ACCESS TO OFFICIAL DOCUMENTS IN THE LIGHT OF THE GENERAL DATA PROTECTION REGULATION

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Abstract

Public access and data protection are both fundamental rights provided for in a wide range of legislation at the national Romanian level and European level. Usually, there is no hierarchical order and no clashes between the two rights. Still, given that the purpose of the right to access to official public documents is to foster access to all documents, whereas the Data Protection Regulation must guarantee the protection of personal data, a tension can arise in some cases. We try in our paper to analyze how these two rights have intertwined before the GDPR and will continue to cross paths after this entered into force. The study uses the logical method, analyzes the legal provisions, as well as the solutions derived from the judicial practice. The conclusions aim at unrevealing some pointers for good practice in the public administration.

Keywords: *GDPR, personal data, public authority, public information, official documents.*

JEL Classification*:* K23, K38

1. Introduction

Public access to official documents responds to a general preoccupation in most democratic societies, where there exists an interest in the disclosure of the information contained in documents issued or handled by public authorities. *Regulation no. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents*[2] states, in its introduction, that „*openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights*". The Regulation aims to ensure the widest possible degree of public access to documents for any EU citizen. The right to public access is limited by a number of exceptions, one of which is essential for the paper, relating to privacy and data protection[3].

On the other hand, *Regulation no. 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data* (GDPR) is one of the most wide ranging pieces of legislation passed by the EU in recent times and it has been adopted in times when the internet and the new technologies find themselves in a dual moment: on one side the development of new technologies and on the other hand the need of regulation[4]. The Regulation introduces concepts such as the 'right to be forgotten', data portability, data breach notification and accountability (to name only a few) that will take some getting used to and putting truly and meaningfully into practice.

In Romania, the directive and the law regarding data protection have been applied and interpreted by the Romanian courts, as proven by the numerous cases solved by these[5].

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[2] Published in OJUE L 145, 31/05/2001.

[3] "*In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. In assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities*" - Recitals 11 of the Regulation. Article 4 states that "*The institutions shall refuse access to a document where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data*".

[4] Daniel-Mihail Șandru, Irina Alexe (coordinators), *Legislația Uniunii Europen privind protecția datelor personale*, Universitară Publishing House, Bucharest, 2018, p. 8.

[5] Daniel-Mihail Șandru, Dragoș-Alin Călin, Constantin Mihai Banu, *Aplicarea și interpretarea Directivei 95/46 de către instanțe române. Tipologii și consecințe juridice*, in vol. Irina Alexe, Nicolae-Dragoș Ploeșteanu, Daniel Mihail Șandru (coordinators),

2. Public access to official documents in the GDPR

Chapter IX of GDPR allows member states to provide for certain waivers, exception, specific condition or particular rules concerning specific processing activities, activities that include also the public access to official documents. Article 86, part of chapter IX of GDPR deals with the exact issue of personal data contained in official documents, establishing the applicable rules for those situations when the protection of personal data clashes with the free access to official documents and the public information these contain: „*Personal data in official documents held by a public authority or a public body or a private body for the performance of a task carried out in the public interest may be disclosed by the authority or body in accordance with Union or Member State law to which the public authority or body is subject in order to reconcile public access to official documents with the right to the protection of personal data pursuant to this Regulation.*"

The legislation that regulates the right of persons to public interest information is, of course, different than the one regulating the protection of personal data, the legislative acts that regulate these two rights having completely different areas of applicability. However, we can also identify a common domain, where these two regulations meet, when public interest information and information concerning personal data are present in the same document. It is without any relevance the type of support, the form or the method of formulation of these pieces of information. In such cases, the need of having a coherent and unitary approach that attributes both rights, the same in their importance, the same value and protection, reveals itself, together with the necessity of ensuring a proper balance between these two rights as a primordial concern for a democratic society.

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[6], that ceased to produce legal effects starting with the 25th of May 2018, allowed member states to adopt national regulations concerning the processing of personal data for public purposes and by public authorities but did not expressly deal with the issue of personal data contained in official documents.

Article 86 of GDPR expressly provides that personal data contained by official documents detained by a public authority or by a public or private body in order to carry out a task that pursues the public interest can be divulged by the authority or body in question in order to establish a balance between the public access to official documents and the right to protection of personal data. Recitals 154 of GDPR underline precisely the fact that personal data in documents held by a public authority or a public body should be able to be publicly disclosed by that authority or body if the disclosure is provided for by Union or Member State law to which the public authority or public body is subject.

European law and national law should thus insure a balance between public acces to official documents and the reuse of information in the public sector, on one hand, and the right to protection of personal data, on the other hand, and could consequently provide the proper balance with this right of protection of personal data. The member states have therefore the task of reaching this balance between the right to confidentiality and the necessity to process personal data in those cases when the processing is carried out for the public interest[7], respectivelly to ensure that these two rights of the person are perfectly fit.

Protecţia datelor cu caracter personal. Impactul protecţiei datelor personale asupra mediului de afaceri. Evaluări ale experienţelor româneşti şi noile provocări ale Regulamentului (UE) 2016/679, Universitară Publishing House, Bucharest, 2017, p. 41.

[6] Published in OJUE L 281, 23/11/1995 P. 0031 – 0050.

[7] Recitals 45 from GDPR: „Where processing (…) is necessary for the performance of a task carried out in the public interest or in the exercise of official authority, the processing should have a basis in Union or Member State law. (…) A law as a basis for several processing operations based on a legal obligation to which the controller is subject or where processing is necessary for the performance of a task carried out in the public interest or in the exercise of an official authority may be sufficient. (…) Furthermore, that law could specify the general conditions of this Regulation governing the lawfulness of personal data processing, establish specifications for determining the controller, the type of personal data which are subject to the processing, the data subjects concerned, the entities to which the personal data may be disclosed, the purpose limitations, the storage period and other measures to ensure lawful and fair processing. It should also be for Union or Member State law to determine whether the controller performing a

3. Applicability of article 86 of GDPR

It is necesarry, from the very beginning, to notice that the applicability range of the provisions of this article is limited, for it does not affect operators that do not process personal data contained in official documents. Therefore, data processors that are the subjects of article 86 are public authorities and public or private bodies that carry out a task for the purpose of the public interest and that detain official documents with personal data in them, only these being able to disclose them. Certainly, the GDPR does not define the collocation „public authority" or „public or private body that carries out a task for the purpose of the public interest", this burden falling into the jurisdiction of every member state that use different definitions in their national legislations.

Law no. 544 of 12th october 2001 regarding free acces to information of public interest[8] defines at its article 2, paragraph (1), letter a), public authorities and institutions as „*any public authority or institution that uses or administers public financial resources, any autonomous company, society regulated by Law no. 31/1990, republished, with ulterior amendments, found under the authority or, as is the case, the coordination or in the subordination of a central or local public authority and where the Romanian state or an administrative-territorial unit is the sole stockholder or has the majority of stocks, as well as any other operator or regional operator, as these are defined by the provisions of Law no. 51/2006 concerning the community services utilities, republished, with ulterior amendments. Also, the provisions of the present law are applicable to political parties, sports federations and public utility non-governmental organizations that benefit from public funding.*" Compared to the definition given by the provisions of Law no. 554/2004 regarding administrative litigations to the notion of public authority, the legislative body seems to have wanted to extend the applicability area of this legal notion in the field of acces to public interest information. Concerning the „private bodies" that perform a task carried out in the public interest, we have to take into consideration the private legal persons to whom the exercise of a public service has been delegated to, as so often is the situation in the practice of public administration.

4. The interference between public access to official documents and protection of personal data in the activity of administrative authorities

Law no. 544 of 12th october 2001 regarding free acces to information of public interest contains the following relevant provisions:

„*Art. 6 – (1) Any person has the right to solicit and obtain from public authorities and institution, in the conditions of the present law, public interest information*".

„*Art. 12 - (1) The following information are exempt from the free access of citizens (...): d) information regarding personal data, according to the law*".

The law is however quiet concerning the means in which public interest documents, that are the object of the right to public interest information and that contain personal data in the same time, can be made available to the claimants and does not provide for any anonymization possibilities of personal data in order to balance these two different rights.

After analyzing the national case-law of the courts in this matter, we have come to the conclusion that this exception provided by article 12, paragraph (1), letter d) of Law no. 544/2001 is often invoked by public authorities as grounds for the refusal of granting free access to citizens to public interest information. The courts, whenever they have to solve disputed caused by such interpretations of Law no. 544/2001 analyze, inevitably, the qualification of certain information as being personal data. At this point, we have to remark in a positive manner, that the courts, despite perhaps certain legislative shortcomings of both Law no. 544/2001 and Law no 677/2001, in their

task carried out in the public interest or in the exercise of official authority should be a public authority or another natural or legal person governed by public law, or, where it is in the public interest to do so, including for health purposes such as public health and social protection and the management of health care services, by private law, such as a professional association."

[8] Published in the Official Gazette no. 663 from October 23rd, 2001.

majority, have concluded in their rullings that, whenever there exists the possibility of anonymization of personal data contained by official documents it is necesarry for the public authorities to carry out such anonymization operations and then to communicate to the claimants the official documents they have requested on the grounds of free access to public interes information[9]. The courts have therefore considered that the existence in official documents of personal data does not automatically trigger the applicability of the exception instituted by article 12, paragraph (1), letter d) of Law no. 544/2001, if the possibility of data anonymization exists. In its decision no. 37 from december 7th, 2015[10], The High Court of Cassation and Justice, indicates to the opinion of the Iași Courts of Appeals that has remarked the issue concerning anonymization and considered it necessary to have certain rules that would regulate these anonymization techniques, reffering to Opinion no. 5/2014 concerning anonymization techniques, adopted by the Working Party composed of the representatives of the personal data processing supervisory authorities designated by each European Union country. We cannot but apreciate the concern of the courts, more accentuated than the one of the national legislator, towards insuring a real balance between these two rights guaranteed by the national legislation.

The High Court of Cassation and Justices' Decision no. 37/2015 presents a special interest in our analysis given that the court was reffered to for giving a preliminary ruling in two legal matters, the one of interest for us in the context of the present paper being: „The existance of certain personal data in the content of documents from the category of public information can represent a reason for refusing the release of copies of these documents even if the information in question is anonymized (made black with a marker)?" The question reffers, therefore, to the general notion of „personal data", contained in a document that contains public interest information and its purpose is to determine whether such a situation represents a justified refusal to communicate to third parties, that are not authorized to process personal data, all the information contained in the document or, on the contrary, it is necessary to censor the information by anonymizing personal data and communicating the documents in this latter form. In its analysis, the Hight Court underlines that the provisions of article 12, paragraph (1), letter d) of Law no. 544/2001 exempts personal data information from the free access of citizens but that, however, the law does not expressly regulate those situations when public interest information and personal data information are present in the content of the same document. The Court appreciates that, taking into account the fact that the legal text mentioned institutes an exception and that exceptions are to be strictly interpreted, the law must be interpreted in the sense that each type of information has its own applicable legal regime that cannot be extended over to the other type. This means that in those situations when both type of information are in the content of the same document, this will be made accessible in a censored form by eliminating all the information relating to an identified or identifiable person. The High Court also makes, in its analysis, certain appreciations on the significance of the term "anonymization", underlying that the means through which information is protected is given by the anonymization techniques. The Court notices that the word is not found in the Romanian dictionary and it represents a linguistic translation of the same English word, its meaning being accepted in the legal meaning as corresponding to that used in official acts. However, since the national legislation does not provide for such techniques, it means that the operator has the possibility of choosing between all possible variants, the sole condition being that of reaching the objective of effective anonymization. The Court further appreciates that the variant of abbreviation does not fulfill this objective since the abbreviation is susceptible of indirectly leading to the identification of the person and thus represents personal data.

In conclusion, the solution of the High Court of Cassation and Justice materialized in its Decision 37/2015 is that, in case of requests of granting free access to public interest information, grounded on the provisions of Law no. 544/2001, when the public interest information and personal

[9] We indicate, as examples: Decision no. 501 from 17-feb-2017 - Timiș Tribunal; Civil Sentence no. 8309 from 11-dec-2014 – BucharestTribunal; Civil Sentence no. 1249 from 26-sep-2014 –Vrancea Tribunal.

[10] Decision no. 37 from December 7th, 2015 regarding the interpretation and applicability of article 12, paragraph (1), letter d) of Law no. 544/2001 and article 3, paragraph (1) letter a) of law no. 677/2001: the name of a person is personal data, regardless of the fact if, in a given situation, this information alone is sufficient to identify a person.

data are present in the content of the same document, regardless of its support or form or means of expressing these information, the access to public interest information is done through the anonymization of personal data and the refusal to grant access to public interest information, even if the personal data contained is anonymized, is unlawfull. We apreciate that the solution of the High Court is entirely in accordance with the provisions and the principles of GDPR. Moreso, the legislative shortcomings in this area have thus been settled through the effects of this decision.

On the issue of official documents in the field of public procurements that contain information that might be considered personal data, Law no. 544/2001 states in its article 11^1: „*It is mandatory for all contracting authorities (...) to put at the disposal of natural or legal persons that are interested (...) the public procurement contracts.*"[11] Law no. 98/2016 on public procurements provides at article 217 that „*(4) Subsequent to the completion of the procedure of awarding, the public procurement folder has the character of public document. (5) The access of persons to the folder of the public procurement according to paragraph (4) is insured in compliance with the terms and procedured provided by the legal regulations regarding free access to public interest information and cannot be restricted unless these information are confidential, classified or protected by an intelectual property right, according to the law*." As far as the case-law of the courts in this field of public procurements as official documents is concerned, we show, for example, that the Bucharest Court of Appeals, it its decision no. 4538 from the 5th of october 2015, has concluded that the name of the experts authorized by the National Association of Authorized Experts in Romania, mentioned in the documentation of the public procurement, are not protected by article 12, paragraph (1), letter d) of Law no. 544/2001. Similarly, the Bucharest Tribunal, in its Civil Sentence no. 3903 from the 26th of May, 2015, decided that the name of a contractor from a public procurement contract is public interest information that can be communicated to third parties in the conditions of Law no. 544/2001.

5. Conclusions

The rights provided by the GDPR and the protection granted through its provisions, especially by article 15 and Chapter III in its entirety are balanced by the permision granted to member states, by article 86, to establish national, internal rules based on which public authorities and public and private bodies can disclose personal data contained by the official documents they detain. Considering the practical implications, data processors and data controllers will have to determine the legislation applicable for their own processing activities and then to establish wheter these activities are object to certain conditions or restrictions, additional to the general provisions of GDPR. This flexibility entails a challenge for multi-national organizations, since compliance with the GDPR implies, from the perspective of efficiency and profitability, standardized solutions at the level of the entire European Union. Regarding the activity of the public administration, we highlight that it is of the utmost importance not to transform there guarantees into a cloack, of course an artifical designed one, in the path of the free access of persons to information contained by official documents emited or handles by public authorities or bodies. However, even if the public authorities will continue to insist in this distorted interpretation, as the existing case-law already shows us, the courts will not hesitate to intervene and correctly apply the legal provisions that are at the confluence of free access to official documents and protection of personal data.

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[11] This 11^1 article was introduced in the provisions of Law no. 544/2001 by Law no. 380 from the 5th of octomber 2006 for the alteration and amendment of Law no. 544/2001 regarding free access to public interest information.

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