

FREEDOM OF ACCESS TO INFORMATION IN BIH

Support to the creation of the BiH National Action Plan within the
framework of Open Government Partnership

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Freedom of access to information in BiH

Background

The right to access information has been recognized in leading international documents, such as *Universal Declaration on Human Rights*, considered to be an integral part of the international law, adopted and proclaimed at the United Nations General Assembly:

„Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.“¹

It is obvious from the quoted article that the right to access information has been recognized as an integral part of the right to freedom of opinion and expression, which indicates that it is established as a fundamental human right. More precisely, at the time of the enactment of the Universal Declaration the right to access information was not understood in all its complexity and importance as today², nor as a special human right, but the quality of the right has been changed over time with the development of political processes in favor of open government. This is confirmed also by the joint declaration of the UN Special

¹ <http://www.un.org/en/documents/udhr/> (date of access 10 November 2014).

² „Although the concept of the right to information, as currently understood, was not yet recognised when the UDHR and ICCPR were adopted, subsequent developments have led to the recognition of this right as being encompassed within the language of international guarantees of the right to freedom of expression, and specifically the rights to seek and receive information and ideas.“ Michael Karanicolas, Toby Mendel, *Entrenching RTI: An analysis of Constitutional Protections of the Right to Information*, Centre for Law and Democracy (CLD) Halifax, 2012, p.2. http://www.rti-rating.org/docs/Const%20Report_final.pdf (date of access 10 November 2014)

Rapporteur, OSCE Representative on Freedom of the Media and the Special Rapporteur of the Organization of American States on Freedom of Expression on access to information and classified data dated 2004.

„The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.“³

Freedom of Access to Information Acts in BiH

The first Freedom of Access to Information Act (FOIA) in BiH was adopted by the Parliamentary Assembly of Bosnia and Herzegovina in 2000, and one year later the entity-level laws were adopted as well. The Act was passed through the influence of representatives of the international community in BiH⁴ who formed the working group consisting of international and domestic experts bent on writing a legal text. The civil sector did not have influence on the enactment of the Freedom of Information Act

³ Quote according to Michael Karanicolas, Toby Mendel, *Entrenching RTI: An analysis of Constitutional Protections of the Right to Information*, Centre for Law and Democracy (CLD) Halifax, 2012, p.3. http://www.rti-rating.org/docs/Const%20Report_final.pdf (date of access 11 November 2014)

⁴ „The Act was passed upon an explicit initiative of the international community representatives in BiH. On 30 July 1999, the High Representative for BiH Carlos Westendorp ordered the BiH authorities to draft Acts on freedom of information in line with the highest international standards in this area. He also stressed that this Act must be drafted under the direct leadership of the OHR and the OSCE Mission to BiH.“, Amer Dzihana, *Monitoring democratic development in Bosnia and Herzegovina/ Index of accessibility of public institutions, organizations and agencies*, Sarajevo 2006.p.18. http://www.media.ba/mcsonline/files/shared/Monitoring_Bos_170306.pdf (date of access 19 November 2014)

(FOIA) which is rightly pointed out in the majority of objections as a shortcoming because it points out at the fact that the establishment of open government principle did not occur thanks to internal political processes and pressure exerted from inside. On the other hand, it is interesting that, when enacting the Act, there was no resistance noted on the part of representatives of authorities, and this is mainly explained by the fact that representatives of the then political will were not aware of the contents and importance of the passed Act.

The shadow cast on the enactment of FOIA in BiH is mostly attributed to the lack of expressed political will and the fact that legislative activities were not a consequence of political struggle and pressures from within. Also, the enacted legislation (at the state and entity levels) were considered to be progressive at the time of their issuance, but these were not an expression of real political situation, but rather of the international influence and pressure in post-conflict years of reconstruction of the country. Amendments that were made in the coming years (BiH, FBiH) contributed to the liberalization of the right to access information, improving legislation and quality of the granted right, whereas in Republika Srpska no amendments to the Act have been recorded since its enactment (2001).

Proactive transparency as a new paradigm

The latest tendencies in the free access to information are seen in the insistence on the proactive transparency as a new quality i.e. a necessary standard that only can ensure an effective and complete access to all information controlled by public authorities and of importance for the public and democratic participation in political processes. The proactive concept implies the disclosure of all data as foreseen by the law via authorities' internet presentation, and a spectrum of data which the proactive obligation refers to is very wide⁵, from the

⁵ Proposed standard of proactive disclosure according to Helen Darbshire, *Proactive*

publication of the law, by-laws and financial reports to individual decisions and public procurement contracts. States differently approach the normative regulation of disclosure of information of public importance. The selected technique is an enumeration of items that must be self-initiatively announced, and there is a rising number of those states that legally regulate the mandatory disclosure of information of public importance postulating the obligation of a regular and updated disclosure for public authorities. The proactive transparency is emerging as a new political imperative in the form of a given goal for public authorities that are required to regularly and actively provide information held by them. This is unthinkable without the existence of democratic political commitment, so, in addition to recommendations on legal regulation, it is necessary to constantly monitor the process and manner of disclosure. Similarly stimulating are public debates being opened on this issue as well as attempts of the civil society stakeholders to impose a proactive standard as a goal of new policies, but one should keep constantly in mind that it is about a constant political struggle and practice that can get stabilized only through persistent

Transparency: The Future of the Right to Information?: A Review of Standards, Challenges and Opportunities, Washington: World Bank Institute, 2011, p. 21-22; quoted according to *ibid.*: institutional information (including regulations and information on competencies), organizational information (including information on personnel and their contact information), operational information (public policies, procedures, reports etc.), decisions and other formal acts (with accompanying documents), public services information (including guidance booklets, forms etc.), budget information, information on sessions and meetings open to the public, information on decision-making procedures and mechanisms of public participation in these procedures, subsidies information, public procurement information, information on the lists, registers and databases held by the public bodies, publications and their price, information on appeals procedures and mechanisms for dispute resolution, information about the right to access information, minutes of parliamentary sessions, court decisions.

monitoring of compliance with proactive obligations foreseen by the law.

Disputable points in the legislation in BiH

It is precisely the lack of proactive provisions that has been mentioned recently as the biggest shortcoming in the existing legal solutions in the area of access to information. The legislator has failed to regulate the mandatory disclosure of the biggest number of information in the FOIA, in all three currently existing FOIAs (BiH, FBiH, RS)⁶ which would reduce actions of the public authorities on the reactive basis. The part on the proactive transparency in the existing legislation is insufficient and extremely modest, especially the part with the explicit proactive provisions for it is reduced to the obligatory appointment of information officers or keeping the register index of the types of information controlled by the public authority. The proactive regulation can be found in fragments in acts such as instructions, rules or rules of procedures which are the acts of lower hierarchy and narrower scope. All this points out at the fact that the existing BiH legislation is far from the latest proactive aspirations which changed the access to open government because the access to information is regulated by the legal requirements directly pertaining to the authorities and representatives of governments placing the burden of responsibility on them. Thus, the emphasis has been shifted from the reactive approach and exercise of rights through the procedure to the obligation of disclosure of a large number of information, in the most comprehensible and adequate way which is easily achieved nowadays through new technologies and media. Despite amendments to the legislation at the state level and the level of the Federation of BiH, none of the changes was going along the lines of adoption

⁶ „Proactive transparency is not comprehensively regulated by primary regulatory framework in BiH, i.e. neither by state nor entity Freedom of Information Acts.“ Alen Rajko, *Proactive transparency in Bosnia and Herzegovina – Situation and perspectives in light of international standards and comparative solutions*, Sarajevo 2014, p.40.

of proactive provisions. This further speaks about the fact that the current political will, learned through the legislator's activities, is not in tune with modern political achievements of opening the government.

The other most frequent objection refers to the RS FOIA which, unlike the legislation in BiH and FBiH, has still not changed the provision establishing that a decision rejecting the access to information is issued in the form of a letter⁷. This is surely an aggravating circumstance, for the party is left to arbitrary interpretations by acting authorities with regard to the selection of form that might use the form of a letter as a reason of non-action on the appeal, given that a sensitive area is in question, the importance of which is often not recognized, thus there is no awareness that an administrative procedure is in question. It is more advisable to precisely formulate a decision as a writ (in the way as it has been done at the BiH and FBiH levels) for this eliminates any doubt in the existence and conduct of an administrative procedure with the accompanying guaranteed legal remedies of decision review.

Inconsistency within our legal order pertaining to the FOIA and affecting the freedom of access to information exists in the sense that, contrary to the provisions of the law,⁸ legislation restricting the rights and obligations as defined by the FOIA is being enacted⁹, although it is considered to be lex

⁷ Freedom of Information Act of the RS, *Official Gazette of the RS 20/01*, article 14.

⁸ „Legislation that is adopted after this law, the purpose of which is not to amend this law, shall not restrict rights and obligations as established by this law.“ Freedom of Information Act of the RS, *Official Gazette of the RS 20/01*, article 25. Similar provisions are contained in the FBiH FOIA and BiH FOIA (article 25 item 3 and article 26 item 4).

⁹ „Regardless of the clear legal provision, some laws enacted after the FOIA hampered or considerably reduced the right to access information. Some of these laws are: Law on the Protection of Confidential Data of BiH, Law on the Intelligence-Security Agency of BiH and Criminal Code of BiH.“ Ena Gotovusa, *Analysis of the Freedom of Information Act of BiH: draft, amendments (FOIA BiH)*, Foundation Public Law

specialis which takes precedence over other similar regulations and it has been explicitly defined that other laws cannot restrict the rights and obligations as foreseen by the FOIA. In some critical comments the lack of harmonization is pointed out as the most serious problem¹⁰, for the created collision of legislation directly affects the range of rights guaranteed in the FOIA. It can also be noted that the legislator failed to precisely regulate the appeals procedure, so it is possible that the RS FOIA does not at all contain the provision on the appellate procedure whereas at the state level only recently a provision has been added through amendments which explicitly regulates within the BiH FOIA legal text itself an appeals procedure as an appellate procedure before the appellate authority¹¹.

Recommendations

Taking into account modern achievements in the area of freedom of access to information, legislation in Bosnia and Herzegovina regulating this area seem to be outdated and it is necessary to enact amendments or a new Freedom of Information Act. Although the right to access information has been derived

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http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Ena_Gotovusa7.pdf (date of access 20 November 2014)

¹⁰ „Based on multiannual experience in the FOIA application the most serious problem is obviously the lack of harmonisation of other legislation excluding or considerably reducing the right to free access of information. There is a series of such pieces of legislation both at the level of both entities and the level of the state of Bosnia and Herzegovina that were adopted after the FOIA enactment and in that regard these are considerably below the level of democratic standards in the world.“ Mehmed Halilovic and Amer Dzihana, *Media law*, Sarajevo 2012 p.111. <http://www.internews.ba/sites/default/files/attachments/Medijsko%20pravo%20u%20BiH%20bos.pdf> (date of access 26 November 2014)

¹¹ „An appeal against the decision referred to in paragraph 3 of this article shall be submitted to the manager of the competent appellate authority“ Freedom of Information Act of BiH, *Official Gazette of BiH* 28/00, 45/06, 102/09, 62/11, 100/13, article 14, paragraph 4.

from the right to freedom of expression, it would be suitable to single out the right to access information in the Constitution as a separate right in order to strengthen (constitutional) legal protection of this right which would be conducive to the democratization of the society.

First of all, in the existing legislation there are very few proactive provisions regulating the mandatory disclosure of information of public authorities with a view to achieving proactive transparency. Amendments or a new Freedom of Information Act should separately regulate the obligation of disclosure of a large number of information of public importance (budget data, budget execution data, judgements and other public documents...) enumerating all information for which there is an obligation of disclosure thereby reducing the number of requests for access to information but also enhancing the transparent acting of public authorities.

Stipulate the legal requirement to keep the central register of information which would also include all information that public authorities are obliged to disclose, and elaborate through by-laws the manner of keeping the central register foreseeing also the creation of the central online platform where all information should be accessible in a transparent and easily searchable way.

The existing laws in BiH have not regulated the existence of an independent institution of Commissioner for information who would carry out the role of the appellate authority in appeals procedures. The Recommendation of the Committee of Ministers of the Council of Europe on access to official documents¹² recommended the establishment of an independent body in the area of free access to information. The increasingly frequent

¹² Dr Dejan Milenkovic, *Reference handbook for the application of the Act on Free Access to Information of Public Importance*, Belgrade 2010, p.120.

tendency, expressed in the modern legislation, is that the Commissioner for Information at the same time represents an independent institution, competent for acting both in the area of free access to information and in the area of personal data protection, because the principles from these two areas are most frequently in conflict, so it is resorted to the solution which will in the best possible way enable the resolution of this conflict. Therefore, the dominant opinion is that it is recommendable to establish an independent body of Commissioner for Information that would be competent for acting on all appellate procedures initiated for the purpose of achievement of the right to access information.

Given the importance of the institution of the Commissioner for Information, in case that this institution is established, special attention should be paid to the manner of election of the commissioner in terms of taking care that a person with particularly expert qualifications is in question, with long working experience in the area of protection of human rights, but allowing him/her a longer mandate in order to be able to autonomously carry out his/her function independently from political and other external influences. The Commissioner should be elected in the Parliament, but for the period longer than four years (5 or 7 years). The law should particularly foresee the obligation for the Commissioner to appear publicly representing the Freedom of Information Act, its importance and borderline cases, all with a view to raising awareness of and educating both narrower and wider public. The Commissioner would also have the obligation to educate staff in public authorities with regard to the correct application of the Freedom of Information Act, and it would be advisable to foresee a requirement for the public authorities to submit annual reports on the number of requests for access to information, their outcomes and activities being taken with the aim of proactive transparency, but also a

requirement for the Commissioner to report once in a year on his/her work to the legislative authorities giving the evaluation for the overall situation in the area of access to information of public importance. Taking into account the complex state setup of BiH, it is usually considered that the establishment of a separate institution would be connected with particular difficulties and that a change in question is one for which it would be very difficult to plead in the current context, especially within the framework of planned advocacy activities in the short-term and mid-term. However, it is advisable to think and talk about that issue as a long-term issue, or possibly the thought should be given how to design the feasibility of such a big change in terms of establishing a new institution, in charge exclusively for the freedom of access to information.

Introduce fines into all Freedom of Information Acts in BiH (followed by provisions on the inspection surveillance) addressing these to responsible persons in the acting authorities, and determine authorities in charge of implementation of the law. Currently such solutions exist only at the state level, and when regulating this, a range of the foreseen fines should be taken into account avoiding wider ranges that leave huge discretionary powers.

Harmonize the RS FOIA with other two Acts stipulating that a request for access to information should be decided on in the form of a writ, and not in the form of a letter as it is currently foreseen because examples from practice indicate that this is a serious flaw which affects the right of those seeking to access information in terms of the achievement of legal protection that they have at their disposal. Namely, practice shows that some courts do not recognize a letter as an administrative act in the case of initiation of administrative disputes, and the proposed change would resolve the disputable situation.

Foresee in all laws, for the purpose of liberalizing the access to information, the possibility to submit the request verbally, by telephone and via electronic message which would facilitate the way of accessing information by providing different platforms through which citizens could address institutions.

