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The Law on the free access to public informations - four months after coming into force

(The analyse has been concluded on the 29th of April 2002 and has been published, in our country, in "The Romanian Magazine for Human Rights", no. 23/2002 and in the newspaper " Cotidianul" and abroad, in the Romanian weekly newspaper " Lumea Libera", edited at New York. Subsequently, for some of the cases in which the Romanian authorities have denied/refused giving the information demanded, I have addressed to the justice and this way I have obtained favourable and irrevocable rulings. Two of these rulings, against the President of Romania and against the Ministry of Home Affaires, are being published in the "Documentary" section of this web-site.)

Exactly eleven years after the Constitution was adopted, the Parliament eventually passed the Law on the free access to information of public interest nr. 544 of 12-th of October 2001.This law was one mostly left behind (with all the negative consequence of this) in the process of instituțional reform after 1990.

1. Requests to some public institutions and authorities

After the law was adopted, in the period February-April 2002, we have made, in writing, the following requests to the following institutions (before this, it should be mentioned that art. 7 paragi'aph 1 of Law 544/2001 says that ***authorities and institutions have the obligation to answer the requests in 10 days and "in case the time necessary[7] for identifyingand disseminating the information required exceeds 10 days, the answer will be commumcated to the apphcant in maximum 30 days, provided a written notification is made of this, in 10 days").***

- The Secretary General of the Government (SGG) - the investigation showed that in 1997, the Government adopted Emergency Ordinance nr 43 under which at the Agricultural Bank (state), credits worth 2,658,473,609,624 ROL were included in the category "losses". The Government decided that the annex including the figures about the respective credits should not be published in the Official Gazette, which was against article 107 of the Constitution which says that exception from publication are only the acts "of a military character" (the verification showed that the annex has not been published, partly also because the interest some dignitaries had to hide the fact that their own companies benefited from the Ordinance provisions). On February 11-th 2002,1 made a request to the SGG to allow me access to the Ordinance annex. The request was given a positive answer.

- The Regie Autonome "The Administration of the State Protocol Property" (RA-ASPP) - following own investigation I found the following: Romania's Government sold two real estate, of public property, in the Regie administration, to the Commercial Company "Romcontrol" (under GD no 811/1998) and to the General Association of Sports Fishermen and Hunters (under GD 487/2001). The selling of the two real estate was not legal, as no public tender was organized (the president of the Association of Fishermen and Hunters is the current Prime Minister, and the Commercial Company has as a shareholder the Minister of Defense as of the date when GD 811 was adopted). On March 7-th 2002,1 asked RA-ASPP for copies of the documents showing the selling of the two real estate. On March 18-th, the director general of the Regie sent the photocopies of the selling document to SC "Romcontrol";

- **The Authority for the Privatization of the State Property Assets - (APSPA)** - on March 12-th, I asked to be given access to the following information: what are the payments which the State Ownership Fund (SOF) and its successor, APSPA, made so far for publicity and consulting. Although 48 days have passed, APSPA has given no answer to this request;

- **The Romanian Commercial Bank (RCB)** - on March 12-th, I asked for information on what persons benefited, on behalf of Bancorex, (RCB is the successor of Bancorex) of credits with preferential interest. On March 27-th, RCB said it would send no information on this, and upheld especially that Law nr.544 provides for an exception from access to information of public interest of commercial companies, including those with majority or integral public capital -which is true, but this represents **one of the most serious shortcomings of the Law** (the refusal of RCB was communicated 14 days after the request was made, and not in 5 days in conformity with art.7, paragraph 2 of the Law). Another reason invoked by the bank was the one of the "banking secret", which is completely unjustified especially having in view that at the request date Bancorex (the bank with public capital) did no longer exist for several years. The request made prior to the adoption of the Law on access to information was answered by the RCB management also at a time when Bancorex did no longer exist for some time; the answer was that the bank could not make public the names of the dignitaries that benefited by preferential credits because that would be of a nature to "damage the prestige of the bank and its customers"). The administrative claim filed against the refusal of RCB was solved, in the sense that" the first answer remains valid";

- **The National Bank of România (NBR)** - on March 12-th, I asked to be given information on the sponsorship that the NBR has made after 1989 (with indication of all the beneficiaries of the sponsorships and the amounts received). On April 16-th, the Secretariat Directorate gave a very general answer, that did not answer the precise requests made by me, on April 19^{lh} I filed an administrative complaint (so far no answer);

- **The Interior Ministry** - on March 13-th, I asked for information on the draft normative acts that are being drawn up by the IM and photocopies of the latest 3 draft normative acts. In 2001, prior to the Law on access to information, GD no 555 on the drafting and adoption by Government of normative acts had been adopted, which, in its article 28 says that "During the drafting of normative acts the public authority staff and to staff giving opinion on them are forbidden to disclose data or information on the respective draft normative acts". The GD provisions are in disagreement with the constituțional norms and with the Law on access to information (versus which they have a lower legal strength). On March 26-th, the Legal Directorate of the IM answered that, "given the complexity and volume of the research work that has to be done, the request will be solved in 30 days of the registration at the IM". On April 18-th, the same Directorate reconsidered its inițial decision and communicated its refusal to give copies of the normative acts that are being drafted.. .because GD 555/2001 forbids this. On April 25-th, I filed a complaint against this answer;

- two requests identical with the one to the IM were made on March 13-th to the Ministries of **Agriculture and Finance.** Although 47 days have passed, the two ministries have not answered.

- **Romania's Presidency** - on March 13-th, I asked for access to the following information: first name, family name, position and total income made by the staff of Romania's Presidency in the period 1-st of January 2001 - 28^{lh} of February 2002; what were the expenses of the tour made by the delegation headed by Romania's president in the first quarter of 2002 to some countries of

Asia. Although 47 days have passed, the Presidency has given no answer. (A request similar to the first one, made to the Presidency in the previous legislature received no answer);

- **The Romanian Intelligence Service (RIS)** - on March 13-th, I asked for the following information: what is the percentage of the RIS staff that worked in the former Securitate; how many applications for tapping of telephone calls has RIS made in the past 4 years, how many of them have been approved and how many have been justified, in the sense that they contributed to solving some cases where the național security was put in danger. On March 21-st, the head of the Public Relations Office sent a negative answer saying "the figures required cannot be made public because they offer some information possibly useful to a potențial enemy". In the second case, the motivation was " that the information required pertain to național security". The refusal is not justified in both cases. In the first case, it is obvious that a percentage of the staff of RIS that belonged to the former Securitate could in no way be useful to "a possible potențial enemy". The RIS answer shows that the psychosis of secrecy, which the former communist political police instilled for several decades in Romania, still persiste in that institution. More than that, some circumstances subsequent to the answer received from RIS suggest even mal intention. Thus, on April 11-th, 2002, at a press conference organized in the opening of the seminar " The intelligence and security services and the security agenda of the 21-st century", the directors of The Romanian Intelligence Service and of the Foreign Intelligence Service said publicly that "in the organizations that they manage there are former securitate agents or workers that did political police, their number being around 15 - 20% of the total employees". As to the second answer, it is obvious also that no information about the number of telephone tappings made by an intelligence service can in any way "damage the național security". Pro of of the evil intention - or anyway, of superficiality - of those who answered the requests is also the fact that the first legal provision for the refusal was art.49, paragraph (2) of Romania's Constitution, a provision which has no connection with the request made, and which I will render now: "Restriction" - of exercising some rights - "should be proporțional with the situation that determined it and cannot impair the existence of the right or freedom". On April 8-th I put up an administrative complaint against the answer received, but so far I have received no response to it. Along the same line of the psychosis of secrecy in the Romanian Intelligence Service, the citizens can only establish a connection with this service by means of mail and of a telephone line, where the person answering the caii does not introduce himself/herself;

- **The National Council for the Study of the Securitate Archives (NCSSA)** - on March 13-th, I asked for the following information: "what are the incomes (including bonuses, increases etc) of the members of the College of NCSSA (management) since its establishment to the day"; the identification data and the positions of the officers and unlisted officers of Securitate which NCSSA identified as having been involved in the activities of the political police, as well as the reasons why NCSSA has not published this data in the Official Gazette" (since the coming into force of the Law on the Securitate files, on December 9-th, 1999 to this day NCSSA has not published anything in this respect, required by art. 17 of the Law). On March 28-th, the president of the NCSSA College answered the request. Photocopies of two normative acts on the salary policy of the NCSSA staff were sent in response to the first question, which obviously does not answer the request. For the second question, the answer was "for the time being NCSSA is not the manager of the former Securitate archive", because it does not have a proper building for organizing its own archive." (The motivation of NCSSA is groundless because, in the interest of the Law on the securitate files, taking over of the archives of Securitate by NCSSA meant taking over also the spaces where they were deposited. Secondly, it is totally unclear why for two and a half years NCSSA has not managed to publish in the Official Gazette any name of a Securitate agent, considering that a big part of its activities was meant for activities that were not imposed by the Law on the Securitate File, sometimes they were even contrary to the Law, as was the case

of the ex officio verification of some candidates in the local elections in 2000). On April 15-th, I filed an administrative complaint against the answer to the first request;

- The National Air Transport Company TAROM - on March 20-th, I made a request for some information: what are the payments that the Company has made in the past six years to consulting companies or lawyers fîrms. The Company general manager answered negatively to the request, motivating that, being a commercial company, TAROM is exempt from the Law on access to information. This example too shows that exception of commercial companies with a state capital from the Law represents one of the **most serious shortcomings of this normative act.** TAROM is a commercial company with almost integral state capital (at the date of incorporation, June 29-th 1998, the Romanian state, represented by the Ministiy of Transports, held 97% of the social capital, and subsequently, no essential modifications emerged regarding this aspect);

- **The National Oil Company PETROM** - on March 20-th, I asked for the following information: what are the payments which the National Oii Company (NOC) made so far for publicity, sponsorship and consulting. Although 39 days have passed since the request was made no answered has been received;

- **The Ministry of Public Finance** — on March 20-th I asked for access to the I ollowing information: what amounts, at what clates and to which consulting companies and lawyers' firms were paid in 1997 and 1998 for "consulting" and "legal expenditures" for the acquisition of Euro-bonds. Although 39 days have passed since the request the Ministiy has given no answer;

- **The Ministry of Public Works, Transports and Housing** - on March 28-th, I asked for the following information: what are the payments made in the past six years by the economic units in which the Romanian state, through this Ministiy, possesses the majority social capital - including by NC TAROM – to the consulting companies and lawyers' firms. On March 29-th, the General Directorate for Public Relations answered no to the request motivating that, on the one hand, "the request does not show clearly what information is required" and, on the other hand, that the subordinated units "are autonomous and the Ministiy does not have the requested data". On April 10-th, I came back by naming 5 of the units under the authority of the Ministiy, including NC TAROM (no answer has been received so far);

- **The Savings Bank** - on April 12-th, I asked for access to the following information: who are the persons that benefited, in the period 1997 - 2000, from credits granted to "young families for buying or building houses". On April 23'", with a delay of 6 days of the legal deadline, THE SAVINGS BANK communicated its negative response motivating mainly that its status is of a legal person of private law and that the operations it carries out are confidențial. The answer is groundless because on the one hand THE SAVINGS BANK is a unit whose sole shareholder is the Romanian State and on the other hand, those credits were subsidized from the public budget. On April 26-th, I filed an administrative complaint against the refusal of THE SAVTNGS BANK.

2. Some conclusions

Out oftiie total 16 requests, 2 were given a positive answer, 8 a *negative* ***answer and 6 received no answer.*** I will file complaints at the administrative dispute section of the Bucharest Court against some of the negative answers.

The almost general refusal to allow access to information of public interest has two main explanations. On the one hand, it is obvious that the **leadership of the public institutions and**

authorities further has serious difficulties in accepting that transparency and public control of their activity is an elementary rule governing the democratic societies and the rule of law. Such a mentality is doubled by the ***interest which poîiticians and dignitaries have in avoiding public knowledge of the fact that many of them have used their positions for private interest;*** it is mostly about the preferențial credits taken by dignitaries from banks for their business or for private interests, sponsorship from public money, of the activity of political parties and people, business of commercial companies, lawyers' firms or consulting companies of the dignitaries with state commercial companies parasiting I hem) with regie autonomes, national companies and even ministries and other public institutions.

The second explanation pertains to **the exception of the state commercial companies from any information on their activity. I repeat, this is one of the most serious shortcomings of the Law.** Undoubtedly, the state commercial companies should be protected also against unfair competition and in this respect they should benefit from Law nr 11/1991 on combating unfair competition. As a matter of fact, even Law nr 544 makes exceptions - in article 12 letter c) - from free access to "information on the commercial and financial companies whose publicity damages the principie of fair competition". However, to say that the information like the one about the dignitaries that have used their positions to take preferential credits from a state bank (which went bankmpt for several years) if made public "would jeopardize the principie of loyal competition", is an abuse. It would also be an abuse to "render secret" the information on the amounts paid by TAROM, for instance, to the companies of the family of a minister or by the Ministiy of Finance and the State Ownership Fund to the lawyers' companies and consulting companies of another minister. Under these circumstances, it is obvious that excepting all the information on state commercial companies from public access is excessive and not acceptable.

The following should also be mentioned regarding the shortcomings of the Law on access to information:

- ***exceptions from the free access to information*** established by art. 12, paragraph (1), letters b), c), d), e) and f) **exceed the frame** instituted by art. 31, paragraph 3 of the Constitution, according to which restriction of access to public information refers only to the cases in which "the measures for the protection of young people or national security" would be jeopardized";

- art 21 paragraph (2) says that "a complaint can be filed" against the refusal of an authority or institution to provide access to information of public interest"; because from the following texts it comes out that the law maker had in view "submittal of the complaint" as a preliminary condition to action in court (administrative disputes), **it is necessary that the current wording on the administrative complaint becomes imperative,** in agreement, as a matter of fact, with the period of time of 30 days, imperative itself, as established in the same paragraph. Anyway, until possible modification in this respect of the Law, those who have in view an action in court will have to see that in art.22, paragraph (1) the term of 30 days for filling the complaint is related to "the term provided for at art.7", which suggests - at least from this point of view - that the administrative complaint to which art.21, paragraph (2) refers would not be a condition preliminary to an action in court;

- art 21 paragraph (3) establishes that "If the investigation of the administrative complaint proves to be grounded, the answer is sent to the person impaired in a period of 15 days of the submittal of the complaint and will include both the requested information and maintaining the sanctions on the guilty person". ***The law does not establish - and needs to be amended in this respect - that the person who makes the request should receive an answer after the administrative***

investigation is made, and in case the complaint proves groundless (and to mention the reasons for which "the institution leadership" decided that the complaint is groundless).