THE TOPIC OF THE ISSUE

RIGHT TO ACCESS TO INFORMATION – THE RIGHT OF CITIZENS AND THE OBLIGATION OF THE AUTHORITIES

RIGHT TO ACCESS TO INFORMATION AS A HUMAN RIGHT

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The history of free access to information held by public authorities can be seen as the history of state democratization and its transformation from the instrument of governance of subjects into an institution at the service of citizens. Until twenty years ago, barely ten countries had had a law guaranteeing citizens' right to access to information possessed by the authorities. Since then 56 countries have adopted a law thereon, so that in October 2005 there were 66 countries guaranteeing their citizens the legal right to have access to information possessed by the authorities. Professor Ackerman rightfully speaks of the "explosion" of laws on free information and on the right to access to information, in view of the fact that 40 of the 66 laws have been adopted since 1999. It is not by coincidence that this flood of laws recognizing and regulating the right of citizens to free access to information possessed by the authorities coincides with the time when citizens' participation in the decision-making process and their right to control the authorities was becoming a democratic standard and transparency and responsibility a criterion for democratic governance.

As a country lagging behind in the process of transition and going through a non-linear transition, Serbia was among the last countries in Europe and the region to be caught by the "explosion"; Serbian authorities joined in the process somewhat reluctantly, while Serbia's civil society did it very resolutely. Indecisiveness on the part of the authorities has been reflected in their years-long hesitation to efficiently bring to an end the adoption of the relevant law. It was in the adoption procedure several times only to be withdrawn without any obvious reasons and finally forgotten. In such circumstances civil society and the media have shown exceptional persistence in the course of the adoption procedure. In 2002 experts from the ranks of civil society came up with two models of legal regulation of access to information possessed by the authorities. One of them, after being somewhat amended, officially became a bill and later a law adopted by Serbia's National Assembly.

Serbia thus joined the modern democratic societies based on the idea that citizens have a justified interest to know everything (or almost everything) about state affairs, since it is precisely them who are the holders of sovereignty and who pay taxes from which the budget and the work of public services and civil servants is financed. The recognition and observance of this right is especially important in the so-called countries of new democracy, including Serbia, in which there is neither a long tradition of parliamentary rule nor of the rule of law and in which the notion of good governance is yet to become part of standard democratic procedures. As a rule all those countries have faced problems regarding the accountability of the elected elite.

The Charter on Human Rights and Civic Freedoms of the State Union of Serbia and Montenegro included the right to free access to information in the body of fundamental human rights. Upon the dissolution of the state union the instruments guaranteeing this right have been weakened. Serbia as the state successor must efficiently deal with this issue. Its future constitution must include the right to access to information in the body of human rights guaranteed by the highest legal act. Serbia would thus follow the practice of the modern constitutions brought in the last two decades the world over, particularly in transitional countries. Its citizens would realize that holders of state offices consider citizens' participation in public affairs a standard democratic practice and procedure and that the public and accountability of public office holders are the principles that cannot be questioned in any way.

If one should briefly and yet comprehensively explain why it is that this Law is so special compared to others, then it should be said in the first place that the right to access to information is the basis of the high-quality and efficient exercise of other human rights and freedoms: freedom of thought, right to information, voting right – to mention but some. The right to free access to information is a powerful means in the hands of each citizen to control the work of state authorities between two election cycles. It enables citizens to be better informed and oblige civil servants to be responsible thus reducing the risk of abuse of power and ensuring the respect of human rights and freedoms. Hence corruption is efficiently controlled from the local level to the highest level of authority. It should be pointed out that citizens are not, nor should they be, under an obligation to prove their legal interest to obtain the requested information and to learn whatever interests them concerning the work of office holders. To exercise the

right to free access to information it is sufficient that the requested information be in possession of public authorities and that it is in the justified interest of the public, i.e. citizens, to become acquainted with it.

Immediately upon the Law had been adopted, the Fund for an Open Society invited 14 NGOs to form a coalition to promote the implementation of the Law on Free Access to Information, to make the Law understandable to the public and to help strengthen the capacities of the holders of public authorities to act under this Law. The Coalition was recognized in the eyes of both the professional and general domestic public and in the donor community as a good example of how people can rally around the goals of civil society organizations and citizens' interests.

After a year and a half the most significant achievements of the Law are undoubtedly the following: the general public has been informed on the importance and achievements of the Law and has started using the possibilities offered by it (in the first year of implementation thousands of requests were submitted to state authorities); the Commissioner for Public Information was established as an independent authority; state authorities (at the central and local levels) were forced to start implementing the Law without delay and to establish their internal procedures for granting information at citizens' request in accordance with the Law; jurisprudence related to the respect of the right to free access to information started to develop; it revealed the shortcomings and limitations of the Law and on that basis amendments thereto were formulated; the implementation of the Law corroborated the request to regulate as soon as possible the issue of information (secret) classification and to strengthen the instruments for the protection of citizens' personal data; a large number of NGOs outside the Coalition became engaged in the issue of free access to information and a part of the Coalition members continued with the activities related to the implementation of the Law; free access to information became part of the high school curriculum related to civil education. Furthermore, principles and standards upon which a new law on the protection of personal data and a future law on the classification of data (secrets) should be based.

The experience regarding the implementation of the Law on Free Access to Information speaks in favour of the need to bring amendments thereto. The Coalition for Free Access to Information drew up 7 amendments whose adoption it intends to strongly advocate in conjunction with other civil society organizations. The amendments among other things envisage the following:

An employee of an authority who, in contravention of the obligation arising from the employment by-law to keep a secret, discloses to the public a document revealing unlawful and illegal acts, thus protecting the public interest, shall not be held accountable (the protection of "whistle blowers");

The right to appeal to the Commissioner, including against the decisions of the President of the Republic, the National Assembly, the Government, the Supreme Court, the Constitutional Court and the Republican Public Attorney, shall be ensured;
Petty offence punishment in case of Law violations shall be stricter;
Efficient monitoring of the implementation of the Law shall be established.

The role of civil society and citizens

Civil society organizations gathered in the Coalition for Free Access to Information and other NGOs, above all the Youth Initiative for Human Rights and CeSID, successfully translated the Law into practice. Through public campaigns activists explained the purpose and reasons for passing the Law. Furthermore, they tested its feasibility, as well as the readiness of public office holders to implement it. After those initial efforts, the implementation of the Law commenced, followed by smaller or bigger resistance, lack of understanding, obstruction. Nevertheless, the results achieved were beyond all expectations of ever critical representatives of civil society.

Serbia's civil society, primarily the Coalition for Free Access to Information, again filled, within a short time, the gap created upon bringing the Law and before appointing a Commissioner for Free Access to Information. Namely, before the Commissioner's appointment, and thereafter, when he faced a lack of support by the authorities in establishing the institution of the Commissioner and in exercising his legal powers (failure to provide working premises; long delay by the National Assembly in approving organization acts; delay in clearing the budget for the institution; inability to act upon appeals; other technical and administrative obstacles marking the first six months after the appointment of the first Commissioner), the Fund for an Open Society published a Guide through the Law on Free Access to Information, prepared by the Coalition's experts. Interestingly, with prior consent of the Fund for an Open Society as the first publisher, the Commissioner later took over the Guide to use it as its official textbook. So far the Guide has been published in 60,000 copies in the Serbian language, including 30,000 copies published in the daily "Danas" on the occasion of 28 September, the international day of the "right to know". The Fund for an Open Society supported the translation of the Guide, and thereby of the Law itself, into minority languages in official use in Serbia. The Commissioner then issued publications in Hungarian, Albanian, Slovak, Romanian and Bulgarian. The Guide has become a manual for the high school subject civil education.

Citizens are gradually becoming used to their new right and are beginning to use it. The number of requests for obtaining information addressed by citizens under the Law is very small. However, the results achieved are significant. For example, owing to his persistence, a citizen who used his new right, revealed one of the biggest financial scandals in the last six years – the misappropriation of the funds of the public enterprise "Putevi Srbije", estimated at tens of millions of euros. Another scandal that was revealed by using the new right was the misappropriation of funds related to public procurement in the Serbian Railway. Unfortunately, as there was no institute to protect "whistle blowers", the citizen who was employed in this enterprise was dismissed from work on the grounds of "disclosing a business secret".

In a democratic society, journalists and the media, being a part of civil society, have a special role of controllers of the work of state authorities. The rules regulating access to public information enable them to efficiently collect information concerning the work of state authorities and to make undreamed-of achievements in investigative journalism. The possibilities offered by the Law on Free Access to Information in Serbia "won over" some journalists who, having understood its potentials, are building successful careers as investigative journalists, offering the Serbian public accurate and often timely information. Thus they are restoring public trust in the journalist profession and protecting the public interest when it comes to free access to information.

However, the attempts to exercise the right to free access to information have not always gone smoothly. The attempts of some journalists, NGOs or citizens to obtain information under the Law on Free Access to Information have often encountered silence on the part of public office holders, including the outpouring of intolerance of top officials in the present Serbian Government or a refusal to act upon court decisions. The response of a highly positioned civil servant in the present government who said to a journalist who had invoked the Law "Who gives a damn about the Law!?", became widely known, as well as the refusal of the Security Intelligence Agency to act upon the Supreme Court's decision and grant the requested information. These are not just the examples of arrogant breaches of the Law on Free Access to Information, but of the intentional ignoring of the principle of the rule of law itself. Individuals, including office holders, may not necessarily like this Law, or they may think that some of its provisions are not good enough and should therefore be amended. In such cases, everyone is entitled to initiate amendments thereto, notably the state authorities. However, as long as it is in force, the Law must be implemented, and civil servants, regardless of how highly positioned they are, are not authorized to select the norms to be implemented and those to be ignored. On the one hand, such conduct constitutes an abuse of power entailing sanctions, and on the other it is the usurpation of both parliamentary and judicial power by the executive branch of power. It also means compromising the powers of an independent body, which is not the first such case in Serbia's political practice.

Local bodies and authorities have often lacked capacities to implement the Law on Free Access to Information. In a year and a half since the implementation of the Law started, the Coalition experts, in cooperation with the Commissioner, OSCE and the Fund for an Open Society, have participated in the continued education of civil servants and persons in the local authorities specially authorized for granting information, in order to offer them additional knowledge to understand the Law and to enable them to implement it.

The silence of public office holders as a response to citizens' requests is still often the result of their ignorance of the fact that the Law on Free Access to Information possessed by the public authorities includes the information available to them, as well as of the failure to perceive their own institution as an organization discharging public authorities. The management of a faculty of the University of Belgrade were totally surprised when asked by a civic association if experiments in that institution were conducted on animals, as well as by the fact that the association requested a reply under the Law on Free Access to Information. Civil society has an important role in improving this situation.

Civil society is a strong driving force in many processes on a global scale as well. Through the FOAdvocates network, at the moment gathering 57 NGOs, taken individually or as coalitions, experiences in implementing national Laws have been exchanged and assistance has been granted to those who are building their legal systems in the field of information accessibility. Apart from that, members of civil society have contributed to accelerating the process which started a year ago, in order to pass a special Council of Europe Convention on Information Accessibility, based on the Council of Europe Recommendation (2) 2002 on accessibility of official documents. Thus access to information, at least when it comes to Europe, would become a recognized human right on the global scale as well, putting an obligation under member countries acceding to that Convention.

The Commissioner for Information as an independent body

By introducing the Law on Free Access to Information in the system of government organization in Serbia, a new authority was introduced – the Commissioner for Information of Public Importance, as an

independent body.

In his work so far the Commissioner has shown a large degree of independence in relation to all three branches of power - the legislative, executive and the judicial branch. From the very beginning the Commissioner has not hesitated to make full use of the legal rights vested in him in order to ensure the right to access to information of public importance. By consistently using his powers he has drawn public attention to the institution of the Commissioner and in his acting he insisted on independence, autonomy and impartiality, which should be the main quality of all independent bodies as the developing fourth branch of power.

The Commissioner has precisely pointed to the problems related to the actions of public authorities, has insisted on implementing legal procedures and criticized those public authorities which have not acted in accordance with the Law. In that way the present Commissioner has managed in establishing the institution as an independent one and in drawing public attention to the issue of access to information of public importance, which is significant for the future work and position of other independent bodies. Two decisions passed by Serbia's Supreme Court quite certainly testify to this: the Court dismissed complaints against the Commissioner's decisions, lodged by Zrenjanin District Court and the Security Intelligence Agency.

Many foreign experts agree that, regardless of the country in question, the existence of a commissioner, as an independent body, to whom complaints are addressed upon the refusal of the authorities to grant some information to a citizen, is an ideal solution for the full implementation of the law on free access to information and that, accordingly, this new authority plays a key role in exercising the right to access to information possessed by the authorities. If there is not such an authority, all complaints are lodged with the court, which is a slow and much more costly process. We can be satisfied with the fact that Serbia is among 13 countries having a fully independent authority in the field. Given various ombudsmen and commissions, that number amounts to 35, although the results of these bodies are not equally good for, as a rule, they are unable to execute their decisions.

In his work the Commissioner has cooperated, among others, with non-governmental organizations. However, in order to further strengthen the institution of the Commissioner, civil society, including the media, will have to monitor and assess the work of this independent authority with due attention, just like it closely monitors the work of the authorities under the Law on Free Access to Information.

Protecting personal data and regulating the issue of secrets

Under the Law on Free Access to Information the rule on accessibility of all information is only exceptionally subject to limitations. These limitations can be divided into two groups – the first one is related to the protection of privacy, which may be invaded by granting information on request, while the second one has to do with the information which may be qualified as a secret whose disclosure for listed reasons may jeopardize an important value of society.

Serbia does not have a law on secrets (classified information) to specify the kind of information which should not be available to the public for a specified period of time as well as the reasons for it. On the other hand, the present Law on the Protection of Personal Data is not precise enough. Due to that the right to free access to information possessed by public authorities can be limited. This has actually happened often enough in the implementation of the Law on Free Access to Information, when the principle of the protection of privacy or the need to treat some information as a secret whose disclosure may result in detrimental consequences for state policy or the state itself, would be invoked.

The adoption of a law on the classified information (secrets) and of a new law on the protection of personal data as well as the adoption of amendments to the Law on Free Access to Information, would ensure a balance between citizens' right to free access to information, the need to protect citizens' right to privacy and the need to prevent detrimental consequences for state policy and the state itself, as a result of making some information public.

Establishing a balance between a citizen's right "to know", i.e. to have access to information, and the right to privacy, is achieved in practice by implementing the standard of the "prevailing interest" invoked by the Law on Free Access to Information. The Commissioner for Information is particularly responsible for developing these standards. Nevertheless, citizens' right to privacy, as one of the fundamental human rights, must be protected by a safer and more precise instrument than a legal standard, which, when interpreted too widely, may limit citizens' right to free access to information. In any case, this issue needs to be fully regulated in accordance with the European standards, notably with Directive EU46/95, which would, inter alia: protect the right of an individual to independently decide on the processing of all data about him, irrespective of whether the data constitute a secret; determine conditions under which personal data can be processed without the person's consent; efficiently protect an individual in case of any breaches of his rights.

On the other hand, there is a need to protect the state and ensure the efficiency of some of its policies, e.g. security policy, which requires that some information should be qualified as a secret within a specified period of time. The right "to know' requires precise criteria known beforehand, under which specific data may be classified as a secret. Due to that, the Law on Free Access to Information undoubtedly requires clear "back-up" legislation and unambiguous standards to establish which documents and data may and should be classified as secrets and, consequently, be inaccessible for the general public within a specified period of time. In order to regulate this issue a new balance needs to be sought and established – the balance between two concepts which are constantly being developed and redefined: the human rights concept and the public order concept. Furthermore, the "culture of secrecy" regarding state affairs, cherished for a long time and typical of authoritarian government, should be finally abandoned.

The more detailed elaboration of the standards and principles which are to regulate the protection of personal data and the treatment of secrets is to be found in Chapter III, items 2 and 3 of this Report. Together with the proposal of amendments to the Law on Free Access to Information, contained in item 1 of the same Chapter, they constitute a triad of inter-dependent principles. These three fields regulated in the above manner will make a new contribution to Serbia's legislative theory and practice, in which the rule of law and good governance will become the leading principle of state organization.

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1 John M. Ackerman, Irma E. Sandoval-Bellesteros, Administrative Law Review, The Global Explosion of Freedom of Information Laws, Volume 58, Number 1, Winter 2006, page 86

2 The Coalition consists of the Belgrade Centre for Human Rights, Belgrade; The Centre for Peace and Democratic Development (CAA), Belgrade; the Centre for Civil Education, Vršac; the Centre for Advanced Legal Studies, Belgrade; the Civil Association of Hungarians in Serbia – "Argus"; The Fund for an Open Society, Belgrade; Forum Iuris, Novi Sad; the Civic Initiatives, Belgrade; the Civic Council of Kraljevo Municipality; the Committee of Lawyers for Human Rights (YUCOM), Belgrade; the Resource Centre, Negotin; the Toplice Centre for Democracy and Human Rights, Prokuplje; the Transparency Serbia, Belgrade; the "Sretenje" Civic Association, Požega