governing their protection" (§ 8a). Previously, this regulation has been the Act No. 101/2000 Coll., On the protection of personal data; since the last year it has been primarily the GDPR and the related national law on the processing of personal data, which is in the final stage of the legislative process. As a general rule, personal data may only be provided with the consent of the data subject, unless one of the expressly provided exceptions applies to the case.

One of these exceptions, which is contained directly in the Act on Free Access to Information, concerns beneficiaries of public funds, on whom basic personal data are provided in the extent of "name, surname, year of birth, municipality where the beneficiary is resident, amount, purpose and conditions of the provided public funds" (§ 8b). Although it may not be entirely clear from the wording used, the administrative courts have inferred that all public employees and complete details on their salaries, including benefits, are included in this category. However, they did not agree on whether the statutory injunction should be applied in all cases ipso jure, or whether the applicant's interest in providing information and the employee's interest in protecting it is to be weighed against each other in particular cases. Finally, in 2014, the extended senate of the Supreme Administrative Court decided in favor of the former of these options, basically arguing that the legislature had already resolved the issue of proportionality when it did not provide the obliged entities with the power to assess them in individual cases. Apparently, the court was motivated by the concern that the generally already widespread obstructive behavior of obliged entities in these cases might be hidden under the guise of the proportionality test. Yet its conclusion can be criticized because a general preference for one right over another, without considering the circumstances of a particular case, is contrary to the general principles that apply in cases of restriction and balancing of fundamental rights (e.g. the principle of proportionality and the principle of minimal interference). In addition, the Court's conclusions were intrinsically inconsistent because, although on the one hand the court excluded the examination of proportionality, on the other hand it stated that this conclusion does not necessarily apply to staff "carrying out activities of an auxiliary or service nature to the obliged entity (e.g. maintenance, cleaning, catering)" (Supreme Administrative Court judgment of 22 October 2014, file No. 8 As 55/2012-62). It is hard to resist the impression that this reasoning was in fact guided by the issue of proportionality.

Decisions of the extended senate of the Supreme Administrative Court serve to unify legal opinions of administrative courts, but this time it did not have the final word. Subsequently, in another case, one of the senates of the Constitutional Court was to solve the same legal question ending up with a substantially different legal opinion (cf. Píša, 2018). It relied on the ECHR decision in the *Magyar Helsinki Bizottság v. Hungary case* (decision of the Grand Chamber of the ECHR of 8.11.2016, Magyar Helsinki Bizottság v. Hungary, No 18030/11) and concluded that in these cases obliged entities are to refuse to provide information on salaries and remuneration of public employees, unless all the following conditions are simultaneously met:

a) the purpose of requesting information is to contribute to a discussion on matters of public interest;
b) the information itself relates to the public interest;
c) the applicant fulfills tasks or missions of public oversight or the role of so-called 'social watchdog';
d) the information exists and is available.

The Constitutional Court judgment of 17 October 2017, file no. IV. ÚS 1378/16

Thus, while the Supreme Administrative Court may have overly favored the right to information, for which it was justifiably criticized, the Constitutional Court, on the other hand, tied it to very restrictive conditions, which may also be the subject of justified criticism. The major weakness of the decision is the slavish adherence to the ECHR's approach in point (c) without taking into account the different starting legal situation. The European Convention does not contain an explicit right to free access to information and thus the ECHR in this case – for a specific range of applicants – inferred it from the general freedom of expression in Article 10 of the Convention. On the contrary, in the Czech legal order, this right is clearly granted to all entities without any distinction. Therefore, the need to prove the status of a "watchdog" is in direct contradiction to this concept and amounts to an additional restriction of the right of access to information without any legal basis.

The decision at stake was issued by one of the four three-member Constitutional Court senates that decide on constitutional complaints. Therefore, it cannot be considered absolutely definitive either: if in the future a similar matter would fall to another Constitutional Court senate, and it had a different opinion, it could refer the issue to the full 15-member assembly of the Constitutional Court for a final resolution.

3.3. Public institutions

In addition to state bodies, territorial self-governing units (municipalities and regions) and their bodies, the definition of obliged entities in § 2 (1) also refers to "public institutions", which is a rather vague term in Czech law. The legislator added this category only later, and according to the explanatory report to the relevant amendment to the Act, the institutions "which are established by the state, follow the public purpose, their bodies are created or co-created by the state and the state supervises their activities" (explanatory report to the Act no. 61/2006 Coll., Amendment to the Act on Free Access to Information) are meant to be included here.

Thus, the particular definition of public institutions was basically left to the practice of courts. Administrative courts, similarly to the previous case, inclined to a relatively broad concept gradually accepted the Public Health Insurance Company, the Prague Airport State Enterprise, hospitals established by the state, public universities, professional chambers, etc. as public institutions (Jelínková & Tuháček, 2017, p. 15-19). In addition to public law persons, courts also include commercial companies (i.e. private law entities) in this category if they fulfill the above-mentioned characteristics and the state, region or municipality exercises a dominant influence in them. Specifically this included i Czech Railways, Prague Public Transit Co., and also ČEZ, which is the main producer and distributor of electricity in the Czech Republic (the state holds about 70% of the shares while the rest is freely traded on the stock exchange).

However, in the latter case, the same senate of the Constitutional Court has intervened in settled case-law and annulled the previous judgment of the Supreme Administrative Court and stated that ČEZ is not an obliged entity. The main argument was the lack of certainty of the statutory definition, which – in short – can only be accepted if through this action the state inflicts harm solely to itself or to persons in the 100% ownership of state or regions/municipalities, but not if rights of other co-owners are to be taken into account. In doing so, the Constitutional Court explicitly stated that its "conclusions do not preclude (…) any (…) commercial company (possibly with regard to the participation of the state) from being obliged to provide information on its activities if there is a public interest. However, such an obligation must be stipulated by law" (Czech Constitutional Court judgment of 20 June 2017, file No. IV. ÚS 1146/16).

This decision of the Constitutional Court can also give rise to some controversy: on the one hand, the emphasis on the legal certainty of entities with mixed ownership is positive, but on the other hand it can lead to circumvention of law. If a public person (state body, municipality, etc.) wants to hide some of its activities from public scrutiny, it will now be enough to set aside the activity to a subsidiary and sell a minimum stake of only say 1% to a private co-owner. Such a subsidiary then, irrespective of whether it serves a public purpose, immediately ceases to be obliged entity. And it is not easy to close this gap by any legislative change because it is difficult to find a sufficiently specific definition to comply with the Constitutional Court's request, yet sufficiently general to avoid circumvention.

Conclusions

Several conclusions can be drawn from the functioning of the right to free access to information in the Czech Republic:

a) The constitutional establishment of the right to information in the Charter of Fundamental Rights and Freedoms is relatively weak and not very specific. The right to free access to information is not even explicitly enshrined therein, which can lead to disputes as to whether it is at all constitutionally protected. The Constitutional Court, however, has bridged the dispute with its interpretation and confirmed that it was guaranteed.

b) Detailed regulation and particular material and procedural guarantees, however, only come from the Act on Free Access to Information, which was only adopted in 1999, i.e. with an eight-year delay after the Charter of Fundamental Rights and Freedoms. Its concept is very liberal and gives applicants access to a fairly wide range of information. It was adopted on the basis of a parliamentary proposal during the minority government, which had no control over the legislative process, and this might lead to the assumption that these facts are in causal relation. In fact, however, the government deputies supported the law.

c) The degree of free access to information has been further extended by a very accommodating approach by the administrative courts, especially by the Supreme Administrative Court, which was newly established and staffed on 1 January 2003. However, the length of proceedings before the courts, often reaching up to three years, is a weakness that restricts the real availability of information when an obliged entity deliberately obstructs access. The newly instituted "information order", to be implemented as of 1 January 2020, should provide a solution.

d) The Constitutional Court has taken a turn towards a somewhat more restrictive approach in recent years. However, all the relevant decisions were only issued by one of its four senates, so it is not possible to say yet whether this is a definitive change or whether it will be overcome by other justices. The story remains ongoing.

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