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Free Access to Information in Bosnia and Herzegovina

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Uglješa Vuković

Small changes, big effects

Challenges in the legislative regulation of free access to information in BiH

Bosnia and Herzegovina adopted the Law on Free Access to Information (LFAI) in 2000, while its Entities brought their own laws a year later, and there is currently a total of three laws regulating this field (Law on Free Access to Information of Bosnia and Herzegovina, Law on Free Access to Information of Federation of Bosnia and Herzegovina, Law on Free Access to Information of the Republic of Srpska). At the time of enactment of the Laws, the awareness of making information of public character freely available was very underdeveloped, as evidenced by the circumstances that followed enactment of the law. Namely, the laws were enacted through the influence of so-called international community, which was a significant political factor in the early post-conflict years during the reconstruction of the country. Yet and very often international representatives did not understand the political context nor the new laws were compatible enough with the existing legislation. Therefore, the acts themselves were not the result of any local initiative or a political process from within the country, nor the initiative for passing the acts came from the civil society sector.


The acts were enacted due to pressure from the international community and mostly foreign intellect and international organizations stood behind it. The former High Representative Carlos Vestendorp ordered in 1999 to the local authorities to bring the Law on Free Access to Information in accordance with relevant international standards. The very text of the Law was prepared by leading international experts, in cooperation with local experts, and at the time of its adoption the Law was considered to be quite liberal, and Bosnia and Herzegovina was the first country in the region in which a special law regulated access to information. The extent to which the Law was misunderstood was demonstrated by the fact that government representatives did not offer any resistance to its adoption even considering the Law was a legal remedy that would enable them to successfully practice secrecy of government.¹ Some of the leading politicians thought that with the help of this Law, they would “get rid of” the annoying journalists by the newly prescribed deadline of fifteen days upon which public bodies were obliged to respond. Described circumstances affected the implementation of the FOI laws, which leads us to an interesting finding: it is more than obvious that it is not opportune to adopt a law which is not being the product of internal political processes. In this particular case, not only that those in power at the

time did not understand what the Law on Free Access to Information regulated, but also the representatives of civil society and the current domestic political processes did not affect the content of the Law. Again, on the other hand, thanks to the decision of the then High Representative, Bosnia and Herzegovina got a significant legislation that affected the democratization of the political process.

Qualitative changes in the legal framework

In the further development of situation, FOI laws were amended a total of four times at the state level and once at the FB&H level, bringing significant qualitative changes that improved the process of liberalization of access to information, while at the level of the Republic of Srpska the Law has never been amended. Although higher quality legal text does not automatically guarantee greater achievements in the process of implementation, the legal solutions being better defined provide greater legal certainty to the applicants for information and present the basic precondition for establishment of the principle of open and public government. The amendments to the Law at the state and FB&H level were related primarily to a substantial change, defining that the public bodies upon the request for access to information have to make decisions in the form of a legal decision,

¹ Džihana, A. (2006:18), *Monitoring Democratic Development in Bosnia and Herzegovina: Accessibility Index of Public Institutions, Organizations and Agencies*, Sarajevo, http://www.media.ba/mcsonline/files/shared/Monitoring_Bos_170306.pdf - accessed on 22 August 2015.



rather than in the very informal form of a letter, as previously planned. In fact, it turns out in practice that if the public entities are ordered to make decisions in the form of a letter, it creates legal confusion and leaves more space to voluntary and wrong interpretations to the courts competent for administrative disputes because it happens that the courts refuse to act on the complaint saying that such letter is not a decision or administrative act and therefore administrative disputes cannot be conducted in case when the applicant considers to be unlawfully denied access to information.

Attitude of legal theory is that any act which decides on someone's right or duty has to be considered as an administrative act,² and in case of requests for information it is undoubtedly decided on someone's rights. The fact that the laws at the state and FB&H levels were amended in a way that a prescribed form of the response to the information access request is a decision and not a letter was of great importance to the non-governmental organizations addressing this area as practitioners because it guarantees them the conduct of administrative disputes and greater legal protection, both in the courts and the relevant authorities in the appeal procedure. The second most significant amendment that took place in the legal framework is the introduction of penal and inspection provisions to the public bodies in case of violation of the provisions of the LFAI. This amendment took place only at

the state level, and the body appointed to be competent for this procedure is the Administrative Inspection at the Ministry of Justice. Yet, the available data on the inspections conducted, together with the statements of the Administrative Inspection about the lack of financial resources and human capacity,³ indicate extremely modest effects in the implementation process so far. Regardless of these obstacles, caused by a lack of institutional capacities, there is a clear reason that the other two laws in the country (RS, FB&H) should also be amended concerning penal and inspection provisions, because in this way the legislator directly impinges on the question of implementation of the law trying to discipline it in a proper and lawful manner.

Government secret sessions and free access to information in RS

It is obvious from the current state of play that the Law on Free Access to Information of the RS is the most deficient, and that the other two laws actually have not been amended over time, which makes it less liberal in comparison to the other two laws in the country. The impression is that this situation significantly affects the overall democratic environment in the Serb Entity. It is interesting that the current RS Government, according to the experiences of journalists,⁴ has been the most closed government so far, and that it very rarely communicates with the public, and when it does it is mostly done through short press releases. The mentioned leaves a very little room for optimism in the context of

the Republic of Srpska regarding freedom of information as it indicates a very striking and obvious lack of political will.

The current paradigm in B&H is based on reactive basis, i.e. the access to information of public importance is predominantly achieved through information access requests, while there are no provisions on proactive transparency that would imply self-initiative publishing of large amount of information under the control of public bodies as simpler and more transparent approach. Also, the B&H legal system does not provide for an independent institution of the Commissioner for Information to decide on all appeals, which is the most common solution in modern legislation for ensuring the independence of the work in an area identified as sensitive since it is decided on information of potentially public character held by the government. Nevertheless, the current legal framework as such is also significant for non-governmental organizations, journalists, and all citizens insisting on the principles of transparency of government institutions. As mentioned above, the LFAI of the RS is not harmonized with the other two laws which made a certain qualitative step forward, and therefore, in order to improve democratic conditions in the smaller B&H Entity, it is inevitable to change the Law in a way to decide on the information access requests in the form of a decision. This would ensure greater legal protection to all applicants for information through practicable and available legal mechanisms providing smooth court decision making, but also any other legal protection because the doubts about the legal nature of the decision on the rights of applicants would no longer exist.

² For more, see Kunić P. (2001:352), *Administrative Law*, Banja Luka.

³ For more, see: <http://www.cin.ba/en/kazne-za-blokadu-javnih-informacija/> - accessed on 23 August, 2015 and Gotoviša E., (2014: 14,15), *Law on Freedom of Access to Information of Bosnia and Herzegovina*, Sarajevo.

⁴ Interviews were conducted with Siniša Vukelić – *Business Portal capital.ba* (editor in chief) and his editorial staff.

Recommendations

- Overall, **the B&H legal framework should experience significant changes by introducing proactive dimension or by establishing an independent institution of the Commissioner for Information.**

In the forthcoming debate on the freedom of information, the standard of proactive transparency has to be seriously discussed, especially related to the categories of information which should proactively be made available in the context of the right to access information. Helen Darbishire, one of the leading experts on freedom of information issues, presented a comprehensive proposal⁵ for information which should be proactively disclosed and that proposed standard includes: institutional information (including regulations and information on powers); organizational information (including information on personnel and their contact details); operational information (public policies, procedures, reports, etc); decisions and acts (including accompanying documents); public services information (including guidelines, forms, etc); budget information; open meetings information; decision-making and public participation information; subsidies information; public procurement information; lists, registers, databases information; publication and price information; appeal and dispute resolution mechanism information;

publication and price information; appeal and dispute resolution mechanism information; information about the right to information (including guidelines on filing a request/appeal and contacting freedom of information officers); minutes of parliamentary sessions; court decisions. New laws on freedom of information have to follow an international consensus on which information in the possession of public institutions should be disclosed proactively.

- The initiation of changes in the Republic of Srpska seems more urgent since it currently has the most deficient law which corresponds to the policy of the current Government that holds its sessions in almost complete secrecy.⁶ It would therefore be more than desirable to initiate changes in the FOI Law of RS by **harmonizing it with the other two laws in the country, especially with the law at the state level through introducing penal and inspection provisions.**

The mentioned legal amendments by which the harmonization with the state law would be achieved do not require any costs, and they would potentially represent a significant step towards the creation of an environment contributing to greater transparency in the work of public bodies. Penal provisions in the form of financial fines applying to both public bodies and civil servants in case of violation of the Law on Free

Access to Information provide greater legal protection since, through them, a legislator directly controls law enforcement.

- The solution which provides for **the establishment of a legal institution of Commissioner** is usually considered to be institutionally demanding and costly, but again it deserves to be seriously considered in the public.

Critics point out that the establishment of the new institution which would only be in charge of the area of access to information is too demanding, expensive and hardly compliant with the complex political system. On the other hand, successful examples from other countries make us to at least take into consideration this establishment of a legal institution of Commissioner, since such a control democratic institution which decides in all appeal processes related to the information access requests and which acts in public significantly contributes to understanding of these sensitive issues and affects the raising of public awareness.

- **The most significant change which should take place as soon as possible refers to the Republic of Srpska level. It is necessary to change the information access request which is in a form of a letter into a form of decision on the information access request**

This change is mostly forgotten in the new advocacy proposals, although it would significantly affect the situation in practice and despite it represents a part of harmonization with the other two laws.

⁵ Helen Darbishire, *Proactive Transparency: The Future of the Right to Information?: A Review of Standards, Challenges and Opportunities* (Washington: World Bank Institute, 2011:21, 22)

⁶ See: <http://www.6yka.com/novost/77945/anketa-buke-pitali-smo-novinare-sta-misle-o-100-dana-vlade-rs.ovo-su-njihovi-odgovori> (accessed on 22 August, 2015)

