# Who abuses the right to freedom of information?

*The impact of information laws on the media's role in informing the public*

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**December 21, 2018**

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# Introduction

For a long time, oil was considered the most valuable asset in our world. However, by 2018, information undeniably took over: it is not only altering referendums and elections, but is creating new state systems, as seen recently in China's 'cyber sovereignty.' There is a growing interest in information from political systems, as well as civil society, the media and through that, from the public. Francis Bacon wrote *ipsa scientia potestas est*[1] in the 16th century, little did he know about a coming age, which is hungry for information and knowledge, but is often unable to differentiate between false and real. It is therefore crucial for citizens to understand the source and the value of information, and the intermediary role the media has in this process.

This thesis focuses on the relationship between the right to information legislation and the media's watchdog role, in the jurisdictions of Hungary, Ireland and Finland. It is trying to answer whether denied freedom of information requests jeopardize the watchdog role of the media and the rule of law.

'Fake news' and 'alternative facts' have become household terms in the past couple of years, which have directly or indirectly led to the public's decaying trust in the media.[2] However, one important aspect of such discourses is little known to consumers, despite being the cornerstone of all modern and functioning democracies: public interest data. According to Denis McQuail, 'cases with interest in question are ones which all members are presumed to have in common, with little scope for dispute over preferences.'[3] Public interest data can be anything from contracts, agendas, invoices to exchanged e-mails, concerning public bodies or public funds. Since it is made available to the public in unprocessed formats, more often than not citizens have no interest in processing raw materials. On the other hand, such information is undeniably a great source for journalists serving as society's watchdogs, keeping a close eye

[1] "Knowledge itself is power"
[2] Ries et al., "2018 Edelman Trust Barometer Global Report."
[3] Feintuck and Varney, "Media Regulation, Public Interest and the Law."

on elected representatives and public entities, translating data tables and scribbled letters into stories ready for public consumption.

The right to information has come a long way since its initial codification in 1766 in the world's first press and information act of Sweden. All international human rights instruments[4] protect the right to seek and impart information. Articles about information freedom are vague, but the instruments set certain grounds of limitation however, such as reputation and respect of others, national security, as well as public order and moral. On a regional level, such as Europe – regulated by the European Union and/or the Council of Europe – further documents were adopted, such as the European Convention on Human Rights, which touch upon the right to information. However, these documents are generally non-binding and only provide recommendations to contracting states. Beyond this, it is in the states' discretion to decide the extent to which this right is implemented.

Since the fall of the Iron Curtain, an increasing number of states have adopted freedom of information laws, starting with Central and Eastern European states such as Hungary – freshly out of the tyranny of the Soviet Union – with the aim of avoiding further oppression by having the ability to hold their respective governments accountable. Unfortunately, despite the adoption of freedom of information acts and articles embedded in constitutions, there is still a long way to go for sufficient transparency. Others have a long history with regards to participation and accountability: countries like Finland are model states in this respect. Yet others stand on the middle ground, struggling to decide the scale of governmental openness, such as Ireland. While the right to information legislations in Hungary, Ireland and Finland are different in many ways, they still share similarities on the grounds of limitation and their approach to the media. Hence, they will serve as base of comparison for this thesis.



[4] By this I mean: the International Bill of Rights, the Europen Convention of Human Rights, the Inter-American Convention of Human Rights and the African Charter of Human and Peoples Rights

Hungary retrieved its sovereignty in 1990, and since it has had a respectable number of legislations promoting accountability and transparency. The right to seek and impart information was present in its Constitution, and was incorporated into the new Fundamental Law that came into force in 2012. The country also adopted an information act in 2011, which stirred some controversy, but is still considered satisfactory.

Ireland's relationship to freedom of information is rather interesting. The country does not mention information freedom in its constitution, but adopted a Freedom of Information Act in 1997, which made it possible for citizens to have a wide degree of access to official information never seen before. This however was amended six years later, to curb access rights. The restrictions were finally repealed in 2014, when the new information act was adopted. In conclusion, there were three changes in the past twenty-one years, which ideologically contradicted each other.

As opposed to Ireland and Hungary, Finland is considered to be a pioneer in information rights. Not only is it incorporated in the country's constitution, but in 1951 Finland was among the first ones to adopt an act which promotes government openness. It was repealed in 1999, to be replaced by the "Openness Act" which is more progressive and modern than its earlier counterpart. The country is considered to have one of the most open governments, based on the Global Right to Information Rating.[5]

Amid debates on information freedom, arises the question of what makes a certain legislation effective. This can be done through the examination of different indicators, most of which this thesis is also taking into consideration, such as access, scope of bodies and information, procedural and substantial requirements, limitations, complaint procedures, sanctions and the presence of competent authorities. Multiple ratings and global indexes are available to define how efficient a country is in implementing information rights, some

[5] "Global Right to Information Rating."

embedded into researches about the level of freedom the press enjoys. These reports are usually compiled by prestigious human rights organizations, such as the World Bank Group, Freedom House, Article 19, Access Info Europe and Reporters Without Borders. Supranational organizations also publish reports on the topic, such as the United Nations' Special Rapporteur on Freedom of Expression, which are proved to be helpful in the evaluation of the efficiency of information rights.

Other than ratings, court judgments also illustrate the issues stemming from the different interpretation of information freedom with regards to public interest information. This thesis relies on prominent domestic court rulings, the case law of the European Court of Human Rights (ECtHR) and occasionally touches upon judgements of the Court of Justice of the European Union (CJEU), as the jurisdictions under examination are member states of the Council of Europe and the European Union. Such case-law emphasizes the importance and the actuality of this thesis, as an increased number of cases are concerned directly or indirectly with journalism. One example is the case of *Társaság a Szabadságjogokért*[6] v Hungary from 2009, in which the ECtHR reaffirmed the role of the press as "society's watchdog."[7] The Court argued 'that that obstacles created in order to hinder access to information of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as "public watchdogs," and their ability to provide accurate and reliable information may be adversely affected.'[8]

The first and foremost obstacle that hinders public discourse with regards to information freedom is secrecy from government entities, hiding information from members of the press, thus from the public, one of the most important aspects examined by this thesis. Simply put, it can be done in two ways: either by adopting legislation that provides little to no space for

[6] Hungarian Civil Liberties Union, a human rights association founded in 1994, with its seat in Budapest, Hungary.
[7] European Court of Human Rights, Társaság a Szabadságjogokért v Hungary. §26, §27, §36, §37
[8] ibid. §38

inquiries of public data, or having adequate legislation with practices that jeopardize the object and purpose of the law. While the first is self-explanatory, the second can entail rather creative solutions. The Irish Freedom of Information Act for example requires citizens to pay for reviews on refused freedom of information requests, while the Hungarian information law's individual complaint procedure can take years to implement. From a journalistic point of view, it is crucial to touch upon information of such nature, information generated by governing bodies and state funded entities, when reporting about state-related issues.

This thesis starts with a brief history of codification of the right to information on international, European and then national levels, with focus on specific instruments that regulate access to information. As violations of the right to information can take different forms, it is crucial to understand how respective FOI regimes reached the state they are in today, as well as the underlying political attitude. Later chapters discussing the substantive and procedural elements of the law often touch on earlier legislations. The chapter starts with the world's first FOI law, and carries on with the international instruments of the United Nations and the Council of Europe. On the national level, it is discussed how the process of adopting information laws begun and what socio-political event influenced their evolution.

The following chapter provides a jurisdiction specific analysis, with the aim to see how FOI laws differ from each other today, considering the separate paths they took over the decades. During my research into the topic of freedom of information, many journalists and members of civil society gave me their insights, which are quoted in this chapter along with my personal experience. The chapter is divided to two bigger sections: procedural requirements, such as the requesting procedure and remedies; and limitations. While the first part categorically inspects most procedural elements of the law, limitations are introduced through real life examples from Hungary, Ireland and Finland. These examples discuss the clash of journalism and activism against public entities. Using examples however is a constant

supporting element for this thesis' statement, namely how journalists are the most active users of FOI laws. The chapter is concluded by a brief recommendation on how each jurisdiction could improve their FOI regimes, based on the previously discussed analysis.

This thesis is proving that FOI regimes constitute a significant element of journalism. Court judgements—regardless whether on international or national levels—more often than not protect the right to information when it comes to journalistic work. As this thesis shows however, public entities are creative in their implementation of the law. I use multiple examples where data controllers refused disclosure of documents to journalists. These are the stories which the public is deprived of, hence their chance to form an informed public opinion is significantly mitigated. Research shows that the majority of citizens who request public interest information (not to be mistaken with personal information requests), are journalists[9]—but they are not the victims of breaches: it is the public who has their right violated.



[9] "Information Commissioner Annual Report 2017."

## Codification of the right to information

For a better understanding of how and why domestic legislation incorporated the right to information, it is crucial to look at international instruments. Treaties and declarations articulated access to information since the end of the Second World War, but the widespread adoption of freedom of information acts only started appearing following the Cold War. As information freedom NGO Access Info Europe pointed out in a briefing paper in 2006, 'the majority of the world's freedom of information (FOI) laws were adopted within the past 15 years: in 1990 there were just 12 laws, there are now over 65.'[10] This number has further increased since 2006, as decision makers started realizing how important it is to regulate the flow of official documents in the light of the infamous WikiLeaks and Snowden-scandals. There are now a number of international instruments influencing domestic legislations, but some of these, such as the Inter-American Convention on Human Rights, are not examined here. They do not apply to jurisdictions under discussion in this thesis.

### International level

The right to information was among the first resolutions adopted by the United Nations General Assembly in 1946. Even though resolutions do not have binding force, decisions made by the General Assembly have a strong symbolic standing, as it is the only organ within the United Nations in which all 193 member states have equal representation.[11] At the UN's first conference (1946), freedom of information was discussed, '[h]owever, what was meant by that phrase was the free flow of information (i.e., press freedom) and not the right to information in the proper sense, i.e., entitling requesters to access information held by a public body (though, being entitled to request information is not the same as actually obtaining it).'[12] Eventually,

[10] Access Info Europe, "Access to Information: A Fundamental Right, a Universal Standard." p.3.
[11] I must note however, that in 1946 the General Assembly consisted of 55 member states.
[12] Goldberg, "From Sweden to the Global Stage: FOI as European Human Right?" p.10.

Resolution 59(I) was adopted, and as a result the right to information is incorporated by all major human rights instruments which touch upon the freedom of expression.

## Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) is among the first international instruments—proclaimed by the United Nations General Assembly in 1948 as Resolution 217 (III) A—which set out that 'the inherent dignity of all members of the human family is the foundation of freedom, justice and peace in the world.'[13] It is one of five conventions and declarations, which we know today as the International Bill of Rights.[14] The main issue with the UDHR is its lack of binding power, as it does not create legal obligations to the contracting states. However, some legal scholars and human rights advocacy groups argue that the document has become part of customary international law, therefore it has some level of binding power. Despite its lack of binding force, the UDHR directly influenced other human rights instruments, and indirectly, national legislations.

This is the first international instrument in which the right to information is mentioned. Article 19 within the Universal Declaration states as follows:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[15]

In spite of having a Sub-Commission on Freedom of Information and of the Press during the drafting period, there is no individual article dedicated to information freedoms in the UDHR. This is rather interesting, considering that 1946's UN Resolution 59(I) declared that freedom

[13] The Universal Declaration of Human Rights, Preamble

[14] The International Bill of Rights is made up of the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Optional Protocol to the International Covenant on Civil and Political Rights, and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

[15] Article 19, UDHR

of information is a fundamental right, and the 'touchstone of all freedoms to which the [UN] is consecrated.'[16] According to William A. Schabas's research on the *travaux préparatoire* of the UDHR, the omission is due to the disagreement between liberal and communist powers at the time of drafting in 1947-48. As a result of this incompatibility, two draft articles, one on information and the press and one on opinion and thought, were merged together into a single provision.[17] Today, article 19 is considered to be primarily protecting freedom of expression, from which the custom of incorporating information rights within such articles probably stems.

## International Covenant on Civil and Political Rights

In 1966, an instrument similar to the UDHR was adopted, now with binding force. It took ten years, but eventually the International Covenant on Civil and Political Rights (ICCPR) came into effect in 1976, and became part of the International Bill of Rights. The ICCPR currently has 167 state parties, among them the three examined jurisdictions of this thesis, meaning that incorporating ICCPR provisions within their national legislations is compulsory for Hungary, Ireland and Finland.

Similarly to the Universal Declaration, it is the article about freedom of expression, number 19, which provides for the right to information. In spite of its almost identical wording, the ICCPR includes a limitation clause. Therefore, the rights included in Article 19 can be subjected to limitations by contracting states. According to the ICCPR, the right to information can be limited on the basis of 'respect of the rights or reputations of others [and] for the protection of national security or of public order or of public health or morals.'[18] Naturally, due to its vague definition, there is debate on the interpretation of Article 19.



[16] United Nations General Assembly. Resolution 59(I). https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/10/IMG/NR003310.pdf?OpenElement
[17] Schabas, *The Universal Declaration of Human Rights*. p.cii.
[18] ICCPR, 19 (3) a and b

## Other UN documents

The Office of the High Commissioner for Human Rights of the UN (OHCHR) has made non-binding recommendations relating to Article 19 of the ICCPR, in order to help decision makers interpret the provision. The first one was General Comment No. 10, which was adopted in 1983. The recommendation does not consider the right to information in detail, it solely puts emphasis on the already existing words within Article 19. I must point out however, that it recognizes that:

> little attention has so far been given to the fact that, because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression in a way that is not provided for in paragraph 3.[19]

This section envisioned the changes to come, namely the extreme increase of internet penetration worldwide, and everything it brought with it: social media and fake news to name two. While making predictions about the potential threat the modern mass media imposes on freedom of expression, General Comment No. 10 seems to have failed to recognize the very real threat of the instant, unfettered circulation of ideas. Therefore, I consider General Comment No. 10 as a missed opportunity to balance freedom of expression with the right to access information, with grave consequences to the public.

There was relative silence on information rights following General Comment No. 10 on the part of the United Nations. In 1998, it was finally broken with a report[20] compiled by the UN Special Rapporteur on Freedom of Opinion and Freedom of Expression, '[which] referred to the right to seek, receive and impart information in Article 19 [of the ICCPR] as imposing a positive obligation on states to ensure access to information, particularly with regard to

[19] Office of the High Commissioner for Human Rights, "General Comment No. 10: Freedom of Expression (Art. 19)."
[20] E/CN.4/1998/40 published on 28 January 1998

information held by governments.'[21] This was endorsed in a report made for the UN Economic and Social Council in 2005 by the UN Special Rapporteur.[22]

Later that year, the UN adopted the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, commonly referred to as the 'Aarhus Convention.' It may focus on the environment, but it is one of the first international instruments which bind contracting parties 'to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.'[23] Article 4 of the Aarhus Convention sets substantive measures to be taken in order to ensure the public's access to information held by public authorities, with regards to time frame and fees. The Convention entered into force in 2001, but this time it seemed that the UN realized the importance of access to information, and the drafting of a new General Comment on Article 19 of the ICCPR was initiated not long after. Events, however, pushed policymakers to take the regulation of information more seriously.

The so-called WikiLeaks scandal broke out in 2006, due to which millions of sensitive data was leaked including information on the Iraq War, the US prison of Guantanamo Bay etc. It is possible that this may have triggered the new General Comment on Article 19, adopted in 2011. General Comment No. 34 finally 'confirmed that there exists a fundamental right to access information held by public bodies and private bodies performing functions […]'[24] and also reinstated the interrelating nature of rights safeguarded within the ICCPR. As opposed to General Comment No. 10, the Human Rights Committee's Comment dissects Article 19 of the ICCPR and discusses other enshrined rights within the Covenant's freedom of expression



[21] McDonagh, "The Right to Information in International Human Rights Law." p.29.
[22] United Nations Special Rapporteur, "Report of the Special Rapporteur on Implementing the Right of Access to Information and Protection and Security of Media Professionals."
[23] "Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)." A3(2)
[24] Helen Darbishire, "Ten Challenges for the Right to Information in the Era of Mega-Leaks." p.10-11.

article, namely freedom of opinion and the right to information as well as the importance of a free press, defining them as 'cornerstones of democracy.'[25] Furthermore, it explicitly states that '[t]he Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function.'[26] Another important point was made with regard to the delicate relationship of the media and information held by public authorities:

> [i]t is not compatible with paragraph three, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.[27]

According to Michael O'Flaherty, rapporteur of the General Comment, initially there was agreement by Committee Members to include the treatment of whistleblowers such as those involved in the WikiLeaks-scandal, but it was omitted since the Committee Members 'had no solid jurisprudence in that area.'[28]

Within its progressive framework, the General Comment provides a detailed guide to contracting parties of the Covenant on how to safeguard the right to information, including details on the timely processing of FOI requests, as well as the appeal system in cases of refusal. The document has no legal binding force, but it provides guidance on how to interpret articles of the ICCPR. Meaning that, after General Comment No. 34, contracting parties to the ICCPR should seriously consider its recommendations when adopting new information and press acts in their domestic legislation.

Concluding, the international level of codification shows that until the late 1990s, there was little interest in information rights. The Aarhus Convention brought change in this attitude, but it was probably the WikiLeaks scandal that triggered the United Nations to emphasize the

[25] "General Comment No. 34." §13
[26] ibid.
[27] ibid. §30
[28] "Human Rights Committee Advance Draft General Comment on Freedom of Expression."

importance of the right to seek and impart information, and the media's role as intermediary in shaping public discourse and opinion.

## European level

During the era of Enlightenment, Europe started embracing the idea of *liberté, egalité, fraternité,* the foundation of modern human rights. In 1766, the Kingdom of Sweden, which at the time also included Finland, adopted the world's first press and information act, called His Majesty's Gracious Ordinance Relating to Freedom of Writing and of the Press. While it was the Swedish who enforced this legislation, the act is attributed to a Finnish pastor, Anders Chydenius.[29] The *offentlighetsprincipen*[30] recently celebrated its 250th anniversary, with Sweden and Finland still being model states in information rights and the rest of Europe attempting to follow on both national and supranational levels. This chapter focuses on the legislation of the European Union and the Council of Europe, in which all three examined jurisdictions are members.

### European Union

The European Union (EU) is a supranational organization consisting of 28 member states in Europe, founded originally to create a common market and customs union. Therefore, the right to information and principles of a free press are not included in the initial 'four freedoms.' However, the EU has evolved throughout the decades and has become more than an economically free area. As the Treaty on European Union proclaims it is now trying to achieve an 'area of freedom, security and justice.'[31] Consequently, it has developed extensive legislation with relation to the role of media and the right to access information.

[29] Mustonen, *The World's First Freedom of Information Act*. p.18-19.
[30] "The principle of publicity" in Swedish.
[31] Treaty on European Union. §3(2)

The civil and political rights of the EU are enshrined within its two core treaties: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) as well as its human rights instrument, the Charter of Fundamental Rights of the European Union (CFR).[32] All three documents touch upon the right to information, but the treaties mainly regulate access to information within EU institutions, rather than national authorities within its jurisdictions. For example, Article 15(1) of the TFEU sets out that '[i]n order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.'[33]

The CFR was considered a secondary instrument until the proclamation of the TEU. Its 6th Article declares the Charter equivalent in legal value to the Lisbon Treaty.[34] On the other hand, '[t]he provisions of [the] Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.'[35] Therefore, all freedoms and rights enshrined within the Charter are only applicable—the same way as the core treaties—to the EU's own institutions, bodies, offices and agencies.

As opposed to other international instruments, the CFR is explicit about freedom of information as Article 11 is called 'Freedom of expression and information.' On the other hand, Article 11 does not offer more on RTI than its global counterparts, it also settles with inclusion of 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.'[36] Contrasting with the UDHR, the ICCPR and the European Convention of Human Rights, the Charter stresses the importance of



[32] "Charter of Fundamental Rights of the European Union. 2000/C 364/01."
[33] Treaty on the Functioning of the European Union. §15(1)
[34] Consolidated Version of the Treaty on European Union. Article 6. http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=EN
[35] "Charter of Fundamental Rights of the European Union. 2000/C 364/01." Article 51.
[36] ibid. Article 11 (1)

the freedom and pluralism of the media,[37] which is crucial in a discussion of the role of journalism in society, precisely that journalists can inform the public about government-related issues with information provided by the access laws. 'However, while it reinforces freedom of speech and freedom of the press, it does not include a specific public right to access official information.'[38]

The EU also has actual secondary legislation on access to information within its jurisdiction. Directive No. 95/46/EC regulates the protection of individuals with regard to the processing of personal data and on the free movement of such data, but as such, it is not examined in this thesis. Regulation (EC) No. 1049/2001 on the other hand declares that

> [e]ven though it is neither the object nor the effect of this Regulation to amend national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations between the institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation and should respect the security rules of the institutions.[39]

In the light of the aim of the EU, defined above, supported by treaties, a charter and secondary legislation suggesting that Member States should be transparent, it is interesting to note how the EU is also protecting secrecy when it comes to disclosure of public documents.

In 2015, a group of investigative journalists from all EU member countries teamed up to collectively sue the EU for non-disclosure of information on benefits and cost accounting relating to their European Parliamentary Representatives' position. The initiative is called the 'MEPs Project,' and its goal is to uncover what more than 71 million euros—allowances Members of the European Parliament receive on top of their salaries every year—is spent on. As of September 2018, '[t]he general court of Court of Justice [of the European Union]

[37] ibid. Article 11 (2)
[38] Adshead and Felle, *Ireland and the Freedom of Information Act*. p.10.
[39] "Regulation (EC) No 1049/2001 of the European Parliament and of the Council of the European Union Regarding Public Access to European Parliament, Council and Commission Documents." (15)

confirmed the decision of the European Parliament which refused journalists of The MEPs Project access to documents about how MEPs spend their travel allowances, daily allowances and budget for staff.'[40]

In conclusion, the EU has competency in terms of legislation and enforcement to create a good practice to its Member States about accessibility, accountability and transparency. Yet, as the MEPs Project example shows, it fails to do so.

## Council of Europe

The Council of Europe (CoE) is the international human rights organization of the wider European continent, consisting of 47 contracting states, including every EU member. Its focus is supervising the respect of human rights, democracy and the rule of law within its jurisdiction. It does that primarily through its judicial organ, the European Court of Human Rights (ECtHR), which enforces Europe's regional human rights instrument, the 1953 European Convention on Human Rights (ECHR).

The drafting committee of the ECHR was debating about how to include the right to information. They were inspired by the Universal Declaration of Human Rights; however, the United Nations did not provide a narrow interpretation for the word "information." Due to this issue, the committee 'had decided to wait for the results in the United Nations General Assembly on the Convention on Freedom of Information.'[41] This disagreement was ultimately settled by the UN General Assembly's Resolution 59(I) in 1946, which put emphasis on the importance of the right to information. Eventually, the UN Convention on Information was never adopted, but the protection of information rights became embedded in the ECHR.



[40] "Investigative Reporting Denmark » The MEPs Project."
[41] Schabas, *The European Convention on Human Rights*. p.447.

The right to information is enshrined in the ECHR under the right to freedom of expression. In terms of wording, it is quite similar to that of the ICCPR. Article 10, paragraph 1 declares that

> [e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.[42]

It is interesting to note that while Article 10 is rather laconic on the right to freedom of information, the Article's preparatory work from 1956 puts great emphasis on it. For example, it suggests that '[m]easures shall be taken to promote freedom of information through the elimination of political, economic, technical and other obstacles which are likely to hinder the free flow of information.'[43] The *travaux préparatoire* is silent on why a separate article on the right to information was omitted considering its importance. The reasoning of the incompatibility of liberal and communist political systems used during the ICCPR's drafting is non-applicable, as all 12 member states of the drafting committee were considered 'liberal' at that time.[44]

We know from the Report of the Fifth Session of the Commission on Human Rights to the Economic and Social Council that there was intense debate relating to the inclusion of the right to information, and it heavily relied on the draft version of the UN's Convention on Freedom of Information.[45] For example, '[i]t noted […] that while generally in accordance with article 19 of the Universal Declaration of Human Rights, [a report prepared by Secretariat-General of the Council of Europe during the drafting of Article 10] espoused a "very broad

[42] "European Convention on Human Rights." A10(1)
[43] European Commission of Human Rights. Preparatory Work on Article 10 of the European Convention on Human Rights. p.5.
[44] The twelve member states of the Council of Europe at the time of drafting were: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, Greece, the United Kingdom and Turkey.
[45] Schabas, *The European Convention on Human Rights*. p.447.

notion" of information.'[46] France proposed the article to be explicit on the scope of information protected within the article, including 'facts, critical comment and ideas, by the medium of books, newspapers, oral instruction or in any other manner.'[47] It was not included in the final version of Article 10 however, and today the interpretation of the provision, such as the scope of information and its limitations, is defined by the case-law of the ECtHR.

Despite the drafter's intent of explicit recognition of the right to information within Article 10, implementation of its protection by the ECtHR was a slow process. '[I]n a series of cases dating back to 1987, the European Court had refused to recognize the right to information as part of the right to freedom of expression.'[48] The first major judgement from the ECtHR is 1987's Leander v Sweden, in which the applicant was complaining about the authorities' refusal to disclose information held about him on grounds of national security. The Court declared that 'the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him.'[49] However, the ECtHR found no violation of Article 10. Two years after the Leander judgement, the Court still did not recognize the right to access documents in the 1989 Gaskin v the United Kingdom.[50] With the exception of some cases lodged by newsrooms, almost a decade went quietly in the international context.[51] 'In February 1998, the Court concluded that Article 10 was not applicable in the case of Guerra and others.[52] In which the applicants complained that the state had not informed the population of the risks run or of the measures to be taken in the event of an accident at a nearby chemical plant.'[53]



[46] Schabas, *The European Convention on Human Rights*. p.447.
[47] "Report of the Fifth Session of the Commission on Human Rights to the Economic and Social Council." p.21.
[48] Mendel, "Right to Information: Recent Spread of RTI Legislation." p.4.
[49] Leander v Sweden. §74
[50] Gaskin v the United Kingdom.
[51] Note, that national FOI laws have started spreading around that time.
[52] Guerra and others v Italy.
[53] Council of Europe, *Freedom of Expression in Europe. Case-Law Concerning Article 10 of the European Convention on Human Rights*. p.75.

Finally, in 2009 the Court gave recognition to the right to information in *Társaság a Szabadságjogokért* (*TASZ*) v Hungary. As this case is concerned with one of the jurisdictions under scrutiny in this thesis, it will be discussed in detail in a later chapter. In short, the applicant NGO claimed 'to play a press-like role [between the public and policy makers], since its work allowed the public to discover, and form an opinion about, the ideas and attitudes of political leaders concerning drug policy,'[54] hence the refusal of government-held information constitutes an Article 10 violation. *TASZ* argued that Article 10 of the ECHR entails positive state obligation in relation to the right to information, precisely that '[s]ince, in the present case, the Hungarian authorities had not needed to collect the impugned information, because it had been ready and available, their only obligation would have been not to bar access to it.'[55] The Court unanimously held that there had been a violation of Article 10, because 'when a public body holds information and refuses to release it, it is exercising the "censorial power of an information monopoly"[56] and hence the interference with freedom of expression.'[57]

The timing of the recognition of the right to information may not be a coincidence on the part of the ECtHR. About two months after the *TASZ* judgement, the Council of Europe's Convention on Access to Official Documents was adopted, becoming 'the first binding international legal instrument to recognise a general right of access to official documents held by public authorities.'[58] The Convention has yet to come into force, as its enforcement requires ten ratifications. At the time of this research, nine states have ratified it, including Hungary and Finland. Ireland refused to sign the document.[59] While the Convention is a prominent step



[54] Társaság a Szabadságjogokért v. Hungary (2009). App. No. 37374/05. (22) http://hudoc.echr.coe.int/eng?i=001-92171
[55] ibid. (23)
[56] ibid. (36)
[57] Helen Darbishire, "Ten Challenges for the Right to Information in the Era of Mega-Leaks." p.10.
[58] "Details of Treaty No.205. Council of Europe Convention on Access to Official Documents."
[59] Chart of signatures and ratifications of Treaty 205. Council of Europe. Status as of 09/02/2018 https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205/signatures?p_auth=5QnnZsqd

towards accountability and the enforcement of the rule of law, members of the civil society expressed their concerns during the drafting period. In 2007, Access Info wrote,

> [t]he concerns include that the proposed Convention establishes a right of access to information but limits the right to administrative information, excluding other information held by the judicial and legislative branches and by private bodies performing public functions from the mandatory part of the treaty. Other major concerns include that there is no right to appeal administrative silence, and no right of recourse to a body empowered to order release of requested information if it decides in favour of the applicant.[60]

Due to these concerns, the date of adoption was initially postponed to 2008, and finally to 2009.

The Convention concludes ideas and recommendations formerly introduced by the Council of Europe,[61] and reflects on UN documents as well. However, as opposed to the more or less concrete instructions set by the later adopted General Comment No. 34 of the UN, it provides an exhaustive list of limitations beside those already set out by the ECHR, such as the protection of inspection, control and supervision by public authorities and the equality of parties in court proceedings and the effective administration of justice.[62] Furthermore, it touches upon accessibility in terms of fees, which are proven to be an obstacle in many jurisdictions, such as Canada or Australia, but not within those under scrutiny in this thesis.

In conclusion, 'the recognition of a right to information in international human rights law [and on a national level] was slow to evolve.'[63] The path leading to the wider recognition of the right is paved with information crises, such as WikiLeaks, which triggered supranational bodies to adopt concrete measures for transparency. However, as Access Info pointed out in relation to the draft Convention on Access to Official Documents, there are major concerns to



[60] Ireland, "TI Ireland Welcomes Delay on Access to Information Convention."
[61] These instruments are not strictly within the scope of this thesis. For further reference, see No. R (81) 19 on the access to information held by public authorities, No. R (91) 10 on the communication to third parties of personal data held by public bodies, No. R (97) 18 concerning the protection of personal data collected and processed for statistical purposes, No. R (2000) 13 on a European policy on access to archives and Rec(2002)2 on access to official documents.
[62] "Convention on Access to Official Documents." A3
[63] McDonagh, "The Right to Information in International Human Rights Law." p.28.

be solved. For example, none of the instruments set out in this chapter regulate private entities, such as politicians. Extensive investigations by journalists, such as those resulting in what we know as the 'Panama Papers'[64] and the 'Paradise Papers'[65] show that there is a pressing need to regulate this aspect as well.

## National level

As it was outlined in the previous chapters, there are a handful of international instruments which influence national FOI regimes. This section examines how the previously introduced instruments, along with their respective constitutions, local decrees and acts influenced the domestic right to information legislation in Hungary, Ireland and Finland. All three jurisdictions adopted freedom of information acts, therefore took steps for the accountability of their public authorities. Yet, the jurisdictions under scrutiny still have problem, for example, Ireland exempted its police from its Freedom of Information Act for a long time, while Finland received international coverage as its Supreme Court ruled to keep important historical documents secret for three decades, meanwhile the Hungarian government classified almost all documents relating to its new atomic power plant funded by the Russian Federation. This chapter will examine the framework on how their recent freedom of information legislation developed, while the substantive provisions are examined in a later chapter.

### Hungary

In 1990, there were only 12 freedom of information laws worldwide. But the end of the Cold War brought a growing interest in the right to information, more specifically, the right to access

[64] In 2015, a giant leak of more than 11.5 million financial and legal records exposed a system that enables crime, corruption and wrongdoing, hidden by secretive offshore companies. The data was processed by investigative journalists from multiple countries, under the umbrella of the International Consortium of Investigative Journalists, considered to be one of the biggest cross-border journalism project to day.

[65] Following the Panama Papers, a new mass data leak took place in 2017, this time from an elite law firm with elite clients, showing how deeply offshoring is embedded in the global financial system.

official documents with it. Hungary is no exception: finally escaping decades of oppression, there was an increased interest in holding decision-makers accountable and transparent.

Hungary's freedom of information regime today is defined by a series of acts adopted since the country retrieved its sovereignty from the Soviet Union in 1989. The first major step to the adoption of information rights came with one of the first constitutional amendments in 1990,[66] declaring that '[i]n a democracy, with a view to forming an educated opinion in matters of public interest, everyone has the right to free access to information proper,'[67] while in the following paragraph the Constitution sets out the protection of the media as necessity in a democratic society.[68] This provision was further supplemented by the 1992 Act on the Protection of Personal Data and the Publicity of Data of Public Interest, which defines the latter as those 'belonging to bodies that carry out public or local government tasks, and are not covered by the concept of personal data and are excluded from the scope of the statutory exceptions.'[69] The Act relies on international instruments mentioned in the previous chapter in terms of limitations and the scope of access, and serves as the basis for Hungary's most recent, 2012 information law.

In 1995 two pieces of legislation were adopted regulating information rights. Within the scope of this thesis the relevant instrument is the Act on State and Official Secrets. [70] It declares that '[t]he review of the classification of classified documents originating from before 1980 shall be terminated within one year from the entry into force of this Act. Once this time-limit has passed, the documents shall cease to be classified.'[71] Many believed it would finally reveal the contents of the so-called *ügynökakták*,[72] documents containing the identities of individuals



[66] Act XL of 1990 on the amendment of the Constitution of the Republic of Hungary
[67] A Magyar Köztársaság Alkotmánya. §61(3)
[68] ibid.§61(4)
[69] 1992. évi LXIII. törvény a személyes adatok védelméről és a közérdekű adatok nyilvánosságáról. §2(3)
[70] Act LXVI of 1995 on Public Records, Public Archives, and the Protection of Private Archives is not strictly within the scope of this thesis.
[71] 1995. évi LXV. törvény az államtitokról és a szolgálati titokról, 1995. §28(2)
[72] 'Agent folders'

who previously served oppressive regimes within either the Hungarian Nazi Arrow Cross Party or the Hungarian Communist Party's State Protection Authority (ÁVH). These documents contain the personal information of many people who continue to hold important state positions to day. They should be accessible so that the public can form an opinion as to a public figure's fitness for office. Members of the opposition, civil society and journalists have been trying to gain access to these documents for almost three decades arguing that they are of public interest, but have failed to retrieve them.

The year 2003 brought another Act which is important for the accountability of public bodies.[73] The "Glasspocket Act" is aimed 'to strengthen the guarantee system for the lawful and rational use and operation of public property and public funds.'[74] The new instrument prescribes that bodies of local and public authorities publish contracts valued at more than 5 million Hungarian Forints (HUF) and accounting of public funds entrusted with the respective bodies. Thus, the Glasspocket Act balances commercial interests against the public interest, with greater emphasis on the latter.

Despite having a mighty aim, journalists have pointed out that not every public and governmental organization complies with the prescribed obligation to provide access to their documents within the scope of the Act. In 2011 a— now terminated—major daily newspaper *Népszabadság* pointed out, for example, that the Ministry of Rural Development had not refreshed its list of contracts exceeding the five million HUF threshold for about a year.[75] As of 2018, investigative journalism portal *Átlátszó* launched a digital initiative to monitor public bodies' compliance with the Glasspocket Act.[76] The same investigative journalism portal operates a FOI requesting platform, where citizens can easily inquire previously undisclosed



[73] 2003. Act XXIV on the amendment to certain acts on the use of public moneys and on disclosure, transparency and increased control in regard to the use of public property

[74] 2003. évi XXIV. törvény a közpénzek felhasználásával, a köztulajdon használatának nyilvánosságával, átláthatóbbá tételével és ellenőrzésének bővítésével összefüggő egyes törvények módosításáról. Preamble.

[75] "Nem igazán működik az üvegzseb törvény."

[76] Bátorfy, "Új alkalmazást fejlesztett az Átlátszó az állami szektor átláthatóbbá tételére."

official documents from public or local government bodies. The portal has over 11.5 thousand requests as of October 2018, giving an idea as to how much information remains undisclosed. The process of requesting information from public bodies is discussed in detail in a later chapter.

2010, the beginning of Prime Minister Viktor Orbán's 2nd term, marks a new era in the history of the Hungarian judiciary and legislation, starting with the annulation of the Constitution, replaced by the 'Fundamental Law of Hungary,' which came into force in 2012. In his—now unavailable—blog, József Szájer, leader of the drafting committee stirred controversy when he wrote, 'Steve Jobs must be really happy if it comes to his attention that the new constitution is written on an iPad (more specifically, on my iPad).'[77] Many found this statement outrageous regarding the weight the document has on the lives of millions. The doubts about the quality were not unfounded as the Fundamental Law (referred to as *Alaptörvény* henceforth) was modified seven times in its first six years of enforcement.

However, none of the amendments effected the right to access documents. Article 6 of the *Alaptörvény* declares that '[e]veryone shall have the right to the protection of his or her personal data, as well as to access and disseminate data of public interest.'[78] As opposed to the former Constitution, it establishes an independent information authority.[79] Article 39 of the *Alaptörvény* defines public interest data as follows:

> Every organisation managing public funds shall be obliged to publicly account for its management of public funds. Public funds and national assets shall be managed according to the principles of transparency and the purity of public life. Data relating to public funds and national assets shall be data of public interest.[80]

[77] Index, "Szájer bevenné az iPadet az alkotmányba."
[78] Magyarország Alaptörvénye. §6(2)
[79] Magyarország Alaptörvénye. §6(4)
[80] Magyarország Alaptörvénye. §39(2)

Ironically, while it was disclosed in the end, journalists still had to file a freedom of information request to gain access to contracts relating to the digital, iPad-optimized version of the *Alaptörvény* itself.[81] It seems that that you can put lipstick on a pig, but it is still a pig: there may be a new constitution, but the attitude towards access to official documents has remained the same.

As established by the *Alaptörvény*, a new media authority was set up, called the National Authority for Data Protection and Freedom of Information (NAIH). It is regulated by the new Information Act, whose substantive provisions are examined in a later chapter.[82] The authority's main responsibilities include, as defined by law, 'responsibility to supervise and promote the enforcement of the rights to the protection of […] access to public information and information of public interest,'[83] more specifically, it 'may turn to court in connection with any infringement concerning public information and information of public interest.'[84] The NAIH also has power to provide recommendations with regards to, *inter alia*, new legislation pertaining to public interest information.[85]

The NAIH can participate in court trials on the applicant's side as intervener, as it did in 2013 when a student sued his university to gain access to information about the disbursal of funds to the student union leaders at his state-operated university.[86] However, it is not within the NAIH's power to oblige non-compliers to disclose public interest data. It can only issue non-binding statements in matters such as denied FOI requests. Statements of this nature are issued by the head of NAIH on behalf of the Authority.



[81] Origo, "Döcögve indul a többmilliós iPad-alkotmány."
[82] Act CXII. of 2011 on the Right to Informational Self-determination and Information Freedom, being in force since 1 January 2012.
[83] 2011. évi CXII. törvény az információs önrendelkezési jogról és az információszabadságról. §38(2)
[84] 2011. évi CXII. törvény az információs önrendelkezési jogról és az információszabadságról. §38(3)d
[85] 2011. évi CXII. törvény az információs önrendelkezési jogról és az információszabadságról. §38(4)a
[86] 19.P.21.318/2013/4. the case of Dániel G. Szabó v Eötvös Loránd University of Science, 2013., see: https://onedrive.live.com/?authkey=%21APfX5j2rd7IhXHE&cid=42985087C3D4804C&id=42985087C3D4804C%218764&parId=42985087C3D4804C%212223&o=OneUp

The head of the NAIH is appointed for nine years by the President of Hungary, with the recommendation of the Prime Minister, meaning that the first appointed head is still holding his seat at the time of writing this thesis. The creation of the NAIH and the appointment of Attila Péterfalvi as director stirred some controversy. The predecessor of the Authority was the Office of the Data Protection Commissioner chaired by the Commissioner with a six-year mandate. Péterfalvi was appointed as Commissioner in 2001, by the first Orbán-government.[87] After his mandate expired in December 2007, the ruling Socialist government of the time did not re-elect him, nor did it do so half a year later when calls to do so were repeated. Upon the re-election of Viktor Orbán in 2010, Péterfalvi actively participated on the Government's side to abolish the Office of the Data Protection Commissioner, while the Commissioner was still holding his seat. Eventually, the Office was replaced by the NAIH and Péterfalvi was appointed as its director in 2011. This course of actions was later deemed unlawful by the Court of Justice of the European Union, and the Minister of Justice of Hungary had to issue a public apology.[88] Therefore, the independence of this government body—as prescribed by the Fundamental Law—is questionable given the history behind its establishment.

In conclusion, Hungary has a short, but eventful history of information rights. It was included in one of the first amendments of the country's Constitution after the Cold War. The 1990s saw multiple Acts detailing the interpretation of the right to information, which eventually became incorporated in the new Fundamental Law in 2011. Today, public interest information is regulated by a cardinal act and a supposedly independent authority. However, the implementation of the protection of the right to freedom of information is a different question, which is discussed in a later chapter.



[87] 1998-2002.
[88] European Commission v Hungary.

## Ireland

When comparing information rights and their implementation, with regards to codification, Ireland's case stands out from the crowd. The protection of the right to information is absent from the country's constitution, but it has a Freedom of Information Act (FOIA). The latter is worth researching as it was changed three times in seven years. It was first adopted in 1997, then amended in 2003, the year that also welcomed the Data Protection Act, followed by a new Freedom of Information Act in 2014. These changes were occasionally contradictory to one another.

The first Irish Freedom of Information Act was adopted in 1997. Its implementation in 1998 was regarded as the end of the Official Secrets Act and secrecy more broadly. The latter Act was adopted in 1911 by the British Empire and controlled access to public interest information.[89] In 1962, the Act was amended by the *Fianna Fáil* government,[90] and as a result '[…] everything that emanated from government was assumed to be secret unless deemed otherwise.'[91] According to the new legislation it was up to the Ministers' discretion to decide the scope of documents to be available to the public and the judiciary had no power to overrule their decision. This made Ireland one of the most secretive nations in the Western world. Journalists commented that the amendment '[…] overrode important principles of human rights and substituted ministerial discretion for the traditional role of the courts in deciding what is, and what is not to be secret.'[92]

On the other hand, it did not considerably hinder the intermediary role of the media. As Michael Foley from the Dublin Institute of Technology pointed out:



[89] Official Secret Acts were adopted in other countries belonging to the British crown: Jersey, India, New Zealand, Singapore, the UK, Canada, Hong Kong and Malaysia also enforced their own vartiations.
[90] One of Ireland's two biggest parties, representing center-right liberal conservative political views at the moment.
[91] Foley, "Keeping the State's Secrets." p.186.
[92] Patrick and Ronan, *Democracy Blindfolded: The Case for Freedom of Information.* p.3.

> [t]here was some investigative journalism, Joe MacAnthony's investigation of the Irish Hospital Sweepstake or Susan O'Keefe's programme on scandals in the beef industry and investigations in child abuse of children in care, especially that of Mary Raftery.[93]

In only a handful of cases were media workers penalized for violating the Official Secrets Acts. These 'crimes'—such as publishing a police bulletin—usually entailed fines. Yet, the possibility of graver punishment hung in the air. I must note, however, that one of the major trials in 1990s Ireland was a result of the work of an investigative journalist. Susan O'Keeffe's documentary for the television channel ITV, entitled "Money for Nothing," investigated the beef industry and exposed a corrupt system run by Irish politicians.[94] She was arrested for her work, but her disobedience to the Official Secrets Act subsequently led to a series of trials, known as the "Beef Tribunal." In court, despite refusing to disclose her sources, she was unexpectedly acquitted. Some see it as a landmark on the way to permissive FOI legislation.[95] This is quite possible, especially considering how other legislation was adopted in the 1990s.[96] Ironically, it was the same political party making it more difficult to access documents, therefore threatening the freedom of the press, that adopted the Freedom of Information Act 35 years later.[97]

In 1997, Ireland shook its chains of secrecy off. Its Freedom of Information Act (FOIA) finally enabled journalists, members of civil society and conscious citizens to gain access to official documents and as such, to have a better grip on their public bodies. It also prescribed the establishment of an independent authority—similar to Hungary's NAIH, with the exception that is has binding force—the Office of the Information Commissioner. I must point out that it was by far not the most permissive right to information instrument. While it established

[93] Foley, "Keeping the State's Secrets." p.189.
[94] O'Keeffe, "Money for Nothing."
[95] Foley, "Keeping the State's Secrets." p.190.
[96] The National Archives Act has been in force since 1991.
[97] More precisely, it was part of the "Rainbow Coalition," consisting of the Fine Gael, the Labour and the Democratic Left parties.

disclosure of official documents by default it was more concerned with personal information than public interest data. 1997's FOIA was very specific on the public bodies with an obligation to publish information. For example, the *An Garda Síochána*—the Irish Police—was exempt from the list until October 2014. Furthermore, '[t]he right of public servants to blow the whistle on what they believed was a wrong doing was not included in the Act, though it had been included in earlier drafts.'[98] In short, the first Irish FOIA had several teething problems.

The first amendment was adopted in 2003 and was a disappointment for FOI-enthusiasts. Its adoption was necessary, according to then Minister of Finance Charlie McCreevy, 'because [the freedom of information] had caused unwarranted pressure on the workings of departments of state and on government.'[99] As pointed out by Nat O'Connor, the background work for the Amendment was done in secrecy and McCreevy 'did not even attend the final debate on the amendment, preferring to attend the Cheltenham horse racing festival instead.'[100]

The lawmakers believed they could solve the alleged issue of pressure on institutions and government by curtailing the right to information. The new amendment introduced fees for FOI requests. It also included that communication 'between two or more members of the Government relating to a matter that is under consideration by the Government or is proposed to be submitted to the Government [may be refused].'[101] Some suggest that the real reason behind severing openness and transparency in Ireland is due to politicians' unwillingness to disclose embarrassing information.[102] This is an accurate reading of the legislation considering the very explicit provision on restricted access to ministers' communication. Whatever the intention was, the Amendment eventually led to a significant drop in the number of freedom of



[98] Foley, "Keeping the State's Secrets." p.191.
[99] Adshead and Felle, *Ireland and the Freedom of Information Act*. Preface.
[100] Adshead and Felle. p.16.
[101] Freedom of Information (Amendment) Act 2003. §14 amending Section 19 of the 1997 FOIA.
[102] Adshead and Felle, *Ireland and the Freedom of Information Act*. Preface.

information requests. Before the Amendment, 15 percent of all FOI requests came from media-makers, but in the 'immediate aftermath [of the Amendment] this fell to 6.5 percent.'[103]

Addressing the issues outlined in the previous paragraphs, a new Freedom of Information Act was adopted in 2014. The Act, which is currently still in force, 'restores the principles contained in the original law and places openness and transparency at the forefront of the operating of the legislation'[104]

One of the most important changes in the new FOIA is permitting access to documents about governmental meetings. In other words, it entirely repeals the 2003 Amendment. Moreover, it returns to the principle of proactive disclosure, now with emphasis on the publication scheme which was deemed outdated in several cases. It also abolishes the application fee set out in the Amendment and extends disclosure requirements to all public bodies.[105] Furthermore, it reintroduces the so-called harm test, a method which '[…] seeks to balance the risk of damage to national security against the public interest in the release of such information.'[106]

One study characterized the evolution of Ireland's FOI legislation as 'a somewhat schizophrenic stop-and-go process of FOI reform.'[107] The country has, indeed, been busy with codifying information rights changing the relating laws from the core three times in 17 years. The original law had its teething problems which are more or less solved by the most recent Freedom of Information Act. The substantive provisions and their implementation are discussed in a later chapter.



[103] Adshead and Felle. p.15 and Table 7.3
[104] Adshead and Felle. Preface xvii
[105] Foley, "Keeping the State's Secrets." p.192
[106] Adshead and Felle, *Ireland and the Freedom of Information Act*. p.62.
[107] Ackerman and Sandoval-Ballesteros, "The Global Explosion of Freedom of Information Laws." p.113.

## Finland

As opposed to the jurisdictions discussed above, Finland has a long history of protecting the right to information. Moreover, while the Irish criticized their FOIA for not emphasizing the role of media in the process of informing the public, Finland has done so from the very beginning. If we take a look at their codification of information rights, a long history of perfecting the legislation and practice is outlined. Of course, no law is perfect and no law is making the entire population content, but Finland seems to be closer to this than most countries.

Finland is defined as a pioneer in information rights.[108] The country adopted its first FOIA in 1951, long before other nations given the short history of the right in question.[109] However, its history of FOI codification dates back to 1766's His Majesty's Gracious Ordinance Relating to Freedom of Writing and of the Press (referred to as the Swedish Press Act), the world's first freedom of information law. It was adopted in the Kingdom of Sweden, of which Finland was part. Moreover, it was a Finnish clergyman, Anders Chydenius,[110] who worked out the *offentlighetsprincipen*, the principle of publicity, the foundation of the Ordinance and all FOI laws that followed.

'In its original formulation, the Swedish Freedom of the Press Act was short-lived, a mere six years, but its effect on the general consciousness about rights was indelible. It was recurrently returned to in new forms.'[111] The original Act's abolition is attributed to Gustav III of Sweden, who amended it in 1774. Allegedly, the move 'had been commended by Voltaire, prompting the thought: Did he read it? Or realize the difference between the two versions?'[112] Despite the challenges the *offentlighetsprincipen* had to face the heritage of His Majesty's Ordinance is still visible today: it resulted in the so-called Swedish system of FOI which is used

[108] Ackerman and Sandoval-Ballesteros. p.109.
[109] Ackerman and Sandoval-Ballesteros. p.97.
[110] 1729-1803
[111] Mustonen, *The World's First Freedom of Information Act*. p.19-20.
[112] Goldberg, "From Sweden to the Global Stage: FOI as European Human Right?" p.2.

by Finland, Norway and Denmark, while it inspired the United States' Freedom of Information Act as well—the latter serving as a basis for most FOI laws enforced today.[113]

Following Sweden's example of adopting a modern FOI act, Finland enacted its own in 1951.[114] '[It] is an ordinary law, the more detailed secrecy provisions are in the form of a decree, which has a lower legal status.'[115] For example, limitations of the right due to secrecy can be found in the Publicity of Documents Decree. Despite its shortcomings, the Act on the Openness of Public Documents

> established the openness of all records and documents in the possession of officials of the state, municipalities, and registered religious communities. Exceptions to the basic principle could only be made by law or by an executive order for specific enumerated reasons such as national security.[116]

One interesting element to note about the 1951 Act is its interpretation of 'official documents'. As Tore Modeen pointed out, '[p]rivate documents which come into an authority become public as soon as these are received by the authority.'[117]

Even though the Swedish and Finnish FOI laws share quite a bit of history, I find it necessary to point out that there are in fact major differences between how the two nations classify information rights. At the time of the adoption of their FOIAs, Sweden listed freedom of information within its constitutional rights, as opposed to Finland, where '[…] citizens have traditionally regarded the right to access as stemming from the legal heritage of Finland and Sweden.'[118] Without constitutional protection, the government could restrict the right, however, it did not do so in significant ways.[119]



[113] Ackerman and Sandoval-Ballesteros, "The Global Explosion of Freedom of Information Laws." p.111.
[114] Adshead and Felle, *Ireland and the Freedom of Information Act*. p.9.
[115] Rowat, *Administrative Secrecy in Developed Countries*. p.3.
[116] Thurston, "Managing Records and Information for Transparent, Accountable, and Inclusive Governance in the Digital Environment: Lessons from Nordic Countries." p.20.
[117] Rowat, *Administrative Secrecy in Developed Countries*. p.60.
[118] Rowat. p.55.
[119] Rowat. p.56.

Between the Act on the Openness of Public Documents and its successor, 1999's Act on the Openness of Government Activities, one of the most important changes in Finland's FOI codification history took place.[120] As part of the comprehensive redrafting of the Finnish Constitution, the right to access official documents became a constitutionally protected right in 1999. Freedom of expression was already included in 1919, but the second paragraph about access to records only came later. Section 12 now states that '[d]ocuments and recordings in the possession of the authorities are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and recordings.'[121]

Earlier in history, fundamental rights and freedoms in the Finnish context were interpreted as rights belonging to individuals barring undue state intervention. In contrast, today the Constitution, along with the FOIA, create a positive state obligation.[122] In practice this requires proactive disclosure and that official information should be readily available for those who request it.[123] I must note that substantive judicial review within Finland's constitutional framework is almost non-existent, however, constitutionalism is not within the scope of this thesis, therefore it is not discussed.[124]

The Act on the Openness of Government Activities, which followed the Constitutional amendments, declares, *inter alia,* things that '[u]nless otherwise provided in an Act, every individual has the right of access to information contained in an official document and pertaining to themselves, subject to the restrictions provided […].'[125] The main aim of the new



[120] There is an intermediary legislation however, the Archives Act (831/1994) was enacted in 1994, and its Section 7 supports the right of private individuals and institutions to obtain information from records open to public inspection, provided that the legal rights and privacy are protected.
[121] Suomen Perustuslaki.
[122] Hallberg and Virkkunen, *Freedom of Speech and Information in Global Perspective*. p.72.
[123] Laki Viranomaisten Toiminnan Julkisuudesta. §20
[124] To understand the special characteristics of The Constitution of Finland, I recommend reading Lavapuro, Ojanen and Scheinin's study, *Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review* (2011).
[125] Laki Viranomaisten Toiminnan Julkisuudesta. §12

Act was to 'clarify grounds for secrecy by bringing them all together under one law, enabling the repeal of over 120 secrecy and confidentiality rules across many different laws and statutes.'[126] Furthermore, it brings a broader range of public interest information under its scope. Internal accounts, studies and statistics, as well as 'earlier access to the ministries' budget propositions' are now available to the public.[127]

The upshot was that information became more accessible. According to a 2018 study by the University of Jyväskylä, 67 percent of journalists reported they received all of the documents requested, and only seven percent experienced an outright refusal.[128] For some, the Finnish authorities' positive approach to disclosure stems from the history outlined above. A book published by the Organisation for Economic Co-operation and Development (OECD) suggests that while other nations regard the right to information as a civil right, which supposes a conflict between the state and the public interest, the Finnish 'already understood [FOI] in terms of democratic control and consensual governance' from the start.[129]

In this chapter, we have seen how the right to information became a codified right. The Swedish Kingdom gave the world its first freedom of information law, but it was not until the mid-20th century that it was adopted in a modern setting. Following the national legislation of Sweden and Finland, the United Nations prioritized it over other rights as FOI was discussed in the organization's first official assembly. The right to information then became an essential part of human rights instruments globally, regionally and domestically. All three jurisdictions under scrutiny share an eventful history of the codification of the right. Nonetheless, in 2018 Hungary, Ireland and Finland all have modern FOI laws in force. The effectiveness of their implementation is another question, which is discussed in the next chapter.



[126] Hallberg and Virkkunen, *Freedom of Speech and Information in Global Perspective*. p.81.
[127] Bertók, *Public Sector Transparency and Accountability Making It Happen*. p.153-154.
[128] Honkonen, "Viranomainen vastaa, jos tietopyyntö miellyttää."
[129] Pozen and Schudson, *Troubling Transparency*. p.251-271.

## Jurisdiction specific analysis

Domestic FOI legislation differs from jurisdiction to jurisdiction, but the principle uniting them all is that '[t]he free flow of information and ideas lies at the heart of the very notion of democracy and is crucial to effective respect for human rights.'[130] We saw in the previous chapter how FOI laws evolved as a matter of law, policy, and jurisprudence. Historical circumstances played a key role in the development in how and why FOI was given its own statutory protection.

This chapter investigates the substantive and procedural nature of freedom of information laws, concentrating on public interest information and its relationship with the media. As I go through different aspects of each FOIA—such as procedural requirements, the scope of the law and its limitations—I will explore how they have been interpreted and put into practice by the courts; the European Court of Human Rights and domestic constitutional courts in particular. Articles from investigative journalism portals, newspaper reports and blog entries are also included so as to understand how the media are affected by the right to public information. After all, they are the main users of freedom of information schemes. In 2017, journalists were the predominant requesters of public information in Ireland comprising 22 percent of all inquiries.[131] This chapter seeks to understand how FOIAs differ from one jurisdiction to another as well as assess and compare their strengths and weaknesses. Further, I investigate how journalism and, through it, the public is affected by the respective legislation.



### Procedural requirements

Citizens of Hungary, Ireland and Finland may request information held by public bodies, usually referred to as FOI bodies, as of right. The process of attaining information is set out in FOI instruments, but, just as the scope of the law differs in each jurisdiction, so too do the

[130] "About Freedom of Information (FOI)."
[131] "Information Commissioner Annual Report 2017."

procedures. Major differences are found in the way information is to be requested, the attendant fees and form of attaining requested information. This subsection scrutinizes and analyzes these differences. Please note that individual complaint procedures are discussed in the section on limitations of the right to FOI.

Stemming from different historical backgrounds and legal systems, the interpretation of the right to access public interest information provides an exciting new way of understanding a nation's relationship to multiple disciplines, such as history or science. In this subsection, these differences and similarities are discussed.

### The scope of information

In this subsection, the thesis examines the scope of FOI laws. It was seen in the previous chapter that the history of codification in each jurisdiction has shaped how the right to information is interpreted therein. The result is that the extent and scope of the right to information varies depending on the national context.

Before engaging in any kind of debate over the scope of the right to information I think it is important to recall what Harold L. Cross—who had an influence in the creation of the United States' FOIA—wrote in his 1953 book 'The People's Right to Know':

> Public business is the public's business. The people have the right to know. Freedom of information is their just heritage. Without that the citizens of a democracy have but changed their kings.

This quote makes clear the importance of FOI, but in the legal context the right is still under development. As discussed in the history of codification chapter, the Leander v Sweden case was considered as precedent-setting at the Strasbourg court for quite some time. But following the boom of RTI legislation across the planet, and under the influence of the 2006 Claude Reyes v Chile[132] case from the Inter-American Court of Human Rights, the Strasbourg court finally

[132] Claude-Reyes et al. v. Chile.

decided to clarify its stance on the right to access information within Article 10 of the ECHR. This was a necessary 'response to the evolving convergence as to the standards of human rights protection to be achieved.'[133] This included clarification on what constitutes public interest information and what bodies may fall under the scope of Article 10.

The Court ruled that cases concerning access to public information should be considered with careful scrutiny. [134] One of its reasons for doing so is 'information monopoly' of the authorities, meaning that official information is solely held by state and public entities.[135] Yet, the Strasbourg court still provides a wide margin of appreciation to contracting parties of the ECHR.[136] As result, even the notion of public interest information, let alone its format, is different in each European jurisdiction. This chapter therefore discusses the notion of public interest information and bodies under domestic RTI regimes.

The Hungarian Information Act (*Infotv*.) divides information into two official, but three unofficial, categories. The two main categories are public interest information and personal data. There is a third category which lies in between: data which is public on grounds of public interest. The law defines public interest data as:

> information or data other than personal data, registered in any mode or form, controlled by the body or individual performing state or local government responsibilities, as well as other public tasks defined by legislation, concerning their activities or generated in the course of performing their public tasks.[137]



[133] Magyar Helsinki Bizottság v Hungary. §154
[134] European Court of Human Rights, Társaság a Szabadságjogokért v Hungary. §26
[135] European Court of Human Rights. §36
[136] A judgment from the UK's Supreme Court for example criticized the ECtHR, claiming that '[i]t is not helpful for national courts seeking to take into account the jurisprudence of the European Court of Human Rights to have different section decisions pointing in directions inconsistent with Grand Chamber authority without clear explanation.' (Kennedy v The Charity Commission, [2014] UKSC 20, 26 March 2014)
[137] 2011. évi CXII. törvény az információs önrendelkezési jogról és az információszabadságról.

We can see in the definition that the law does not differentiate between 'data' and 'information' and does not include data carriers. However, it is quite definitive in what kinds of information constitute public interest information.

Of course, there are governmental attempts to keep matters secret from the public on grounds of claiming that certain information fall out of the scope of the *Infotv.* In 2001, the Hungarian Air Force leased fighter jets from Sweden within the framework of an offset agreement.[138] A Hungarian journalist requested documents regarding the list of offsets approved by the Hungarian government, but her claim was rejected on the basis of a commercial secrets exemption. The case—now referred to as the Gripen case—ended up in Appellate Court, which ruled that the requested information was of public interest as the agreement was financed by public funds and the Ministry of Defense is 'clearly an organ that performs state functions.'[139] Other cases, however, are not so clear-cut.

The law also defines 'data [as] public on grounds of public interest.' This includes personal information where the public interest is at stake. An illustrative example relates to a public procurement by the University of Szeged (SZTE). In 2017, the state university called for offers for an iPhone, with the condition that the device must be gold in color. I contacted the respective office at SZTE, inquiring about the odd specification set by the call, their reasons for choosing such an expensive device, and last but not least, the name and position of the person who received the golden iPhone.[140] The person's name was personal data up until she received the golden iPhone, apparently necessary for her work at a state university and paid for from public funds. In this case, the name had to be disclosed for the benefit of the general public.[141] After an exchange of e-mails, and me having to point out the relevant passage of the law—

[138] An import agreement involving government(s), and where the exporters agree to undertake secondary objectives, distinct from the initial trade. These agreements often involve military goods.
[139] Gergely v Ministry of Development and Economics.
[140] Katona, "Közpénzből IPhone-t, de Csak Aranyszínűt!"
[141] 2011. évi CXII. törvény az információs önrendelkezési jogról és az információszabadságról. §26(2)

which seemed to be unknown to the university's administrators—SZTE disclosed the individual's name. The story caused controversy and circulated across the Hungarian media.

It seems that the law is straightforward what it considers public interest information, and what are the clear exemptions. Yet, as seen from the above examples, data controllers challenge the letter of the law regularly. In a high number of cases however, NAIH and courts rule in favor of the requesting party in Hungary.

As opposed to its Hungarian counterpart, the Irish FOIA does not define public interest information, however it does define personal information. The history of Irish FOI law is necessary to understand this state of affairs. As discussed in the previous chapter, the 1997 FOI was more about protecting personal data rather than that related to the public interest. The 2014 Act somewhat maintained this priority. The concept of public interest information can be found in 'the 2002 Annual Report of the Office of the Irish Information Commissioner [which] draws from the Queensland Freedom of Information Act 1992 in addressing the meaning and concept […]'[142] While the explicit definition of public interest is missing from the introductory interpretative section of the Irish FOIA, it is defined later in the section regarding the scope of the law:

> (i) the activities of public bodies and their use of public funds, (ii) information relating to the performance of such bodies' functions, and (iii) information on services funded by the State, and in particular (as respects those matters) to ensure accountability and the promotion of the principle of transparency in government and public affairs.[143]

While the notion of public interest is more or less defined in black and white, in some cases the notion is not so easy to apply.

In a 2018 case, Ken Foxe—director of the Irish information rights NGO Right to Know—filed a request asking for a list containing names of (former) members of the parliament

[142] Adshead and Felle, *Ireland and the Freedom of Information Act*. p.59.
[143] Freedom of Information Act 2014. §6(6)

who had their *Dáil*[144] bar/restaurant bills written off, along with anything owing in addition.[145] The request was rejected and, responding to Foxe's appeal, the Information Commissioner upheld the refusal to disclose. Both the Parliament and the Information Commissioner argued that such a list would entail disclosing personal information. Members of parliament acted in a private capacity when at bars and restaurants according to the findings. Needless to say, the establishments in question were on the premises of the *Dáil.*[146] The Information Commissioner further argued that such information might defame members of parliament. Of course, the release of thins information can be justified on the basis that the public has a right to know how their representatives are handling public finances. But in this case the right to privacy outbalanced the right to know.

The 2014 Act better elaborates on the entities constituting public bodies. It extended coverage to institutions left out of previous legislation, including the *An Garda Síochána*, the Central Bank and the National Treasury Management Agency. Of course, the road leading to the inclusion of these organs was not smooth and there was resistance and there remains significant room for improvement in Irish legislation.

Finland's Act on Openness of Government Activities lays down several criteria that must be met for a piece of information to constitute a 'document' under the law. Though it is a bit repetitive, the law defines an official document:

> as a document in the possession of an authority and prepared by an authority or a person in the service of an authority, or a document delivered to an authority for the consideration of a matter or otherwise in connection with a matter within the competence or duties of the authority.[147]

This definition includes any information in the public entities' possession, but the law provides a list of exceptions permitting non-disclosure. These exceptions include, for example, 'notes

[144] The *Dáil Éireann* is the lower house of the Irish Parliament directly elected under universal suffrage.
[145] Foxe, "FOI Decision."
[146] Mr X and the Houses of the Oireachtas Service (FOI Act 2014).
[147] Laki Viranomaisten Toiminnan Julkisuudesta. §5(2)

kept by a person in the service of an authority or a person commissioned by an authority and such drafts which have not yet been released for presentation or other consideration.'[148] But once a document, as previously noted, is presented or considered within government it enters what the law refers to as the 'public domain.' At this point it comes under the scope of the freedom of information act (as defined in Sections 6 and 7 of the Act on Openness of Government Authorities).

Unfortunately, definitions do not always make life easier. As was the case in Hungary and Ireland, the precise meaning of what constitutes a public information is up for debate in Finland too. In 2014, journalist Tero Karjalainen requested information concerning Finland's gambling policy. The document in question—a memorandum—was unarguably of public interest. It discussed the infringement procedure launched against the country by the European Commission.[149] The Ministry of Interior refused the disclosure of it, citing Section 24 of the Openness Act. According to the latter, a document may be classified as secret when it is 'concerning the relationship of Finland with a foreign state or an international organization; the documents concerning a matter pending before an international court of law, an international investigative body or some other international institution.'[150] And the European Commission is an international organization by definition. The Supreme Administrative Court later annulled the Ministry's decision and ruled Section 24 was inapplicable to the document at issue because 'the background memorandum did not relate to the matter referred to in that Article or to any other Commission at the time of the request for a document, but was drawn up only after the infringement procedure referred to by the Ministry of the Interior had already expired.'[151] The Supreme Administrative Court also emphasized the principle of openness in its judgement,



[148] Laki Viranomaisten Toiminnan Julkisuudesta. §5(3)2
[149] "Press Release - Commission Requests Member States to Comply with EU Law When Regulating Gambling Services."
[150] Laki Viranomaisten Toiminnan Julkisuudesta. §24(1)2
[151] Muu päätös 1355/2015.

noting that everyone has the right to receive information contained in public documents possessed by the authorities unless the law says otherwise.

There is consensus in each of the countries discussed in this thesis that the right to information needs to be protected. Though they interpret the letter of the law in different ways, they must do so in mind of the standards set by the Council of Europe through the European Court of Human Rights. This requires that the rights found therein 'must be interpreted in the light of present-day conditions.'[152] The data revolution is part and parcel of our 'present-day conditions' and requires that the authorities ensure their FOI practices keep up with technology and the law.

Proactive disclosure

Not every attempt to access official documents has to be done through an information request. The three jurisdictions under scrutiny in this thesis have adopted the principle of proactive disclosure, meaning that publication schemes are set out in the respective FOIAs and require public bodies to publish as much information as possible in an open and accessible manner.[153] Unfortunately, proactive disclosure has not been thoroughly researched and national statistics bodies are not collecting data to measure the degree of compliance with the principle. So far, we can only rely on journalists' experiences.

There is a reason why proactive disclosure is part of RTI schemes: it increases accountability, fosters participation and forces public bodies to adhere to the rule of law. Furthermore, '[b]y proactively publishing information governments have the potential to satisfy the information needs of the public *en masse* rather than just the individual.'[154] I would like to point out that those who research government documents are mostly journalists, not laypersons.



[152] Tyrer v the United Kingdom. §31
[153] Freedom of Information Act 2014 (Ireland): Section 8; "Glasspocket Act" (Hungary); Act on the Openness of Government Activities (Finland): Chapter 2.
[154] Zausmer, "Towards Open and Transparent Government." p.29.

But proactive disclosure is a great help in that it reduces the number of obstacles between the sources of information, the disseminators of that information, and the public. This is true, of course, only if proactive disclosure is effectively put into practice.

Unfortunately, things do not always work in practice as they are planned in theory. As Helen Darbishire records, the Hungarian government introduced the e-FOIA within the framework of the Glasspocket Act in 2005. She describes the Hungarian system as hybrid, where disclosed information is uploaded on the respective body's website, which can be accessed via hyperlink from a centralized homepage. Darbishire writes that '[t]his model relies on each body updating their websites (which has been a problem in practice), but has advantages for users looking for information by giving them both the departmental websites and the central portal's search function.'[155] In reality however, authorities often fail to fulfill their obligations under the Glasspocket Act. So much so that in 2018 the investigative journalism portal *Átlátszó* launched an initiative with the help of Google's Digital News Initiative to monitor public bodies' compliance with the law.[156] The purpose of the project is to rate bodies on a scale of 1 to 5 depending on how compliant they are with the legislation. Attila Bátorfy, the individual responsible for managing the initiative, confirmed what Darbishire suggested, saying that the initial goal of the project was that '[citizens] do not need to visit thousands of state websites, let alone spend half an hour looking for a piece of information.'[157] While it might make research more efficient in theory, *Átlátszó*'s service has demonstrated a systematic inability of government institutions to comply with the law at a practical level.

Since the project's launch in early 2018 its algorithms have demonstrated public bodies' haphazard and inconsistent adherence to the scheme. Bátorfy said he has not noticed a single organization doing better than any other. This holds for urban bodies in Budapest and more

[155] Darbishire, "Proactive Transparency." p.26.
[156] Bátorfy, "Új alkalmazást fejlesztett az Átlátszó az állami szektor átláthatóbbá tételére."
[157] Bátorfy to Katona, "Üvegzsebfigyelő App."

rural ones in the countryside. What he noticed is the low number of users. He could not give me precise figures, but admitted that the initiative has not been used as fully as it could by citizens to hold power to account.[158] As opposed to the new applications, the NGO also operates a successful FOI requesting platform. *KiMitTud*.org, has been utilized much more by journalists and the public.

Proactive disclosure is implemented to the bare minimum in Ireland too.[159] With the 2014 FOIA came a Code of Practice, which 'promised to fix the problems that have blighted *bona fide* attempts to use the Act to scrutinise public bodies.'[160] The Code included an entire chapter on proactive disclosure. The purpose of the latter, according to the document, was to mitigate the workload of data controllers stemming from individual FOI requests. This view of the problem aligns with previous criticism of the Irish FOIA, namely that the administrative burden of the legislation outweighs its advantages. The document therefore stresses that the '[t]he adoption of a practice of routine publication of information which might otherwise be the subject of an FOI request will free up staff capacity of public bodies from dealing with FOI requests.'[161] To my question of the policy's effectiveness, Irish journalist and FOI expert Gavin Sheridan responded that its 'disclosure obligations are minimal and basically amount to guidelines. There are no methods to force compliance.'[162] Despite having a Code of Practice explaining publishing routines and best practices the Irish entities still have a long way to go in terms of positive disclosure for the benefit of journalists and the public. As Access Info Europe's study put it, '[e]ven with the advent of the internet, public bodies tend to regard their websites as shop windows for promoting their services and achievements […] rather than letting



[158] Bátorfy to Katona.
[159] Access Info Europe and Open Knowledge Foundation, "Beyond Access: Open Government Data and the 'Right to Reuse.'" p.69-70.
[160] Adshead and Felle, *Ireland and the Freedom of Information Act*. p.102.
[161] "Code of Practice for Freedom of Information for Public Bodies." p.23.
[162] Sheridan to Katona, "FOI Ireland."

look directly at the raw data about the day-to-day functioning of government.'[163]But Ireland appears to be making a real effort, inadequacies aside, to ensure good governance.

Ireland joined the Open Government Partnership in 2013, an international organization aimed at bringing together government reformers and civil society leaders to create action plans that make governments more inclusive, responsive and accountable. The three main points in Ireland's action plan include promoting open data and transparency, building citizen participation and strengthening governance and accountability to rebuild public trust in government. To do so, the authorities plan '[t]o increase the release of data, preferably machine readable data, on organisations delivering services on the Government's behalf. This will include audited financial data, compliance data and on-going performance delivery data.'[164] Even though the Open Government Partnership has not evaluated Ireland's progress—it is still in the process of developing a comprehensive action plan—the country's commitment to change is a step in the right direction. Openly available data and government transparency allow journalists and the public to check the exercise of power.

A 2011 OECD report indicates that Finland is actively operating its public procurement website, divulging information on the details of its agreements online.[165] The Finns go above and beyond what is strictly necessary: public 'contracting entity websites may disclose information for potential bidders, information on contract awards (name and amount of selected contractor) and on justifications for awarding a contract.'[166] Not only are documents relating to public procurements open and accessible by default. There is transparency in the law-making process too:



[163] Access Info Europe and Open Knowledge Foundation, "Beyond Access: Open Government Data and the 'Right to Reuse.'" p.70.
[164] "08 Mprove Transparency of Government Service Providers."
[165] The website is similar to the Hungarian government's.
[166] Organisation for Economic Co-operation and Development, *Government at a Glance 2011*.

> Finland has rules requiring central government authorities to make public the fact that they are starting work on a reform of legislation. All authorities have an obligation to actively give information when they are working on plans and reports on important matters in the general interest, and they must publish alternatives and impact assessments.[167]

Furthermore, taxation information is available to the public.[168] All of this this is done in accordance with the law which, as in Hungary, categorizes data as public on grounds of public interest. The latter point will be discussed below.

Enabling access to public interest information is also on Finland's agenda within the Open Government Partnership. The country joined in 2012 and has actively participated since. The focus of its current action plan is the publication of budget/fiscal information, but it has made other commitments as well. Its "access to information on incorporated public services" initiative's object, for example, is 'to secure open and transparent decision-making.' To this end Finland states that 'the access to information principle will be widened to apply also to those public services that are produced in a company format.'[169] Its "access to information knowledge in the public administration" scheme, too, is bold in its objective: '[a]ccess to information needs to be the main rule also in practice.'[170] These policies put proactive disclosure of information at the forefront of Finland's push for improved governance.

Proactive disclosure is an important part of FOI regimes. Unfortunately, there are few scholarly studies available measuring the degree of implementation and the principle's effectiveness. From the perspective of journalists and members of civil society there is always room for improvement, but the fact that the jurisdictions under review here are taking steps to make public data more widely available is a positive sign. With the law in place all that needs to be done is put it into practice.



[167] Jørgensen, *Access to Information in Nordic Countries*. p.19.
[168] https://www.vero.fi/en/individuals/
[169] "03 Access to Information on Incorporated Public Services."
[170] "04 Access to Information Knowledge in the Public Administration."

Means of requesting information

When governments fail to proactively disclose information citizens can request information on their own. This is called a freedom of information request, or FOI request. FOI requests give people the right to question public and state bodies' expenditure of funds and ask for data on the day-to-day workings of these organizations. They can cover everything from the cost of keeping koalas at Budapest Zoo[171] to the list of members of the Stasi in Finland.[172] (Please note that the scope of law is discussed in the next chapter.)

Different jurisdictions have various conditions that must be fulfilled before access to information is granted to the requesting party. Hungarian law is rather permissive about the means of request, which can be 'presented verbally, in writing or by electronic means.'[173] The Irish FOIA is less determinate, holding that a request may be submitted 'in writing or in such other form as may be determined.'[174] This vagueness gives the receiver of the request a modicum of discretion to decide whether the formal requirements have been met when a submission is made in a form other than writing. Surprisingly, the Finnish Act on the Openness of Government Activities is silent on the means of requesting information. We know from studies that in order to obtain a document within the framework of the Finnish FOI regime requesters 'must orally or in writing ask for it from the authority that has the original document in its keeping.'[175] The absence of a provision on the means of requesting information presupposes that citizens know how to file a FOI request. Failing to divulge the procedure is in itself problematic from an FOI perspective.

The practical costs of requests, aside from fees, are given no attention by legislators. As Gavin Sheridan wrote in his study on non-personal FOI requests: '[e]very request requires

[171] "Koala-költségek."
[172] "'Tiitinen List' Could Be Available to Historians by 2015."
[173] 2011. évi CXII. törvény az információs önrendelkezési jogról és az információszabadságról. §28(1)
[174] Freedom of Information Act 2014. §12(1)
[175] Rowat, *Administrative Secrecy in Developed Countries*. p.70.

envelopes, stamps, cheques, a printer, printer ink – many of which people either do not have, or cannot afford.'[176] This acts as a significant impediment to making use of one's right to access information and results in a lower number of FOI requests by ordinary citizens.

Of the three jurisdictions only Hungary has a central FOI requesting platform where requests may be sent every public and state body within the scope of the *Infotv.* This platform, KiMitTud.org, however, is powered by a non-governmental organization. Citizens can register with an e-mail address and, once they have signed up, can begin requesting information from 5,213 data holders.[177] Requests are done through a template containing the relevant sections of the law, making the platform extremely uder-friendly. All requests and answers are public and searchable. Where a request is denied the NGO even provides legal aid to help ask for more information from the data holder or pursue an appeal. The effectiveness of KiMitTud.org can be seen in its numbers: since its launch in 2012, 11,785 requests were made.[178]

Requests may be rejected if the authorities deem the question too vague. There is a consensus among the three jurisdictions about requests needing to 'contain[] sufficient particulars in relation to the information concerned to enable the record to be identified by the taking of reasonable steps.'[179] In case the request is not clear, the FOI body should ask for clarification within a provided statutory limit, though this element of the law differs between jurisdiction. In Hungary, 15 days are given to FOI bodies to contact the requesting party for clarification.[180] According to the 2015 Amendment to the *Infotv.*, the 15 days starts on the day the data holder becomes aware of the request. In practice, if a request is done after working hours, then the countdown begins the following day.[181] In Ireland and Finland notice of the



[176] Adshead and Felle, *Ireland and the Freedom of Information Act*. p.138.
[177] As of 26 November 2018
[178] https://kimittud.atlatszo.hu/
[179] Freedom of Information Act 2014. §12(1)b
[180] 2011. évi CXII. törvény az információs önrendelkezési jogról és az információszabadságról. §29(1)
[181] "Mától hatályos az Infotörvény módosítása."

need for clarification should be given 'not later than 2 weeks' after the request is received.[182] Unfortunately, there are instances when even the clearest requests are sent back to the requesting party for clarification.

When the authorities ask for clarification from requesters they gain extra time to decide how best to deal with the request. This is particularly useful when a request involves sensitive information or an inconvenient line of inquiry for the data holder. Of course, wherever there is a backdoor allowing a public body to escape responsibility it will be taken advantage of. The experience of EDRi, a Brussels-based information rights NGO, illustrates how the clarification system is misused. EDRi sent a simple request to the European Commission, the executive branch of the European Union, asking for 'all correspondence (including emails) to officials in […]' various offices in the Commission. To their surprise the Commission replied on the last possible day, restating EDRi's request and asking for it to 'please confirm to us that our understanding [of the request] is correct?'[183] The NGO believes the Commission used the clarification procedure to delay having to disclose important information about behind the scenes corporate lobbying related to the upcoming copyright reform.[184] If this reading of events is true, it is a clear and gross abuse of right to FOI procedures.

Personal information of the requesting party

In order to receive documents from the data holder requesters must provide personal information. The Hungarian information law (the *Infotv.*) was amended in 2015, stirring controversy among members of the civil society.[185] One of the questionable new rules added to the law was data holders' right of refusal in cases where requesters fail to provide their full



[182] Laki Viranomaisten Toiminnan Julkisuudesta; Freedom of Information Act 2014. §12(2)
[183] Fiedler, "Correspondence Received on the Copyright Directive between 07/2016-09/2016 - a Freedom of Information Request to Communications Networks, Content and Technology."
[184] Fiedler, "EU Commission on FOI Request."
[185] Rényi Pál, "Így Múlik Ki a Magyar Információszabadság."

name and contact address.[186] Legal experts saw this as a disproportionate requirement designed to allow the authorities to collect the personal information of nosy citizens. Attila Péterfalvi, director of NAIH, addressed this issue in a letter to the editor-in-chief of the investigative portal *Átlátszó*. He wrote that 'upon the enforcement of the Amendment, NAIH will follow the practice of settling [requests] with the name and e-mail provided' by users of 'the *KiMitTud* data requesting platform.'[187] He further elaborated that the verification of the requesting party's identity would be unlawful. As a result of these comments the lawyers at *Átlátszó* deemed the new addition to the law 'a blank bullet.'[188] It remains suspicious that the government would pass an amendment that had, in practice, little utility. Names and addresses, after all, do not change the nature of the information requested from public bodies.

According to the Irish FOIA, requesters seeking personal information from public data stores must prove their identity to the authorities.[189] The law is silent on what information a requester has to provide to receive non-personal information. Common sense dictates that a name and contact address—to where the information should be delivered—should be enough, but the rules remain unclear. The Finnish Information Act explicitly declares that '[t]he person requesting access need not identify himself or herself nor provide reasons for the request, unless this is necessary for the exercise of the authority's discretion or for determining if the person requesting access has the right of access to the document.'[190] How the authorities determine when more information is needed from requesters remains opaque.



[186] 2011. évi CXII. törvény az információs önrendelkezési jogról és az információszabadságról. §29(1)a-b
[187] Péterfalvi to Bodoky, "NAIH/2015/4710/2/V."
[188] "Vaktöltények az infotörvény módosításában."
[189] Freedom of Information Act 2014. §37
[190] Laki Viranomaisten Toiminnan Julkisuudesta. §4(14)1

Fees

In my opinion, one of the most outrageous aspects of FOI regimes are fees. I think it is important to keep in mind what Joseph Stiglitz, the Nobel prize-winning economist and former chief economist at the World Bank, said in an Oxford lecture in 1999:

> [t]he question is, given that the public has paid for the gathering of government information, who owns the information? Is it the private province of the government official, or does it belong to the public at large? I would argue that information gathered by public officials at public expense is owned by the public— just as the chairs and buildings and other physical assets used by government belong to the public.[191]

If citizens own public information and paid for its creation in the first instance, why should they be forced to pay a second time to see it? Fees are particularly problematic given that 'in 72% of [all OECD countries], proactive disclosure is required by FOI laws for certain categories of information.'[192] But fees may serve other purposes. First, information is the most valuable asset of our time. It is lucrative to own data. Second, 'knowledge is power' and governments want power in their own hands, not with citizens. Perhaps Foucault was correct when he wrote in his *Discipline and Punish: The Birth of the Prison* that modern governments have shifted from open oppression of citizens to more sophisticated, cost-effective bureaucratic tools in order to keep the socioeconomic order in place.[193] Control of information allows governments to control society.

Jurisdictions have different approaches to fees. By default, citizens seeking information from Hungarian public and governmental bodies are not required to pay for public interest data. Fees may be imposed on the requester if the information is disclosed by means other than digital copies. In 2016, a decree was enacted to regulate these sorts of charges in order to avoid abuses.

[191] Stiglitz, "On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life." p.7.
[192] Organisation for Economic Co-operation and Development, *Government at a Glance 2011.* p.142.
[193] Foucault, *Discipline and Punish: The Birth of the Prison*.

For example, it set a 5000 HUF minimum threshold for miscellaneous fees, such as photocopying, under which the requester does not need to pay.[194] In accordance with the Hungarian Information Law (referred to as *Infotv*. henceforth), free access shall be granted to data of public interest.[195] However, §29(4) of the law declares that if the request imposes an undue burden on the respective public body's everyday operations the requester can be charged proportionally.

Unfortunately, this practice is often exploited. In 2017, for example, a pool and spa complex in the East-Hungarian city of Szolnok was about to receive approximately 3 billion HUF of state and European Union subsidies to improve its facilities. The spa is operated by a private sewer company, but still receives government funds.[196] For this reason its documentation is of public interest, meaning it has to comply with the *Inftotv*. Unfortunately, the Glasspocket section on the company's website has not been updated since 2014. I sent the sewer company a freedom of information request to learn how previous state subsidies were utilized and who their contractors were. Upon sending the inquiry, I was told that the completion of my request would impose an undue burden on the company. However, if I had been willing to pay 6.6 million HUF and wait half a year for the request to be processed they were willing to disclose the requested information.[197] Needless to say, all of the requested information should have been readily available on their website in conformity with the law.

As was discussed in the previous chapter, the first Irish FOIA did not contain fees. These were introduced later in the 2003 Amendment. Prior to the introduction of fees in 2003 a working group consisting of government officials was set up to review the 1997 Act. As summed up by Adshead and Felle: 'The group's report illustrated a high degree of skepticism regarding the alleged advantages of the Act as compared to the administrative costs of its

[194] 301/2016. (IX. 30.) Government Decree.
[195] 2011. évi CXII. törvény az információs önrendelkezési jogról és az információszabadságról. §26(1)
[196] Katona, "6,6 Millió Forintot Kér Nyilvános Adatokért a Szolnoki Vízmű."
[197] "Liget Termálstrand és Élményfürdő bevételei, kiadásai, szerződései."

implementation […]'[198] which eventually led to the incorporation of fees. Put otherwise, the group believed it was too expensive for the government to give citizens access to public information. Their solution was to make citizens pick up the tab.

In the late 2000s government reports claimed that a FOI request cost up to 600 EUR.[199] With fees in place the cost of a request, including appeals, could cost hundreds of EUR for journalists and NGOs. It must be noted, however, that lower fees applied to personal information requests. According to Sheridan, newsrooms paid from their own budgets but smaller media outlets and NGOs, like Sheridan's thestory.ie, had to solicit external funds to support their FOI requests.[200] As I mentioned in the previous chapter on the history of codification, the number of requests decreased significantly under this FOI scheme.

As of today, the application fee of 15 EUR has been abolished. Like the Hungarian regulations, statutory instrument details when extra fees apply. In accordance with this document, there is a minimum threshold of 101 EUR below which no search, retrieval or copying fees may be charged. If the cost of supplying information surpasses the threshold the full cost must be paid. If the inquiry is rejected and the requester decides to file an appeal to the Information Commissioner she must pay 50 EUR.[201] For all but the most basic requests the fees are significant.

Finland's FOI regime is similar to the Hungarian and the Irish. Requesting information is free of charge. The Act on the Openness of Government Activities lists all cases where information shall be free: e.g. when it is provided orally, when it is read and copied at the authority's office, and when am electronically recorded document is sent by e-mail.[202] However, if the document 'cannot be specified and found in a manner' as prescribed by the



[198] The government, however, failed to provide proof to substantiate this figure. See Adshead and Felle, *Ireland and the Freedom of Information Act*. p.32-33
[199] Adshead and Felle. p.168-169
[200] Sheridan to Katona, "FOI Ireland."
[201] Freedom of Information Act 2014 (Fees) (No. 2) Regulations 2014.
[202] Laki Viranomaisten Toiminnan Julkisuudesta. §34(1)

requesting procedure (§13), then the authority may impose proportionate charges on the requester. The same logic applies to cases when a requester wishes to have print-out copies of the documents. In these instances, the charge is to 'correspond[] to the amount of costs incurred by the authority in providing access, unless a lower charge is provided in law or a lower charge is decided on the basis of the Municipal Act (365/1995).'[203]

A pattern is discernable in the way public information can be accessed in Hungary, Ireland and Finland. As we saw in the examples discussed above, the word "free" can be deceiving. Despite having relatively good regulations in place with regard to fees, the latter often provide a means by which data holders scare away journalists, NGOs or conscious citizens from requesting public information. It can simply be too expense for them.

Timeframe

Once a freedom of information request is written and submitted in the prescribed manner, FOI bodies have to identify, find, prepare and disclose the documents. A study alleges that, in the United Kingdom for example, administrators spend an average of seven hours on a single request.[204] Sometimes inquiries can be answered by sending a hyperlink to the relevant public or governmental body's database where the information is already disclosed. These are the easy cases. There are plenty of others where the request is a bit harder to fulfill. In such circumstances, regulations put statutory time limits in place.

In a handful of cases, different deadlines apply to FOI bodies. For example, where an authority asks for clarification from the requester or when the requested documents must be physically delivered. In Hungary, the deadlines for these two situations are the same. According to the *Infotv.*, '[t]he body with public service functions that has the data of public interest on record must comply with requests for public information at the earliest opportunity within not

[203] Laki Viranomaisten Toiminnan Julkisuudesta. §34(3)
[204] Adshead and Felle, *Ireland and the Freedom of Information Act*. p.168-169.

more than fifteen days.'[205] If the FOI body needs clarification, then it has to notify the requester within this timeframe. The timeframe is then extended by an additional 15 days after the body becomes aware of the requester's clarification. The 15 days' timeframe can also be extended by the data holder without asking for clarification, in cases where the request is 'substantial in terms of size and volume.'[206] However, if the FOI body decides to extend the deadline, it needs to notify the requester within the first 15 days. When the data holder rejects the request, it is given and eight-day timeframe to notify the requesting party.[207]

In the Irish FOI regime, the timeframe provided for clarification requests and the delivery of the documents differ. If a data holder experiences trouble understanding the inquiry, it has two weeks to ask for clarification. However, the final decision, let it be the delivery of the document or the rejection of the request, has to be communicated 'as soon as may be [possible], but not later than 4 weeks, after the receipt of an FOI request.'[208]

The Finnish legislation is similar to its Hungarian counterpart in two ways. First of all, the timeframe within which the notice asking for clarification needs to be sent is the same as the deadline for the decision. The Act on the Openness of Government Activities orders that any 'matter referred to in this section shall be considered without delay, and access to a document in the public domain shall be granted as soon as possible, and in any event within two weeks from the date when the authority received the request for the document.'[209]

Individual complaint procedures and remedies

Unfortunately, holders of public interest information—as defined by law—often refuse to disclose information. The right to official documents is not an absolute right meaning it can be limited, which serves as basis for refusing freedom of information requests. Beyond the

[205] 2011. évi CXII. törvény az információs önrendelkezési jogról és az információszabadságról. §29(1)
[206] 2011. évi CXII. törvény az információs önrendelkezési jogról és az információszabadságról. §29(2)
[207] 2011. évi CXII. törvény az információs önrendelkezési jogról és az információszabadságról. §30(3)
[208] Freedom of Information Act 2014. §13(1)
[209] Laki Viranomaisten Toiminnan Julkisuudesta. §14(4)

limitations set out in the law, data holders often refuse to disclose information by simply ignoring a request. Alternatively, they disclose only partial information. Each jurisdiction has its own individual complaint procedure to mediate between the requesting party and data holder.

In Hungary, despite the apparent agreeable phrasing of the *Infotv.*, the situation is far from perfect. The information act is silent on sanctions but it does define the role of NAIH, a public body designated to oversee the implementation of information rights. Once a request is denied or ignored beyond the 15-days statutory limit, the requesting party has two paths to choose from. It can either file a lawsuit in court or ask for an official—non-binding—resolution from NAIH and, with this document in hand, proceed to court.

Asking for a resolution from NAIH is optional. The Authority is obliged to investigate the complaint unless, however, it is anonymous or the case is of little significance. Complaints are free of charge. Furthermore, the law says '[NAIH] may refer cases to the judiciary in connection with any infringement concerning public interest data and […] on grounds of public interest.'[210] A complaint can be lodged at NAIH within 30 days following the end of the requesting procedure, when, for example, the rejection has been received or the expiration of the statutory time limitation has passed.[211] The body has two months from the day of receiving the complaint to publish a resolution, but in reality this can take significantly longer. In August 2017, I sought a resolution from NAIH[212] when the Somogy County Police Department rejected my FOI request concerning the police presence at a major music festival, Balaton Sound.[213] I heard nothing from NAIH in the coming months. To my surprise, the resolution arrived nine months later in May 2018.[214] By that time, probably due to NAIH's investigations, the police

[210] 2011. évi CXII. törvény az információs önrendelkezési jogról és az információszabadságról. §38(3)d
[211] 2011. évi CXII. törvény az információs önrendelkezési jogról és az információszabadságról. §31(3)
[212] Katona to Péterfalvi, "Somogy Megyei Rendőr-Főkapitánysággal Szembeni Bejelentés."
[213] "SOUND 2017 rendőri jelenlét."
[214] Péterfalvi to Katona, "NAIH-2018-2096-3-V."

had already disclosed the data I requested. NAIH resolutions are non-binding, but the administrative body can impose fines on entities infringing information rights. It is unclear whether the fines system is merely a formality, passing public funds from one body to another.

The second path one can take to force data holders to disclose information is taking the case to court. This can be done with or without a NAIH resolution. When it comes to deciding right to information cases, Hungarian courts are generally in favor of its enforcement. For example, in 2004 the Hungarian Constitutional Court declared that 'in a democratic society, the publicity of public interest data is a main rule; the limitation of the publicity of public interest data should be regarded as exceptional.'[215] This judgement can be regarded as precedent-setting. It is worth recalling, however, that in a continental legal system such as Hungary the notion is understood a bit differently from its common law counterpart: precedents serve a persuasive rather than binding role in civil law systems.[216] But inconsistency in protecting the right to information in court rulings persists, especially in high profile cases like that involving Hungary's expansion of its nuclear power plant, Paks II.[217]

In a recent opinion piece published on the renowned *Verfassungsblog*, freedom of information expert Dániel G. Szabó came to a grim conclusion about Hungary's compliance with the law. He writes that '[t]he judgement is not enforced, and the right to know remains theoretical and illusory, rather than practical or effective.'[218] He lists Hungarian entities which are notoriously non-compliant with judgements, such as the Ministry of Human Capacities and the Ministry for National Economy (currently named Ministry of Finance) with multiple examples to substantiate his claim.



[215] 12/2004. (IV. 7.) AB határozat.
[216] Fon and Parisi, "Judicial Precedents in Civil Law Systems."
[217] These decisions are based on the limitations permitted in adjudicating right to information cases, discussed in the next chapter.
[218] G. Szabó, "Executive and Legislative Organs of Hungary Disobey Court Rulings."

Not complying with court judgements is a bold game to play—in theory at least. The Hungarian Criminal Code (*Btk.*) includes a section on infringements of the right to access information under section 220: 'any person who […] refuses to disclose public information in spite of being ordered to do so by a final court ruling […] is guilty of a misdemeanor punishable by imprisonment not exceeding two years.'[219] If the crime is committed for unjust enrichment, the imprisonment can even be three years. The lawyers of Hungarian NGO *Átlátszó* interpret alleged infringements of this section as precluding conviction on the basis of negligence.[220] On paper, the sanctions are severe. But, truth be told, upon researching the anonymized database of Hungarian court rulings I am unaware of anyone being convicted under section 220.

In Ireland, the number of requests made under the FOIA is on the rise. In 2016, the Office of the Information Commissioner (OIC) reported that the number grew by 32 percent that year, reaching the highest number of FOI requests ever made: 30,417.[221] With large numbers of inquiries come more appeals. An applicant seeking to remedy a refused FOI request in Ireland may turn either to the FOI head who made the decision (for internal review) or to the Information Commissioner. Notice can be given in writing, orally or by electronic means 'not later than 2 weeks after the notification of the decision.'[222] Following receipt of a complaint the OIC is given four months to make a decision about the review process. During this time, the Information Commissioner provides the FOI body in question with a copy of the appeal. Whether personal information of the requesting party is disclosed to the FOI heads is at the discretion of the OIC.

In contrast with the Hungarian complaint procedure, review by FOI heads and the Information Commissioner are subject to fees regulated by a statutory instrument. The cost is not insignificant. An internal review by the head decisionmaker is 30 EUR (appx. 34 USD),

[219] 2012. évi C. törvény a Büntető Törvénykönyvről. §220
[220] Asbóth, "Egy Megválaszolatlan Levél Miatt Börtönbe?"
[221] "Information Commissioner Annual Report 2016."
[222] Freedom of Information Act 2014. §2 and §4(a)

and an appeal to the OIC is 50 EUR (appx. 56 USD). Sheridan wrote that in his experience the review fees along with the "spurious exemptions" permitted by law 'will dissuade most people from appealing.'[223] For this and other reasons the Office of the Information Commissioner is subject to criticism from civil society members, such as NGOs and journalists.

Finland is the odd one out when it comes to rights protection. While constitutionalism is not within the scope of this thesis, it is important to understand the role of the legislature and judiciary in the Finnish context. Some argue that rights protections in Finland are basically non-existent, due to what is called 'Nordic constitutionalism.' First of all, Finland does not have a judicial review system, which for some is problematic. However, as Lavapuro, Ojanen and Scheinin point out, '[r]eminiscent of several other theaters within the global constitutional arena, northern constitutionalism also has witnessed a clear shift from the legislative sovereignty paradigm to one in which legislative acts are increasingly subordinated to rights-based judicial review.'[224] By legislative sovereignty they mean the judiciary has little power over rights protections. Instead, these are treated as political questions and review is implemented by the Constitutional Law Committee, which consists 'solely of members of the Parliament representing both government and opposition parties, many of whom are lawyers by education. The committee hears professors and scholars […]' as well when making decisions.[225] As a result, courts cannot overrule legislation. This means that case-law, which is of great significance in human rights law, is not given too much consideration. Instead, '*travaux préparatoires*, and a deductive legal method [have] enjoyed supreme importance.'[226]

Naturally, with the 1989 ratification of the European Convention on Human Rights the system in Finland has changed. The substantive rights provisions did not bring significant change to

[223] Adshead and Felle, *Ireland and the Freedom of Information Act*. p.139.
[224] Lavapuro, Ojanen, and Scheinin, "Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review." p.507.
[225] Lavapuro, Ojanen, and Scheinin. p.511.
[226] Lavapuro, Ojanen, and Scheinin. p.512.

the Finnish law, as it had previously incorporated the protections found in the International Covenant on Civil and Political Rights.[227] The ECHR, however, brought an 'effective international judicial monitoring mechanism that allowed individuals to bring their cases to an international court if they had not succeeded on the domestic level.'[228] There are thus judicial options at the European level for those who feel their right to information has been violated. On the whole, however, the sanctions in Finland are weak. Its freedom of information act, for example, is silent on the applicable sanctions for breaches of the right to FOI.

Upon researching relating laws, such as the Administrative Law, the Criminal Code, the Openness Act and the Openness Decree I did not identify criminal sanctions which could be imposed on those who violate the right to information in Finland. This excludes breaches which involve state secrets and privacy.

**Limitations**

The right to access information is not an absolute right, meaning that it can be subject to certain limitations. As was discussed in the chapter on the history of codification, limitations were included in the first international human rights instruments such as the Universal Declaration of Human Rights. The drafters of subsequent legislation borrowed liberally from the original formulation of what limitations entail and, as a result, the limitation clauses in many human rights laws are almost identical. Europe's preeminent human rights document, the European Convention on Human Rights, sets out acceptable limitations on freedom of expression in Article 10. Restrictions are permissible:

> in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or

[227] Finland signed the ICCPR in 1967, ratified it in 1975. The Covenant has been in force since 1976.
[228] Lavapuro, Ojanen, and Scheinin, "Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review." p.513.

> rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[229]

Fortunately, restrictions cannot be applied on a whim by the government. Alleged violations and undue limitations on the exercise of freedom of expression, along with other rights, may be litigated at European Court of Human Rights (ECtHR) following the exhaustion of domestic remedies. The ECtHR applies the so-called limitation test when investigating alleged violations. It consists of three questions, including whether: (1) the restriction is prescribed by law; (2) it is necessary in a democratic society; and (3) it pursues a legitimate aim.

There are a handful of cases concerning the right to information decided by the Grand Chamber of the ECtHR, such as Bédat v Switzerland.[230] However, these are often concerned with privacy and not the right to access official documents. The majority of cases which do discuss the issue are lodged against Hungary. Ironically, a country with strong protections of the right to FOI on paper has the most problems in the implementation of the law. Legislation, after all, is only as good as the people who apply it.

This section discusses limitations. Instead of focusing on the individual limitations set out in the legislation, it focuses on the types of information public bodies try to keep out of the public's reach. Taking the length of this thesis into consideration, the scope is narrowed down to show how state and public entities hinder the public's right to know. The two major issues identified as particularly relevant include cover-ups of past wrongdoing and the non- or insufficient disclosure of information on the expenditure of public funds. The justifications for withholding otherwise public information are used with a significant degree of creativity. As such, this section will address the possible grounds for limiting the right to freedom of information as they are used by politicians under the broader heading of reducing knowledge

[229] "European Convention on Human Rights." §10(2)

[230] Bédat v Switzerland is concerned with privacy and the disclosure of documents about ongoing criminal proceedings, in the context of a car accident in which three were left dead. (App. no. 56925/08, 29 March 2016)

of malfeasance. It addresses the two major issues thematically. Hungary takes pride of place in the jurisprudence of the ECtHR related to these problems, but case law at the domestic level from all three jurisdictions will complement Strasbourg's findings.

Covering up the past

Historical documents often stir controversy. They often shed light on past wrongdoing, clarifying debated historical events and the role of individuals involved in them. As such, it is crucial for the public to understand the past in order to form an opinion and participate in democratic processes. Scientific life is not limited to researchers, however, as the two instances discussed in this chapter show. When researchers publish politically relevant findings they often need to be presented in 'digestible' form for the public to contextualize what has been discovered. Journalists and the media are the key actors in this endeavor. Their work is hampered wherever the authorities are 'discouraging the participation of the press, one of society's "watchdogs", in the public debate on matters of legitimate public concern […].'[231] There are multiple legal documents emphasizing the importance of scientific life to society, such as Article 27 of the Universal Declaration of Human Rights.[232] For this reason, the right scientific life can be read in conjunction with other rights and freedoms. The Hungarian Constitutional Court, for example, ruled that it is protected under freedom of expression. The inclusion of scientific life under this heading means that the right can be limited on multiple grounds, including national security and privacy. This sub-section looks at the precedent-setting ECtHR case of Kenedi v Hungary to discuss public interest data in the context of scientific life.



[231] European Court of Human Rights, Társaság a Szabadságjogokért v Hungary. §26

[232] Article 27 of the UDHR reads: (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

One thing Hungary and Finland have in common is that they were ruled by oppressive regimes during the 20th century. Hungary was under both Nazi and Soviet rule. Finland was occupied by the Nazis during World War II. One of the characteristics of such regimes is their extensive use of secret services and mass human surveillance systems, often the product of coercion and intimidation. After regaining independence, many wanted retribution for the years of suffering inflicted on them and demanded the names of those responsible so they can be held accountable for the regime's crimes. In these circumstances the balancing of rights is extremely important. Is the protection of the personal information of those involved more important than the people's right to know their oppressors? Would release of the names endanger national security in cases where the respective individuals still hold public office? What we know from the case-law is that there is something of a consensus within the judiciaries of Hungary and Finland on these questions. The issue was resolved by the ECtHR in Kenedi v Hungary.

In the 2000s, a Hungarian researcher, Kenedi, wanted access to files about the workings of the Hungarian Secret Services from the 1970s. He requested these documents from the Interior Ministry. According to a 1994 judgment of the Constitutional Court, freedom of scientific life and the right to spread scientific truth are part of freedom of expression and, as such, it enjoys constitutional protection.[233] Kenedi therefore believed he had a right to view the files. But the 1995 State and Official Secrets Act held that '[t]he review of the classification of classified documents originating from before 1980 shall be terminated within one year from the entry into force of this Act. Once this time-limit has passed, the documents shall cease to be classified.' Since the time-limit had passed, the documents were classified until 2048. On this basis the Ministry refused his request.[234] Only after Kenedi obtained a court judgment in his favor did the Ministry agreed to disclose the documents under certain conditions. Kenedi had

[233] 36/1994. (VI. 24.) AB határozat.
[234] 1995. évi LXV. törvény az államtitokról és a szolgálati titokról, 1995. §28(2)

to sign a confidentiality agreement and agree not to publish his findings where 'state secrets' were concerned.[235] Despite the judgement and fines imposed on the Ministry, Kenedi was still unable access one of the documents. Having exhausted every domestic remedy, he decided to lodge a complaint at the ECtHR.

The Court ruled in Kenedi's favor, finding a violation of Article 10 of the Convention. It applied its limitation test and found no reasonable ground to support the Hungarian Government's claim that the limitation was 'prescribed by law.'[236] The ECtHR reiterated a point it had made in one of its previous judgements, Társaság a Szabadságjogokért v Hungary, which held that: 'access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression.'[237] This was a great victory for scientific life and should have settled the matter for the Hungarian authorities. Unfortunately, it has not.

In early 2018, a journalist requested documents pertaining to a world champion Hungarian water polo player. The person in question, however, previously won a lawsuit to reclassify himself as an agent. He is now listed as 'third person' meaning that any information on him cannot be disclosed by the authorities. Research has been made impossible.[238] The ECtHR closed on loophole allowing public bodies to withhold information and another one opened up.

Kenedi was a researcher, not a journalist, but the information he wanted to access was important in shaping public discourse and opinion. This was especially pertinent considering the numerous rumors circulating about members of the Hungarian administration being part of the secret service before the fall of the Soviet regime. As recently as 2017 there have been calls



[235] Kenedi v Hungary. §16
[236] Kenedi v Hungary. §46
[237] Kenedi v Hungary. §43
[238] Ungváry, "Ügynökakták."

for a referendum to vote on whether the so-called 'agent files' should be disclosed, but every attempt has failed despite the public interest served in releasing them.[239]

One of the major counterarguments for non-disclosure is the question of the extent to which 'agents' contributed to the crimes of the socialist era. As mentioned above, some willingly contributed to collecting intelligence but others were coerced. Others argue that the publication of the list of names would jeopardize national security, setting a dangerous precedent in favor of releasing the personal information of more recent agents in the near future. Some claim that these files are not what they are thought to be. Information was added and removed along the way, making them unreliable.[240] This heated debate is not an isolated example of a country failing to come to terms with its past. A quite similar debate took place in Finland.

The '*Tiitinen* list' stirred controversy in the first half of the 2010s.[241] The list —named after then-head of the Secret Police Seppo Tiitinen—contains information on Finns allegedly involved in Stasi-related activities. The list, consisting of 18 names, was provided to the Finnish by West Germany in 1990. Though highly sought after by researchers and journalists, Finnish secrecy law requires the documents remain classified for 40 years. Opposing the law on the ground of public interest, news reporter Susanna Reinboth decided to challenge the law in court in 2007. After an initial decision in her favor from the Helsinki District Court the Supreme Administrative Court of Finland decided in May 2010 that the list shall be kept secret by the Security Police until 2050. It found that premature disclosure could jeopardize international intelligence sharing.[242]

There is a legal solution to address this issue. Ireland, for example, has developed a 'harm test' to balance conflicting interests. It is used to determine whether disclosure would

[239] Marosi and Koncz, "Ügynöklista."
[240] Marosi and Koncz.
[241] "'Tiitinen List' Could Be Available to Historians by 2015."
[242] Susanna Reinboth v Suojelupoliisi.

cause more harm than non-disclosure. Even though it seems that national security, privacy, and international relations get the highest protection from the courts, the harm test may be able to take the public's right to know into consideration, weigh the risks and benefits of disclosing sensitive information, and compromise so as to divulge as much as feasibly possible. As regards the '*Tiitinen* list,' the courts could consider the possibility that the individuals on it may have never worked for the Stasi. If they were wrongly accused of spying then there is little but false information to hide. If they found that it were true, they could keep the list secret. Naturally, a balancing of rights should be considered here: particularly the right of individuals to privacy and good reputation against the public interest. A calculation of harm could help in such analysis. If this is not done, public interest might lead to the publication of the list without any oversight at all.

The '*Tiitinen* list' made it onto the data leaking portal Wikileaks' 'Most Wanted Leaks of 2009.'[243] Finnish national news later reported that the list might, indeed have become available on the site.[244] In 2011, Julien Assange—founder of WikiLeaks—claimed that it had acquired eight documents relating to the list, some of which turned out to be fraudulent. Others remained to be fact-checked. As of 2018 there is no news about the documents being leaked to the public. But journalist Seppo Tiitinen published a book in September 2018 hinting at the contents of the infamous list. He wrote that it is inaccurate and contains insignificant names: 'I do not remember all the names in the list, and it is very difficult to imagine that I could not recall any names if there was something worth remembering.'[245] These events show the danger of too-secretive a state in the era of data leaks. It can lead to the proliferation of rumors and false information. A legal solution on the basis of the public's right to know is needed.



[243] "The Most Wanted Leaks of 2009."
[244] "Wikileaks kiinnostunut Tiitisen listasta."
[245] Koponen, "Uutuuskirja: Tiitisen lista esiteltiin presidentti Mauno Koivistolle heinäkuussa 1990 Kultarannassa."

It is clear from the Finnish and Hungarian cases regarding the disclosure of information about secret services that in a couple of decades we will witness a wave of accountability; whether the authorities like it or not. Unfortunately, those involved in serving oppressive regimes may still be working today. Citizens are possibly forming their opinion of these individuals without being aware of their highly problematic past.

## Expenditure of public funds

Probably the most important advantages of having RTI regimes is its power to uncover unlawful expenditure of public funds. From Hungary to the United Kingdom, politicians claim that journalists are driven by 'ill-mannered curiosity,' or are using the FOI Act as a weapon against the government.[246] There is a reason why politicians are critical of journalistic inquiries into expenditure. For example, following the Panama Papers scandal Iceland's Prime Minister had to step down as his assets kept in an offshore account were uncovered, as it sparked suspicion of unlawful enrichment.[247] As result of the power FOIAs grant to the public, there are attempts to curb the right without explicitly breaching the law.

Creative examples include completed FOI request with poor quality copies, uneditable Excel files, unnecessary extension of the timeframe, fees imposed on requesters arguing undue burden on public bodies.[248] But of course there are more serious ways to be creative. For example, to enact new laws on various grounds or claim that certain bodies fall out of the scope of the law.

One serious example comes from Ireland. Where a public body—founded by the Government of Ireland in 2009—claimed not to fall under the scope of the FOIA. The National

[246] Erdélyi, "Négy Év Alatt 110 Millió Forintot Költöttek a Józsefvárosi Adatigénylések Megválaszolására"; Blair, *A Journey*. p.516-517.
[247] Erlanger, Castle, and Gladstone, "Iceland's Prime Minister Steps Down Amid Panama Papers Scandal."
[248] Erdélyi, "Az első idei nemzeti konzultációt 7,2 milliárd forintért reklámozta a kormány."

Asset Management Agency's (NAMA) case reached the Supreme Court and resulted in the entity's explicit mention in the 2014 FOIA.

In 2010, Irish journalist Gavin Sheridan requested information from NAMA under Access to Environmental Information legislation. Part of the request was information about A 'all properties and property loans currently owned or controlled by the Agency.'[249] The inquiry was consequently rejected by NAMA, which claimed it was not a public authority, as defined by the Amended 1997 FOIA. Furthermore, it argued that '[t]he mere fact of being a body established by or under statute does not automatically bring that body within the definition of public authority in the Regulations.'[250] Following NAMA's repeated refusal of disclosure during an internal review, and in accordance with the prescribed procedure, the issue was taken to the Information Commissioner in 2011 by the journalist.[251] The Commissioner declared NAMA to be in fact a public authority, and their refusal to be unjust.

The Agency appealed against the decision at court. Finally, in 2015, the case was closed when the Supreme Court unanimously upheld the Information Commissioner's ruling recognizing NAMA as a public body.[252] 'Sheridan has welcomed [the Supreme Court's] decision, but said it was regrettable that NAMA had not handled the issue better at the outset. He said it had taken nearly 2,000 days, and the expenditure of significant sums of public money, for the matter to be settled.'[253] While the case undoubtedly squandered public funds the five-year procedure likely helped pave the way for the more inclusive 2014 FOIA.

During the legal limbo that took place among NAMA, the Office of the Information Commissioner and Sheridan's NGO, TheStory.ie, a new FOIA was adopted and ratified. The new FOIA included NAMA in the chapter of "Partially Included Agencies." Meaning, that the



[249] Gavin Sheridan and the National Asset Management Agency (NAMA).
[250] Gavin Sheridan and the National Asset Management Agency (NAMA).
[251] Gavin Sheridan and the National Asset Management Agency (NAMA).
[252] National Asset Management Agency v Commissioner for Environmental Information.
[253] "NAMA Loses Appeal over Information Requests."

entity falls within the scope of the FOIA, but with limitations such as 'records concerning investors or potential investors in any security issued by the Minister for Finance or any of these bodies, or in any project, fund or other investment managed or promoted by any of these bodies or in which any of these bodies is an investor.'[254]

Today, as access is granted to documents held by NAMA, multiple stories were published about the Agency's workings, including some which stirred controversy. The latest report about the entity for example, is about 2.3 million EUR worth of salaries given to 23 developers.[255] Emphasizing that some were given 195,000 EUR per year, while the minimum wage in the country was 1,614 EUR as of July 2018.

The issue of surrounding the definition of a public body or authority also raised concerns in Hungary, when contradictory judgments were made in two cases with similar merits. *Társaság a Szabadságjogokért*—the NGO whose 2009 ECtHR judgment is a key case in the field of FOI—was involved in two litigations to gain access to documentation about two power plants.[256] The litigations took place at two different cities but almost at the same time. Furthemore, the majority shareholder in both power plants are the state energy company.

In the case of *Vértesi Erőmű*, the local court decided in favor of a journalist represented by the NGO, and the requested information was eventually released.[257] While in the case of the other power plant, *Paks*, the court ruled in favor of the defendant. It argues that while the sole owner of the plant is the state energy company, the plant itself is not a public body, therefore it does not have an obligation to disclose information.[258] The case of *Paks* later snowballed into what became probably the biggest FOI scandal of Hungary.



[254] Freedom of Information Act 2014. §6(x)
[255] Foxe, "NAMA Paying Developers €2.3 Million in Salaries with the Top Earner Receiving €195,000 Annual 'Allowance.'"
[256] Hüttl, "Zavar Az Erő(Mű) Térben - Azonos Perek, Különböző Ítéletek."
[257] Bodoky Tamás v Vértesi Erőmű "cs.a."
[258] Energia Klub Egyesület v Paksi Erőmű Zrt.

The story of the expansion of Hungary's nuclear power plant commonly referred to as *Paks* II became one of the most outrageous attempts to hide contracts, therefore indirectly keeping expenditure in secret. In 2014, Hungarian Prime Minister Viktor Orbán and Russian President Vladimir Putin signed a bilateral agreement between the country about the expansion. A couple of weeks later, the Parliament—in which the Prime Minister's party had constitutional majority—voted yes on an amendment which legitimized the investment.

Initial calculations predicted that the expansion would cost about 3700-3800 billion HUF (appx. 13 billion USD), of which 80 percent is covered by a loan from Russia. In practice, it means that the Hungarian state is obliged to pay about 11 billion USD plus interest to the Russian Federation in 30 years following the agreement. Surprisingly, there was no referendum about the investment. Furthermore, about a year later the same Government voted on an amendment to the FOIA, which classified all documentation concerning the expansion for 30 years. The events surrounding Paks II resulted in public uproar, from demonstrations to the neighboring Austria's complaint to the Court of Justice of the European Union.[259]

In late October 2015 however, one of the green party politicians was provided access to the documents within the framework of a non-disclosure agreement. Benedek Jávor later reported that he found that some documents were modified concerning classification. Contracts about the planning and the construction signed with Russian parties are now allegedly disclosable from mid-2025.[260] Eventually, in 2017 one of the politicians assigned to matters relating Paks II announced that some of the documents would be disclosed.[261] In 2018 Hungarian weekly *Népszava* pointed out during its lawsuit for certain Paks II documents, that the contracts only exist in English and Russian. The newspaper pointed out that this is highly



[259] "On the Measure/Aid Scheme/State Aid SA.38454 - 2015/C (Ex 2015/N) Which Hungary Is Planning to Implement for Supporting the Development of Two New Nuclear Reactors at Paks II Nuclear Power Station."
[260] "Csak 10 évig lesz titok Paks II. a 30 év helyett."
[261] Kovács-Angel, "Kicsit kevésbé lesz titkos Paks II."

problematic for settling possible future lawsuits with the Russian contractors.[262] From a FOI point of view however, it seems to be also an obstacle for access, as Hungarian citizens—or journalists and civil society members—without the necessary language skills would not be able to understand the documents.

The classified documents include information about possible fines in case the project is withdrawn, contractors in general which overwhelmingly include Russian businesses, etc. In practice, it means that those who wish to see how this tremendous amount of public funds is utilized have no chance to do so. The 30 years long secrecy could be applied, according to the Paks II-induced amendment to the *Infotv.*, in cases where national security is concerned.[263] The bill which proposed changes to the *Infotv.* has one interesting element to note. It says that the law is applicable to on-going freedom of information requests as well. This was of course, due to on-going freedom of information requests, submitted by civil society members, journalists and members of the opposition. The law was eventually adopted and is currently enforced.

Whether the potential harm to national security is more significant than the public's right to know about the investment is still subject to debate. It is not within the scope of this thesis to discuss issues of national security. However, these examples show that "creativity" is an understatement when it comes to secrecy.

## Recommendations

Upon reviewing how Hungary, Ireland and Finland developed and implements their respective FOI regimes, it is clear that each jurisdiction has its strengths and shortcomings. This section is briefly concluding the lessons learnt from these ascertainments and provides recommendations for improvement.

[262] "Eurómilliárdok sorsa - Paks2 csak idegen nyelveken."

[263] T/9632. számú törvényjavaslat a Paksi Atomerámű kapacitásának fenntartásával kapcsolatos beruházásról, valamint az ezzel kapcsolatos egyes törvények módosításáról szóló 2015. évi VII. törvény módosításáról.

In terms of definitions, it would be advisable that all freedom of information laws included a clear, full definition of what it considers of public interest information and public entity. Similar to the Finnish Act on Openness of Government Activities, in which it gives a wide definition, later narrowed down by limitations on grounds of international standards. This way, cases similar to Paks II and the NAMA can easily be avoided.

Each jurisdiction under scrutiny in this thesis built the principle of proactive disclosure into its legislation, yet seems to fail in its enforcement. In Ireland's Code of Practice of the FOIA, trainings are included on how public servants and entities could be more effective when implementing the principle. However, it seems that even with such manual present, public bodies do not disclose enough information proactively. Therefore, it would be advisable if complaints, followed by a speedy procedure to the Information Commissioner could be submitted. In case it imposes undue burden on the Authority, then an annual review procedure should be in place in which public bodies, as well as members of civil society and scholars are present, similar to Finland's Constitutional Law Committee.

The requesting procedure information is satisfactory in all three jurisdictions. However, following Stiglitz's brilliant example about ownership of official documents, no fees should be imposed on the requester. This include internal review procedures and appeals submitted to the respective Information Commissioners. In cases where the amount of data requested imposes undue burden on the data controller, no addition fee should be charged but additional time should be provided for the completion of the request. The default statutory limitations on time are also satisfactory in the discussed jurisdictions.

Privacy is not within the scope of this thesis; however, it seems that it is important to briefly mention the protection of personal information of the requester. In Hungary, it is kept from the data controller in case of an investigation by the NAIH. In Ireland however, it is up to the Office of the Information Commissioner's discretion to disclose such information. As we

could see from multiple examples how the right to information is abused, such data would provide grounds for intimidation to the data controller. Therefore, it is advisable to handle the requester's personal information as discreetly as possible within the context of the request.

Criminal sanctions should be imposed on those who breach the law. While Hungary's law is seemingly straightforward and proportional, there are multiple examples to prove that criminal sanctions are not enforced with abuses of public interest information. This may stem from political ideologies but also may be from the underrepresented nature of the right to information. Workings of law enforcement however are not within the scope of thesis, therefore no further recommendations can be made on criminal sanctions.

Loosely connecting to law enforcement and criminal proceedings, the case of whistleblowers is commonly absent from FOI instruments, both on international and domestic levels. London-based NGO, Article 19 included the protection of whistleblowers in their "Model Freedom of Information Law." It writes,

> [n]o one may be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment obligation, for releasing information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment.[264]

This paragraph is essential considering that we live in the "Era of Mega-Leaks." Learning from the WikiLeaks- and Citizen Four-scandals, there should be a supporting document detailing how whistleblowers are protected and what exactly are the protected grounds. As of course, unsupervised released of information concerning national security issues is highly problematic.

As all three freedom of information regimes are satisfactory, the first and foremost change that should be made is towards the attitude of disclosure. Unfortunately, as the examples

[264] "Model Freedom of Information Law."

show in this thesis, this is the matter of politics and ideology. This is the reason why awareness raising and active participation from civil society members and media workers are crucial.

# Conclusion

This thesis demonstrated that European FOI laws, while protective of the right to information on paper, are far from adequate in practice. As a result, journalists and other watchdogs are unable to access public information key to informing and shaping the lively debates necessary in healthy democracies.

Since the adoption of the world's first freedom of information law of 1766 the world came a long way in ensuring the public's access to official documents. Unfortunately, with wider recognition came more criticism from those who would rather keep uncomfortable facts to themselves. This issue does not stop with attempts to discredit media workers—labeling them ill-mannered and lazy and claiming that they abuse Freedom of Information Acts—but with effective changes in the legislation as well. This is the reason why oftentimes journalists and other watchdog organizations cannot gain access to important documentation concerning public matters. As a result, the public is also deprived from crucial information which would otherwise help them form opinion. And that is, as ruled by the European Court of Human Rights, a serious violation.

In the first half of this thesis I summarized how RTI regimes developed throughout history, considering socio-political events. The United Nation's human rights instruments, adopted after World War II had a great impact on regional conventions, such as the European Convention and the Inter-American Convention on Human Rights. And eventually, domestic legislations. It is visible from the evolution of the right that journalists and members of civil society tirelessly contributed to the process with litigations, awareness raising and occasionally by publishing information unlawfully.[265] As a result, today everyone within the three jurisdictions under scrutiny in this thesis can access public interest information, with certain

[265] An example for the latter is the Watergate scandal from the United States.

limitations. However, as Ireland's statistics show, it is still journalists who use the Freedom of Information Acts the most.

This thesis also provided a jurisdiction specific analysis on domestic freedom of information laws. I came to the conclusion that all three countries have satisfactory legislation. Their legal definition of what constitutes public interest information and public body differs however. Finland and Hungary give a rather broad notion, with an extensive list of exceptions. Ireland on the other hand is quite specific on what is considered to be under the scope of the law. Proactive disclosure is part of all three, showing the willingness of public entities to be transparent and accountable. When a citizen comes across a piece of information which falls under the scope of the RTI regime but is not proactively disclosed, she can request the information from the data controller. The procedure is defined by law with elements such as statutory limitations, fees and complaint procedures. In this regard, however, it seems that Finland is the odd one out, as the country does not have a judiciary review system due to its constitutional framework following the "Nordic model." On other aspects, their protection of the right is quite similar: FOI requests are free of charge, and notification has to be given in about two weeks.

As opposed to other sections of this thesis, the analysis of limitations is not categorized. The reason being is the length of this thesis. While the number of permitted limitations is narrow, such as national security, public moral, privacy etc., there are multiple other ways to curb the public's access to information. Hence, I decided to introduce examples of FOI breaches which stirred major controversy in the respective jurisdictions. I found that regardless of the country, data controllers can be really creative in how not to breach the law, but still violate the right to access and refuse disclosure of uncomfortable public-interest data. I summarized one of the ECtHR's key cases, Kenedi v Hungary and compared it to Finland's Tiitinen-list, to show how states attempt to keep the public away from reconciling with the past. Following, the issue

of disclosing expenditure of public funds came under scrutiny. I illustrated the problem with Ireland's Supreme Court judgment against the National Asset Management Agency and Hungary's classification of documents concerning its nuclear power plant, *Paks* II. It became visible from these examples that public bodies do not stop with simply refusing to comply with FOI Acts, but that they occasionally receive help from high circles who bend the law in order to avoid disclosure of document which may negatively influence public opinion regarding decision makers.

Due to the limitations of this thesis multiple aspects of RTI regimes were omitted, which could serve as basis for further research. Such elements include institutions which fall out of the scope of the current laws, for example universities or private companies. While these institutions may not operate from public funds and have no state contracts, they may still hold information which is of public interest. The public has the right to know whether these entities comply with other aspects of the law, for example whether they have discriminatory practices in the employment process. Another aspect which is absent from this thesis is the protection of whistleblowers. Considering the scale of leaks in the past decade, their impact on public discourse weighted against unlawful disclosure, thus possible damage is an exciting topic to investigate.

The majority of cases discussed in this thesis are concerning journalistic work, and the impact freedom of information right had on their watchdog role. Politicians can claim that journalists abuse FOI laws. But in fact, without journalism and non-governmental organizations there is no monitoring body which can guarantee that politicians and public entities are not abusing their power. Hungary's case about how bodies are non-compliant with court decision is a really serious illustration on why the world needs watchdogs.

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