



PROACTIVE TRANSPARENCY AND THE RIGHT OF ACCESS TO INFORMATION TWO SIDES OF THE SAME COIN

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Authors: Ana Bukovac
Vuletić, Anida Šabanović



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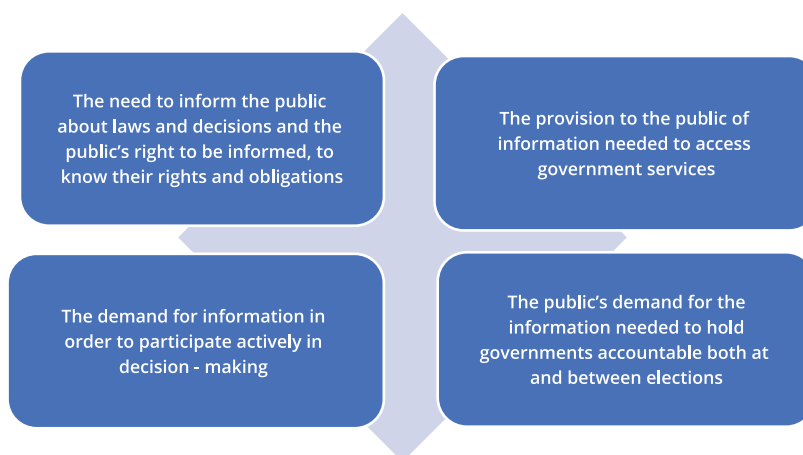


Kingdom of the Netherlands

Societies which are seen as democratic societies are generally envisioned as an environment in which the government operates for the benefit of its citizens and works together with the citizens. One of the values of a democratic order of a country is the transparency of work of its administrative structures, as well as full respect of the inalienable rights of its citizens. Proactive transparency and free access to information are the basic methods of communication between a state and its citizens.

Depending on the side initiating this communication, there is a reactive transparency of the administration and it is based on citizens requesting information pursuant to the Freedom of Access to Information Act, and the requested information is then granted to the citizens upon their request; and there is a proactive transparency, where the administration publishes specific information on its own initiative because it wants to inform the citizens of its work, on their rights and obligations, or wishes to involve the citizens in decision-making processes pertaining to laws, policies, actions and other. There are different reasons for initiating this communication. Furthermore, through the development of new technologies, particularly wider use of internet, platforms and social media, this communication has gained an entirely new dimension.

Four main drivers of proactive transparency¹



¹ For more information see: Helen Darbshire: „Proactive transparency; The future of the right to information. A review of standards, challenges and opportunities“ World Bank Institute, Governance working papers series; available at: <https://openknowledge.worldbank.org/handle/10986/25031?show=full>

CURRENT SITUATION IN BIH – HOW (PRO)ACTIVE ARE WE?

When speaking about Bosnia and Herzegovina (BiH), a country which is, at least declaratively, a democratic state, it is still very far from the ideal when it comes to these two aspects of democracy. Its lack of openness partly stems from its historic background from the time of communism, when it was not customary to ask the government to justify its actions or working methods. However, now, for this state which is striving towards EU and Euro-Atlantic integration and membership, it is necessary to change this paradigm of communication between this state and its citizens. In order to build the citizen's trust in the administration, the administration needs to be transparent, its work needs to be visible and understandable to the citizens, because in that way the possibility of corruption and abuse of power is reduced, and the citizens are enabled to take active participation in decision making processes. However, it is still too early to speak of the existence of a consistent proactive transparency in BiH.

The right of access to information is one of the basic human rights. In BiH, this right has been defined through various documents including:

1. Freedom of Access to Information Act² (both on State and Entity level) which has had several amendments till now;
2. The UN Universal Declaration of Human Rights;
3. The UN International Covenant on Civil and Political Rights (Article 19, where it is stated that everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information);
4. European Convention on Human Rights (where Article 10 defines that freedom of expression implies the right to, amongst other things, receive and impart information);
5. Recommendations of the Council of Europe;
6. The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (The Aarhus Convention) - This Convention underlines the significance of informing and raising awareness of citizens for quality development and implementation of specific policies;
7. Council of Europe Convention on Access to Official Documents³; which BiH has joined in 2011, speaks of a practical side of proactive transparency, that is, that the information which are the most common subject of information requests, should serve as the bases for proactive transparency. This means that the government would make its job much easier if it was to publish the data once, and make it publicly available to all, instead of dealing with answering to multiple information requests for same thing every time.

When it had adopted the Freedom of Access to Information Act in 2000, BiH was one of the first Western Balkan countries to do so. In 2001, these laws were adopted at Entity level as well. This Law, (Article 1) defines that 1) information under control of public authorities is a valuable public resource and that public access to such information promotes greater transparency and accountability of those authorities and is essential to the democratic process; 2) that every person has the right to access this information to the greatest extent possible consistent with the public interest and that the public authorities have the corresponding obligation to disclose information; and 3) to enable every natural person to request the amendment of and to comment on his or her personal information in the control of a public authority. The institution in charge of monitoring the implementation of this Law is the BiH Ombudsmen.

However, this Law, which has had several amendments up until this point, does not instigate proactive

² Freedom of Access to Information Act in BiH (Official Gazette of BiH, No: 28/00, 45/06, 102/09, 62/11 and 100/13).

³ Freedom of Access to Information Act in BiH (Official Gazette of BiH, No: 28/00, 45/06, 102/09, 62/11 and 100/13).

transparency of the government, but rather defines the rights of the citizens to gain specific information. According to the research done by Transparency International BiH in September 2018 on the application of this Law⁴ it is visible that this law is not being applied consistently in practice. In fact, on some levels of government (FBiH) almost half of the institutions the request for information was sent to for the purpose of this research, did not respond to the request.

In 2017., the BiH Ministry of Justice had, with the assistance of the NGO sector, organized a public debate on the new draft Freedom of Access to Information Act. The draft Act was unanimously refuted by the NGOs and other relevant stakeholders. The main reasons cited for the creation of this new draft Act was to technically conform the law with legislative drafting requirements, which is important, however, not as important as the very content of the Law. Through detailed analysis of the draft, the participants of this public debate have concluded that the draft, in its content, was a lot worse than the existing legislation in the sense that specific international standards have been neglected when it comes to freedom of access to information. The draft Act was missing clear definitions of public interest test, jurisdiction of supervising authority, clear definition of what is information of public interest and what can be defined as private and non-disclosable information. The draft was also lacking clear definition of sanctions for violating provisions of this Law. The new draft, where all the comments would have been incorporated, is still not made.

A working group, which was formed as a part of the Programme for Strengthening of Public Institutions of BiH, and which was composed of the members of the Interinstitutional working group for communications and knowledge management (Directorate for European Integration, Public Administration Reform Coordinator's Office, Agency for Statistics of BiH and Agency for Higher Education and Quality Assurance of BiH) and the representatives of the NGO sector, has prepared the Standards of Proactive Transparency in Public Administration in BiH⁵ where types of information that need to be publicly available have been defined in detail under four types, which are: financial information, strategic information, institutional information and operational information.

MOVING TOWARDS PROACTIVE TRANSPARENCY – HOW CLOSE ARE WE TO OUR RIGHT TO ACCESS TO INFORMATION?

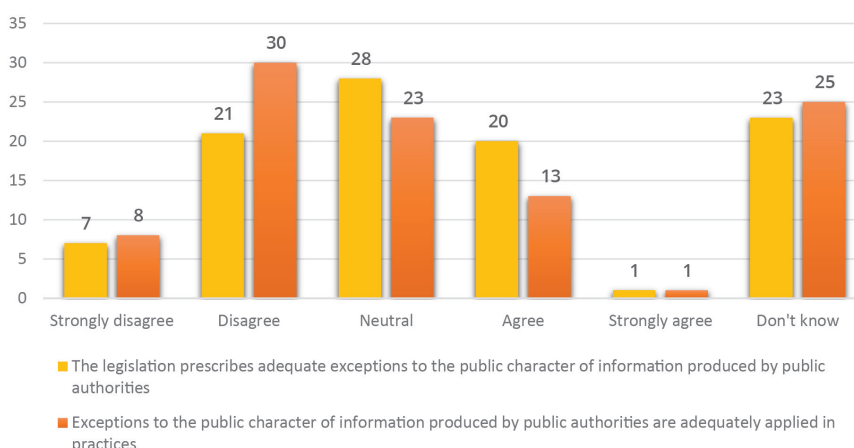
According to the research of the WeBER project⁶, perception of the civil society pertaining to the quality of legislation and the practice of access to information of public importance is low for all Western Balkan countries, but BiH and Montenegro are at the very bottom. The results of this research for BiH show that less than 30% of the CSOs agree that the public administration authorities record enough information within their work in order to provide the public with free access to information of public importance. Furthermore, only 20% of the surveyed OCDs consider the exceptions to the presumption of public character of information to be adequately defined in the legislation and adequately applied in practice. However, some positive views are held towards practical aspects of requesting information: information is provided in requested format, within deadlines, and free of charge. Furthermore, the research has also shown that the information provision on the websites of the institutions lacks a citizen-friendly approach. Publicly available information is only partially complete and updated, and accessible within maximum three clicks from homepages of the institutions.

⁴ Freedom of Access to Information Act in BiH (Official Gazette of BiH, No: 28/00, 45/06, 102/09, 62/11 and 100/13).

⁵ Freedom of Access to Information Act in BiH (Official Gazette of BiH, No: 28/00, 45/06, 102/09, 62/11 and 100/13).

⁶ Freedom of Access to Information Act in BiH (Official Gazette of BiH, No: 28/00, 45/06, 102/09, 62/11 and 100/13).

FIGURE 1 AGREEMENT WITH STATEMENTS ON EXCEPTIONS TO THE PUBLIC CHARACTER OF INFORMATION (%)



Source: WeBER National PAR Monitor Report for BiH 2017/2018

INSTEAD OF A CONCLUSION

Good governance concept implies an open government that functions along the principles of efficiency, transparency and legality. Within that context, citizen’s demands for a more transparent administration are not aimed against that administration but rather towards obtaining welfare both for the citizens and the administration. Nevertheless, in BiH, certain parts of the administration do not implement the Freedom of Access to Information Act in practice. According to the public opinion poll conducted amongst the citizens and NGOs in BiH within the scope of the WeBER project, the right of free access to information is often violated by the public institutions, and the NGOs believe that the sanctions for such actions do not induce serious consequences. No one is held accountable for not providing information, even in cases where NGOs have won actual court cases against public institutions on this matter. The NGO sector is often forced to use informal channels and private contacts to gain access to information of public significance. Practices vary at different levels of government, and even when all of the preconditions are met, it is questionable whether a request for free access to information will be granted. Information pertaining to finances, tender procedures, public companies or public spending are the hardest to obtain.⁷

In the end, there are plenty good practices in the world that should be considered when it comes to proactive transparency. There are no exact, precise and uniform standards pertaining to which information needs to be published proactively. However, it is possible to determine (and for BiH it has already been partially defined) what are the common groups of information that should be made available to the wider public. Furthermore, it should be taken into consideration that it is not enough to simply publish information. This information needs to be in an open format, easily understandable and usable by the citizens. The more the public is informed, the more confidence the citizens have in the institutions that proactively publish the necessary information which is one of the qualities of a successful democratic society.



⁷ Freedom of Access to Information Act in BiH (Official Gazette of BiH, No: 28/00, 45/06, 102/09, 62/11 and 100/13).