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Free Access to Information Legislation in Serbia

(with a review of Draft Law on Free Access to Information of public importance)

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1. PRESENT TIMES

No right of access to official information follows from the European Human Rights Convention. The protection afforded by Articles 8 and 10 the European Human Rights Convention has not been interpreted by the European Court as to include a right to seek information from authorities. But, there is no doubt that, on the one hand, according to the Council of Europe Recommendation No. R (81) 19 on the Right of Access to Information held by Public Authorities and, on the other, according to the Committee of Ministers Recommendation Rec (2002) 2 on access to official documents, that member states should guarantee a right of access, on request, to official documents held by public authorities.

International Covenant on Civil and Political Rights, in force in this country since 1976, in Article 19 provides not only the right to disseminate information but also the right "to seek information".

The right of public access to official information, on request, is in Serbia a basic right, provided by the *constitutional* provision. According to the Charter on Human and Minorities Rights and Freedoms of the State Union Serbia and Montenegro (2003): "Everybody has a right to access to information held by state bodies, in accordance with the law" (Article 29 Para. 2).

In the year 2003 Serbian Government has submitted to the Parliament *Draft Law on Free Access to Information of Public Importance* (Predlog Zakona o slobodnom pristupu informacijama od javnog značaja).

2. PAST TIMES

The first draft provisions on freedom of information in Serbia have been drawn up in 1998, by the experts` group of the Belgrade Center for Human Rights in the frame of "Model Law on Public Information". First legal initiative for new legislation on the right to free access to public information came from NGO - Center for Advanced Legal Studies, Belgrade 2001, and Serbian Government, especially vice Prime minister Zarko Korac, has supported the initiative, without delay. In 2002 non-government organizations have so far drawn up two different model acts on free access to public information, that has provided the right of everyone, not exclusively of journalists, to free access to public information.[1] The Government of the Republic of Serbia has taken the Model Law on Free Access to Information of Public Interest, developed by the Center for Advanced Legal Studies, as a basis for draft law submitted to the Serbian Parliament 2003, but dropping out some of its original provisions.

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In the meantime, in the framework of public debates, some media associations and domestic non-governmental organizations, representatives of Council of Europe, Article XIX, Transparency International, some countries in transition (Latvia, Bulgaria, Bosnia and Herzegovina), Serbian Ministry of Culture and Media, republican, provincial and municipality administration suggested to the authorities to reconsider some Draft Law solutions.

3. PROBABLE FORTHCOMING FUTURE

By submitting Draft Law on Free Access to Information of Public Importance to the Parliament of Serbia, the Government demonstrated willingness to give effect to the right to freedom of information. The next step should be parliamentary approval of the draft law.

Constitutional provision in the Charter on Human and Minorities Rights and Freedoms of the State Union Serbia and Montenegro (Article 29 Para. 2) is still unique, for Freedom of Information Act has not been adopted. On the other hand, adoption of Draft Law on Free Access to Information of Public Importance 2003 is necessary for efficient protection of rights and for legal security.

Due to the fact that the right to free access to public information has a constitutional force, Serbia and Montenegro could already considered as a country in “high society”. Constitutional guarantees of this right, and/or legal guarantees, are long time in force in several European countries of so called old democracies and new democracies –Sweden, Finland, Norway, Denmark, France, The Netherlands, Austria and after the fall of Berlin Wall – Hungary, Bulgaria, Russia.

Draft Law o FAI is based on international (Article 19 of International Covenant of Civil and Political Rights) and regional law and standards (i.e. the abovementioned recommendations of the European Council and of the Committee of Ministers), but it could be improved by amendments, formulated upon given suggestions, in parliamentary procedure.

4. MAIN POINTS OF THE DRAFT LAW

Apart of the issue of future implementation of the law, the level of regulation of the right to access to public information, on request, in Serbia will depend on legislative answer to following questions:

1. what are the issues covered by the notion of public information?
2. what are the rights of the persons having an interest for information?
3. when public authorities have a right to deny access to information?
4. what are the ways of implementation and protection of the right to free access to information?

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4.1. INFORMATION OF PUBLIC IMPORTANCE

Article 2 Draft Law in defining the "public information" was inspired by the "maximum disclosure" or "maximum openness" as a principle: all information (1.1) held by any authority (1.2.) covering all issues (1.3.) should be available.

4.1.1.***"…all information..."*** Article 2 provides: "In terms of this Law, information of public importance held by a public authority body (hereinafter: public information) shall denote information on everything anyone has a justified interest to know, i.e. information created during the work or regarding the work of a public authority, e.g. an information kept by a public authority or kept at the order, on behalf or at the expense of a public authority, notwithstanding whether: the source of information is a public authority or another person; the information medium (paper, tape, film, electronic medium, et al.); where or at whose order, on whose behalf or at whose expense information was stored; the date of creation of or manner of obtaining information (directly, by listening, watching, etc., or indirectly, by insight in a document containing the information, etc.); or, another feature of information."

Essential part of this extensive definition is focused to a few words: "notwithstanding ... feature of information". As "public information", by this wording was defined maximal broadly, that means that "public information" includes all information held by a public authority body, regardless of any feature of information. Unlike some foreign peaces of legislation, Draft Law does not reduce the notion of public information to documents (records) only, but covers all information held by the public authority, regardless of the form in which the information is stored, including also oral information.

4.1.2.*"…* ***information held by any authority*** *…"* As any information held by public authority is public information, information held by any public authority is public information. Public authority body is defined in Article 3 in this manner: "a public authority body (hereinafter: public authority) shall denote notably:

1. A state body, territorial autonomy body, local government body and a person vested with public authority (hereinafter: state body)
2. A legal person founded by or funded wholly or predominantly by a state body;
3. Another person entrusted by a state body, through contract or through other legal ground, to perform certain affairs.

In that way, unlike some foreign laws, Serbian Draft Code embraces all types of authorities – all branches of authorities (not only executive, but also legislative and judicial branches), all levels and instances of authorities (local and central ones), as well as all functions of authorities - defense and security bodies are, therefore, not excluded – and, at the same time, Draft opens an access to information held by private persons entrusted by the state to perform certain activities (such as: procurements for the army, services, manufacture).

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4.1.3.*"… **information on everything done by authority** …"* The principle is not only that a public authority body, also in the field of defense and military matters, is obliged to provide information on that what is in its competency. Also, a public authority body is not only obliged to provide information on everything what is in its competency. The principle is, in fact, much wider: a public authority body is obliged to provide information on all of its activities. So, if it is working on something, it cannot withhold information on this work by referring to its work as something that is not in its competency, because a public authority body is obliged to provide all information held by him, regardless of the fact whether the information falls within the scope of its regular competency or information is related to the other operations.

4.2. RIGHTS

Concerning the right itself, in the Draft is adopted (as a guiding principle), a concept that encompasses all rights, known as those which enable maximum disclosure or maximum openness (2.1), simply achievable rights (2.2) and rights free of proving (2.3).

4.2.1.*" … **all conceivable rights** …"* Therefore, Article 5 Draft Law provided: "1. Everyone shall have the right to be informed whether a public authority holds specific public information, i.e. whether it is otherwise accessible. 2. Everyone shall have the right to insight in a document containing public information and the right to a copy of that document."

According to the Draft Law the right of access to public information consists consequently of:

1. a right to be informed whether a public authority holds specific public information (Article 5 Para. 1)
2. a right to have insight in a document containing public information (Article 5 Para. 2), and
3. a right to a copy of a document containing public information (Article 5 Para. 2).

According the first right mentioned above (e.g. right to be informed whether a public authority holds specific public information), which in some of foreign laws is not regulated, it was held as necessary to introduce it in the law in order to stress that the right of access encompasses also the right to know if an public authority body holds certain information.

But, the obligation to provide information does not mean that there is a right to receive information from the particular official in charge of the case. The substance of the right is to receive information from the particular public authority body. It is a duty of a head of that public authority to ensure access to the provided information.

Since there is no obligation to appoint a spokesman, a head of particular body may maintain duties of a spokesman himself/herself. Even if he/she does not keep the office of a spokesman for himself/herself and if a special spokesman is not appointed, he/she is obliged to carry out

duties of a spokesman.[2] It would be classified as misuse of right and evading the law, as well as breaching the obligation to provide information, if a head keeps those duties, failing to appoint a spokesman, and therefore should only be available to journalists occasionally or with great delay, due to his regular busy schedule.

4.2.2.*" **…request in any adequate form**…" "… …"* According to Draft Law (Article 15), like in some foreign laws, the request shall be submitted in writing form, and public authority body also has to provide information in writing form. In discussion has been suggested to reduce formalities for request and to leave much space for discretion of the public body in order to allow the authorities to deal with requests in a simpler manner, even orally (by fax, e-mail, etc.), if it is appropriate to existing circumstances. Public authority body has to find out the best decision on the issue of the form of providing the information that corresponds to the particular situation, taking into consideration efficiency and savings.

Public authority itself has to make choice of the form of providing information, while obligatory forms of information are an exception.

4.2.3.*"… **achieving the right without any nomination or any proving of conditions** …"* A person never needs to have or to prove any special legal interest in requesting information, nor ever has to state in the request reasons for requesting the information (Article 15 Para. 4). "It shall be deemed that there is always a justified public interest to know information that regards a threat to i.e. protection of public health and the environment and if related to other information government body is provided with, it is considered that justified public interest to know exists, unless government body shall prove contrary" (Article 4). The organ of public authority, that is the body that the access to information is requested from, may, only in certain cases exhaustively and expressively regulated in the law, produce the evidence to prove that there is no justified interest of a person to receive the requested information. So, if the body refers to any of the reasons prescribed exhaustively by law for refusing or restricting access to information (Article 9seq), it has to prove that such a reason does exist (Article 23 Para. 2).

This solution is a result of a Copernicus-type switch in regards to the citizens and the authority by recognizing the right of free access to information: instead of a citizen explaining always to the authority reasons for requesting access to information, the authority is the one that has to state reasons for depriving the requested information access, and that only as an exception.

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4.3. EXCEPTIONS AND LIMITATIONS OF RIGHTS

In the Draft is laid down the rule that access to information could be limited only exceptionally and only when particular limitation is explicitly provided by law (3.1), if it is necessary in a democratic society (3.2), in order to achieve exhaustively regulated legitimate and predominant interests (3.3). The burden of proof of the exception is on the side of the authority claiming the exception (Article 23 Para. 2). Article 8: "(1) The rights in this Law may be exceptionally subjected to limitations prescribed by this Law if that is necessary in a democratic society in order to prevent a serious violation of an overriding interest based on the Constitution or the law. (2) No provision of this Law may be interpreted in a manner that could lead to the revocation of a right conferred by this Law or its limitation to a greater degree than the one prescribed in Para. 1 of this Article."

4.3.1. *"…* ***only limitations prescribed by law*** *…"* Public authority body may deny requested information only if some of explicitly prescribed grounds exists and that authority is under the burden of proving that ground in given case (Article 23 Para. 2). The grounds for complete or partial denying the information are exhaustively prescribed. (Chapter II. Exemption and Limitation of Free Access to Public Information, Article 9-14):

4.3.2. *"…* ***predominant interest only*** *…"* Legitimate interests authorizing a public authority to deny access to information to an applicant are: suppression of the misuse of rights, protection of the life, health, security, judiciary, public safety, economic interests, confidentiality, privacy and other personal rights, among them also an interests of national defense (Article 9seq, 13). Reasons that justify deprivation of information do not include those that are characteristic for authoritarian regimes and that are in this country well known as a part of its past, such as to avoid disturbing the public or to avoid damaging the positive image of the authorities, or to obtain non-disclosure of the exposure of corruption in the public authority body.

4.3.3. *"…* ***when it is necessary only*** *…"* "The rights in this Law may be exceptionally subjected to limitations prescribed by this Law if that is necessary in a democratic society in order to prevent a serious violation of an overriding interest based on the Constitution or the law" (Article 8 Para. 1).

In the Articles 8 and 9-14 the three-part test is laid down: A refusal to disclose information is justified only when the public authority body can prove that the disclosure of the provided information

a) affects legitimate interest (life, national defense etc. or some other explicitly mentioned interest in Articles 9-14),

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b) causes substantial harm to that legitimate interest ("serious violation of an overriding interest", for example, "seriously endangers national defense, or national or public security - third bullet point in Article 13, "substantially undermine the government's ability to manage the national economic processes or significantly impede the fulfillment of justified economic interests", Article 13, etc.),

c) but, that particular substantial harm has to be predominant to the opposite adverse interest to obtain the information ("prejudice the interests that are protected by the law and outweigh the access to information interest", Article 13).

4.4. ENFORCEMENT AND PROTECTION OF RIGHTS

One of the Draft principles is to make rights attainable (4.1) and to provide protection (4.2) in a clear way expeditious and inexpensive.

4.4.1. *"… **efficient and inexpensive accomplishment of rights** …"*

The public authority body shall without delay and within 20 days from receipt of the request inform the applicant whether it holds the requested information and give access to it (Article 16). Positive decisions to grant access are given to the applicant in the simple form of an official notice (Article 16 Para. 5, Article 9). Simultaneously with the notice allowing access to a document shall inform the public authority body the applicant of the time, place and manner in which the information shall be available for insight, the necessary costs for duplicating the document, or inform the applicant of the possibility to use his own equipment for duplication if the authority does not have the technical means for duplication (Article 16 Para. 2).

It was strongly suggested to reduce the delay to 7 days, as especially for journalists, the value of a certain information highly depends of how efficient information has been received.

A copy of the document containing the requested information shall be issued and the applicant shall be obliged to reimburse only the necessary costs of duplication (Article 17). It has been suggested that the right of consultation of documents on the authorities' premises should be free of charge.

Within the frames of abovementioned delay, refusals are given in a written form together with the reasons for refusal (Article 16, Para. 9). In that case, as well as when an public authority body does not hold the document in question, it shall refer the request to the Commissioner and inform him who, to its knowledge holds the document (Article 19). The Commissioner shall then refer the request to the right authority (Article 20).

4.4.2. *"… **review procedure before a independent and impartial body**…"*. An applicant may lodge a complaint to the Commissioner within 15 days upon receipt of the public authority

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decision, if the public authority body: refused to inform the applicant whether it holds specific public information or whether it is otherwise accessible to it, refused to allow insight in the document containing the requested information i.e. to issue the applicant a copy of the document, or failed to do so within the prescribed deadline, or does not allow insight in the document containing the requested information, i.e. does not issue a copy of the document in the prescribed manner.

The Commissioner shall reach a decision promptly and within 30 days (Article 23), and that decision is binding for a public authority body and it is enforceable.

Decisions by central Government, judicial and legislative bodies are exempt from the possibility to appeal - National Assembly, President of the Republic of Serbia, Government of the Republic of Serbia, Supreme Court of Serbia, Constitutional Court and the Republic Public Prosecutor (Article 22 Para. 2). It has been strongly suggested to remove this exception from the Draft, as there is no exemption of this kind provided for in the Council of Europe Recommendation and on the ground that there is no legitimate reason for such an exception.

An applicant who holds the decision of Commissioner as unsatisfactory, may lodge an court procedure against the Commissioner decision (Article 22 Para. 3).

5. LEGAL SOLUTIONS OF SPECIAL IMPORTANCE FOR JOURNALISTS

In some European countries, in the times when the right to free access to public information, on request, was not recognized as a right of everyone, in the laws has been prescribed a journalists` privilege to request information from public authorities. In present times there is a legal principle that everybody, and therefore not only the journalist, enjoys this right. However, Draft law provides this privilege for journalists, concerning their special professional interests and needs:

Free of Charge

Journalists (and NGO´s in the human rights field) have a privilege in respect of charges as they are exempted from reimbursement (Article 17 Para. 2).

At the end, it is important to inquire what kind of access to information held by authorities, may journalists count with in Serbia in future, taking into consideration certain provisions and legal institutes that are related not only to the journalist, but still are of special interests for them.

Principle of Equality and Ban of Discrimination

Not only nationals, but also every foreign journalist shall be able to exercise the rights in this Law under identical conditions (Article 7).

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A public authority body may not give preference to any journalist or media outlet by informing only him/her/it or informing him/her/it before other journalists or media outlets whether it holds specific public information, i.e. whether such information is otherwise accessible to it, or, by allowing insight in a document containing public information or providing a copy of that document only to him/her/it or to him/her/it before other journalists and media outlets (Article 8).

Authenticity of Information Issued by Public Authority Body

A fine between 5,000 and 50,000 dinars shall be imposed upon the person in charge (entitled person) in a public authority body if the public authority body communicate untruthful, inaccurate and incomplete information (bullet point 4 in Article 46).

Denial of Published Information by a Public Authority Body

If a public authority body disputes the authenticity, accuracy or completeness of public information that has been published, it shall make public the truthful, accurate and complete information, i.e. shall enable insight in the document containing accurate and complete information (Article 13).

Whistleblowers

Unlike suggestions formulated in the course of public discussion, Draft Law has no provision that secure protection against sanctions to the persons pinpointing the illegal actions of the institutions they are employed in (so called whistleblowers).

Openness of public authorities' sessions

Right of journalists to attend public authorities' sessions is not provided in any form.

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