

Two Decades of Existence of the Freedom of Information Act in Romania: Appearance and Specificity

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Abstract

In 2001 the Freedom of Information Act (Law no. 544/2001) was adopted by the Romanian Parliament, in a sign of unprecedented openness of the beaurocratic apparatus towards its citizenry. This article answers two main questions: firstly, how did Law no. 544/2001 appear in Romania, what was the general social and political context, and what made civil society, the government and opposition at that time to cooperate for the adoption of the law? And secondly, what is the specificity of this law, which are the main traits that distinguish it as an anti-corruption tool, two decades after it entered into force?

Keywords: freedom of information, Law no. 544/2001, public interest, transparency, Romania.

JEL Classification: H83, K23, K40

1. Introduction

According to Ben Worthy², the world's first regulation on the access to public information appeared in Sweden in 1766, but the first truly modern law of the free access to information belongs to the United States of America (Freedom of Information Act/FOIA, 1966), being signed by President Lyndon B. Johnson; similar laws were passed in Australia, Canada and New Zealand in the 1980s. In Great Britain, the law on free access only came into force in January 2005, after a period of four years of preparations by the government led by Prime Minister Tony Blair.

Over the past quarter century, the American model of free access to information has spread across the globe. Encouraged by increasing right-to-know reforms, most of the world's countries and virtually all developed countries have adopted laws that replicate the basic principles of FOIA in the United States. However, "[t]wenty years later, only eleven countries had comparable statutes. It was assumed that FOIA-style laws were a luxury, only likely to be adopted by wealthy, politically stable democracies—perhaps as a way of appeasing disaffected voters as the advanced economies stagnated in the late 1970s and early 1980s"³.

The situation changed dramatically after 1989, and more and more countries borrowed the American model at a sustained pace, so that today over a hundred countries around the globe, as well as all 50 US states, have adopted access to information laws⁴. Obviously, this trend was the result of the profound changes in the international system in the early 1990s. Many countries have removed, this way, the secrecy of the collapsed authoritarian regimes, thus signaling the closeness, in terms of values, to the United States of America.

Countries like Zimbabwe or China also have such legislation, although not all of them are operational—this fact is explained by global normative pressure, but translated by imitation and not by real conviction. Daniel Berliner⁵ calls these trends the “expressive benefits” of adopting freedom of information legislation, arguing that many developing countries—and particularly highly corrupt states—adopt this type of regulation to show support in favor of the liberal principles or to send a signal about their willingness to fight corruption.

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² B. Worthy, “More Open but Not More Trusted? The Effect of the Freedom of Information Act 2000 on the United Kingdom Central Government”, *Governance: An International Journal of Policy, Administration, and Institutions*, 23(4), 2010, p. 561.

³ A. Roberts, *Blacked Out: Government Secrecy in the Information Age*, New York: Cambridge University Press, 2006, p. 14.

⁴ D. E. Pozen, “Freedom of Information beyond the Freedom of Information Act”, *University of Pennsylvania Law Review*, 165, 2017, pp. 1098-1099.

⁵ D. Berliner, “The Political Origins of Transparency”, APSA 2011 Annual Meeting Paper, <http://ssrn.com/abstract=1899791>, accessed April 8, 2021.

2. How did Law no. 544/2001 appear in Romania?

Romania's regulation on the access to information of public interest contested the state of affairs existing before the fall of the communist regime, namely the quasi-generalized secrecy of state institutions, both at central and local levels.

Before 1989, the Romanian Communist Party practiced various mechanisms of control over the citizens, one of them being projected through the administrative apparatus, the public agenda being set by the agenda of the party, which led to a great distrust of the citizens in the state institutions, a condition still perpetuated at different levels of Romanian society⁶.

According to the journalist Emilia Șercan, the communist power developed a complex surveillance system, whose capacity for action covered all functional aspects of the media system, from the institutional to the legal, informational and economic aspects. The educational role of the mass media has replaced the role of information ("The press educates through what it publishes and, sometimes, through what it does not publish"—was the emblematic assertion of those times), the main objective being the propagation of political, ideological and moral preachings by the use of press; "the press communicated ideas, and not information, the party's conception of the world, and not events, the ideological activity of the party, and not the immediate reality"⁷.

Law no. 544/2001 on free access to information of public interest constituted an important breach in the culture of secrecy that dominated Romania for decades⁸. It produced, most likely, one of the most profound changes in the approach of Romania's political and administrative thinking. For the first time, public authorities and institutions are legally obliged to provide information from their own activity to anyone who requests it.

The Romanian law on free access to information, which entered into force on December 22, 2001, represents "a modern regulation, necessary for a society that still retains authoritarianism at the level of communication between the administrative level and the citizenry"⁹.

Between the adoption of the new Romanian Constitution, in 1991, and the entering into force of Law no. 544/2001, access to public information "was regulated non-unitarily, either by specific organic laws (...) or by internal norms (...). The lack of coherence in the establishment of a regime of free access to information generated arbitrary or, in the best case, inefficient decisions, so that the state kept its monopoly on public information in relation to the citizens"¹⁰.

The right to information was enacted by article 31 of the 1991 Constitution, which established that "a person's right of access to any information of public interest shall not be restricted" (paragraph 1), and "the public authorities, according to their competence, shall be bound to provide correct information to the citizens in public affairs and matters of personal interest" (paragraph 2). However, it took ten years for the right to information to find its place in a separate law.

The need for the adoption of a law that granted access to public information also came in relation to access to environmental information¹¹. In January 2000, a cyanide spill near the municipality of Baia Mare, which affected the neighbor states of Hungary and Yugoslavia, generated a wave of international outrage and revealed the government's flawed handling of the crisis, especially when compared to information released by a European Union (EU) task force investigating the same incident. In this context, Romania ratified, in July 2000, the Aarhus Convention on environmental information and, even before the general elections, the authorities

⁶ C. D. Tufiş, "Despre necesitatea încrederii în instituțiile sistemului politic", in B. Voicu, H. Rusu and C. D. Tufiş (Eds.), *Atlasul valorilor sociale. România la 100 de ani*, Cluj-Napoca: Presa Universitară Clujeană, 2020, pp. 46-53.

⁷ E. Șercan, "Cultul secretului: mecanismele cenzurii în presa comunistă", Iași: Polirom, 2015, p. 13.

⁸ Regarding the doctrinal analysis of the provisions of Law no. 544/2001 see C.-S. Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, Bucharest: C.H. Beck, 2016, p. 205-209.

⁹ A. Mogoș, "Cultura secretului, inamic al accesului la informațiile de interes public", *Transylvanian Review of Administrative Studies*, IX, 2003, p. 173.

¹⁰ *Ibidem*, p. 175.

¹¹ A. Grigorescu, "International Organizations and Government Transparency: Linking the International and Domestic Realms", *International Studies Quarterly*, 47(4), 2003.

quickly established a working group made up of members of parliament, government officials and representatives of NGOs to discuss the law on access to information¹². However, the actual legislative proposals did not appear until after the change of government in December 2000, following the elections that brought to power the minority government of the Social Democratic Party of Romania (PDSR) led by Adrian Năstase.

According to Mihaela Ristei¹³, starting from 2001, the main impetus behind the anti-corruption legislation and the judicial reforms was the external pressure exerted by the EU, but the adoption of Law no. 544/2001 was an exception due to the double external pressure, both from the EU and from NATO. When Romania was not included in the first wave of NATO expansion, in 1999, despite the support offered to the war in Yugoslavia, the absence of legislation regarding access to public information and classified information was considered to be one of the reasons for NATO's decision. External pressure was combined with a change in internal leadership after the 2000 elections, which brought back to power the PDSR and its leader, Ion Iliescu, who had led the country for the first six years after 1989. In 2000, both Iliescu, and his party declared their commitment to establish the rule of law in Romania, to fight against corruption and prepare the country for EU accession, and the regulation of free access to information was supposed to serve as a demonstration of this change of perspective¹⁴.

After a short period of debate in the media and within the Romanian political class, Law no. 544/2001 on free access to information was adopted and entered into force at the end of 2001, practically two years after Romania received the status of candidate country to the European Union, in 1999, and the beginning of a period of accelerated institutional reforms aimed at convincing the EU that Romania's place is within this organization.

In the countries least ready to join the EU (Romania and Bulgaria), the population was also the most enthusiastic about joining the EU, which created huge pressure on governments to make progress in accession negotiations, that led to the adoption of new legislation, both in Bulgaria and in Romania, in the late 1990s and early 2000s.

According to experts Sorin Ioniță and Laura Ștefan¹⁵, EU accession did not claim any *acquis communautaire* regarding the access to information of public interest and no formal obligation to adopt such legislation for a candidate country to be accepted into the EU, but the European officials have put political pressure on the governments of the candidate states to solve the problem of the lack of transparency. Thus, the establishment of the model of the rule of law, the fight against corruption, the reform of the public function and the media's access to information were imposed on the agenda, as preconditions for the beginning of the official negotiations on the technical chapters.

Since the political establishment believed that the media and the population were interested in this type of legislation, the law of free access to information was included on the legislative agenda of the social democratic government led by Adrian Năstase, following the example of Tony Blair's party in Great Britain. Thus, two legislative initiatives on this topic appeared in the Romanian Parliament, the first in chronological order belonging to the National Liberal Party (PNL) (in opposition, at that time), and the second one being submitted approximately half a year later by the government.

In March 2001, the "Coalition for Transparency" of civil society was formed (consisting of the Center for Independent Journalism, APADOR-CH, the Press Monitoring Agency, Freedom House Romania, the Academic Society of Romania, the Foundation for the Development of Civil Society, IRIS Center, *Pro Democratia* Association, Transparency International Romania), which mediated the negotiations on this law between the Ministry of Public Information and the

¹² *Ibidem*, p. 561.

¹³ M. Ristei, "The Politics of Corruption: Political Will and the Rule of Law in Post-Communist Romania", *Journal of Communist Studies and Transition Politics*, 26(3), 2010, p. 355.

¹⁴ A. Mungiu-Pippidi, "Coalition for transparency-The passage of the Freedom Information Act (FOIA) in Romania Case Study", 2001, www.sar.org.ro/files_h/docs/advocacy_foia/7_case_study.pdf, accessed April 10, 2021.

¹⁵ S. Ioniță and L. Ștefan, "Implementing Right to Information: A Case Study of Romania", in S. E. Trapnell (Ed.), *Right to Information: Case Studies on Implementation*, Washington, DC: World Bank, 2014.

opposition (represented by PNL)¹⁶.

On the other hand, a group of politicians, most of them from the Greater Romania Party (PRM) led by Corneliu Vadim Tudor, initiated a draft law on the protection of classified information, but this fact was perceived by the working group on the law of access to public information as a threat not because of the provisions of the project (although, until that moment, the tendency was to interpret these provisions in the sense of restricting the freedom of the press), but because of the succession in time of the two draft laws (the law on free access to public information had to be adopted first, in order to enshrine the principle that free access to information is the rule, and non-disclosure, only an exception)¹⁷.

The final form of the freedom of information law, adopted, in turn, by the two chambers of the Parliament, on September 13, 2001, in the Senate, and on September 18, 2001, in the Chamber of Deputies, represented the common version resulting from the opposition text, the government text, but also from the proposals of the NGOs¹⁸. In the Chamber of Deputies, the National Liberal Party had a strong supporter of this law, namely deputy Mona Muscă, close to civil society and attached to the values of public transparency.

The process of debating and adopting the law constitutes, for that period, an example of good practices in the cooperation between civil society, the government and opposition, and represented the first example of an authentic partnership between these participants¹⁹. Law no. 544/2001 has since become a very important anti-corruption tool, especially for the NGOs that monitor the government's activity and for the media that frequently use this regulation to gain access to information that would otherwise have remained confidential²⁰.

Ben Worthy²¹ believes that the adoption of free access to information legislation has a very high symbolic potential. First of all, it symbolizes a radical change: free access to information implies "the redistribution of power over one of the most fundamental and fought-over resources in politics. It symbolizes a popular transfer of sovereignty of power and influence from an elite to the populace". Second, open access "carries a powerful moral force. (...) It signals to the populace that a government is willing to be observed and challenged, and, in doing so, implies that there is *nothing to hide* and no malign intentions or corrupt motive". Third, free access to information "offers a modernising symbol of an *open* society. An FOI law brings new democratic freedoms, as a *deepening* of democracy, and bringing of rights *up to date*".

The adoption of Law no. 544/2001 was not an automatic response of the bureaucracy to the administrative innovation of free access to information, already successfully implemented in so many democratic states, to solve the legacy of the secrecy of the old communist regime before 1989, it did not arise naturally, involuntarily, but was imposed explicitly, consciously, based on the realities of the moment. Law no. 544/2001 does not represent an institutional construction for which the Romanians were prepared, but a real framework that prepared the beginning of a culture of involvement, participation and knowledge of individual rights by as many citizens as possible. We start with such laws, they have a pronounced formative character, precisely because they are designed to establish ways of relating to democratic values²².

The question is whether genuine legislative reform can be achieved by simply transferring the pre-existing legal framework to a new jurisdiction, paying little attention to differences of culture or legal system. Indeed, the legal norms that make up one law or another are seen not only as a set of autonomous and easily transferable concepts in time and space, but also as a cultural artifact embedded in the society in which the legal institution operates. On the other hand, institutions operate in an environment populated by other institutions, organized according to different principles and logics. No contemporary democracy subscribes to a single set of principles,

¹⁶ A. Mungiu-Pippidi, *op. cit.*

¹⁷ S. Ioniță and L. Ștefan, *op. cit.*

¹⁸ A. Mungiu-Pippidi, *op. cit.*

¹⁹ M. Ristei, *op. cit.*, p. 349.

²⁰ *Ibid.*, p. 350.

²¹ B. Worthy, *op. cit.*, pp. 233-234.

²² V. Dîncu, "Nu avem de ce să ne temem", *Dilema*, 514, 2003, p. 8.

doctrines and structures. While the concept of “political system” suggests an integrated and coherent institutional configuration, political-legal institutions are never perfectly integrated, they routinely experience institutional imbalances and collisions²³.

Beyond the partnership between government, the parliamentary opposition at the time and the non-governmental organizations in completing the writing and adoption of Law no. 544/2001, the regulation of access to information is also a model of good practices for Romania, after the collapse of the communist regime. It gave rise to new rules and operational practices in the control of the state by citizens. There was also parliamentary consensus regarding the adoption of disciplinary sanctions for officials guilty of concealing public information. Also, the emergency procedure for legal action was regulated in case the public institution does not respect the principle of free access to information and does not communicate the requested information within the legal framework of time.

But what are the most important principles and mechanisms of granting access to public information in Romania? In the following I will detail the specificity of Law no. 544/2001, as they are presented in the version of the law in force at the time of writing this article (August 2023).

3. The principles and mechanisms of granting access to public information in Romania

3.1. Who can request public information?

Although the purpose of Law no. 544/2001 was to serve the citizens, the regulation does not establish a standard user: instead, there are various users, who resort to this law for various reasons; they can be ordinary citizens, companies, non-governmental organizations or journalists, some of whom are more vocal than others and attract more attention.

Art. 6 para. (1) of the law establishes that “any person has the right to request and obtain from public authorities and institutions, under the terms of this law, information of public interest”. Therefore, Law no. 544/2001 allows any interested person, whether Romanian or foreign citizen, to request public information; also, from a legal point of view, the residence of the petitioner does not matter. The law applies equally to commercial enterprises, but also to non-governmental organizations that can also request public information.

Law no. 544/2001 does not give any advantage to journalists compared to ordinary citizens, who would like to inform themselves using this regulation. Journalists are placed on the same level with any other citizen and “even if some journalists often invoke the right to information as a right that belongs exclusively to them and by which they can justify certain actions, they must not forget that they benefit from this right only in their capacity as members of the society. (...) The public has a right to know, and mass media function only as an intermediary between the public and the institutions or individuals who hold certain information”²⁴.

As a general rule, journalists, NGO activists or ordinary petitioners do not have to state why they are requesting the information, nor do they have to answer questions about the motivation for the request or what they will do with the information later on. Law no. 544/2001 does not bind the petitioners to justify or prove their own/personal interest in order to be able to prepare a request for public information, so it remains their option if they mention this aspect in the request.

Law no. 544/2001 legally defines, in a generous manner, the concept of information of public interest as “any information that concerns the activities or results from the activities of a public authority or public institution, regardless of the support or the form or the way of expressing the information”. Therefore, the petitioner is entitled to receive the requested information and not a simple access to documents; the public authority/institution must collect the information it holds, even if it is included in several documents.

²³ J. G. March and J. P. Olsen, “Elaborating the New Institutionalism”, in R. A. W. Rhodes, S. A. Binder and B. A. Rockman (Eds.), *The Oxford Handbook of Political Institutions*, New York: Oxford University Press, 2006, p. 14.

²⁴ A. Thiemann, “Libertatea de exprimare și de informare. Limitele libertății”, in Radu, R.-N. (Ed.), *Deontologia Comunicării Publice*, Iași: Polirom, 2015, p. 88.

In this sense, referring to the Decision no. 531/2021 of the Mehedinti Court, the administrative and fiscal litigation section, Sorin-Alexandru Vernea²⁵ considers that the depository institution “will make an assessment of proportionality, namely it will reflect to what extent the requested information can be obtained from its records, and if this fact is not excessively difficult to achieve, it will proceed to process the records and provide the information to the petitioner. (...) The institution does not have the obligation to process the data in a complex manner, by carrying out expertises or statistics, but it can proceed to extract the relevant data from its registers”.

The legal conflict between “access to documents” and “access to information” was the subject of a decision of the European Court of Human Rights (ECHR), in *Roșianu vs. Romania* case. Romania was sentenced, on June 24, 2014, to pay approximately 9,000 euros, after the former mayor of Baia Mare between 1993 and 2010, Cristian Anghel, refused to communicate information of public interest to the journalist Ioan Romeo Roșianu, although he won three final court decisions. According to the Association for the Defense of Human Rights-Helsinki Committee (APADOR-CH), “before the ECHR, the Government of Romania claimed that the requested information would have been made available to the applicant, but he did not appear at the town hall to collect them. Or, precisely to discourage him from asking for them again, the mayor *offered* the journalist a whole series of documents against absurd sums (hundreds of euros) for their photocopying”²⁶.

Also, the scope of the entities subject to this law is very broadly defined, covering practically all public authorities and institutions in Romania, but also some private entities that administer public financial resources (commercial companies under the authority, in the coordination or under the subordination of a public authority, political parties, sports federations and non-governmental organizations of public utility benefiting from public funding).

3.2. *Ex officio* communication of public information

The General Secretariat of the Government and the Ministry of Internal Affairs carried out, between July 2018 and December 2019, the project “Transparent, open and participative governance - standardization, harmonization, improved dialogue”²⁷, financed from European and national funds, with the aim to increase the transparency of governance at central and local levels and to stabilize and standardize the working practices of public authorities.

The public policy developed within the project recommends the adoption by the institutions of an internal procedure regarding the *ex officio* communication of information in a standardized and open format, as well as the standardization of their Internet pages, in order to simplify the identification and communication of information, through a better correlation of the immediate interests of citizens and civil society with the activity of public institutions, in order to obtain, indirectly, the decrease in the number of requests.

Law no. 544/2001 establishes the categories of minimum information that must be communicated *ex officio*. Thus, public authorities will publish, *ex officio*, information related to their internal structure (normative acts that regulate the organization and functioning, organizational structure, departmental attributions, operating schedule, audience schedule, names of persons in the management of the public institution and of the civil servant responsible for communication of public information, the contact details of the institution), financial information (such as the budget and balance sheet), specific programs and strategies or the ways of contesting the decision of the institution if a the person considers himself/herself discriminated in regard to the right of access to information.

Also, the law does not prohibit institutions from publishing other information than the

²⁵ S.-A.Vernea, *Dreptul comunicării*, București: Hamangiu, 2021, pp. 99-100.

²⁶ The Association for the Defense of Human Rights-Helsinki Committee (APADOR-CH)’s press release of June 25, 2014, <http://www.apador.org/category/asistenta-cedo/procese-castigate-la-cedo/page/2/>, accessed August 8, 2020.

²⁷ <https://sgg.gov.ro/new/guvernare-transparenta-deschisa-si-participativa-standardizare-armonizare-dialog-imbunatatit-cod-sipoca-35/>, accessed August 8, 2020.

minimally specified information. Open public data will be able to be accessed, reused and redistributed freely, they can be processed by automatic means and available in open format, without being limited by intellectual property rights.

Information on the activity of institutions is available, more than ever before, together with the technologies needed to decode it. However, the current approach no longer refers to a fight for minimal state transparency. Since 2009, a growing global movement has gained momentum in order to make available government information about the economy, society and government, 78 states and 76 local governments, representing more than two billion people, joining the Open Government Partnership (OGP)²⁸, to accelerate the degree of transparency.

The OGP is an international agreement aimed at engaging governments in promoting transparency, fighting corruption and using new technologies, to strengthen the act of governance and dialogue with citizens; it was launched by the US President Barack Obama in 2011, when eight countries signed the Open Government Declaration, namely Brazil, Indonesia, Mexico, Norway, the Philippines, South Africa, Great Britain and the United States of America.

Romania joined the OGP in 2011, and the Government of Bucharest made a series of commitments to become more open, more responsible and more efficient through the four National Action Plans already implemented. The fifth Action Plan (2020-2022) is now being implemented, with the main areas of commitments structured as follows: (1) Participation and Consultation; (2) Transparency; (3) Justice and Integrity; (4) Social Services; (5) Debureaucratization; (6) Open Data. The new plan aims to increase the quality and number of open data sets published by public institutions on the data.gov.ro portal, as well as increasing the degree of reuse of open data.

3.3. Communication of public information upon request

There are still public institutions, especially at local level, that refuse to communicate the requested information, even though it is clearly public. Law no. 544/2001 establishes that all information related to a public authority/institution, as well as the way public money is spent, is of public interest and is to be communicated, either upon request or *ex officio*.

Although petitioners' requests trigger the force of law, they are still dependent on the subjective practices of the public authority/institution depositing the information, as well as on the will of the officials designated to formulate and/or communicate the responses.

The bureaucratic functioning of the public administration is much less linear and predictable than the petitioners imagine at the time of writing their requests. Once the petition is submitted, the petitioner ceases to know what happens to his/her petition, although some generalizations can be inferred, depending on the petitioners' previous experience with the institutions they address. Most often, the request is designed to be handled by a faceless bureaucratic apparatus—especially in the case of electronic requests that do not involve any contact with the bureaucratic apparatus, but ultimately the petition is assigned to a certain official, who assumes the answer by signature.

Another way by which public institutions increasingly avoid Law no. 544/2001 refers to the unjustified invocation of the protection of personal data, under the General Data Protection Regulation (GDPR), effectively applicable from May 25, 2018. When the requested documents also contain personal data, “the protection offered to personal data must not, however, lead to the suppression of other rights recognized to a person, such as the free access to information of public interest”²⁹.

When information of public interest and information regarding personal data are found in the content of the same document, the solution adopted by the courts is the elimination of all data relating to an identified or identifiable person, by anonymizing the personal information. The Romanian High Court of Cassation and Justice established, in the Decision no. 37/2015, that “refusal of access to information of public interest, in the conditions where information on personal

²⁸ <https://www.opengovpartnership.org/about/>, accessed May 26, 2021.

²⁹ A. Georgescu, I. Alexe and D.-M. Şandru, “Ciocnirea valorilor: legea română privind liberul acces la informațiile de interes public și protecția datelor personale”, *Revista română pentru protecția și securitatea datelor cu caracter personal*, 2, 2020, p. 33.

data is anonymized, is unjustified”³⁰.

The fundamental principles underlying the communication of information upon request are easy to understand and no in-depth knowledge of the legal system is necessary to be able to apply for public information. Law no. 544/2001 is flexible, it contains only 25 articles, and it was designed so that as many citizens as possible could use their right to inform themselves in this way.

The application is sent, either by post or to the e-mail address of the public authority/institution, to the person who has been designated as responsible with Law no. 544/2001 within that institution.

Preliminary research regarding the precise content of the written request (for example, with the tools made available by the Internet) is the most important aspect of petitioning under Law no. 544/2001, having an impact on the success or failure of the request. Also, a thorough preliminary research will increase the precision of the object of the request.

In this regard, Scottish environmental journalist Rob Edwards³¹ wrote on his blog: “Use Google to check what’s online. Look at the information already released and work out which public agencies might have the information you’re after. Talk to experts, insiders, academics, campaigners, politicians—anyone who might have insight into the issue you are researching.”

The petitioner must ensure that the piece of information is in the possession of the respective public authority/institution, otherwise obtaining the information will be delayed by redirecting the application to the competent institution (in this case, the 10/30-day deadline for receiving the response begins to run from the registration of the request at the new institution).

It is also possible that the desired information to be published *ex officio* on the institution’s website, therefore it is preferable for the applicant to contact the institution by phone to ensure the information has not already been published this way.

When drafting the request, the applicant should not assume that the information officer is there to automatically reject it.

3.4. Response deadlines

The deadlines for written communication of answers are found in the methodological norms of Law no. 544/2001, namely:

- 10 days, for communicating the requested information if identified within this deadline;
- 10 days for notifying the petitioner that the 10-day period was not enough to identify the requested information;
- 30 days for the communication of identified information beyond the 10-day deadline;
- 5 days for submitting the refusal to communicate the requested information, accompanied by the reasons of refusal.

These deadlines are calculated from the day of the registration of the request. The day the deadline begins and the day it ends are not included in the calculation of deadline, and when the last day of a deadline falls on a non-working day, the deadline is extended until the first working day that follows. Therefore, the 10-day deadline is, in fact, a deadline of approximately 12-13 days if the application is submitted during the week-end and if, for example, the following week starts with at least one legal holiday (a non-working day in which public institutions are closed to citizens).

3.5. The answer on paper, the electronic answer and the editable answer. Sensitive requests

The open access legislation currently allows the petitioner to choose the format in which they wish to receive the response. Thus, the public information will be communicated in the format specified in the request by the applicant, namely in electronic/e-mail format or on paper. The lack of

³⁰ <https://legislatie.just.ro/Public/DetaliuDocumentAfis/175268>, accessed May 26, 2021.

³¹ R. Edwards, “16 Tips for Using Freedom of Information Law in the UK”, 2013, <https://www.robedwards.com/2013/04/exercising-your-right-to-know-.html>, accessed February 9, 2021.

applicant's signature on the request sent electronically cannot constitute a reason for not providing the information.

If the information is available in an editable format, at the request of the applicant, it will also be provided in this format (for example, an Excel document).

As Owen David Thomas³² has written with reference to the UK, the deliberation of the officials on the exact content to be communicated is almost always centered on the preservation of confidentiality, not on the disclosure of the requested information. Institutions should decide to release information through a "balancing" of public and state interests, but in practice the process of deciding whether or not to provide that information is centered around secrecy, not disclosure.

According to Thomas³³, the principle of "balancing" has been normatively enshrined in many national legislations of free access to information of public interest: "for example, the laws of the United Kingdom, United States, Sweden, Germany, New Zealand and the European Union follow the same pattern: that disclosure can *harm* specific public interests, including harm to liberal democratic government; they grant authorities the *power to judge those harms and to withhold* information in order to mitigate these harms; and they do *not* explicitly state the potential *harms of non-disclosure*. These laws are also vague about the public interests *for* disclosure, or how disclosure benefits liberal democratic government."

Thus, whenever a public institution in Great Britain intends to resort to exempting information from free access, it must carry out a "Public Interest Test" (PIT). The test requires the institution to balance the interests of not communicating the information with the interests of communicating it. PIT is not expressly defined in the UK Freedom of Information Act, but according to the Information Commissioner's Office (ICO) in the UK when an exception of non-disclosure is invoked, the public interest in disclosure must in all cases outweigh the public interest if an exception would occur³⁴.

In Romania, neither Law no. 544/2001, nor the Methodological Norms no. 123/2002 contain provisions that describe how the officials in the public relations departments assess the public interest and, respectively, the state's interest. However, in the absence of precise legal norms, the Administrative Code of Romania contains provisions that can guide officials in making the best decision.

Thus, according to the Administrative Code, on the one hand, the professional conduct of civil servants is subject to the principle of the priority of the public interest in the exercise of their competencies, and on the other hand, civil servants are obliged to show loyalty to public authorities and institutions, meaning that they are bound to loyally defend the prestige of their institution and to refrain from acts that may harm its image or legal interests.

We can interpret these legal norms in the sense that loyalty to the public institution represents a duty of a continuous nature which exists throughout the practice of the function, while the public interest is appreciated from case to case, as communicating certain information could constitute or not, for the officials, a disciplinary offense that would entail their disciplinary liability.

Therefore, I consider that, *de lege lata*, when there is a conflict between the principle of loyalty to the public institution and the principle of public interest, loyalty to the public institution has priority, so that the favorable resolution of the request made under Law no. 544/2001 takes into account the prevention of damage to the public institution and only then respecting the public interest. *De lege ferenda*, I believe that the principle of public interest should be better defined and legislatively correlated, since the social benefits of making information available do not always appear to be obvious or self-evident.

Regarding the costs paid by the applicant, until 2016 many town halls charged a fee several times higher than the market price for photocopying documents of public interest, which was equivalent to a limitation of the right of access to information. According to an analysis by

³² O. D. Thomas, "Security in the balance: How Britain tried to keep its Iraq War secrets", *Security Dialogue*, 51(1), 2019.

³³ *Ibidem*, p. 90.

³⁴ Information Commissioner's Office, *The public interest test. Freedom of Information Act*, 2.1, https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf, accessed January 21, 2022.

APADOR-CH from 2014, regarding the prices of local authorities for the photocopies of documents requested under Law no. 544/2001, Drobeta Turnu-Severin Town Hall was in first place, with a fee of 18 lei/page, followed by Bacău Town Hall (5 lei/page), Tulcea Town Hall and Cluj County Council, both with 4 lei/page. In contrast, there were nine institutions that did not charge any kind of price, namely the county councils of Bihor, Maramureș, Satu Mare and Vaslui and the town halls of Botoșani, Brăila, Cluj-Napoca and Satu Mare.

This discrimination ended in July 2016, through the legislative amendments adopted by the Cioloș Government, which correlated the methodological norms of Law no. 544/2001 with the technological evolution and the socio-economic reality of the moment. From that moment, the Methodological Norms no. 123/2002 states that the answers must be communicated on the format desired by the applicant, either electronically or on paper, and the cost of the copying service cannot exceed 0.05% of the minimum living wage calculated per page.

3.6. Information exempted from open access

One of the most controversial areas of any access to information legislation constitutes the exemptions from communication, namely the categories of information which are exempted from free access of petitioners.

The main mechanism for granting access to information regulated by Law no. 544/2001 is that free and unrestricted access to information of public interest represents the rule, whereas limiting access to such information is only an exception.

These exceptions are expressly provided by Law no. 544/2001, namely:

- the information in the field of national defence, public safety and order if they are classified information;
- the information on the deliberations of authorities, as well as those that concern the economic and political interests of Romania if they are classified information;
- the information regarding the commercial and financial information if their publicity is prejudicial to the intellectual or industrial property right, as well as to the principle of fair competition;
- the information regarding personal data;
- the information regarding the proceedings during the criminal or disciplinary investigation, if the results of investigation are put to risk, the confidential sources are disclosed or the life, body integrity or health of a person are endangered as a consequence of the investigation completed or in progress;
- the information regarding the judicial proceedings, if their publicity could be prejudicial to a fair trial or to the legitimate interest of any of the parties in the lawsuit;
- the information the publication of which is prejudicial to the measures for the protection of youth.

Regarding these exceptions, Sorin-Alexandru Vernea³⁵ considers that the decision to classify some information can be contested under the conditions of the special law, namely Law no. 182/2002 on the protection of classified information. Thus, the classification of information, the duration of classification and the assigned level of secrecy can be challenged under the terms of the administrative litigation law.

According to Vernea, referring to the exception of the information on commercial or financial activities, “it is necessary that the disclosure of the information to lead to an effective violation of intellectual property rights or the principle of fair competition, a simple concern in this regard being not sufficient”, as well as the existence of a confidentiality clause in the contract being not sufficient to trigger the refusal to communicate information of public interest³⁶.

Law no. 544/2001 establishes two special situations in which these limitations do not apply:

³⁵ S.-A. Vernea, *op. cit.*, p. 90.

³⁶ *Ibid*, p. 90.

- in the case of information that favors or hides the violation of the law by a public authority or institution, it cannot be included in the category of classified information and constitutes information of public interest;

- information regarding personal data can become information of public interest only if it affects the ability to exercise a public function by a person.

Law no. 544/2001 removes from the category of information that cannot be communicated certain data that, even if they are personal or not intended for publicity, still have an impact on public life, and their communication is useful for society, i.e. personal data, insofar as they refer to situations or facts that affect the ability to exercise a public function.

In the event of a lawsuit for not communicating public information on these exceptional grounds, the burden of proof of the exceptional nature of the information belongs to the public institution depositing the information and not to the unsatisfied claimant.

3.7. Administrative complaint, disciplinary sanction and the complaint in court

The refusal of public authorities to comply with the requests regarding public information is regulated by the Administrative Litigation Law no. 554/2004, which defines the refusal via two legal notions: “failure to answer a request within the legal deadline” and “unjustified refusal to answer a request”³⁷.

Thus, failure to answer a request within the legal deadline means not responding to the applicant within 30 days from the registration of the request, if no other deadline is provided by law. The unjustified refusal to answer a request involves the explicit expression, with excess power, of the will not to answer a person’s request.

The notion of “(unjustified) refusal to answer a request” is also known in the legal doctrine as ‘express refusal’ (explicit), and “failure to answer a request within the legal deadline” is called ‘tacit refusal’ (implicit)³⁸.

According to Law no. 544/2001, against the explicit or implicit refusal to communicate public information the disappointed petitioner can make an administrative complaint to the head of the authority or public institution, within 30 days of being informed of the refusal.

The disciplinary sanction operates after the analysis of the administrative complaint made by the petitioner and, in the case the complaint is solved in favor of the petitioner, the response will contain both the information of public interest originally requested together with the presentation of any disciplinary sanctions taken against the person guilty of hiding the information.

The disciplinary sanction does not take place automatically based on Law no. 544/2001, but it is subject to the requirements of the Labor Code or the legislation applicable to civil servants, so it intervenes only after the disciplinary investigation has been carried out by the disciplinary committee.

The Methodological Norms no. 123/2002 establish that, for the analysis of the petitioners’ administrative complaints, each public institution creates an analysis commission for the violation of the right of access to information. The commission must register the administrative complaint, carry out the administrative investigation, determine whether the complaint is well-grounded, propose a possible disciplinary sanction to the official found guilty and draft the answer to the petitioner.

The complaint in court is the last step that the disappointed petitioner can take. However, Law no. 544/2001 does not stipulate that the complaint in court must necessarily be preceded by an administrative complaint, so that the dissatisfied petitioner can go directly to justice.

According to Law no. 544/2001, the court may compel the public institution to provide the requested information and to pay moral and/or patrimonial damages. The complaint is addressed to

³⁷ See about “failure to answer a request within the legal deadline” and “unjustified refusal to answer a request” C.-S. Săraru, *Tratat de contencios administrativ*, Bucharest: Universul Juridic, 2022, p. 221-224.

³⁸ A. Trăilescu and A. A. Trăilescu, “Unele reflecții asupra refuzului autorităților publice de a rezolva cererile particularilor”, *Dreptul*, 11, 2010, p. 155.

the court and is judged by its administrative litigation section. The decision of the tribunal is subject to appeal, and the decision of the court of appeal is final and irrevocable. Both the complaint and the appeal are judged in court, in an emergency procedure (the deadlines are shorter) and are exempt from stamp duty.

Given that the Romanian Ombudsman does not have direct powers in the field of free access to public information, the interpretation of Law no. 544/2001 returned to the courts. Advocacy programs by non-governmental organizations focusing on the judicial testing of Law no. 544/2001 have been extremely important in enabling judges to issue sentences in this domain. Even less transparent institutions have been forced to obey court rulings. The Romanian Academic Society (SAR), the Institute for Public Policies (IPP) and other civic actors appeared before courts in strategic and visible cases on the topic of public information that had not been voluntarily disclosed by public institutions, they won almost all the lawsuits filed, “whether the issue at stake was the breakdown of office expenses by an individual councilor—decision: this is not personal information; conditions of privatization of a car-making plant with Ford Motors by the State Property Authority—decision: confidentiality clauses requested by the investor and accepted by the state cannot override the law, so the contract and all annexes should be made public; or public relations and service contracts concluded by the state-owned export-promotion Eximbank—decision: these contracts are not covered by the banking secrecy rules because these apply only to clients, not to subcontractors”³⁹.

4. Conclusion

Law no. 544/2001 on free access to information of public interest represents a very important breach in the culture of secrecy dominating Romania for decades, it has produced one of the most profound changes in the approach of Romania’s political and administrative thinking because for the first time, public authorities and institutions are legally obliged to provide information from their own activity to anyone who requests it.

It came into force after the government, opposition and civil society at that time have cooperated in an effort to write and adopt a modern regulation. The main principles and mechanisms of granting access to public information in Romania are very generously defined by Law no. 544/2001: the petitioners are not bind to justify their personal interest in order to be able to prepare a request, a lot of public information is available online on the websites of public institutions, deadlines for making the response are short, ranging from 10 to 30 days, the exemptions from communication are strictly provided by the law, there are sanctions applied to the persons found guilty of hiding public information.

This paper was supported by the Council for Doctoral Studies (CSUD), University of Bucharest.

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