Republic of Serbia

The Ministry of State Administration and Local Self-Government

A special working group for drafting amendments to the Law on Free Access to Information of Public Importance

Belgrade

Subject: Past experience of Transparency Serbia regarding the implementation of the Law on Free Access to Information and suggestions regarding its upcoming changes

A summary of past experiences of Transparency Serbia

Since its establishment in 2002, Transparency Serbia **has actively campaigned for the adoption of the Law** on Free Access to Information as one of the most important acts that Serbia needed to prevent corruption. This is why, in addition to legal analyses and suggestions for specific solutions among draft regulations and existing legislation, we discussed international experiences, organized public campaigns and cooperated with other NGOs and international organizations, as well as international NGO networks.

During the second phase of our work and after the Law was passed, we investigated **how the Law was implemented in practice** (e.g. the first study that included forwarding identical requests to all ministries in 2004 and the first analysis of information booklet from all ministries in 2006). Another aspect of verifying Law compliance, which has continued until today, consists of making requests for access to information, complaints to the Commissioner and complaints to the Administrative Court in situations where some information are necessary for the operation and monitoring of many other laws (e.g. the Law on Public Procurement). We took part in this phase either individually or together with other NGOs from the Coalition for Free Access to Information and the newly established institution - the Commissioner for Information of Public Importance and we promoted the right of access across Serbia, through numerous seminars, forums, conferences and the like.

Shortly after the Law was adopted, and soon after positive impacts were recorded, **tendencies for restricting the right to access to information started emerging.** The most obvious instances of this kind were related to mere force or lack of will - refusal to submit information, refusal to act upon the Commissioner's orders, ignoring the obligation to ensure the execution of Commissioner's orders, falsification of documents, false claims that documents did not exist and the like. Another form of obstruction was related to the inspection body itself – long term refusal to provide necessary work conditions for the Commissioner significantly limited the ability to efficiently resolve complaints. The third form of obstruction was related to "sophisticated" methods - obstruction of access to information through provisions of other legislation.

The obstruction of the right of access to information by means of other legislation also took various forms. The constitutional norm of the "right to information" does not fully reflect the right of access to information and redundant amendments to the Law on Free Access to Information were made due to the alleged needs of compliance (in order to shorten Commissioner's term of office). Serbia entered into bilateral agreements whose implementation through specific contracts sometimes limited the right of access to information. Some laws adopted after 2004 contained or still contain rules that specifically aim to limit access to certain information (e.g. Section 45 of the Law on Protection of Competition). Specific by-laws or the recommendations of the administration board were adopted for this reason. Although these acts obviously did not have the same legal power as the law, they led to difficulties in practice because certain authorities referred to them, and by doing so, slowed down the implementation of the right at the very least.

The obstacles for accessing information were caused not only by the newly adopted legislation, but also by the legislation that were adopted before the Law on Free Access to Information. The authorities that had been implementing them for a long time were inclined to interpret this by saying that "their" laws "took precedence". These instances occurred particularly often when certain regulations entitled specific categories of persons to access specific information (e.g. the right of parties in judicial or administrative proceedings to inspect and copy certain documents). This (privileged) right of some persons was interpreted as if no one else had the right to access that information, which in many cases was not grounded.

Finally, the problem was also reflected in the **absence or inaccuracy of other regulations** that are important for the proper exercise of access to information. Thus, for a long time, Serbia did not have the Law on Personal Data Protection, unique regulation on information confidentiality, etc.

In addition to the activities implemented earlier, over the last seven years special attention has been paid to a proactive approach to information - releasing as much information as possible on the web pages of authorities. In addition to the need to increase the amount of disclosed information, it is equally important for the information to be searchable and usable in any other way (e.g. the option for the information to be copied), but also updated and reliable in other ways. Despite substantial progress (more information are being disclosed every year), there are still no guarantees that the information will be reliable, many of the existing databases are not available proactively although this would be technically feasible and it is not possible to merge the data from various public databases.

We have been particularly engaged in the disclosure of data from information booklets, especially after the adoption of the new Commissioner's Directive on Drafting and Publishing Information Booklets of state authorities, when the obligations of the authorities were considerably regulated. This Directive (and the Section of the Law on Free Access to Information that served as grounds for its adoption) are important because they present the **only common binding ground for proactive disclosure of information** about the work of state authorities. In fact, authorities are not explicitly required to have a website and to present any

specific content online. There are only guidelines for developing websites (that are binding for state administration bodies based on the Government's decision), as well as the standards for certain information to be published online (if websites already exist), as in the example of the Law on Public Procurement.

In addition, over the last few years we engaged in the issue of improving the system of access to information. The best way for this to be achieved is to take advantage of the **annual reports of the Commissioner** for Information of Public Importance (and Personal Data Protection). Thanks to, among other things, the efforts of TS, the analysis of the Commissioner's report and reports of other independent state bodies in the Assembly was regulated by amending the Assembly's Rules of Procedure. However, these standards were generally not applied in practice (reports were analyzed too late), and there ware almost no outcomes. Even when the National Assembly reached specific conclusions regarding these reports, no effort were made to ensure that the Government implemented them. A typical example is the fact that, contrary to the conclusions adopted by the Assembly, in 2014 the Government did not propose amendments to the Law on Free Access to Public Information that would enable more effective work of the Commissioner.

Finally, one part of TS efforts was aimed at improving access to information in the context of broader reforms (strategy for fighting corruption, strategy for judicial reform, public administration reform strategy, reforms in public finance, the initiative for open government, etc.), as well as communication with various international organizations and initiatives (e.g. GRECO, UNODC, ODIHR). Serbian European integrations are of particular importance in this context.

TS submitted specific proposals for improving the Action Plan for Chapter 23, including the part related to access to information. Unfortunately, **not even the final version of this document included specific measures to ensure the full implementation of the recommendations** "2.2.5. Improving the regulations of free access to information of public importance and their implementation in practice, including information on privatizations, public procurements, public expenditures or foreign donations for political subjects, as well as information considered "sensitive." In fact, none of the activities described hereafter are related to drafting of the existing Law on Free Access to Information, nor to the amendment of other laws (e.g. the Public Procurement Law or Law on Privatization).

Te main problems that TS encountered while implementing access to information:

1. **The state authority did not act upon requests within the statutory deadline** (requests were neither approved, nor declined). In current practice, this was by far the most common problem we encountered. Solutions to this problem are to strengthen the Commissioner's capacity (for faster resolution of appeals) and to increase the number of proceedings against the persons responsible for this violation of the Law, which can be achieved by strengthening the capacity and the increased involvement of the

administrative inspection or giving jurisdiction to the Commissioner for supervision of the Law implementation.

2. **The state authority unfoundedly denied access to information**, with reference to the confidentiality of documents, the alleged abuse of the right of access to information (e.g. frequent requests), and, in rare cases, the protection of privacy. In almost all cases, appeals resulted in ordering the authority to act on the request. This problem can be partially solved by clearly regulating the Law, in order to reduce space for unfounded denials, particularly through limiting the standard of "abuse of rights". In most cases the problem is reflected in the fact that the authority knowingly violates the Law, and not in the fact that the standards are vague. Indeed, there are situations when authorized persons within authorities are confused about the way the Law should be applied once the request is received. This is particularly the case when documents are labelled as confidential in some way and a person who is deciding on the requests is not authorized to remove the label of confidentiality when conducting a "test of public interest".

3. **The state authority claimed it was not in possession of the information.** In some situations, there was a suspicion that this statement was true. This situation also differs in terms of the degree to which the authority is required to possess the requested information. The problem can have various causes and various solutions – e.g. holding the authority responsible for not possessing certain documents, providing opportunities to prepare non-existent information upon request (and with compensation, if there was no obligation to prepare such information), issuing authorization to verify the claims about the lack of information and so on.

4. **Providing information in print rather than electronically and by mail rather than e-mail.** The provisions of the Law could be more precise, particularly in terms of responsibility of the authority that obstructs the implementation of the right of access to information in this way.

5. **A claim that the person who signed the request is not an authorized representative of the organization and that the request needs to be regulated in order to be considered**. This issue is not explicitly regulated by the Law on Free Access to Information. The standards of the Law on General Administrative Procedure are applied instead. Given the fact that everyone is equally entitled to the right of access to information, the requirement and verification that the request is signed by an authorized representative of a legal entity are essentially irrelevant.

6. **The Court did not provide protection even though the request was wrongfully denied**. In several cases, TS filed a complaint in an administrative dispute, and the Court refused to provide us protection, even though the complaint was founded. In one case, this happened when the state authority (the General Secretariat of Serbian Government) acted upon the request on a number of required counts, but not on all of them. According to one of the counts, General Secretariat did not provide precise information

as to whether it was in the possession of the requested document. The court, however, ignored this fact and decided that there was no violation of the right of access to information. Potential solution to this problem could be to provide the right to appeal to the Commissioner in all cases (even if a request is denied by one of the six bodies under the Section 22, paragraph 2 of the Law), because this would provide dual protection of the right of access to information and minimize the occurrence of such errors.

7. **The solutions were not always enforced.** Even though the Commissioner/Administrative Court decided in favor of TS, the authority did not comply with the order (even after imposing fines in enforcement proceedings). The government did not fulfill its obligation to ensure the execution of the decision in such cases.

8. **Information booklets on the work of the authorities were not up to date, the information were incomplete or information booklets were not published at all.** Some authorities whose work is essential for citizens are not required to disclose information booklets. This problem can be partially resolved by extending and specifying the obligation to prepare information booklets and implementing a more effective mechanism for sanctioning responsible persons who withhold the information.

9. **Difficulties in proving that requests that were left unanswered were actually submitted by e-mail or refusal of some authorities to receive requests by e-mail.** The solution to this problem is to introduce obligations and regulations for the receipt of such request.

10. **The average time for the Commissioner to decide on appeals was too long.** In some cases, resolving appeals extended beyond the statutory deadline, which, according to the annual reports of the institution, was related to lack of capacity/large number of complaints.

Basic provisions for the amendment of the Law on Free Access to Information of Public Importance

1. Transparency Serbia assumes that the **existing Law on Free Access to Information is still one of the best and most important anti-corruption legislation in Serbia.** Serbian legislation was rated at the international level as one of the best in this regard. Therefore, we believe that, from the very beginning, it should be clearly announced that **amendments to the Law do not violate the achieved level of guarantees of the right of access to information in any way.** This, among other things, implies the following:

- Law amendments should not stipulate any exceptions to the absolute right of access;
- No restrictions should be imposed on using the information obtained upon request and no obligations should be imposed to prove an interest in access to information;
- The list of authorities obliged to act in accordance with the requirements and to publish information proactively should not be reduced;

- The list of authorities whose decisions can be appealed or the list of reasons for appeals should not be reduced;
- Commissioner's powers or independence should not be reduced.

Taking this into account, we believe that **the starting point for making amendments to the Law should be the amendments that were proposed in 2012.** These standards should be supplemented in cases where they can contribute to strengthening the rights of access to information.

2. Improving access to information **implies the need to amend not only the Law on Free Access to Information, but also other related legislation** – e.g. the Law on Data Secrecy, in regards to the abolition of unfoundedly established secrecy, the Law on Budget System, in order to increase the amount of information related to public finances that will be published in advance and ways of their presentation, the Law on General Administrative Procedure (in regards to electronic communication), etc. In addition, it is important to remove all existing norms in the legal system that cause confusion (e.g. Section 45 of the Law on Protection of Competition). It is necessary to revise legal system in regards to the issues that are not fully regulated – e.g. establishing duty for the authorities to prepare specific information or to prepare them in a certain way, and make them available to the public (e.g. information on public expenditure in the form of a searchable database, modeled on the Slovenian "Supervisor") or reviewing the standards of the Criminal Law in regards to liability for intentional destruction of information, failure to prepare required documents, etc.

3. Numerous provisions of the Law on Free Access to Information should be revised, such as:

a) Section 1, defining Commissioner as an independent state authority;
b) Section 2, defining information in specific contexts – e.g. when the information is a result of long-term efforts of other authorities, when the information is contained in a database, and above all, taking into account the current practice of the Commissioner.
c) Section 3, expanding the list of persons who are considered "authority" (e.g. public notaries) and erasing the differences between "state authority" and other authorities. Legal definition of the scope of information required to be disclosed by government bodies should also be revised (e.g. those to whom holding a position in a public authority is a secondary occupation, who entirely belong to private sector, who are not financed from public sector and who do not perform activities of public interest);
d) Section 5, considering introduction of the right to request an authority to prepare certain information (for a compensation). This question can also be regulated separately.
e) The need for Section 6 to be reconsidered, due to other regulations that were adopted in the meantime (after 2004) and which regulate this matter (prohibition of discrimination);
f) The standard referred to in Article 7 should be elaborated in the procedural section of the Law (after Section 16) – actions of authorities upon receiving requests for the same information from several journalists or media outlets;

g) Section 8 should more clearly emphasize the priority of Law on Free Access to Information over other laws governing this matter;
h) In Section 9, the scope of potential exceptions can be reduced by modifying broad definitions such as "personal interest of another kind" or "management of economic processes in the country." It is necessary to specify the situations where the secrecy of documents may serve as grounds for denial of information and to align used terminology with the laws that govern secrecy.
i) Narrowing down the exception under Section 10 only to information that are still available;
j) Specifying the duties of authorities referred to in Section 11;
k) Specifying actions of authorities while classifying information, especially in regards to providing access - Section 12;
l) Deleting Section 13, or specifying certain grounds for "abuse" that are currently listed;
m) Specifying standards within Section 15 in regards to amendments to the Law on Administrative Procedure and the practice of the Commissioner and the Administrative Court in regards to identification of requests to access information;
n) Closer regulation of the request record keeping;
o) Section 16 - specifying the rights of those who submitted requests in regards to response times;
p) Specifying the standards and limiting Government's discretion in regards to determining the bill of costs under Section 17;
q) Specifying the standards of Sections 19 and 20 in regards to forwarding requests and acting upon forwarded requests;
r) Assessing the need for amending specific issues of access to information – e.g. artistic and cultural assets that contain information and the like.
s) In other regulations (the Law on Administrative Procedure, court rules, etc.), arranging the matter so that the right of access to information is not in any way called into question due to the existence of special rights of some persons to access specific information.
t) Removing Section 22, paragraph 2 and allowing an appeal to be filed to the Commissioner against the decision of each of the authorities.
u) Considering the extension of the Commissioner's deadline for reaching a resolution (Section 24) and the introduction of shorter deadlines in some cases (e.g. where the deadline to act upon the request is 48 hours).
v) In Section 27, the obligation of making an "expedite procedure" as a condition for initiation of an administrative dispute should be removed.
w) In Section 33, conditions for the election of Deputy Commissioner should be amended;
x) In Section 33, the jurisdiction of the Commissioner should be extended;
y) Section 38 should specify the duties and responsibilities and remove the standards about whistleblowers.
z) The list of authorities required by Sections 39 and 40 to prepare information booklets should be expanded, as well as the contents of information booklets, the manner of publication and responsibility for subsequent updates within the Law (transferring part of the provisions from the current Rule Book)

aa) Specifying the manner and scope of training referred to in Section 42;
bb) Specifying the content of the report referred to in Section 43 and further regulating the report content through a bylaw;
cc) Regulating right to compensation to other persons except journalists and the mass media - Section 44;
dd) Making distinctions between severe and minor offenses - Section 46