NEJVYŠŠÍ SPRAVNI SOUD

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Supreme administrative courts and evolution of the right to publicity, privacy and information.

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Answers to Questionnaire: Romania

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Supreme Administrative Courts and evolution of the right to publicity, privacy and information

ROMANIA
High Court of Cassation and Justice of Romania
-The Administrative and Fiscal Division -

1. Briefly describe the administrative institutional backing of free access to information and of the protection of personal data. Whenever those agendas are institutionally linked, provide for a brief description of such relations.

Free access to information

In Romania, similar to other countries members of the European Union, there is not a unique administrative authority that would be responsible and in charge with such matters, namely for providing free access to any kind of information and this is the reason why the requests for information are being dealt with by the addressed authorities themselves.

The right to information is expressly mentioned and regulated in the **Romanian Constitution**, in Article 31 of Title II – The fundamental rights, freedoms and duties. In Paragraph 1 of Article 31 of the Constitution it is stipulated the principle of no restricting such right.

However, according to Paragraph 3, the exercise of this right can sometimes be restricted, to protect young people or the national security.

The constitutional provisions establish correlative obligations attached to this right, indicating that it is the obligation of the public authorities to ensure and provide the accurate information of the citizens on public matters as well as on matters of personal interest. Also, the representatives of mass media have the duty to inform correctly the Public opinion.

In 2001 the Parliament of Romania enacted the **Law No 544/2001**, *on the Free Access to Public Information* („Law no. 544“)

According to this law, public authorities and institutions shall grant, *ex officio* or by request, access to the public information, through the department of public relations or the designated person. Also, in order that each individual should have access to public information, public authorities and institutions shall establish specialized departments for public relations and information or shall designate a person with tasks in this field. The attributions, organization and functioning of the public relation departments shall be established according to the organizational and functioning rules of relevant public authority or institution, based on this law.

Article 5 in the Law 544 explicitely stipulates that each public authority or institution shall communicate *ex officio* the following public information:

a) the norms that settle the organization and functioning of the public authority or organization;

b) the organization's structure, the departments' attributions, the working time table and the audience time table of the public authority or institution;

c) the name and surname of the management staff of the public authority or institution and of the employee assigned to release public information;

d) contact coordinates of the public authority or institution: name, headquarters, phone numbers, fax numbers, e-mail and website address;

e) financial sources, budget and balance sheet;

f) own programs and strategies;

g) list of public documents;

h) list of categories of documents produced and/or managed, according to the law;

i) ways of contesting the decision of the public authority or institution if a person considers himself/herself deprived of his/her right of access to the requested public information.

Also, within the following paragraphs of the same article it is mentioned that the public authorities and institutions shall annually publish and update an information bulletin, which will include the information provided in paragraph (1). Also, the public authorities shall release to the public, *ex officio*, at least annually, a periodical activity report, which shall be published in the Official Journal of Romania, Part II.

Finally it is worth to be indicated that according to Law 544 , the Access to the information provided in paragraph (1) shall be granted by:

a) display of information at the public authority's or institution's headquarters or by publishing in the Official Journal of Romania or in the mass-media, in its own publications and website;

b) consultation of the information at the headquarters of the public authority or institution, in specially designated places.

Protection of personal data

In Romania, the administrative authority protecting personal data and fulfilling conditions of the directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, is the ***National Supervisory Authority for Personal Data Processing*** (hereinafter „the National Authority “).

The National Authority is a judicial public authority, autonomous and independent from any authority of the public administration, as well as from any natural or juridical person and has the goal of protecting the fundamental rights and freedoms of the natural persons, especially the right of intimate, family and private life, in connection with the processing of personal data and the free circulation of these data.

The legal framework is primarily ensured through Law No. 677/2001, *on the Protection of Individuals with Regard to the Processing of Personal Data and the Free Movement of Such Data* (**Law 677/2001) , as further** amended and completed, which applies to the processing of personal data carried out by automated means and / or manuals, which are part of a record system or intended to be included in such a system.

In addition, Law no. 238/2009, regulating the processing of personal data by the structures and units of the Ministry of Administration and Interior in the activities of prevention, investigation and counter crime and maintaining public order applies to the processing of personal data carried out on public policy.

This right has a complex content, given the importance confered to the freedom and to the personality of the citizen, and in our country such is guaranteed by the Constitution (art. 26).

According to Law no. 677/2001 the meaning of most important concepts is the following: "***Personal data***: - any information referring to an identified or identifiable person; an identifiable person is a person that can be identified, directly or indirectly, particularly with reference to an identification number or to one or more specific factors of his physical, physiological, psychological, economic, cultural or social identity;

Data controller: - any natural or legal person, including public authorities, institutions and their legal bodies, that establishes the means and purpose of the personal data processing; if the purpose and means of the personal data processing is set out or based on a legal provision, the data controller shall be the natural or legal person assigned as data controller by that specific legal provision;

The ***RIGHTS OF SUBJECTS CONCERNED*** (people whose personal data are processed) are the following:
a) The right of informing - art. 12;
b) the right of access to data - art. 13;
c) the right to intervene on the data - art. 14;
d) the right to object - art. 15;
e) the right not to be subject to individual decisions - art. 17;
f) the right to go to court - art. 18.

a) The right of informing of the concerned person (art. 12 from the Law no. 677/2001).
When personal data are obtained directly from the data subject, it is the data controller's obligation to provide the data subject the following information, except for the situations in which he/she already has this information:
• the identity of the data controller and, if required, of the data controller's representative;
• the purpose of the data processing;
• additional information, such as: the recipients, or the categories of recipients of the data; whether the requested information is compulsory, and the consequences of the refusal to provide it; the existence of the data subject's rights, stated by this law, notably the right of access, intervention and objection as well as the terms in which they may be exerted.

b) ***The right of access to data*** (art. 12 from the Law no. 677/2001)
Every data subject has the right to obtain from the data controller, upon request, and free of charge, once a year, the confirmation of the fact that the data concerning him/her are or are not being processed by the data controller. The data controller, in case he has processed any personal data concerning the petitioner, is obliged to communicate to the petitioner, along with the confirmation, at least the following:
• a) information regarding the purposes of the data processing, the categories of data concerned,
• and the recipients or the categories of recipients to whom the data are to be disclosed;
• b) communication in an intelligible form of the processed data and of any other available
• information regarding the source of origin of the respective data;
• c) information on the technical principles and mechanisms involved in the data processing
• concerning that data subject;
• d) information concerning the existence of the right of intervention upon the data, and the right to
• object, as well as the conditions in which the data subject can exert these rights;
• e) information on the possibility of consulting the Register of personal data processing, stated under Article 24, before submitting a complaint to the supervisory authority, as well as to dispute the data controller's decisions in court, according to the provisions of this law;
It is the data controller's obligation to communicate the requested information, within 15 days of receipt of the petition.

c) ***The Right of Intervention upon the Data*** (art. 14 from the Law no. 677/2001).
Every data subject has the right to obtain from the data controller, upon request, and free of any charge:
• as the case may be, rectification, updating, blocking or deletion of data whose processing does not comply with the provisions of the present law, notably of incomplete or inaccurate data;
• as the case may be, transforming into anonymous data the data whose processing does not comply with the provisions of the present law;
• notification to a third party to whom the data were disclosed, unless such notification does not prove to be impossible or if it does not involve a disproportionate effort towards the legitimate interest that might thus be violated.
The data controller has the obligation to communicate the measures taken, as well as, as the case may be, the name of a third party to whom the data concerning the data subject were disclosed, within 15 days from the date of the petition's receiving.

d) ***The Right to Object*** (art. 15 from the Law no. 677/2001).
The data subject has the right to object at any moment, based on justified and legitimate reasons linked to his particular situation, to a processing of data regarding him/her, unless there are contrary specific legal provisions. In case of justified opposition, the processing may no longer concern the respective data.
The data subject has the right to object at any moment, free of charge and without any justification, to the processing of the data concerning his/her person for overt marketing purposes on behalf of the controller or of a third party, or to be disclosed to a third party for such a purpose.

e) The Right Not to be Subject to an Individual Decision (art. 17 from the Law no. 677/2001).

Any person has the right to demand and receive the following:
• the withdrawal or the cancellation of a decision that produces juridical effects concerning him/her, adopted exclusively on a personal data processing basis, carried out through automatic means, destined to evaluate some aspects of his/her personality, such as professional competence, credibility, behavior or any other similar aspects
• re-evaluation of any decisions regarding him/her, that affect him/her in a significant manner, if the decision was adopted exclusively on a basis of data processing that meets the requirements stated above.

(1) Without prejudice to the possibility of addressing the supervisory authority, the data subject has the right to address to a court of law in defense of any rights, guaranteed by the present law, that have been infringed.

f) ***The Right to Refer to a Court of Law*** (art. 18 from the Law no. 677/2001).
Without prejudice to the possibility of addressing the supervisory authority, the data subject has the right to address to a court of law in defense of any rights, guaranteed by the Law no. 677/2001, that have been infringed."

2. Describe in general terms the regular administrative and court procedure in a typical disputable case of free access to information. Describe also the procedural role of your supreme administrative instance.

We would like to point out first, that, as a matter of principle, the Administrative and Fiscal Division of the High Court of Cassation and Justice of Romania ("HCCJ – Administrative Division") does not have any direct procedural role within the judicial procedure of a disputable case of free access to information. This is the consequence of the fact that the judicial competence to rule upon such a case, in first instance, belongs to the *tribunal.* The appeal or, better said the recourse filled against such a decision, shall be decided by the administrative division of the court of appeal, which is a regional court.
The decision of the Appeal Court is final and irrevocable, as provided in the Law no. 544.
Also, the general rule and principle applicable in administrative matters is that only one way of recourse can be filed against a court decision pronounced in administrative judicial cases. In other words, the HCCJ – Administrative Division is competent to rule in recourse just upon the decisions pronounced by the courts of appeal in first instance.

With regard to the administrative procedure, prior to a possible court action, according to Law no. 544 (see articles 21 and 22) the individual, namely the interested person may file a complain against the explicit or silent refusal of the designated employee within a public authority or institution to enforce the provisions of this law. Within 30 days from acknowledgement the complaint shall be filed with the head of the public authority or institution.

If, after administrative investigation, the complaint proves to be well grounded, the individual shall receive an answer within 15 days since he/she has lodge the complaint; the answer shall contain the public information previously requested and the disciplinary sanctions taken against the guilty person.

Nevertheless, if a person considers himself/herself deprived of his/her right, as stipulated under this law, he/she may lodge a complaint to the section for contentious matters of the tribunal within his/her residential area or in the area where the public authority or institution has its headquarters. The complaint shall be lodge within 30 days from the expiration of the period set forth in Art. 7 of the law.

The law court may oblige the public authority or institution to provide the requested public information and, if grounded, also to pay moral and/or patrimonial prejudice.

According to a recent mechanism introduced into the new Romanian Civil Procedural Code, in force since February 15, 2013, called *request for a preliminary decision for solving legal matters*, it is possible that a judge from the tribunal, the court of appeal of even from HCCJ, invested with a certain case suspend the proceedings if the decision that shall be pronounced depends on the interpretation of a legal matter that is new and upon which the HCCJ did not rule in the past through a *recourse in the interest of the law.*

In other words, from now on the HCCJ may be required to issue a legal interpretation upon provisions that may be eventually considered unclear, in the law no. 544/2001. No request has been registered up to date.

3. Describe the procedural role of your supreme administrative instance in the agenda of protection of personal data.

As already mentioned above, the National Authority is the public authority dealing with the agenda of protection of personal data. According to the Law no. 677/2001 this entity is empowered to eventually impose fines either to legal and natural persons that committed administrative delict regarding the personal data.

From the point of view of the conduct of the procedure, the regular administrative and court procedure in a typical dispute is the same as the procedure described in question 2 regarding the free access to information disputes. The only difference would be that while the free access to information disputes (and consequently the proceedings) are based on a first decision issued by the public authority that refused to provide the requested information, the protection of personal data disputes generally originate from the National Authority 's decision imposing a fine.

It means that first, the National Authority shall carry out, upon request, an administrative verification in connection with the operations of personal data registration, during which, it may order, if necessary even the suspension of all such operations. Such administrative decision issued by the National Authority can be challenged with a delay of 15 days, before the competent administrative authority, which is the tribunal. In this case, according to article 26 in the Law no. 677/2001, as amended, the court decision is final and irrevocable.

In other words in this matter, as well, the HCCJ – Administrative Division has no specific competence and consequently at least to date, we cannot indicate from our jurisprudence, any decision pronounced in connection with this piece of legislation. (See also the references regarding the new mechanism inserted in the newly passed civil procedural code, applicable as well).

4. Provide for a general overview of historical development of access to information rights in your jurisdiction while focusing on most important legislative and judicial milestones. Also, please try to generally describe the main driving forces behind the development of these rights.

During the first years after the December 1989 Revolution, the access to information was present in an indirect way, as a subject totally subordinated to the topic regarding the access to the files of the former communist Security body – " dosarele Securitatii". In this respect the politicians as well as the public and mass media were pushing for the creation of legal and independent authority capable to ensure that task. A special accent at the time was also put on the creation of independent television.

The requirement of ensuring the access to free information was somehow unclear during the first two years of transition from communism.

Nevertheless, within such an unclear context, the new Constitution from 1991 brought a quite liberal content for the right to access to any information , as follows:

ARTICLE 31
(1) a person's right of access to any information of public interest shall not be restricted.

(2) The public authorities, according to their competence, shall be bound to provide correct information to the citizens in public affairs and matters of personal interest.

(3) The right to information shall not be prejudicial to the measures of protection of young people or national security.

(4) Public and private media shall be bound to provide correct information to the public opinion.

(5) Public radio and television services shall be autonomous. They must guarantee any important social and political group the exercise of the right to broadcasting time. The organization of these services and the parliamentary control over their activity shall be regulated by an organic law.

Political annalists believe that respective provision is more the result of an "import" from other pieces of legislation, rather than the result of a general consensus regarding the importance of the transparency of the public institutions.

The protection of the secrecy was regulated first, in years 1993-1996.

A change of attitude of the politicians occurred in 2000, when via the mass media, a law project regarding the free access to the public information was released. That was considered a significant political moment, followed in 2001 with the promulgation of the law 544.

As a general remark, it is to be mentioned that the mass media and the observations of the non governmental associations played an important role in the whole process of the issuance of this piece of legislation.

To the best of our knowledge, we cannot indicate any significant piece of jurisprudence that could have played a significant role in the process of the promulgation of Law no. 544.

5. Give basic subjective observation as to the role and importance of free access to information in political system of your country. In particular, focus on how the importance of freedom of information is perceived by general public and by non-governmental sector.

It is not possible, indeed, to provide a structured as well as a comprehensive response to this question, given the lack of relevant information and due to the fact that judges are not involved in preparation of this kind of analysis.

Nevertheless we shall rely in the preparation of the required response, upon a study that has been published in October 2011, jointly prepared by the Institute for Public Politics (IPP) and the National Union of Judges (UNJR) regarding the way in which the Law 544 on free access to public information was applied during a 10 (ten) year period upon its promulgation in 2001. We believe the results of this study are relevant due to the fact that its conclusions were drawn based on a questionnaire addressed both to individuals, public authorities and non governmental entities as well as upon verification of the court statistics regarding the number of such cases existing at the level of the 15 courts of appeal in Romania
Main conclusions of this study were the following:

- The jurisprudence in this matter is far of being unified and citizens believe that the court decisions are still unpredictable;
- In only around 30% of the cases opened by citizens a satisfactory ruling was pronounced;
- More than 850 cases were identified at the time and verified and more than half were generated either by the refusal of the city hall to respond to the request for information or due to the issuance of an incomplete response;
- Until 2008 many of the public authorities perceived a tariff for issuing copies of the required documents;
- the public sector bodies do not act in full transparency and that is encouraged also by the lack of provisions in Law no. 544 imposing substantial sanctions in case the law is not observed.

At the same time, to the best of our knowledge, the free access to information is not considered to be relied directly, or to be the main tool against corruption, or discrimination. For the time being the general perception, still, seems to be in the sense that citizens are not fully aware of their rights.

6. Give subjective general observation as to whether and eventually how free access to information rights are in practice abused or misused by the petitioners.

It is our view, subjective and not supported by any statistics, that the assumption that some legal instruments that provide for free access to information also represent a useful tool for notorious (or even pathological) petitioners is correct.

We also share the opinion according to which such petitioners are chronic complainers, who usually address several courts with a large-scale variety of actions. Thus, in such cases we cannot talk about

an abuse of rights in the true sense of the word, especially when the courts are capable of dealing with this small percentage of abnormal behaviour quite easily.

Nevertheless, over the past few years it looks like the number of such petitioners is decreasing.

Also it is worth to be mentioned, also as a subjective perception, that such may be the result of the fact that the public authorities organized over the years in a better way their *web pages* containing the categories of the mandatory information that are to be offered to the public.

7. Give a list and brief explanation of security, law enforcement and/or defence institutions that can benefit in your country from the exceptions lay down in Art. 7(e), Art. 8(4) and 8(5) of the Directive 95/46/EC.

The exceptions mentioned in Article 7(e), Article 8(4) and 8(5) of the Directive 95/46/EC were implemented in Article 2 para. 7 of the Romanian law no. 677/2001, further amended, on the protection of personal data.

This Article excludes the applicability of the law provisions to the transfer as well as to the processing of personal data within the activities concerning the national defence and protection of national security.

This law is applicable also to the processing as well as to the transfer of personal data, obtained within activities concerning the prevention, the research and the repress of criminal acts and maintaining the public order, as well as with regard to other activities deployed in the criminal area, within the limits and the restrictions imposed by the law.

Due to the general wording of the law it is obvious that in order to determine all authorities possibly exempted it is necessary to examine every time, in particular cases, more pieces of legislation, each regulating respective area in order to determine whether Law 677/2001 applies or not.

8. Subjectively identify most emerging actual problems that arise from processing of personal data by aforementioned security, law enforcement and/or defence institutions. Whenever appropriate, demonstrate them on particular examples.

Unfortunately we cannot offer, as particular examples, cases decided by our supreme administrative division, for the reasons presented under questions 1-3 above.

We can however indicate the "hot" subject matter, still pending in the political environment as well as in the mass media, regarding the fact that the Romanian Constitutional Court declared the *Law on cybernetic security* – the so called the Big Brother law no.2- as unconstitutional. Main reasons for such decision were the facts that the law was not approved in advance by the Supreme Council for the Defence of the Country as well, as the fact the national designated authority was the Romanian Intelligence Service (SRI) which has a military character. The Romanian Constitutional Court decided

through the Decision no. 17 of January 21, 2015 that such legal construction contravenes to the European legal norms.

The conclusion of the judges was in the sense that the law does not have a precise and predictable character due to the fact that the state intrusion with regard to the exercise of the constitutional right to personal and family privacy, as well as of the right to the secrecy of correspondence, stipulated as such, is not clearly and undoubtedly provided in order to confer confidence for the citizens.

Finally, the Constitutional Court decided that the examined law does not offer sufficient guaranties for the data protection. In this respected it was indicated that limitation of the exercise of the personal rights for the purpose of collective rights and public interest regarding the cybernetic security breaks the right balance that has to be preserved between the individual rights and interests, on one side, and the ones of the society and the problem with this law is that it does not provide for enough guaranties with respect to the efficient protection of data, against possible abuses and unlawful use of personal data (see also as relevant the Constitutional Court Decision no.440 of July 8, 2014) .

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