THE TOPIC OF THE ISSUE

New Principles of the Amended Act on Access to Public Information in Slovenia

- COMMISSIONER OR OMBUDSMAN -

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1. Introduction

Two and a half years after passing the first Act on the access to public information (hereinafter: ZDIJZ) in Slovenian history, we have with passing of the amending Act in the National Assembly on June 15th, 2005 attained the first amendments to this extremely important act, administering access to public information as one of the fundamental human rights. This area is undoubtedly one of the most important in the public sector, particularly because the spirit of the law changes the thinking of the public sector employees and is clearly oriented towards transparency and openness of functioning of all bodies in the broadest segment of the public sector. The amending Act of ZDIJZ presents quite a few new concepts establishing Slovenia even higher on the international scale of country transparency. The promulgation of the original ZDIJZ itself placed Slovenia among the 65 countries, which passed such an Act at all . Even though Slovenia was one of the last European countries to pass it, the situation in every day life proved, in contrast with quite a few, especially Balkan countries, that Slovenian public sector did not accept this novelty with too much opposition or rejection.

Two years of active implementation of the Act showed that the time has already come to do away with a few of its deficiencies. The lawmaker's conservative approach with the original ZDIJZ was of course understandable, though even then both many of the creators of the law as well as members of parliament realized that changes will soon ensue. They are here, and can be summarized into three most important points:

1. The new ZDIJZ introduces a public interest test,
2. The Directive on reuse of public sector information (2003/98/EC) obliges Slovenia to implement its guidelines in its legislation until July 1st, 2005,
3. Commissioner for Access to Public Information is, due to the incorporation of jurisdiction over the Information Commissioner Act , transformed into "Information Commissioner".

2. Public Interest Test

Public interest test is the highest form of judging the access to public information available to a particular country. It is said that public interest test lies at the very core of the Act on access to public information. Due to its extremely loose definition (which practically doesn't exist), many countries avoid it, claiming it could allow for a too broad maneuvering space in opening what should remain closed. It is evaded particularly by those countries that have interest for their citizens not to learn about the mistakes of its public sector, but foremost by the countries ruled by authoritarian regimes, which for obvious reasons detest all and any control. These are especially those most autocratic countries with the world's highest corruption levels, many of which even without an Act on access to public information altogether. They are Belarus, Russia, China, Iraq, Iran, Chad, Algiers, Angola, Morocco, Tunis, Congo, Azerbaijan, Ukraine, Ivory coast, Kenya... The evolution of law on public information showed that it is not easy to write down a precise definition of the test and moreover that the test changes over time. Though it remains a fact that this exact test can reveal even the most hidden faults and irregularities taking place in the public sector. The evolution also showed that there should be no absolute exceptions. In any case it is important that public interest test represents an exception of an exception and at that only when it could be used to disclose information pertinent for a broad public debate and comprehension of a subject important for general public.

What is the public interest test then? In short it is a type of weighing test (a so called balance test) with which an appointed official, the Commissioner as the body of appeal, as well as courts during an administrative proceeding, weigh whether the public's right to know should take precedence over another right or exception based on ZDIJZ (such as protected personal data, tax secrets, business secrets, classified data) even when the disclosure would cause harm. The British Information Commissioner has argued that the public interest test reveals matters that are in the public interest, but not those that merely interest the public. Personally I could not concur more with such a definition. It is interesting that Britain passed its Act on access to public information in January 2000 already, though the vacatio legis

period (the time between passing and entry into force of an Act) lasted for five years. The British authorities had therefore had ample time to prepare themselves for its implementation. As early as 2001 the British decided to attach Access to information to an independent state body for personal data protection. The Information Commissioner published its first guidelines on how to execute the public interest test even before the entry into force of the Act itself . While browsing over web pages of British public bodies, I came to a conclusion that most of them also, based on the Commissioner's directions, designed their own instructions. Worth mentioning are for instance instructions for carrying out the public interest test for the employees of Medway municipality , which present a valuable indicator of the negative and positive sides, with the final weighing on whether the right to know (public interest) or an exception should preponderate:

1. The public interest in disclosure is likely to be strong where:
- the disclosure will assist public understanding of an issue of current national debate,
- the issue has generated public or parliamentary debate,
- proper debate cannot take place without wide availability of all relevant information,
- where an issue affects a wide range of individuals or companies,
- where the issue affects public safety or public health,
- where the release of information would promote accountability and transparency in decision making,
- where the issue concerns the making or spending of public money,

2. The factors which may weigh against disclosure are largely those set out in the exceptions themselves, e.g. the public interest in cases such as the Human Rights or where disclosure of information may prejudice the right to a fair trial.

3. Factors that are irrelevant in applying the public interest test include:
a. causing embarrassment to any public official or employee,
b. the possibility of a loss of confidence in the public authority,
c. that information may be overly technical and not easily understood by a member of the public,
d. That the information is incomplete and may misinform the public (the answer to this is to explain the context of the information when releasing it).

Quite a number of countries already have a public interest test, among others Ireland, Great Britain, Japan, South Africa, Trinidad and Tobago, New Zealand, Canada, Australia, Lichtenstein, Bosnia and Herzegovina, Estonia, Germany, Jamaica and Israel. This type of weighing test is also implemented in the Aarhus convention, which is directly applicable in the Slovenian legal system, as well as in the Directive 2003/4/ES of the European parliament and Council on the access of public to the environmental information and in the Regulation 1049/2001 on public access to the documents of the European parliament, Commission and Council .

On May 11th, 2005 the amended Act was passed also in the world's second largest country, India. Mrs. Sonia Gandhi, the president of National Congress Party expressed that she is very much in favor of transparency. It is above all due to her personal involvement and commitment in passing of the law, that the public interest test was implemented in the Indian Act, even with regard to personal and classified information.

The Slovenian government finally reached a conclusion that information classified with two highest grades of secrecy will not be subject to the public interest test, thus leaving to the public scrutiny just the two lower security grades of INTERNAL and CLASSIFIED . The two highest grades of secrecy, SECRET and TOP SECRET, remain absolute exceptions, along with the tax secrecies of natural and legal persons.

Absolute exception will also be information, which contains or is prepared based on secret data of another country or international organization, with which Slovenia concluded an international agreement on exchange or delivery of secret information, and information which contains or is prepared based on tax data, delivered to the Slovenian authorities by a foreign country authority.

Let us hope that the public sector will not exploit these two highest grades of secrecy provided by the Confidential Data Act merely for the purposes to hide information from the public. Though the Commissioner will nevertheless still have the capacity to acquaint himself with such information and notify the authorities, should he learn of any misuse. In accordance with the amended Act the applicant will have the possibility to demand the withdrawal of the grade of secrecy.

3. The Reuse of Public Information

Another novelty, required by the European Directive 2003/98/EC is implemented into the amended ZDIJZ. It will introduce into public sector the viewpoint of reuse of public sector information. The public

sector collects, produces, and disseminates a wide range of information in many fields of activities such as information on social affairs, economy, geography, weather, tourism, entrepreneurship, patenting, justice affairs, culture, education and policy making. Information from many of the stated fields is available in public registers, and according to my personal opinion the reuse of public sector information will thus include particularly the larger, for the purpose of reuse more suitable, databases. This concept is undoubtedly new in the Slovenian legal system.

The public sector bodies collect, produce, reproduce and disseminate documents to carry out their public tasks. The use of such documents for other purposes is regarded as a reuse. A key element for it is the added value of particular public information. The private sector should thus be able to offer more than the public sector does when carrying out its public tasks.

The country can in accordance with the EU Directive also decide to charge for the information "ready" to be reused. This will of course have no effect on the entirely voluntarily and free of charge exchange of information between the bodies of public sector in order to insure the execution of public tasks, while at the same time charging the same information to others. Countries can also adopt differential policies with charging for commercial and non-commercial reuse. This latter option was adopted also by the Slovenian lawmaker.

4. Extension of the jurisdiction and the renaming of the Office of Commissioner to Information commissioner

I should lastly also explain the merging of the two separate bodies, the Commissioner for access to public information and the Inspectorate for protection of personal data (after the inter-departmental harmonization, the Government decided not to include the anticipated merger into ZDIJZ itself, but instead to prepare a separate purposeful Information Commissioner Act). The Personal Data Protection Act (hereinafter ZVOP-1) as it specifies the level of personal data protection remains valid, there is therefore no grounds for concern that the supervisors while carrying out their supervision should be subordinate to the Information commissioner. The supervisors have the title of inspectors and within the frame of their inspection activities retain their full independence. The Office of the Commissioner will in the long run also be able to furthermore improve the protection of personal data with the help of its professional team of lawyers and experts in the field of personal data protection. The only change is the abolition provided for in the new Act on Information Commissioner of the possibility to file administrative disputes among the two bodies. Personal data protection will remain to be carried out with the existing procedures and same employees regardless of the changes. The Information Commissioner acts as a principal of both sectors, each of which with its own obligations and duties. The duty of the sector for access to information is issuing decisions, which with newly acquired expertise will undoubtedly prove to be of an even better quality. At the same time, the sector for personal data protection carries out duties of inspections and all other legally assigned duties. An additional distinction between the two sectors is furthermore the fact the ZVOP-1 also includes the supervision over actions of the private sector, an area into which ZDIJZ is allowed no entry.

Why a merged body? One reason is of a material nature, arising from the fact that two bodies which operate in an area so closely interlinked would inevitably come into conflicting situations. This fact was already foreseen by the lawmaker, which implemented in ZVOP-1 the institute of an administrative dispute as a tool for settling such conflicts. Such a manner of settling mutual conflicts though, would due to the long time periods of dispute resolutions, mean a lessened legal certainty. It is therefore reasonable to establish a common body and thus prevent similar conflicts from forming altogether. The second reason is the rationalization of operation, two similar state bodies would namely require more human, financial and other resources than a single merged body.

The merged body also insures for its greater visibility as well as unification of the entire legal practice of the field. It will also increase the awareness of all other government bodies while carrying out the stated legislative provisions to the benefit of all applicants.

We should keep in mind that the right to privacy and the freedom of expression are merely two sides of the same coin. One can never prevail over the other. It will be necessary to lead a consistent and unified policy with balance and proportionality tests towards the citizens and government bodies, a policy of legal review which will prevent public confusion. Precisely this emphasis is the one observed most by many fellow Commissioners from other countries. The trust in a certain institution can only be obtained by professional and faultless work in comparing both human rights, with professional attitude towards both the applicants i.e. citizens on the one side and public sector bodies on the other. The latter are bound with transparency and guarding personal data and at the same time also with professional attitude towards citizens and private sector, which also handles personal data.

The same organization of the field, where both access to public information as well as personal data protection are merged into one body, is also implemented in Great Britain, four federal states

(Bundesländer) in Germany and on a state level as well from 1st of January 2006, Hungary, Estonia, Latvia, on regional level in Canada, as well as in some federal states of Mexico.

Europe currently has 11 Commissioners, 2 of them are Data Protection Inspectors (UK, Ireland, Germany, Hungary, Serbia, Slovenia, Belgium, Portugal, France, Estonia, Latvia – last two ones are Data Protection Authorities) of which six include both of these constitutionally extremely important fields of law. Also Latvia, namely already has a joint body, though as of yet it still doesn't have an independent status, which is a requirement for carrying out the duties of the Commissioner and with Directive 95/46/ES (Article 26) also for duties regarding personal data protection.

5. And what is the practice of institutions reviewing legitimacy of rejecting the request for access to documents? Commissioner or Ombudsman?

At first I would like to tell there are three systems of second-instance (judicial) decision making:

1. Many countries left the conflict between the body obliged to follow the rules of the access to information and applicant of information to be settled before the courts which proved to be extremely non-efficient in the systems where judiciary process is slow since a chief aim of the access to information – speed is not reached. In these systems the disadvantage is also the fact that the courts as the third branch of government are not included in the system of bodies obliged to follow the rules of the access to information although they hold many documents which should be made public without doubt (documents from the field of court administration…). Take for instance Montenegro where the Access to Public Information Act is still being prepared and most of the problems are connected with the courts since it is not possible to obtain final judgment from them and they are indifferent concerning the public. What is more, they even do not have computer judiciary data and it is needless to say that non-governmental organizations a lot of times need to apply exactly the jurisprudence of court in exercising their rights.

2. In many countries the function of review is subject to Ombudsman (who does not have a statues of a second instance body) which may be good where his words count but may not be good where he is seen as a toothless tiger whose decisions do not have any legal power since the one who rejects to give information can either respect Ombudsman's decisions or not.

3. In the countries where democracy is still under develop is surely most sensible to have an authorized body, independent state body (sui generis) watching over law enforcement and reviewing the conflict between the person obliged to follow the rules of the access to information and the applicant. Its decision is final and no appeal shall be made against this decision except complaint (in all countries which have an authorized body an administrative dispute may be launched since it is clear that judiciary has to be the last instance dealing with the protection of the right). Article XIX, one of the biggest non-governmental organizations in the world dealing with protection of human rights recommends having an Information Commissioner to all since it was found out it has the least disadvantages and that the applicants obtain information in the fastest possible way. Today approximately 30 countries have an information commissioner and the number is still increasing.

Each of these three systems has its advantages and disadvantages. The main value of the states is and has to be the Access to Public Information Act, and the question which body supervises is finally not so important. In fact, a bigger problem is if a state does not have this act at all or even worse if these human rights are not even written down in the Constitution.
Regardless of different traditions in law the fundamental solutions to legislative regulation of the access to public information in the legal orders of developed democracies are totally comparable. The fact is that the access can be limited only in precisely determined cases which are also similar in comparable law. The legislative regulation of protection of the law in the case of rejecting the access to public information is also totally comparable. Recently, when it came to the appeal procedure, the importance of instance review by an independent body from civil service has been pointed out. Judicial supervision (i.e. administrative dispute) remains the last legal means in all cases.

6. Slovenian Model – Competencies of Commissioner and Ombudsman

Abbreviations:
APIA – Access to Public Information Act
ICA – Information Commissioner Act
IA – Inspections Act
HROA – Human Rights Ombudsman Act
CCA - Constitutional Court Act

Ombudsman could deal with access to public information because it is a constitutional fundamental

human right in our legal system, but in practice only Information Commissioner (IC) deals with this field. All the appeals go to the IC, because APIA defines IC as an appeal body with binding powers.

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1 http://www.freedominfo.org/survey.htm
2 Official Gazette of the Republic of Slovenia, No. 113/2005
3 http://www.privacyinternational.org/issues/foia/foia-laws.jpg
4 http://www.informationcommissioner.gov.uk/cms/DocumentUploads/ag%203%20-%20pub%20interest%20apr05.pdf
5 http://www.medway.gov.uk/index/council/policy/freedomofinformation/29499-3/29499-10.htm
5 Available on http://www.dostopdoinformacij.si/index.php?id=247
6 http://www.freedominfo.org/news/india/20050516/THE_RIGHT_TO_INFORMATION_ACT_2005-Final.pdf
Article 8.: Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;
(j) information which relates to personal information the disclosure of which has not relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information: Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.
(2) Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.
8 Confidential Data Act, Official Gazette nr. 135/2003, Article 13.
9 Directive Nr. 2003/98/EC of the European Parliament and Council on Reuse of Public Sector Information dated 17.11.2003, OJ 2003/L 345
10 Article 2., Paragraph 4. of the Directive: "reuse" means the use of documents, kept by public sector bodies, by natural or legal persons for commercial and non-commercial purposes except for its original intended purpose within the frame of public task, for which they were created. The exchange of documents between public sector bodies themselves for the purpose of carrying out their public tasks does not constitute a reuse.
11 Point 19 of the introductory explanation of the Directive
12 Article 34.a ZDIJZ-A: State body can charge for the reuse of information for profitable purposes, except in cases of use for purposes of providing information, ensuring the freedom of expression, culture and art, and the use of information by the media.
13 Official Gazette RS, nr. 86/2004
14 Dated 22.5.2005 - http://www.mju.gov.si/fileadmin/mju.gov.si/pageuploads/mju_dokumenti/doc/Predlog_zakona_o_spremembah_in_dopolnitvah_ZDIJZ.doc
15 http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=31995L0046&lg=SL
16 http://www.article19.org/docimages/1112.htm
17 First three acts are accessible in English on Commissioner’s website - http://www.ip-rs.si/index.php?id=162
18 http://www.varuh-rs.si/index.php?id=91&L=6#613
19 http://www.us-rs.si/en/index.php?sv_path=6,18