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**Freedom of information and Covid-19 – the
Hungarian case**

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Freedom of information and Covid-19 – the Hungarian case

Introduction

Covid-19 pandemic challenged the universal system of human rights around the world. Citizens have been forced to endure a multitude of binding restrictions, whether on their privacy, freedom of movement, access to justice or the exercise of any other fundamental right. The 'balancing principle' of constitutional law – basically the need to weight what restrictions on fundamental rights are necessary and proportionate in a democratic society – has been regularly applied and invoked in the face of the greatest human epidemic of the 21st century.

The situation of freedom of information is specific in that data of public interest on the endemic, such as the spread of the virus, the number of infected, the number of death, the hotspots of outbreak, or the most important vaccine information as well as credible information on Government measures to combat the epidemic, are not simply *data of public interest*, but are in fact data that are prerequisites for public confidence in the fight against the pandemic.

The lesson learnt from pandemic so far is that only credible, up-to-date, verifiable information can strengthen public confidence and reduce uncanny panic reactions (e.g. unwarranted getaway from parts of the country where there is no demonstrable threat. Another unwanted effect to avoid is a fear-driven isolation of infected people, but one should also avoid stigmatisation of certain infected or exposed groups).

To highlight just one aspect of our claim: without authentic information, it is certainly not possible to increase confidence in vaccination. The willingness to vaccinate is a key factor, without which it is not possible to successfully combat the pandemic. Therefore our claim on this study is that freedom of information is referred to increase the willingness to vaccinate. It is highly justified to assume that the willingness to vaccinate will increase if citizens are aware of the data on how many people have been vaccinated (for instance) in Hungary, what vaccine was used, how many vaccinated and not vaccinated have died.

It is justified to have accessible data on the health risks (if any) on the vaccinations. All such data contribute to the trust in vaccination which contributes to a safe handling of the pandemic. (For example vaccination of children under 12 in Hungary depended heavily on whether guardians who decided for or against the vaccination of minors had access to credible information. Such data reduced concerns about the side effects of vaccine and contributed to herd immunity).

In the international practice of freedom of information and Covid-19, it seems to be highly unusual, one could argue, that a special "Hungarian way" to handle the crises was by the Government to restrict freedom of information. By and large, the Government failed to recognize how information power served its own interests, and regarded the extended exercise of freedom of information as an obstacle to its own effectiveness in the fight against Covid-19. In sum, the Hungarian Government chose to restrain data of public interest by statutory measures from the very early stage of the pandemic.

Regulatory Background

The Hungarian government declared a state of emergency for the first time on 11 March 2020 [Government Decree 40/2020 (11.III.) on the declaration of a state of emergency], thus a special legal regime for the whole country came into force. The decree was extended continuously, and currently is in force due to the war in Ukraine. So, the state of emergency was originally introduced (and justified) in the fight against Covid-19 pandemic and the special legal order was continuously extended for reasons related to the war in Ukraine.

Restrictions on freedom of information were first regulated by Government Decree 179/2020 (4 May 2020) on the derogation from certain provisions on data protection and data requests in times of emergency¹ and then by Government Decree 521/2020 (25 November 2020) (with the same title and the same content but different numbering). Government Decree No 521/2020 (25.XI.) expired on 8.II.2021. It was then re-enacted by Government Decree 27/2021 (29 I).² After a new expiry, the validity of Decree No 521/2020 (XI.25) was extended until 23 May 2021 by Government Decree No 80/2021 (II.22).³ Finally, under the next amendment, the scope of Government Decree 521/2020 (XI.25) was again extended by Government Decree 271/2021 (21 May) until the expiry of Act I of 2021 on the protection against the coronavirus pandemic.⁴

In May 2020, the Civil Liberties Union for Europe, Access Now and the Hungarian Civil Liberties Union (TASZ) appealed to the European Data Protection Board (EDPB) against the provisions of Government Decree 179/2020 (4 May 2020) that derogate from freedom of information principles and certain data protection provisions. In its reply of 3 June 2020, the EDPB stresses that it has no jurisdiction in the matter. Suspected violations of the GDPR can be investigated by the national data protection authority.⁵ (In this study we argue that the credibility of European and Hungarian NGOs are higher if they manage to apply to competent authorities with their claim. Even though their claim was rightful they were unable to articulate it).

The government's justification for the restrictions on the right to freedom of information in Hungary in the fight against Covid-19 is authorities' administrative workload. According to the Government's reasoning, the delay in fulfilling data requests is justified because the data controller (public authority in charge) is burdened with other pandemic-related tasks. The nature of the restrictions in Hungary are as follows:

1. the request for access to data of public interest may not be submitted orally, and the request for access to data does not have to be fulfilled in the form and manner requested by the applicant pursuant to Paragraph (2) of Section 30 of the Information Act, if it involves personal appearance before the public authority performing public tasks.

¹ The legislator has always adapted the order of the data request to the scope of the law imposing the imposition (and reimposition) of the emergency measure. Government Decree 179/2020 (V.4) provided for its application until the end of the state of emergency declared by Government Decree 40/2020 (11.III.).

² 27/2021 (I. 29.) Government Decree on the declaration of a state of emergency and the entry into force of emergency measures, § 4, point 17, reapplies Government Decree 521/2020 (XI. 25.).

³ Government Decree 80/2021 (22.II.) on the extension of the period of validity of the emergency measures related to the state of emergency declared on 8 February 2021. Pursuant to Article I, point 17: the Government extends the validity of Government Decree No 521/2020 (25.11.20) on derogations from certain provisions on data requests during the emergency until the expiry of Act I of 2021 on the control of the coronavirus pandemic.

⁴ 271/2021 (21.V.) Government Decree on the renewal of the extension of the emergency measures related to the state of emergency declared on 8 February 2021 § 1.

⁵ https://edpb.europa.eu/sites/default/files/files/file1/edpb_letter_out2020-0046_ngoshudecrees.pdf

2. the public authority challenged shall comply with the request within 45 days of receipt of the request for data, if it is likely that compliance with the request within the time limit (15 days) would jeopardise the performance of the public task of the body. The applicant shall be informed of this (new) deadline within 15 days. This time limit (45 days) may be extended once by 45 days.
3. if the fulfilment of the data request involves a disproportionate use of the staff resources necessary for the performance of the core activities of the body performing public tasks, or the requested document is of significant volume, then a cost compensation may be determined pursuant to Section 29 (2) of the Information Act, and the data request should be fulfilled within 45 days of the payment of the cost compensation instead of the original 15 days of deadline. This period of 45 days may be extended once by another 45 days
4. the data requester under FOI must be notified of the refusal of the request, the reasons for the refusal and the legal remedies available (Section 30 (3) of the Information Act) within 45 days of receipt of the claim instead of 15 days. This period may be extended by a further 45 days.
5. the restrictive measures shall also apply retroactively to pending requests for access to data of public interest.

We have summarised above the most important features of the legal context of freedom of information during Covid-19 pandemic, the essay will further focus on the three most significant problems in the context of coronavirus and freedom of information in Hungary: first, the lack of regional and territorial epidemiological data. Hence the title of the first paragraph: epidemiological data, delay and consequences. The second paragraph is entitled: publication of mortality data, data of public interest and bad government practices. The third problem is the separation of personal and public data in the context of Covid-19 contagion, part of which is the identifiability of infected people was jeopardised.

Epidemiological data, delay and its consequences

Essential epidemiological data were partly not communicated by the Hungarian Government to citizens and data were partly delayed. This caused extreme difficulties in the first wave of the pandemic, in the spring of 2020. Also, the Hungarian Government did not communicate (at all) regional epidemiological data in the first phase of the outbreak.

Gergely Gulyás, Minister heading the Prime Minister's Office stated that regional epidemiological data are not disclosed because "the Operation Task Force's position is clear: we must not create panic in any one municipality."⁶

Meanwhile, the Government-critical daily 444.hu carried an analysis in an editorial that all European countries publish regional data on coronavirus patients, except for Hungary.⁷ In a press statement, the president of the Hungarian National Data Protection Authority (NAIH) grabs the reason for the concealment of the territorial data in the fact that these data can also be decision-preparatory data that are immune from disclosure. According to Paragraph 5 of Article

⁶ <https://infostart.hu/belfold/2020/03/19/kormanyinfo-tiz-tizenotszorosa-lappangas-szazezres-lehet-a-megbetegedes>

⁷ <https://444.hu/2020/03/17/az-osszes-europai-oroszag-kozol-teruleti-adatokat-a-koronavirusos-betegekrol-kivev-magyarorszagt>

27 of the Hungarian Information Act⁸, “any information compiled or recorded by a body with public service functions as part of, and in support of, a decision-making process for which it is vested with powers and competence, shall not be made available to the public for ten years from the date it was compiled or recorded. Access to these information may be authorized by the head of the body that controls the information in question upon weighing the public interest in allowing or disallowing access to such information”⁹

According to the President of National Data Protection Supervisory Authority (NAIH), the disclosure of regional data can be restricted if data are attributing to decision-making procedure, especially if they determine the modus, the place or the time of effective defence against the virus. Government should avoid to "frustrate the effective fight against the virus"¹⁰. If the effective fight is jeopardised than restriction on public data is justified. (In such a case, the subsequent decision to make - in which the mentioned data is “preparatory” - can vary. For example the closure of an infected area can be decision making document if there is a threat of mass displacement due to fear-induced panic.

The question is rather how much does it violate the essential content of the fundamental right to freedom of information for a government to withhold territorial infection data in contravention of European best practice? President of the Hungarian Data Protection Supervisory Authority (NAIH) strengthens the position of the Hungarian Government when he stresses that the fact that territorial data are not considered personal data in statistical form,¹¹ does not automatically mean that they are open and accessible data, because data disclosure may be restricted for other reasons, e.g. for the preparation of decision decision-making.

The President of NAIH points out that there is a contradiction in case law (according to the practice at the time) because municipalities widely disclose infection data, while the Operation Task Force considers or may consider the same data as decision-preparatory.

The President of NAIH also makes a sovereignty argument against the EU: he points out that regulation of the freedom of information is a national competence, referring to the fact that there are no milestones for the restriction of the freedom of information, only national law can set limits to it, and that no other EU norms have to be complied with.¹²

In NAIH Resolution 2020/2904-2 of end of March 2020, the President of the Data Protection authority confirms his previous (televised) statement - discussed in detail above - and refers to the fact that the geographical spread of the epidemic is multiply published, it does not rely on the willingness of the Hungarian Government, for example geographical data is also published by the WHO, the source of information is multiple.¹³ Similarly, a leaflet can be downloaded in Hungary at <https://koronavirus.gov.hu>. In this statement, the President of NAIH confirms that

⁸ Act CXII of 2011 on the Right to Informational Self-determination and Freedom of Information (Hereinafter: Information Act).

⁹ Paragraph 5 of Article 27 in Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information.

¹⁰ Interview with Attila Péterfalvi. Hungary live extra: with Attila Péterfalvi (2020-03-19) - HÍR TV. https://www.youtube.com/watch?v=YAQ_-hPxjGQ

¹¹ Personal data are considered always “protected data”

¹² Interview with Attila Péterfalvi. Hungary live extra: with Attila Péterfalvi (2020-03-19) - HÍR TV. https://www.youtube.com/watch?v=YAQ_-hPxjGQ

¹³ <https://who.maps.arcgis.com/apps/opsdashboard/index.html#/ead3c6475654481ca51c248d52ab9c61>
<https://coronavirus.jhu.edu/map.html>

the Information Act allows for restrictions on the disclosure of information preparatory to a decision: "this may be particularly true in a spontaneous or rapidly changing epidemiological situation, where the public authority is not necessarily obliged to provide full information on planned or ongoing decisions or the information on which they are based. It should be stressed that once a decision has been taken, the request for information can only be refused if the information is also used as a basis for a future decision (...)."14

NAIH practice

According to NAIH's case law and consistent practice, under the 'exceptional legal regime' (eg. state of emergency), "notwithstanding Section 29 (1) of the Information Act,¹⁵ the public body handling the data shall comply with the request for access to data of public interest within 45 days of receipt of the request, if it is likely that the timely fulfilment of the request pursuant to Section 29 (1) of the Information Act would jeopardise the public body's performance of its public duties in connection with the emergency."¹⁶

"According to the case law of the data protection authority, if the conditions set out in the Government Decree are met, the data requester must at least be informed of the circumstances of Section 29 (2) of the Information Act that grounded the extension of the deadline, also the data requester must be informed of the public tasks to fulfil that would be jeopardised by providing the information within the original deadline. It is not sufficient to state the fact that the deadline has been extended [by the public body], reasons must also be given."¹⁷

"The National Data Protection Authority will assess the justification for the 45-day time limit for compliance and the justification for an extension, which may be applied under the Government Regulation, in each case on the basis of its assessment of all the circumstances of the case."¹⁸ On this basis, for instance, NAIH did not find it lawful to refuse to provide data of public interest in relation to a request for data from the municipality of Gyömrő, where the applicant had not received a reply to his FOI request for two months.¹⁹ The case of NAIH-3092-4/2021 of the municipality of Nagytarcsa is particular, where, following the receipt of a request for data of public interest, on 11 January 2021, the notary extended the 15-day deadline for the request by a further 15 days under the Information Act. In its investigation, the NAIH found the extended deadlines to be applicable in the pending case, in accordance with the broad interpretation of the cited Government Decree.²⁰

However, in the periods when the government decree restricting freedom of information was repealed due to the improvement of the virus situation, the default rule of the Information Act was applied: the request had to be fulfilled within 15 days.²¹ Thus, the municipality of Eger was in breach when it failed to inform the data requester within 15 days "when, from whom and

¹⁴ NAIH 2020/2904-2

¹⁵ Paragraph (1) of Article 29 of the Information Act sets a 15-day time limit for the fulfilment of the request.

¹⁶ NAIH 2010-6/2021.

¹⁷ NAIH 2010-6/2021.

¹⁸ NAIH-831-11/2021. See also NAIH-4751-5/2021

¹⁹ NAIH-831-11/2021. See also NAIH-2940-8/2021

²⁰ NAIH-3092-4/2021

²¹ NAIH/2020/6190/3

how many coronavirus tests were obtained by the municipality” and “who among the municipal leaders had received a rapid test”.²²

The research has also shown that, in addition to the above legal reference, the NAIH also refers to other legal bases. In NAIH Resolution No. 685-1/2021, the NAIH does not find that Government Decree No. 41/2020 (11.III.) on measures to be taken in the event of an emergency situation to protect the health and life of Hungarian citizens, is a sufficient legal basis for restrictions of data of public interest. According to paragraph 3(2) of Government Decree 41/2020 (11.III.), the mayor of the municipality is responsible for the care of persons in official quarantine. On the other hand, the NAIH, relying on an extremely rarely cited piece of legislation, states, on the basis of Article 4(8) of Act XI of 1991 on Health Authority and Administrative Activity, that “data established on the epidemiological situation are public, and therefore data established on the pandemic should be made public by the State health administration.”²³

An interesting development is the data request by Anna Donáth, member of the European Parliament, in April 2020, where she asks questions about the Action Group set up to "ensure the functioning" of state and non-state economic companies "vital to the functioning of the country" and the functioning of the Defence Management Tribes (HI Tribes) within it, through a public a data request.²⁴ The NAIH's position is that "in the absence of a separate and distinct legal entity and associated budget, the HI Tribes have no directly accountable disclosure obligations". Their primary functions are logistical, such as passenger transport and guarding. According to Article 28(1) of the Information Act, a request for public data can be submitted directly to the Minister of Defence or his/her superior body in charge of the Task Force but not the Task Force directly.²⁵

Public access to mortality data, data of public interest and bad governance practices

In addition to the above, the government's freedom of information practice received other criticism. One criticism is that the mortality data provided by the Government on the web, do not include information on the sub-data that would reflect on more detailed information on the nature of the virus. One of these critical gaps is the mortality statistics for patients admitted to intensive care units and ventilators, which at the peak of the outbreak were reported by the press to be over 80%.²⁶ (It is not sufficient to know how many people died, it is important to know how many died out of those that got on intensive care, how effective the intensive care unit was, if there were enough life saving ventilators, etc).

In Hungary, the most important Government data on the epidemic can be found at koronavirus.gov.hu/#news. In April 2021, the Government published its statistics on the effectiveness of the five vaccines available in Hungary on the same page. The data compared the number of people vaccinated, or the number vaccinated per 100,000 people, with the number of people who became ill or died from the virus. By this statistics (and methodology

²² NAIH/2020/6190/3. If necessary in connection with the request, the Infotv. does not prohibit the public body from providing information, explanations and additions to the data request in order to provide authentic and complete information.

²³ NAIH/685-1/2021

²⁴ Government Decision 1108/2020 (18.III.) and Government Decision 1101/2020 (14.III.), point 3 a) and b).

²⁵ NAIH 2020/3404/2.

²⁶ The guest of Straight Talk is Hunor Novák, an infant and paediatrician. <https://www.youtube.com/watch?v=jzjLjxOJFdk>

used for the statistics), the best overall statistical results were granted to the Russian vaccine Sputnik together with the Chinese vaccine Sinopharm.²⁷ Biochemist Katalin Karikó questioned the accuracy of the statistics, saying on her social media page that the age of the deceased was not indicated and that the sampling intervals were unjustifiably different for the vaccines compared.²⁸ Szabolcs Dobson, a pharmacist and founder of the Facebook group Coronavirus Vaccination - Literature Trampling, says:²⁹ "no professional conclusions can be drawn from the data published by the Government. We do not see that the Government have taken into account the timing of vaccination campaigns (see epidemic surge), the demographic, geographical and health characteristics of those vaccinated, the severity of the disease, diagnostics and more. We don't even know if data exist to allow such analyses. I would like to believe that the scientific standard of Hungarian epidemiology is (traditionally has been) much higher than what we see here. However, if public epidemiological decision-making is based on the collection and processing of data to an asthmatic standard, combined with political marketing, it results tragedy. Poor Hungary". In response to the harsh criticisms, the Government of Hungary did not subsequently correct the allegedly incorrect data provided on the Government site.

On 16 June 2021, Bernadett Szél, Member of the Hungarian Parliament, requested the Ministry of Human Resources the followings: "Please send me the background material, background calculations and detailed documentation of the research underlying the table published on the Government's Facebook page on 25 April, entitled "Data on infections and deaths after the second vaccination between 26 December 2020 and 20 April 2021"."³⁰ In its response, the Ministry (referred in Hungarian as EMMI) repeated the same data from the (originally) criticised table that previously raised serious concerns: (Number of cases per 100,000 vaccines, rounded to the nearest whole number = (total number of cases after the second vaccination) / (number of second vaccinations administered = fully vaccinated) and the number of deaths per 100,000 vaccines, rounded to the nearest whole number = (total number of deaths after the second vaccination) / (number of second vaccinations administered = fully vaccinated)).³¹

In September 2021, István Ujhelyi, member of the European Parliament (part of the Hungarian opposition) requested data of public interest on how many of the coronavirus patients who were finally hospitalized or died had been previously vaccinated, what vaccine they received and how many times were they vaccinated? - No reply was received.³² In his study, Tamás Ferenci points out that, unfortunately, in Hungary there is still no public, written record on the procedure for determining how (exactly) to consider the cause of death as Covid-19 related death.³³

²⁷ <https://index.hu/gazdasag/2021/04/27/kormanyzati-tajekoztatasi-kozpont-vakcina-tablazat/>

²⁸ <https://www.facebook.com/photo.php?fbid=10157763512121034&set=a.476277836033&type=3>. See also: opinion of the Hungarian Medical Chamber: <https://index.hu/belfold/2021/04/27/a-mok-szerint-a-kormany-vakcinatablazata-nem-alkalmas-melyebb-kovetkeztetesek-levonasara/>

²⁹ <https://www.facebook.com/groups/740482753554572/permalink/819601538976026/>

³⁰ <https://444.hu/2021/08/04/szel-bernadett-kivancsi-lett-volna-a-reszletes-adatokra-a-kormany-elhiresult-vakcinahatekonysagi-tablazatarol-de-nem-kapta-meg-azokat>

³¹ The EMMI has also sent a new table showing how many people have been vaccinated with the different vaccines. According to the daily 444. hu, this is the data that would have been available anyway from the European Centre for Disease Prevention and Control. <https://444.hu/2021/08/04/szel-bernadett-kivancsi-lett-volna-a-reszletes-adatokra-a-kormany-elhiresult-vakcinahatekonysagi-tablazatarol-de-nem-kapta-meg-azokat>

³² https://nepszava.hu/3132813_miert-titkolja-a-covid-betegek-oltasi-adatait-a-kormany. Also: <https://infostart.hu/belfold/2021/09/30/ujhelyi-istvan-pert-indit-a-covid-betegek-oltottsagi-adatai-miatt>

³³ <https://github.com/tamas-ferenci/ExcessMortEUR>

Among the bad government practices, it is worth mentioning the reference to the previously discussed unreflective decision making as a limit to the disclosure of data of public interest. This practice is exempting cases from the principle of freedom of information relying on their nature as preparatory documents for decision making without discretion. In none of the cases examined in this research paper has the NAIH found that the data or information used to prepare a decision is wrongly classified and is, *in fact*, data of public interest, and therefore no conclusion was made that disclosure was unjustifiably restricted.

The first such group of ambiguous cases was the above mentioned geographical disaggregation of infection data. Here the Hungarian National Data Protection Authority actually formulated the legal basis for the data not to be revealed (how to block them from public) basically in lieu of the Government. (To be reminded, NAIH is established by law to protect in each possible way the disclosure of public data not to block them).

The other typical set of cases using the argument of preparatory data for decision-making to reject freedom of information request was related to the evacuation of hospital beds in Hungary. The Order by the Ministry of Human Resources (EMMI) on the emptying of hospital beds for the purpose of accommodating future coronavirus patients was not made public,³⁴ and therefore the Hungarian Helsinki Committee, a civil rights organisation, submitted a public interest data request to the Ministry (EMMI) on 20 April 2020,³⁵ asking for a copy of the Order. The Hungarian Helsinki Committee claimed that according to the Order 50% of the bed capacity in Hungarian hospitals by 19 April 2020 should be deliberated, for a total of 32,900 beds, and in the next phase another 60% of the bed capacity for a total of 39,500 beds for the purpose of the subsequent care of patients with Covid-19 to be hospitalised.³⁶ In its ironic reply, the Ministry states: " I would like to inform you that the document you requested will also provide the basis for a further future decision-making. According to Paragraph 6 of Article 27 of Information Act I reject it."³⁷

Another typical case in Covid-19 and freedom of information relation in Hungary is related to NAIH-157-2/2021 statement. In this case NAIH finds the FOI (freedom of information) request to reject was justified. Chief Surgeon General, Cecilia Müller rejected the request to provide access to several provisions of Government Decree 431/2020 (XI.18). Regarding the Decree petitioner also requested "the professional-medical ground" of a statement by Gergely Gyulyás, head of Prime Minister's Office. Moreover, applicant also requested the opinion of the National Centre for Public Health (NNK) on whether the textile mask is a garment or a medical device. The Hungarian data protection supervisory (NAIH) concluded that "NNK did not infringe the applicant's right of access to data of public interest by not complying with its request (...)." ³⁸ At the same time, the data protection authority (NAIH) draws Cecilia Müller's attention to the fact that "information on masks (..) is extremely important in the current situation, so please do not hesitate to provide a link to the information on the website for applicants (...)." ³⁹ The NAIH's position does not give explanation why NNK has not infringed the right of the petitioner to

³⁴ <http://www.ekint.org/az-allam-atlathatosaga-informacioszabadsag/2020-05-12/uvegemberkent-elni-a-nagy-testver-oroszagaban-avagy-a-lemeszarolt-informacios-szabadsagok>

³⁵ https://kimittd.atlatszo.hu/request/korhazi_agykapacitas_felszabadi

³⁶ <https://koronavirus.gov.hu/cikkek/korhazak-orszagszerte-felkeszulnek-tomeges-megbetegedesekre>

³⁷ https://kimittd.atlatszo.hu/request/korhazi_agykapacitas_felszabadi

³⁸ NAIH-157-2/2021

³⁹ NAIH-157-2/2021

access data of public interest by rejecting the request, if the information on protection masks and their wearing is (per definition) data of public interest.

Conflict between freedom of information and data protection in the era of covid

It is a well-known truism among information rights researchers that, in the course of research, it is inevitable that - in the given context - sooner or later to be faced with the conflict of the rights of privacy versus freedom of information.

In the fight against Covid-19 pandemic, the most visible conflict in Hungary relates to the improper disclosure of data of covid-infected citizens. In the early stages of the outbreak in Hungary, we witnessed that local communities protected themselves against the outbreak by publicly identifying the infected population. In her study, Christina Etteldorf rightly notes that the publicity of a specific person's infection is an issue that puzzles many authorities across Europe.⁴⁰ The disclosure of such personal data can affect the socio-economic situation of the person concerned and can be counterproductive in that it discourages cooperation with the authorities, mainly due to fear of stigmatisation.⁴¹ Various European solutions are known, for example the Latvian DPA states that the designation of infected areas should be sufficiently broad to prevent a person from being personally identified. Such a broad definition would be to refer to a large town instead of a municipality of a handful inhabitants.⁴²

In case NAIH/2020/3378/4, the mayor of the city of a small town in Hungary, Szarvas, published on his personal Facebook page the public areas of the city where he had ordered an official quarantine, and at one point he also gave the exact address of the property concerned, which he later corrected and called the release of the address as an "administrative error". NAIH points out that there are precise and strict legal-epidemiological rules for the designation of an official quarantine. "In a small municipality, it is inevitable that news of an outbreak might spread from the affected location and affected residents. This does not mean, however, that either the head of the municipality or the general practitioner should make this information public in a targeted way (...)."⁴³ In Resolution NAIH-3418-4/2021, the Mayor of the Municipality of Mikófalva is censured for having provided information on the covid positive status of a parent in a closed Facebook group of the local kindergarten, disclosing the full name of the parent. Data protection supervisory body (NAIH) stresses that in a small town it is almost inevitable that news of someone's illness will spread in a closed community known to all. However, this does not mean that either the head of the municipality or anyone else should purposefully make such information public. There are strict rules of procedure for the disclosure of such information. Information on the number of persons infected or under official quarantine in the municipality, or information on who may have unfortunately died, is lawful, but any other unintended use of the data should be avoided. This could apply to the naming of one or more "infected streets" (in a small municipality citizens know who resides on the designated street) in a small municipality, or the naming of an infected person on a social media or community site.

⁴⁰ Christina ETTELDORF, EU Member State Data Protection Authorities Deal with Covid-19: An Overview, 6EUR. DATA PROT. L. REV (2020). p. 265.

⁴¹ Christina ETTELDORF, EU Member State Data Protection Authorities Deal with Covid-19: An Overview, 6EUR. DATA PROT. L. REV (2020). pp. 276-77.

⁴² Christina ETTELDORF, EU Member State Data Protection Authorities Deal with Covid-19: An Overview, 6EUR. DATA PROT. L. REV (2020). p. 277.

⁴³ NAIH/2020/3378/4

It is typical in the early case law of the Hungarian data protection authority (NAIH) that the principles of data protection in human epidemic are fuzzy and not yet clear. To show the ambiguity, we highlight that NAIH does not oppose the disclosure of personal data in circumstances similar to those in the previous cases. The local media and the official Facebook page of the city of Cigánd published the covid-19 infection of a nurse from the city, information was made public by the Mayor himself. In an article published on 22 March 2020, the local news, Frissmédia writes: "the head of the town had vain hopes that a nurse working in Budapest, who is a native of Cigánd is unaffected by the virus, but she finally tested positive.⁴⁴ According to the mayor, "there is no reason to panic, we have taken the precautions that are customary at such times. The family (Gönczi family, School street) will be covid-tested soon according to the procedure. They have thus been moved from voluntary quarantine to strict official quarantine. So they will not be allowed out of the door until they are found not to be carriers." The Mayor continues, "as there are small children in the family, I ask you to deal with the situation appropriately. Please do not make their already difficult days more difficult with negative comments". NAIH argued in the case that the data subject did not subsequently request the deletion of her data, and therefore she consented to the disclosure of it, so, her privacy rights under the Information Act were not violated. However, both GDPR and the Hungarian Information Act requires prior consent for the disclosure of personal data. (Not to ask deletion later on is an opt out solution and prior consent is needed instead). Our research moreover did not highlight any document that the data subject's family, also named in the communication, had given their prior (informed, voluntary and explicit) consent to the disclosure of their data. Thus, this case is in contradiction with similar facts in previous cases elaborated in this study earlier.

Data protection authorities in Germany, Austria, Sweden, Belgium, Spain and the Czech Republic also stress that specific names and other personally identifiable information in the context of the pandemic can only be disclosed in exceptional cases. The Slovak data protection agency vests the competent authority to decide case by case the need to protect data subject or to protect public health interest of the competent authority.⁴⁵ The Lithuanian data protection authority prohibits the disclosure of such data by individuals on social media, arguing that only the competent body can take such a decision.⁴⁶ The Italian DPA even calls for a journalist's code of ethics (despite the fact that the DPA has no control over such codes).⁴⁷

The case of President János Áder in the context of Covid-19 is part of the "balancing conflict" between data protection and freedom of information. The petitioner referred to the certificate testifying that President of the Republic has been vaccinated against SARS-COV-2. The fact that the President was vaccinated by the Chinese Sinopharm has been released by his Office. In case NAIH-3356-2/2021, the complainant requested the Office of the President to release a copy of the certificate as data of public interest, claiming that the President of the Republic had previously announced the news, as an advertisement against the virus. The claim points out that the President himself had therefore made the information public. The petitioner's position could

⁴⁴ <https://frissmedia.hu/hir/egy-cigandi-apolono-is-covid-19-beteg/13913>

⁴⁵ Christina ETTELDORF, EU Member State Data Protection Authorities Deal with Covid-19: An Overview, 6EUR. DATA PROT. L. REV (2020). p. 277.

⁴⁶ <https://www.dvi.gov.lv/lv/zinas/dvi-vers-uzmanibu-uz-personu-tiesibam-un-pienakumiem-datu-aizsardzibas-joma-ves-elibas-informacijas-konteksta>

⁴⁷ Christina ETTELDORF, EU Member State Data Protection Authorities Deal with Covid-19: An Overview, 6EUR. DATA PROT. L. REV (2020). p. 278.

have been further strengthened, - but he did not refer to case NAIH/2020/3378/4 - in which the person concerned had himself contributed to the disclosure of his data. In the abovementioned case the data protection supervisory authority finds the “previously published personal data” such data that is already made public: "I note that in NAIH's case law and practice, there have been cases where a GP concerned has personally agreed to the publication of his health data and the fact of his infection in the local electronic newspaper in order to control the coronavirus at the municipal level."⁴⁸

In the case of János Áder, NAIH argues that personal data of public interest covered by Article 26(2) of Act CXII of 2011 on the Right to Informational Self-Determination and Freedom of Information is explicitly refers to personal data related to the performance of public duties of the President of the Republic, i.e. data closely related to the performance of his constitutional duties of the Head of State. Unless János Áder, the President of the Republic, 'voluntarily and freely decides otherwise', the request for his vaccination certificate 'may be lawfully refused in the current context.'⁴⁹

A statistic that is actually personal

The most visible conflict in the relationship between freedom of information and data protection in Hungary was caused by the death of a British diplomat working in Budapest. On 25 March 2020, the national news portal Index published an article entitled. "Steven Dick, British Deputy Ambassador in Budapest, is one of the victims of the crown virus outbreak in Hungary. He is the tenth person to have died in Hungary from the coronavirus. The man, aged just 37, died on Tuesday. The British embassy confirmed the news to Index News."⁵⁰

The Government started to publish updated statistics on infections and deaths in March, 2020. Data is updated from then on at: <https://koronavirus.gov.hu/elhunytak>. In addition to the number of people who have died, their age, sex and underlying disease are also listed. In the published list, the tenth victim of Covid-19 was a 37-year-old man with an underlying alcoholism problem. The data were attributed to the British deputy ambassador, and as a result of the statistical disclosure, it became common knowledge that the deputy ambassador was suffering in alcoholism. This was understandably embarrassing for both parties, for the Hungarian Government (releasing the information) and for the British Government (hiring high profile diplomats with alcoholism). All in all it was a sensitive data about a diplomat of a sending state that was being published.

On 31 March 2020, the Hungarian Civil Liberties Union (TASZ) published a position paper stating: "the Government published an illegal list of victims of the coronavirus". TASZ notes that in the current epidemic situation, the balance between informing the public and protecting individual rights is delicate. It is unacceptable, according to TASZ, that the data is attributed to each anonymised and numbered individual and such as it was made public. According to TASZ, "Only data that is inappropriate for individual identification should be made public."⁵¹ According to TASZ, freedom of information is an important public interest, but the current methodology of publishing coronavirus information on individuals needs to be reformed by the

⁴⁸ NAIH/2020/3378/4

⁴⁹ NAIH-3356-2/2021

⁵⁰ https://index.hu/belfold/2020/03/25/a_brit_nagykovethelyettes_a_koronavirus_egyik_aldozata_magyarorszagon/

⁵¹ <https://tasz.hu/cikkek/jogserto-listat-kozolt-az-allam-a-koronavirus-aldozatairol>

Government. TASZ suggested that the statistics on deaths should include three graphs. The first shows the sex ratio, the second the age distribution and the third the distribution of underlying diseases. A graph can contain only one characteristic (i.e. only age or only underlying disease). Thus, with this method, the integrated data cannot point to a specific individual.

Contrary to the position of TASZ, the President of the National Data Protection Supervisory Authority (NAIH) "has emphasized in several statements that NAIH does not consider the table in which the underlying disease of the deceased was published by the portal to be problematic, since, as stated above, the disclosure of information related to the coronavirus does not violate data protection rules as long as the person concerned cannot be specifically identified. In addition to the gender, age and underlying disease listed in the table, the government portal did not disclose or confirm any other identifiable information, and the statistical data published on the portal do not identify a specific individual, and therefore do not constitute personal data."⁵² NAIH continues its argument as follows: "data related to certain identifiable persons are of course sensitive personal data which cannot be disclosed, but if data are anonymised or figures are used such as the number of cases of deceased patients, then the right to protection of personal data cannot be called for in this current context."⁵³

Our point in this study is that contrary to the NAIH's position, TASZ's argument is correct, but its reference to a general infringement to the right to privacy is inaccurate. Hungarian Government did in fact wish to fulfil its duty to inform public and to increase public confidence in Government's actions by providing data on the correlation of virus and death cases during the crisis. In the current case, the problem is more a so called statistical error or a statistical *disclosure error*.

The essence of a statistical disclosure error is exactly relies on anonymised statistical data. The (anonymised) statistical data due to all other circumstances (such as small number of cases, small number of samples and other reasons) becomes identifiable and thus sensitive data will accidentally be revealed which may cause significant harm to the data subjects. "The high penetration of information technology and technical progress mean that, by analysing and combining the data provided, an external third party may obtain new information which the data provider did not intend to disclose (...) The problem is particularly acute at the territorial level: the small size of a territory, the limited population or the limited content of the data may jeopardise publishing them in an unbiased way. For instance the disclosure of rare occupations (e.g.: the disclosure of an opera singer living in a small municipality in the Budapest agglomeration, even without mentioning her name, results a clear disclosure); Even the identification of an average occupation (e.g. shop assistant) becomes possible to identify if there is only one person in the area; also certain specific, rare family circumstances or other rare circumstances in a small community (e.g.: a family with 8 children; a high income person) should be protected."⁵⁴

It is slightly disturbing that the President of the National Data Protection Agency (NAIH) does not recognize the data protection relevance of the disclosure error. As news portal Infostart put it on 1 April 2020, the President of the Data Protection Authority does not consider the table in

⁵² NAIH2020/5138/2.

⁵³ NAIH/2020/3506-2. See also: <https://hang.hu/belfold/koronavirus-csak-akkor-serulnek-adatvedelmi-jogok-ha-az-erintett-szemely-beazonosithato-115063>

⁵⁴ Virág ERDEI - Roland HORVÁTH, Az adatfeldedés elleni védelem statisztikai eszközei. Statisztikai Szemle, August 2004. https://www.ksh.hu/statszemle_archive/2004/2004_08/2004_08_705.pdf

which the Operation Task Force published the underlying disease of those who died in coronavirus epidemic in Hungary to be of concern. President of NAIH, Attila Péterfalvi pointed out to InfoRadio that, with the exception of the British deputy ambassador, it is not possible to identify other victims.⁵⁵

In this study we claim that NAIH's argument is not valid from a data protection point of view. From a data protection point of view, the identification of a person - especially if the information may lead to stigmatisation and negative perception, as in the case of alcoholism - is always illegal to reveal information. Moreover it is of concern to the family of the data subject, especially in a death case, where fair treatment of the family is very important. On our view it is not a valid argument that "with the exception of the British Deputy Ambassador, the victims cannot be identified". Even one victim is unjustified.

The extent to which there was a statistical discovery error – as we argued in this article - is clearly illustrated by the fact that, after the Hungarian Government refused to change its disclosure practices and the layout of the charts, the breach no longer occurred with the increased number of cases and the larger sample size. In a similar case, the Czech Data Protection Authority stated as a "Frequently Asked Question" on health care that anonym information about an 80-year-old male patient in Prague who, in addition to an infection, also suffers from lung problems does not infringe his rights. However, the same information in a small municipality, results that man's identity will be revealed. Public health authorities have a responsibility to prevent the spread of identifiable information.⁵⁶

Summary

The aim of this paper was to bring an insight in the freedom of information practices in Hungary during covid-19 epidemic. In the first part of the paper, we described the legal environment that governed access to and dissemination of information of public interest from the beginning of the epidemic until the end.

Later, the paper summarised all major cases related to freedom of information and data of public interest in Hungary, with particular reference to the delayed disclosure of regional and territorial data. We also revealed and explained in the article inaccuracies of mortality data and the problem of separation of personal data from public data in the context of Covid-19 infection. The article devoted special attention to questions of best government practices and European examples.

⁵⁵ <https://infostart.hu/belfold/2020/04/01/a-veszelyhelyzet-vegeig-fenntartja-a-jarvany-miatt-elrendelt-rendkivuli-intezkedeseket-az-operativ-torzsa-a-nap-hirei>

⁵⁶ https://www.uoou.cz/dp/id_ktg=5141

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