OPEN GOVERNMENT, E-GOVERNMENT AND THE IMPORTANCE OF THE RIGHT TO INFORMATION MONITORING

by

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This article deals especially with the connection between good governance approach and the right to information legislation. Legislative anchorage of the right to access information is considered to be an important prerequisite of many other principles fulfilment. Only the anchorage of the right to information within the legislation is not sufficient however. The level of law realization and related activity is much more important. It is also linked to the electronization of administrative activities where provision of information is often understand as one of the basic level of online administrative sophistication. Problems that may emerge are relevant for both of the forms of information dissemination - the paper-like or the electronic practice. This may be forgotten by the side of public administration, the legislature or by the side of citizenry. The perfect legal framework for the freedom of information may be created, however its effectiveness may be zero or negligible. Therefore the monitoring of the right to information is of crucial importance.

Principles of Public Administration [1]

Public administration represents a significant social phenomenon that has been an object of the researches probably since its beginning. The value framework of its activities is related to the feature of dynamics of public administration. The dynamic characteristic sources from the attempts of this social phenomenon to adapt to its changing external as well as internal environment. This adaptation is caused by self-reforming or in help of external pressures. Dynamics of public administration is connected especially with the instrumental character: public administration has been

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considered to be a one of the institutional instrument for "delivering" the functions of a state or of a self-governmental unit (no matter how these functions are defined). Activities of public administration have always reflected the development of these (historically or otherwise conditioned) functions which practice is always circumscribed by a kind of basic values. The sociology of bureaucracy and economic models based on the methodology of individualism emphasize the necessity to distinguish the formal (i. e. stipulated by a sort of a norm) and the informal dimension of these activities of public administration.

The term and concepts of constitutional and administrative law may differ significantly among states. However, it is possible to find a common principles, that are considered as values which are to be common to public administration functioning. Such principles are to represent very important limits of public administration activities that in today's practice should lead in a reduction of public administration baronial behaviour. Today, principles also represent a way of approximation attempts among different administrative law systems in order to create a specific public administration region - the European Administrative Space is an example here. They may be considered to be an important instrument for 'administrative law globalization' especially as part of the first two phases of approximation as defined by Pomahač - harmonization (with an emphasis on convergence and harmonizing of heterogeneous legal procedures and criteria) and standardization (with an emphasis on choice and recommendation of adequate models and principles) (Pomahač, Vidláková 2002: 48).

The concrete examples of principles lists that are influential in the European region due to their soft law implications may be found particularly in these documents:

a) SIGMA´s study European Principles for Public Administration (OECD, 1999) stipulates the following principles - standards - that - according to the authors of this document - have been originated during the development of democratic states on the basis of the general consensus about the key components of the so called good governance without regards to the different legal traditions and varieties of governance systems: reliability and predictability, openness and transparency, accountability, efficiency and effectiveness.

b) document Open Government - Fostering Dialogue with Civil Society (OECD 2003) speaks about these principles of good governance that are considered to be widely accepted and therefore recommended: openness, transparency and accountability; fairness and equity in dealings with citizens, including mechanisms for consultation and participation; efficient and effective services; clear, transparent and applicable laws and regulations; consistency and coherence in policy formation; respect for the rule of law; and high standards of ethical behavior.

c) Some of the principles were also formalized by the Charter of Fundamental Rights of the European Union et the end of 2000. The stated documents have also influenced the list of principles of good governance stated in the European Governance - a white paper (EC 2001). We can find their reflections also in the proposal of the Treaty establishing a Constitution for Europe[1] as well.

Principle of Openness and of Transparency, Right to Information and Electronic Public Administration [2]

Definition of the Principle of Openness and the Principle of Transparency [2.1]

For the purposes of this article definitions of the first mentioned document (OECD 1999) is sufficient. According to its authors, openness suggests that the administration is available for outside scrutiny, while transparency suggests that, when examined closely, it can be "seen through" for the purpose of scrutiny and supervision. Openness and transparency allow, on the one hand, anyone affected by an administrative action to know its basis, and on the other, they render outside scrutiny of administrative action by supervisory institutions easier. Openness and transparency are also necessary instruments for the rule of law, equality before the law, and accountability. It is necessary to underline the connection of the principle of openness and transparency with the principle of participation, particularly because of the often heard attempts to ensure

[1] For example *the principle of participatory democracy* its article I-47, *the principle of representative democracy* in the article I-46. Article I-50 speaks about the *transparency of the proceedings of Union institutions, bodies, offices and agencies*. Also the its article II-101 may be mentioned.

the informed, more participatory and more inclusive decision- and policy-making in the sphere of public affairs which is the part of prerequisites of the public policy effectiveness, economy and purposefulness, i.e. efficiency itself. According to the mentioned white book of the European Commission, the quality, relevance and effectiveness of policies depend on ensuring wide participation throughout the policy chain – from conception to implementation. The Commission stresses here that improved participation is likely to create more confidence in the end result and in the Institutions which deliver policies. Today participation is emphasized particularly due to the gap between the democratic expectations and the democratic reality and the related public authorities confidence and legitimacy of their activities. Therefore the concept of quality defined by Zeithaml, Parasuraman and Berry (1990) or the model of quality prescribed by Gaster (2003) is therefore relevant. The movement of quality itself may be considered an important impetus for participation due to the emphasized role of stakeholders in quality assessment.

Text of the Open Government - Fostering Dialogue with Civil Society represents the shift in definitions of principles towards the good governance aspects. According to the authors, principles enumerated here represent the basis upon which open government can be built - "one that is more accessible, responsive and transparent in its operations". This document stresses the importance of the following three principles: a) accountability - the authors define it in a way of the meaning that it is possible to identify and hold public officials to account for their actions; b) transparency - in the meaning that reliable, relevant and timely information about the activities of government is available to the public; and c) openness - in the meaning that governments listen to citizens and businesses, and take their suggestions into account when designing and implementing public policies.

Right to Information and Electronic Public Administration [2.2]

The openness and the transparency are always significantly influenced - especially restricted - by a degree of publicity / a certain degree of secrecy of some information. This restrictions and publicity must comply with the

requirements of the rule of law principle. The still issued question is related to the width, legitimacy and democratic character of the group of non-public information.

The legislative anchorage of the right to access information is not an old story at all. Although the right to government documents were stipulated for the first time in Sweden in 1766 (Freedom of the Press Act), the modern trend of legislation for opening the government through certain kinds of information has been realized in the called Western democracies since the second half of the 20th century, particularly in sixties. In most of these countries, the passing of such freedom of information (FOI) legislation was conditioned by the negative critique of the government and governance secrecy, their non-transparency and non-openness to citizenry and to civil society that were and sometimes still are in contradiction with the duty of public administration to inform and that lead to the mentioned democratic deficit. In transforming countries in the Central and Eastern Europe, the more significant role has been played probably by the factor of fashion in this part of the law that influenced importantly the (in)sufficiency of the preparatory phase of legislation that today sometimes standardly requires a kind of regulatory impact analysis.

Broader approach to freedom of information purpose definition can be found in the preamble of the Irish Freedom of Information Act from 1997. According to its provisions, the goal of this act is following: to enable members of the public to obtain access, to the greatest extent possible consistent with the public interest and the right to privacy, to information in the possession of public bodies and to enable persons to have personal information relating to them in the possession of such bodies corrected and, accordingly, to provide for a right of access to records held by such bodies, for necessary exceptions to that right and for assistance to persons to enable them to exercise it, to provide for the independent review both of decisions of such bodies relating to that right and of the operation of this act generally (including the proceedings of such bodies pursuant to this act) and, for those purposes, and to define its functions, to provide for the publication by such bodies of certain information about them relevant to the purposes of this act.

The right to information (in the form that is defined by general and special acts) determines (particularly limitates) the practice of e-government /e-governance informatory aspects particularly by influencing the content of the information systems in public administration.

On the basement of FOI lex generalis analysis, elaborated by the author of the paper, provisions of the law may affect the electronic information dissemination:

1. positively (i. e. it can bring real benefits) in the form of a clear definition of:
   a) public information and clear definition of duties to make public information electronically accessible;
   b) requirements of the application for information (for example the act of Hong-Kong prescribes a special form for this application);
   c) a duty to inform about the receipt of the electronic application for information;
   d) a mechanism of protection against an inactivity of public administration subjects and by the clear definition of sanctions in the case of non-fulfillment of prescribed duties of public administration subjects;
   e) central authority / independent controlling institution for the monitoring and protection of the right to information and also for the education of the public and public authorities themselves.
2. negatively (i.e. it can bring detriments to the right to information democratic ideas) especially because of the non-reflection of a) and by a blankly definition of the fees requested for the access to information - this can deepen the so called digital divide. There is no place for analyzing the Czech act 106/1999 on free access on information or the act 123/1998 on environmental information. Some of the problems particularly of the first mentioned legal document are stated below.

The Importance of the Right to Information Monitoring: The Canadian Case [2.3]

The importance of the monitoring of the right to information practice has to be stressed especially because of the regard to the following claims of Weber: "every bureaucracy tries to amplify the supremacy of the erudite

professionals by the concealing of its knowledge and intentions. Bureaucratic administration has always a tendency to be an administration that excludes the public. Bureaucracy hides its wisdom and its activities from a critique as it is just possible... The term "official secret" is its specific invention and bureaucracy does not stress anything else so much, although in many areas it is not substantiated." (Weber 1997: 85). In all constitutional democratic countries, constitutional or normal legislation at least reinforce the protection by the guaranteed rights by the judiciary. Also with regards to institutional and procedural forms there might be found some specifics in some countries. For the Czech Republic where the act 106/1999 on free access to information does not give the duty to monitor to any concrete independent or executive institution foreign situation may be therefore challenging.

The mentioned Irish Freedom of information act establishes the office of the information commissioner. The Commissioner shall be independent in the performance of functions. The Commissioner may, on application to him or her in that behalf, in writing or in such other form as may be determined, by a relevant person (a) review a decision to which this section applies, and (b) following the review, may, as he or she considers appropriate(i) affirm or vary the decision, or even (ii) annul the decision and, if appropriate, make such decision in relation to the matter concerned as he or she considers proper, in accordance with this Act. The legal status of the Hungarian Data Protection Ombudsman is weaker than the special Irish institution. His responsibilities lay in the field that is similar to the Czech ombudsman. According to the Act No LXIII of 1992 on protection of personal data and disclosure of data of public interest, the Data Protection Ombudsman shall a) observe the implementation of this Act and other laws on data processing; b) examine complaints lodged with him; c) ensure the maintenance of Data Protection Register (article 24). According to article 25 of this act the ombudsman shall monitor the conditions for protection of personal data and for disclosure of data of public interest, present proposal for adoption or modification of legislation concerning data processing and disclosure of data of public interest, and give opinion on such draft legislation. The ombudsman may initiate a decrease or an increase in categories of data classified as state or official secrets. He is responsible for observing an unlawful processing of data, shall require the controller to

discontinue the processing. The controller shall take the necessary measures without delay and inform the Data Protection Ombudsman in writing within 30 days thereof. The ombudsman shall announce to the general public the existence of data processing unlawfully undertaken, the identity of data controller, and the categories of data processed, if the data controller does not stop unlawful processing.

Special monitoring institution that has similar responsibilities to the Hungarian one has been established also in Canada by the Access to Information Act. Reports on monitoring results of the Canadian Information Commissioner may be utilized as an analyzer of potential FOI issues that may be choose as on object of challenging comparative analyses not only in the countries where the legislation is younger. The 2000 – 2001 report stressed the difficultness of the right to information practice due to the nature of the Canadian politics and the influence of ministers that may reflect in the quality of information provided by public administration in several aspects. Their influence is reflected in the work of the personnel that prepares the written reports on the government performance and sometimes tries to say as little as possible especially in the cases that may lead to the negative critique of a minister. "There is a reluctance to let Parliament and the public know how government programs are working, because if things are going badly you may be giving your opponents the stick to beat you with." According to the commissioner, a decade or more of neglect of basic, good information management has devastated the ability of departments to create, maintain and effectively use an institutional memory. The mentioned problem is also caused by certain paranoia over access to information rules and the traditional reluctance of senior public servants to keep records of direction from Ministers or discussions of why decisions were made. The ability to audit decisions suffers as well. The audit trail is also damaged by the way the information technology is used. At one time, all correspondence and documents were on paper and were physically filed in a department's central registry. Today, internal memos have been replaced by e-mails, which are not filed centrally and which evaporate when the server where they are stored runs out of space. Most knowledge workers have their own hard disk and keep many important records there, invisible to the departmental records managers. Although the act has come in force since

1989, the spirit of the "culture of secrecy" had been prevailing here till the time of this report. One of the problems is also cause by the loyalty - Loyalty is understood by public servants to imply loyalty to the minister and the government of the day. Interpreted in that manner, the value of loyalty may suppress public candour and obedience to law. "There have been almost 18 years of experience with the Act and there have been some surprises. Most surprising is the modest use Canadians make of the Access to Information Act. Before the Act was passed, the government forecast that approximately 50,000 requests per year would be received by the totality of government institutions (some 150) covered by the Act. In fact, it took an accumulation of requests over 10 years to reach the 50,000 request mark. In year 1999-2000 - was the year in which the most access requests were received since the Act's passage — there were some 19,000." Another described problem relates to the government misuse of the act for the economic utilization of information ("gold mines"). This problem gains more importance in the situation where the area of fees requested for the access to information is not clearly defined. This situation is still characteristic for the law on free access to information in the Czech Republic. The report summarized the following persistent problems: 1) delays, 2) excessive secrecy, 3) improprieties such as improper records-handling practices, using fees/extensions as a barrier to access, inadequate searches, political interference. The report names the following causes of the mentioned problems: 1) inadequate resources, 2) absence of targeted educational programs, 3) poor procedures and practices (including the matter of poor information management), 4) inadequate delegation to, and classification of, Access Coordinators, and 5) slowness of Ministers/Deputy Ministers and senior managers to change the culture of secrecy by force of leadership. For reparation of the mentioned negative situation the commissioner stipulated to enforce the following key changes: 1) to define a legal "duty to document" an institution's organization, functions, policies, procedures and transactions and to include such records within institutional records systems – especially in the case of electronic records; 2) to define a legal "duty to preserve" records for a period appropriate to their purpose and content; 3) to establish a legislated accountability framework governing essential recordkeeping and reporting requirements and procedures; and 4) to adapt a coordinated leadership

approach to completing the revitalization project with the oversight of a Parliamentary Committee.

According to the 2001 - 2002 report, the senior level of government still shows the remains a more hostile attitude towards the right of access. The fact remains, however, that there is a reluctance to write things down (for fear of access) and an oversensitivity to preserving the good "image" of a minister, the government or the department. This year is important for the establishment of the monitoring methodology. The Office of the Information Commissioner conducted follow-up reviews in six departments for the purpose of preparing "report cards" on their performance in meeting response deadlines under the Access to Information Act. The grading scale used is based on the percentage of access requests received by a department which are not answered within 30 days or within the extended deadline chosen by the department. The scale for evaluation was states as followed

Table - Scale for evaluation of Canadian federal FOI practice

% of requests answered late	Comment	Grade
0-5%	ideal	A
5-10%	substantial	B
10-15%	borderline	C
15-20%	below standard	D
over 20%	red alert	F

In the first paragraphs of the 2002 - 2003 report it is stated that “only” four major barriers to the full vibrancy of the right of access remained - until this reporting year - unresolved. Three of these intransigent barriers arose from the government-held views that: 1) the Act gives government an unreviewable right and obligation to exclude any information from the right of access which it considers to be a "cabinet confidence"; 2) the Act constrains the public right of access by a broadly-defined zone of privacy for information about public officials; and 3) the Act does not apply to records held in the offices of ministers of the Crown or in the Prime Minister's office. The fourth barrier arises from the crisis in information management in government. The fourth barrier is caused by the crisis of the

information management within the government. This year, the first two of these remaining barriers to public access were struck down by the Supreme Court of Canada and the Federal Court of Appeal in three unanimous decisions, according to the commissioner. The Supreme Court of Canada ruled that decisions by government to refuse access, by asserting that records contain cabinet confidences, may be reviewed by courts and by bodies such as the Information Commissioner. As well, the Federal Court of Appeal ordered the government to narrow the zone of secrecy heretofor afforded to cabinet confidences. Also, this year, the Supreme Court of Canada ruled that the sphere of privacy accorded to public officials is significantly smaller than that previously asserted by government. It reminded governments that the value of accountability has to be taken into account in defining the proper zone of privacy for public officials. This year also the document Access to Information: Making it Work for Canadians was published. The information commissioner also approved the quality of service standards for the work of investigators and government officials with whom they deal. The commissionaire also states the following persistent factors that represent potential causes of delay: slow records retrieval, inadequate resources and inappropriate delegated authority of the access to information coordinator, top-heavy approval process,[2] and inadequate attention from the top.

The 2003 - 2004 report contains also the evaluation of timeliness of handling requests for information and states the following five factors of delays: - Slow retrieval of records, due to poor records management and staff shortages; - Poorly managed consultations with third parties and other government institutions; - Inadequate resources and training; - Top-heavy approval processes, including too much "hand-wringing" over politically sensitive requests and too frequent holdups in ministers' offices; and - Poor communications with requesters to clarify and narrow requests. The 2005 - 2006 report is still not optimistic. Its motto states that "countless individuals reported that senior officials, both political and administrative, find various ways to deny providing information to the public".[3] The valuation here is

[2] An approval process that requires a number of reviews is burdensome and causes substantial delays in departments that continue to operate in a "play it safe" mode

[3] The report is available here: http://www.infocom.gc.ca/reports/2005-2006-e.asp.

based on the same methodology as in 2001 - 2002 report. This methodology is based on assumptions that a good indicator of the overall effectiveness of the access to information process in government is the percentage of access requests made to government that are answered within the statutory deadlines. According to the commissioner, regrettably, the government does not gather and report this key statistic, according to the Commissionaire. Consequently, it is only possible to offer here an impression based on the number of delay complaints received as compared with previous years, and on the results of the commissioner's report card reviews of selected government institutions. The results themselves sometimes show that the monitoring may not lead to the improvement of practice and thus addressed the resistance of some institutions.[4]

Conclusion [3]

The paper discussed particularly the ideas of the principle of openness and transparency that can be found in the comparative studies which are recommended as the basic for administrative ethics. The ideas must be discussed with the real legal effectiveness. The Canadian case may be inspiring here. Its validity may be a part of e-government effectiveness in the field of one way dissemination of information or in case of transactions that are assumed by the provision regulating applications for public information. The critique expressed by the Canadian commissioner in relation to approaches of public authorities to methodology deficits is relevant to the Czech Practice where it relates to the duty to publish the annual report. This report is specified by § 18 of the Act on free access to information (106/1999)- and its content should comprise the following: a) number of submitted requests for information and the number of decisions issued on the denial of the request, b) number of appeals filed against the decision, c) copy of substantial parts of every court judgment on the review of the legitimacy of the decision by a legally bound person to deny information, and the list of all the expenses of the legally bound person in connection, with the legal proceedings on the rights and duties under this Act, including the costs on the legally bound person´ s employees and on legal representation, d) list of

[4] See the Table Table 2: Grading from 1998 to 2005 (April 1 to November 30)

exclusive licenses granted, including the justification of the necessity to grant the exclusive license, number of complaints filed under § 16a), reasons for their submitting and a brief description of the way of handling them, and expressively also f) other information related to the enforcement of this Act. The problem is that such report does not necessarily take into account the oral applications since only for the case of the written form certain procedures are prescribed for handling the applications, particularly the time limits, registration of the procedure of information disclosure and also the content of the mentioned annual work - see §§ 14 - 16a, § 18). Such duty must be link to another duty prescribed by the Czech act - within 15 days from providing the information on the basis of application the legally bound person shall publish the information in a manner enabling a distant access. This provision of article 3 of § 5 presupposes, that the subjects of control as well as potential applicants know or are able to know the content of individual applications for information including both of their potential forms - oral or written, which stipulates the very important request of sufficient registering of all applications.

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