

Information by
the Hungarian National Authority for Data Protection and Freedom of Information
on the openness of the operation of
the bodies of local governments

In view of the professional practice of the data protection commissioner and the Hungarian National Authority for Data Protection and Freedom of Information (hereinafter: Authority) to date in the context of applying the provisions of Act CXII of 2011 on the Right to Self-Determination and the Freedom of Information (hereinafter: Privacy Act) and Act CLXXXIX of 2011 on the Local Governments of Hungary (hereinafter: Local Government Act), the Authority developed the following position in relation to the openness of the operation of the body of representatives and its committees.

1. Principles

Article VI (3) of Hungary's Fundamental Law declares that everyone has a right to access and disseminate the data of public interest. The primary purpose of the freedom of information is to ensure transparency of the state. Pursuant to Decision 32/1992 (V. 29.) AB, the Constitutional Court (hereinafter: CC) this fundamental right "*enables the control of the legality and efficiency of the elected representative bodies, the executive power and public administration, and stimulates their democratic operation*". Control over the decision-making by public powers can only be successful and effective, if the citizens have access to the necessary information.

Pursuant to Decision Köf.5036/2012/6 of the Municipal Council of the Supreme Court "[...] *Openness means in part participation in the sessions of the body of representatives, and partly the possibility to access the data on such sessions. The two together provide for openness and as a consequence the possibility of access to data in the public interest, which also establishes the possibility of exercising control over operation*".

The right to access and disseminate data in the public interest is frequently considered a prerequisite and point of departure of exercising another fundamental right, which is the freedom of expression [CC Decision 34/1994. (VI. 24) AB]. Participation in public life, i.e. forming and expressing an opinion concerning the operation of the bodies of the state and local governments and their efficiency would be inconceivable, if these bodies were able to keep data in the public interest secret, or enable access to them at their own discretion only. "*The open, transparent activity of public powers subject to control, in general the operation of the state bodies and the executive power open to the public is one of the cornerstones of democratism, the guarantee of a constitutional state organisation.*" The openness of exercising public power, including local public power, is the basis of democratic operation, a cornerstone of the operation of law and order.¹

¹ Decision Köf.5.036/2012/6.

Pursuant to Section 3(5) of the Privacy Act, data of public interest means “*information or data other than personal data registered through any method or in any form pertaining to the activities of and processed by the organ or person performing state or local government duties and other public duties defined by law, or generated in the course of performing their public duties irrespective of the method or form in which they are recorded and regardless of their singular or collective nature; in particular data concerning material competence, territorial competence, organisational structure, professional activities and the evaluation of their performance, the type of data held and the laws governing their operation, as well as data concerning financial management and concluded contracts*”.

Data accessible on public interest grounds belong to the other group of public data. Section 3(6) of the Privacy Act classifies all data other than data of public interest, the disclosure, availability or accessibility of which is prescribed by an act of law for the benefit of the general public. This means that even personal data may be data accessible on public interest grounds.

Aligned with the Fundamental Law, the **data principle** rather than the document principle is **enforced** in the conceptual system of the Privacy Act. This means that the Privacy Act regulates access not to documents but to data of public interest and data accessible on public interest grounds. Any given document may contain different kinds of data (data of public interest, data accessible on public interest grounds, personal data, business secret, other protected data), hence access to data of public interest and data accessible on public interest grounds is enforced not with respect to a document, but with respect to the data of public interest and data accessible on public interest grounds in the document. Consequently, if the right to access data of public interest and data accessible on public interest grounds is exercised the data are the subject matter of the basic right.

2. Open and closed sessions

Section 46 of the Local Government Act provides for the openness of the sessions of the body of representatives and the conditions of holding closed sessions. Section 2² of the Local Government Act declares the **openness of the sessions of the body of representatives as a principle**, which is confirmed by the legislator in Section 46(1)³ of the Local Government Act. Openness means participation in the sessions of the body of representatives and the possibility of access to the data of the protocol drafted on the sessions. Consequently, the local government office which fails to adequately inform citizens of the sessions of the body of representatives also bars those concerned from exercising their right to control by citizens and to have access to data of public interest.

Section 46(2)⁴ of the Local Government Act provides for the exceptional cases when closed sessions must be held and the conditions of holding closed sessions upon the request of the person concerned, or the consideration of the body of representatives.

² Local Government Act Section 2(1) Local governance is the right of the community of the citizens of the settlement and of the county, in the course of which the citizen’s sense of responsibility is enforced and creative cooperation unfolds within the local community;

(2) The local government expresses and implements local public will in local public affairs democratically, creating broad publicity.

³ Local Government Act Section 46(1) The session of the body of representatives shall be open.

⁴ Local Government Act, Section 46(2) The body of representatives

In the course of the operation of the body of representatives access to data of public interest and the right to the protection of personal data must be equally guaranteed, hence the Local Government Act specifies stringent rules for holding closed sessions: on the one hand, a closed session may only be held in exceptional cases, on the other hand, the Local Government Act specifies the mandatory and optional cases of holding a closed session. **Section 46(2) a)⁵ of the Local Government Act** contains the mandatory, non-optional cases of closed sessions, namely the types of cases when a closed session is called for by the force of the law.

The Local Government Act includes the **cases of the municipal authority** in this category. Although the law does not define the precise concept of an administrative case of municipal authority, it designates the bodies that can adopt municipal decisions. Pursuant to Section 41(2) of the first sentence of the Local Government Act, the body of representatives and its organs perform the tasks of local government. The second sentence of the same provision gives an itemised list of the organs of the body of representatives: the mayor, the senior mayor, the chair of the county assembly, the committees of the body of representatives, the body of the partial local government, the mayor's office, the office of the county government, the joint local government office, the municipal notary and the association. Paragraph (3) of the section of the Local Government Act referred to⁶ accurately sets forth the bodies, which may bring municipal decisions pursuant to this provision, while paragraph (4)⁷ provides for the transfer of the powers of the body of representatives. Pursuant to Section 53(1) of the Local Government Act, the powers transferred by the body of representatives must be listed in the decree of the body of representatives on its rules of organisation and operation.

3. Cases of municipal authority assigned to the body of representatives or its committee

Based on the above, certain individual cases of the municipal authority⁸ delegated or assigned to the body of representatives or its committee are among the cases, which limit the openness

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- a) shall hold a closed session in the case of procedures related to cases of municipal authority, conflict of interest, unworthiness, decoration, imposing a disciplinary penalty or procedures related to statement of financial interests;
 - b) shall hold a closed session upon the request of the person concerned when discussing elections, appointments, dismissals, issuing leadership assignments or their withdrawal, launching disciplinary procedures and personnel cases requiring a statement;
 - c) may order a closed session in case of providing for its assets and when specifying the conditions of a tender issued by it when discussing the tender, if an open discussion would infringe upon the business interests of the local government or another concerned party.

⁵ Local Government Act, Section 46(2) The body of representatives shall

- a) hold a closed session in the case of procedures related to cases of municipal authority, conflict of interest, unworthiness, decoration, the imposition of a disciplinary penalty or procedures related to statement of financial interests.

⁶ Local Government Act, Section 41(3) Municipal decisions may be made by the body of representatives, the local referendum and based on the authorisation granted by the body of representatives, the committee of the body of representatives, the body of the partial local government, the association, the mayor and the municipal notary.

⁷ Local Government Act, Section 41(4) With the exception specified in this Act, the body of representatives may transfer its powers to the mayor, its committee, the body of the partial local government, the municipal notary and the association. It may issue instructions for the exercise of such powers and it may withdraw those powers.

⁸ Section 3(1) of Act LXXVIII of 1993 concerning certain rules applicable to the leasehold of housing and premises and their alienation. A contract may be concluded for housing that is property of the local government

of the sessions of the body of representatives and of its committees as indicated under Section 46(2) a) of the Local Government Act, because in the course of the evaluation and discussion of these cases, the decision-making body processes special sensitive personal data (primarily related to social and financial situation or health status).

Leasehold cases

One of the categories of the individual cases of municipal authority within the powers of the body of representatives include the leasehold cases, which can be of several types pursuant to Section 34(1) of Act LXXVIII of 1993 on Certain Rules concerning the Leasehold and Alienation of Housing and Premises. In view of this, leasing municipal housing may be done

- on the basis of social situation,
- according to the cost principle, or
- on a market basis.

In all three cases, the owner which is the local government must set forth the detailed rules of letting in a decree (Annex 2 to the Housing Act specifies the mandatory content of the municipal decree on leasehold and alienation).

Based on a review of the documents published by individual local governments concerning the letting of municipal housing accessible through the internet, it can be established that the owner local governments select the tenants of the municipal tenements through a publicly announced tendering procedure in every case whether the evaluation is done on the basis of social situation, according to the cost principle or on a market basis. In all three cases, applicants need to fill in a tender datasheet on which applicants need to state, in addition to their and their relatives' personal data, the data required to calculate per capita income as well as their financial assets and their housing situation.

The Authority is of the view that in such cases with regard to the openness of the session of the municipal body making the decision, the provisions of Section 46(2) a) of the Local Government Act restricting openness should apply. With regard to the practical implementation of the cases of the municipal authority to be discussed at the closed session of the body of representatives/ committee, the Authority recommends that the submission be drafted on the basis of the individual application submitted, which in view of the principle limiting the purpose of data processing, containing the data and information indispensable for decision-making. According to the Authority, in view of Section 46(3) of the Local Government Act, the submission drafted in this way may be distributed only to those participating in the closed session until the decision is made.

According to the consistent position of the Authority, in the course of anonymising the decisions made in closed session and when evaluating data requests aimed at learning these data, the provisions and criteria limiting access to data, i.e. the obligation to protect personal data, must be taken into account.

Pursuant to Section 1(14) of Act CXCV of 2011 on Public Finances, “*budgetary support means financial support granted from a central sub-system of public finance with the exception of the financial funds of social insurance without a counter-value excluding*”:

(hereinafter: municipal housing) in accordance with the conditions specified by the owner local government in its decree enacted within the frame of the law (hereinafter: municipal decree).

- a) *donations, aids, offerings,*
- b) *support to parties and party foundations, support for costs of campaigns for the election of members of Parliament,*
- c) *scholarships to pupils and students,*
- d) *financial rewards granted in relation to decorations,*
- e) *financial benefits granted to disabled and severely mobility impaired persons in view of their life situation,*
- f) *cash and in-kind welfare and child protection benefits according to the Act on Social Administration and Welfare Benefits and the Act on the Protection of Children and Social Services Administration.*
- g) *support for training to facilitate employment, job seekers' benefits, wage guarantee support according to the Act on the Facilitation of Employment and benefits to the unemployed, and support that may be granted to individuals specified in the decree concerning employment support,*
- h) *family allowances, benefits below the age limit, welfare support supplementing or substituting for income, the reimbursement of costs related to supplementary leave due to fathers and support for energy use provided on the basis of legal regulation,*
- i) *support for the general operation and sectoral tasks of local governments,*
- j) *support for public employment,*
- k) *support for fare based on welfare policy,*
- l) *support in the case of force majeure,*
- m) *support for education, which may be provided in neighbouring states”.*

Pursuant to the provision of the law referred to, the natural persons who may rent housing held by the local government in view of their social situation on a welfare basis cannot be regarded as persons in a business relationship with the local government, thus in view of the fact that they use public property, **their data other than their name and personal data related to the fact of the leasehold relationship** do not qualify as public data accessible on the grounds of public interest.

In the case of individuals and other organisations or persons pursuing other economic activities who are tenants of a property in public ownership **on a market or business basis**, the provisions of the Privacy Act referred to above shall apply, hence **in addition to their names and their legal relationship, their other data related to the public property and the leasehold**, including any arrears on their rent, shall qualify as public data accessible on the grounds of public interest.

According to the position of the Authority, the fact itself that somebody paid rent belatedly but subsequently honoured his obligations does not qualify as a public data affecting public property subsequently, except because of this he incurs or has incurred a payment obligation, which qualifies as public money or public revenue. [NAIH/2017/2138/V.]

Natural person data subjects must be informed of forwarding their data and the legal basis for doing so when concluding the contract or, if it has not taken place yet, prior to the issue of the data, and it is necessary to provide for such information in a local municipal decree.

Welfare cases

With respect to access to data included in the decisions of the body of representatives on welfare cases, the provisions of Act CL of 2016 on the Code of General Administrative Procedure (hereinafter: Procedures Act) and Act III of 1993 on Welfare Administration and Welfare Benefits (hereinafter: Welfare Act) also have to be taken into account.

Section 4/A of the Welfare Act lists the bodies of welfare administration to which it assigns tasks and powers with regard to these cases. The body of representatives of the local government⁹ is in the first place of the list referred to.

Pursuant to Section 18 of the Welfare Act, the municipal executive shall keep records with a view to establishing entitlement to welfare benefits under the responsibilities and powers of the body of representatives of the local government providing, maintaining and terminating these benefits.

Section 45 of the Welfare Act provides for the **municipal support**, the awarding of which is included by the Welfare Act among the responsibilities of the body of representatives. Section 42 of the Local Government Act, however, enables (does not prohibit) the transfer of these powers.

Pursuant to the position taken by the Authority in an earlier case, the bodies of the local government have to prevent not only access to the submissions and protocols of the closed session, but also the infringement of interests related to the protection of personal data and other protected interests by the bodies of the local government themselves in accordance with the Privacy Act with regard to personal data.

Controllers need to implement the protection of personal data in accordance with the provisions of Regulation (EU) 2016/579 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (GDPR). Inter alia, it is necessary to ensure that the processing of personal data take place for a specified unambiguous and legal purpose and for the time period required to achieve the predetermined purpose. Data processing must be done in such a way applying the appropriate technical and organisational measures that will guarantee adequate security for the personal data processed.¹⁰

Based on the above, the consistent position of the Authority is that the members of the body of representatives may access the data of the welfare records, only if and to the extent decision on awarding the benefit in question is made by the body of representatives within its powers, and the representative personally exercises his decision-making powers as a member of the body.

A member of the body of representatives may have access to the personal data (the decisions and the documents of the procedure) in procedures related to welfare benefits under transferred powers, if the representative is an elected member of the committee or other body authorised to

⁹ Welfare Act, Section 4/A (1) The welfare responsibilities and powers specified in this act shall be exercised by

- a) **the body of representatives of the local government,**
- b) the municipal notary,
- c) the government office of the capital city and the county, the district office (capital city district office),
- d) the welfare authority, or
- e) the minister in charge of welfare and pension policy.

¹⁰ GDPR Article 5(1)

make decisions concerning the evaluation of an appeal submitted under a legal remedy procedure.

A member of the body of representatives may receive information containing personal data about the beneficiary, the amount or the extent of the support awarded by the mayor or the municipal notary under transferred powers only in a closed session and he may only access the data which are indispensable for the discharge of his tasks as a representative.

In view of the reasons for holding a closed session, i.e. the protection of personal data, those authorised to have access to the documents and protocol of the closed sessions may not provide information on the content of the documents and the personal data included in them to unauthorised persons, they may not forward the data they had access to, and they may not allow unauthorised person to inspect them.

From the viewpoint of data protection, the correct procedure is when the submissions produced for the closed session, the information referred to in the letter or the protocols of the closed session are returned by the participants of the session of the body of representatives or committee after the decision of merit is made.

The right of the municipal representative to access data related to the discharge of his responsibilities

Pursuant to Section 32 d) of the Local Government Act, the *municipal representative may participate in any open or closed session of any committee of the body of representatives with the right to be consulted. He may recommend the discussion of a case subject to the responsibilities of the committee to the chairman of the committee, which case will have to be submitted to the next session of the committee and the municipal representative has to be invited for its discussion. He may initiate a review of any decision brought by a committee of the body of representatives, the mayor, the body of the partial local government, the municipal notary in a municipal case transferred by the body of representatives.*

According to the position of the Authority, the right of the representative to access data does not in itself extend to requesting personal data from the welfare records. In practice, the representative may exercise this right in the field of welfare cases upon the request of the data subject, the rejected applicant, or on the basis of information provided by the mayor on the decisions, i.e. the data subject may authorise access to the data, or the data subject may make the data available to the representative with a view to the positive evaluation of his application, or the body of representatives itself may decide on the initiation of a review.

Beyond all of the above, it is unambiguous that the data to which the representative requires access are not data of public interest and are not public data on grounds of public interest, but they are personal or, in certain cases, special personal data to be protected.

This means that the municipal representative may have access to the data processed by the mayor or the municipal notary in the welfare records (application, decision, enclosed documents, etc.) only if an appeal is lodged with the body of representatives or its committee against the mayor's decision and the representative will have the right and obligation to evaluate the appeal and to make the decision. In other cases there is no legal mode of making the data accessible or forwarding them.

4. Disclosure of the data of the closed session

Pursuant to Section 46(3) of the Local Government Act, the members of the body of representatives, the deputy mayor elected not from the members of the body of representatives and the municipal notary, the deputy or deputies of the municipal notary and, if invited, the staff member of the mayor's office or the joint municipal office, the data subject and the expert may participate in the closed session. The chairman of the self-government of an ethnic minority may participate in the closed session only when an agenda item affecting the ethnic minority represented by him is discussed. An act of law or municipal decree may stipulate the cases when the invitation of the data subject is mandatory. Obviously, *the participants of the session have access to the submissions* of the closed session and, if they can be present only when certain agenda items are discussed, to the submissions and protocol of the given agenda item.

Pursuant to the various provisions of the Local Government Act, the participants of the session of the body of representatives, the members of the committees of the body of representatives, the staff members of the mayor's office working on the submission and drafting the protocol, and following the session of the body of representatives (committee), the head of the government office performing a compliance audit are entitled to have access to the submissions and the content of the protocol of the closed sessions. In the case of such persons exceeding the "necessary extent" does not arise.

In view of the principle of purpose limitation, it is expedient to prepare the documents to be submitted to closed sessions in as many copies as are indispensable for informing those participating in the decision-making (members of the body of representatives and of the committees, those invited to the session or for the given agenda item with a right to be consulted, etc.), and the government office, in addition to the copies for the archives. The solution, according to which the individual copies are numbered and the recipient of each copy is registered, is also in line with the Privacy Act.

5. The destiny of the submissions to the closed session after the closed session

In view of the reasons for holding a close session those entitled to have access to the document of the closed sessions may not provide information on their content to unauthorised persons, they may not forward these documents to them and they may not allow their inspection.

From the viewpoint of data protection, the correct practice is, if the participants of the session of the body of representatives or of the committee return the submissions drafted for the closed sessions after the decision of merit is made. They, however, cannot be obligated to do so, they are free to weigh whether they would comply with the request. It is expected of the person chairing the session to warn the participants of the session to handle the information on the case confidentially and their related obligation of confidentiality.

With regard to access to the protocol of the closed session and the decisions made at the closed session, Section 52(3) of the Local Government Act¹¹ specifies that the citizens may inspect neither the submissions to the closed session, nor the protocol of the closed session.

Consequently, **the submissions to and the protocol of the closed session need not be published** in publication unit II.8 of the general publication schemes in Annex 1 to the Privacy Act¹², because their publication is restricted by the above provision of the Local Government act. The last two sentences of Section 52(3) of the Local Government Act – “[...] *The possibility to access public data of public interest and public data accessible on the grounds of public interest must be ensured also when a closed session is held. The decision of the body of representatives brought at a closed session is also public*” must be underlined. It follows that with a view to ensuring the transparency of the operation of the body of representatives/committee, the **anonymised decisions of the closed session** must be published, they must be made accessible to anyone. The controller must ensure access to public data of the public interest and public data accessible on grounds of public interest included in the documents of the closed session by meeting the expressed request for this with a view to ensuring the transparency of the collegiate operation.

Decision about how long submissions to the closed session and related other documents can and should be retained after the closed session it not to be made separately with respect to the individual submissions, but by the types of cases in the file management rules of the local government and its bodies and its archiving plan. The deletion dates for the individual case types have to be determined in accordance with the provisions of Act LXVI of 1995 on Public Documents, Public Archives and the Protection of Materials in Private Archives, and Government Decree 335/2005 (XII. 29) Korm. on the general requirements of file management by bodies performing public tasks.

According to the position of the Authority, the decision made at closed sessions of the body of representatives are data of public interest, but access to their content is limited, provided that they include personal data.

The Authority repeatedly calls attention to the fact that in the case of decisions made by the owners (local governments) with respect to **letting municipal housing, the name of the natural person tenant is a public data accessible on grounds of public interest**, but his personal identification data and the financial, social and health data (other protected data) serving as the basis of the decision are not, hence they need to be made illegible when publishing the decisions of the closed session or when providing access to these decisions through data requests in the public interest.

¹¹ Section 52(3) of the Local Government Act – With the exception of the closed session, citizens may inspect the submissions to the body of representatives and the protocols of its sessions. The possibility to access public data of public interest and public data accessible on the grounds of public interest must be ensured also when a closed session is held. The decision of the body of representatives brought at a closed session is also public.

¹² Privacy Act, General publication schemes II/8. – With respect to collegiate organs, the decision-making process, means of participation by the general public (providing opinion), procedural rules, place and time of meetings of the collegiate organ, publicity, decisions, minutes or summaries of meetings, information and voting on the collegiate organ, **if this is not restricted by legal regulation**.

Decisions made **in welfare cases** can be accessed in accordance with Section 33(5) of the Welfare Act¹³ and their **anonymisation** needs to be carried out with particular care.

6. Anonymisation

In the context of interpreting the law in relation to anonymisation, the Authority underlines that the open or closed character of the session of the collegiate body determines the accessibility of the submissions, the decisions and the protocol made. The submissions and statements made at open sessions of the body of representatives or of the committee and the events taking place there qualify as data of public interest (or public data accessible on grounds of public interest), hence as a major rule the relevant data and information can be accessed freely by anyone without limitation and they can be disseminated. The openness of the sessions of the body of representatives serves precisely this purpose. It does not require any special demonstration that if anyone participating in the open session of the body of representatives as a member of the audience can learn of what was said there and of the votes cast by the representatives, he may take notes and make recordings of them, which he may subsequently disseminate freely, then anyone has the right to have access to the contents of the audio (eventually video) recordings of the session.¹⁴

In the position of the Constitutional Court and of the Authority, in view of its practice to date, if the session of the collegiate body is open, the submissions, the decisions made, the voting ratios and the protocol qualify as public data as a main rule. At the same time, in view of the enforcement of the data principle, it may happen that the documents of the open session include data, which are not data of public interest and are not public data accessible on grounds of public interest. Naturally, in such a case all the protected data must be rendered illegible in all of the documents concerned. The fact that some data protected or to be protected are disclosed in a public session does not mean in itself that such data become public data accessible on grounds of public interest merely because of this circumstance. **The obligation to protect the data holds despite and besides publication.** The Authority emphasises in every case that the protection of privacy, private secrets and personality rights must be taken into account and fully ensured at open sessions, as well as in the course of their preparation and when drafting their protocols.

Section 52(3) of the Local Government Act is unambiguous: the possibility to access data of public interest and public data accessible on grounds of public interest in accordance with a separate law (Privacy Act) must be provided. The Local Government Act does not stipulate mandatory publication with respect to the data and documents of the closed session, it only provides for the publication of the decision made in the closed session and of the need to ensure the publication of the data of public interest and public data accessible on grounds of public interest of the closed session. Hence, if anyone submits a data request aimed at accessing such data, it cannot be rejected on the grounds that the given issue was discussed and the decision was made in closed sessions and because of this the data cannot be accessed.

¹³ Welfare Act Section 33(5) – Unless publication of the decision is restricted or excluded by law, the final decision not including personal data and protected data and the order declaring the decision of the first instance null and void and instructing the authority that adopted the decision in the first instance to conduct a new procedure may be accessed by anyone without limitation.

¹⁴ Constitutional Court Decision 57/2000 (XII. 19) AB

7. Statements of the data subjects of the sessions in the case of closed sessions

The Local Government Act specifies the range of those participating in closed sessions in its Section 46(3)¹⁵, which provision is applicable to the sessions of both the body of representatives and the committees.

With respect to defining the “*data subject*” participating in the closed session, Section 46(2) b) of the Local Government Act lists the types of cases, whose data subject must be invited to the closed session provided that the governing legal regulations so provide.

The same data subject **may request a closed session pursuant to Section 46(2) b) of the Local Government Act** in the event of discussing an election, appointment, dismissal, issuing or withdrawing a leadership assignment, when initiating a disciplinary procedure and a personnel case requiring a statement affecting him.

Based on the Privacy Act and the decisions of the Constitutional Court related to the protection of personal data, according to the content of the right to informational self-determination, everybody provides for the disclosure and use of their personal data. Section 46(2) b) of the Local Government Act enforces this right through stating that the data subject concerned, aware of which of his personal data may be disclosed at the session of the body of representatives or the committee, may request the body of representatives or the committee to discuss the agenda item affecting him in a closed session.

In the case of several data subjects, the session may be held in public, if they all consent to holding an open session with statements in one voice. If the data subjects are not requested to make a statement, or none of them makes a statement, or even a single one among the several data subjects requests to hold a close session, the body of representatives must order a closed session.¹⁶

Pursuant to Section 4(2) of the Privacy Act “*only personal data that is essential and suitable for achieving the purpose of processing may be processed. Personal data may be processed only to the extent and for the period of time necessary to achieve its purpose*”. The requirement of data security [Privacy Act Section 4(4a)¹⁷] requires the controller to take technical and organisational measures that guarantee the appropriate security of personal data. Thus, for instance, documents to be submitted to the closed session are only made in as many copies as is required for informing the participants involved in decision-making, distributing them on site, and the documents required for decision-making are returned to the keeper of the protocol or to the municipal notary, who performs the administrative tasks after making the decision of merit.

¹⁵ Local Government Act Section 46(3) - The members of the body of representatives, the deputy mayor elected not from the members of the body of representatives and the municipal notary, the deputy or deputies of the municipal notary and, if invited, the staff member of the mayor’s office or the joint municipal office, the data subject and the expert may participate in the closed session. The chairman of the self-government of an ethnic minority may participate in the closed session only when an agenda item affecting the ethnic minority represented by him is discussed. An act of law or municipal decree may stipulate the cases when the invitation of the data subject is mandatory.

¹⁶ ABI position 1926/H/2004 , ABI position 2434/K/2007-3

¹⁷ Privacy Act Section 4(4a) – During processing, appropriate technical or organisational measures shall be applied to ensure the appropriate security of personal data, including in particular protection against unauthorised or unlawful processing, accident or loss, and destruction or damage.

The Authority regards the solution acceptable according to which the body of representatives hears every data subject one by one in a closed session prior to making the decision. After this, the body pursues its deliberations and makes its decision in a closed session (without the presence of the data subject), of which the data subjects must be informed.

8. Disposal over the municipal assets

In the case of disposal over municipal assets and in the cases listed under **Section 46(2) c) of the Local Government Act** – if an open session would infringe upon the business interests of the local government or another stakeholder, the body of representatives may order a closed session – exercising its power to weigh the matter.

In the case of decision-making concerning municipal assets, the committee(s) of the body of representatives (may) have the right to provide their opinion or make recommendations.

The Authority does not support the practice, which may result in two contradictory determinations of the publicity of the data: the committee of the local government discusses the submission concerning the assets in an open session, at the same time, the body of representatives orders a closed session to discuss the same agenda. In order to prevent the occurrence of such cases, the municipal notary supervising and in many cases performing the preparatory functions for the sessions, being “*the guardian of compliance with the law*”, must signal to the bodies if he perceives any infringement or the threat thereof in the course of discharging their responsibilities. As a professional leader, the municipal notary must ensure that there are no situations in violation of the law in the course of the operation of the body of representatives and its committees and that the decision be made in compliance with the law in every case.

In relation to municipal assets, the Authority underlines that pursuant to Article 38(1) of the Fundamental Law, the property of the state and the local governments constitutes national assets, while Article 39 raises the requirement of transparency in managing public finances and the qualification of data concerning public funds and the national assets as data of public interest to a constitutional rank.¹⁸

Pursuant to Section 1(2) of the Act on National Assets, the following shall be considered as national assets:

- a) things exclusively owned by the state or the local government,*
- b) the thing owned by the state or the local government not subject to point a),*
- c) financial assets owned by the state or the local government, and shareholdings due to the state or the local government,*
- d) any right or title having a pecuniary value due to the state or the local government, which legal regulation names as a right of pecuniary value, [...].*

In line with the Fundamental Law, Section 7 of the National Assets Act declares that **the fundamental purpose of the national assets is to ensure the discharge of public tasks**. National assets have to be managed in a responsible manner in accordance to their purpose. The

¹⁸ Article 39(2) of the Fundamental Law – Every organisation managing public funds shall be obliged to publicly account for its management of public funds. Public funds and national assets shall be managed according to the principles of transparency and the purity of public life. **Data relating to public funds and national assets shall be data of public interest.**

task of national asset management is to operate national assets in accordance with their purpose, adjusted load-bearing capacity of the state or the local government at all times, primarily as needed to discharge public tasks and to satisfy social needs at all times based on uniform principles, transparently, efficiently and in a cost-efficient manner to safeguard their value, to protect their condition, to use them so as to increase their value, to utilise and augment them and to alienate the assets that become superfluous from the viewpoint of discharging the tasks of the state or the local government.

In addition, the Authority also calls attention to the fact that the Constitutional Court interpreted the provisions of the Fundamental Law and the relevant legal regulations pertaining to the transparency of public funds in several cases. In its Decision 21/2013 (VII. 19) AB, the Constitutional Court stated that the purpose of the Fundamental Law qualifying information pertaining to public funds and the national assets as data of public interest is **to enforce the principle of transparency and the integrity of public life**. *“Taking the provisions of the National Creed into account, this principle governs not only the processing of data related to public funds and the national assets, but also data related to the discharge of public tasks in general.”* Transparency and integrity of public life are requirements of the Fundamental Law related to the entire operation of a democratic state serving its citizens, generally related to the discharge of public tasks, and inter alia, the fundamental right to access and disseminate data of public interest is called to enforce it.

In the context of the possibility of discussing submissions related to municipal assets in closed session, the Authority underlines **the importance of ensuring a wide range of publicity**, which is also highlighted in Decision Köf.5.003/2012/9. of the Municipal Council of the Supreme Court: *“[...] 2. The primary scene of exercising the right to self-government and to bring local government decisions is the body of representatives of the local government. Pursuant to Section 2(2) of the Local Government Act, local self-governance expresses and implements the local public will in local public affairs democratically, creating broad publicity.”*

Furthermore, the Authority calls attention to Section 27(3) of the Privacy Act, which also stipulates that *“(3) as public data accessible on grounds of public interest the central and the local government budget, the data related to the use of European Union support, any transfer or benefit affecting the budget, the **management**, possession, use and **utilisation of state and municipal assets, disposal over such assets or encumbrance of such assets or the acquisition of any right affecting such assets in the data**, whose accessibility or publication is required by separate law for reasons of public interest **do not qualify as business secrets. Publication, however, may not result in access to data** – thus in particular proprietary information – **access to which would cause disproportionate damage from the viewpoint of pursuing business activities**, provided that this does not prevent the possibility of accessing public data accessible on grounds of public interest”*.

Pursuant to the provision of the Privacy Act referred to above, the local government concerned and the natural person, **legal entity**, or organisation that is not a legal entity, or who or whatever **enters into a financial or business relationship with the local government must, if so requested, provide information to anyone on the public data accessible on grounds of public interest pursuant to paragraph (3) related to this legal relationship**. Consequently, the data related to adopting decisions related to municipal assets are public data accessible on grounds of public interest.

With respect to the issues under discussion, it is necessary to clarify a range of protected data and information generated in the course of the management of municipal assets. Section 1 of Act LIV of 2018 on the Protection of Trade Secrets (hereinafter: Trade Secrets Act) defines the concept of trade secret: “(1) *Trade secret means a fact, information, other data and an assembly of the foregoing, connected to an economic activity, which is secret in the sense that it is not, as a body or as the assembly of its components, generally known or readily accessible to persons dealing with the affected economic activity and therefore it has pecuniary value, and which is subject to steps made with the care that is generally expected under the given circumstances, by the person lawfully in control of the information, to keep it secret.* (2) *Protected knowledge (know-how) means a technical, economic or organisational knowledge, solution, experience or the assembly of the foregoing, classified as trade secret and recorded in an identifiable manner.*”

The Authority summarised its position concerning the collision of trade secrets and the freedom of information in its recommendation issued under No. NAIH/2016/1911/V. Accordingly, the facts, information, solutions or data, which qualify as trade secrets, on the basis of which a business organisation functioning within the framework of market competition builds its corporate, economic plans and strategy are of major importance for such a company as it brings its decisions on the basis of such information, which will ensure its place in the market, thus disclosure of such information may result in it being excluded from the market.¹⁹ As the Constitutional Court also established in its decision 165/2011 (XII. 20) AB “*transborder economic relations, but at least the context of the single European market, the fact that companies within the media sector also bring their economic decisions within European market dimensions lend a broader perspective to the significance of trade secrets. The Court of the European Union accepted the protection of trade secrets as a basic principle in its practice to date*”.²⁰

Resolving the conflict between trade secrets and the freedom of information, Section 27(3) of the Privacy Act, with a view to the transparency in the management of public funds, qualifies the “quasi” trade secrets that are data related to the use of European Union funds, to benefits and allowances involving the budget, to the management, possession, use, utilisation and the disposal and encumbrance of central and local government assets and the acquisition of any right in connection with such assets as data accessible on public interest grounds.

Naturally, any given document (such as a contract or quotation) may include data, which do not belong under any of the categories of data according to Section 27(3) of the Privacy Act (such as a priced budget), or which were qualified as trade secrets by the party concluding the contract with the local government. If the discloser has taken the necessary legal measures (e.g. expressed marking of the parts concerning the trade secret and the detailed explanation of the reasons for protection) to protect the trade secret, the local government and the contracting party may not disclose it without authorisation.

With a view to transparency, the Authority recommends that the bodies of the local government avoid, if possible, holding closed sessions when discussing matters related to municipal assets.

¹⁹ Constitutional Court decision 165/2011 (XII. 20) AB

²⁰ Section 28 of the judgment of 24 June 1986 in case C-53/85 AKZO Chemie and AKZO Chemie UK v Commission; Section 37 of the judgment of 19 May 1994 in case C 36/82 SEP v Commission; Section 49 of the judgment of 14 February 2008 in case C-450/06 Varec SA v State of Belgium.

9. Accessibility and mandatory publication of documents related to or generated in the course of the operation of the body of representatives

In addition to the provisions of the Local Government Act ensuring publication, publication unit II/8 of the general publication scheme accurately specifies the documents and data whose publication is mandatory: “*With respect to collegiate organs, the decision-making process, means of participation by the general public (providing opinion), procedural rules, place and time of meetings of the collegiate organ, publicity, decisions, minutes or summaries of meetings, information on voting in the collegiate organ, if this is not restricted by an act*”:

- a) *the decision-making process, means of participation by the general public (providing opinion), procedural rules;*
Data concerning the activities and the operation of the body discharging public tasks constitute data of public interest pursuant to Section 3(5) of the Privacy Act and Section 51(2) of the Local Government Act orders the publication of municipal decrees.
- b) *place, time and openness of sessions of the collegiate organ (body of representatives, committee)*
[the invitations to these sessions contain these data];
Pursuant to Section 3(5) of the Privacy Act, these data qualify as data of public interest, but the Local Government Act does not provide for the publication of the invitation to the session of the collegiate body. According to the position taken by the Authority however, the case when citizens do not get appropriate information on the collegiate sessions can be regarded as a case of limiting transparency, because in this way they are unable to exercise their fundamental right to access data of public interest.
- c) *decisions;*
According to Section 3(5) of the Privacy Act, decisions are data of public interest. The provisions of Section 51(2)-(3) of the Local Government Act shall apply to the publication of normative resolutions, similarly to the publication of municipal decrees. Individual decisions, which may also contain other protected data in addition to the personal data and are brought in closed session must be published in an anonymised form.
- d) *protocols, minutes, summaries of sessions;*
Pursuant to Section 3(5) of the Privacy Act, the protocols, minutes and summaries of collegiate sessions are data of public interest, Section 52(3) of the Local Government Act however contains a limitation: the protocol of the closed session is not public, while the decision brought at the closed session is.
- e) *data of the voting by the collegiate organ;*
Section 52(1) i)-j) and l) of the Local Government Act specifies the number of those participating in decision-making, the name of the representative excluded from the decision-making and the reasons for the exclusion and the numerical result of the voting as mandatory elements of the content of the protocol drafted on the session. With reference to point d), similarly to the publication of the protocol, the data included in the protocol as mandatory elements of content also qualify as public data.

I trust that the above information provides appropriate guidance to local governments concerning the issues affecting the freedom of information arising in the course of their operation.

Naturally, the Authority continues to be readily available to local governments in cases affecting the protection of personal data and the accessibility of data of public interest.

Budapest, 13 November 2019