

## THE RIGHT OF AN INDIVIDUAL TO FREE ACCESS TO INFORMATION – THE CASE OF SERBIA\*

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*The objective of the paper is to discuss the right of an individual to open public administration as a global phenomenon and in the specific context of the Republic of Serbia. The paper first provides an overview the key supranational regulations and standards in the area of free access to information and assesses the Serbian legal framework against these standards. The central part of the paper analyses the trends on the free access to information in Serbia in the period of 2008-2018, based on statistical data, which include, inter alia, the number of requests submitted (by citizens), the number of appeals to the Commissioner for Free Access to Information and Data Protection, the share of executed requests, the reasons for withholding information etc. The authors argue that during the observed period, the right to free access to information in Serbia has effectively been applied in practice, due to a sound legal framework and personal integrity and work perseverance of the Commissioner for Free Access to Information and Data Protection, who managed to successfully overcome the obstacles of deeply rooted traditional culture of secrecy.*

**Key words:** individual, free access to information, Commissioner for Free Access to Information and Data Protection, Serbia

### INTRODUCTION

Transparency is now a central tenet of democratic societies and, it is hoped, a vehicle for increased citizen oversight of government (Worthy, John, Vannoni, 2016). And at the core of transparency lies the right to information. It as an essential right of every person, as it allows individuals and groups to protect their rights (Banisar, 2019)

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and hold their governments accountable. As such, it is an important guard against abuses, mismanagement and corruption and a prerequisite of participatory governance, or, as the British human's rights organisation ARTICLE 19 points out, "an oxygen of democracy" (ARTICLE 19 *at al*, 2001). Freedom of information is therefore an essential element of the rule of law (Milenkovic, 2015).

The right to information held by public authorities gained recognition as one of the fundamental human rights only recently (Mendel, 2008).<sup>1</sup> Sweden is a notable exception, as it legally recognized the public right to information under its freedom of press regulation in the eighteenth century (OECD, 2010). The first free access to information statute was adopted in 1966 in the United States of America,<sup>2</sup> and was followed by similar legislation adopted in other countries as well.

The objective of this paper is to discuss the right of an individual to open public administration as a global phenomenon and in the specific context of the Republic of Serbia. According to the Global Right to Information Rating, Serbia has the highest ranking of all the Western Balkan countries – it currently holds the 3rd place in the world, with a total of 135 out of possible 150 points.<sup>3</sup> The application of this right is facilitated by quite effective work of the Serbian Commissioner for Information of Public Importance and Personal Data Protection. Serbia has also taken part in the Open Government Partnership (OGP) initiative<sup>4</sup> since 2012, and has developed two Action plans, which, inter alia, address issues of free access to information.<sup>5</sup> In spite of a commendable achievements in this area, there are, however, a number of limitations which restrict an individual from accessing the data of public importance in Serbia.

The paper consists of four key sections. The first section of the paper shall analyse the supranational policy and legal framework on the right to information. The second section shall examine the content of key international standards in the area. In the third section, the current legal framework governing the free access to information in Serbia will be analysed, together with the recently proposed amendments. The fourth section shall analyse the empirical data on the free access to information in

<sup>1</sup> Mendel underlines that, while in 2003, when the first edition of the comparative legal survey on freedom of information was published the claim that freedom of information is an internationally recognised right was rather bold; however, as soon as 2008 this was a widespread contention.

<sup>2</sup> The Freedom of Information Act, 5 U.S.C. § 552.

<sup>3</sup> 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.

<sup>4</sup> The Open Government Partnership (OGP) is a voluntary international initiative that aims to secure commitments from governments to their citizenry to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance. The Independent Reporting Mechanism (IRM) carries out a review of the activities of each OGP- participating country.

<sup>5</sup> Action plan for implementation of the initiative for Partnership for open administration in the Republic of Serbia for 2016 -2018; Action plan for implementation of the initiative for Partnership for open administration in the Republic of Serbia for 2018-2020.

the period of 2008-2018, along with key problems in the implementation of the legal framework. The last, concluding section of the paper shall outline the lessons learnt and provide recommendations for improving the right of an individual to open public administration in the local context.

## 1. SUPRANATIONAL REGULATION OF FREEDOM OF INFORMATION

As early as 1946, the UN General Assembly adopted its Resolution 59(I), which states that “Freedom of information is a fundamental human right and the touchstone of all the freedoms to which the United Nations is consecrated”. Article 19 of the UN Universal Declaration of Human Rights<sup>6</sup> and Article 19 of the UN International Covenant on Civil and Political Rights,<sup>7</sup> stipulate that everyone shall have the right to freedom of opinion and expression, which includes the right to seek, receive and impart information and ideas through any media and regardless of frontiers. Further, the UN Convention Against Corruption in its Article 10 encourages the state parties to take such measures as may be necessary to enhance access to information as one of the means used in the action against corruption.<sup>8</sup> Access to information also lies at the core of the Aarhus Convention,<sup>9</sup> whose Article 4 requires the state parties to adopt and implement legislation that would ensure that public authorities, in response to a request for environmental information, make environmental information available to the public.<sup>10</sup>

The Council of Europe recognises freedom of information as a fundamental human right under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>11</sup> The scope of this right is further elaborated in the case-law of the European Court of Human Rights (ECtHR), which recognised that freedom to information implies free access to information.<sup>12</sup> Council of Europe has been developing further standards for access to information over

<sup>6</sup> Universal Declaration of Human Rights. General Assembly resolution 217 A (III) of 10 December 1948.

<sup>7</sup> International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI) of 16 December 1966, [http://www.unhcr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhcr.ch/html/menu3/b/a_ccpr.htm).

<sup>8</sup> The United Nations Convention against Corruption, adopted by the UN General Assembly on 31 October 2003, by resolution 58/4, entered into force on 14 December 2005.

<sup>9</sup> Convention on Access To Information, Public Participation in Decision-Making and Access to Justice In Environmental Matters, done at Aarhus, Denmark, on 25 June 1998. The Aarhus convention has 47 parties – 46 states and the European Union.

<sup>10</sup> Article 2 of the Aarhus Convention.

<sup>11</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>12</sup> In the case *Kenedi v. Hungary*, Application No. 31475/05, judgment 26 May 2009, the Court explicitly recognised the obligation of the state, in circumstances when the requested information is available and does not require the government to gather any data, to refrain from interfering with the flow of information requested by the applicant. In the case of *Társaság a Szabadságjogokért v. Hungary*, Application no. 37374/05, judgment 14 April 2009 in Paragraph 35, the ECtHR recognised that it had dvanced towards a broader interpretation of the notion of freedom to information, which implied also free access to information, as stated in its judgment in the case of *Sdružení Jihočeské Matky v. Czech Republic* Application no. 19101/03, judgment 10 July 2006.

the past decades (Banisar, 2019); they are incorporated in the Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents<sup>13</sup> and the Council of Europe Convention on Access to Official Documents of 18 June 2009. As pointed out by former Serbian Commissioner for Information of Public Importance and Personal Data Protection, Rodoljub Sabic (Sabic, 2012), the Recommendation is a refined summary of the best international standards in this field. The Recommendation was in fact used as a basis for the aforementioned Convention, which is yet to enter into force and be effected as the first fully-fledged binding international legal instrument to recognise a general right of access to official documents held by public authorities.<sup>14</sup>

The European Union has also recognised the issue of access to information from the date of its establishment – the Declaration on the Right of Access to Information was adopted together with the Maastricht Treaty.<sup>15</sup> In 2011 the Council and the European Parliament adopted the Regulation No. 1049/2011 regarding public access to European Parliament, Council and Commission documents<sup>16</sup>, its approach corresponding to the Nordic concept of access to information (Augustyn, Monda 2011). The Treaty of Lisbon confirmed the commitment of the European Union to the implementation of the right to information in Article 15.<sup>17</sup> Furthermore, the Charter of Fundamental Rights<sup>18</sup> in Articles 41 and 42 explicitly guarantees the right of every person to have access to his or her file and documents of the EU institutions (Savino, 2011). The content of the EU standards regarding free access to information is defined more closely in the SIGMA/OECD Principles of Public Administration issued in 2014 (SIGMA, 2014).

When it comes to the limitations of the right to free access to information, they are embedded in the above-mentioned legislation, with a notable addition in the form of Global Principles of National Security and the Right to Information, or Tshwane Principles.<sup>19</sup> This document deals with the 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. 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 (Rabrenovic, Radevic, 2016).

<sup>13</sup> Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents, available at <https://wcd.coe.int/ViewDoc.jsp?id=262135>.

<sup>14</sup> For the Convention to enter into force, it must be ratified by 10 states. So far, it has been ratified by 9 states, although it has been signed by seventeen. For more details, visit <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=205&CM=1&DF=&CL=ENG>.

<sup>15</sup> Declaration No. 17 on the right of access to information, available at <http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html#0101000037>.

<sup>16</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJ L 145*, 31 May 2001, 43–48.

<sup>17</sup> Consolidated version of the Treaty on European Union, Official Journal of the European Union C 83/13.

<sup>18</sup> Charter of Fundamental Rights of the European Union, 2010/C 83/02.

<sup>19</sup> 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>.

## 2. FREEDOM OF INFORMATION STANDARDS

The SIGMA “Principles of Public Administration” (SIGMA, 2014) require that public information be defined broadly to encompass all information that is recorded and documented on the performance of public duties. In that sense, private persons who carry out public duties are also to be considered holders of public information.

The person requesting information should not be obliged to state reasons for the request.<sup>20</sup> This is an important standard as it reflects the very essence of this right – access to information must be free and it cannot be conditional. At the same time, the formal requirements for the submission of requests must be minimal.<sup>21</sup> The request for access to information of public importance can be denied if it is obvious that it is unreasonable. In that way the public authorities are protected from requests that would present an unreasonable burden for the authority or that present the blatant abuse of the right – this includes the cases when the applicant resubmits the same request several times.<sup>22</sup> Even in the case of a partial denial of the request, the justification of the reasons for the denial must be given.<sup>23</sup> The only exception is allowed in cases when the justification could release information exempt from the right to information.

For access to information to be truly free, it must not imply high costs for the applicant. That means that no fees can be charged for access to information<sup>24</sup> - any insight into original documentation must be free of charge. However, a public authority may charge the applicant for the issuance of copies of documentation, but such fees must be reasonable, and cannot exceed the real costs incurred by the public authority.<sup>25</sup>

In case the request is not considered within the specified timeline, or is denied, it is necessary to ensure a fast and inexpensive procedure before a court or another independent and unbiased authority.<sup>26</sup> OECD recommends that the states introduce in their national legislation a two-tier system – the first-instance procedure before an administrative authority, and the second-instance procedure before a court of law (Savino, 2011).

As other human rights, the right to information of public importance is subject to restrictions. These must be clearly and explicitly specified by law,<sup>27</sup> necessary in a democratic society and proportional in relation to the objective they seek to protect, which can include the following: national security, defence and

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<sup>20</sup> Section V 1. Council of Europe Recommendation, Article 6 of the Regulation No. 1049/2011 regarding public access to European Parliament, Council and Commission documents.

<sup>21</sup> Section V 2. Council of Europe Recommendation.

<sup>22</sup> Section VI 6.

<sup>23</sup> Section VI 7 of the Recommendation.

<sup>24</sup> Section VIII 1 of the Recommendation.

<sup>25</sup> Section VIII 2 of the Recommendation.

<sup>26</sup> Section IX 1 and 2 of the Recommendation.

<sup>27</sup> Section IV1 of the Recommendation.

international relations, public safety, prevention, investigation and prosecution of crimes, disciplinary investigations, privacy and other legitimate private interests, commercial and other economic interests, national economic and monetary policy, environmental concerns, inspections, confidentiality of deliberations within different public authorities relating to the examination of an issue.<sup>28</sup>

The right to information may be denied if the release of information contained in the document would or could affect any of the aforementioned interests, unless there is an overriding public interest to make such information available to the public.<sup>29</sup> The Council of Europe Recommendation emphasises also the obligation of the state to ensure that the public is informed about their right to information, and that civil servants are educated about such public rights and the procedures for the provision of information.<sup>30</sup> Furthermore, it encourages public authorities to make information available on voluntary basis if that is in the interest of improving transparency of the public administration, and to encourage informed public participation in the decision-making on all issues of public importance (Knezevic Bojovic, 2013).

### **3. SERBIAN FOIA – FROM THE TOP TO THE AVERAGE MODEL LAW?**

Article 51 of the Serbian 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 (see also: Vodinelic, 2015).<sup>31</sup> This right is regulated more specifically by the Free Access to Public Information Act<sup>32</sup> (hereinafter - the FOIA; for its detailed overview see: Milovanovic, Davinic, Cucic, 2019).

According to the RTI ranking, Serbia has the highest ranking of all the Western Balkan countries – it is currently at the 3rd place in the world, with a total of 135 out of possible 150 points.<sup>33</sup> Such a good RTI ranking implies a very high level of alignment of legal framework with the international standards (Knezevic Bojovic, Radevic, 2018).

A key feature of the FOIA is the assumption included in its 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. Even then, the FOIA clearly stipulates that the specified rights

<sup>28</sup> See Section IV of the Recommendation, Article 3 of the Council of Europe Convention, and Article 4 of the EU Regulation.

<sup>29</sup> Section IV 2 of the Recommendation. Sigma paper, 23 and 40.

<sup>30</sup> Section X of the Recommendation.

<sup>31</sup> Free access to information became a constitutional category in Serbia in 2006.

<sup>32</sup> Free Access to Information Act, *Official Gazette of the Republic of Serbia*, Nos. 120/2004, 54/2007, 104/2009 and 36/2010, hereinafter FOIA.

<sup>33</sup> See footnote 5.



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.<sup>34</sup>

The procedure to obtain access to information is initiated upon the applicant's written request or verbal request. The applicant is not obliged to state the reasons for the request.<sup>35</sup>

Serbian public authorities are obliged to act upon the requests without any delay, and at the latest within 15 days upon receipt of the request.<sup>36</sup> The FOIA 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.<sup>37</sup>

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 costs of the procedure.<sup>38</sup>

If the public authority grants the request, the requested information is accessed on the official premises of the public authority free of charge. The applicant may be obliged to pay a fee to cover the costs of duplication of the document containing the requested information.<sup>39</sup> 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.

The grounds for withholding information envisaged in the FOIA are in line with the relevant international standards. To be able to withhold information, a public authority must apply the balance 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 (Gajin, 2018).

If the public authority rejects or refuses the request for access to information, 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.<sup>40</sup> The Commissioner deals with the complaint without any delay, and at the latest within 30 days from the submission of the complaint.<sup>41</sup> 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. If the Commissioner finds that

<sup>34</sup> Article 8 of the FOIA.

<sup>35</sup> Article 15 of the FOIA.

<sup>36</sup> Article 16 of the FOIA.

<sup>37</sup> Article 31 of the FOIA.

<sup>38</sup> Article 30 of the FOIA.

<sup>39</sup> Article 17 of the FOIA. The fee is set by the Government.

<sup>40</sup> Article 22 of the FOIA.

<sup>41</sup> Article 24 of the FOIA.

the complaint is justified, it adopts a decision ordering the public authority to ensure free access to information as requested. Decisions adopted by the Commissioners are binding, final and enforceable, and are implemented by the Commissioner through imposing compulsory measures or fines.<sup>42</sup> The decision by the Commissioner may be challenged in administrative dispute, and that procedure is considered urgent.<sup>43</sup>

Over the past couple of years, there have been several attempts to amend the FOIA. The latest draft amendments were prepared in 2018 and have sparked significant public debate, due to their potential to significantly hinder the right to free access to information.

The key contentious provisions of the proposed new legal framework are related to the restriction of the concept of public information. The draft amendments define public information as the information related to the execution of public *powers*, and not all information that is recorded and documented in the performance of public *duties*, as required by the SIGMA standards. In addition, political parties and religious communities are also excluded from the application of this law. The most problematic provision of the draft amendments is the one which excludes companies, either wholly or partially owned by the Government, from the scope of the Law.<sup>44</sup> This means that a number of companies which perform public duties would be exempted from the obligation to allow free access to information<sup>45</sup> (Nenadic, 2019). The adoption of these amendments would definitely pose a step back in the regulation of the free access to information and lead to the diminishing of transparency of the work of the Serbian public sector.

#### 4. SERBIAN FOIA IN PRACTICE

The Commissioner for Free Access to Information in Serbia was appointed in December 2004 by the National Assembly, shortly after the first Serbian FOIA was adopted.<sup>46</sup> The Office of the Commissioner was established in early 2005, when the first requests for free access to information were filed to public authorities and first appeals submitted to the Commissioner. On 5 December 2011, the National Assembly reappointed Mr. Sabic to serve as the Commissioner for Information of Public Importance and Personal Data Protection in the Republic of Serbia. At the end of December 2018, the second term of office of Mr. Sabic expired and the new Commissioner has still not been appointed at the time of writing this paper (June 2019).

<sup>42</sup> Article 28 of the FOIA.

<sup>43</sup> Article 27 of the FOIA.

<sup>44</sup> Article 1 of the draft amendments of the FOIA.

<sup>45</sup> This could include the current companies with shared state ownership such as “Telekom Srbija”, Air Serbia, “DIPOS” and “Železnice Srbije”.

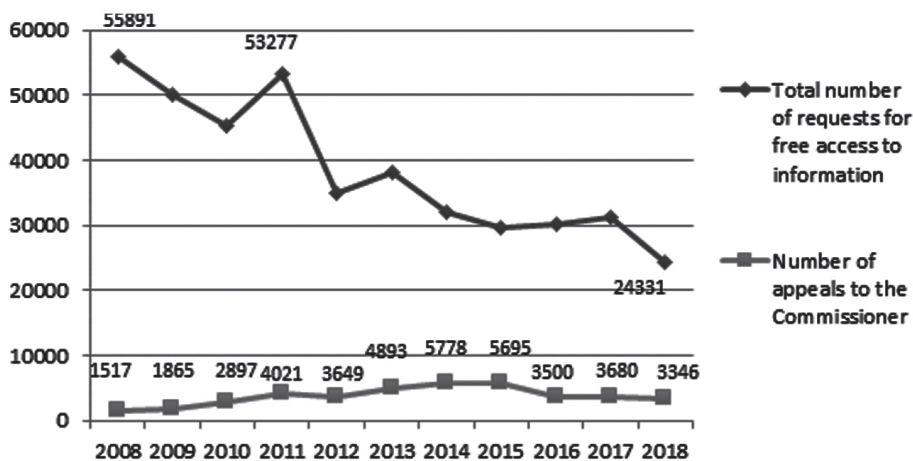
<sup>46</sup> The authority of the Commissioner was extended in 2008, by the Law on Data Protection (Official Gazette RS, No. 97/08), by which the Commissioner became responsible for the area of the personal data protection. For this reason, the name of the head of the office was changed to the Commissioner for Free Access to Information and Personal Data Protection.



In this section of the paper we shall analyse the data on free access to information in 'Serbia the period from 2008-2018. The data for the period of 2005-2007 were excluded due to their insufficient quality. The presented data for the period of 2008-2018 were obtained from two key sources: 1) the response to the request for the free access to information sent to the Office of the Commissioner for Free Access to Data and Data Protection and 2) annual Commissioner's reports available on the Commissioner's website.<sup>47</sup> As advised by the Commissioner's office, the data regarding to the number of the filed requests for free access to information to all public authorities and the number of individual applicants (by categories), should be taken with a reservation. These data are based on the information which public authorities provide to the Commissioner and it appears that only a handful of public authorities submit their reports to the Commissioner in a timely manner.<sup>48</sup>

According to the data available, the number of request for free access to information over the period of 2008-2018 has been steadily declining (see graph 1). After initial significant increase of the number of request, which was only around 2000 in 2005,<sup>49</sup> when the office of the Commissioner was established for the first time, the number of requests in the observed period (2008-2018) was the highest in 2008 with 55,891 filed request and almost twice as low in 2018, with 24,331 requests. There was also a high number of requests in 2008 and 2011, which may be explained by Serbian parliamentary elections which took place in 2008 and 2012, although such high number of requests was not noticeable in other elections years (2014 and 2016).

Graph 1. The number of requests for free access to information and the number of appeals to the Commissioner 2008-2018



Source: The Office of the Commissioner for Free Access to Information

The number of appeals to the decisions on free access to information, on the other hand, has been on the rise from 2008 to 2014-2015 and then declining slightly

<sup>47</sup> <https://www.poverenik.rs/>, access 10 June 2019.

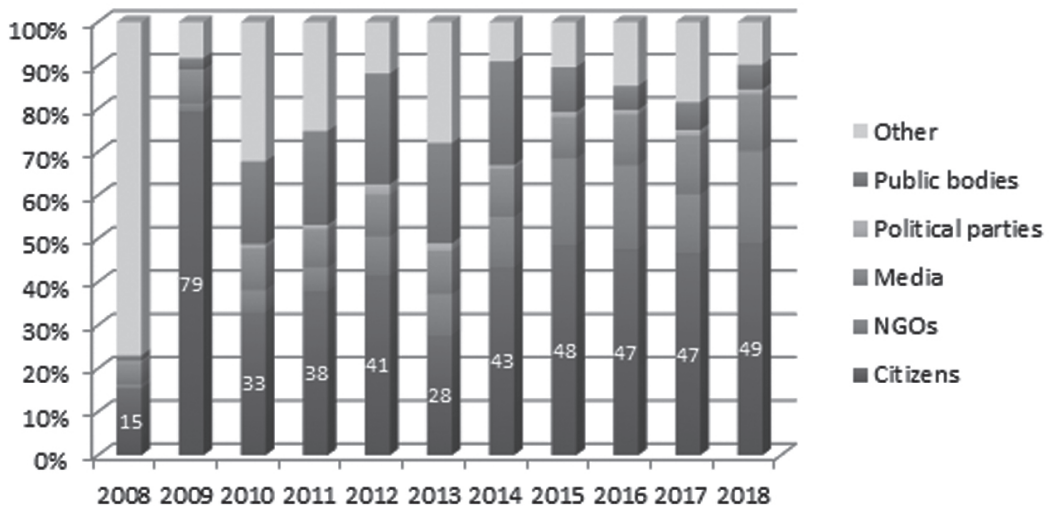
<sup>48</sup> In his 2018 report, the Commissioner notices that its office received the information of only 28 % of the institutions who are obliged to provide the data on free access to information.

<sup>49</sup> The Commissioner for Free Access to Information and Data Protection, Report for 2010.

over the period of 2016-2018 (see graph 1). The number of appeals was the highest in 2014, with 5778 appeals, which is almost four times as high as the number in 2008 (1517 appeals). The number of appeals has slightly decreased over the past three years, recording 3346 appeals in 2018.

The highest number of requests for free access to information during the observed period comes from individuals - citizens (see graph 2). The number of citizens' requests, according to the available data was the lowest in 2008, constituting only 15 per cent of all requests, but the highest only a year later, in 2009, making up 79 per cent of all requests. In all other observed years, share of requests from citizens was more balanced, ranging from 28 to 49 per cent of all requests. On average, the share of citizen requests in the total number of requests is around 42.3 per cent, which means that citizens requests take almost a half of all submitted requests for free access to information.

**Graph 2. The share of appeals per different applicants in percentages (citizens, media, NGOs etc)**

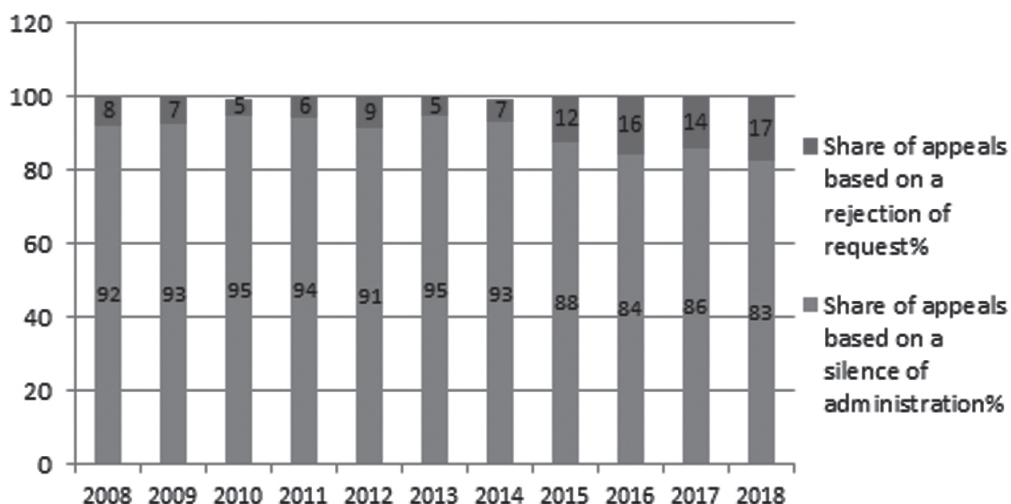


Source: The Office of the Commissioner for Free Access to Information

Throughout the whole observed period, a fairly high number of appeals brought to the Commissioner was based on a reason of a silence of administration (see graph 3 below). The silence of administration means that the applicants did not receive any answer to their request from the state authority to which a request was referred to. From 2008-2014, the share of appeals on the basis of a silence of administration was higher than 90% of all appeals. In the period of 2015-2018 this number gradually started to decrease, but still remains quite high making up more than 80% per cent of all appeals. A high number of appeals based on a silence of administration shows a low level of responsibility of state bodies to respond to the requests for free access to information.<sup>50</sup>

<sup>50</sup> Commissioner for Free Access to Information, Annual Report 2018.

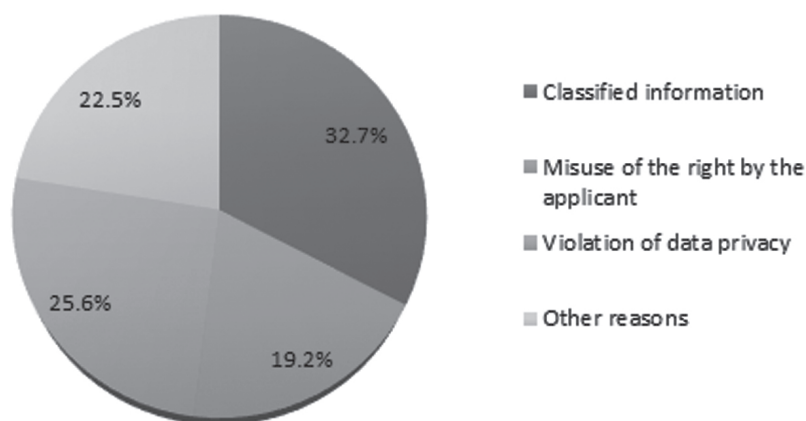
Graph 3. Share of appeals on the bases of silence of administration/rejection of request



Source: Annual reports of the Commissioner for Free Access to Information and Data Protection 2008-2018

The reasons for rejection of requests for free access to information include three key grounds: classified information, misuse of the right by the applicant and violation of data privacy. The available data from 2012-2018,<sup>51</sup> show that on average, the classified information constitute the main reason for rejection of a request for free access to information (32.7%), followed by a violation of data privacy (25.6%) and misuse of the right to free access to information (22.5%). All other reasons constitute around 22.5 per cent of the grounds for refusal. In the Commissioner's view, the main causes of these breaches are a traditional culture of secrecy of administration and lack of political support to make administration more open and transparent. The political will to uphold and enforce the freedom of access to information is weak.

Graph 4. Reasons for rejecting the requests for free access to information 2012-2018 (average values)

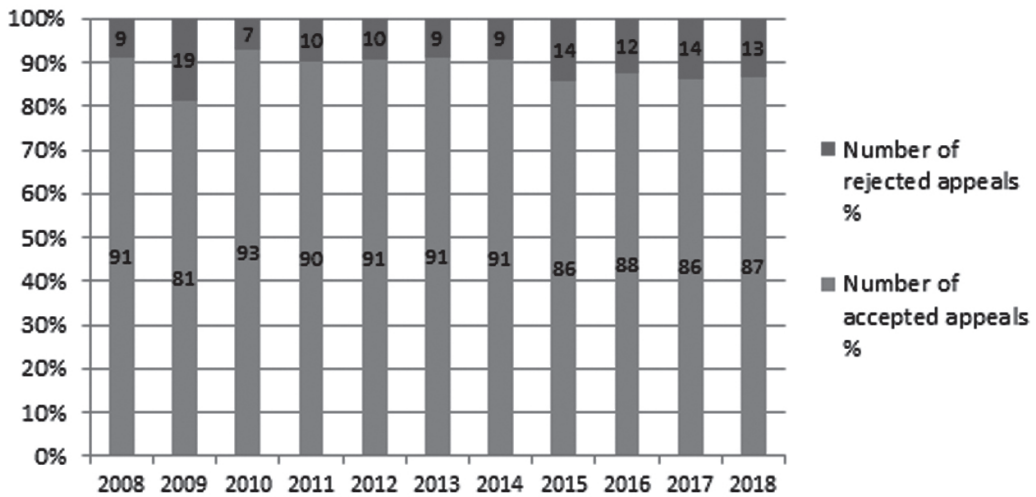


Source: Annual reports of the Commissioner for Free Access to Information and Data Protection for 2012-2018.

<sup>51</sup> There were no statistical data available on the grounds for rejection of appeals in the period of 2008-2011.

Once dissatisfied applicants filed an appeal to the Commissioner, they had a fairly high chance to get the Commissioner's approval and support. Throughout the whole observed period around 89% of all appeals on average have been approved by the Commissioner (see graph 5 below). A high number of accepted appeals also demonstrates that the Commissioner for Free Access to Information has used a restrictive interpretation of the exceptions to the free access to information and required public authorities to grant access to information unless strictly prohibited by the legal framework.

Graph 5. The share of appeals upheld/rejected by the Commissioner 2008-2018.

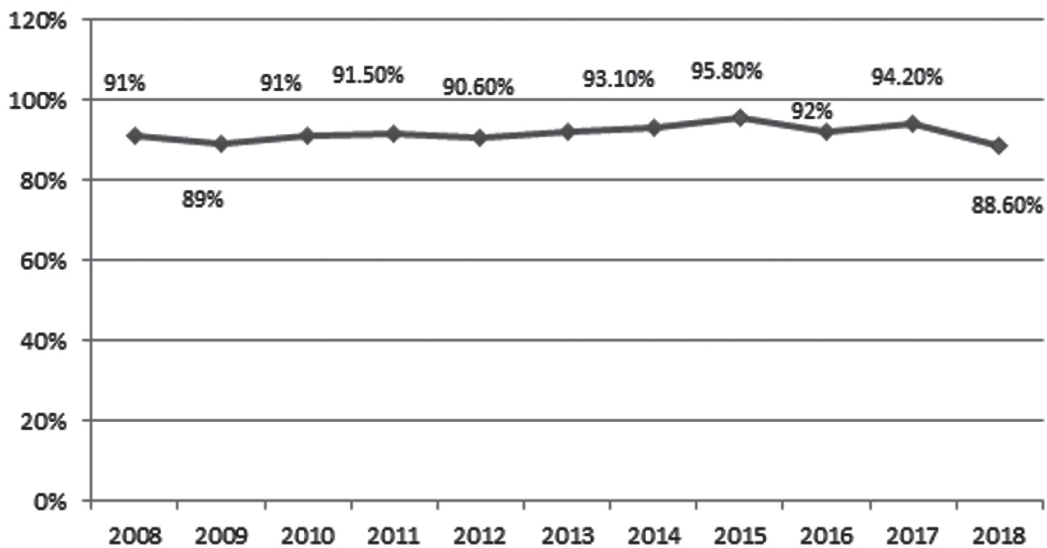


Source: Annual reports of the Commissioner for Free Access to Information and Data Protection

The number of executed requests for information, based on the appeals proceedings held before the Commissioner, has been fairly high ranging from astonishing 95.8% per cent in 2015 to 88.6% in 2018 (see graph 6). The Commissioner's annual reports show that in around 50-70% of the cases, public bodies would provide information to an applicant as soon as they would learn that an appeals proceedings was initiated before the Commissioner, which would result in a suspension of a proceedings. If this was not the case, the Commissioner would finalise the proceedings and impose a fine to the public body in question. It is, however, worrying that the share of executed requests for free access to information declined rapidly in 2018, recording its lowest point. One of the reasons for this appear to be the difficulties with the implementation of the new Law on Administrative Procedure, which was adopted in 2016.<sup>52</sup>

<sup>52</sup> Law on General Administrative Procedure, Official Gazette RS. 18/2016 and 95/2018. See the Commissioner's Annual Report for 2017. Source: <https://www.poverenik.rs/sr-yu/o-nama/godisnji-izvestaji/2820-izvestaj-poverenika-za-2017-godinu.html>, 10 June 2019.

Graph 6. The share of executed requests for free access to information based on appeals proceedings held before the Commissioner 2008-2018 (excluding the rejected appeals)



Source: Annual reports of the Commissioner for Free Access to Information and Data Protection 2008-2018

Although the results of the Commissioner's work have been impressive, there are still a number of the Commissioner's decisions that have not been executed in spite of the Commissioner's efforts. In such cases the FOIA requires the Serbian Government to assist the Commissioner to execute his decisions.<sup>53</sup> It is interesting to note that ever since this mechanism was introduced in the FOIA in 2010, the Serbian Government has never assisted the Commissioner in executing the requests for free access to information. From 2010 to 2018, the Commissioner requested the Serbian Government to assist him in executing the requests in 238 cases, and none of these requests for assistance was supported,<sup>54</sup> regardless of the political establishment in power.

The Commissioner has also not received adequate support from the Serbian National Assembly, which is responsible for his appointment/dismissal and overseeing his/her work. The National Assembly has reviewed the reports of the Commissioner on several occasions (from 2011 to 2014) and adopted the conclusions of the responsible parliamentary committees, which, however, were not followed up in practice. In 2015, the responsible parliamentary Committee for Culture and Information drafted the conclusions to support the Commissioner's work (although in somewhat "lukewarm" manner, see: Nenadic, 2019), which have been adopted by the Assembly.

<sup>53</sup> Article 28, paragraph 4 of the FOIA.

<sup>54</sup> Commissioner for Free Access to Information and Personal Data Protection, Annual Report, 2018, 12-13.

## CONCLUSION

The conducted review of the supranational regulation of the free access to information, the assessment of the quality of the free access to information legislation and its application in Serbia over the past 10 years have shown several interesting findings. Some of them have already confirmed what has been discussed in the current literature on free access to information so far, while others have brought a new light to the free access to information ground.

The first one is that the quality of legislation on free access to information in Serbia is quite high, being one of the best international legal frameworks in the world. This flattering FOIA's title, however, may soon be discarded, if the analysed amendments of the FOYA get adopted. There is an obvious need for a review of the amendments, which restrict the horizontal scope of the law and hence the right of individuals to know what is going on in a large sphere of the public sector.

The second interesting observation is that the number of requests for free access to information in Serbia over the past decade has been declining, which triggers the question of why this is happening? This trend may be explained by the increasing efforts of public authorities to publish a number of data on their operation in their information booklets which are available on line and hence a reduced need for filing request for free access to information.<sup>55</sup> Furthermore, over the past years, the Serbian government has demonstrated its commitment to developing E administration and E government services, currently streamlined through the work of its Office for Information Technologies and eGovernment. The Government has also launched an Open Data Portal, contains 45 datasets from eight government institutions, a relatively small number given the more than 11,000 public authority bodies (Lazarevic, Bajic, 2018). However, fully fledged open data and transparency are still a goal to be achieved, as this approach remains segmented and uneven across different state bodies and covers only selected administrative processes and decisions, especially those where potential for economic growth and direct foreign investment has been recognised and supported by the business sector. In order to achieve the open data goal, this approach needs to be systemically applied to all sectors.

Finally, the impressive results and the importance of the work of the Commissioner for Free Access to Information, which has secured the execution of more than 90 per cent of justified appeals for free access to information in the course of 10 years of his term in office, cannot be overstated. This is primarily due to the Commissioners personal integrity and work perseverance, which obviously managed to overcome the challenges of the traditional culture of secrecy and other institutional obstacles, such as the lack of the support from the Government and the Parliament. The Serbian free access to information case shows that the recipe for

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<sup>55</sup> The Commissioner has provided guidance on what kind of information such a publication has to contain: key authorities of the body in question; its organisational structure; number of employees; financial statements etc.



success in promoting good governance lies in a good quality legislation, which needs to be coupled with proactive and effective institutional leadership. Nothing more, nothing less.

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