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Advances in Transparency and Right to Access Information in The Czech Republic – Evolution of the Interpretation of Contested Statutory Provisions[1]

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ABSTRACT

Purpose: The article examines the advances in the transparency of the Czech public administration since the 1990s. Transparency is subtly intertwined with accountability, promotes democracy, and helps to prevent misuse of power or other types of illegal acting. Thus, the right to access information must be interpreted broadly enough, yet there are other rights such as privacy or trade secrets which must be respected at the same time. The paper therefore explains the balance between those rights that has been achieved through years of court interpretation. It explores the advances in the courts' views and the resulting improvements in the administrative practice, as well as the relationship between the right to information and accountability.

Design/methodology/approach: The author studies the crucial provisions of the Act on Free Access to Information. Based on an analysis of the interpretation by the Czech Supreme Administrative Court and the Czech Constitutional Court of the most questionable issues – such as the determination of which public institutions are considered obliged entities, the exemptions from the duty to provide information, remedies, and payments for complicated data searches – the paper shows the developments over the past 23 years. The paper also seeks to identify the

1 This article is a revised version of the paper entitled Transparency of Administrative Bodies and Accountability of Public Officials – is There Any Link? – Analysis of the Czech Republic practice presented at the 29th NISPACee Annual Conference Citizens' Engagement and Empowerment – the Era of Collaborative Innovation in Governance, 21–23 October, 2021, Ljubljana, Slovenia. The article was supported by the Student Grant Competition of University of Pardubice SGS_2022_017. It is partly based on research carried out by Dominika Tůmová in her master thesis defended successfully in 2021 which I had the pleasure to supervise. I wish to thank her for her contribution.

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relationship between the outcomes of the analysis, i.e. the confirmed advances, and the accountability od administrative bodies which should theoretically result therefrom.

Findings: The case law on the interpretation of individual legal provisions is rather favourable to a broad access to information, restricting the exemptions and other obstacles. However, the article argues that in order to take full advantage of the gains in the area of free access to information brought about by the carefully argued case law and subsequent improvements of the obliged entities approach, the resulting accountability still needs to be elaborated.

Academic contribution to the field: The research contributes to administrative science by addressing the practical application of laws on transparency issues. It shows the importance of court support to an interpretation broad enough to balance other rights, such as the right to privacy. It provides a background for further research of the consequences, i.e., accountability.

Originality/significance/value: An overview of the evolution of court decisions interpreting controversial legal provisions is provided. The gaps between the advances in the implementation of the principle of transparency and the theoretically resulting accountability are identified.

Keywords: *access to information, good governance, human rights, openness, transparency, rule of law*

JEL: K40, K38

1 Introduction

Secrecy and non-accessibility to information related to government issues were the norm of totalitarian regimes in Central and Eastern European countries till the democratic changes in 1990ies. However, the change in the attitude of public administration does not happen overnight. President Masaryk wished for 50 years of undisturbed democracy for the new republic of Czechoslovakia. This wish may be interpreted to mean that there needs to be a continuous development and that it takes time to build a robust democracy based on the respect of law and human rights. Transparency as one of the key elements of good administration that enables control of public administration and thus should lead to improvements in dealings with public issues. The more transparent public administration is, the more citizens can be informed about its activities and may have background to form their own opinions regarding public issues and thus participate in public life. Access to information enhances the freedom of speech. Finally, transparency is believed to eliminate corruption. Especially with the development of information technologies, transparency is becoming more and more discussed as provision of information to the public is simplified. This is also related to the increase in demands on the information made available, e.g., in terms of the amount of information, machine-readable format, remote access, etc.

The change from secrecy to transparency is gradual and may take time and effort of both sides – the controlled and the controlling. Such controls are carried out not only by citizens but also by public institutions. The procedure needs to be set in robust legislation and the courts need to provide interpretation to enhance smooth running of the procedures and effective outcomes. However, too much openness may be harmful to other protected values such as privacy protection. To find the right degree of transparency might take difficult balancing. Thus, the case law helps to set the boundaries of what is appropriate.

Transparency of public administration can be understood more broadly as openness or in a narrower sense as free access to information. Access to information was enshrined in law in the second half of the 20th century. This legislation gained popularity after the Johnson Administration adopted it in the US in 1966 and the example was followed by a spread of legislation from the 1970s onwards in the west democracies (Meijer, 2014, p. 4). Post-communist countries did not enact it until the 1990s. In the Czech legislation, the right to information is guaranteed in the Charter of Fundamental Rights and Freedoms (hereinafter the "Charter" only) in its Article 17 together with freedom of speech since 1991.

Free access to information legislation experienced its boom at the turn of the millennium, the Czech statutory law was enacted first for specifically for environment as Act. No. 123/1998 Coll., on Access to Environmental Information and few months later generally in Act No. 106/1999 Coll., on Free Access to Information. By law, public institutions must respond to requests for information – take reactive measures (passive behaviour), but also make some information available on their own initiative (or if required by law) – take proactive measures (active behaviour) (Buijze, p. 32).

The article analyses the advances in the Czech Republic approach to the free access to information since the enactment of the procedure. Thus, case law of both Constitutional Court and Supreme administrative courts is analysed especially where they dealt with the difficult question of the scope of the right and exemptions, the obliged institutions and finally the payments which may hinder the exercise of the right to access information. "The decisions of these courts are usually based on the effort of these courts to preserve this fundamental right as much as possible" (Kadečka, p. 473).

Nevertheless, there are still areas to be developed. It is the objective of making institutions visible in order to make them accountable what makes transparency strengthen democracy and rule of law. Both transparency and accountability certainly contribute to government legitimacy. Transparency enables the citizens to see whether the government act according to the rules they are to obey, and accountability operates both as prevention from breach of rules and misuse of power and as punishment when such misconduct occurs. Transparency is generally believed to be a necessary precondition for accountability (Fox, p. 663). The article argues that to take full advantage of the gains in free access to information brought by the more than 20 years of the carefully argued case law and subsequent improvements of the obliged entities approach the accountability consequences need to be worked upon.

2 Literature review

The principle of transparency is one of the fundamental principles of good governance. It is the need for legitimacy of the government which is the main reason for adherence to this principle (Addink, p. 111). The basis of democratic governance is time limited government enabling change at each election. The winning political party (-ies) are given a period of several years to prove their ability to politically lead the country well in accordance with the expectations of the societal majority. As a consequence, the electorate does call the government to account at each general election and gives its verdict on the government performance in its previous term of office. And the threat of the ultimate sanction, losing the next election to one of the opposite parties, is enough to make the government seek good press for their initiatives in the hope that they will carry the electorate along with them (Webley, p. 341). Transparency and namely access to information is also a precondition to the freedom of speech and active involvement in political life. Every individual must have access to information in order to form his own opinion and initiate or enter public discussion (Wagnerova, p. 432).

Transparency also helps to build trust in the government and thus eliminates the risk of extremist parties gaining support from the public. The power of the executive grows as public policies become more complex. "Competencies are frequently transferred to regulatory agencies that hold a considerable degree of discretion' (Addink, p. 111). Access to relevant governmental documents and providing reasons behind the policies and individual measures shed light on the public administration actual functioning. Possibility to check that these competencies are not misused, and predictability of future state operations helps the public to identify with the activities of public administration bodies.

Thus, when analysing transparency, we can distinguish two functions (Buijze, pp. 54, 56). First, it allows monitoring what the government is doing, checking public authorities or organizations to see if they are acting in accordance with the law and in favour of democratic principles. In its second function, it facilitates the decision-making of individuals who, thanks to a transparent environment, can anticipate the consequences of their behaviour

Within these functions, we can distinguish the goals that transparency helps to fulfil. Transparency contributes to democracy as it is a prerequisite for participation and responsibility. It helps the market to function as a transparent environment, allowing economic operators to make better decisions. Furthermore, it is a necessary precondition for the accountability of public authorities, it also contributes to the realization of the rights of individuals in order to prevent the violation of their rights (Androniceanu, pp. 111–112). Therefore, transparency does not have one specific goal, but helps to meet general goals, such as democracy, increasing trust in government, the implementation of individual rights, economic performance and the functioning of the market (Buijze, pp. 52–53).

Transparency is thus the opposite approach to secrecy. It has multiple meanings and can be interpreted broadly as openness or more narrowly as information availability. Openness is more dependent on the character of the institution and the approach of individuals. Thus, through legal regulation it is easier to ensure the access to information, production of governmental documents and the procedural aspects thereof.

It is usually defined as relation between an actor and forum (Bovens 2010, p. 946). Meijer defines transparency as "the availability of information about an actor that allows other actors to monitor the workings or performance of the first actor" (Meijer, p. 430). This means that there are four areas (1) First, there need to be the object of transparency and the subject who monitors the first actor. (2) There must be information flowing between the two actors – and it needs to be set which information as sensitive will not be provided. An inherent conflict with the private data protection occurs. This conflict needs to be solved by applying the principle of proportionality. (Hofmann, p. 489) (3) A procedure enhancing such flow should be enacted. (4) And finally, there should be some outcome in the form of evaluation of data available from the provided information together with consequences drawn if the outcomes are not satisfactory in the form of accountability and improvement of public services. The article follows the logic of these four areas and concentrates on the analysis of the controversies that might occur in each of them. It intends to show how dealing with these partial issues developed since 1990ies in the Czech Republic and whether transparency is improving the democratic direction of the country.

Transparency as principle binding on public authorities does not have to be explicitly stated in statutory laws, as its essence appears in individual legal regulations or in the definition of the activities of public institutions. However, it is connected to the freedom of speech usually as a very general guarantee of access to information leaving the details to statutory laws. In the Czech legal order, it is guaranteed by article 17 of the Charter of Fundamental Rights and Freedoms which rather laconically states that right to information is guaranteed, and everyone has right to freely to seek, receive, and disseminate ideas and information irrespective of the frontiers of the State. Par. 5 of this Article states that "State bodies and territorial self-governing bodies are obliged, in an appropriate manner, to provide information on their activities. Conditions therefore and the implementation thereof shall be provided for by law." This law did not see the light till 1998 when due to the requirements set in the Aarhus Agreement and increased overall public concern about the state of environment devasted by the communist regime resulted in enactment of a law specifically dealing with access to environmental information – the Act No. 123/1998 Coll. Notwithstanding its importance in the beginning of its effectiveness this law was later overshadowed by the universal information access legislation, therefore it is set aside for the purposes of this article.

The more detailed statutory law regulation of the general right to information can be found in Act No. 106/1999 Coll., on Free Access to Information (hereinafter referred to as "Act"). The Act has a rather broad effectiveness, anyone

might require information without having to provide any reasons for doing so, the scope of institutions that are to provide information in its regime is rather wide. Generally, all information available to the institution is to be provided unless provided otherwise. However, some information may be sensitive and could be misused if it is made available to everyone. This type of information is covered by exemptions which are interpreted restrictively. Nevertheless, this current state is a result of continuous development of more than past twenty years of administrative practice influenced by the interpretation of the Constitutional Court and the Supreme Administrative Court commenting on the question the Act brought about and setting the sometimes subtle lines of what needs to be provided and under which conditions.

Transparency on its own would work as a pure incentive to publish information to the public, but without accountability there would never be any action against inappropriate behaviour of politicians, civil servants, or other actors. The public would learn about misconduct, but there would be not negative consequence to it. At the same time, a separate accountability principle would not make do, as there would be no incentives or evidence information for granting corrective action. Transparency therefore has a very strong position of a partner principle, as it creates accountability (Fox, p. 664) or, as some authors state, transparency is part of accountability (the so-called information phase) (Brandsma, p. 147). However, a high degree of transparency does not automatically mean a high degree of accountability or better performance of public administration. The level of responsibility of governments in Central Europe is relatively limited (Veselý, p. 320) and the low level of responsibility significantly correlates with the level of corruption.

B. Guy Peters distinguishes accountability per se, responsibility and responsiveness. In the strict sense accountability implies "that the independent authority to whom the account is rendered will have some capacity to enforce remedies for any perceived failures on the part of the individual or the organization that is found wanting." (Guy Peters, p. 213) The process involves an external actor and hierarchical control either through regular reports that are to be submitted, or through ad hoc controls. On the other hand, responsibility implies some internal checks and is a more individually oriented concept. Finally, responsiveness rest in the fact that civil servants should be responsive to the political leaders who have been elected and thus enjoy some level of legitimacy. More broadly public administration should be responsive to the public who is affected by the making and carrying out of public policies (Guy Peters, pp. 214–215).

Accountability is a very broad and complex concept that is rarely applied in practice flawlessly. There are several repeating problems or shortcomings described in theories related to acountability. These are the liability deficit, the overload of acountability, the acountability trap and the so-called sleeping acountability. The occurrence of any of these is undesirable. Accountability deficit manifests itself as inappropriate behavior or unresponsive and opaque management (Bovens, 2010, p. 957). It is most often associated with the absence of political control by democratically elected representatives, but it can also be found in other types of responsibility. The accountability deficit

illustrates: "the condition that those who govern us are not sufficiently constrained by the requirements to publicly explain their behavior to the various types of forums that have a duty to sanction them" (Bovens, 2014, p. 229).

Discrepancies between the formal existence of many accountability mechanisms and their actual performance is a phenomenon of post-communist countries in Central and Eastern Europe. Veselý describes these deficits in the so-called EU-10, which includes: Poland, the Czech Republic, Slovakia, Hungary, Slovenia, Lithuania, Latvia, Estonia, Romania and Bulgaria (Veselý, p. 314). In these countries, accountability mechanisms have only been incorporated in the 1990s, and in general we can say that they do not work as well as in Western European countries. In this respect, the term "sleeping accountability" has been used, which is characterized as: "insufficient use of established procedures and liability mechanisms" (Veselý, p. 320).

Sleeping accountability can be studied in more detail along to the three phases of accountability – the information, the discussion and the consequences – when they are not fully satisfied. In practice, the information phase is not the essential element causing sleeping responsibility, although it still might be improved.

3 Methods

For the purposes of this qualitative research, several different methods were applied as relevant. First, a comprehensive overview of the principle of transparency is carried out through literature review and using normative-analytical method. Through systematic approach, the author analyses the Act on Free Access to Information and its interpretation in the case law of both the Czech Supreme Administrative Court and Constitutional Court. The purpose of this analysis is to determine how the courts treat this principle what are the solutions to balance the answers to the main controversial areas and how the case law developed over the years. There are three main areas which are analysed – the entities subject to information disclosure, exemptions from the right, and remedies including the appropriate level of payments. The advances in the courts' views and outcoming improvements in the administrative practice are sought for. The main research question is how the approach changed and whether the conditions for strengthening of democracy and rule of law through transparency are supported enough through the statutory laws and court interpretation.

The examined sample of decisions was selected applying a combination of three following criteria. First, the most controversial areas where access to information could be hindered were defined – the obliged entities, the extent to which information is provided (i.e. which information is exempt from the duty) and finally the remedies including cases when unreasonably high payments are asked for by the obliged entities. Then, a sample of the case law of the Constitutional Court was provided through the NALUS[2] database for searching the

2 NALUS is a database of the Constitutional Court's decisions enabling search by keywords available at https://nalus.usoud.cz.

case law over the whole period when the Act on Free Access to Information has been effective. The same with the case law of the Supreme Administrative court, which is available at the web page of this court. The first criterion for the selection of the case law in the electronic database was the connection to the Act and secondly the key words referencing the three identified areas were refined. The cases that were cited later most frequently were chosen for the analysis. In the discussion the author seeks for a relationship between the outcomes of the analysis i.e. the advances that were found and the accountability which should theoretically result therefrom so that the benefits of transparency could be used completely in favour of strengthening democracy. The author provides arguments that there should be more stress to take advantage of the results achieved in the field of transparency. In the conclusion a synthesis of the findings is carried out and proposals for further research are made.

4 Results

4.1 Public bodies required to disclose data and the extensive interpretation of "public institution"

The relationship between the actor and forum is a crucial aspect of transparency. The group of obliged persons must be defined clearly to ensure that attempts to evade the duty will be reduced to minimum. Defining those authorised to ask for information is much easier – the Act grants the right to everyone including children and legal persons. The actors obliged to proceed according to the Act are according to Sec. 2 par. 1 of the Act, state bodies, territorial self-governing units, their bodies, and public institutions. Their duty to provide information is limited to the information related to their competence. It does not apply to opinions and future decisions. Furthermore, according to par. 2 of the same section, those entities to which the law has entrusted decision-making on the rights, legally protected interests or obligations of natural or legal persons in the field of public administration, must provide information under the Act, but only to the extent of their decision-making activity(e.g. natural persons that authorised to caary out activities as protective guard in forests or protective guard of fishing activities). The obliged entities thus include the legislative, executive, and judicial bodies, as well as the Supreme Audit Office and the Czech National Bank; central state administration bodies (ministries and other central state administration bodies); the Ombudsman; Government Office; security forces of the Czech Republic; Public Prosecutor; municipalities, regions; and last but not least "public institutions". This vague legal term leaves space for interpretation as with some institutions, it is not obvious straight away whether they are to be regarded public or not. This interpretation is crucial, as private institutions generally have no duty to provide information under the Act. "In relation to private legal persons, it is not only the right to privacy that is relevant for the assessment of the question under examination, but also the freedom of establishment guaranteed by the Charter in respect of legal persons that are engaged in business. This is because the breadth of the information obligation imposed by the law affects

their business, the value of their business establishments and their competitive position vis-à-vis their competitors" (Eichlerova, p. 235).

The Constitutional Court (hereinafter referred to as the "CC") set criteria to assess the nature of a particular institution, in its key judgment file No. I. ÚS 260/06. The discussed case dealt with the public or private character of Prague Airport, a state enterprise. The criteria for this assessment were set as:

a) the method of establishment (dissolution) of the institution (presence or absence of private acting),
b) whether the founder of the institution is the state or not; if so, it is a sign of the public institution itself,
c) the body forming the individual organs of the institution.
d) existence or non-existence of state supervision over the activities of the institution, and
e) public or private purpose of the institution.

The examined institution should be assessed according to the "predominance of features", to assume on its public or private nature. The CC concluded that the state enterprise undoubtedly meets the criteria, and therefore it is a public institution.

Further doubts arose more recently in the case of a joint stock business company producing energy ČEZ, a.s. The state has a share in ČEZ, a.s. of approximately 70% and the company is listed thus anyone can buy and sell its shares on the market. The goal of this company is to make profit and thus it has an important interest in some of its activities not being revealed to its business rivals. The duty to disclose certain information could jeopardize its market position. The case law has undergone a certain shift since the key CC finding on Prague Airport. First, the Supreme Administrative Court (hereinafter referred to as the "SAC") ruled in judgment file No. 2 Ans 4/2009-93 that ČEZ, a.s. is a public institution. The company was established during the so-called large-scale privatization by a decision of the National Property Fund (i.e., established by the state). The state has a dominant position in the company, and thus the creation of bodies takes place under the dominant influence of the state. Thanks to the dominant position, there is also state supervision over the activities of ČEZ. Further, the energy sector is one of the strategic, security and existential interests of the Czech Republic, and therefore the reason why the state retains a decisive share in this company is a public interest.

However, the CC to a constitutional complaint against the cited SAC decision came to a different conclusion in its decision file No. IV. ÚS 1146/16. The CC grounded its argument on the constitutional rule that duty can only be established on the basis of the law. The infringement was found because the definition of the concept of public institution was not provided by the law, but only by court jurisprudence. The CC concluded that while in relation to public bodies the vagueness of the term "public institutions" used in the statutory law does not constitute a problem, such a conclusion could not be made if

it were to apply to other entities. This is because the addressee of the duties arising from the right to information under Article 17(1) and (5) of the Charter are exclusively public bodies (public authorities) and not private law entities. For them, this obligation would have to be in accordance with the Article 4(1) of the Charter created by a statutory law, subject to other conditions arising from the constitutional order, including the requirement of legal certainty and proportionality of the interference with fundamental rights and freedoms. Classifying a certain private company under this term would – under its current statutory definition – would only be possible if it fulfilled the definitional characteristics of a public institution and at the same time, any legal consequences associated with its status would go exclusively to the public authority. A commercial company does not show the nature of a public institution within the meaning of Section 2(1) of Act No 106/1999, therefore, if the state or a local authority entity or other obligatory body under Act No. 106/1999 Coll. were not its sole shareholders, or if all of its shareholders did not consist of these entities.[3] Furthermore, the CC explained that the aim of privatization was the privatization of state-owned enterprises, while at the moment of denationalization the direct management or founding function of the state ceased to exist. The company has therefore been a person of private law since its inception, which differs from the state and to which the Commercial Code applied. The creation of its bodies or the exercise of shareholders' rights then had a completely private regime. The CC agreed with the SAC that the company fulfils a certain public purpose, but the essence of its existence and operation is primarily carrying out business activities and making profit. The obligation to provide information under the Act would affect its position in competition, which could jeopardize its existence. The State "regardless of the size of its shareholding in a company, merely exercises its rights, which, like any other shareholder, confer on it the rules of private law." The majority share does not change anything in itself. Moreover, there is no threshold set in legal provisions the excess whereof would constitute an answer to the question whether it is a public institution or not.

ČEZ is thus not an entity with a duty to provide information pursuant to Sec. 2 par. 1 of the Act but has the status of the obliged person under Sec. 2 par. 2 of the Act.[4] This decision thus narrowed decisively the situations when the duty of ČEZ, a.s. occurs.

However, the CC finally specified the decisive criteria in its decision file No. II. ÚS 618/18 of 2 April 2019. The case concerned another energy sector company - OTE, a.s., which is fully owned by the state. Theoretically, three solutions were possible based on the previous case law of the CC:

3 According to finding of the CC file No. I. ÚS 1262/17 the legal consequences associated with the status of the obligated entity under the Act No. 106/1999 Coll. apply to a private entity controlled by a public corporation, even if this control is applied indirectly (thorugh a chain of other companies within the holding structure).

4 Sec. 2 par. 2 of the Act stipulates that: "Entities that have been authorised by law to decide on the rights, legally protected interests or obligations of natural or legal persons vis-a-vis the public administration shall also be obliged persons under the Act, however, only to the extent of their decision-making powers."

a) a business company 100% owned by the state is not a public institution according to the (points 67–69 of the ČEZ decision),
b) a business company will fall under the notion "public institution" within the meaning of the Act only if the state or a public corporation is its sole owner (points 70–71 of the ČEZ decision), or
c) all such business companies, which show prevailing characteristics typical of public institutions fall within the scope of the notion "public institution" (in particular, the property share of the state, or a public corporation prevails - Prague Airport finding).

The CC explained that the purpose of the constitutionally guaranteed fundamental right to information is to enable and facilitate effective public control of the exercise of public power, which, of course, also includes control of the management of property values that are directly or indirectly controlled by public power. However, this purpose will be fully fulfilled not by limiting the range of mandatory subjects, but rather by choosing a solution for their expansion in case of doubt. The means capable of achieving the stated purpose are both the legal regulation of the register of contracts and the subordination of legal entities in which the state or another public corporation has a 100% ownership interest under the term "public institution" according to the Act on Free Access to Information. The reasons for which the given information duty, even if implemented in two different statutory laws, should apply to the same range of obliged persons, are identical. This entity is controlled by the state, and its existence and activity itself are exhaustively defined in the Energy Act, with the provision that it can only carry out further activity after approval by the ministry. Moreover, with regard to the monopolistic position of the company in this market segment, the information obligation does not affect it in any way, even from the point of view of its position within the framework of economic competition. "Proper and effective management of the funds available to the concerned entity is not only in the interest of a narrow circle of persons (primarily partners or shareholders) or an individual, as is the case with ordinary capital companies, but in the interest of the wider community [e.g., citizens of the municipality or region, if they are entities according to Sec. 2 para. 1 letter n) of the Act], or the entire society." Thus, the CC concluded that: "The term "public institution" according to the Act also includes legal entities in which the state or another public corporation has a 100% ownership interest." According to the cited legal opinion, even the fact that obliged entities carry out business activities and find themselves in a competitive environment with other private entities does not establish a reason for which public control of their management should be weakened.

Nevertheless, this opinion concerned only the issue of defining obliged entities and did not apply to the scope of specific information that should be provided. This scope can be limited by the Act, for several reasons which create exemption from the general duty to provide all information available. However, where there is no relevant interest in withholding information, the provision of information may not be refused.

4.2 Exemptions and their restrictive interpretation

It is generally accepted that not all information must be provided. Information revealed to the applicant exercising control over a public body will also be revealed to third party who may make use of it in ways that hurt the provider of the information. "Transparency on consequences is beneficial, transparency on action can have detrimental effects." (Prat, p. 863) Furthermore, the information may also concern a third party who might have a strong legal interest on this information being kept secret by the obliged entity. The range of specific information that should be provided with the request can thus be limited for several reasons. Restrictions can only be set by law. As has been repeatedly judged, the right to information is not an absolute right, and the obliged entities are therefore under no duty to provide all information. According to the findings of the CC decision file No. I. ÚS 1885/09 dated 5 May 2010 provision may be denied with regard to the interests enshrined in Art. 17, par. 4 of the Charter. This denial must be necessary in a democratic society, i.e., in particular proportionate to the interest being pursued as follows for example, from the decision of the CC file No. Pl. ÚS 2/10 of 30 March 2010, points 31 et seq., or decision of the CC file No. I. ÚS 517/10 of 15 November 2010, points 56 et seq.

The restrictions are covered as exemptions from the general duty to provide all information in Sec. 7-11 of the Act, specifically with regard to the protection of classified information[5], protection of privacy and personal data, protection of trade secrets, protection of property confidentiality and further.

Rather often the obliged entities argued that they may not provide a contract they have entered into as it contains a trade secret the other party to the contract wishes to remain undisclosed. The courts interpreted this exemption narrowly. For example, in the decision file No. 3 Ads 33/2006 of 16 May 2007 the Supreme Administrative Court held that rather than subjective statement of a party to the contract the objective criteria set by the Commercial Code have to be applied when deciding whether a specific piece of information meets the criteria. "In the vast majority of cases, the reality will be that only part(s) of the document will contain information that can legitimately be considered (and protected) as a trade secret" (Furek, p. 465). Thus the court will order to produce the contract or other document containing the trade secret partially, without the information that falls within the exemption as in the judgment of the Supreme Administrative Court file No. 7 A 2/2003 – 73. Later, the issue has been solved by the Contracts Register Act which was adopted in 2015.

Furthermore, it is not possible to provide information regarding privacy and personal data. Here, the right to information conflicts with the right to pri-

5 Pursuant to Act No. 412/2005 Coll., on the Protection of Classified Information and Security Clearance, the right to information may be restricted with regard to classified information. Classified information must be included in the list of classified information (according to the Government Regulation No. 522/2005 Coll., which lays down the list of classified information) and there must be a potential risk that its disclosure or misuse could cause harm to the Czech Republic. If the applicant requests classified information, the obliged entity may not provide it. If the classified information is only a part of the requested information, the obliged entity shall exclude the classified information and provide the remaining part.

vacy, which is enshrined in Article 10 of the Charter. Thus, personal data are protected, however the absolute priority of personal data protection over the right to information is not in place and the two rights have to be balanced by the principle of proportionality in each individual case.

Therefore, the disclosure of personal data which is in the public interest will lead to publication of such data, if the public interest prevails over the private interest of the affected individual. The CC concluded in its decision file No. ÚS 517/10, that there is a public interest in learning about the Communist Party membership of individual judges during the totalitarian regime, even though it is personal data information. A political regime that refuses to disclose this information would be untrustworthy and would not be of a democratic state governed by the rule of law. Persons in public office enjoy a reduced level of personal data protection. The proportionality test is based on the presumption that the rights of judges are weaker than the right of the public to know how a judge has behaved in the previous regime. The CC further added that information on membership in the Communist Party is not an indication of the current political attitudes of the subjects and is therefore not an indication subject to the protection of personal data.

Interesting developments may be discerned in the case law dealing with salaries of public officials and employees of the obliged entities. In 2004[6] the Supreme Administrative court held that it is not possible to provide detailed information together with names of individuals (members of a city assembly), however data may be provided in anonymized form. The first judgment[7] ordering to provide information was passed in 2011 in which the Supreme Administrative Court denied taking the proportionality test as the information on remuneration should be provided under Sec. 8b of the Act ordering the beneficiaries of public funds to provide their personal data at request. The court continued that the right to personal data protection is not unlimited and thus quashed the decision of the regional court which denied access to this information. However, two years later[8] the Supreme Administrative Court changed its position when another senate stated that the proportionality test must be carried out when providing information on remuneration. Thus, in principle, the court did not rule out that the provision of such information could be refused in some justified cases.

In October 2017 the CC changed this approach favourable to openness when it filed a rather controversial decision file No. IV. ÚS 1378/16 according to which the employer may refuse to provide the applicant with information about the employee's salary unless all of the following conditions are not met:

a) the purpose of requesting information is to contribute to the discussion on matters of public interest

b) the information itself concerns the public interest,

6 Judgement file No. 2 As 6/2004 of 10 August 2004.

7 Judgement file No. 5 As 57/2010 of 27 May 2011.

8 Judgement file No. 8 As 55/2012 of 28 February 2013.

c) the applicant for information fulfils the tasks or mission of public supervision or the role of a "social watchdog"

d) the information exists and is available.

This was not a solitary decision as the CC decided later similarly in its finding file No. IV. ÚS 1200/16 of 18 April 2018. However, the Supreme Administrative Court elaborated on these conclusions in its judgment of file No. 5 As 440/2019 dealing with a case of a journalist who had asked several times to be provided with information on salaries and benefits of high-ranking regional officials and was denied access to them despite of the decisions of the appellate body and courts. The court stated that, first of all, it is necessary to assess whether, in a specific case, the right to information is used as a tool for the realization of freedom of expression, or whether it is applied in the public interest. It is undoubtedly in the public interest that administrative authorities respect the decisions of administrative courts The court continued: "Even in the case of information about the salaries of employees of public authorities, one can undoubtedly imagine situations where this condition will not be fulfilled - for example, information about the salaries of employees who do not participate in the exercise of public authority at all, while there are no doubts about the adequacy of the benefits provided to them." Thus, the Supreme Administrative Court effectively reduced the situations when the information will not be provided to minimum.

4.3 Procedure, remedies, payments and their limitations

The Act requires that the obliged entities act proactively and publish certain information. Further information may be requested. The requests are not limited, they only need to include the question, and to whom should be replied. Generally, no reason why the applicant is asking needs to be provided[9]. The answer should be given in 15 days and there is a possibility to appeal against a negative or incomplete decision. The court review is carried out by administrative courts that may order provision of information. If the obliged entity remains silent or does not provide the information despite the court's decision the applicant for information can file a claim to the court directly against the decision of the obliged entity, by which the obliged entity again refused to provide the requested information after the previous negative decision annulment by the appeal body according to the judgment of the Supreme Administrative Court file No. 7 As 192/2017.

Another obstacle abused by the obliged entities may be of financial nature. The Act in its Sec. 17 allows the obliged entities to charge a fee for the provision of information in an amount which must not exceed the costs relating to making copies, obtaining of data media and sending the information to the applicant. Obliged entities may also request a fee for a labour intense search for information. This fee is to be paid in advance. In a recent decision of the CC file No. III. ÚS 3339/20 of 1 July 2021 the CC dealt with a case of a journalist

9 In case of salaries of public officials the case law created some restrictions which are discussed below.

who asked the Police to provide a list of data on all criminal offenses recorded in the last five years preceding the submission of the application. The Police found that the processing of the request would be connected with an extraordinarily extensive search for information, and therefore, on the basis of Section 17 of the Act, set a fee of almost CZK 26 million (EUR 1million) using a qualified estimate. The CC found that the Police unjustifiably chose the most complicated possible way to deal with the application when they claimed they needed to search each detail manually and estimated that they needed four minutes per each crime. The CC therefore found their procedure in determining the payment not only unreviewable, but also highly irrational. According to the CC the obliged entity is to be a legal professional in the information procedure under Article 17 (5) of the Charter, which is to guide the applicants in the process of providing information in such a way as to satisfy them as far as possible; it is inadmissible for the obliged entities to transfer the responsibility for the successful processing of the application to the applicants and to blame them for the lack of activity where the administrative body should be active with regard to the basic principles of administrative activity. The obliged entity should look for ways to maximally comply with the submitted application and not with reasons to prevent its compliance. In view of the requirements of Art. 4 par. 4 of the Charter, care should be taken to review the justification for setting a fee for the provision of information not only in terms of its amount, but also in terms of effectiveness and rationality.

5 Discussion

The analysis of the three transparency key areas shows that there has been a tendency towards promoting the importance of this principle namely by the Supreme Administrative Court. The group of obliged entities has grown gradually as more cases proved the extensive court interpretation especially of the vague term public institution. The exemptions were often misused as excuses by administrative bodies and the administrative courts tend to interpret them narrowly. The examples above show, that there is a stable case law of the CC and the administrative courts interpreting the restrictions, i.e., the exceptions when information is not provided rather restrictively. Procedural aspects such as availability of appeals and court revision were also granted to the utmost extent by the case law. The CC approach seems to be partially influenced by its long ago set doctrine that all the rights granted by the Charter should be of the same value (although to some extent this does not apply to the social rights). Thus, the CC insists on protection of personal data and application of the proportionality test in each case when these are to be revealed to become public. The salaries case law seems to be even more restrictive on transparency, however the administrative courts interpretation seems to move towards a better balance. The payments are limited and review procedures including the access to administrative courts are enshrined in the law. This all may lead us to a conclusion, that the free access to information legislation and its interpretation are robust and should ensure transparency of administrative bodies.

However, the obliged entities ignorance of the appellate administrative decisions and court decisions ordering them provision of information which is not only scarce unfortunately results in the right not being granted in practice. Moreover, it seems difficult the enforce these decisions. According to the resolution of the Supreme Court file No. 20 Cdo 3922/2009 it is not sufficient for the purposes of enforcement decision if the appellate body decision only orders to comply with the application and does not specify, how the requested information is to be provided. However, this is usually difficult, as the appellate body or the court do not have precise information about what is in disposition of the obliged person. Further, this disrespect together with situations when information is made public, however no consequences are drawn when the information reveals misconduct show the lack of accountability. In theory, transparency is closely intertwined with accountability. If left without consequences on its own would work as a pure incentive to publish information to the public, but without accountability there would never be any action against inappropriate behaviour of politicians, civil servants, or other actors. The public would learn about misconduct, but there would be not negative consequence to it. At the same time, a separate accountability principle would not make do, as there would be no incentives or evidence information for granting corrective action. Transparency therefore has a very strong position of a partner principle, as it creates accountability (Fox, p. 664) or, as some authors state, transparency is part of accountability (the so-called information phase) (Buijze, p. 147). However, a high degree of transparency does not automatically mean a high degree of accountability or better performance of public administration. The level of accountability of governments in Central Europe is relatively limited (Veselý, p. 320).

Theoretically, should a piece of information showing misconduct of a public official appear due to the transparency rules, such official should be held accountable. Legal mechanisms for holding public officials accountable through disciplinary proceedings for any intentional breach of rules and negligent misconduct are contained in the Act No. 234/2014 Coll., On Civil Service. The disciplinary action may result in dismissing the official, should such misconduct be proved during the proceedings. The basic preconditions of legal regulations include, for example, officials independent of the political environment, transparent selection procedures, clearly defined duties, remuneration based on performance, etc. Duties of civil servants may arise from legal and service regulations, and ethical standards set by internal rule.

Unfortunately, no national statistics regarding the numbers of those subject of disciplinary proceedings are kept. The Civil Service Section of the Ministry of the Interior, that is the authorised body, does not record collectively the number of disciplinary proceedings for all the public bodies in the Czech Republic. Unless the civil servant appeals against the decision of the disciplinary commission of the first instance, the Civil Service Section does not even know about the disciplinary proceedings. Thus, collecting the data would be extremely difficult if not impossible. The same applies to obtaining the source of information due to which the misconduct was revealed.

Since 2015, there has been an investigator position established with individual service authorities, appointed by the service authority to investigate allegations of suspected law infringements and to ensure the protection of the civil servant who announced such misconduct (the whistle-blower) and thus fears sanctions, disadvantage or coercion that may occur in connection with the notification made. The activity and designation of investigators is based on the empowering provision of Sec. 205 letter d) of the Act on civil service, on the basis of which the Government Decree No. 145/2015 Coll., was issued. It is a matter of course for the investigator's activities to protect the identity of the whistle-blower during the ongoing investigation; in the case of the whistle-blower's interest, the investigator has the opportunity to keep his identity secret. The investigator prepares a written report on the course and results of his investigation, which, with regard to the identified breaches of law or other misconduct, contains a proposal for appropriate remedial measures. All the designated investigators shall submit to the Ministry of the Interior a report on their activities for the past year, no later than 1 March of the following year.

The following table shows the statistics and proves a very low number of deficiencies and measures that were taken in response. We might expect, that the situation is similar in case of reacting to information provided on the basis of the free access to information.

Table 1. Summary survey statistics for the years 2017 to 2021

Year	2017	2018	2019	2020	2021
Total number of service offices where the investigator is appointed	107	107	108	109	109
Total investigators' reports sent	107	100	106	109	108
Total notifications received in the sense of Government Decree No. 145/2015 Coll.	71	57	55	41	21
Investigation finalised	39	48	38	21	18
Ongoing investigation	2	3	3	1	2
Transferred to another investigator	74	7	15	19	1
Forwarded to the competent administrative authorities*	61	28	67	230	111
Handed over to the administrative body competent to hear the administrative offense	10	0	1	2	0
Notification to the public prosecutor or to the Police of the Czech Republic	1	2	1	1	1
Identified deficiencies	11	9	6	5	2
Measures taken	11	9	9	6	2

* This is a transfer of other complaints or grievances that were delivered to the investigators, but it was not a notification in the sense of Government Decree No. 145/2015 Coll.

Source: Annual Report on the Civil Service: on the Civil Service in 2021.
Ministry of the Interior of the Czech Republic: Civil Service (Výroční zpráva, p. 79)

The issue of sleeping accountability could be solved through a more intensive citizen engagement by applying pressure on authorities. However, there needs to be a direct possibility of being sanctioned or not being re-elected. Some public authorities are more open than others to discuss with civil society ways to ensure the accountability of other state bodies. This all depends on the culture of the authority and individuals in management positions. This seems to improve by degrees; however, it might take other generation and confirm the words of President Masaryk about the 50 years necessary for democracy to start flourishing. The judiciary is certainly an important actor, and the analysis proves its role in promoting transparency, however the ministries and other superior administrative bodies should play a more active role in the accountability implications. Thus, effectiveness of transparency to promote accountability also depends on the availability of mechanisms to enforce sanctions. These sanction mechanisms would deserve a thorough revision as they do not seem to be sufficient.

6 Conclusion

Transparency requires access to information by public. The right to information is a necessary precondition for proper exercise of other political rights, such as freedom of speech and the right to vote and be elected. Further, transparency is one of the fundamental principles of good governance, as it implies the public insight in the work of administrative bodies. Every natural and legal person should be enabled to inspect how properly the public administration operates as well as public expenditures effectiveness. It helps to build trust in public administration and thus prevents from unpredictable results in elections favouring extremist parties.

The Act providing for a broad right to obtain information from administrative authorities and other obliged persons has been effective for more than twenty years in the Czech Republic. This has been enough time for stable case law of the administrative courts and the Constitutional Court to develop. The analysis proved that transparency is strongly supported by adopting a broad interpretation of obliged persons, rather restrictive interpretation of exemptions when information does not need to be provided and procedural provisions being explained in a way to make the access as easy as possible.

Provision of information on implementation of state policies, behaviour of politicians and officials, decision-making on public issues, etc., is not a self-sufficient goal. It is necessary to create an environment where a specific individual needs to be held accountable and bear the negative consequences associated with the found misconduct. Thus, government transparency and accountability are closely intertwined.

Proper statutory laws should assure not only that sufficient transparency sheds light on maladministration. Further, accountability should be ensured, so that individuals and institutions are held liable, bear legal consequences. The Czech Republic together with Central and Eastern European countries

face accountability deficits. The legal instruments are not necessarily as strong as they generally are perceived if the interconnections between the two principles are weak. The article argues that there has been sufficient concentration on transparency, the laws on free access to information and their interpretation have developed greatly during the past 20 years. However, as the level of accountability divulges the democratic character of the administrative system, the same attention paid to transparency would be needed for accountability to improve the democratic character of the country.

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