Ana Knezevic Bojovic
Rajko Radevic

Free Access to Public Information

1. ACCESS TO PUBLIC INFORMATION AND INTEGRITY CHALLENGES IN THE WESTERN BALKANS

Integrity is a notion contrary to the notion of corruption. Integrity is the approach to the key values – behaving in accordance with certain key values and being consistent in their use. Institutional integrity is an organisation's resistance to corruption, and one of the key values that helps prevent corruption is transparency. Without transparency, there is no true democracy – a form of government which should serve and be used by all citizens.[1] Free access to information is a critical mechanism for monitoring transparency and holding public authorities accountable, and one of the key factors for anti-corruption efforts. Therefore, providing free access to public information is crucial to ensure and promote institutional integrity. Free access to information also strengthens citizen's trust in institutions and creates conditions for good governance.

In the former Yugoslav legal theory and practice, the right of access to information was mostly perceived as the right to be informed about what the authorities wanted the citizens to know, and it was accompanied by the obligation to provide such information.[2] This right was extended mostly to journalists and the associated labour organisations dealing with information activities. Providing of information to other groups was conditional upon the

1 See Judgment in case *Youth Initiative for Human Rights v. Serbia*, Application No. 48135/06.

2 Truth be told, the legislation of some SFRY republics prescribed it as an express obligation, whilst the regulations of others included a less precise formulation on general or equitable accessibility of information. V. Cok, *Informing the public: Transparency of Work and Access to Information – Legal Theory and Legislation*, Savremena administracija, Belgrade 1982, p. 80.

existence of social interest.[3] As for individuals' right of access to information – in the SFRY regulations – it did not exist.[4]

At the same time, notwithstanding the proclaimed principle of transparency of the actions of public authorities, one should bear in mind that the SFRY had hundreds of regulations governing the concept of a "secret".[5] Moreover, to a certain extent, the SFRY nurtured a culture of secrecy – there were topics no one spoke of and the majority was either silent or obediently accepting that some questions were permitted, while others were prohibited.[6] In Albania, free access to public information and freedom of expression were even actively supressed, particularly through the use of the notorious Article 55 of the Albanian Criminal Law, entitled "Agitation and Propaganda Against the People's Government."[7] In these undemocratic regimes, the option to mark documents as secret was in frequent use, while disclosure of data from such documents was considered as a threat to national or public security, the country's military defence, its international relations, or intelligence services.[8].[9]

Despite the democratic changes and considerable progress made through the adoption of constitutional and statutory provisions that regulate the right of access to information, the practice in this field still remains problematic.[10] Natural and legal persons who try to access sensitive information held by public authorities face, as a rule, a wall of resistance. Such information is either arbitrarily declared secret or confidential, or their disclosure is delayed indefinitely – the requests are not acted on within the statutory time limits or the person seeking access is informed that the public authority is not in the possession of the requested information. There are numerous examples of such practice.[11] Another problem is the limited mutual exchange of public

---

3 SFRY Constitution.

4 V. Cok, p. 78.

5 J. Popovic, *Legislative Regulation of Data Confidentiality in the Countries on the Territory of the Former Socialist Federal Republic of Yugoslavia*, Atlanti, Trieste 2010, pp. 229–238.

6 J. Kregar, V. Gotovac, Đ. Gardasevic, *Regulation of the Right to Access Information*, Transparency International Croatia, 2004, p. 4.

7 V. X. Zaganjori, *Freedom of Expression and Access to Information*, p. 1, available at https://www.ecoi.net/fileupload/dh678_01358.pdf.

8 R. Sabic, "Open issues on the Application of Law on Free Access to Information of Public Importance in the Period After the Adoption of Law on Secrecy of Information", in *Access to Information of Public Importance and Protection of Classified Information*, OEBS and CUPS, Belgrade 2012, p. 26.

9 J. Popovic, "Legislative Regulation of Data Confidentiality in the Countries on the Territory of the Former Socialist Federal Republic of Yugoslavia", Atlanti, Trieste 2010, pp. 229–238.

10 This is clearly seen when comparing the RTI ratings (Right to Information Ratings, www.rti-rating.org) of the analysed countries and their scores in the WJP Open Government Index, where the countries have lower scores when it comes to practices related to the exercise of the right to information, http://data.worldjusticeproject.org/opengov/.

11 For instance, the Serbian Ministry of Economy had refused to act on the ruling of the Commissioner for Information of Public Importance and Data Protection and forward to

information between various public authorities, where one authority requests information from the other following a request filed by a person seeking access to information.

The following observation seems to be true for all the analysed countries – "in real situations, public officials and authorities tend to deny requests if they perceive the information as personal data or a secret in any way, even when the information does not qualify as personal data or a secret under the law."[12] It is interesting to note that in almost all six countries included in the analysis the adoption of the legislation on free access to public information preceded the adoption of the modern legislation on secret information, although, as Vodinelic[13] points out, the right of free access to information predates all other subject-matters concerning data. This could serve as another illustration of the idea that the culture of secrecy is still deeply rooted in all the countries analysed, and that full implementation of the right of access to public information requires consistent execution of all the measures prescribed by law, coupled with additional awareness-raising activities in public authorities on the importance and necessity of free access to information.

This conclusion is confirmed to a certain extent by the Global Open Data Index,[14] which monitors the extent of the openness of data that states make available to their citizens. According to this index, the best ranked among the analysed countries is Serbia, which is ranked 41st of 94 countries, with the Global Open Data Index score of 41 out of 100. It is followed by Albania, ranked 47th with a score of 36, Montenegro ranked 49th with a score of 35, Macedonia ranked 51stwith a score of 31, and Bosnia and Herzegovina and Kosovo*, sharing the 58th place with a score of 26. It should be noted that this index covers a wide range of issues, from the transparency of budget information to weather forecasts. The scores indicate that in some of the countries that are the subject of this research, the openness of some important data categories, such as the current overview of the government expenditures by transactions, is evaluated by zero, that is, these data are not open at all.[15]

Transparency Serbia, an NGO, the Management and Consultancy Services Contract signed between the Serbian Government and Smederevo Steel Factory, HPK Management and Dutch HPK Engineering.

12 *Law on the Right to Access to Information in the Republic of Croatia: Application of Public Policy Analysis in the Work of Students of the Faculty of Political Science*, 2007, p. 94

13 V. Vodinelic, "Information Triangle Standardising", in: *Access to Information of Public Importance and Protection of Classified Information*, OSCE and CUPS, Belgrade 2012, p. 19.

14 Available at: https://index.okfn.org/.

15 This indicator is 80% in Albania and 50% in Montenegro, while in other countries that are the subject of the research it is 0.

2. WHAT ARE THE CONTENTS OF THE INTERNATIONAL STANDARDS ON ACCESS TO PUBLIC INFORMATION FROM THE ASPECT OF INTEGRITY?

To understand the right of free access to information, at the outset, we need to distinguish two aspects of that right. The first aspect is the right of a person with an eligible interest to access documents that may be relevant for decision-making in a proceeding conducted before a public authority. The second aspect is much wider, and it implies the right of the public to have access to public documents that represent public information. The first aspect of this right is in fact only a form of exercising the right to a fair trial, while the second one is more directly linked to freedom of information and is the main subject of this Chapter.

The right to access information held by public authorities has recently been recognised as one of the fundamental human rights.[16] The exception is Sweden, where the right of the public to access public records was introduced within the framework of the regulation on freedom of the press in 1776.[17] The first Freedom of Information Act in the United States was enacted in 1966[18] and was followed by the enactment of similar acts in other countries. In recent decades, the legislative activity in this area has been particularly intense – both at the national and international levels. In addition, in some countries, the right to access information is guaranteed by the Constitution.[19] The right of access to public information prescribed by the legislation and consistently applied in practice is one of the fundamental principles of public administration.[20]

What are the international standards on free access to public information?

---

16 T. Mendel, *Freedom of information (a Comparative Legal Survey*), United Nations Educational Scientific and Cultural Organisation (UNESCO), New Delhi 2003, p. iii.

17 OECD, "The Right to Open Public Administrations in Europe: Emerging Legal Standards", *Sigma Papers*, No. 46, OECD Publishing, 2010, p. 7. Available at: http://dx.doi.org/10.1787/5km4g0zfqt27-en. The same regime applied also to Finland, which at the time was part of the Kingdom of Sweden. Finland adopted its regulation on this issue in 1951.

18 As D. Banisar points out (*Freedom of Information Around the World 2006: A Global Survey of Access to Government Records Laws,* Privacy International, 2006), US President Lyndon Johnson said on that occasion: "I signed this measure with a deep sense of pride that the United States is an open society in which the public right to know is cherished and guarded."

19 Spain, Estonia, Finland, Poland, Portugal, Romania, Slovenia. The Right to Open Public Administrations in Europe: Emerging Legal Standards, p. 7.

20 SIGMA, *Principles of Public Administration*, OECD Publishing Paris, 2014, Accountability, Principle 2.

1. An applicant requesting access to information should not be obliged to give reasons for such a request.[21] This is important, as it reflects the very essence of this right – access to information should be free and unconditional. The formal requirements for submitting applications should be kept to a minimum.[22] This means that it is sufficient for the application to be submitted in a written form – on paper or electronically.[23] In addition, if an application is not sufficiently precise, the public authority should not ignore it but rather assist the applicant to clarify the application,[24] or try to identify the official document that contains the requested information.[25] Only if that is unsuccessful, the public authority is not obliged to comply with the request.

2. Any public authority that has received a request for access to information, which may or an official document, should handle such requests without any discrimination, on an equal-treatment basis.[26] Requests should be handled promptly, i.e., requests should be handled within a reasonable time limit that has been specified in advance,[27] and the specified time limit cannot be met, the applicant should be informed about it.

3. A request for access to information may be refused if it is manifestly unreasonable. This provision protects public authorities from requests that would bean unreasonable burden for the authority or that present an obvious abuse of rights – that could also include the case of applicants who unnecessarily resubmit the same request several times.[28] Even in the case of a partial refusal, the reasons for the refusal of the request must be explained.[29] The only exception to this may be the event that the grounds for refusal can only be formulated in way thatmay reveal information that is in fact exempt from the right to free access to information, which will be discussed further below.

4. To be truly free, access to information must not imply unreasonable costs for the applicant. That means that public authorities should not charge for access to information[30] – one should be able to inspect official documents

21 Item V 1 of the CoE Recommendation, Article 6 of the Regulation No. 1049/2011 on Access to Documents of the European Parliament, the Council and the Commission.

22 Item V 2 of the CoE Recommendation.

23 This is, for example, specified explicitly in Article 6 of the Regulation.

24 Article 6, Paragraph 2 of the Regulation.

25 Item VI 5 of the CoE Recommendation.

26 Item VI 2 of the Recommendation.

27 Item VI 4 of the Recommendation. The Regulation, for example, specifies the time limit of 15 days.

28 Item VI 6 of the Recommendation.

29 Item VI 7 of the Recommendation.

30 Item VIII 1 of the Recommendation.

free of charge. However, applicants may be charged afee for the delivered copies of official documents in the amount not exceeding the actual costs incurred by the public authority.[31]

5. If the request has not been dealt with within the specified time limit, or if the request has been refused, the applicant should be ensured access to an expeditious and inexpensive review procedure before a court or before another independent and impartial authority.[32]

LIMITATIONS TO THE RIGHT OF ACCESS TO PUBLIC INFORMATION

The right of free access to information, like other human rights, may be subject to certain limitations. In which circumstances can states prescribe limitations to this general right?

1. Firstly, limitations to the right of access to information must be set down precisely in law,[33] as well as justified in a democratic society and proportionate to the importance of that that is protected. That could include the following:
    - national security, defence, and international relations
    - public safety
    - the prevention, investigation and prosecution of criminal activities
    - disciplinary investigations
    - privacy and other legitimate private interests
    - commercial and other economic interests
    - the equality of parties to court proceedings
    - environmental protection
    - state economic, monetary and exchange rate policies
    - inspection, control and supervision by public authorities
    - the confidentiality of deliberations by various public authorities during the internal preparation of a matter.[34]

The right to access to information may be refused if the disclosure of the information contained in the official document would harm or could potentially

31 Item VIII 2 of the Recommendation.

32 Items IX 1 and 2 of the Recommendation.

33 Item IV 1 of the Recommendation.

34 Compare Item IV of the Recommendation, Article 3 of the Convention of the Council of Europe, and Article 4 of the EU Regulation.

harm any of the protected interests, unless there is an overriding public interest in favour of disclosure of the information.[35] Therefore, it is crucial to balance the right of the public to know and the need to protect the above interests. At the same time, that means that no category of information is excluded *per se* from the free access regime, and the authorities deciding on whether some information should be kept away from public knowledge must interpret the right to limit access to information in a narrow sense.[36]

Although the area of free access to information has seen considerable progress and development in recent decades, there are still no uniform standards adopted and accepted by all or at least by most Western countries. This applies particularly to the limitations to the right of free access to information.

One of the most important international documents in this area, aiming to develop and provide clear guidelines for the public authorities involved in drafting and implementing the legislation on free access to information in the sphere of national security, is: *Global Principles of National Security and the Right to Information,* or *Tshwane Principles*. This document deals with the above listed areas as justifiable grounds for withholding information, suggesting at the same time that any other grounds for withholding information should comply with the same or at least with similar standards.[37]

The Tshwane Principles underline that national security should be used as the grounds for denying access to information only in exceptional cases, and that it should be interpreted narrowly. In this regard, it is stated that only the authorities that have the exclusive jurisdiction over this area (national security protection) can use this groundsfor refusing access to information. The Principles further indicate that the very fact that there is a presumption of *national security protection* cannot in itself be sufficient grounds for denying access to information. A set of conditions must be fulfilled in order for national security protection to be appropriate and justified as grounds for denying access. These relate to the need for the public authority to demonstrate that the restriction:

(1) is prescribed by law

  (a) as something that is necessary in a democratic society, which means

    (i) that the disclosure of the information must pose a real risk that may cause significant harm to a legitimate national security interest; and

35 Item IV 2 of the Recommendation.

36 SIGMA, p. 40.

37 The Global Principles on National Security and the Right to Information (Tshwane Principles), available at: https://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf.

(ii) the risk of harm from the disclosure must outweigh the overall right of the public to know, i.e. the right of access to information;

(iii) the restriction must comply with the principle of proportionality, and must be the least restrictive means available to protect against the harm;

(iv) the restrictions must not impair the very essence of the right of the public to have free access to information

(b) that protects a legitimate national security interest, and

(c) that the law provides adequate safeguards against possible abuse

(2) as well as that there is effective oversight of the validity of restrictions by an independent supervisory authority, and full judicial protection.[38]

The Principles *inter alia* seek to define the types of information that the public administration authorities have the right to withhold on national security grounds, including:

a) information on operational utility for ongoing defence plans, operations, and capabilities;

b) information about the production, capabilities, or use of weapons systems and other military systems, including communications systems;

c) information about specific measures to safeguard the territory of the state, critical infrastructure, or critical national institutions against threats or use of force or sabotage, the effectiveness of which depends upon secrecy;

d) information pertaining to or derived from the operations, sources, and intelligence services' methods, insofar as they concern national security matters;

e) information concerning national security matters supplied by a foreign state or an inter-governmental body with an express expectation of confidentiality, and other diplomatic communications insofar as they concern national security matters.[39]

At the same time, the Principles suggest that it is a good practice for the national legislation to set forth an exclusive list of information categories that are specified as the narrowly as the above categories or more detailed.

On the other side, in order to facilitate the implementation of what is referred to as the "public interest test", the Principles also list the information categories

38 Principle 3 of Tshwane Principles: Requirements for Restricting the Right to Information on National Security Grounds.

39 Principle 9, Item a) of Tshwane Principles: Information that Legitimately May Be Withheld.

where there is a strong presumption of overriding public interest in favour of disclosure. Specifically, Principle 10 specifies the following categories:

a) information regarding violations of international, human rights or humanitarian law;

b) protection of the right to personal liberty and security, prevention of torture, and the right to life;

c) government structure and powers (availability of the information about the existence of all defence and security sector authorities, their legal regulations, and the information needed for evaluating and controlling their public expenditures);

d) decisions to use military force or acquire weapons of mass destruction;

e) the security sector financial information (including all information sufficient to enable the public to understand public expenditures in the security sector, such as budget proposals and end-of-year financial and execution statements, financial management rules, public procurement rules, etc.);

g) public health, public safety, or the environment.[40]

3. REVIEW OF THE LEGAL FRAMEWORK IN THE FIELD OF ACCESS TO INFORMATION IN THE WESTERN BALKANS

3.1. ALBANIA

The right of access to information is guaranteed by Article 23 of the Constitution, which stipulates that everyone has the right, in accordance with the law, to access information relating to the work of the public authorities and persons performing public office.[41] Albania adopted a new Law on the Right to Information[42] in 2014, which ranked the country quite high, in the fifth place, in the Global Right to Information Rating List (RTI Rating), with a

40 Principle 10 of Tshwane Principles: Categories of Information with a High Presumption or Overriding Interest in Favour of Disclosure.

41 Constitution of the Republic of Albania, English translation, 1998. Text approved by referendum on 22 November 1998, and amended on 13 January 2007, translated under the auspices of OSCE – Albania, available at: http://www.osce.org/albania/41888?download=true.

42 Law No. 119/2014, English translation – The Law on the Right to Information. The Law is available at: http://www.rti-rating.org/view_country/?country_name=Albania#right.

score of 127 out of 150.[43] This new legislation specifies that public information is any data recorded in any form or format, during discharge of any public office, irrespective of whether it is prepared by a public authority.[44] The term "public authority", in addition to the administrative authorities, legislative and judicial authorities, local government authorities, public administration authorities, also includes commercial companies in majority state ownership and other legal or natural persons who have been granted by law, secondary legislation or in any other form the right to perform a public office.

The right to access public information is guaranteed to all natural or legal persons, local or foreign, including stateless persons.[45] The applicant requesting information is not obligated to indicate the reasons for the request.

The information request must be submitted in writing and can be delivered in person or by regular mail or email. It has to be noted that the applicant must give his/her correct identity and sign the application personally.[46] All requests for accessing public information are registered in a special Register of Information Requests and Responses, and all public authorities are obliged to maintain such a register in accordance with Article 8 of the Law. That allows for the information requested on one occasion from a public authority to be made available also to all other prospective applicants that may request access to the same information. The data in the register is updated every 3 months.[47] However, the above rule does not mean that other applicants cannot request access to the same information separately. In that case, the time limit for the disclosure of information is shorter than the time limit specified by law – only 3 days.

The time limit allowed for the public authority to disclose the requested information is 10 business days from the date of the application. If the application is not sufficiently clear, the public authority may request the applicant to clarify it within 48 hours. If the public authority does not hold the requested information, it is obliged to refer the application to the relevant authority within 10 days, and to notify the applicant about it. If accessing the information means reviewing or considering extensive documentation, looking

43 RTI Rating analyses the quality of the legislation on free access to information, and the rating methodology and scores and available at: http://www.rti-rating.org/index.php. The RTI Rating is a website launched by two non-governmental organisations – *Access Info Europe* and *Centre for Law and Democracy*, with the idea to provide activists and legislators with a reliable tool for assessing the legal framework for the right to access public information in their country. The RTI Rating contains information about the regulations in this area in 89 countries, and the ranking is based on their own in house-developed methodology.

44 Article 2 of the Law.

45 Article 3 of the Law, Article 2, paragraph 3 of the Law.

46 Article 11 of the Law.

47 Article 8 of the Law.

for information in various offices or on various premises that are physically separated from the headquarters of the public authority, or if it is necessary to consult other public authorities before deciding on whether to allow access to the information that has been requested, the above time limit may be extended by a maximum of 5 business days. The applicant must be notified about such extension. If the access to the information has not been provided within such extended time limit, the application is considered refused.[48]

The applicant may access the requested information by obtaining a copy in printed or electronic format. Accessing information is free of charge, and the applicant may be charged only a fee that is proportionate to the cost of the duplication of the information and the average market cost of the information delivery service. Electronic delivery of information is free of charge.[49] The Commissioner for Freedom of Information has issued guidelines specifying that public authorities should provide the first 10 printed pages of a document free of charge. The limitations to the right of access to information are set down in the Law. Information may be withheld exclusively on the grounds that it is contained in an official document classified as "state secret". In that case, the public authority is obligated to initiate promptly the classification review procedure with the public authority that originally assigned the classification. The applicant must be notified promptly about the classification review procedure, and the public authority may decide to extend the time limit for delivery of information to 30 days.[50] Furthermore, the right to information may be restricted if that is necessary and proportionate, and if its disclosure may harm the following interests:

- the right to privacy
- trade secrets
- copyrights
- patents.

The right of access to information cannot be restricted if the owner of the information has given consent for the disclosure of the information, or if the owner is considered a public authority in accordance with definition in the Law on the Right to Information. In any case, the right of access to information cannot be denied if there is an overriding public interest in favour of disclosure. Moreover, the right to access information may be restricted if the disclosure would cause a clear and serious harm to the following interests:

- national security;
- crime prevention, investigation, and prosecution;

48 Article 15 of the Law.
49 Article 13 of the Law.
50 Article 17 of the Law.

- conduct of an administrative investigation within a disciplinary proceeding;
- inspection and auditing of public authorities;
- state monetary and fiscal policy formulation;
- equality of parties before court and the conduct of court proceedings;
- preliminary consultations and discussions between public authorities on public policy development;
- strengthening international or intergovernmental relations.

In these cases, too, the right of access to information cannot be restricted if there is an overriding public interest to know.

If the public authority refuses the application, such decisions must be delivered to the applicant in writing, and it must include a justification.

Any person considering that his/her rights under the Albanian Law have been violated has the right to file an administrative complaint to the Commissioner for the Freedom of Information and Protection of Personal Data, in accordance with the provisions of the law governing free access to information and the Administrative Procedure Act.[51] The complaint is to be submitted to the Commissioner for Freedom of Information and Protection of Personal Data within 30 days from the decision refusing the application or from the expiry of the time limit for disclosure of information. The Commissioner is obligated to decide on the complaint within 15 days, specifically by:

– rejecting the complaint if the time limit has expired, if the complaint has not been submitted in writing, or if the complaint does not indicate the applicant's name/title and address,
– accepting the complaint and ordering the public authority to ensure access to the required information in full or partially, and specifying the time limit for the public authority to do so,
– refusing the complaint in full or partially.

If the Commissioner fails to decide upon the complaint within the specified time limit, the complainant has the right to address the courts. In case the complainant or the public authority disagrees with the decision of the Commissioner, both parties may initiate an administrative dispute challenging the decision.

The Law on the Right to Information specifies explicitly that any person who has suffered harm due to a violation of the provisions of this Law has the right to indemnity in accordance with the Civil Code.[52]

51 Article 24 of the Law.
52 Article 26 of the Law.

It is important for public officials to know that each public authority must appoint freedom of information coordinators. These coordinators are responsible to ensure that the applicants get access to public information, establish and maintain the register of requests and responses, coordinate the work on meeting the applicants' requests, refer requests to the competent public authorities, and verify cases in which information is provided to citizens free of charge.

The Law also stipulates fines for non-compliance with the obligations prescribed by law. The responsibility is shouldered either by the responsible person in the public authority – the highest-ranked public official – or by the freedom of information coordinator. The fines range from ALL 50,000 to 100,000, or ALL 150,000 to 300,000, respectively – which means that the minimum prescribed fine is only slightly lower than the average monthly earnings in Albania in 2016.

3.2. BOSNIA AND HERZEGOVINA

The Constitution of Bosnia and Herzegovina does not provide for the right to information. Although Article 2 of the Constitution stipulates that the European Convention for the Protection of Human Rights and Fundamental Freedoms is directly applicable in Bosnia and Herzegovina, Article 3, which lists the protected human rights and fundamental freedoms, does not mention the right to information even in a broad sense. Free access to public information is regulated in the same way at all three government levels.[53] According to the RTI ranking,[54] Bosnia and Herzegovina has 102 points and is ranked in the 29th place.

In accordance with the applicable legislation, all natural and legal persons have the right of access to information held by public authorities. The term "public authority" is understood to mean executive, legislative and judicial authorities, bodies appointed or established by law to carry out a public office, all other administrative authorities, and legal persons owned or controlled by a public authority. The term "information" is understood to mean any material communicating facts, opinions, data or any other content, including any copy or part thereof, regardless of its form or characteristics, when it is compiled or how it is classified.[55]

---

53 Law on Freedom of Access to Information in Bosnia and Herzegovina, *Official Gazette of the BIH*, Nos. 28/2000, 45/2006, 02/2009, 62/2011 and 100/2013; Law on Freedom of Access to Information in the Federation of Bosnia and Herzegovina, *Official Gazette of the FBiH* Nos. 32/2001and 48/2011; Law on Freedom of Access to Information, *Official Gazette of RS*, No. 01–572/2001.

54 See footnote 43.

55 Law on Freedom of Access to Information in BiH, Articles 2–4; Law on Freedom of Access to Information in the FBiH, Articles 1–3; Law on Freedom of Access to Information of RS, Articles 1–3.

The applicant requesting access to information is not obliged to explain the reasons for the request. The application must be submitted in writing, in one of the official languages in Bosnia and Herzegovina, and must indicate: sufficient details as to the nature or contents of the information requested to enable the public authority to identify the requested information; and the name and address of the applicant. Should the public authority be unable to comply with the request due to the absence of the formal requirements, including if the application is not sufficiently clear, the applicant must be notified in a written notice, no later than 8 days upon receipt of the application, that the public authority is unable to disclose the requested information, referring the applicant to available legal remedy, or the right to complain. In addition, this notice must include all specific issues that could clarify the application, and a copy of the Guidelines for Individuals for Accessing Information Held by Public Authorities, and the Registry Index (types of information held by the public authority, the form in which the information is available, and the details on how the information can be accessed), which must be compiled by all public authorities concerned. If, upon receipt of the notice, the applicant revises the application, such revised application is considered a new application.[56]

Should the responding public authority not be the authority competent to decide upon the application, the application must be referred, no later than within 8 days, to the competent public authority, and the applicant must be notified about the referral. Upon receipt of the application, the competent public authority should undertake all necessary actions to collect the requested information and consider all facts or circumstances that are relevant to the processing of the application. If the access to information is granted, the public authority will notify the applicant about it in a written notice – informing the applicant that he/she may access the information in person, at the premises of the competent authority, and/or whether it is possible to duplicate the information, specifying the cost of duplication, and whether such duplication would be possible only after the applicant has made the appropriate payment. The first 20 pages of the duplicated information are free of charge, and thus, the first 20 pages (or fewer) of the information will be provided as part of the notice that the application has been accepted. If the public authority denies access to the requested information, in part or in full, it is obliged to notify the applicant about it. That notice must contain the legal grounds for the exemption of the information from the free access regime, indicating all material issues relevant to the decision, including the public interest considered and a notification that the applicant has the right to appeal.[57]

---

56 Law on Freedom of Access to Information in BiH, Article 12, paragraph 3; Law on Freedom of Access to Information in the FBiH, Articles 11–12; Law on Freedom of Access to Information of RS, Articles 11–12.

57 Law on Freedom of Access to Information in BiH, Articles 11–13; Law on Freedom of Access to Information in the FBiH, Articles 13–16; Law on Freedom of Access to Information of RS, Articles 13–16.

The time limit for the public authority to decide upon a request for access to information is 15 days upon receipt of the request. However, this time limit may be extended if any legally prescribed limitations to the right of access to public information apply, and if the public authority must test the public interest in favour of disclosure. There are no legal restrictions for such extended time limit.

The limitations to the right of access to information are laid down in law at all three levels of government. Based on a detailed consideration of each individual case, an exemption from the disclosure of the requested information may be determined if the public authority has established that the information is exempted from public disclosure or if has established, after applying the public interest test, that the disclosure of the information is not in the public interest.

What exemptions are prescribed by law?

1. When it could be reasonably expected that the disclosure would cause substantial harm to the legitimate goals in the following categories: foreign policy, defence and security issues, protection of public safety, monetary policy interests, crime prevention and detection, protection of the decision-making process by the public authority insofar as it involves providing opinions, advice or recommendations by the public authority, its employees or any persons acting on behalf of the public authority – and does not involve factual, statistical, scientific, or technical information.

2. When the competent authority determines that a request for access to information involves the confidential commercial interests of a third party. The competent authority in that case must notify the third party in writing about the specifics of the request, specifying the time limit of 15 days upon receipt of the notice for the third party to respond in writing that it considers such information to be confidential and give reasons as to why harm would result from the disclosure. Upon receipt of such a response, the competent authority would confirm the exemption. If the third party fails to respond within the specified period, the information would be disclosed.

3. When the public authority reasonably establishes that the requested information involves the privacy of a third person. However, the competent public authority is obliged to disclose the requested information, notwithstanding that it has claimed an exemption, when doing so is justified by the public interest. The public authority is obliged to take into consideration any harm or benefit that may result from the disclosure. If the authority assesses that, despite the existence of an exemption, there is a public interest in favour of disclosing the information, the third party having a

commercial interest, or the third party to whom the privacy of the information relates, has the right to appeal the decision.

The Law on Freedom of Access to Information in Bosnia and Herzegovina prescribes that the supervision of its implementation is carried out by the Administrative Inspectorate of the BiH Ministry of Justice.[58] According to this article, any natural or legal person may address an Administrative Inspectorate, orally or in writing, to protect their right of free access to information if the public authority makes it impossible for them to exercise that right. Based on such an application, the Administrative Inspectorate is obliged to carry out administrative supervision, and prepare a report containing the established factual situation andthe identified irregularities in the work of the public body. If the Administrative Inspector finds that the law has been violated, he/she would issue a decision ordering the manager of a public authority to take action to remedy the irregularities within a specified time limit; if the order is not followed through, the Administrative Inspector would initiate misdemeanour proceedings.

The other two laws do not specify clearly to which authority the appeals against the decision should be addressed –this information is an integral part of the notice that the public authority submits to an applicant whose request has been denied, or to a third party. The Ombudsman institutions at all three government levels have limited powers in so much as that they can:

– analyse the compiling and providing of information, such as guidelines and general recommendations for the easier implementation of the Law,
– include in the performance reports dedicated parts related to their activities pursuant to the law on access to information.

3.3. KOSOVO*

The right of access to public information is regulated by the Constitution, which, in Article 41, stipulates that all persons enjoy the right to access public documents, and that documents held by public and state authorities are public, with the exception of those with restricted access on grounds of privacy, business secrets or information classified as confidential. The means and method to exercise this right are regulated in greater detail by the Law on Access to Public Documents.[59] The implementation of the Law is ensured by the Decree No. 3/2011 on Government Services for Communication with Citizens, and the Rulebook No. 1/2012 on the Code of Ethics for Public

58 Article 22 b. of the Law.

59 Law No. 03/L-215 on Access to Public Documents, *Official Gazette,* No. 88.

Communications Officers. According to the RTI Ranking,[60] Kosovo* is ranked in the 25th place, with a total of 106 out of possible 150 points.

The Law on Access to Public Documents stipulates that all applicants, or all natural and legal persons, have the right of access to public documents.[61] The applicant requesting information is not obligated to explain the reasons for the request for information, and also has the right to remain anonymous vis-à-vis third parties.[62] The Law stipulates[63] that an official document means any information recorded in any form, originating from or received by a public institution, including all official letters issued or received by a public institution verifying or certifying something, regardless of the physical form or characteristics – specifying explicitly that such information can be in the form of written or printed text, in audio form, optical or visual recordings, photographs, drawings, working materials, or portable automatic data processing equipment.[64] Public institutions are understood to mean the government or administrative authorities, legislative or judicial institutions, natural or legal persons if they exercise administrative powers or public office or have public funding, as well as independent institutions established in accordance with the Constitution.

The procedure to obtain access to a public document is initiated at the request of an applicant, and the request may be submitted in the form of a direct request, a written request, or a request filed electronically or through the registry.[65] The requests must be submitted in a form that enables the public institution to identify the document, and if that is not the case, the public institution will ask the applicant to clarify the request, and will assist the applicant in doing so.[66] The Law does not specify any time limit for the applicant to submit the revised application.

If the public institution does not possess the requested document, and has knowledge that it is held by another public institution, it will refer the application within a maximum of 5 business days from the receipt of the application to that public institution, notifying the applicant about it.[67] The Law stipulates explicitly that requests for access to official documents must be reviewed and handled promptly, which is specified in greater detail in

60 See footnote 43.
61 Articles 3 and 4 of the Law.
62 Article 6 of the Law.
63 Article 3 of the Law.
64 Article 3 of the Law.
65 Article 4 of the Law.
66 Article 6 of the Law.
67 Article 7 of the Law.

Paragraph 8 of Article 7 of the Law, stipulating that the public institution must issue a decision within 7 days from the registration of the request either granting access to the requested document or refusing the request in writing, fully or partially. This decision must be justified and must include instructions on legal remedies.[68] The time limits for dealing with a request to access public information may be extended to maximum 15 days if the information or the document must be requested outside of the public institution, or if the request refers to access to several pieces of information. The public institution must notify the applicant about the extension of the time limit promptly, and within a maximum of 8 days, indicating the reasons that have caused the extension.[69]

If the public institution fails to adopt a decision upon the request within the legally specified time limit, the request is deemed refused, and the applicant has the right to institute proceedings before the supervisory authority.

The grounds for denying access to a public document include the following:

– if the same applicant has already requested access to the same document, and the public institution has evidence that the applicant has previously misused public information or a public document,
– if the content of the requested public document is incomprehensible,
– if, regardless of the assistance by the public institution, it is not possible to identify the document.[70]

If a document has already been made public and is easily accessible to the applicant, the public institution may fulfil its obligation by informing the applicant how to obtain the requested document.[71]

The public institution may also deny access to a document based on the need to protect of one of the following interests:

- national security and protection and international relations
- public security
- criminal investigations and prosecution
- disciplinary investigations
- inspections, controls, and supervision by public institutions
- privacy and other legitimate private interests

68 *Ibid*.
69 Article 8 of the Law.
70 Article 11, paragraph 2 of the Law, Article 13 of the Law.
71 Article 11 of the Law.

- commercial and other interests
- state economic, monetary and exchange rate policies
- equality of parties to court proceedings and efficient administration of justice
- environmental protection
- the deliberations within or between the public institutions concerning the examination of specific matters.

The public institution may refuse access to a document, fully or partially, or may withhold a part of the document that is covered by one of the legally prescribed restrictions, while granting access to the remaining parts of the document.[72] Before it refuses access to a document, the public institution must apply the harm test – the access to information will be restricted if the disclosure would or could be harmful to any of the above stated interests, and the public interest test – to establish whether there is an overriding interest in favour of disclosure.[73] If such an overriding interest exists, the public institution is obliged to disclose the document.

Regarding access to the information classified as secret, the Law stipulates that requests for access to such information are submitted in accordance with the Law on the Classification of Information and Security Clearances.[74] According to that Law, all requests for access to classified information in the possession or under the control of any public authority are submitted to the manager of the public institution concerned, who makes the decision to allow or to deny access to the classified information.[75] This implies that all persons requesting access to classified documents must pass through the confidentiality clearance procedure prescribed by the Law,[76] which significantly impedes access to the information classified as secret.

In accordance with the Law on Access to Public Documents,[77] all public institutions are obliged to assign an officer or a unit that would be responsible for receiving requests for access to information, and initially reviewing of the applications for access to documents. All requests should be addressed to them. Upon receipt and initial review, this officer or unit will assess and identify the relevant unit within the public institution that has or should have

72 Article 12 of the Law.

73 *Ibid.*

74 Law No. 03/L-178 on Classification of Information and Security Clearances, *Official Gazette*, No.76/10.

75 Article 23 of the Law.

76 Articles 21–40 of the Law.

77 Article 5 of the Law.

the requested information in its possession and will refer the request to that unit. Once it has identified the requested document, the said unit will send it to the applicant. The unit or officer for communication with citizens must keep precise records of the number of requests for access to public documents.

If a request for access to an official document is refused or not answered, the applicant may, within fifteen (15) business days upon receipt of the response from the public institution, or after the unanswered request had been sent, file a request asking the institution to review the decision. While the Law does not regulate in detail the appeals procedure, it explicitly stipulates that the provisions of the Law on the Administrative Procedure should apply accordingly.[78]

The Law on Access to Public Documents also stipulates that applicants may contact the Ombudsperson to assist them in exercising their rights in case their requests have been refused. The Ombudsperson is an independent body, established by the Constitution[79] and regulated in greater detail by the Law on Ombudsperson Institution,[80] and its role is to ensure that the right of access to official documents in ensured in accordance with the law. The Ombudsperson has the power to take the necessary measures to promote and support the right of access to official documents and submits regular reports to the parliament on the exercise of the right of access to official documents. However, the decisions of the Ombudsperson are not binding.

3.4. MACEDONIA

The right of access to information is regulated by the Constitution of Macedonia. Article 16 of the Constitution stipulates that free access to information and freedom to receive and disseminate information is guaranteed to everyone. This right is regulated in greater detail by the Law on Free Access to Public Information.[81] According to the RTI Ranking,[82] Macedonia is placed in 16th place, with a total of 113 out of possible 150 points.

The Law[83] stipulates that all legal or natural persons have the right of access to information, and states explicitly that foreign legal or natural

78 Article 15 of the Law.

79 Articles 132–135 of the Constitution.

80 Law No. 05/L-019 on the Ombudsperson Institution.

81 Law on Free Access to Public Information, *Official Gazette of the Republic of Macedonia,* Nos.13/2006, 86/2008, 6/2010, 42/2014, 148/2015 and 55/2016.

82 See footnote 43.

83 Article 3 of the Law.

persons also enjoy this right, in accordance with this Law and other laws. In accordance with the Law, public information is information in any given form, created and owned by the information holder, while a document is any record of information, irrespective of its form – written or printed text, maps, schemes, pictures, sketches, working materials, vocal, magnetic, electronic, optical or video recordings, or even portable automatic data processing equipment.[84] Public information holders are the public authorities and institutions, local government authorities, public institutions, as well as legal or natural persons performing public powers.[85] All information holders must appoint one or several officials responsible for the implementation of the right of access to public information.[86] Furthermore, public information holders are obliged to maintain and regularly update a list of information in their possession and to publish it in a way that is accessible to the public (on webpages, noticeboards, etc.).[87]

The procedure for obtaining access to information is initiated upon the applicant's request, which can be submitted verbally, in writing, or in electronic form. If the applicant submits a verbal request, the information holder is obligated to ensure that the applicant gets access to information in a way that would give the applicant sufficient time to review its contents, and to write an official note documenting it. If the response to the verbal request is positive, the applicant will be given a possibility to review the requested information within a maximum of ten days from the date of the request. If the information holder responds negatively to the request, or if it is not able to respond immediately, or if the applicant has a verbal or written complaint to the way he/she was allowed to review the information contents, the official person from the information holder is obliged to write an official note documenting it.[88] Written requests or requests in electronic form are submitted in the form specified in greater detail by the Commission, which is an independent supervisory body. The request must indicate the name of the information holder, the name and surname of the applicant requesting information, the details about the information that is requested, and the desired way of receiving the information contents. The applicant is not obliged to explain the reason for the request, but he/she must indicate that the request relates to public information. If the request is incomplete, the information holder may request that the applicant clarify the request, indicating the consequences of his/her failure to do so. The applicant has a time limit of 3 days from the date he/she was informed that the request needed to be clarified. The

84 Article 3 of the Law.
85 Article 3 of the Law.
86 Article 8 of the Law.
87 Article 9 of the Law.
88 Article 13 of the Law.

official person responsible for handling requests for information is obliged to assist and advise the applicant. If the applicant fails to supplement the request within the specified time limit, the information holder will conclude that the request has been withdrawn. If the supplemented request still is not sufficiently clear and comprehensible, and the information holder still is not able to process the request, the information holder may adopt a decision rejecting the request.[89] If the information holder that received the request does not possess the requested information, the information holder should refer the request immediately to the appropriate public institution, within a maximum of ten days upon receipt of the request. The applicant should be informed that the request has been referred.

The information holder is obligated to respond to the request promptly or, at the latest, within 30 days after the request has been received.[90] This time limit may be extended if the information holder needs a longer period of time, if it is necessary – due to reasons specified by law – for a part of the document to be withheld, or due to the volume of the requested document – the extended time limit must not exceed 40 days.[91] The information holder is obliged to inform the applicant about the extension of the time limit, at the latest, three days before the expiry of the 30-day time limit. If the information holder fails to act within the specified time limits, the applicant has the right to file a complaint with the Commission within eight days.

The information holders may refuse a request, in full or partially, if it has been established that the requested information is covered by the legally prescribed limitations. More specifically, in accordance with Article 6 of the Law, the information holders may withhold information if it relates to:

- information that is classified with a proper degree of secrecy in accordance with law,
- personal information whose disclosure would cause harm to the protection of private information,
- information relating to archives classified as confidential,
- information whose disclosure would cause harm to the confidentiality of the tax procedure,
- information obtained or produced during investigation in the course of criminal or misdemeanour proceedings, or during executive and civil proceedings, whose disclosure would have harmful consequences for the proceedings,

89 Article 17 of the Law.
90 Article 21 of the Law.
91 Article 22 of the Law.

- information concerning commercial or other economic interests, including monetary and fiscal policy interests, whose disclosure would have harmful consequences,
- information contained in a document that is still under preparation, whose disclosure would cause misinterpretations of its contents,
- information that harms industrial or intellectual property rights.
- If it has been established that the requested information belongs to one of the above categories, the information holder is obliged to apply the harm test to assess the potential harm to the interest that is protected against the public interest in favour of disclosure. Notwithstanding the rules prescribed by the Law, the information holder is obliged to disclose information if it has established that the public interest in favour of disclosure overrides the potential harm to the public interest that is protected. If the document or a part of the document contains information that maybe withheld, and if that can be separated from the document in such a way as not to harm its security, the information holder will exclude such information and inform the applicant about the remaining contents of the document.

If the information holder allows access to information, an official note is to be compiled documenting that, and the applicant will be given immediate access to the information contents.[92] If the information holder refuses the request, partially or in full, it is obliged to explain the reasons for the refusal of the request. If the information holder does not providethe applicant access the requested information, and if the information holder fails to adopt and deliver the decision refusing the request, it is considered that the request has been refused, and the applicant may file a complaint.

The applicant has the right to appeal the information holder's decision refusing the request with the Commission for Protection of the Right to Free Access to Public Information, within 15 days upon receipt of the decision.[93] In case the information holder fails to act within the prescribed time limit, the time limit for appeal is somewhat shorter – only eight days. The Commission must decide upon the applicant's appeal within 15 days upon receipt of the appeal.

While the inspection of information is free of charge, the applicant requesting information is obliged to pay a compensation fee that is equal to the material costs of transcribing, photocopying or making electronic records of the information. The fee levels are specified in a decision adopted by the Government of Macedonia.[94]

---

92 Article 24 of the Law.

93 Article 28 of the Law.

94 Decision on Determining Reimbursement of Material Costs for Information Provided by Information Holders, available at: http://www.komspi.mk/?page_id=312.

3.5. MONTENEGRO

The right of access to information is regulated by the Constitution of Montenegro. Article 51 of the Constitution stipulates that everyone has the right to obtain information held by public authorities and organisations that exercise public office. The Constitution stipulates that the access to information may be restricted if that is in the interests of protecting life, public health, morality and privacy, the conduct of criminal proceedings, security and defence of Montenegro, or foreign, monetary and economic policies. The restrictions are specified in greater detail in the Law on Free Access to Information.[95] According to the RTI Ranking,[96] Montenegro is ranked the lowest of all the Western Balkan countries – in the 51st place, with a total of 89 out of possible 150 points. However, it should be noted that this ranking refers to the previous Montenegrin law, and that the 2012 Law on Free Access to Information is a considerable improvement. Unfortunately, this progress is undermined by the amendments to the Law on Free Access to Information adopted in 2017. Pursuant to these amendments, the following data is exempt from the Law on Free Access to Information:

1) information on parties to court, administrative and other proceedings based on law, where access to data related to such proceedings is prescribed by a regulation,
2) information that must be kept secret pursuant to the law governing data secrecy,
3) classified information owned by international organisations or other countries, and classified information that originate from or are exchanged as a part of cooperation with international organisations or other countries.[97]

The Law on Free Access to Information stipulates that all national or foreign natural or legal persons have the right of access to information without the obligation to state the reasons and explain the interest behind the request for information. The Law prescribes[98] that information is a document or a part of a document in a written, printed, video, audio, electronic or other form, including its copies, regardless of the contents, source (author), date of creation, or the classification system. The public authority is the information

95 *Official Gazette of Montenegro*, Nos. 44/2012 and 30/2017.

96 See footnote 43.

97 In May 2017, an initiative was filed to the Montenegrin Constitutional Court for assessing the constitutionality of the amendment exempting classified information from the Law on Free Access to Information. At the time of writing of this study, the Constitutional Court did not decide on the initiative.

98 Article 9 of the Law.

holder if it has the information in its actual possession. The public authority is understood to mean the legislative, executive, judicial or administrative authorities, local government authorities, institutions, companies, or other legal persons founded or cofounded or in the majority ownership by a state or local government authority, legal persons whose operations are financed predominantly from the public revenues, as well as entrepreneurs or legal persons that exercise public powers.

The procedure for accessing information may be initiated at a written or oral request by the applicant. The written request is to be submitted directly, by regular mail or electronically, and the oral request should be submitted directly to the authority, on the record. One request may include access to several documents or pieces of information. The request should indicate the title of the information or the details based on which it may be identified, the way in which the access is requested, and the details about the applicant.[99] If the request is incomplete or incomprehensible and therefore cannot be processed, the public authority should give the applicant a time limit of eight days from the date of the request to correct the irregularities, and should inform the applicant on how they can be corrected. If the applicant fails to do so, the public authority will adopt a conclusion rejecting the request.[100] The public authority is not obliged to provide electronic access to any information that has been published in Montenegro or that is available on the website of public authorities. Instead, it should simply inform the applicant in writing, within five days from the submission of the request, where and when the requested information has been published.[101]

The public authority is obliged to act upon the request for access to information within 15 days from the date of the request. If it is necessary to protect life or freedom of a person, the response to the request must be given promptly, and no later than within 48 hours.[102] The specified time limit of 15 days may be extended by the public authority by additional eight days if the requested information is particularly extensive, if it contains some information that is classified as a secret, or if its identification requires searching a large volume of information, which significantly impedes the regular activities of the public authority. The public authority must inform the applicant about any such extension.

The public authority may refuse the request for access to information or grant access to the requested information. The decision granting access

99 Article 19 of the Law.
100 Article 28 of the Law.
101 Article 26 of the Law.
102 Article 31 of the Law.

to information must include: the form in which the information may be accessed, the time limit in which the information may be accessed, and the cost of the procedure.[103] If the authority has decided to refuse access to the requested information, it is obliged to explain in detail the reasons for denial of access. On what grounds can access to information be denied? In the following events:

- if accessing the information requires or implies new information to be generated;
- if the applicant was granted access to the identical information in the previous six months;
- if there are legal grounds for restricting access to the requested information.[104]
- The legal grounds for restricting access to information are prescribed in a somewhat broader sense than in the Constitution – the public authority may restrict access to information or parts of the requested information if it in the interest of:
  - the protection of privacy, except for the information relating to high-ranking public officials where it relates to the discharge of public office, income, property and conflict of interest of those persons and their relatives, as well as any information relating to allocated public funds, except social security, health care, and unemployment benefits.
  - security protection, foreign, monetary and economic policies in accordance with the laws regulating confidentiality of information that is classified in accordance with the secrecy regulations,
  - crime prevention, investigation and prosecution in order to ensure protection from disclosure of any information referring to crime reporting and perpetrators, contents of all actions undertaken in the course of pre-trial and criminal proceedings, evidence collected through observation and investigation, secret surveillance measures, protected witnesses and collaborators of justice, and the effective conduct of the proceedings,
  - performance of official duty in order to ensure protection from disclosure of any information referring to inspection and supervision plans, public authorities' internal and interagency consultations for defining positions for the elaboration of official documents and proposal of decisions for specific cases, collegial bodies' actions and decision-making, and initiation and conduct of disciplinary proceedings,

103 Article 30 of the Law.

104 Article 29 of the Law.

– protection of private and commercial interests from disclosure of any information that relates to the protection of competition, as well as of business secrets related to intellectual property rights.
– if the information constitutes a business or tax secret, in accordance with the law.[105]

Before denying access to information, a public authority must apply the harm test – access to information will be restricted if it significantly harms one of the interests outlined above, or if the disclosure of information would have harmful consequences that are of greater importance than the public interest to know. On the other hand, the information may be disclosed if there is an overriding public interest in favour of disclosure of the information or a part of the information (public interest test). The latter situation arises if the information contains any data that potentially indicates: corruption, non-compliance, illegal use of public funds, abuse of power, a criminal offense or grounds for revocation of court judgement, illegal acquisition or spending of public funds, or a threat to public safety, life, public health or the environment.

However, the harm test is not applied for information relating to high-ranking public officials and social benefits. If access is requested to information that contains some pieces of information that are classified in accordance with the secrecy regulations, it is necessary to obtain prior consent from the authority that decided that classification. Nevertheless, the Judgment of the Administrative Court from 8 February 2016[106] and the Judgment of the Supreme Court of Montenegro from 22 January 2016[107] clearly indicate that the lack of consent by the authority that originally classified the information does not *per se* constitute sufficient grounds to refuse the request for access to that information. The public authority is in this case obliged to apply the harm test, and only then, on the basis of the harm test, it may refuse the request for access to information. This interpretation is extremely important for public officials because it indicates that it is not sufficient for the Law on Access to Information to be interpreted linguistically, and that it must be interpreted in a targeted manner, taking into account the provisions of Article 2 of the Law, which stipulate that the Law is based on the principles of free access to information and the right of the public to know, which are exercised in accordance with the standards contained in the ratified international human rights and freedoms agreements and the generally accepted rules of international law. It is important to point out that the Law explicitly stipulates that the court has the right to assess whether the public authority that originally classified a document or some specific information did so in accordance with

105 Article 14 of the Law.
106 Judgment of the Administrative Court No. U 307/2016, dated 8 February 2016.
107 Judgment of the Supreme Court Uvp 390/2015.

the requirements contained in the secrecy regulations, with the appropriate degree of properly.[108] The harm test is not performed for any information that is marked as classified by other states or by international organisations.

The applicant does not pay any fee for the request, but he/she carries the actual costs incurred by the authorities for duplicating, scanning, and delivering the requested information. These costs are prescribed by the Decree on the Reimbursement of Expenses in the Process of Accessing Information.[109]

The applicant, or another person having an interest, may appeal the decision on access to information with the Agency for Protection of Personal Data and Access to Information (hereinafter: "the Agency"), through the public authority that has decided upon the request in first instance. The only exception to this is the decision denying access to the information containing pieces of information marked as classified – in this case, the decision cannot be appealed, and it may be contested only by a lawsuit to initiate an administrative dispute.

The Law also lists the grounds for appeal[110] – a violation of the rules of procedure, an incomplete or incorrectly defined factual situation, and misapplication of material law. The first-instance authority is obliged to act within five days in accordance with the powers referred to in Article 125 of the Administrative Procedure Act[111] – which means that it can adopt a decision refusing untimely and unauthorised appeals or appeals filed by persons not authorised to file appeals – or, if it finds that the appeal is justified, it can accept the appeal and issue a new decision fully replacing the previous decision. If it fails to adopt a new decision, the first-instance authority must refer the appeal to the Agency. The Agency is obliged to decide on the appeal within 15 days from the appeal.

The Agency is authorised to submit requests for the initiation of misdemeanour proceedings for violations of the provisions of the Law on drafting and updating guidelines for access to information, which public authorities are obliged to prepare in accordance with the provisions of Article 11 of the Law.

It is important that public officials are aware that the Law stipulates explicitly that the government employees who, conscientiously carrying out their duties, disclose any information on abuse or irregularities in the course of

108 Article 44 of the Law.

109 *Official Gazette of Montenegro,* No. 66/16.

110 Article 35 of the Law.

111 *Official Gazette of Montenegro*, No. 56/2014.

carrying out a public office or official powers cannot be held liable for a violation of a work obligation.[112]

3.6. SERBIA

The right of access to information is regulated by the Serbian Constitution. Article 51 of the Constitution stipulates that everyone has the right to access information held by public authorities and organisations vested with public powers, in accordance with the law. This right is regulated more specifically by the Law on Free Access to Public information.[113]. According to the RTI ranking,[114] Serbia has the highest ranking of all the Western Balkan countries – it is in the 2nd place, with a total of 135 out of possible 150 points.

The Law on Free Access to Information stipulates that everyone has the right to be informed whether a public authority holds specific information, including whether such information is accessible elsewhere, and has the right to access to such information.[115] This right belongs to everyone, under equal conditions, irrespective of their citizenship, temporary or permanent residence, and other personal characteristics.[116]

The Law stipulates that public information is understood to mean any information held by a public authority, created during work or related to the work of the public authority, contained in a document, and relating to anything that the public has a justified interest to know.[117] Public authorities, for the purposes of the Law, mean state authorities, territorial autonomy authorities, local government authorities, organisations vested with public powers, as well as legal persons founded, or predominantly or fully financed, by a public authority.[118]

The Law contains an important assumption in Article 4 – it is considered that there is always a justified public interest to know the information held by public authorities that refers to a threat to, or the protection of, public health and the environment. With regard to other information held by public authorities, it is considered that there is a justified public interest to know unless proven otherwise by the public authority. This means that, when

112 Article 45 of the Law.
113 *Official Gazette of the Republic of Serbia*, Nos. 120/2004, 54/2007, 104/2009 and 36/2010.
114 See footnote 43.
115 Article 5 of the Law.
116 Article 6 of the Law.
117 Article 2 of the Law.
118 Article 3 of the Law.

handling the applicants' requests for access to information, the authorities carry the burden of proving that there is no public interest to know, and that legally based limitations to access to information therefore apply. Even then, the Law clearly stipulates that the rights specified in the Law may exceptionally be subject to limitations if that is necessary in a democratic society to prevent serious harm to an overriding interest in accordance with the Constitution or as prescribed by law.[119]

The procedure to obtain access to information is initiated upon the applicant's written request or based on a verbal request that the applicant has made for the record. The latter kind of request must be registered in special records. The request must indicate the name of the public authority, the full name and surname and the address of the applicant, and the most precise description possible of the requested information, as well as other details that will facilitate identifying the requested information. The applicant is not obliged to state the reasons for the request.[120] If the request does not contain the above elements, or if it is incomplete, the authorised person in the public authority is obliged to instruct the applicant free of charge on how to revise the request. The applicant is given a time limit of 15 days upon receipt of the instructions to complete the revision. If the applicant fails to correct the irregularities, or if he/she revises the request, but such revised request still contains irregularities that make it impossible to be processed, the public authority will adopt a decision rejecting the request as incomplete.[121]

The public authorities are obliged to act upon the requests without any delay, and at the latest within 15 days upon receipt of the request.[122] The Law specifies also a shortened time limit for acting upon a request if it relates to information that is presumed to be of relevance to the protection of a person's life or freedom, including the protection of public health or the environment – in that case, the time limit is 48 hours upon receipt of the request. The Law also stipulates a possibility to extend the time limit if the public authority is unable, for a justified reason, to confirm to the applicant that it holds the requested information, or to ensure the applicant access to the document. However, in that case, the public authority is obliged to forward a notice to the applicant within seven days, specifying the extended time limit that should not exceed 40 days. If the public authority fails to respond to the request within the specified time limit, the applicant may file a complaint with the Commissioner for Access to Public information.

---

119 Article 8 of the Law.

120 Article 15 of the Law.

121 *Ibid*.

122 Article 16 of the Law.

If the public authority refuses to notify the applicant, either entirely or partially, about the possession of the requested information, or denies the applicant access to the document containing the requested information, it is obliged, within 15 days upon receipt of the request, to make a formal decision refusing the request and to provide a written explanation of its decision. It must also instruct the applicant about the legal remedy at his/her disposal to appeal the rejected request.[123]

If the public authority grants the request, the requested information will be accessed on the official premises of the public authority. Access to information is free of charge, but the applicant is obliged to pay a fee to cover the costs of duplication of the document containing the requested information. The fee levels are specified by the Government.[124] Journalists, when requesting a copy of a document for professional reasons, human rights organisations, and all persons requesting any information that relates to a threat to, or protection of, public health or the environment, are exempt from the obligation to pay the fee.

When can public information be withheld? The Law specifies several grounds:

1. if it would:

- pose a threat to the life, health, safety or another vital good of a person,
- threaten, obstruct or impede crime prevention or detection, indictments for a criminal offence, pre-trial proceedings, trial, execution of a sentence, or enforcement of punishment, or any other legal proceedings, or unbiased treatment or a fair trial,
- pose a serious threat to national defence, national or public security, or international relations,
- considerably undermine the government's ability to manage the national economic processes, or significantly impede the fulfilment of the justified economic interests,
- disclose information or a document classified according to legal regulations, or an official document based on the law, as a state, official, business or other secret, that is, if such a document is accessible only to a limited group of persons, and its disclosure could seriously legally or otherwise harm the interests that are protected by law, and if such interests override the public interest in favour of disclosure.[125]

123 Article 16 of the Law.

124 Article 17 of the Law.

125 Article 9 of the Law.

When it is necessary to protect the life or freedom of a person, the request must be answered promptly, and at the latest within 48 hours.[126] The prescribed time limit of 15 days may be extended by a public authority by additional eight days if the information requested is particularly extensive or if it contains pieces of information that are classified in accordance with the secrecy regulations, or if identifying the requested information requires searching a large volume of information, which significantly impedes the regular work of the public authority. The public authority must inform the applicant about the extension.

The public authorities may refuse a request for access to information or adopt a decision allowing access to information. The decision allowing access to information must indicate: the way in which access is allowed, the time limit for obtaining access, and the cost of the procedure.[127] If the public authority has refused access to the requested information, it is obliged to explain in detail the reasons for denying access. It is important to note that access may be denied not only if there are grounds for restricting access, but also:

- if accessing the information requires or implies that new information needs to be generated,
- if the same applicant was granted access to the same information in the previous six months.[128]

2. The public authority does not have to provide the applicant access to public information if that information has already been published and is publicly available in the country or on the Internet. However, in the response to the request, the public authority should in that case indicate the information carrier (the number of the official gazette, the title of the publication, etc.).

3. If the public authority challenges the accuracy or completeness of the already published information, it should make publicly available the accurate and complete information, that is, provide access to the document containing the accurate and complete information.[129]

4. The public authority will not allow the applicant to exercise the right of access to public information if the applicant abuses such right, especially if the requests are irrational ortoo frequent, if the same or previously obtained information is requested again, or if the applicant's requests refers to an unreasonably large volume of information.[130]

126 Article 31 of the Law.
127 Article 30 of the Law.
128 Article 29 of the Law.
129 Article 11 of the Law.
130 Article 12 of the Law.

5. Another limitation is provided for in Article 14 of the Law – the public authority will not allow the applicant to exercise the right of access to information if it would thereby violate the right to privacy, the right to reputation, or any other right of the person to whom the requested information personally relates. Access will be allowed if the person to whom such information relates personally has consented to it, if such information regards a public personality, phenomenon or event of public interest, and especially if it regards a publicor political office holder, or if it regards a person who has caused, with his/her behaviour, especially with regard to his/her private life, a request for information to be submitted.

To be able to withhold information, a public authority must apply the harm test –information will be withheld if it would harm an interest of greater importance than the public interest to know, whose existence is presumed by the law.

If the public authority rejects or refuses the applicant's request, the applicant may file a complaint with the Commissioner for Public information and Personal Data Protection within 15 days upon receipt of the decision or other legal act.[131] Consequently, the applicant also has the right to complaint if the public authority fails to respond to the applicant's request within the prescribed time limit, if the conditions for disclosing the requested information include payment of a fee that exceeds the necessary costs of duplication, if the authority fails to make the document accessible as prescribed by law, or if it impedes or prevents the applicant in any other way from exercising the right of free access to information. The Commissioner should deal with the complaint without any delay, and at the latest within 30 days from the submission of the complaint.[132] Prior to adopting a decision, the Commissioner is obliged to allow the authority to make a written statement, and, if necessary, to give the same possibility to the applicant. The Commissioner will reject any complaint that is inadmissible, overdue, or filed by an unauthorised person. If he/she finds that the complaint is justified, the Commissioner will adopt a decision ordering the public authority to ensure free access to information as requested. If, after the complaint has been filed and before the Commissioner has adopted his/her decision, the public authority allows the applicant to access to the requested information, or if it decides to review the request, the Commissioner will suspend the case. The Commissioner will suspend the case also if the applicant withdraws the complaint. Decisions adopted by the Commissioners are binding, final and enforceable, and are implemented by the Commissioner through imposing compulsory measures or fines.[133]

131 Article 22 of the Law.

132 Article 24 of the Law.

133 Article 28 of the Law.

The decision by the Commissioner may be challenged in an administrative dispute, and that procedure is considered urgent.[134]

4. WHAT ARE THE KEY ISSUES IN IMPLEMENTATION OF THE OUTLINED LEGAL PROVISIONS ON FREEDOM OF ACCESS TO INFORMATION AND HOW TO OVERCOME THEM?

It is beyond doubt that the key problem in the Western Balkans in the implementation of regulations and international standards on access to public information is the failure on the part of numerous public authorities to recognise this right as a human right, and that the exercise and observance of this right contributes to integrity. The previously mentioned culture of secrecy, which seems still solidly rooted in these societies, according to which the state should jealously protect and hide the information in its possession, is only starting to make way to full recognition of the public's – both the general public's and individuals' – right to know. In addition, what is worrying is the prevalent practice[135] of public authorities having to resort to the institute of the right of free access to information in their dealings with other public authorities. In Serbia, for instance, the Anti-Corruption Council, which is a government body, filed a total of 65 complaints to the Commissioner for Free Access to Information in 2015 alone, due to not having been granted access to information it had requested from other public authorities.

The conclusion that in none of the analysed countries freedom of access to public information has been accomplished to a full extent is supported by the findings in the annual reports of institutions that are vested, by law, with the right to decide in the appeals instance on appeals against decisions by public authorities relating to access to public information, or with the right to monitor the implementation of the regulations on access to information. All the reports point consistently to a practice of "administrative silence," that is public authorities simply refusing to act on the requests for access to information, or failing to do so within the prescribed time limit. Such practice is present in Macedonia, Montenegro and Serbia. Moreover, there is an impression that access to public documents largely depends on the will of the manager of

134 Article 27 of the Law.

135 See. Report of the Commissioner for Personal Data Protection and Access to Information of Public Importance of Serbia for 2015.

the public institution concerned, which is indicative.[136] In some cases, the grounds for denying access to information verge on the absurd – in one case, the public authority stated "we do not anyone's service and we do not act based on somebody's wishes."[137] In other cases, the public authorities initiated appeals instance proceedings against the Commissioner's decision, even when they did not have a legal basis for doing so (they did not have active procedural legitimacy), and then referred to the proceedings as the grounds for not following through the Commissioner's orders, etc. What is also notable is the practice of many public authorities to deny requests based on the excuse that they are not in possession of the requested information – this is a frequent problem in one of the countries. Such practice may be a consequence of lack of a clear statutory mechanism for resolving the cases when a public authority, in the course of processing a request for information, finds itself not to be the correct addressee (and thus not in the possession of the requested information). However, it is just as likely that this practice is, in fact, yet another manifestation of the culture of secrecy – that is confirmed by the fact is that in a number of cases, the independent public body responsible for follow up procedures to verify such responses often found that the public authority concerned was indeed in possession of the requested information.[138]

Actually, practice has shown that the person requesting access to information may sometimes be informed that the public authority concerned is not in possession of the requested information even after an express order to make the requested information available to the applicant has been issued by an independent body or by the relevant court after court proceedings had been conducted. This happened in a case that was eventually resolved in the European Court of Human – the case is typical. The applicant had requested from the Security and Intelligence Agency information on the number of persons who were subject to electronic surveillance by that Agency in 2005. The Agency denied the request, invoking the provision of the law stating that information or a document that is formally marked as a state, official, business or other secret, the disclosure of which could seriously damage the lawful interest that has precedence over the freedom of information, may be legally denied. The applicant, a local non-governmental organisation, then filed a complaint to the Commissioner, who found that the Agency had violated the law, and ordered that the requested information should be made available to the applicant. The Agency filed an appeal against the Commissioner's decision, but the Supreme Court determined it had no active process legitimacy and dismissed the appeal. After that, the Agency informed

136 See. Kosovo* Ombudsman Institutions Annual Report for 2015.

137 *Ibid*.

138 See. Montenegrin Report on the Status of Personal Information Protection and Status in the Field of Access to Information for 2015, available at: https://www.azlp.me/index.php/me/izvjestaji/godisnji-izvjestaji.

the applicant that it was not in possession of the requested information. The applicant then filed an application to the European Court of Human Rights, which found that the Agency's reply was unconvincing, and that Article 10 of the European Convention of Human Rights was breached.[139]

The circumstances of this case are a good illustration of what seems clearly to be the key problem in the implementation of the regulations on free access to public information – denial of access to information on the grounds of secrecy. A frequent practice is to deny access to information on the grounds of a confidentiality clause stipulated in investment contracts and contracts on other forms of business cooperation, as well as to deny access to information on the grounds of potential harm of the competitors' rights. The most drastic example is that from Serbia, from 2015. The Ministry of Economy denied access to the Contract on Management and Consultancy Services regarding the Iron and Steel Factory in Smederevo. In doing so, the Ministry invoked the regulations concerning protection of competition as justification, according to which the Republic of Serbia and the company that provided the contracted services had requested that information related to the contract be kept confidential. Hence, the Ministry claimed that it was unable to disclose the information related to that contract to the applicant.

In cases when access to information is denied based on confidentiality of the requested data, public authorities, as a rule, provide no proof that the document is indeed marked as secret in the manner prescribed by law. Furthermore, public authorities seldomly present decisive reasons and evidence supporting the decision not to disclose the information–quite to the contrary, public authorities deny access *a priori*, without applying the harm test to assess the potential harm caused by the disclosure, or the public interest test to assess the prevalence of the right of the public to know against other public interests that might be harmed by the disclosure. Such practice was challenged before the court in Montenegro and the Administrative Court and the Supreme Court,[140] in their respective judgments, clearly indicated that the statutory provision according to which access to information marked as secret is conditional upon the consent of the public body that originally classified the information as confidential does not mean that lack of such consent *per se* constitutes grounds for denying access to information. The courts asserted that the public authorities are even then under the obligation to conduct the harm test.

It is reasonable to assume that one of the reasons why the full implementation of the regulations on access to information, data confidentiality or personal data protection is such a challenge for public officials lies in the lack of internal accordance of the mentioned regulations in all the analysed

139 See. Youth Initiative for Human Rights vs. Serbia, Application No. 48135/06.

140 See. 4.3. Montenegro.

countries. The very fact that some specific information is classified implies that the harm test should be conducted, and that the conclusion may well be that such information should be kept secret, precisely to protect certain interests as prescribed by law. Nevertheless, it is not surprising that public officials may face a difficult challenge in cases when access to a document that had already been marked as classified is requested. That implies that disclosure may cause harm to protected interests, which means that access to the requested public information may be denied. Moreover, in certain cases, it may well be the case that it is precisely the possibility of request to obtain access to that particular information that triggers the classification procedure. These rules imply the severity of damage (irreparable damage, grievous harm and the like), and the probability that such damage will actually be caused. However, a key problem regarding data classification in all the analysed countries lies in the fact that the public interests protected by the data secrecy regulations are not prescribed in the law in a sufficiently precise way. Consequently, the margin of discretion of the person in charge of deciding whether some information should be classified or not is rather broad – that makes the decision-making about the possibility of accessing the information already marked as classified considerably harder.

This implicit limitation may be resolved in several ways. For instance, an illustrative example of that is Slovenia, a country that is not a part of the present analysis. In order for a document or a piece of information to be marked as classified, it is necessary to conduct the harm test and the decision on classification must be accompanied by a detailed written justification. Other countries have also adopted mandatory secondary legislation, which set out in detail the criteria for marking information as classified, that is, provide elaborate guidelines that detail what may be considered as irreparable or severe damage.[141] In Serbia, too, rules that regulate the criteria for certain degrees of classification have been adopted.[142] That provides additional guidance for the classification of data but also helps public officials to make

141 See, for instance, Australian government gudielines – Information security management guidelines- Australian Government security classification system, Approved November 2014, Amended April 2015; Also see to the Ordinance of the Czech government which includes a list of data and their respective degrees of classification. Government Regulation No. 522/2005 Coll. Government Regulation Specifying a List of Classified Information, available at https://www.zakonyprolidi.cz/cs/2005522.

142 Decree on the Criteria for Determination of Secrecy Levels “STATE SECRET” and “TOP SECRET” Decree on Specific Criteria for Determining Secrecy Levels “SECRET” and “INTERNAL” in the Office of the National Security and Protection of Classified Information Council, Decree on Specific Criteria for Determining Secrecy Levels “SECRET” and “INTERNAL” in the State Authorities in the Country, Decree on Specific Criteria for Determining Secrecy Levels “SECRET” and “INTERNAL” in the Security Information Agency, Decree on Specific Criteria for Determining Secrecy Levels “SECRET” and “INTERNAL” in the Ministry of Defence, Decree on Specific Criteria for Determining Secrecy Levels “SECRET” and “INTERNAL” in the Ministry of the Interior, available at: http://www.nsa.gov.rs/lat/domace-zakonodavstvo.php.

decisions on access to information through the correct application of the criteria prescribed by law.

It has already been noted that failure to conduct the harm and public interest tests represents a major challenge in the implementation of the regulations on free access to public information. Public authorities, for reasons that may be political but that may also include a general fear of disclosure of information, frequently prefer to deny access to information *a priori,* without thoroughly examining the potential consequences of disclosure and the public interest to know. It is, therefore, imperative for public officials to have proper training not only on the letter of the law and the contents of international standards. They also need practical support, through training, that will enable them to apply both the letter and the spirit of the law and to conduct the harm and public interest tests when appropriate.

Another frequent reason for denying access to information is the protection of privacy. In some cases, the protection of privacy and the protection of secrecy of information are used simultaneously as grounds to deny access to public information. In specific cases, access to information has been fully denied on the grounds of protecting the privacy, even when that is relevant for only a small part of the requested information (examples are citizens' single identification number, address, bank account number, etc).[143] Such practice implies the incorrect application of statutory provisions and a possibility to protect only a part of the requested information, indicating its scope and the reasons for doing so. Another indicative example of unjustified denial of access to information, based on an inadequate interpretation of the right to privacy, was the denial of the Higher Public Prosecutors' Office to make available to the public the name of the public prosecutor acting in the so-called "Savamala" case.[144] The Higher Public Prosecutors' Office initially took the position that the disclosure of the name of the public prosecutor in charge would jeopardise the prosecutor's privacy and that the publication of the case number would harm the course of the proceedings. Such interpretation of the exemptions from the rules on free access to information is manifestly wrong.

Practice has shown that citizens and the civil sector have most difficulties to obtain access to the information related to public expenditures, including public procurement. This shows that despite statutory provisions on proactive approach to public information and raising awareness of public authorities about the need and duty to disclose such information, public authorities still

143 See Report on the Status of Protection of Personal Information and Status in the Field of Access to Information for 2015, Agency for the Protection of Personal Information and Free Access to Information of Montenegro.

144 The case of demolition of buildings in the Hercegovacka Street in Belgrade by unknown perpetrators, in the night between April 24 and 25, after the completion of the parliamentary and local elections in Serbia.

show resistance to full transparency of their financial operations and public fund management. For instance, the organisation BIRN Macedonia was able to calculate and publish information on the total costs of the renovation of buildings in the centre of Skopje paid from public funds only by combining publicly available information and the information requested based on the regulations on free access to information.[145]

What is also noticeable is the practice of denying access to information based on the claim that such information is already available to the public, but without indicating where the information was published or when. Sometimes subsequent checks show that the information was never made public. This, again, is characteristic of the persistent culture of secrecy.

On the other hand, it should be noted that many public officials face very concrete obstacles when deciding whether or not to grant access to information that have been marked as classified, particularly when they work in public authorities and bodies with a strict and complex hierarchy, such as the Ministry of Interior or the Ministry of Defence.

What are the possible ways to overcome the identified problems?

Practice shows that public authorities, in some particularly sensitive cases, often refuse to act on the orders of independent bodies, or even court judgments made in the proceedings relating to access to information. The reasons behind such practice are political, just as the mechanisms that should enable the observance of the rules on access to information are, in fact, political – and based on the fundamental principles of democracy. That is why it is not necessarily sufficient to provide concrete recommendations for the improvement of the regulatory framework. There is ample room to reiterate the need to reconfirm and further recognise of the right of free access to information as a basic human right. Improved observance of this human right can also be supported by informing public authorities that failure to provide a reply to requests for access to information is a violation of a personal right, and that the applicant, as the injured party, may initiate misdemeanour proceedings against the public authority. This position was recently adopted by Serbian Supreme Court of Cassation,[146] and it is particularly important given the general practice of failing to launch misdemeanour proceedings against those who have violated the law. Even it is relevant only to the legal system in Serbia, this legal position, in fact, has much wider implications. It indicates the way in which relevant courts, but

145 According to this research, the cost of renovation had increased sevenfold compared to the initial price. The database including information on every building is available at: http://skopje2014.prizma.birn.eu.com/mk, and also as an Android application.

146 Legal position adopted at the session of the Civil Law Department of the Supreme Court of Cassation held on December 6, 2016, available at: http://www.vk.sud.rs/sites/default/files/attachments/II%20Su-17%20157-16%20-%20pravni%20stav%20za%20verifikaciju.pdf.

also public authorities, should understand the right of access to information and its observance in accordance with international standards.

What is undoubtedly necessary is additional support to public officials in handling requests for access to public information that may be exempt from the rules on free access to information. Detailed knowledge of the statutory provisions and international standards – including the case law of the European Court of Human Rights – and to practical information on how to apply the harm and public interest test, may considerably improve the observance of the right to access public information in practice. Such trainings should be complemented by clearly stating that a public officials who disclose information for which there is a public interest to know cannot be sanctioned for such actions, while in the opposite case, adverse consequences, including sanctions or misdemeanour or other proceedings may be applied to both the public authority and the responsible public official. Furthermore, the development of a set of practical guidelines that are both universal and sensitive to the various national regulatory frameworks would considerably facilitate the work of public officials deciding on whether or not to grant access to public information.

5. INTERNATIONAL AND REGIONAL PRACTICES THAT COULD BE USED FOR TRAINING OF PUBLIC OFFICIALS

The public interest test is used in a number of countries, including Slovenia, Ireland, UK, Lichtenstein, Estonia, Australia, Israel, Jamaica, and India. Public interest is a concept that is not precisely defined, and that ambiguity may cause difficulties for those who need to use it in order to decide whether to allow access to public information or not. Openness is, in itself, a principle that should be considered to be in the public interest.[147] In order to help public officials in the practical implementation of the rules on free access to public information, the authorities and bodies in charge of monitoring free access to information often issue guides or handbooks with instructions that explain the applicable norms, rules regulating this matter, providing guidelines and instructions on appropriate conduct for both the general public and public authorities. When it comes to the countries in the Western Balkan region, such publications focus mostly on informing the citizens on how to exercise their right of access to public information, rather than assisting the public authorities in implementing the relevant legislation. The Serbian Commissioner's Office has issued a Guidebook on the Implementation of the

147 How and When is Public Interest Test Used? , p. 21

Law on Free Access to Public Information, which is very useful[148]– however, even this guide leaves some practical questions open and needs to add guidance notes and breakdown of the various steps of the procedure. Some indirect information and guidance can be found in the annual reports of the authorities and bodies in charge for monitoring the implementation of the freedom of information legislation and their practice of the rules, which are available on the webpages of most such bodies.[149]

Here are some examples:

THERE IS NO PREVAILING INTEREST TO DENY ACCESS

Nova Srbija City Board of Nis filed, in the capacity of applicant, a complaint to the Commissioner for Information of Public Importance on April 13, 2010, because it did not receive all the requested information in its request for access to information filed to the Mayor of Nis on March 26, 2010. Namely, the Mayor had partially granted Nova Srbija access to the requested information but had denied access to the following information: a copy of the contract concluded between the city of Nis and an air carrier anda copy of agreement between the city of Nis and the Nis Airport, a publicly owned company. Nova Srbija had attached a copy of the Mayors' response to the complaint.

Acting on the complaint, the Commissioner forwarded the complaint to the Mayor to give him the opportunity to provide his comments. In response, the Mayor forwarded copies of the requested documents to the Commissioner and stated that access to documents was not granted to the applicant since the contract between the city of Nis and Wind Jet air carrier stipulated that any disclosure of the contract, in full or partially, was conditional on the written consent of Wind Jet. Otherwise, it would be strictly prohibited.

The Commissioner ordered the Mayor to forward the requested information to Nova Srbija City Board of Nis within three days. In his ruling, the Commissioner stated that he had determined that the information requested was not information to which access could be denied or restricted according to law.

"Even if the mentioned contract clauses are interpreted as implying an express provision that any disclosure of information from the contract without Wind Jet's written contract is prohibited, this ground cannot be deemed as justified. Article 9 and 14 of the Law on Free Access to Public Information prescribe exceptions from the rule that requested public information should be made available, and in this specific case disclosure without a written consent from Wind Jet does not and cannot constitute a valid argument for denial of access to the requested information since lack of written consent is not an exception prescribed by the law. The right of the public to know, or everyone's right of access to public information, is guaranteed by the Constitution, and is implemented under the conditions prescribed by law and cannot be suspended by provisions of a commercial contract".

Source: Serbian Commissioner Ruling No. 07-00-00694/2010-03.

148 Available at: http://www.poverenik.rs/images/stories/dokumentacija-nova/vodic/prirucnikza-primenuzakonacir.pdf.

149 Available at: http://www.azlp.me/me/izvjestaji, http://www.poverenik.rs/sr/izvestaji-poverenika.html, http://www.ombudspersonKosovo*.org/sr/godi%C5%A1nji-izve%C5%A1taji, http://www.komspi.mk/?page_id =2609.

PERSONAL DATA CAN BE EXCLUDED BUT ACCESS TO THE REMAINING INFORMATION CAN BE GRANTED

Foundation "Open Society Fund – Macedonia" filed a request for access to information to the Basic Court in Skopje, requesting access to a copy of the judgment in the case "Buckovski – Spare Tank Parts", a high-profile case against a former defence minister. The court had denied access to the judgment. The Court found that the judgment included personal data under the Data Protection Law and, consequently, invoked a limitation to the right of access to public information with the state justification that a public authority may deny access if the information is related to personal data, the disclosure of which would entail a violation of the protection of personal data and might endanger that person's safety. Moreover, the Court stated that it was not under the obligation to provide the applicant with information on a specific court case since the applicant was neither a party nor the counsel of a party. The Foundation filed an appeal against the decision of the court. Ruling on the case, the Commission found that the Law on Free Access to Information was simply an operationalisation of the constitutional right of access to public information, regardless of whether the applicant seeking access was a party or a counsel in the proceedings in the court case itself. The Commission also found that the court's invoked limitation to access to the requested information – the safety of the person to whom the personal data related – had been decided without precisely stating exactly how the safety of the person concerned might be endangered. The Court had carried out the harm test, but the Commission found that the Court failed to state which harm would arise and, consequently, what interest should be protected. As for the fact that the Court's sentence was not yet finally binding, the Commission found that its judgement, nonetheless, represented a final document in that stage of the proceedings. The Commission also underlined that the Court could not deny access to public information for all the cases tried before that Court but had to consider the circumstances in each individual case. The Commission, therefore, ordered the Court to allow the applicant access to the judgment, but with the deletion of all personal data such as the citizen's single identification number and other data that might refer to a person's mental, economic, cultural or social identity.

Source: Macedonia, Examples of the Commission's Report, Macedonia, 2009.

THERE IS NO SERIOUS BREACH OF THE RIGHT TO PRIVACY NOR OTHER GRAVE LEGAL OR OTHER CONSEQUENCES IN CASE OF ACCESS TO CONFIDENTIAL INFORMATION

Union University in Belgrade filed a request for access to public information to the Accreditation and Quality Assurance Commission in Belgrade, requesting access to documents filed to the Commission by three faculties in Belgrade, and specifically to documents on the award of academic titles to the teaching staff, alternatively to forward to the Union University copies of documents including information on who had awarded academic titles to the teaching staff and when.

The Quality Assurance Commission had denied the request stating that access to information on award of academic titles would breach the confidentiality of that information. The Commission also invoked the right to privacy and other personal rights as an interest established by law, which in the concrete case prevailed over the right of the public to know.

With regards to the right to privacy as the prevailing interest, the Commissioner of Public Access to Information found that the first-instance authority was wrong when it denied the applicant's request by invoking Article 14 of the Law. The Commissioner found that in that specific case the conditions for granting access to information existed, since award of academic titles at faculties is an event of interest to the public, and that the faculty teaching staff are holders of public offices.

With regards to confidentiality, the Commissioner stated that, in order to deny access to information, the public authority has to prove that such denial is justified in the concrete case for the purpose of protecting prevailing interests invoked as justification for the ruling. In that, two conditions must be met. First, the requested information has to be marked as a state, official, business or other secret by a regulation or an official act based on the law. Secondly, the disclosure of such a document or information would have to result in grave legal or other consequences for interests protected by law, in order to prevail over the public interest to access the information. The first-instance authority had not provided valid evidence for justifying the denial, that is, has not provided evidence that these two conditions were met.

Source: Serbian Commissioner's Ruling No. 070001170/201003

THERE IS NO PREVAILING INTEREST

MANS, a Montenegrin NGO, requested access to public information, that is, the copies of all payments made to the Pljevlja municipality by the Montenegro Electric Power Company of Niksic. The first-instance authority established it was in possession of the requested information but had refused access, invoking two exceptions as a justification. The first exception was the protection of trade or other economic interests related to business secrets – the first-instance authority found that the requested information constituted a business secret and that it could not be disclosed without the consent of the owner of such information. The second limitation invoked by the first-instance authority was the duty to keep imposed taxes secret, which, as prescribed by the Tax Administration Law, cannot be disclosed without a written consent of the taxpayer. The first-instance authority considered that the Tax Administration Law had precedence over the Law on Free Access to Information. MANS appealed against this decision.

The Montenegrin Agency Council found that the appeal was founded and annulled the ruling of the first-instance authority based on erroneous application of material law. The Council emphasised that Article 14 of the Law on Free Access to Information prescribes the limitations of access to information, and that this Article does not recognise tax and business secrets as grounds for limiting access to information. The Council also found that the first-instance authority had not carried out the harm test to prove that its position to deny the disclosure of the requested information would incur harm to a prevailing interest.

The Council ordered the first-instance authority to allow access to the requested information, stating that this information represents a testament of the legality of the company's operation, and that, contrary to the claims of the first-instance authority, it is failure to disclose the requested information that would cause mistrust in the operations of the first-instance authority.

Source: Ruling of the Montenegrin Agency for Personal Data Protection and Free Access to Information No. UP II 07-30-402-2/16

On the other hand, some countries have issued detailed instructions and guidance on how to conduct the public interest test and also the harm test. The following is an example from a guidance note issued by the Irish Office of the Information Commissioner[150] on the need to conduct the harm test:

In Case 060233 a Council had argued that release of certain records relating to a new prison could possibly assist the escape of convicted prisoners. The Department of Justice, Equality and Law Reform had stated that some information, in the wrong hands, could place the operation of the prison in jeopardy. The Commissioner said that she would have expected some form of analysis of how specific items of information could, if disclosed, have the said type of negative consequence that the exemption is intended to prevent. She stated that where neither the Council nor the Department had identified, explained or considered the likelihood of a particular harm occurring, she was satisfied that there was nothing in the content of the records that persuaded her that the exemption claimed was justified.

Source: Office of the Irish Information Commissioner, Guidance Note, Freedom of Information Act 2014, Section 32: Law Enforcement and Public Safety, p. 6

After amending its access to information law, the Slovenian Commissioner's Office issued a brochure on how and when to use the public interest test.[151] The United Kingdom has also issued a Guidance on how to implement the public interest test, and its visual representation is given below.

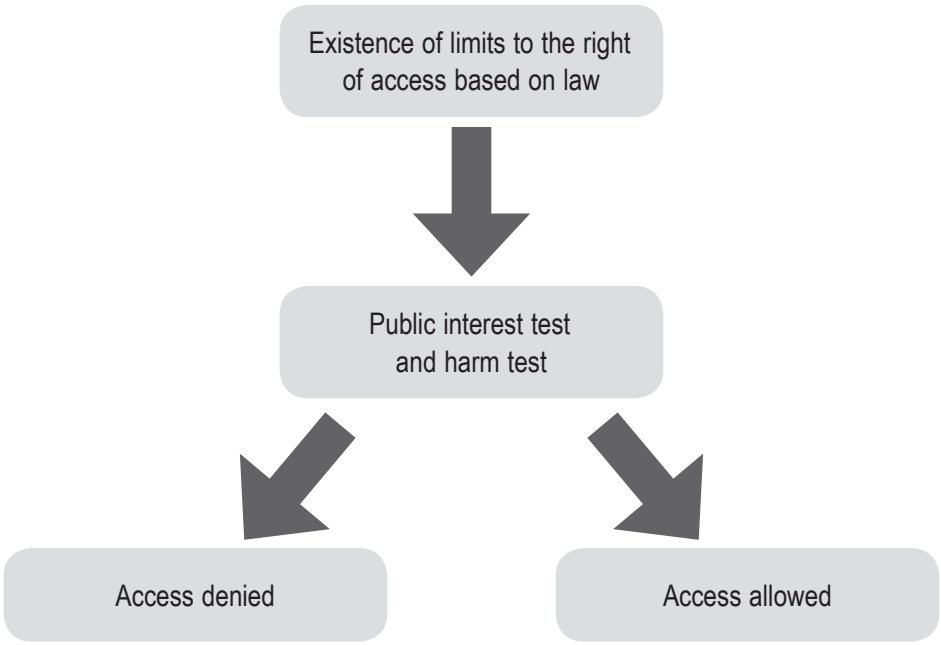
1. PUBLIC INTEREST TEST

A public interest test comprises three fundamental steps, which include (1) establishment of factors enabling access to information, (2) establishment of factors against giving access to information, and (3) weighing the factors for and against giving access. This can be illustrated through the following flow diagram:

150 Guidance Note Freedom of Information Act 2014 – Section 32: Law Enforcement and Public Safety, available at: http://www.oic.gov.ie/en/Publications/Guidance/.

151 Available at: https://www.ip-rs.si/fileadmin/user_upload/Pdf/brosure/test_javnega_interesa.pdf.

Figure 1: Flow diagram of public interest test[152]

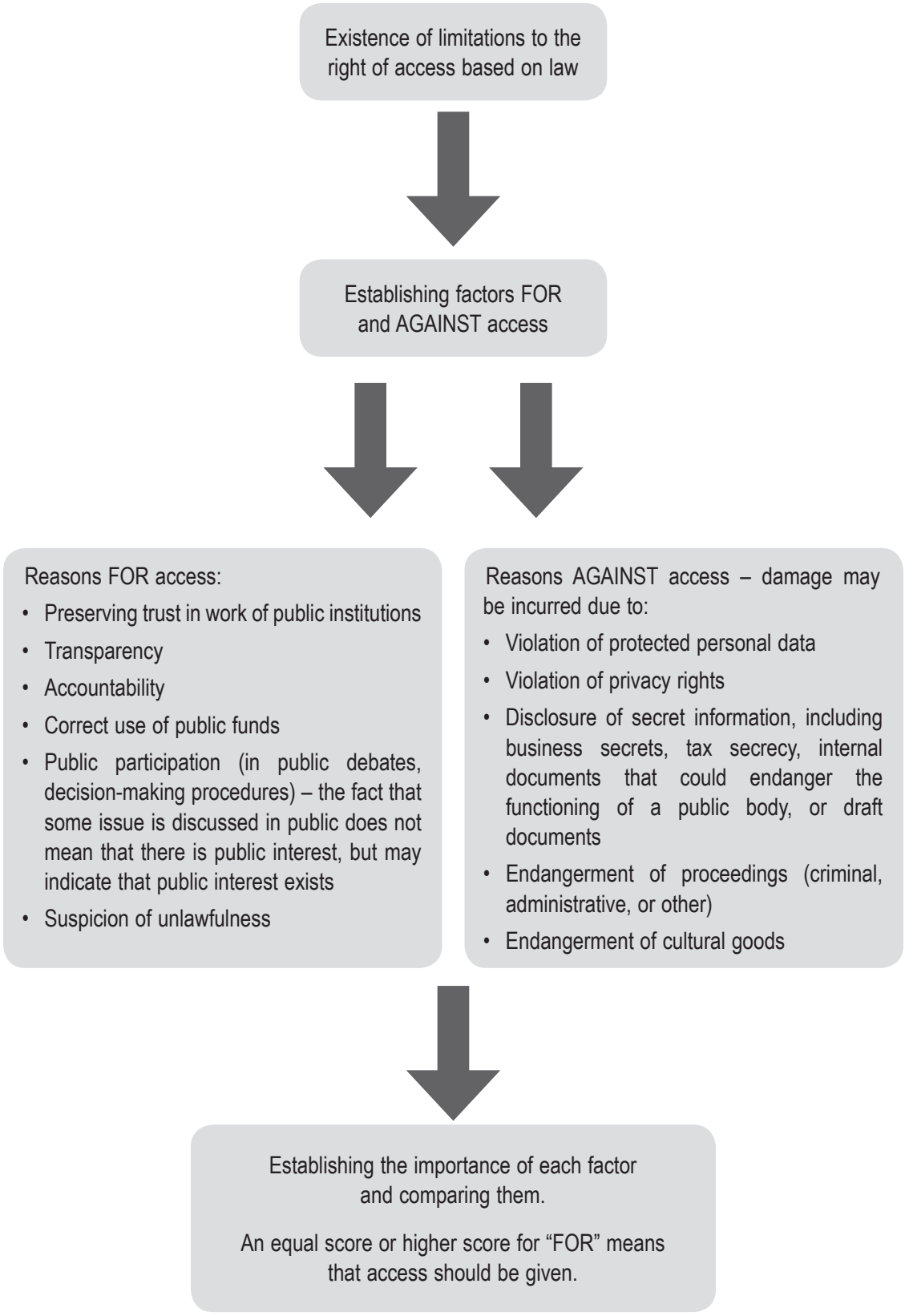


In addition, in 2012, United Kingdom has issued a flowchart of how to handle information requests. This flowchart, coupled with more detailed instructions on how to conduct the public interest and the harm tests, provides a very useful step-by-step guide that can easily be followed by every public official charged with handling requests for access to public information. Currently, the UK Information Commissioners' Webpage includes a detailed interactive step-by-step guide for public institutions on how to handle information requests– which is in fact an upgrade of the flowchart. However, the flowchart still represents an instrument that may be very useful for all the Western Balkans countries in facilitating the access to public information – provided it is adapted to national legislation. Below, the flowchart is shown in full (Source: V. L. Lemieux, S. E. Trapnell, Public Access to Information for Development – A Guide to the Effective Implementation of Right to Information Laws, p. 119–121).

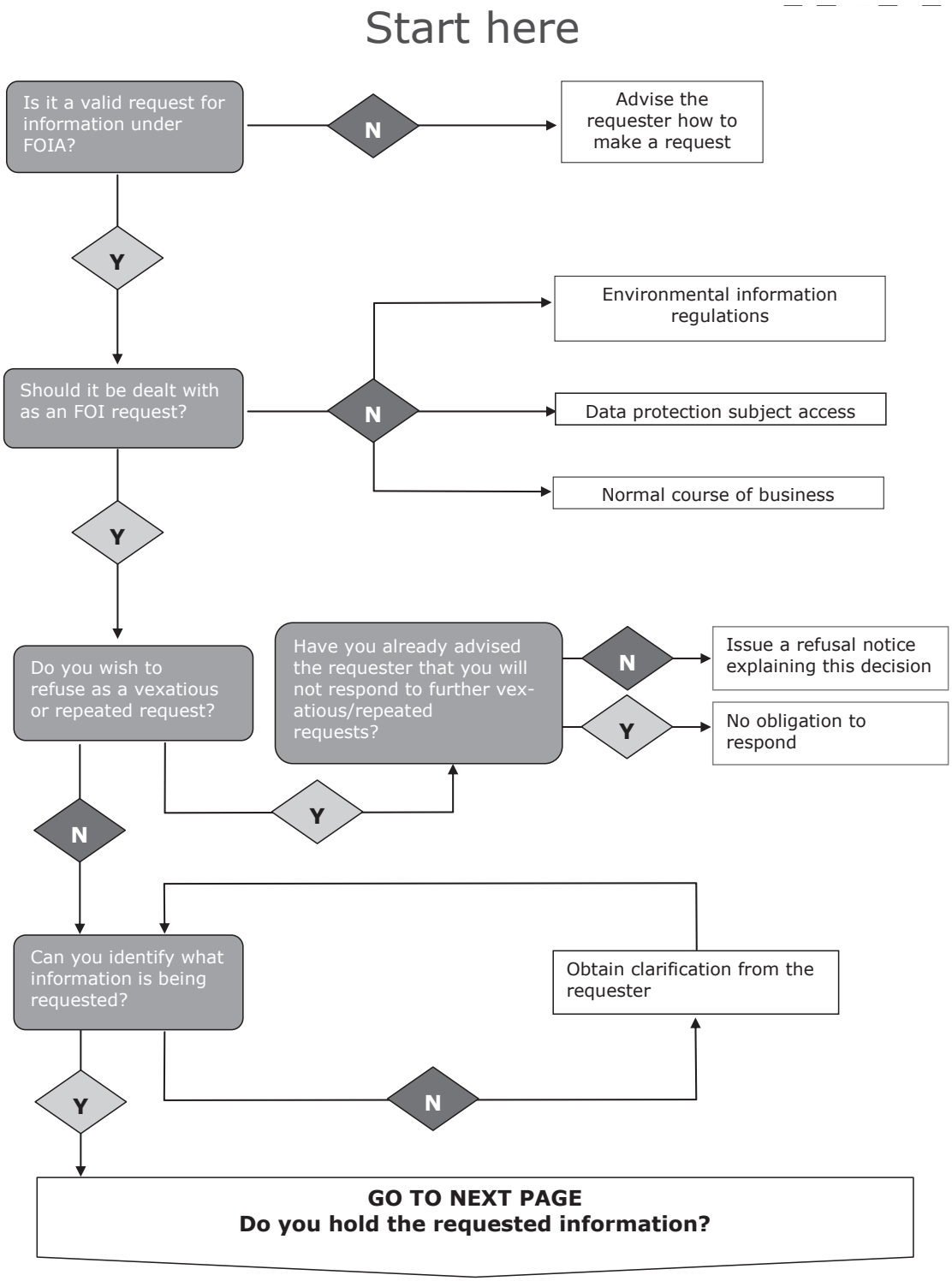
Another useful instrument in order to address one of the major challenges in access to public information – how to ensure public access to government information without jeopardising legitimate efforts to protect national security –is the Tshwane Principles. And even though, as explained in the section dealing with international instruments, the Tshwane principles relate to issues of national security, they provide good guidance on how to handle access to public information related to any category of classified information. A summary of the principles may also provide useful guidance.

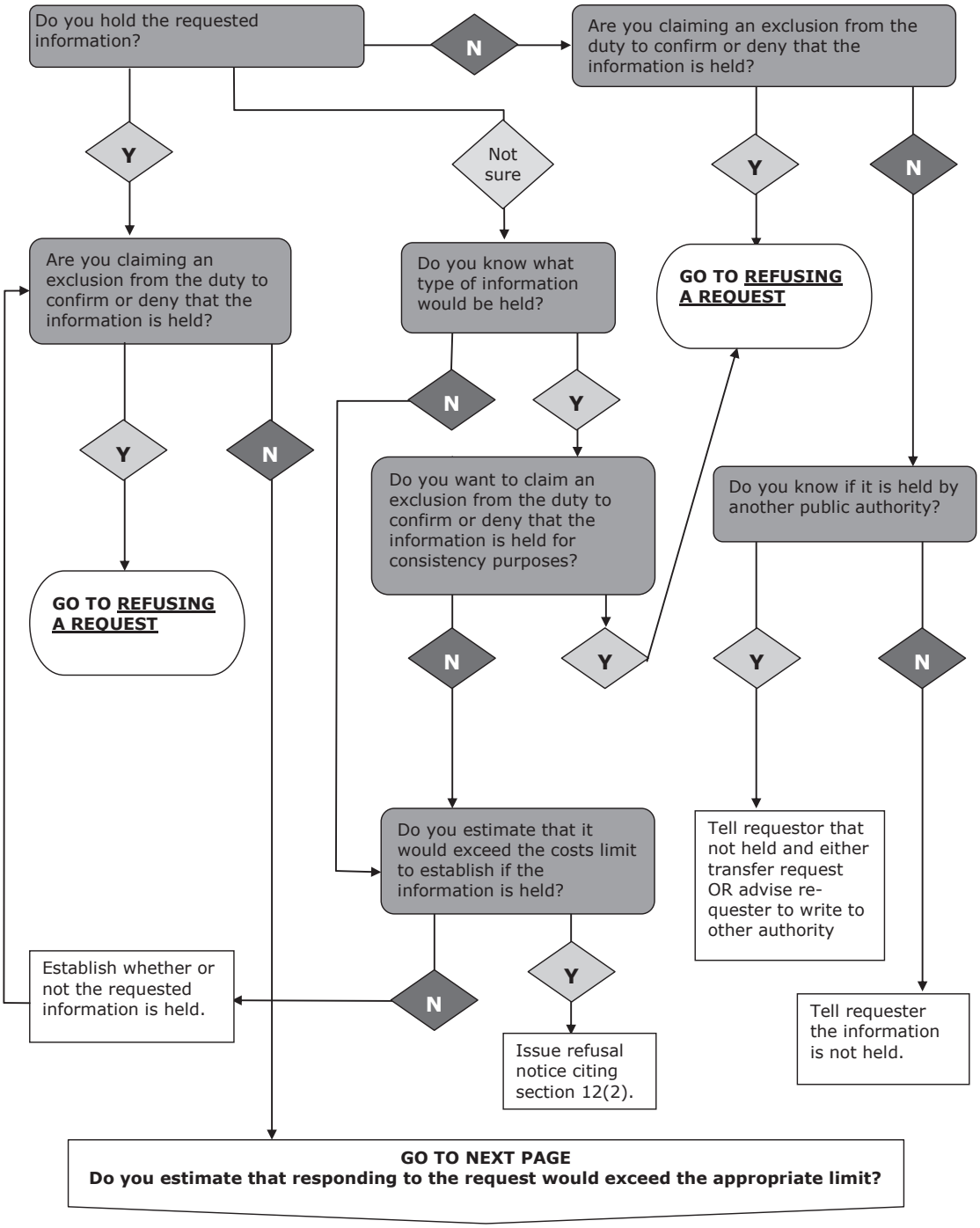
152 Information Commissioner's Office: The Public Interest Test, *Freedom of Information Act*, p. 5, available at: https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf. 22.4.2015.

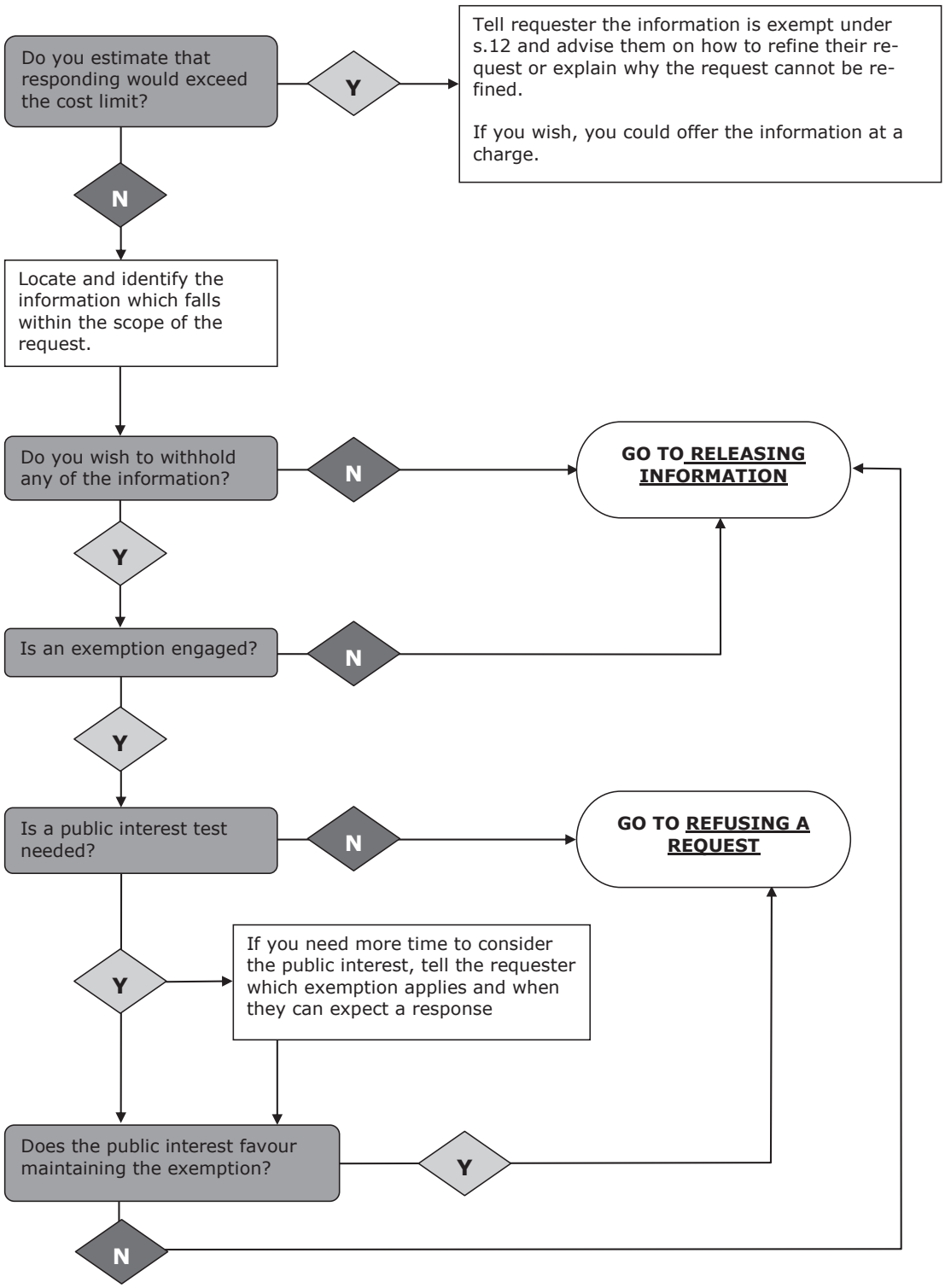
Figure 2. Conducing the public interest and harm tests[153]



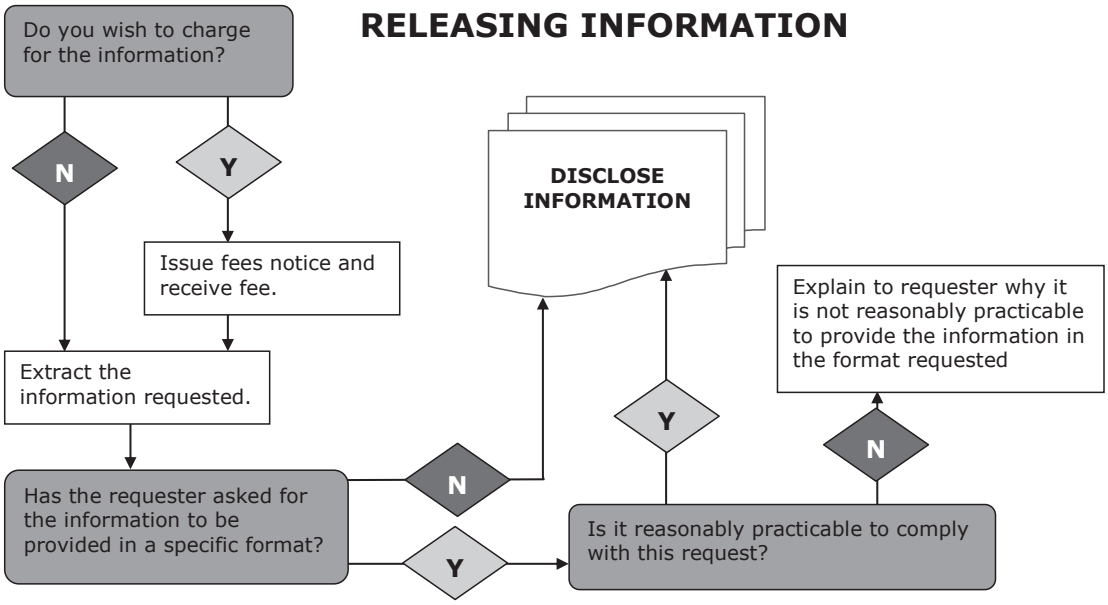
153 Adjusted from N. Odic, R. Galovic, *Proportionality and Public Interest Tests as Instruments for Establishing Balance between the Right to Access Information (Principle of Transparency) and its Constraints in the Republic of Croatia*, Faculty of Law, Zagreb, available at: www.unizg.hr/.../Odic_Galovic_Test%20razmjernosti%20i%2.


Start here
Is it a valid request for information under FOIA?
N
Advise the requester how to make a request
Y
Should it be dealt with as an FOI request?
N
Environmental information regulations
Data protection subject access
Normal course of business
Y
Do you wish to refuse as a vexatious or repeated request?
Have you already advised the requester that you will not respond to further vexatious/repeated requests?
N
Issue a refusal notice explaining this decision
Y
No obligation to respond
Y
N
Can you identify what information is being requested?
Obtain clarification from the requester
Y
N
GO TO NEXT PAGE
Do you hold the requested information?

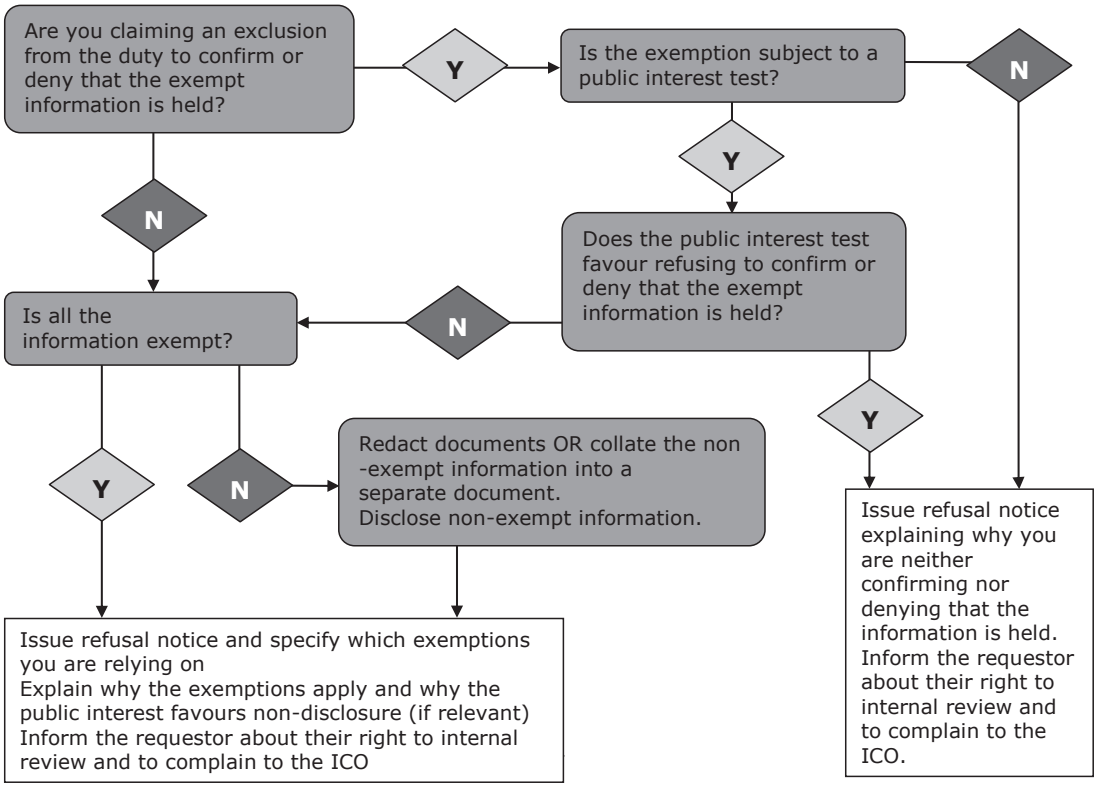

Do you hold the requested information?
N
Are you claiming an exclusion from the duty to confirm or deny that the information is held?
Y
Not sure
Y
N
Are you claiming an exclusion from the duty to confirm or deny that the information is held?
Do you know what type of information would be held?
GO TO REFUSING A REQUEST
N
Y
Y
N
Do you want to claim an exclusion from the duty to confirm or deny that the information is held for consistency purposes?
Do you know if it is held by another public authority?
GO TO REFUSING A REQUEST
N
Y
Y
N
Do you estimate that it would exceed the costs limit to establish if the information is held?
Tell requestor that not held and either transfer request OR advise re-quester to write to other authority
Establish whether or not the requested information is held.
N
Y
Issue refusal notice citing section 12(2).
Tell requester the information is not held.
GO TO NEXT PAGE
Do you estimate that responding to the request would exceed the appropriate limit?


Do you estimate that responding would exceed the cost limit?
Y
Tell requester the information is exempt under s.12 and advise them on how to refine their request or explain why the request cannot be refined.
If you wish, you could offer the information at a charge.
N
Locate and identify the information which falls within the scope of the request.
Do you wish to withhold any of the information?
N
GO TO RELEASING INFORMATION
Y
Is an exemption engaged?
N
Y
Is a public interest test needed?
N
GO TO REFUSING A REQUEST
Y
If you need more time to consider the public interest, tell the requester which exemption applies and when they can expect a response
Does the public interest favour maintaining the exemption?
Y
N

RELEASING INFORMATION



REFUSING A REQUEST



An Overview: Fifteen Things the Principles Say[154]

1. The public has a right of access to government information, including information from private entities that perform public functions or receive public funds. (Principle 1)
2. It is up to the government to prove the necessity of restrictions on the right to information. (Principle 4)
3. Governments may legitimately withhold information in narrowly defined areas, such as defence plans, weapons development, and the operations and sources used by intelligence services. Also, they may withhold confidential information supplied by foreign governments that is linked to national security matters. (Principle 9)
4. But governments should never withhold information concerning violations of international human rights and humanitarian law, including information about the circumstances and perpetrators of torture and crimes against humanity, and the location of secret prisons. This includes information about past abuses under previous regimes, and any information they hold regarding violations committed by their own agents or by others. (Principle 10A)
5. The public has a right to know about systems of surveillance, and the procedures for authorizing them. (Principle 10E)
6. No government entity may be exempt from disclosure requirements—including security sector and intelligence authorities. The public also has a right to know about the existence of all security sector entities, the laws and regulations that govern them, and their budgets. (Principles 5 and 10C)
7. Whistle-blowers in the public sector should not face retaliation if the public interest in the information disclosed outweighs the public interest in secrecy. But they should have first made a reasonable effort to address the issue through official complaint mechanisms, provided that an effective mechanism exists. (Principles 40, 41 and 43)
8. Criminal action against those who leak information should be considered only if the information poses a "real and identifiable risk of causing significant harm" that overrides the public interest in disclosure. (Principles 43 and 46)
9. Journalists and others who do not work for the government should not be prosecuted for receiving, possessing or disclosing classified information to the public, or for conspiracy or other crimes based on their seeking or accessing classified information. (Principle 47)
10. Journalists and others who do not work for the government should not be forced to reveal a confidential source or other unpublished information in a leak investigation. (Principle 48)

154 Source: https://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles.

11. Public access to judicial processes is essential: “invocation of national security may not be relied upon to undermine the fundamental right of the public to access judicial processes.” Media and the public should be permitted to challenge any limitation on public access to judicial processes. (Principle 28)
12. Governments should not be permitted to keep state secrets or other information confidential that prevents victims of human rights violations from seeking or obtaining a remedy for their violation. (Principle 30)
13. There should be independent oversight bodies for the security sector, and the bodies should be able to access all information needed for effective oversight. (Principles 6, 31–33)
14. Information should be classified only as long as necessary, and never indefinitely. Laws should govern the maximum permissible period of classification. (Principle 16)
15. There should be clear procedures for requesting declassification, with priority procedures for the declassification of information of public interest. (Principle 17)

These principles may be coupled with a general recommendation to allow access to information that has been classified at the lowest level, after having conducted the public interest and harm tests, without the need to obtain prior approval of the person who had declared the information classified.[155]

6. TRAINING EXERCISES

1. A public authority is requested to grant access to the records of electronic voting, which include information on how certain members of the local self-administration legislative body have voted on certain items on the agenda, which is considered public information. Is there a statutory obligation to grant access to such information to journalists, having in mind the fact that the work of this body is public, and the concern that access to such records may influence the independence of members of the local parliament and their freedom of will? Should access to such information be granted? What steps should be taken in order to reach a decision?

2. A public authority has received a request for access to public information, requesting a list of all owners and members of non-commercial farmsteads that have exercised the right to use support funds, as prescribed in the

155 See. A. Rabrenovic, R. Radevic, “Limits of the Right to Free Access to Information in the Security Sector – Example of Montenegro”, *Foreign Legal Life*, No. 3/2016, p. 36.

relevant secondary act. The public authority has formed a register in accordance with that secondary act. The same act prescribes that the register can be used for the purpose of collecting statistical data and to carry out analytical tasks and planning public policies, and that it cannot be used for other purposes. The register, *inter alia*, includes the name of the company, identification number, date of birth, place of birth, sex, place of residence, including address, phone number, etc. Should the public authority allow access to this data? When deciding on access, what options can the public authority consider (potential exclusion of certain data)?

3. A public authority vested with the power to register companies has received a request to forward to the applicant, in electronic form, the copies or all databases this public authority possesses which related to natural and legal persons registered as for profit or non-profit organisations, in an electronically searchable format. The public authority has provided a public file available on its webpages that encompasses the data and documents, and direct links to these registers. How should the public authority act?

4. An applicant has requested from the National Bank access to documents that include information on which banks were subject to direct control by the National Bank in the previous year and what measures were taken with regards to those banks. The National Bank has denied the request and stated that a secondary act prescribes that data and documents collected by the National Bank in control proceedings are classified as confidential, and that disclosure of requested information would constitute a reputational risk for the banks that were subject to control, or that disclosure would adversely affect the financial results and capital of the banks due to a negative public reaction that might affect the banks' market position. Did the public authority act correctly? How would you conduct the public interest test and the harm test?