

December, 2013

Towards Proactive Transparency in Bosnia and Herzegovina

Introduction

Freedom of access to information (FOI) laws in BiH should be changed. That is confirmed by numerous analyses and discussions, which have for years indicated the shortcomings of the current state and entity-level laws. *Inter alia*, in cases when a relevant public body refuses access to information, the appeal process is not sufficiently defined by law. Although freedom of information laws are applied as *lex specialis*, many laws which were later adopted in practice limited access to information. The public interest test, foreseen by all three acts, is arbitrarily applied in practice, while the access to information is often baselessly refused, using legally defined exceptions as reasons for refusal. Meanwhile, a procedure for amending the existing state law, which was started in early 2013, actualized the discussion about the need for achieving a balance in existing laws between the right to access information and the right to privacy, in accordance with international standards.¹

In the debate on the freedom of access to information in BiH, proactive disclosure of public information was given less attention. This policy memo highlights the reasons due to which this principle should be considered more carefully and applied in BiH, especially in the light of a new initiative for harmonizing the state-level FOI law with the Convention of the Council of Europe on Access to Official Documents.

Proactive Disclosure of Information: International Standards

The right to access information is one of the basic standards of open government. In 2009, the European Court of Human Rights interpreted that the right to access information was protected by Article 10 of the European Convention on Human Rights, which protects the right to freedom of expression.² There is a growing consensus that the right to access information should not be exercised only through individual requests, but that public bodies need to be proactive in disclosing information. That is confirmed by “at present, the strongest general provision in

¹ For more information on Laws on Freedom of Access to Information in BiH, see, for example: Helen Darbishire, Analysis of Amendments to the Law on Freedom of Access to Information in Bosnia and Herzegovina, OSCE Representative on Freedom of the Media, <https://www.osce.org/bs/fom/102272>; Mehmed Halilović, “Freedom of Access to Information Laws” [Zakoni o slobodi pristupa informacijama], in *Media Law in Bosnia and Herzegovina* [Medijsko pravo u Bosni i Hercegovini], Mehmed Halilović and Amer Džihana, eds. (Sarajevo: Internews, 2012).

² European Court of Human Rights judgment in *Társaság a Szabadságjogokért v. Hungary*, April 14, 2009, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92171>; also see Darbishire, *Analysis of Amendments to the Law on Freedom of Access to Information in BiH*, p. 2.

international law that refers directly to proactive disclosure”³ in the first binding international treaty on accessing information – the Convention on Access to Official Documents of the Council of Europe:

“At its own initiative and where appropriate, a public authority shall take the necessary measures to make public official documents which it holds in the interest of promoting the transparency and efficiency of public administration and to encourage informed participation by the public in matters of general interest.”
(Article 10)⁴

Other conventions in this area, such as the United Nations Convention against Corruption or the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), define the types of information which the ratifying states should publish. In the case of the first convention, such information, for instance, may be related to the employment, promotion and retirement of public servants, financing of political parties and public procurement.⁵ The Aarhus Convention contains detailed provisions about the ways in which public authorities should collect and distribute information on environmental matters.⁶ BiH has signed and ratified all three above mentioned conventions.

It is necessary to point out that the principle of proactive disclosure is one of the key principles of the multilateral Open Government Partnership (OGP) initiative, endorsed by 60 countries, including all countries in the region except for Kosovo and BiH.⁷

In her 2011 analysis, Helen Darbishire, one of the most prominent experts on access to information, compared several countries’ legal rulings on proactive disclosure relating to the right to access information with international rules on proactive disclosure. Darbishire concluded there was an international consensus on the categories of information which should proactively be made available in the context of the right to access information. She suggested a standard for proactive disclosure, which could be of use to legislators.⁸ According to that standard, the following categories of information in the possession of public institutions should be disclosed proactively:

³ Helen Darbishire, *Proactive Transparency: The Future of the Right to Information? Review of Standards, Challenges, and Opportunities* (Washington, D.C.: World Bank Institute, 2011), p. 20, <http://siteresources.worldbank.org/EXTGOVACC/Resources/DarbishireProactiveTransparency.pdf>

⁴ Council of Europe Convention on Access to Official Documents, June 18, 2009, CETS no. 205, <http://conventions.coe.int/Treaty/EN/Treaties/Html/205.htm>

⁵ United Nations Convention against Corruption, October 31, 2003, http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf; also see Darbishire, *Proactive Transparency*, p. 20.

⁶ United Nations Economic Commission, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, http://www.unece.org/fileadmin/DAM/env/pp/documents/Bosnian_Aarhus_Convention.pdf

⁷ For more information, see www.opengovpartnership.org.

⁸ See Darbishire, *Proactive Transparency*, pp. 21–22.

- **institutional information**, including legal basis, internal rules and information on functions
- **organizational information**, including information on staff, the names and contact details of public officials
- **operational information**, including policies, strategies and plans, activities, procedures, reports, evaluations and reports of supervisory mechanisms and oversight bodies
- **decisions and other formal acts**, including any supplementing documents
- **public service information**, including the description on services offered by the public bodies, service guides, informational leaflets, forms, information on service fees and deadlines
- **budget information**, including budget projections, realized income and expenditure, auditors' reports
- **information on sessions or meetings** open to the public
- **information on decision-making procedures**, as well as the mechanisms of public consultations and public participation in decision-making processes
- **information on subsidies**, including information on public subsidy users, on the aims and amounts of subsidies, as well as their implementation
- **information on public procurement**, including detailed information on procedure related to public purchases, the criteria, results of decisions on procurement, contract copies and contract completion reports
- **information on lists, registers and databases** in the possession of public bodies, including information on the ways of accessing such information
- **information on publications** released, including whether they are free of charge or not, as well as their price
- **information on appeal processes and dispute resolution mechanisms**
- **information on the right of access to information**, including information on how to make a request or appeal as well as the contact details of information officers
- **minutes of parliamentary sessions**, which parliaments should publish
- **court judgments**, which courts at every level should publish.⁹

The principle of proactive disclosure should be applied on all public institutions, including legislative, executive and judicial bodies, and all private entities performing public functions. All public bodies should at least publish information on their competences, way of functioning, how they spend public funds as well as the services they offer. Frequently sought information should also be proactively disclosed,¹⁰ which is also suggested by the explanatory memorandum to the Convention on Access to Official Documents.

⁹ Here we are referring to the newer version of the proposed standard published in the Open Government Guide (2013): "Right to Information: Publish Core Information about Government on a Proactive Basis", *Open Government Guide*, Transparency and Accountability Initiative, 2013, <http://www.opengovguide.com/commitments/publish-coreinformation-about-government-on-a-proactive-basis/>

¹⁰ *Ibid.*

In terms of proactive disclosure of information, it is important to bear in mind several important principles:

- Among other things, information should be distributed through different channels (e.g. Internet, media, public libraries, bulletins, notice boards) so that as many people as possible can access it.
- It should be organized in an easy-to-find way.
- Its content value and presentation should be relevant to final users. It is recommended that regular consultations are held with representatives of the public about information most useful to them, which should be published as a matter of priority.
- Information should be made available in a timely fashion and regularly updated.
- Also, it should be understandable to the wider public.
- It should be free or available at a small fee, for example, due to copying or postage costs.¹¹

Table 1. Examples of proactively published information in legislation of countries from the region¹²

<p>Croatia: Law on Right of Access to Information, Croatia's <i>Official Gazette</i> no. 25/13.</p>	<p>According to Article 10, public authorities should publish the following on the Internet, in an easy-to-find way:</p> <ul style="list-style-type: none"> • legislation in their area of work, general acts and decisions (including reasons for decision), draft laws, other regulations and general acts they adopt • annual plans, programs, strategies, instructions, activity reports, financial reports and other documents relevant to their field of work • information on sources of financing, budgets and budget execution • information on issued subsidies, grants, donations, including lists of users and amounts • information on the internal structure, names and contact details of managers • minutes and conclusions of official meetings and official documents adopted at those meetings, information on the activities of formal working groups in their field • information on public procurement procedures, including tender documentation and information on contract execution • notices on job advertisements, including relevant documentation • registers and databases in possession of public bodies or information on the registers or databases and how to access them • notices on the methods of exercising the right of access to information and its reuse, information officers' contact details, information on fees for access to and use of information • most frequently sought information • other information (e.g., news, press releases, information on public authorities' other activities).
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¹¹ Darbishire, *Proactive Transparency*, pp. 31–32.

¹² In Croatia, rulings on proactive disclosure are not applicable to information to which access is limited by law (Article 10). In Montenegro, authorities are due to protect personal data, as well as data to which secrecy provisions apply (Article 12).

<p>Montenegro: Law on Free Access to Information, <i>Official Gazette of Montenegro</i> no. 44/2012.</p>	<p>According to Article 12, public authorities are required to publish the following on their websites:</p> <ul style="list-style-type: none"> • information access guide • public registers and records • activity programs and plans, reports, as well as other documents on activities and circumstances in various areas under their authority • preliminary texts, proposals and final texts of strategic documents, plans and programs for their implementation, drafts and proposals of laws and other regulations, including expert opinion on regulations • acts and contracts related to the disposal of public finances and the disposal of state property • list of public officers and employees, including their titles, as well as a list of public functionaries and a list of statements of their earnings and other income and reimbursements relating to the exercise of public duties • decisions and other individual acts of importance to the rights, obligations and interests of third parties • information that access has been granted to upon request • other information that public authorities wish to publish.
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From Passive to Proactive Disclosure of Information in Bosnia and Herzegovina

Freedom of access to information laws in BiH do not contain rulings on proactive publication. The only exception are rulings on the publication of guides and the index of information registers in possession of public authorities, so that the public knows which type of information it can seek to access. Nevertheless, there are other relevant laws which prescribe the proactive disclosure of certain information (eg. information contained in official gazettes or official websites of public bodies). For example, public bodies must disclose various budget documents according to budget laws at various levels of government. According to audit laws, supreme audit institutions publish audit reports on their official websites. On some levels of government, rulings relating to the maintenance of official websites have been adopted. They partly prescribe the type of information that should be made available.

However, there is no clear and all-encompassing strategy on proactive disclosure of information at various levels of government, which could be solved by adopting rulings on proactive disclosure, as is the case in other countries.¹³ During an earlier initiative to change the state-level Freedom of Access to Information Law in early 2013, the Personal Data Protection Agency in BiH highlighted Article 10 of the Convention on Access to Official Documents and pointed out the need to include provisions on proactive disclosure in the Law itself:

¹³ Research carried out to date implies that much important information is not accessible in official gazette or authorities' official websites. See, for example: International Budget Partnership, *Open Budget Survey*, BiH, 2012, <http://internationalbudget.org/wpcontent/uploads/OBI2012-BosniaHerzegovinaCS-English.pdf>; Transparency International Bosnia and Herzegovina, "Research Findings on the Transparency of Local Government Units in Bosnia and Herzegovina" [Nalazi istraživanja o transparentnosti jedinica lokalne samouprave u Bosni i Hercegovini"], 2012, <http://magg.mladenbl.com/Pregled/MAGG%20-%20drugi%20nacrt%20izvjestaja.pdf>

“[...] In the interests of simplifying and reducing the number of freedom of information requests and the gaining of public trust in bodies of government to which they pay taxes and other dues, we believe it is necessary to widen Article 20 of the Law by adding an obligation of disclosing other documents, such as, for example, lists and titles of public body employees, lists of public functionaries and statements of their earnings relating to the performance of public duties, individual acts and contracts about the disposal of public finances, information to which, on request of one or various information seekers, access has been granted three or more times or similar.”¹⁴

The BiH Council of Ministers recently formed an interdepartmental working group which should prepare a new draft law on the changes and amendments to the state-level FOI law. The group is tasked with evaluating the compatibility of the existing law with the Convention of the Council of Europe on Access to Official Documents.¹⁵ This can be an excellent opportunity for BiH authorities to improve the existing law with the rulings on proactive publication of information in possession of public authorities.

There are many reasons for that. Apart from the obvious need to harmonize the law with the Convention and the reasons mentioned by the Personal Data Protection Agency, it is necessary to point out the benefits to both citizens and authorities:

- First, the BiH public will be better informed about authorities' decisions and current laws.
- Proactive disclosure of information can potentially help in closing the gap between citizens and public authorities, given that research has shown an alarmingly low level of citizens' trust in executive and legislative authorities on all levels (between 18.2% and 38.4%, depending on the level of government), as well as political parties (14.1%).¹⁶
- Citizens will be able to have easier access to public services and participate in the decision-making process.
- Everyone will be able to access information equally.
- The spending of public funds will be made more transparent.
- Proactive disclosure can lead to better information management within public authorities, as well as better internal communication generally, which increases their efficiency.
- There would be less pressure on public authorities to reply to freedom of information requests adequately and on time.

¹⁴ Personal Data Protection Agency in Bosnia and Herzegovina, Remarks on the Draft Law on the Changes and Amendments to the Law on Freedom of Access to Information, [Primjedbe na Nacrt Zakona o izmjenama i dopunama Zakona o slobodi pristupa informacijama], April 18, 2013.

¹⁵ Decision on the Formation of the Interdepartmental Working Group for the Drafting of the Draft Law on the Changes and Amendments to the Law on Freedom of Access to Information in BiH [Odluka o formiranju interesorne radne grupe za izradu Nacrta Zakona o izmjenama i dopunama Zakona o slobodi pristupa informacijama u Bosni i Hercegovini], *Official Gazette of BiH*, no. 95/13.

¹⁶ Analitika – Center for Social Research, “Survey Results: Citizens Don't Trust Governments and Political Parties in BiH”, 2013, <http://www.analitika.ba/en/publications/survey-results-citizens-dont-trust-government-and-political-parties-bih>

- Disclosure of information can also encourage the creation of new initiatives for using information creatively, which happens in a great number of countries: For example, private sector representatives may combine available public information with other information and create web-tools and services which can be used by the wider public and decision-makers.¹⁷ In this way, proactive disclosure can significantly boost private sector development, particularly IT services, as well as new job creation.

A Strategic Approach to the Promotion of Proactive Disclosure of Information

However, any serious efforts to proactively disclose information imply a carefully designed system of publication:

- Among other things, enough resources should be allocated to its creation and development. For greater efficiency, coordination with other relevant programs can be established. For example, Slovenia combined the legal obligation of the proactive disclosure of information with e-government and e-democracy strategies, which resulted in the State Portal of the Republic of Slovenia.¹⁸
- Functional mechanisms for regular publication and updates to information should be established, so that information is of value and public trust in public bodies is maintained.
- Public officials should be trained to be able to act in accordance with proactive disclosure rules, including the preparation of information, the implementation of legally defined exceptions to disclosure, the use of various communication channels, etc.
- It is necessary to inform citizens about the type of available information and the ways of accessing it.¹⁹

In order to make the proactive disclosure system truly functional, it is also necessary to establish:

- proactive disclosure oversight mechanisms
- appeal lodgment and processing mechanisms, as well as
- implementation mechanisms which would ensure public bodies disclose information.

In the context of BiH, it could mean the creation of an independent body (the equivalent of an information commissioner in other countries), which would be tasked with introducing standards in this field, as well as the monitoring and oversight of proactive disclosure.

In the long term, the system should aim towards proactive disclosure, with the goal of building up an initial base of key information categories which would gradually grow. The BiH authorities should harmonize existing freedom of access to information laws with new disclosure standards and bring them closer to a new technological environment. The benefits which public bodies and citizens could enjoy through access to proactively disclosed information speak in favor of such changes of legal rulings.

¹⁷ Darbishire, *Proactive Transparency*, pp. 3–4.

¹⁸ *Ibid*, str. 27.

¹⁹ Here we are referring to the recommendations of Helen Darbishire, *Proactive Transparency*, pp. 33–35.

This publication is the result of the project “Advocacy for Open Government: Supporting the Right to Know in South East Europe,” which is being implemented in six Western Balkans countries: Albania, Bosnia and Herzegovina, Montenegro, Macedonia, Serbia and Kosovo.

PROJECT PARTNERS



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This publication is funded by the European Union and the Open Society Fund Bosnia and Herzegovina.



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