Comments to the proposal for amendments of the Law on Free Access to Information of Public Importance of Serbia[1]

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2 Rue André Pascal
75775 Paris Cedex 16
France

mailto:sigmaweb@oecd.org
Tel: +33 (0) 1 45 24 82 00

www.sigmaweb.org

Introduction

This document provides major comments to the proposal for amendments of the Law on Free Access to Information of Public Importance (LFAI) prepared by the Ministry of Public Administration and Local Self-Government. The major focus is on compliance of the Proposal with the international standards regarding transparency of public administration, including Council of Europe Convention on Access to Official Documents (Tromsø Convention[2]), signed (but not ratified yet) by the Republic of Serbia, EU/SIGMA Principles of Public Administration[3], and the standard of proactive disclosure of public information established by the World Bank[4].

These comments do not refer to the deficits of the current law[5] but concentrate on the changes envisaged by the Proposal. Comments are based on the original Serbian language version of the proposal for amendments as translation to English was not yet available.

General comments:

1. At the time of adoption, the current LFAI was among the most progressive acts regulating this matter in Europe. This was confirmed by the top position in the Global Right to Information Rating, assessing the laws on freedom of information across the world.[6] However, nearly two decades after its adoption, refreshing and upgrading some elements of this regulation is definitely needed.
2. This need is amplified by several shortcomings already identified, e.g. in the SIGMA 2017 assessment[7] and annual reports of the Commissioner for Information of Public Importance and Data Protection[8]. They related mainly to ineffectiveness of supervision of observance of the right to information, caused by flawed mechanism for imposing sanctions and lack of safeguards against non-enforcement of the Commissioner's decisions.
3. The Proposal generally addresses some of these shortcomings, especially by strengthening the procedural guarantees for implementation of the Commissioner's

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[2] https://rm.coe.int/1680084826.

[3] http://www.sigmaweb.org/publications/principles-public-administration.htm.

[4] World Bank (2010). *Proactive transparency: the future of the right to information? A review of standards, challenges, and opportunities (English)*. Governance working paper series. Washington, DC. http://documents1.worldbank.org/curated/en/100521468339595607/pdf/565980WP0Box351roactiveTransparency.pdf

[5] Deficits of the current regulation are presented in the SIGMA 2017 Monitoring report, Serbia, Paris: OECD Publishing, page 95-98. http://www.sigmaweb.org/publications/Monitoring-Report-2017-Serbia.pdf

[6] https://www.rti-rating.org.

[7] OECD SIGMA (2017). The Principles of Public Administration. Monitoring Report: Serbia, Paris: OECD Publishing, page 95-98. http://www.sigmaweb.org/publications/Monitoring-Report-2017-Serbia.pdf

[8] https://www.poverenik.rs/en/o-nama/annual-reports.html.

decisions and streamlining the procedure for sanctioning violations of the right to information. However, it also contains numerous controversial provisions that fail to address some of the existing problems, while potentially creating new obstacles in access to information of public importance.

This relates particularly to:

- the definition of public authorities (information holders),
- catalogue of restrictions in access to information or possibility for refusal of access to information upon the "abuse clause".
- the regulation of proactive transparency which suffers from incomplete and unclear formulation, as well as lack of mechanism of monitoring/inspecting the level of proactive transparency.

Specific and more detailed comments relating to all these matters are provided below.

4. Further, development of this Proposal could be used as the opportunity to ensure implementation of the international standards on the re-use of public sector data, especially the standard established by the EU in its new Directive 2019/1024[9] adopted in 2019, replacing the old Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information. The increasingly important issue of re-use of public sector information currently lacks any regulation in the Serbian legal system.
5. On a technical side, it is recommended to consider adoption of a new law instead of amending the current one. The scope of proposed (and other necessary) changes is so extensive that revision of the existing law might not be the adequate drafting technique amending almost every second article. Second, adoption of a new act is also justified by the need to change the logic of the regulation – proactive transparency should be promoted as a major and primary form of ensuring the right to information, not as a subsidiary one, after the request. The current law (and the Proposal) envisages proactive transparency at the end of the law instead at its beginning before the request.

Additional third reason for the adoption of a new act is also harmonization with the above-mentioned EU Directive 2019/1028 on re-use of public sector data which requests additional set of new articles in this Law.

Specific comments:

Article 3 – Definition of public authority

[9] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.172.01.0056.01.ENG.

Current definition of public authority for the purposes of application of the LFAI is relatively broad,[10] though some institutions appear to enjoy unfounded exemption from the transparency requirements established by this law. According to Article 1 of the Tromsø Convention, definition of public authorities may include – in addition to classical public bodies (government and administration, judicial and legislative bodies) - also natural or legal persons insofar as they perform public functions or operate with public funds, according to national law. The current definition does not include all private bodies that operate public funds, concentrating only on bodies that are fully or predominantly funded by the State or public authorities.

The proposed amendment fails to address this problem. According to the proposed point 8), the LFAI will apply to (private) legal entities that in the year to which the requested information relates generated more than 50% of the income from one or more public authorities, in relation to information related to the activity financed by those revenues. Further, the political parties and religious communities enjoy general exemption, regardless of the amount of received public funding.

Moreover, there are some gaps in other parts of the definition of the public authorities (information holders). For example, the LFAI will apply to companies whose founder or member is the Republic of Serbia, an autonomous province, a unit of local self-government, or one or more other public authorities, if they have 50% or more shares of the relevant company. There are several types of bodies that could not fall under this definition, yet definitely should be subject to transparency rules established by the LFAI:

- Subsidiary companies of these companies;
- Other types of bodies established by these companies (e.g. foundations established by the companies controlled by the state);
- Companies, where the state (or any public authority) does not have majority of shares, but anyways controls them due to dispersed structure of shareholders or special governance arrangements (e.g. golden share);

These gaps make bypassing of the transparency rules established by the LFAI likely and possible, especially with regard to bodies of mixed public-private legal and organizational nature.

In order to address these shortcomings, the Proposal should envisage broader definition of public authorities that could be based e.g. on the catalogue of bodies that are under remit of other independent accountability institution, i.e. State Audit Institution (SAI). The catalogue of auditees established by the Article 10 of the Law on SAI[11] appears to capture all bodies directly or indirectly controlled by the State and financed or co-financed by the State. There is no

[10] 1) A central government body, a territorial autonomy body, a local self-government body or an organization vested with public powers (hereinafter referred to as government body); 2) A legal entity founded by or fully or predominantly funded by a government body.

[11] *Official Gazette of the Republic of Serbia, No. 101/2005, 54/2007, 36/2010 and 44/2018.*

ground for narrowing down the catalogue of these institutions for the purposes of application of the LFAI.

Article 9 – restrictions in access to information

Article 9 is of crucial importance for determining the actual scope of the right to information. The catalogue of already established grounds for restricting access to information is already extensive, but generally in line with the international standards in this matter, particularly Article 3 of the Tromsø Convention. The Proposal further expands the list of available restrictions. The proposed limitations of the right to information require more in-depth case-by-case analysis:

Proposed grounds for restricting access to information	Comment
Endangering the life, health, safety or any other important good of a person	The clause of "other important good" (interest) of a person appears to be too vague and general. More specific formulation indicating specific goods/interests to be protected is necessary, e.g. privacy of individuals.
Endangering the reverence of the deceased	Reverence of the deceased persons might be subject to protection to the extent necessary to protect the right to privacy. Reverence of any person (living or deceased) should not itself serve as a ground for restriction of access to public information, as long as disclosure of specific information does not violate the right to privacy. In other words, the public should have the right to access information about e.g. activities of deceased public officials relevant in the context of their functions, even if these activities undermined this person's reputation.
Endangering or hindering the prevention or detection of a criminal offense, criminal charge, pre-trial proceedings, court proceedings, execution of a judgment or execution of a sentence, administrative proceedings, arbitration proceedings or any	The clause of "other legally regulated proceedings" is too general as it opens the possibility to restrict access to practically any activities of public authorities, as they all qualify as "legally regulated proceedings" in broad sense.

other legally regulated proceedings, or fair trial, until the end of the procedure;	
Seriously endangering the country's defense, national or public security, international relations or violating the rules of international arbitration law	"Rules of international arbitration law" should not serve as a general ground for restricting access to information. Access to information held or obtained in the context of arbitration proceedings is already restricted according to the previous ground and there is no justification for any further, general limitations.
Significantly reducing the state's ability to manage economic processes in the country, or significantly impeding the realization of justified economic interests of the Republic of Serbia or jeopardizing or possible jeopardizing of the implementation of monetary, fiscal and foreign exchange policy, financial stability, foreign exchange management, supervision of financial institutions or issuance of banknotes and coins	This remains generally compatible with international standards.
Making available information or a document for which regulations or an official act based on law stipulate that it is kept secret or is a business or professional secret, or information obtained in the representation procedure for the publication of which the representative did not give approval, in accordance with the law the work of the Attorney General's Office is regulated	This remains generally compatible with international standards.
Violating the equal legal position of capital companies operating in accordance with the regulations on companies on the market	Restrictions to information that is business (commercial) secret are sufficient to protect the rights of the business entities against any damage caused by releasing public information. Thus, this restriction is not justified.
Violating the business interests of natural and legal persons in terms of the law	Restrictions to information that is business (commercial) secret are sufficient to protect

governing the protection of competition, as well as intellectual or industrial property rights, endangering the protection of artistic, cultural and natural assets	the rights of the business entities against any damage caused to their interests by releasing public information. Thus, this restriction is not justified.
Adversely affecting or endangering the environment to which the requested information relates, as well as in the case of disclosure of information on the location where rare plant and animal species are located.	This remains to some extent compatible with the legitimate restrictions in access to environmental information established by Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). However, this provision requires reformulation. Disclosure of public information cannot cause any harm to the environment, as the proposed provision suggests. It can only (in some, very limited cases) hinder environmental protection, e.g. when the exact location of habitats of protected species is disclosed.

Article 13 – abuse of the right to information

The current valid LFAI already contains the "abuse clause" enabling the authority to refuse access to information, if the request is "unreasonable, frequent, where an applicant repeatedly requires the same information or information already obtained, or when too much information is requested". This provision has been already criticized by SIGMA as vague and creating risk for arbitrary restrictions of access to information.

The Proposal modifies the "abuse clause" in a manner that continues to pose a risk of unfounded limitations of the right to information. It is welcomed that the Proposal makes the grounds for application of the "abuse clause" more specific. Nevertheless, the proposed formulation does not mitigate the problems associated with this clause. Firstly, it is stipulated that the request could be refused if it relates to information already obtained or made available to the applicant. It should be noted that in such cases refusal of access to information is not an adequate reaction. It would be sufficient to respond to request by referring to previously provided information or indicating the website where the information was made available. There is no ground for refusal, as in such cases there are no doubts about the grounds for disclosing information. Decision on refusal should be restricted to cases where there is a legitimate ground for keeping the relevant information.

Second ground for application of the "abuse clause" is even more problematic. It is stated that the request could be refused also it would impose "*excessive burden"* in terms of time and

resources on relevant information holder in relation to the public interest justifying the disclosure. First of all, this is extremely vague formulation offering (too) wide margin of appreciation to the respective authorities. Secondly, the reasons of technical and economic nature should not determine the actual scope of the right to information. In other words, restricting access to information cannot be based on ground relating to costs or organizational capacities of the public authorities. These are not legitimate grounds for refusal of access to information. Information holders have other tools to reduce the potential administrative and financial burden associated with processing requests for public information. This includes, in particular:

- The power to impose fees covering justified costs of processing public information requests;
- The possibility to extend the deadline for response and sharing the requested information.

Article 22 – Right to file an appeal

Some changes were introduced in the provision regulating the right to file an appeal. This particularly includes explicit exclusion of the Commissioner's power to decide on appeals against his/her own decisions, when Commissioner acts as an information holder with regard to public information requests addressed to this body. In such cases, the party may launch judicial review not preceded by the administrative appeal procedure. This amendment implements the principle "*nemo iudex in causa sua"* and is fully justified.

The Proposal also adds one more institution (National Bank of Serbia) to the list of bodies whose decisions in the first instance are not subject to the appeal considered by the Commissioner yet might be challenged directly before the court. This amendment remains in line with the international standards, as the review of decisions of these bodies by the court is guaranteed.

The most problematic is the proposed change of the primary ground for filing an appeal with the Commissioner. According to the current wording of the relevant provision, a complaint might be lodged if *"a public authority rejects or denies an applicant's request, within 15 days of delivering of the relevant decision or other document*". According the Proposal, the phrase "or other document" will be deleted.

This change may hinder access to appeal procedure in frequent cases, where the public authorities do not issue decision rejecting access to information, but e.g. refuse access through act that is not formulated as decision or release incomplete information or information different than the one requested by the applicant. These are the cases, where the request is, at least partially, denied by the public authority through "other document" and without classic refusal or silence although final result is the same. Therefore, the proposed change may result in narrowing down the scope of review of acts of public authorities. The most suitable solution would be to explicitly ensure the right of appeal in all cases described above (i.e. refusal without decision, incomplete or inadequate response) to make sure that the public authorities cannot prevent review of their actions based on formal "tricks".

Article 24 – Appeal procedure

Several changes are proposed with regard to the appeal proceedings conducted by the Commissioner in the area of access to public information. First, this involves, extension of the deadline for the Commissioner to process the appeal (from 30 to 60 days). Considering that in cases pertaining to access to information, time is the factor of major relevance, this amendment cannot be supported. Combining the basic deadline for processing public information request in the first instance (15 days)[12], the total legitimate time for handling case in the first and second instance amounts to 75 days (2,5 months). This does not secure effective and fast access to information of public importance.

We are fully aware of the high workload of the Commissioner's office and insufficient capacities of this body. However, extension of the deadline for processing the appeals is not an adequate response to this problem. It is an obligation of the State to ensure sufficient resources to the institution, enabling it to process the cases within the current deadline that is already relatively long.

Article 26 – Obligation of cooperation with the Commissioner

This provision addresses the problems identified in practice of the Commissioner's activities, i.e. lack of cooperation of some institutions, in particular failure to enable Commissioner's access to relevant information in the course of the appeal procedure. However, these investigatory powers of the Commissioner could be further strengthened:

- The Commissioner's powers should be based on similar concept as investigatory powers of the Ombudsman; hence it should include also physical access to premises of public institutions and access to the staff/officials of bodies under investigation;
- There should be explicit deadline established for meeting any Commissioner's requests for access to documents/information/premises/staff;
- Access of the Commissioner to classified information should be regulated – Commissioner should have explicitly guaranteed access to classified documents with necessary security measures applicable.

Article 28A - Enforcement of the Commissioner's decisions

Problems with enforcement of the Commissioner's decisions were marked in annual reports of the Commissioner since 2017. They resulted from flawed alignment between the LFAI and the new Law on General Administrative Procedure (LGAP) that entered into force in 2017. Theoretically, the Commissioner has the power to impose sanctions for non-enforcement of

[12] Article 16 of the LFAI.

his/her decisions already now. However, in the current legal framework it is not possible to calculate the amount of fine, hence the sanctions are not imposed. According to Article 198 (2) of the new LGAP, fine for legal entity should be imposed in the range of half of its monthly income. For state administration bodies, it is difficult or legally unfeasible to establish what is their "income", hence calculation of the fine was practically not possible.

The Proposal seems to address this problem by setting the amount of possible fines for failure in enforcement of the Commissioner's decision - up to RSD 20,000, if the fine is imposed for the first time and up to RSD 200,000 in total (in case of repetitive failure in enforcement). However, the formulation proposed in the Article 28A does not guarantee that the deficits of the LGAP's regulation will no longer affect enforcement of the Commissioner's decisions. In particular, there is a need to explicitly exclude application of the Article 198 (2) of the new LGAP to this procedure to prevent problems in the implementation due to possible collision of both provisions (LFAI and LGAP).

Furthermore, the question arises with regard to proposed maximum limit of sanctions for non-enforcement of the Commissioner's decisions. The amount of RSD 200,000 (approx. EUR 1700) might be for some institutions acceptable "price" for not sharing some sensitive data with the public. In such cases, there is a need for harsher instruments, e.g. criminal liability of the persons responsible for failure in execution of the Commissioner's decision.

Finally, the regulation on sanctions for failure in execution of the Commissioner's decisions is not fully clear and consistent on who bears the liability. Article 28A suggests that it is an authority (institution), but Article 46 indicates the head of authority (institution). In general, the relation between these two provisions (28A and 46) regulating the same type of violation of the LFAI, is not fully clear.

Article 28B – Power of the Commissioner to launch misdemeanor procedure

This provision appears to address one of the major shortcomings of the current legislation, i.e. ineffective mechanism of sanctions for violation of the right to information. As SIGMA noted in the 2017 assessment:

"(…) *the Commissioner has the power to impose sanctions only in the case of non-execution of decisions ordering disclosure of public information. He/she cannot sanction the relevant bodies for other violations of the LFAI (e.g. failure to disclose information proactively on the websites of public institutions). In such cases, the responsibility for supervision of the implementation of the LFAI is assigned to the Administrative Inspectorate (AI), which can file a request with the Misdemeanor Court for sanctions against responsible civil servants. This arrangement is questionable in terms of its effectiveness for the supervision of the implementation of the LFAI. There is no value added in involving the AI when there is already an independent institution*

specialised in access to public information that has expertise and the most comprehensive view of the major problems in this area." [13]

It should be added that in 2020, the AI submitted no requests for initiating misdemeanor procedure in cases pertaining to access to public information.

The Proposal offers opportunity to resolve this problem by enabling the Commissioner to initiate the misdemeanor procedure by himself/herself, without mandatory involvement of the Administrative Inspectorate. This arrangement may improve enforcement of the LFAI. However, further simplification could be considered, based on experience of other countries where such independent supervisory body in the area of access to information exists. For example, in Albania, Croatia and Slovenia, the respective commissioner may impose sanctions by themselves. The officials fined may challenge such decisions before the courts, but the commissioner is explicitly empowered to impose sanctions as a first instance body. This solution is recommended also for Serbia.

Furthermore, the Article 28B envisages that the request for misdemeanor procedure could be submitted by the Commissioner only in the course of processing the appeals against refusal of access to information or administrative silence. The Commissioner does not have power to initiate misdemeanor procedure outside the appeal procedure. In particular, the Commissioner cannot initiate ex officio investigations e.g. on compliance with the requirements on proactive transparency, followed by launching misdemeanor procedure. Therefore, we recommend this additional power of the Commissioner is included in the draft law.

Article 30 – Appointment of the Commissioner

The Proposal envisages some procedural improvements in the process of appointment of the Commissioner. Introduction of more detailed timeline and strengthening the role of respective parliamentary committee is welcomed. Further, the Proposal introduces a ban on re-election of the Commissioner. The majority required for appointment remains the same (majority of all deputies).

Considering the Commissioner as a thematic (specialized) kind of ombudsman institution, these provisions could be assessed against the international standards for ombudsman institutions. The most recent and most comprehensive standard in this matter was established by the Venice Commission as the Venice Principles on the Protection and Promotion of the Ombudsman Institutions developed and adopted in 2019,[14] subsequently endorsed by the Parliamentary Assembly of the Council of Europe.[15] It was preceded by other documents of the Council of

[13] OECD SIGMA (2017). The Principles of Public Administration. Monitoring Report: Serbia, Paris: OECD Publishing, p. 97.

[14] European Commission for Democracy Through Law (Venice Commission), Principles on the protection and promotion of the Ombudsman Institutions ("The Venice Principles), 15-16 March 2019, Opinion No. 897/2017,

https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)005-e

[15] Parliamentary Assembly of the Council of Europe, Resolution 2301 (2019): Ombudsman institutions in Europe – The need for a set of common standards, 2 October 2019.

Europe, e.g. Recommendation 1615 (2003): The Institution of Ombudsman of the Parliamentary Assembly of the Council of Europe adopted on 8 September 2003. Both documents recommend election of ombudsman by qualified majority, though they do not specify the exact threshold.

The idea of appointment (and dismissal) by supermajority aims at supporting bipartisan agreement and strengthening the authority of the incumbent. It might be also the most effective guarantee of electing a person who is widely perceived as independent.

Article 31 – Dismissal of the Commissioner

According to the Proposal, the grounds for early dismissal of the Commissioner remain similar to the current regulation. Changes proposed relate mainly to the dismissal procedure, introducing more specific rules on the procedure before the respective parliamentary committee. However, in order to strengthen the formal independence of the Commissioner, the following amendments could be considered:

- Similarly, to the recommendation on appointment process - introducing the supermajority requirement, especially for dismissal based on vague and subjective ground of "unscrupulous or unprofessional performance of duties". Various models of supermajority could be considered, e.g. 2/3 or 3/5 of the members of the National Assembly;
- Enabling the Commissioner to challenge the dismissal before the Supreme Court of Cassation.

Article 34 – Internal management of the Commissioner's office

For ombudsman-type institutions there is an international standard of their autonomy in internal management of the institution. From this perspective, it is not clear what is the rationale and added value of empowering one of the parliamentary committees to approve the Commissioner's act regulating the work of professional service of the institution.

Article 39 – Proactive transparency

The Proposal envisages expanding the catalogue of information to be disclosed proactively by public authorities. The idea of improving the standard of proactive transparency is welcomed. However, there are significant amendments needed both on material and technical aspects of proactive transparency.

On material side, there is a need for further extension and specification of the catalogue of information subject to proactive disclosure. The necessary improvements should concentrate particularly on ensuring that the following information is published proactively:

- Financial data – according to the Proposal, "data on income and expenses" is subject to publication. However, this formulation is too general and vague to ensure a satisfactory level of transparency in financial matters. For example, the law should require public

authorities to publish full registry of all contracts for purchases of goods and services concluded by them, including data on subject of the contract, type of the contract, parties and value of the contract. Further, the data on any grants and subsidies awarded should be made available. Finally, as regards data on state aid, it should be clarified what kind of information should be published, e.g. information on the value of state aid, beneficiaries and legal grounds for awarding state aid;

- Procurement data - according to the Proposal, "data on public procurement" should be proactively disclosed. Again, this needs to be formulated in more precise manner. For example, the law should explicitly require to publish proactively information on pending tenders and their results, documentation of tenders and information on contracts awarded.
- Salary data – the Proposal requires publication of "data on paid salaries, earnings and other income". It is not clear what kind of data and with regard to which persons (staff members) are subject to mandatory disclosure. It should be explicitly required, as a minimum standard established by SIGMA, to publish at least complete salary information for the top managers of relevant institutions, including data on bonuses and any additional payments made to them;
- Complete inventory of the property owned/managed by the state authority;
- Reports of any inspections and audits of the relevant institution;
- Statistical data on the number of requests for public information received and processed, including data on requests refused or rejected.

There should be also a general clause prioritizing proactive disclosure as a primary channel for making all other types of public information available to the public. The public authorities should be generally required to publish proactively all categories of information that fall under definition of public information. The catalogue established by the law should only constitute a minimum standard, but all public authorities should be explicitly instructed to publish as much information as possible.

On technical side, the regulation on the manner of publishing information is unclear. The Proposal refers to the unique information system to be managed by the Commissioner. However, the Proposal does not contain any further regulation on this system. It is not explained whether this means that all information from all information holders will be collected and published by the Commissioner, or the Commissioner will be only setting standards for maintaining the websites of public bodies. There are also no standards ensuring timeliness of publication (e.g. 7 days from the relevant event). As a result, there is a high risk that the responsibilities pertaining to proactive transparency will not be properly implemented.

Further, it is not justified to narrow down the obligations relating to proactive transparency only to some information holders (authorities listed in the Article 3 point 1-5) of the LFAI in the revised version). It is clear that the remaining institutions (e.g. private bodies authorized to exert public authorities and legal entities funded predominantly by the State) should have more limited obligations on proactive transparency, but they should not be completely exempted

from them. For example, information on salaries of persons managing bodies predominantly funded by the State should be proactively disclosed as well.

Conclusion

The Proposal generally addresses some of identified shortcomings of the current law, especially by strengthening the procedural guarantees for implementation of the Commissioner's decisions and streamlining the procedure for sanctioning violations of the right to information.

However, it also contains numerous controversial provisions that fail to address some of the existing problems, while potentially creating new obstacles in access to information of public importance.

The Proposal could ensure implementation of the international standards on the re-use of public sector data, especially the standard established by the EU in its new Directive 2019/1024 as re-use of public sector information is currently not regulated in the Serbian legal system and this law is the proper place for its regulation.

It is recommended to consider adoption of a new law instead of amending the current one with taking into account suggestions and comments hereby provided.

Comments to the revised version of the proposal for amendments of the Law on Free Access to Information of Public Importance of Serbia

July 5, 2021

Introduction

This document provides SIGMA comments to the revised version of the proposal for amendments of the Law on Free Access to Information of Public Importance of Serbia (LFAI) received on 29 June in Serbian language version.

We have shared extensive comments and suggestions relating to the initial draft law proposal on May 17, 2021. In this document, we focus only on changes introduced to the new proposal, following our comments and results of the public consultation process.

We have noticed the report on the public consultations, published on the Ministry's web page.[1] The report clearly indicates that numerous comments had arrived, majority of them stressing attention on the same articles as us. In the conclusions we can read that *"recognizing the importance of this law, recognized not only in the obligations established by strategic documents in the process of European integration of the Republic of Serbia, but also the undoubted importance of this law when it comes to improving the transparency of public administration and democratization of society in general... all received proposals, suggestions and comments represents the basis for further improvement of the legal text which will be published on the web site of the Ministry as well as on the e-Government Portal…"*

Unfortunately, the report from consultation does not present position of the Ministry on the most important comments submitted by SIGMA or other participants. This is peculiar, considering that the revised draft does include changes submitted in the consultation process. Therefore, it it is not clear what have been the considerations of the Ministry of accepting some suggestions and not others. The proposal shared with us, as demonstrated below, contains only minor technical

[1] http://mduls.gov.rs/javne-rasprave-i-konsultacije/javna-rasprava-o-nacrtu-zakona-o-izmenama-i-dopunama-zakona-o-slobodnom-pristupu-informacijama-od-javnog-znacaja/?script=lat

2 Rue André Pascal
75775 Paris Cedex 16
France

mailto:sigmaweb@oecd.org
Tel: +33 (0) 1 45 24 82 00

www.sigmaweb.org

changes and is not supported by evidence of thorough analysis of other major issues raised by SIGMA and other actors during the public consultation process.

Nevertheless, SIGMA remains committed to the efforts for improving legislative framework on access to public information in Serbia. In particular, we express our willingness to provide further comments and suggestions to any version of the proposal that thoroughly addresses comments and suggestions raised during the consultation process by SIGMA as well as by other actors.

General observations

Revised proposal contains only minor, largely technical changes, compared to the initial proposal. Considering that SIGMA recommended quite extensive revision of the draft, this results in most of our comments not being addressed. In particular, the following shortcomings of the initial proposal remained:

- Too narrow definition of public authorities subject to transparency obligations (Article 3 of the LFAI);
- Too extensive and vague catalogue of legitimate restrictions in access to public information (Article 9), including extremely controversial clause of abuse of the right to information (Article 13);
- Too long deadline for the Commissioner to consider appeals (Article 24);
- Insufficient investigatory powers of the Commissioner (Article 26);
- Potentially still ineffective, though improved, mechanism for enforcement of the Commissioner's decisions (Article 28A);
- Insufficient powers of the Commissioner with regard to launching misdemeanor procedures (Article 28B);
- Too narrow catalogue of information to be disclosed proactively, as well as lack of proper technical standards regarding proactive transparency (Article 39).

Specific comments

Article 3 – Definition of public authority

It is welcomed that the revised version of the proposal expands the catalogue of information holders to subsidiary companies of the companies where the state is the dominant shareholder, as well as other legal entities established by the companies controlled by the state (e.g. foundations). However, the proposal continues to exclude another group of bodies, i.e. companies where the state (or any public authority) does not have majority of shares, but anyways controls them due to dispersed structure of shareholders or special governance arrangements (e.g. golden share).

Article 9 – restrictions in access to information

In line with SIGMA comments, the revised version does not enable restricting right to information in order to protect "reverence of the deceased person". However, other important SIGMA comments on this Article were not taken into account, in particular;

- Preserving the clause of protection of "other legally regulated proceedings" as vague and general ground for refusing access to information;
- Enabling restricting access upon the general clause of "rules of international arbitration law";
- Allowing restrictions based on the need to protect "equal legal position of capital companies operating in accordance with the regulations on companies on the market". As mentioned previously by SIGMA, restrictions to information that is business (commercial) secret are sufficient to protect the rights of the business entities against any damage caused by releasing public information. Thus, this additional ground for restriction is not justified.

Article 22 – Right to file an appeal

It is welcomed that, following SIGMA's comment, the crucial provision of Article 22.1.1) was reinstated in the current wording, ensuring that also refusal of access to information issued in other form than decision will be subject to appeal to the Commissioner.

Article 28B – Power of the Commissioner to launch misdemeanor procedure

Revised version of this provision introduces reference to the Administrative Inspectorate as a body that, as under the current legislation, has the power to launch misdemeanor procedure. It should be considered whether preserving the powers of the Administrative Inspectorate brings any added value. As mentioned previously, this institution (Administrative Inspectorate) remains completely inactive in terms of sanctioning violations of the right to information. Keeping its powers to launch misdemeanor procedure, in parallel with the Commissioner's powers, creates a risk of confusion and potentially conflicting actions. Exclusive mandate of the Commissioner to launch misdemeanor procedures in public information matters could be considered as an alternative especially as Commissioner has such a right in case of personal data protection and has a trained legal staff, too.

Article 30 – Appointment of the Commissioner

The revised version contains some further procedural improvements increasing the transparency and merit-based character of the procedure of appointment of the Commissioner. However, the SIGMA's suggestion to consider requirement of supermajority for appointment of the Commissioner (to increase the chances for appointment through wide political consensus) was not taken into account.

Conclusion

Revised version of the proposal contains amendments that, in general, improve the quality of the initial draft. However, they are skipping the issues of the greatest relevance. As such, the revised

proposal does not constitute a major step forward in the reform of legislative framework for access to public information in Serbia.

Comments to the revised version of the proposal for amendments of the Law on Free Access to Information of Public Importance of Serbia

19 July 2021

Introduction

Following the meeting with the representatives of the Ministry of Public Administration and Local Self-Government and the Office of the Commissioner for Information of Public Importance on 9 July, SIGMA received another version of the proposal for revision of the Law on Free Access to Information. This document focuses on the most recent changes proposed there. It also addresses request to propose formulation of some provisions of the LFAI.

Specific comments

Article 3 – Definition of public authority

SIGMA was asked for help with translating our comment on the catalogue of bodies subject to transparency obligations into specific provision of the LFAI. As SIGMA noted in the previous comments: *It is welcomed that the revised version of the proposal expands the catalogue of information holders to subsidiary companies of the companies where the state is the dominant shareholder, as well as other legal entities established by the companies controlled by the state (e.g. foundations). However, the proposal continues to exclude another group of bodies, i.e. companies where the state (or any public authority) does not have majority of shares, but anyway controls them due to dispersed structure of shareholders or special governance arrangements (e.g. golden share).*

In order to address this gap, SIGMA recommends considering definition of the "bodies of public law" established in the EU public procurement system. It includes not only bodies, where the state (directly or indirectly) controls more than half of shares, but also bodies that "are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or

2 Rue André Pascal
75775 Paris Cedex 16
France

mailto:sigmaweb@oecd.org
Tel: +33 (0) 1 45 24 82 00

www.sigmaweb.org

local authorities, or by other bodies governed by public law"[1]. This formula could be useful to capture special cases of bodies, where the state does not have majority of shares, but still controls them thanks to e.g. special powers granted by the company's statute or by the law.

Article 9 – Restrictions in access to information

In line with SIGMA comments, the revised version no longer enables restricting right to information in order to protect "equal legal position of capital companies operating in accordance with the regulations on companies on the market" or "business interests of natural and legal persons". SIGMA is satisfied with the both amendments.

Article 13 – Abuse of the right to information

The highly controversial clause of the "abuse of right to information" was considerably narrowed down, what is acknowledged by SIGMA. However, SIGMA continuously recommends its complete removal. Risk of hindering efficient functioning of state administration bodies due to transparency obligations could be effectively mitigated through other measures existing already in the LFAI, such as:

- The power to impose fees covering justified costs of processing public information requests;
- The possibility to extend the deadline for response and sharing the requested information;
- Possibility to publish information online and redirecting applicant to the relevant website.

Article 28A - Enforcement of the Commissioner's decisions

It is positive that the maximum amount of fine for non-enforcement of the Commissioner's decision was raised to RSD 300.000. However, SIGMA further recommends removal of this limit. The overall objective of this provision is to ensure effective enforcement of the decisions. For some institutions, especially large companies (which are subject to management supervision by public authorities or bodies) this maximum fine might be still too low to force them to release information upon the Commissioner's decision. Therefore, effectiveness of this provision is questionable.

Article 39 – Proactive transparency

SIGMA was requested to provide suggestions for potential formulation of the provision relating to proactive transparency obligations. This is an example of how this issue could be regulated in more comprehensive manner than in the current version:

> Article 39
>
> 1. Public authorities listed in Article 3 points 1) to 5) of this law shall publish on their websites or on relevant government portal the following information:
>
> (1) Basic organizational information, i.e. legal basis for operation, functions established by the legislation, governing bodies, list of organizational units with the names and

[1] Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Article 2 par. 1 pt 4.

contact details of the heads of these units as well as lines of accountability (organigram); postal and email address of the authority; working hours; information on accessibility for persons with special needs;
(2) With respect to collegiate organs, the decision-making process, means of participation by the general public (providing opinion), procedural rules, place and time of meetings of the collegiate organ, publicity, decisions, minutes or summaries of meetings; information on voting in the collegiate organ,
(3) Strategies, programmes, plans and reports produced by the authority;
(4) Proposals for normative acts developed by the authority and information on public consultation regarding the acts of the authority;
(5) Financial data, i.e. budgets or financial plans and reports on their execution, sources of income, salaries of the members of the governing bodies and heads of organizational units (including allowances and bonuses), information about granted subsidies and donations, including indication of beneficiaries and amount or value;
(6) Information of the number of staff of the authority broken down to the level of organizational units and type of employment;
(7) Information on recruitment of staff, including complete information on available vacancies, job descriptions, required qualifications and procedure for submitting applications, as well as results of the recruitment proceedings, including names of the persons selected;
(8) Information on public procurement, including procurement plans, announcements of procurement procedures, information and documents required from applicants, conditions for selection of the contractor, and information on results of the procurement procedures;
(9) Registry of contracts concluded by the body for acquiring or disposing goods, services and property, containing at least the value of the contract, the date of conclusion and duration, contractor and subject of the contract;
(10) Registry of public property owned or maintained by the body, including legal title for disposing property, description of the property and its estimated value;
(11) Information on services offered to the citizens, i.e. inventory of services describing the services, procedure for access (including documents and information required from applicants), information on fees for access to service, standards for provision (time, form of provision), and right to complaint about quality or integrity of service provision;
(12) Information about access to information upon request, including the information about the right to request information, email address, where the request can be submitted electronically, deadline to process request, appeal measures and fees for access;
(13) Contact details (at least name and email address) to the public information officer or unit responsible for maintaining the information on the website of relevant body;
(14) Reports from the inspections and audits conducted by public authority or relating to authority;
(15) Information disclosed to the applicant upon request according to this law;
(16) Information on the content and accessibility of all registries and databases maintained by the authority;
(17) Other categories of public information that was produced or obtained and held by public body.

2. Information listed in paragraph 1 shall be published or updated on the websites of information holders within seven days as of the relevant event occurred in open and machine-readable format.

3. The Government after consultation with the Commissioner shall adopt within six months as of this law entered into force regulation specifying:

(1) additional categories of public information to be published on the websites of public bodies;

(2) technical requirements for accessibility of the websites of information holders for users with special needs.

4. The Commissioner shall inspect compliance of each public authority with obligations specified in paragraph 1 at least every two years and produce report presenting results of this inspection. Following this inspection, the Commissioner shall be authorized to submit a request for initiating misdemeanor proceedings for misdemeanor referred to in Article 46, paragraph 1, item 6) of this Law.

Conclusion

Revised version of the proposal contains major amendments addressing SIGMA comments. Quality of the draft is considerably higher than in the initial version thanks to constructive co-operation of the Working Group with SIGMA. It could be further enhanced, if the suggestions presented in this document are considered. While some of SIGMA recommendations have not been fully implemented, the proposal offers opportunity for improvement of the legislative framework for access to public information in Serbia.

SIGMA reiterates again, that considering the scope of the proposed changes to the current LFAI, adoption of completely new act rather than revision of the existing law might be the most adequate solution. This would also enable to express the new axiology of the LFAI, where greater importance could be attributed to proactive transparency which should form the initial chapter of the draft law. However, this issue is not of substantial nature in terms of the overall assessment of the proposal, which is after the latest improvements, prepared by the Working Group, on the much higher quality.