

Proactive Transparency in Bosnia and Herzegovina

Status and Perspectives in Light of International
Standards and Comparative Solutions



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By Alen Rajko



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1.

Introduction

In order to effectively exercise the right to access public sector information, it is not enough to regulate and implement its reactionary segment (acting on individual requests for access), but to do so with respect to the proactive dimension of the right to access information. The proactive dimension of this right is reflected in the continued unprompted disclosure of certain categories of information in the possession of public authorities, which makes such information easily accessible to the general public. Thus, proactive transparency offers a range of benefits, for persons authorized to access information and public authorities alike, while simultaneously reducing the possibility of corruption and other deviations. Hence the standardization of proactive measures is an important part of the role of a modern state in a democratic society.

Much like a medal with two sides, the right to access information has two inseparable faces: reactive and proactive. The proactive dimension of the right to access information usually encompasses the obligation of unprompted disclosure of certain types of information on a public authority's website, regulating the required standard of consultation with the interested public in the process of public authorities' decision-making and the minimal level of informing the public about the meetings of those authorities. The aforementioned comes with the requirements of accuracy, relevance, completeness, promptness and intelligibility of published information and the relevant technical and other standards, while the supporting functionalities are also useful – for example, setting up a centralized information registry and a central information and documentational service.

Internationally, the current phase of development of the right to access information, including its proactive segment, is characterized by accepting proactive measures as an inseparable part of the modern regulation of the right to access information, a gradual stepping away from soft law towards legally binding documents, a reinterpretation of classically-codified provisions in favor of exercising the right to access information, standardizing the lowest common denominator of the contents of proactive measures,¹ as well as the harmonization

¹ Eg. The proposal systematized by Darbishire, presented in Chapter 4 of this study.

of certain elements of the state legislation in numerous European states,² including states neighboring Bosnia and Herzegovina.³

Bosnia and Herzegovina was the first state in the region to legislate the right of access to information. However, the Bosnian-Herzegovinian legislation in this area lags behind international standards and does not follow other states' advanced solutions with respect to the right of access to information. Freedom of access to information laws in Bosnia and Herzegovina⁴ regulate only the reactive dimension of this right – the disclosure of information on request, while the proactive dimension of the right to access information is completely neglected by those laws. Besides, the aforementioned legislature is fragmented and incoherent, does not contain adequate legal protection with respect to the implementation of proactive measures, while this area is partly regulated by acts which are not at the required level in the hierarchy of sources of law.

This study should provide some answers to the question of how Bosnia and Herzegovina can catch up with the standards and practice which have developed in this area in the meantime. Hence the following text presents in detail international standards and other states' positive practice in the domain of legislation and the institutional framework of proactive transparency, as well as analyzing the relevant regulations in Bosnia and Herzegovina and establishing their fundamental flaws. Recommendations to legislators and other stakeholders in this area conclude the study.

² See the comparative analysis in subchapters 5.1 and 5.2 of this study.

³ Regarding states neighboring Bosnia and Herzegovina, see the comparative analysis in subchapter 5.3 of this study.

⁴ For more on this topic, see Chapter 7 of this study.

2.

Conceptual Considerations

Proactive measures of exercising the right to access information include measures that public sector subjects (hereinafter “public bodies”) are obliged to continually undertake *ex officio* (unprompted, routinely), without a special request by a person authorized to access information. Primarily, this relates to the regulation of minimal information content⁵ that public bodies must make continually accessible to the public in an easily searchable format, aids to persons authorized to access information while they are exercising that right, public participation in the legislative process and openness of public bodies’ meetings. Besides that, the regulation of proactive measures encompasses legal instruments which ensure the exercise of those measures so that the standardization of proactive measures is not left at the level of sheer proclamation. In order to enable a truly active public, it is necessary to regulate, at the state legislation level, the minimal generally binding standards of proactive information disclosure, oversight of the implementation of those measures and the elimination of deficiencies which may arise. It is also necessary to regulate legal processes which effectively protect the right to access information in its proactive segment. Activating such processes should be made possible not only by official action of oversight bodies, but also on the initiative of persons authorized to access information.

The regulation of proactive measures, as a vital part of legislature with respect to the right to access information, is an important element of information administrative law.⁶ Hence the organization of proactive measures should be viewed together with the regulation of that legal discipline, which includes matters relating to the public sector managing or participating in the management of information, i.e. primarily the area of the right to access information, protection of personal and confidential (classified) data, records management and external and

⁵ The term information, in the context of information processing, is standardized in the following way by the ISO/IEC 2382 standard (in use since January 1, 2001): “Information equals the knowledge relating to objects, such as facts, events, things, processes and ideas, including concepts, which has a certain meaning in a particular context.” For various theoretical and other definitions of information, as well as related terms of data and knowledge, see, for example: Alen Rajko, *Informacijsko upravno pravo: pravo na pristup informacijama: zaštita osobnih i tajnih podataka* [Information Administrative Law: The Right to Access Information: The Protection of Personal and Confidential Data], (Zagreb: TEB – Poslovno savjetovanje, 2011) [Zagreb: TEB – Business Consulting, 2011], pp. 11-12.

⁶ The subject of information administrative law as referred to in: Rajko, *Information Administrative Law*, p. 20.

internal public sector communication. Information administrative law includes negative rights (aimed at the protection of an individual's private sphere from the actions of public authorities, i.e. denying state interference in certain areas), as well as positive rights, which relate to the state duty to ensure a certain level of individual security or the exercise of particular individual interests, i.e. a positive request to the state.⁷

Within information administrative law, the right to access information, particularly its proactive dimension, covers the largest part of positive rights. The majority of other segments of information administrative law present limitations to the fundamental provisions of the right to access information held by public bodies. Naturally, such limitations are much more pronounced in the regulation of actions regarding individual requests for access to information, but are also relevant with respect to the standardization of proactive measures.⁸ Viewing any of the aforementioned parts of information administrative law in isolation does not answer the question about the accessibility of certain public information or the question about the general level and true effects of a certain regulatory model.

Due to the special role of the media in a democratic society,⁹ journalists' access to public sector information is a separate subsection of access to information. Without adequate access to information, the media cannot exercise their public function. Although general instruments for the exercise of the right to access information are available to journalists, there is no obstacle to special (additional) regulation of journalists' access to information – which in some cases is useful or necessary – which entails public bodies' special proactive obligations towards the media. By the areas it covers, media law is usually combined; besides the elements of mandatory, trade and workplace law, competition protection etc., it also covers the standards of administrative law, particularly relating to media freedom, active state duties in that area, the accessibility of public information, privacy protection, media principles and obligations and the like. The regulation of proactive measures addressed to the media, as well as proactive measures relating to the function of

⁷ Differentiation of positive and negative rights according to: Branko Smerdel and Smiljko Sokol, *Ustavno pravo* [Constitutional Law], (Zagreb: Law Faculty of the University of Zagreb, 2006), p. 105. The aforementioned authors classify the right to free speech, the right to information and related rights under 'third-generation rights', developed after classical human and citizen's rights (first-generation) and economic, social and cultural rights (second-generation). *Ibid*, p. 107.

⁸ For more on the limitations to the right to access information, see Chapter 5 of this study.

⁹ The European Court of Human Rights has raised the special role of the media in a democratic society on numerous occasions. Wide privileges, as well as the special duties of the media, are necessary to enable them to perform their dual role of "information providers" and "public watchdogs", within which the role of the media is not just to disseminate information, but to exchange ideas and opinions, while information about ideas in the public interest as well as in the context of political debate or about politicians, enjoys particular protection – European Court of Human Rights (ECtHR), *Lingens vs. Austria*, July 8, 1986. For more on the importance of the freedom of the media in a democratic society, see e.g. European Court of Human Rights (ECtHR), *Castells vs. Spain*, April 23, 1992.

bodies which perform public duties in the area of media law, can find their place in such a regulatory framework. On the other hand, the special role of the media implies certain standards of proactive publication by the media themselves (public information about the publisher, transparency of ownership structure and the like).

As an inseparable part of the right to access information, the proactive segment of the aforementioned area is tightly linked to a range of other fundamental rights.¹⁰ Most importantly, it relates to the following rights:

- Freedom of expression, which encompasses the right of seeking, receiving and disseminating information and thought¹¹
- Privacy protection (including personal data protection), which is one of the main limitations to the right to access information, as well as a convention-level right and in most countries a constitution-level right
- Petition, which, amongst other things, in its core contains receiving a reply to a question posed to a public body
- Freedom of scientific creativity, which is facilitated by the wide availability of various sources of information used in scientific work
- Fair trial, particularly regarding the openness of court hearings, access to case files, access to information which may be part of the evidence, access to procedural information which may facilitate the actions of a litigant; the majority of the aforementioned also being relevant for the exercise of the right to participate in a legal process in the context of the procedural equality of litigants.

Besides that, there are links to the right to access information in relation to:

- The body of laws usually known as the right to good administration, which is reflected in Article 41 of the Charter of Fundamental Rights of the European Union,¹² which mostly covers process elements (method and time of action, the right to participate in a process, the right to access case files, the obligation of explaining decisions and the right of the use of language, while the right to damages compensation is covered outside the process sphere)

¹⁰ Türk defines the concept of indivisibility and mutual dependency of human rights as a set of concentric circles, that changes depending on which right is placed in the center. If, for instance, the right to freedom of expression is placed in the center of the circle, the other human rights are placed in concentric circles with varying levels of relevance to the right in the center. The closest circles would, most likely, contain the rights of participation in public affairs, freedom of opinion, conscience and religion, assembly and association – Danilo Türk, “On the Right to Freedom of Opinion and Expression”, *Zbornik Pravnog fakulteta u Zagrebu* 39 [Collected Papers of Zagreb Law Faculty], no. 5-6(1989), pp. 1032-1033.

¹¹ For more on the relationship of the right to access information and the right of freedom of expression, see the analysis of the practice of the European Court of Human Rights in this area in Chapter 3 of this study.

¹² “The Charter of Fundamental Rights of the European Union”, *Official Journal of the European Communities* C 364, December 18, 2000.

- The concept of good administration (good governance), which – in its principal parts – implies respect for human rights and the rule of law, democracy and the principle of legality, including transparency and accountability, public sector effectiveness and, consequently, improvement of performance characteristics in the public sector, a clear definition of powers, responsibilities and control of public bodies, strengthening the legal system, transparency (easy access to reliable information), legitimacy, the existence of a system of public stakeholder accountability (which requires management visibility and a free media), as well as competence in devising and implementing public policies and public service delivery.¹³

Besides regulating the exercise of the right to access information by individual request (reactive approach), the standardization of proactive measures is an important part of regulating the exercise of that right. Without adequately devising proactive measures and the means of legal protection relating to their implementation, there cannot be complete and adequate regulation of the right to access information. Access to information which is exercised by individual request is, by its real effect, a relatively narrow way of exercising the right to access, with respect to the contents of the available information, as well as the circle of addressees to whom information has become available using this approach. Proactive measures make a certain part of public information available continually and to all, in a way which implies easy access without a special administrative procedure on individual request and, as a rule, without the need for further interaction with the public body. It follows that proactive measures are necessary for exercising all of the aims of standardizing the right of access to information. Those aims do not only cover the exercise of rights and legitimate interests of an individual authorized to access information while providing an informational basis for making informed decisions in various situations, but they also ensure the control and openness of the public sector, as well as having a preventative effect on its performance and significantly contributing to the effective functioning of democratic order, including the participation of the public

¹³ A summary of the right to good administration and good administration (governance) according to: Alen Rajko, “Pravo na dobru upravu – Nica, Strasbourg, Lisabon” [The Right to Good Administration – Nice, Strasbourg, Lisbon], *Pravo i porezi* 17 [The Law and Taxes], no. 2(2008), pp. 57-65. Of the aforementioned two concepts (the right to good administration or good governance), the latter concept is much more relevant to proactive transparency. The aforementioned source also covers the importance of public sector transparency within the European administrative space in the text of the “Code of Good Administrative Behaviour”, *Official Journal of the European Communities* L 267, October 20, 2000 and the like.

in the process of public bodies' decision making.¹⁴ Within the framework of the aforementioned, quality regulation and consistent implementation of proactive measures particularly improves the transparency of public bodies' actions, lowers the "price" of a part of public information as well as the possibility of corruption and other deviations. Besides that, the proactive segment of the right to access information and the right to petition highlight the oversight role of the public towards the state and the service function of the public sector towards citizens and legal persons.

Information can thereby be viewed as a commodity in the marketplace. In the political and administrative segment of that market, the public sector is the main supplier and buyer and the price of information is made up of the benefits the receiver expects from the information. Secrecy exists as "added value" to informational commodities in such a marketplace and the value changes depending on the number of those who are aware of it.¹⁵ Informal contact between the administration and outside stakeholders (lobbyists and others) follows the "market value" of public sector information. A proactive public is again one of the most effective instruments of lowering the possibility of deviation which often follows such contact.

In practice, the proactive segment of the right to access information lessens the need for managing part of the procedures relating to an individual request for access, while simultaneously making easier the exercise of the right to access by individual request. An adequate proactive openness of public bodies, to the extent that it provides information necessary in a certain case, makes the accessing of that information by request and administrative procedure unnecessary, which is suitable for both the person authorized to access information and the public body. Contemporaneously, even when access to certain information is possible only by individual request, proactive publication can initiate the decision on making the request and/or simplify that access by easing the formulation of the request for access, giving procedural advice to parties already in the access procedure, enabling the control of accuracy and completeness of information received and the like.¹⁶

¹⁴ For more on information, consultation and active participation in a political cycle, see, e.g.: Organisation for Economic Cooperation and Development (OECD), *Gradani kao partneri – Informiranje, konzultiranje i participiranje javnosti u kreiranju provedbene politike* [Citizens as Partners – Information, Consultation and Public Participation in the Creation of Implementative Policies], (Zagreb, Oksimoron, 2004), pp. 23-24.

¹⁵ Itzhak Galnoor, ed., *Government Secrecy in Democracies* (New York: Harper & Row, 1977), p. 77.

¹⁶ For more on additional benefits related to proactive information disclosure, see e.g.:

- Analitika – Center for Social Research, *Towards Proactive Transparency in Bosnia and Herzegovina* (Sarajevo: Analitika, 2013), pp. 6-7.
- Analitika – Center for Social Research, *Data as Potential: Towards Open Data Policies in BiH* (Sarajevo: Analitika, 2014).
- Rebecca Zausmer, *Towards Open and Transparent Government: International Experiences and Best Practices* (London: Global Partners and Associates, 2011), pp. 16-19.

Taking a wider view, proactive measures are an integral part of the role of a modern democratic state in an information society. We will use Kellerhals's words to support this thesis:

“The state and public administration do not only have to use information and communications technology to fulfill their tasks. In an information society, they have another function: they need to guarantee that they will provide the public with high-quality and reliable information. Besides violence and poverty, ignorance is the main public organization problem which the state should be involved in. It has to offer minimal infrastructure, founded in knowledge, to alleviate the dramatically increased dependence on information and knowledge. While doing so, it should act in a way similar to that implemented in relation to the problem of violence, which it solved by monopolizing the use of force, or the way in which it tackled the problem of poverty, by guaranteeing minimal economic security (as a counterbalance to the effects of structural economic power).”¹⁷

If we narrow the focus, proactive measures are a necessary part of the concept of e-administration, or e-government. That concept and practice, developed within the framework of the global reform movement started in the 1990s, encourages the public sector to use information and communications technology in order to more effectively provide and receive information and support in the following ways: government-to-citizen – G2C, government-to-business – G2B, or government-to-government – G2G.¹⁸ In the aforementioned areas, technology – in this case, information-communications technology – did not just have a supporting service role, but technological development was one of the principal factors which facilitated and stimulated the proactive public.¹⁹

¹⁷ Andreas Kellerhals Maeer, “Država, informacijsko društvo, ‘dobra vladavina’ i arhiv” [The State, Information Society, ‘Good Governance’ and the Archive] u *Modernizacija hrvatske uprave* [The Modernization of Croatian Administration], Ivan Koprić, ed. (Zagreb: Društveno veleučilište, 2003) [Zagreb: Public University, 2003], pp. 230-231.

¹⁸ For more on e-government, e-democracy, information economy and other elements of the information society phenomenon, see e.g. Rajko, *Information Administrative Law*, pp. 21-29.

¹⁹ On the role of information-communications technology, see e.g. Zausmer, *Towards Open and Transparent Government*, p. 19.

3.

Methodological Remarks

The aim of this study is to answer a key question: To what extent does the current legal framework in Bosnia and Herzegovina support, make difficult or prevent proactive disclosure of key information held by public bodies and what are the key elements of the legal framework which would support proactive transparency of government institutions in Bosnia and Herzegovina (BiH).

Besides the introductory remarks on the concept and importance of a proactive segment of the right to access information, the following is also analyzed:

- Global and European standards in the development of the right to access information, at the level of international codes, international court practice, non-binding international documents and non-government sector initiatives
- Comparative experiences in the field of comparative transparency in Europe
 - summarily and using two specific examples of good practice, as well as by analyzing legislature in states neighboring BiH
- Usual limitations to the right to access information, in order to contextualize real content and reach of that right, including its proactive component.

Finally, the existing Bosnian-Herzegovinian regulatory framework is assessed, based on an analysis of various levels of sources of law (Constitution, acts and bylaws) at state and entity level,²⁰ together with recommendations for improvement in order to meet widely accepted legal standards in this area.

The study consists of a combined analysis of the following elements:

- Fundamentals of legal doctrine relating to the right to access information held by the public sector
- Binding and non-binding sources of international law and international court practice
- Recommendations of the non-government sector and other stakeholders with knowledge of this subject
- Provisions of right to access information laws of certain European countries related to a proactive public and relevant legislature in BiH.

²⁰ There are also certain provisions of particular regulations related to proactive measures, analysis of which would disproportionately burden this text, and their omission does not greatly impact the results of the study.

As the comparative analysis of the legislature of European countries beyond BiH's immediate neighbors is mostly based on secondary sources, it does not recognize each specificity of national legislature, but it enables a summary detection of trends and governing regulatory concepts in this field. The comparative analysis of legislature in countries neighboring BiH is more detailed and is based on the original texts of laws governing the right to access information, while it is possible that certain details impacting the aforementioned legal framework might be omitted, but are contained in other regulations. Nevertheless, that should not impact the basic research results. As is the case in the wider European context, when considering criteria and categories applied to summarizing regional legislature, it is impossible to apply a model which wholly recognizes each specificity of certain legislation, but we believe that the applied models of comparison ensure the soundness of the general conclusions. The Bosnian-Herzegovinian legislation, which is the focus of this study, is broken down in the most detail and other theoretical, regulatory and other sources are used in the study to assess and improve the legislation.

4.

Global and European Standards

The actual development phase of the right to access information at the international level – including its proactive segment – is characterized by: (1) a gradual shift away from soft law towards legally binding documents; (2) a reinterpretation of classical codification provisions in favor of exercising that right; (3) accepting proactive measures as an integral part of modern regulation of the right to access information; (4) standardization of the lowest common denominator of the content of proactive measures as widely accepted guidelines to lawmakers; (5) harmonization of individual elements of national legislature in a number of countries. The main points of each of the aforementioned five characteristics are analyzed in the following text.

Article 10 of the Council of Europe Convention on Access to Official Documents²¹ has gone the farthest regarding explicit codification of proactive measures by binding legal instruments. That provision governs the disclosure of documents at public authorities' initiative, in the way that those authorities, when suitable and on their own initiative, take necessary steps to disclose official documents in their possession in order to promote transparency and effectiveness of public administration as well as encourage informed public participation in matters of general interest.²²

Generally, with respect to the explicit regulation of the right to access information, we point to Article 42 of the European Union Charter of Fundamental Rights. That standard prescribes the right of every European Union citizen and every person or legal person residing or with registered office in a member state to access the documents of the European Parliament, Council and Commission.²³

²¹ "Council of Europe Convention on Access to Official Documents", *Council of Europe Treaty Series* No. 205, 2009. The Convention was ready for signing on June 18, 2009. Non-binding regulatory predecessors of the Convention are the following recommendations of the Council of Europe: "Recommendation No. R/81/19 on the Access to Information Held by Public Authorities" and "Recommendation No. R/2002/2 on the Access to Official Documents".

²² Although this study primarily deals with general questions of standardizing proactive measures, it should be noted that proactive measure standards are contained in certain sector codifications, such as the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention, 1998) as well as the United Nations Convention against Corruption (2003).

²³ For the standards developed by the Organization of American States (including the practice of the Inter-American Court of Human Rights) and the African Union, see, e.g. Toby Mendel, *Freedom of Information: A Comparative Legal Study* (Paris: UNESCO, 2008), pp. 10-14.

For emancipation and widening the reach of the right to access information, it is important to gradually widen the interpretation of the right to free speech, which is achieved through legal practice, especially newer practice of the European Court of Human Rights (ECtHR).²⁴ All classical international codifications of human rights – such as the General Declaration on Human Rights, International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “European Convention”) also cover the standardization of the right to free speech. However, the creators of those codes did not envisage the right to access public sector information as an integral part of the right to free speech (that is, a decades-long accepted view that the right to free speech does not imply the general right of access to information), nor did it stem from, for instance, the practice of the ECtHR. Nevertheless, in recent years, the aforementioned practice has gradually widened the interpretation of the right to receive information, as an element of Article 10 of the European Convention, in a way relevant to the protection of the right of access to information. For example, in paragraph 35 of the reasons for decision in the case of *Társaság a Szabadságjogokért v. Hungary*,²⁵ besides referring to its earlier more restrictive practice, the ECtHR notes that it has in recent times moved closer to the wider interpretation of the topic of freedom to receive information,²⁶ and as follows, recognizing the right to access information. In paragraph 20 of the reasons for decision in the case of *Youth Initiative for Human Rights v. Serbia*,²⁷ the court more explicitly notes, referring to the view expressed in the *Társaság* judgment, that the concept of freedom to receive information covers the right to access information.

The recognition of the general right to access public sector information in legal practice is also found in the judgment of the Inter-American Court of Human Rights in the case of *Reyes et al. v. Chile*,²⁸ in the context of the right to freedom of thought and expression. In addition, the judgment notes that in order to fully materialize that right, states need to adopt legislative and other measures which enable the effective exercise of the right to access information, while regulating limited exceptions to access.

Furthermore, several international documents, which are not legally binding but act indirectly on the authority of their bearers, are in favor of the affirmation of the right to access information and, indirectly, proactive measures in that area. They include, for example, UN standards developed from comments and reports of the

²⁴ In a limited fashion, the practice of the ECtHR is relevant with respect to the right for respect of private life, as set out by Article 8 of the European Convention. For more, see *ibid*, pp. 14-16.

²⁵ European Court of Human Rights (ECtHR), *Társaság a Szabadságjogokért v. Hungary*, April 14, 2009.

²⁶ Cour européenne de Droits de l’Homme (CEDH) [European Court of Human Rights (ECtHR)], *Sdruženi Jihočeské Matky v. Czech Republic*, July 10, 2006.

²⁷ European Court of Human Rights (ECtHR), *Youth Initiative for Human Rights v. Serbia*, July 25, 2013.

²⁸ Inter-American Court of Human Rights, *Claude Reyes et al. v. Chile*, September 19, 2006.

Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and the joint declaration of the UN Special Rapporteur, OSCE Representative on Freedom of the Media and the Organization of American States Special Rapporteur for Freedom of Expression.²⁹ For instance, in the Annual Report of the UN Special Rapporteur for 1998, it is explicitly stated that the right to seek, disseminate and receive information gives states a positive obligation to ensure access to information, especially bearing in mind different ways in which states store information. In the Annual Report for 2000, the fundamental importance not only of democracy and freedom, but also of the right to participation and development is also noted. The Joint Declaration of 1999 notes that the freedom of expression indirectly implies the public right to open access to information and to know what the authorities are doing in the name of the public,³⁰ without which truth would be suppressed and the participation of citizens in government would remain fragmented. According to the Joint Declaration of 2004, the right to access information is a fundamental human right which should be materialized by a wholesome state legislation, based on the principle of maximum and presumed availability of information, with narrow prescription of exceptions to access.

At the level of non-binding documents, the SIGMA 46 recommendation should be noted. It was developed within the joint OECD-EU Support for Improvement in Governance and Management (SIGMA)³¹ program and highlights the need for regular disclosure of information of importance to a relatively large number of individuals and groups, while simultaneously noting the request that such disclosure does not harm relevant public or private interests. The following are highlighted as key preconditions for proactive access to information: The use of the internet, development and publication of information registries on the internet including guidelines for access to disclosed information, while noting that the selection of information disclosed cannot be entrusted exclusively to the public body disclosing relevant information.

The most specific standardization of proactive measures currently exists at the level of non-government organization and other specialised stakeholder documents. Among the principles of freedom of information legislation as proclaimed by the non-government organisation Article 19, are the duty of disclosing key information and openness of public bodies' meetings,³² while proactive disclosure is among the key principles of the multilateral initiative

²⁹ The contents of certain reports and declarations in the continuation of this passage are referred to as per Mendel, *Freedom of Information*, pp. 8-9.

³⁰ For more, see *ibid*, pp. 8-9.

³¹ Mario Savino, *The Right to Open Public Administration in Europe: Emerging Legal Standards, Sigma Paper No. 46* (Paris: OECD Publishing, 2010), p. 4 and pp. 32-33.

³² Article 19, *The Public's Right to Know: Principles on Freedom of Information Legislation* (London: Article 19, 1999), pp. 3-4 and 9-10.

Open Government Partnership.³³ Furthermore, the following leading examples of proactive access to information standards are noted: disclosing information in several formats, user-friendliness, relevance, intelligibility, timeliness and accuracy, as well as free access to electronic information. In that sense, fundamental types of information subjected to proactive disclosure include information on public services, public procurement and budget, registries, databases et al., as well as frequently requested information as an indicator of determining priorities in active information disclosure.³⁴ Darbshire³⁵ has presented an even more precise standardization proposal for information which should be proactively disclosed. That proposed standard includes:

- Institutional information (including regulations and information on powers)
- Organizational information (including information on personnel and their contact details)
- Operational information (public policies, procedures, reports, etc.)
- Decisions and acts (including accompanying documents)
- Public services information (including guidelines, forms, etc.)
- Budget information
- Open meetings information
- Decision-making and public participation information
- Subsidies information
- Public procurement information
- Lists, registers, databases information
- Publication and price information
- Appeal and dispute resolution mechanism information
- Information about the right to information (including guidelines on filing a request/appeal and contacting freedom of information officers)
- Minutes of parliamentary sessions
- Court decisions.

According to Darbshire's authoritative recommendation, the principle of proactive disclosure should apply to all public bodies (legislative, executive and judicial), as well as private bodies performing public functions. As a minimum, all public bodies should disclose information on their powers, how they function, how they spend public funds and the services they provide.

³³ Open Government Partnership, as referred to in: Analitika, *Towards Proactive Transparency in Bosnia and Herzegovina*, p. 2.

³⁴ Zausmer, *Towards Open and Transparent Government*, pp. 20-21.

³⁵ Helen Darbshire, *Proactive Transparency: The Future of the Right to Information?: A Review of Standards, Challenges and Opportunities* (Washington: World Bank Institute, 2011), pp. 21-22.

5.

Scope and Form of Regulating Proactive Measures: Comparative Experience

European standards are to some extent being indirectly developed by the acceptance of certain elements of proactive transparency in the majority of, or numerous, European states. The comparative part of the study, which follows, presents the founding principles of European state legislature in the area of proactive transparency, a more detailed summary of the legislature of two states with different political and legal traditions whose legislature in this area is an example of good practice, as well as the breakdown of the legislature in five states neighboring BiH.

5.1. Key Tendencies in the Domain of Proactive Transparency in Europe

The available comparative analyses of the European legislative and institutional framework clearly point to a trend of legislative standardization of proactive transparency of public bodies and ensuring relevant institutional infrastructure is implemented. Hence the analysis of the legislature of 26 European states with respect to information subject to proactive publication³⁶ summarily notes the representation of certain proactive measures in state legislature:

- In at least 18 states, contact information of the freedom of information officer and/or information on methods of access to information
- In at least 17 states, information on the organizational structure of a public body (including information on personnel and their contact details), information on responsibilities, activities, decisions and acts, decision-making processes and public participation in such processes
- In at least 14 states, index or register of information in possession of a public body or the types of information held

³⁶ “Administrative Information and Proactive Publication”, Right2INFO – Good Law and Practice, September 9, 2013.

- In at least 11 states, budget information (in others, it is often noted that the aforementioned information is available through centralized sources) and public procurement information (before and after entering into contract)
- In only five states covered by the analysis, little or no proactive disclosure is prescribed.

Although the aforementioned is subject to constant changes, we can generally conclude that in the area of proactive transparency, legislators have a tendency to prescribe the obligation of more substantial disclosure of technical information before prescribing other elements of proactive disclosure, such as disclosing public finance, public procurement, contract and other information.

A 2010 OECD³⁷ survey offers more detailed information regarding obligatory proactive measures prescribed by access to information law in European states covered by this research. That data is summarily outlined in the table which follows.

³⁷ Organisation for Economic Co-Operation and Development (OECD), “Proactive Disclosure of Information” in *Government at a Glance* (Paris: OECD Publishing 2011).

Table 5.1 Proactive Measures in Freedom of Access to Information Laws in European States

State	Proactive Measures											
	1	2	3	4	5	6	7	8	9	10	11	12
Austria												
Belgium										x		
Czech Republic	x	x							x	x	x	x
Denmark												
Estonia	x	x	x	x	x	x	x	x	x	x	x	x
Finland	x	x	x	x	x		x	x				x
France	x	x								x	x	x
Ireland										x	x	
Iceland												
Italy	x	x	x	x	x	x				x	x	x
Luxembourg												
Hungary	x	x	x	x	x		x	x	x	x	x	x
Netherlands												
Norway												
Poland		x					x			x		x
Portugal	x	x	x		x			x	x	x	x	
Russia	x			x		x	x	x	x		x	x
Slovakia	x			x						x		x
Spain	x	x	x		x				x	x		
Sweden												
Switzerland												
Turkey	x	x	x		x		x			x	x	x
United Kingdom											x	x
Ukraine		x		x					x	x	x	x
Total States of 24 Included	11	11	7	7	7	3	6	5	7	13	11	12

Source: OECD, "Proactive Disclosure of Information" in *Government at a Glance*, p. 143.

Proactive Measures – Legend:

- 1 – Budget documents
- 2 – Annual reports, including financial data
- 3 – Audit reports
- 4 – All government policy reports
- 5 – Contracts above a prescribed value
- 6 – List of public servants and their salaries
- 7 – Collections of administrative data
- 8 – Information about the types of record-keeping systems, their contents and use
- 9 – Information about internal procedures, manuals and guidelines
- 10 – Description of the structure and function of a public body
- 11 – Annual reports about the implementation of freedom of access to information legislation
- 12 – Process information on the exercise of the right to access information.

This research shows the greatest propensity to prescribing the obligation of publishing organizational information, to a great extent budgetary information and information related to the exercise of the right to access information, and to a lesser extent, other categories of information covered by the analysis – audit and government reports, information on contracts, public servants/officials and their salaries, administrative records collections, records systems and internal procedures.

The aforementioned research also shows that the level of obligatory regulation of proactive transparency is largely reversely proportional to the perceived level of democratic development of a certain state, primarily because in democracies with a strong democratic tradition, a sufficient level of proactive measures has been reached even without strict legislation. Part of the OECD research, covering routine proactive disclosure of information in areas not explicitly prescribed, where more developed democracies are significantly more represented, supports that argument, but that area is not covered by this study, as it is primarily focused on official regulation of proactive measures. When considering not only the criteria of specific regulation but also the practice of routine proactive publication as a whole within the OECD research, in the part relating to European states, those states which are usually considered to be developed democracies but are not covered to a great extent in the preceding table (which is limited to specific regulation), apply, for instance, the following number of the 12 proactive measures researched: Iceland, Netherlands and the United Kingdom – 10 each, Denmark and Sweden – eight each, Ireland and Switzerland – seven each, Austria, Belgium and Norway – six each, etc.

As can be seen, consideration of indicators of explicit regulation and practice of routine proactive disclosure of information as a whole reveals a wide application of proactive measures in the legislature and practice of European states. This points to the conclusion that in European states, a proactive public at the legislative and political-administrative practice level is recognized and accepted as a necessary component of exercising the right to access information, but also as an integral part of the foundations of a democratic state.

Hence the lack of a certain number of proactive elements in the legislation of certain developed states, together with the simultaneous existence of the usual practice of a proactive public, cannot be an argument for not including those elements in the legislation of states in transition and those with a lower level of democratic development, including BiH. Moreover, in the latter states, the need to accept the highest possible level of the proactive segment of the right to access information through imperative regulation is of greater importance.

5.2. Examples of Good Practice: Legislation in Finland and Hungary

In this part it is useful to consider the available information on the legislation in Finland and Hungary as examples of good legislative practice in this area.³⁸

Finland has very developed legislation on proactive information disclosure, with the presumed obligation of publication of all official documents which do not cover specifically prescribed exceptions (negative enumeration). Generally, it is thought that a certain document has entered the public domain by entering into the public register, or when a certain body has finished considering a matter, with specific regulation of the timing of when certain types of documents enter the public domain (e.g. public tenders, calls for comments, budget proposals, documents received from third parties, etc.)

Exceptions (limitations) are related to the reasons commonly covered by a great number of state freedom of access to information laws, such as international relations, criminal investigations, police registers and plans, active court processes, security of individuals and infrastructure, emergencies, state security, defense intelligence information, financial, tax and monetary policies (if publication would harm their implementation), oversight of financial markets and insurance companies (if publication would harm their credibility or functioning), economic statistics or operational plans (if their premature disclosure would affect markets), environment protection, inspection and other surveillance activities, data voluntarily submitted to the government exclusively for research purposes, professional and trade secrets and certain categories of personal data. Some documents are not covered by the definition of official documents, so they are not subject to the obligation of disclosure (e.g. letters to government officials not related to their public function, informal notes and similar preparatory materials, documents submitted to government as lost property and the like).

The law also prescribes the management of information and records in a manner which facilitates their availability, as well as the duty of public authorities to document their activities and provide information about planned legislative changes, including an evaluation of the effects of the legislation and considered alternatives. Such a concept of open government is underpinned by interactive websites of public bodies.

The Hungarian law is highlighted primarily because of the attached Annex, which contains 34 precisely formulated categories of information, the publication

³⁸ Sources of the aforementioned part of comparable data: Finland – Alysia Davis and Dara Lithwick, *Government 2.0 and Access to Information: 2. Recent Developments in Proactive Disclosure and Open Data in the United States and Other Countries: (Background Paper)* (Ottawa: Library of Parliament, 2010), pp. 13-16, where the “Finnish Act on the Openness of Government Activities” is analyzed; Hungary – “Act XC of 2005 on the Freedom of Information by Electronic Means”, adopted July 4, 2005.

of which by public bodies is mandatory. Those categories are divided into three groups: organizational and personnel information, information on actions and activities and information on public administration, with prescribed deadlines for their updating and keeping.

In summary, this is information relating to the organizational structure, contact details, managers and public service liaison officers, the composition of collegial bodies, subordinated bodies and foundations, publications founded by public bodies, superior and oversight bodies, basic legal principles implemented by a body, types of processes and information about them as well as public services. In addition, the following is also considered a mandatory part of proactive transparency in Hungary: lists of databases and records, publications, decision-making process (including information about public bodies' meetings), legal bills, technical descriptions of public tenders, public findings of investigations and audits, work performance measurement indicators, results of prescribed statistical research, contracts and general contract conditions, budget and implementation reports, summarized data on employee numbers and their salaries, subsidies, public procurement, information prescribed by the Concessions Act and payments greater than five million forints which are not related to the primary activities of a public body.

Provisions of the Act do not affect the obligations of a public body according to the Data Protection Act and other acts pertaining to the publication of public information. The minister responsible for civil national security, with referral to the opinion of the Information Commissioner, is authorized to differently determine the scope of information proactively published in that area.

The law also regulates:

- The central electronic list of public information, which is controlled by the Department of Information Technology and Communications, in order to ensure simple and quick access to electronically available information. This list contains a summary of descriptive information about the websites of public bodies and their databases and registers, as well as
- The singular system of access to public information, also controlled by the aforementioned Department, with the aim of standardizing the criteria and electronic search possibilities of information held by public bodies,

The publication of legislation and court decisions, together with rules on the anonymisation of personal data in those decisions, is also prescribed.

5.3. Legislation in States Neighboring BiH

Regarding the legislation in states neighboring BiH, the regulations of the following laws are analyzed:

- In Montenegro – Law on Free Access to Information³⁹
- In Croatia – Law on the Right to Access Information⁴⁰
- In Macedonia – Law on the Free Access to Public Information⁴¹
- In Slovenia – Law on the Access to Information of Public Importance⁴²
- In Serbia – Law on the Free Access to Information of Public Importance.⁴³

The regulation of proactive measures contained in the aforementioned regulations can be summarized in the two tables which follow.

The first table presents the representation of certain proactive measures in each of those laws, wherein the existence of a certain measure is shown by the number of the article of the relevant law covering that measure.⁴⁴

In the second table, we additionally break down certain elements of the minimal prescribed content of own-motion disclosure on a public body's website. The categorization developed by Darbishire (see Chapter 3) is applied as the basis for the systematization of the legislative elements in this area, with slight adaptations. Please note that sections of the examined laws contain certain parts of regulations not related to minimal contents of public bodies' websites, so in that section we point to Table 5.2.

³⁹ "Zakon o slobodnom pristupu informacijama" [Law on Free Access to Information], *Official Gazette of Montenegro* 44/12.

⁴⁰ "Zakon o pravu na pristup informacijama" [Law on the Right to Access Information], *Official Gazette of Croatia* 25/13.

⁴¹ "Zakon za sloboden pristap do informacii od javen karakter" [Law on the Free Access of Public Information], *Official Gazette of the Republic of Macedonia* 13/06, 86/06 and 6/10.

⁴² "Zakon o dostopu do informacij javnega značaja" [Law on the Access to Information of Public Importance], *Official Gazette of the Republic of Slovenia* 51/06 and 23/14.

⁴³ "Zakon o slobodnom pristupu informacijama od javnog značaja" [Law on the Free Access to Information of Public Importance], *Official Gazette of the Republic of Serbia* 120/04, 54/07, 104/09 and 36/10.

⁴⁴ At the terminological level, the term "proactive approach" is only mentioned in the Montenegrin Law (Article 12), while the Croatian Law explicitly lists the timely publication of information by public bodies about their activities, in a suitable and available format, as one of two methods of allowing access to information (Article 17, p. 1, section 1).

Table 5.2 Proactive Measures in Freedom of Access to Information in States Neighboring BiH

Measure	Montenegro	Croatia	Macedonia	Slovenia	Serbia
Prescribed minimal content on a public body's website	12	10	10	10,10.a	(Guide, t. 19-40) ⁴⁵
Manual or guidelines			36		(37) ⁴⁶
Register (catalogue, guide) of information	11 (41) ⁴⁷	10	9	8	(39, 40) ⁴⁸
Naming of an authorized person	11	13	8, 11	9	38
Specific regulations about oversight and/or inspection powers of an independent body relating to proactive disclosure	39	41-59		(32) ⁴⁹	25
Regulations on legally non-binding powers of an independent body	39	35	32	(32) ⁵⁰	25
Disclosure of documents for public consultation		11			
Transparency (public bodies' meetings)		12			

⁴⁵ The Serbian Law does not contain regulations about minimal content of proactively published information on a public body's website, but such content is regulated by the "Uputstvo za izradu i objavljivanje informatora o radu državnog organa" [Manual for Writing and Publishing Information Handbooks on Public Bodies' Work], *Official Gazette of the Republic of Serbia* 68/10, made by the Commissioner based on powers from Article 40 of the Law.

⁴⁶ The Commissioner for Information of Public Importance, not the public authorities, issues the guide on exercising rights.

⁴⁷ Besides the guide to access to information, which each public body is obliged to publish and regularly update, Article 41 of the Montenegrin Law additionally prescribes a centralized information system of access to information, managed by an independent body responsible for access – Agency for the Protection of Personal Data and Access to Information. The Central Catalogue of Official Documents of the Republic of Croatia has a somewhat different concept (see Article 5, par. 9, Article 10, par. 3 and 4 and Article 17, par. 1 of the Croatian Law). It is not managed by an independent body (Information Commissioner) but the Digital Information and Documentation Office, as the successor of HIDRA (see notes nos. 77 and 78). In Slovenia, there is the State Catalogue of Information of Public Importance (see Article 8, par. 2 of the Slovenian Law), which is managed by the relevant government department.

⁴⁸ This relates to a booklet with basic information about the public body's activities which is prepared at least once a year. It is possible to view the information booklet by request. Its publication on a website is not prescribed by law, but by the Manual for Writing and Publishing Information Booklets on Public Bodies' Work. According to Article 11, par. 1 of the Manual, a state authority that possesses, hires or otherwise uses a website is also obliged to publish an information booklet. The Manual prescribes monthly updating of information contained in the booklet (Article 17, par. 1)

⁴⁹ This relates to the powers of the relevant government department, not those of an independent body – Commissioner for Access to Information of Public Importance.

⁵⁰ See the previous footnote.

Table 5.3 Obligatory Elements of Content Published on a Public Body's Website

Element	Montenegro	Croatia	Macedonia	Slovenia	Serbia ⁵¹
Institutional information	x	x	x	x	x
Organizational information	x	x	x	x	x
Operational information	x	x	x	x	x
Information on public services	x		x	x	x
Budget information		x		x	x
Information on meetings		x			x
Information on decision-making procedures and mechanisms of public participation					x
Information on subsidies		x			x
Public procurement information		x	x	x	x
Register and database information	x	x		x	x
Publications			x		
Information on appeals processes and dispute resolution mechanisms					x
Information on the right to access information		x	x		x
Minutes of meetings		x			
Answers to frequently asked questions		x		x	x
Individual acts and contracts for the disposal of state finances and property	x				
Payrolls of public officials	x				x

⁵¹ Regarding Serbia, the aforementioned elements are prescribed by the Manual for Writing and Publishing Information Booklets on Public Bodies' Work (see footnote 45), that is, a bylaw.

By summarizing the data from **Table 5.2**, we can conclude the following:

- All five reviewed legislations prescribe the minimal content which is published on the websites of public bodies (in Serbia, a bylaw prescribes this), as well as measures related to the information registry, naming authorized persons and what is known as soft powers of an independent body, that is, an oversight public administration body
- Some form of a central registry of information is prescribed in the laws of Montenegro, Croatia and Slovenia, while at the legislative level, the contents of a central register, at least the main points, are regulated in Montenegro and Croatia
- In four states, there is some level of inspection or other type of oversight of the implementation of at least some proactive measures, while inspection of regulated proactive measures in their entirety by an independent body is prescribed only in Montenegro
- Compulsory proactive measures related to the disclosure of documents for public consultation and of the bodies' public work are prescribed by law only in Croatia.

At the level of legislation regulating the right of access to information, the following types of oversight of the implementation of prescribed proactive measures are envisaged:

- Inspection by an independent oversight body (agency, commissioner) – Montenegro, Croatia
- Powers of an independent body to determine a breach or failure to perform obligations or to order their execution (a process not defined as an inspection) – Serbia
- General regulations on inspection of the implementation of legislation by relevant government department – Slovenia, Serbia
- Offences related to breaching (part of) the regulations on proactive measures – all five states
- Judicial oversight, which follows the aforementioned instruments. In all five states it is envisaged as part of administrative processes, or misdemeanor proceedings.

The analyzed legislation in the states neighboring BiH does not contain specific regulations on proactive disclosure and typical limitations to the right of access to information. In some cases, specific regulations are envisaged about the non-disclosure of information falling under one of the limitation regimes, or the non-implementation of regulations on proactive disclosure of information to which access is limited (e.g. Article 12, par. 4 of the Montenegrin Law, or Article 10, par. 4 of the Croatian Law), although by the implementation of generally accepted standards of legal interpretation, such a conclusion would follow even without a specific regulation.

Furthermore, if we summarize the data in **Table 5.3**, we reach the following conclusions:

- In all five states, the proactive publication of institutional, organizational and operational information is prescribed
- A high level of similarities (four of five states) exists regarding the regulation of the disclosure of information on public services, public procurement and registers and databases
- The majority of states (three of five) prescribe the disclosure of information on budgets, the right to access information and frequently asked questions.

With respect to the systematization of proactive measures offered by Darbshire, most states neighboring BiH prescribe such measures, but the minimal contents proposed by Darbshire are not prescribed by all states. Namely, there are regulatory loopholes related to the expenditure of public funds and public services offered.

Regarding the comparisons with summary results of comparative research listed in subchapter 5.1 of this study, a general similarity between state legislation in the region covered by the aforementioned comparative analyses is noted with respect to the most represented groups of information subject to compulsory disclosure. Between the considered five legislations of countries neighboring BiH, Montenegro, Croatia and Serbia (at bylaw level) have the fullest regulation of content which must be published on the websites of public bodies. The most precise regulation of certain categories of information which must be published on the internet is contained in the Serbian Manual for Writing and Publishing Information Handbooks on Public Bodies' Work.

With respect to both tables, regulatory solutions in force in a smaller number of countries or in only one of them should not be viewed as variants which do not deserve to be included in legislation when taking a wholesome approach to the regulation of proactive measures. On the contrary, those elements represent an example of good practice in certain legislation, which, for now, has not become part of other legislation in this area.

6.

Proactive Transparency and the Limitation of the Right to Access Information⁵²

The real content of each recognized right is truly governed by the prescribed limitations to that right. The same is true of the right to access information, including its proactive segment. Hence, after an analysis of global and European standards and comparative experiences in this legal field – with the focus on best practice – and before an analysis of the current Bosnian-Herzegovinian regulation in the light of the aforementioned standards and good practice, we outline unified key indicators of the limitation of the right to access information, with an added review of the restrictions in the context of proactive measures. The presumed availability of public sector information together with negative enumeration of restrictions of the right to access that information is uncontested, as is the availability of public sector information without the obligation of proving individual interest for the access to individual information as generally accepted modern legislative standards in this field.

Generally, limitations to the right to access public sector information are content and time-based. In addition, limitations are usually subject to variously named types of tests (i.e. limitations of limitations), such as the predominance of interest, harm, public interest, proportionality and other tests.

Content limitations answer three questions: (1) which information is not presumed to be accessible; (2) which of that information is subject to obligatory inaccessibility and which to the regime of facultative inaccessibility, i.e. to which information must access be given and to which can it be denied; (3) what regulations exist regarding the access to some inaccessible information with respect to which there are no reasons for limiting access? With respect to the second question, there are no generally accepted standards, nor is there such a differentiation in some sections of the legislation. However, regarding the third question, there is no reason for the unavailability of those information which do not fall under the regime of limitations if by accessing that information the

⁵² Systematization and analysis of usual limitations to the right to access information, contained in this part of the study, is mostly based on the author's previous analysis (Rajko, *Information Administrative Law*, p. 121), while the remaining part is the author's original report.

content of the inaccessible part of the information is not compromised. Hence we continue the analysis by answering the first question.

In the domain of public sector information, access is usually limited by personal data, secret (classified) data and certain types of information not in the aforementioned categories, but with valid reasons for their unavailability (e.g. international obligations, criminal and other investigations and oversight, protection of internal decision-making processes, intellectual property protection, etc.) In such cases, it is not only important to regulate the right to access information, but all other regulations with respect to the management of public sector information subject to some of the limitation regimes.

In the domain of content-based limitations to accessing information, it is necessary to consider the need to protect personal data separately from the protection of other types of inaccessible information. Namely, the protection of personal data is the central part of privacy protection, which is a conventional and, most often, constitutional level right which is not subordinated to the right to access information. However, other typical limitations protect certain legitimate public or private interests, but not a right whose importance would present an equivalent collection of privacy-related rights.

On the other hand, the protection of privacy, and hence personal data, does not cover all personal data, especially not data the protection of which is not necessary for the protection of a certain individual's privacy. Personal data of public officers and officials, less often of other persons, which is necessarily publicly available for the exercise of the right to access information, does not fall within the scope of information that is not available in principle. With respect to the proactive transparency of public bodies, there is especially no reason for the protection of personal data related to the makeup of certain bodies, authorized and contact persons, their qualifications, salaries and the like, nor the protection of personal data of public bodies' contract partners and recipients of public subsidies, donations, etc. Such data is not in the sphere of privacy protection – it is necessary for public insight into public bodies' work and the strengthening of public trust in public bodies, as well as effective control over those bodies, while citing business secrecy has no place when utilizing budget funds.

Various texts which represent the limitation of limitations foresee different criteria and implementation processes, while there is a common “levelling” of whether in specific cases access to information should be allowed despite that information originally being inaccessible. Hence it is relevant to pose the question whether the test applies to proactive measures, too. On the regulatory level, there are two typical variants here, which are presented using the examples of the aforementioned laws – Croatian and Montenegrin.

In the first variant, the application of the test is not explicitly limited to the process ensuing after an individual request for access to information, i.e. to the reactive segment of the right to access, such as in the provision of Article 16, par. 1 of the Montenegrin law, which covers the test of harm of publishing information. Albeit partial deflection from such “neutrality” of the regulatory test is contained

in the related provision of Article 17 of that law, which regulates the standard of overarching public interest, with the use of the conditional, “when the sought information ...”

In the second variant, the public interest test, at first glance, is applied only in actions related to the reactive segment of the right to access information, but not to proactive disclosure. Such a conclusion can be reached by a purely grammatical interpretation of Article 16, par. 1 of the Croatian Law, which contains the following formulation: “A public authority authorized to act on a request to access information as per Article 15, points 2, 3, 4, 5, 6, 7 and Article 3 of this Law, must, before reaching a decision, implement proportionality and public interest tests.” Yet we are of the view that the application of systematic, logical and teleological techniques of interpreting the whole text of the Croatian law leads to the conclusion that there is no legally justified reason to exclude the application of the test in relation to proactive obligations of public bodies.⁵³

In summary, with respect to the limitation of the right to access information in the proactive segment of that right, we hold the view that there is no reason for harsher content or time criteria relating to proactive availability of public sector information and/or time limitations to access instead of reactive availability, which includes the application of prescribed texts in the same way. As proactive measures are implemented on the initiative of the public body itself, that body must also officially apply the test to information it is obliged to publish.

Alongside that, a question arises; whether – irrespective of a prescribed test and the way in which it is applied in a certain case, and irrespective of other limitations of access prescribed in the reactive approach – it is necessary to be presumably accessible in the field of proactive information for a minimum of information necessary for exercising that segment of the right to access information, e.g. roughly in the scope defined by the catalogue (or its minimal part) recommended by Darbishire, and which was earlier presented in Chapter 4 of this study. Bearing in mind that conventional techniques of legal interpretation do not unilaterally lead to such a conclusion and bearing in mind the need to ensure legal security, we are of the view that only explicit regulation can be a foundation for such presumption of accessibility of proactively published information, irrespective of whether it is subject to limitations according to reactive access criteria.

⁵³ Further arguments in favor of that view are featured in, e.g.: Ivan Šprajc, “Obveze tijela javne vlasti prema hrvatskom Zakonu o pravu na pristup informacijama” [Obligations of Public Authorities according to the Croatian Law on the Right to Access Information], *Sveske za javno pravo 4 [Public Law Volumes]*, no. 13(2013), pp. 24-25. Regarding this question, the future practice of the first Croatian Information Commissioner, appointed last year, will be particularly important.

7.

Evaluation of the Existing Regulatory Framework in Bosnia and Herzegovina

The theoretical and comparative exposition to date is a basis for the evaluation of the existing Bosnian-Herzegovinian regulations in the field of proactive transparency, as part of the right to access information, and for recommending necessary interventions to that regulation.

7.1. Proactive Transparency According to Current Legislation in Bosnia and Herzegovina: Current State and Main Shortcomings

7.1.1. Lack of Appropriate Regulations in This Field

At the constitutional level, the right to access information is not an explicitly regulated right. There are regulations related to that right, which relate to the right of freedom of speech,⁵⁴ the public nature of parliamentary sessions⁵⁵ (except in exceptional circumstances, as per the rules) and the obligation of disclosing entire minutes of parliamentary debates, the right to participate in public business⁵⁶ and the direct application and supra-statutory position of the rights and freedoms envisaged by the European Convention.⁵⁷ According to available information, there is no constitutional or judicial practice in BiH related to the proactive segment of exercising the right to access public sector information.

⁵⁴ “Ustav Bosne i Hercegovine” [Constitution of Bosnia and Herzegovina] (UBiH), 1995, Article II. 3. h); “Ustav Federacije Bosne i Hercegovine” [Constitution of the Federation of BiH] (UFBiH), *Official Gazette of FBiH* 1/94, 13/97, 16/02, 22/02, 52/02, 18/03, 63/03, 9/04, 20/04, 33/04, 71/05, 72/05, 88/08, Article. 2. par. 1. t. I ; “Ustav Republike Srpske” [Constitution of Republika Srpska] (URS), *Official Gazette of RS* 21/92 – revised text, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 26/02, 30/02, 31/02, 69/02, 31/03, 98/03, 115/05, 117/05, Article 25.

⁵⁵ Article IV.3 i) of UBiH.

⁵⁶ Article 2, par. 2, section b) of UFBiH, Article 33 of URS.

⁵⁷ Article II.2 of UBiH.

Proactive transparency is not wholly regulated by the primary regulatory framework in BiH, i.e. neither by the state nor the entity-level freedom of access to information laws. The Law on Freedom of Access to Information in Bosnia and Herzegovina⁵⁸ (ZOSPI) does not contain most of the widely accepted elements of proactive disclosure. Explicit proactive regulations (Articles 18-20 of ZOSPI⁵⁹) apply to the obligation of aiding physical and legal persons in exercising the rights under that law, naming an information officer and the provision of their contact details to the Human Rights Ombudsman of BiH, as well as the obligation of disclosing and providing an Ombudsman, public and legal libraries, and when possible, publishing on the internet a free guide on access to information,⁶⁰ a register index of the type of information controlled by the public body (including the form of the available information and where it can be accessed), prescribed statistical data and annual reports. In addition, the following minimal detailed information is prescribed: position, policies, duties and organizational structure of a public body and its financial business, which includes at least a proposed budget and annual financial report, while it is in the Ombudsman's domain to prepare a guide and general recommendations for the application of the Law, including activities related to the ZOSPI in the Ombudsman's annual report and recommending guidelines on the application of the Law (Article 22 of ZOSPI). The Law does not prescribe mandatory proactive disclosure on the public body's website, nor the proactive disclosure of materials related to the participation of the interested public in the regulatory process, nor information on the public nature of public bodies' activities (public nature of meetings and the like).⁶¹ In addition, the information set out in Article 20 of ZOSPI makes up for just a small

⁵⁸ "Zakon o slobodi pristupa informacijama u Bosni i Hercegovini" [Law on Freedom of Access to Information in Bosnia and Herzegovina], *Official Gazette of BiH* 28/00, 45/06, 102/09, 62/11 and 100/13. For more information on the withdrawn Changes and Amendments Draft to the Law on Freedom of Access to Information in Bosnia and Herzegovina, which was in procedure in 2013 and generally about the evolution of ZOSPI, see, e.g. Ena Gotovuša, *Zakon o slobodi pristupa informacijama u BiH: nacrt, izmjene i dopune (ZOSPI BiH)* [Law on Freedom of Access to Information in BiH: Draft, Changes and Amendments (ZOSPI BiH)] (Sarajevo: Foundation Public Law Centre).

⁵⁹ Part of the criminal offence regulations contained in Article 22.a par. 1. pt. f)-j) of ZOSPI apply to those regulations.

⁶⁰ The following is the proposed minimum of information covered by the guide: information necessary for contacting the public body and its information officer, important elements of the process of filing a request with a sample request in written form, information on exemption categories related to access, information on the process of access to information, copying costs, legal remedies and all important deadlines, together with a referral to the register of types of information overseen by a public body.

⁶¹ Such regulations are contained in certain sector laws (e.g. "Zakon o sudovima u Federaciji Bosne i Hercegovine" [Law on the Courts in the Federation of Bosnia and Herzegovina], *Official Gazette of FBiH* 38/05, 22/06, 63/10, 72/10 and 7/13, Article 8), regarding public hearings, disclosing the composition of the court, providing notifications on the progress of a process and possible disclosure of court decisions and other information of interest to the public.

part of the information which should be proactively disclosed in order to reach an adequate level of proactive transparency.

The aforementioned shortcomings exist at the entity-level laws, i.e. The Law on Freedom of Access to Information in the Federation of Bosnia and Herzegovina⁶² and in Republika Srpska the Law on Freedom of Access to Information.⁶³ Namely, those laws do not contain material differences to ZOSPI BiH with respect to a proactive public.

We also note that in BiH media law, which in its administrative component enters into the area of information administrative law (see Chapter 2 of this study), does not enter the supporting regulation corps in this area. Namely, the provisions of media law at the legislative level apply to radio and television, while the press and electronic media are subject to self-regulation. Within the above framework, provision on proactive obligations of public bodies are contained in Article 38 of the Law on Communications,⁶⁴ which regulates the procedure of making Communications Regulatory Agency rules, which includes public consultation before they are reached. However, at the legislative level, there are no general provisions on the responsibilities of public bodies with respect to proactively making certain information available to the media.

7.1.2. Insufficient Regulation Quality and Lack of a Comprehensive Legal Framework

BiH has a lower level of quality regulation in this area than its neighboring countries, although BiH was the first in the region to enact a law which regulated the right to access information. Although the provisions of ZOSPI only to a lesser degree explicitly prescribe proactive obligations of public bodies, we can conclude that the general orientation of the Law, expressed in Articles 1 and 2, supports proactive transparency. There are also fragments in other laws which importantly support the concept of proactive transparency, but they are not joined in a coherent regulatory framework. Namely, according to Article 1 pts. a) and b) of ZOSPI, the aim of the Law is to establish that information controlled by a public body represents a public good of value and that public access to this information promotes greater transparency and responsibility of those public bodies, as well as that this information is key to the democratic process, or to establish that each person has the right to access this information at the greatest possible level in

⁶² “Zakon o slobodi pristupa informacijama u Federaciji Bosne i Hercegovine” [Law on the Freedom to Access Information in the Federation of Bosnia and Herzegovina], *Official Gazette of FBiH* 32/01 and 48/11.

⁶³ “Zakon o slobodi pristupa informacijama” [Law on Freedom of Access to Information], *Official Gazette of Republika Srpska* 20/01.

⁶⁴ “Zakon o komunikacijama” [Law on Communications], *Official Gazette of BiH* 31/03 and 75/06.

accordance with the law and that public bodies have a suitable responsibility to disclose information.⁶⁵

The interpretative provision under Article 2 of ZOSPI prescribes that ZOSPI is interpreted to have the aim of facilitating and promoting disclosure of information controlled by a public body to the greatest extent, without delay and at the lowest possible cost.⁶⁶

Regulations in this segment are fragmented and contained in a range of laws and other regulations of lower legal force. In that sense, we point especially to the Law on Administration,⁶⁷ as a systematic law related to the majority of public bodies. That Law contains a general provision on the accessibility of public bodies' activities to the public (Article 6) and regulates classical types of relationships of administration and clients, such as handling petitions and proposals, enabling the exercise of rights as effective and easy as possible, obtaining official documents ex officio, as well as compensation of charges caused through no fault of a party (Articles 39-44). Although the provision under Article 6 of the Law on Administration is an example of a classical provision on the transparency of administration, which inherits the tradition of such regulation from a time in which it surely did not contain the obligation of proactive transparency, it contains a capacity, in the spirit of legal development in this area, to become one of the foundations of regulating proactive disclosure of public bodies' information.⁶⁸ On the other hand, there are no provisions directly related to access to information among the provisions on the organization of public bodies under Article 45 of the Law on Administration.

When considering supporting standards of other regulations, it is important to also bear in mind the Law on Administrative Procedure⁶⁹ (ZUP), which regulates the principles of access to information and protection of data as well as the public principle under Articles 6 and 7, while the provisions of Chapter 6 point to the implementation of laws governing the protection of personal and secret data. ZUP also contains regulations on the inspection of files, the openness of oral hearings as well as informing a party on the reasons for not enacting an administrative

⁶⁵ The latter part of the above provision contains, in our opinion, references to proactive transparency.

⁶⁶ Although the provisions on the aims and interpretation of the law, as well as the principles of regulating certain matters are often considered just decorative or empty declarations, these are regulations which have a key role in the interpretation of open legal questions. Hence it is important to bear in mind the provisions of Act 1 and Act 2 of ZOSPI when interpreting obligations of public bodies.

⁶⁷ "Zakon o upravi" [Law on Administration], *Official Gazette of BiH* 32/02 and 102/09.

⁶⁸ Compare the gradual reinterpretation of the conventional right to freedom of expression, elaborated in Chapter 3 of the study.

⁶⁹ "Zakon o upravnom postupku" [Law on Administrative Procedure], *Official Gazette of BiH* 29/02, 12/04, 88/07, 93/09 and 41/13.

act on time, official records and reporting.⁷⁰ However, those provisions relate to the administrative process, i.e. the process of solving individual administrative matters and not all public bodies' actions. Though the formulation of Article 6, paragraph 1 has, of itself, a somewhat wider reach, or contains certain proactive elements, because it also covers the obligation of public bodies to enable parties access to prescribed forms and the body's website, it is important to bear in mind the reach of ZUP (Article 1, par. 1), which is limited to the segment of public sector activity related to administrative processes in specific legal matters.

In addition, proactive disclosure of information in BiH is partly regulated by acts which are not at the necessary level in the hierarchy of sources of law, nor is their reach wide enough, whether with respect to bylaws or so-called *soft law* regulations. For example, this relates to acts which partially regulate:

- Disclosure of content on official websites and/or technical standards of those websites⁷¹
- Public participation in preparation of regulations⁷²
- Accessibility of minutes of public bodies' meetings, disclosure of materials, access to meetings, public relations and the like, within the rules and other internal organizational acts.⁷³

⁷⁰ Ibid, Article 72, Articles 141-142 and Articles 284-285.

⁷¹ E.g. "Uputstvo o izradi i održavanju službenih internet stranica institucija Bosne i Hercegovine" [Development and Maintenance Manual for Official Websites of Institutions in BiH], *Official Gazette of BiH* 21/09; Agency for an Information Society of Republika Srpska, Preporuke za izradu i održavanje veb prezentacija institucija Republike Srpske [Recommendations on the Development and Maintenance of Web Presentations of Republika Srpska], (Banja Luka: Agency for an Information Society of Republika Srpska, 2011).

⁷² E.g. "Pravila za konsultacije u izradi pravnih propisa" [Rules on Consultation in Drafting Legal Provisions], *Official Gazette of BiH* 81/06, devised by the Council of Ministers of BiH; at the Federation BiH level – "Uredba o pravilima za sudjelovanje zainteresirane javnosti u postupku pripreme federalnih pravnih propisa i drugih akata" [Regulation on Rules for the Participation of the Interested Public in the Preparation Process of Federal Legal Regulations and Other Acts], *Official Gazette of FBiH* 51/12; "Smjernice za postupanje republičkih organa uprave o učešću javnosti i konsultacijama u izradi zakona Republike Srpske" [Guidelines on the Activities of Republic Authorities on Public Participation and Consultation in the Development of Laws of Republika Srpska], *Official Gazette of RS* 123/08 and 73/12.

⁷³ E.g. "Poslovnik Predstavničkog doma Parlamentarne skupštine Bosne i Hercegovine" [Rules of Procedure of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina], *Official Gazette of BiH* 33/06, Articles 90-93; "Poslovnik Predstavničkog doma Federacije Bosne i Hercegovine" [Rules of Procedure of the House of Representatives of the Federation of Bosnia and Herzegovina], *Official Gazette of FBiH* 69/07 and 2/08, Articles 29-31; "Poslovnik Narodne skupštine Republike Srpske" [Rules of Procedure of the People's Assembly of Republika Srpska], *Official Gazette of RS* 3/11, Articles 271-276; "Poslovnik o radu Predsjedništva Bosne i Hercegovine" [Rules of Procedure of the Presidency of BiH], *Official Gazette of BiH* 10/13 and 32/13, Articles 26 and 27; "Pravila Ustavnog suda Bosne i Hercegovine" [Rules of the Constitutional Court of Bosnia and Herzegovina], *Official Gazette of BiH* 22/14, Articles 13-15.

7.1.3. Inadequate Legal Protection of Persons Authorized to Access Information

The existing framework of inspection of the implementation of the Law (Act 22.b), under the authority of the Administrative Inspectorate of the Department of Justice of BiH does not give unambiguous authority to inspectors to oversee the implementation of proactive measures. According to information which Analitika received in March 2014 from the chief administrative inspector, the existing inspection oversight is related only to reactive measures.⁷⁴ In the Bosnian-Herzegovinian legislature there are no other provisions on the protection of a person authorized to access information regarding a proactive public. For instance, the Croatian Law on General Administrative Procedure⁷⁵ contains provisions applicable to proactive measures about additional forms of legal protection from administrative actions outside the administrative process, such as protection of persons who file a petition by which ex officio procedures are begun, informing before starting a procedure and protection from other types of activities of administrative bodies. These are instruments which override the protection of a party in an administrative procedure and enable, among others:

- Persons authorized to access information to challenge the refusal of a relevant body and to start an ex officio oversight/inspection procedure of fulfilling proactive obligations of public bodies (protection of the petitioner), or
- Starting a procedure of legal protection due to the failure to act by a body obliged to apply proactive measures, while the procedure itself entails an objection to the head of that body and the possibility of challenging a negative decision (administrative action) about the objection before the responsible body and court (protection from other forms of action by public legal bodies).

7.1.4. Lack of Centralized Information and Documentation Activity

There is no public body in BiH responsible for centralized information and documentation activity as institutional support to proactive transparency, within which, among other things, there is proactive disclosure of official documents and guides to public bodies and public office bearers, information on political parties subject to prescribed disclosure and the like. The Digital Information and

⁷⁴ Interview with Emir Mehmedović, chief administrative inspector, Administrative Inspectorate of the Department of Justice of BiH, March 4, 2014; “Freedom of Access to Information Act in BiH”, Article 22b.

⁷⁵ “Zakon o općem upravnom postupku” [Law on General Administrative Procedure], *Official Gazette of Croatia* 47/09, Articles 42, 155 and 156.

Documentation Office of the Government of Croatia⁷⁶ (until recently Croatian Information and Documentation Referral Agency - HIDRA⁷⁷) is defined as an expert office of the Government of Croatia authorized to carry out information and documentation activities, which ensures unified and permanent accessibility of public official documents and Government of Croatia information for informational and reuse purposes, and which covers the management of the Central catalogue of official documents prescribed within proactive measures of the Croatian Law on the Right to Access Information. The Office ensures accessibility and reuse to all users impartially and under the same conditions.

In order to foster the conditions for being informed and for the reuse of documents and information, the Office performs expert, analytical, advisory, coordination and administrative activities, and especially:

- Composes the digital Central register of official documents of the Government of Croatia based on the Law on the Right to Access Information and publishes it on the information and documentation Office website
- Coordinates and follows the transfer of information to the Central catalogue
- Works on the preparation of information and contents for the Central state website
- Based on official information, prepares and manages databases on public authorities in the role of public document creators
- Based on official information and documentation, creates and manages a database of political parties registered in the Republic of Croatia
- Based on the Law on Financing Political Activities and Election Advertising,⁷⁸ creates and manages the database of annual financial reports of political parties, independent representatives and members of representative bodies of local and regional administration elected from a group of voters list and financial reports about the financing of election advertising of political parties, independent list holders, or the holders of lists of groups of voters and candidates
- Shapes criteria and organizes the gathering of official documents and information
- Shapes and maintains the website for the display and reuse of official documents and information

⁷⁶ “Uredba o digitalnom informacijsko-dokumentacijskom uredu” [Regulation of the Digital Information and Documentation Office]; *Official Gazette of Croatia* 66/13.

⁷⁷ At the time of writing this study, the website <http://www.hidra.hr> is still active and it will later be replaced by the website <http://www.digiured.hr>.

⁷⁸ “Zakon o financiranju političkih aktivnosti i izborne promidžbe” [Law on Financing Political Activities and Election Advertising], *Official Gazette of Croatia* 24/11, 61/11, 27/13 and 48/13 – revised text.

- Creates documentation tools for the area of official information (glossary and classification), which is simultaneously applied in the management of materials covered by the Catalogue and databases on the creators of public documents
- Participates in the development of program modules for the acquisition, processing and dissemination of public official information and documentation
- Based on international standards, develops procedures for the exchange of documents and data and, when necessary, applies them to communication with other documental systems at the national and international level
- Determines rules and recommendations on handling official information and documentation
- Participates in the creation of an informational infrastructure of public authorities
- Shares expert knowledge and use of own informational services through presentations, workshops and lectures
- Participates in programs of professional development and specialization of state officials and other users in the area of information and documental activity
- Provides expert help to public authorities, citizens and representatives of civil society organizations in areas of the Office's authority
- Cooperates with relevant international expert bodies
- Cooperates with the Office of Official Publications of the European Union on the development of program modules and implementation of documental principles.

7.2. The Problem of Limitation after Data Disclosure in the Bosnian-Herzegovinian Context

With respect to laws relating to matters which are usually subject to limitations to access to public sector information, we do not find that the provisions of the Law on the Protection of Personal Data⁷⁹ (ZZLP), nor the Law on Protection of Confidential Data⁸⁰ (ZZTP) have limited proactive disclosure of public sector information according to standards considered in chapters 4 and 5 of this study.

⁷⁹ “Zakon o zaštiti ličnih podataka” [Law on the Protection of Personal Data], *Official Gazette of BiH* 49/06, 76/11 and 89/11 – corr.

⁸⁰ “Zakon o zaštiti tajnih podataka” [Law on the Protection of Confidential Data], *Official Gazette of BiH*, 54/05 and 12/09.

That particularly relates to information that under ZOSPI would explicitly be subject to proactive disclosure.

Here it is necessary to bear in mind the provision in Article 8 of ZOSPI, according to which a privacy-related exception is limited to personal interests related to a third party's privacy, not all of their personal data, as well as the provision in Article 26, point 4 of ZOSPI, according to which legal acts adopted after that law, whose aim is not the change of the aforementioned law, will not limit the rights and obligations established by that law. The usual presumptions of access to personal data are set out by the provisions of Article 17 of ZZLP, firstly the aim related to the conduct of business within the authority established by law or exercising lawful interests of users; any widening or other enabling of access to personal data falls under the definition of personal data management under Article 3, subsection 5 of ZZLP and the aim of the Law (Article 1, point 1) is linked to ensuring the protection of human rights and basic freedoms (see also the earlier mentioned Article 8 of ZOSPI). Furthermore, although proactive disclosure, as a rule, does not feature own-initiative discovery of confidential data, certain provisions of ZZTP may be relevant here, primarily protected goods as per Article 8 and the provisions of Article 9 (prohibition of data classification with the aim of concealing a criminal offence or an administrative error), Articles 10-12 (general conditions for access to confidential documents and the obligation of their safekeeping), Article 22 (obligation of declassification of data when legally prescribed conditions are met), as well as Article 25 (declassification of data).

Therefore, the regulation of typical limitations of access to information in BiH does not deviate from widely accepted standards, does not pose difficulties for further regulation of proactive measures, nor does it give a basis for concluding that limitations should be stricter in the proactive than in the reactive segment of access to information.

8.

How to Improve Regulation of Proactive Measures in Bosnia and Herzegovina?

For improving the existing regulative situation, it is firstly necessary to supplement ZOSPI, as the law most suitable to an all-encompassing regulation of proactive measures, with suitable cogent provisions, formulated precisely enough, featuring at least the following:

a) Content of proactive measures

- 1) Prescribing the quality standards of proactively disclosed information (primarily: accuracy, relevance, integrity, timeliness, intelligibility)
- 2) Prescribing deadlines for proactive information disclosure, their updating and accessibility of earlier versions after updating
- 3) Prescribing technical and other standards of accessibility of other proactively disclosed information which guarantee easy access under the same conditions, while the primary method of publishing is the internet (without charge for that method of access)
- 4) Prescribing minimal content of information that public bodies proactively disclose on their websites
- 5) Prescribing minimal level of document disclosure with the aim of consulting the interested public in drafting laws and general acts
- 6) Prescribing the minimal level of information provided to the public about sessions of public bodies in order to realize the public function of their work
- 7) Regulating the limitations to the right to access information with respect to proactive disclosure in a range equal to limitations in the reactive segment
- 8) Establishment of a central register of most important information subject to aforementioned publication under 4) – 6), and in a suitable timeframe, establishment of a centralized information and documentation office, which would supplement the quality of the public service in this area
- 9) Authorizing an independent subject, if possible, with further regulation under bylaws of certain technical aspects of the aforementioned matter
- 10) Subjecting the non-implementation or insufficient implementation of all proactive measures to suitable criminal sanction provisions.

b) Minimal content of a public body's website (proposed measures 4-6)

We do not see valid reasons for the minimal content of information that public bodies proactively disclose on their websites in BiH to be narrower than the catalogue proposed by Darbshire (see Chapter 4 of this study). At the regional level, the provisions of the Montenegrin Law on Freedom of Access to Information and the Croatian Law on the Right to Access Information are closest to that list.

Regarding the preciseness of regulating the aforementioned content, the Annex to the Hungarian Law on Access to Information by electronic means (see subchapter 5.2 of the study) can be used as a good example (see subchapter 5.2 of the study), as an additional comparative instrument, as well as the Serbian Guideline on the Development and Disclosure of the Booklet on a Public Body's Activities.

c) Measures proposed under 5) and 6)

With respect to measures listed under 5) and 6), there is no reason to go below the level of provisions of Article 11 and 12 of the Croatian Law.

According to Article 11 of that Law, public bodies responsible for the development of the draft law and bylaws are obliged to publish on their websites, in order to inform the public, an annual plan of regulatory activities, a consultation plan on draft laws and other regulations related to their field and draft laws and other regulations subject to public consultation with the interested public, usually over 30 days, with the publication of reasons for decisions and the aims of the consultation process. After the consultation process, public bodies are obliged to inform the interested public about accepted and rejected objections and proposals on their website, where they should publish the report on the consultation with the interested public, which they submit to the Government of the Republic of Croatia. The aforementioned applies to the suitable procedure of adopting general acts of local and regional governments and legal persons with public authority, which regulate matters within their competence, enabling the direct realization of the needs of citizens or other matters of general welfare of citizens and legal persons in their area, or the area of their activity (community and housing planning, spatial planning, public utilities and other public services, environment protection, etc.)

However, According to Article 12 of the above law, public bodies are obliged to inform the public of the schedule of sessions or meetings of official bodies and their timing, the mode of operation and the possibility of direct insight into their work, as well as the number of persons who can simultaneously be given direct insight into the work of public authorities, while taking care with the order of application. Public bodies are not obliged to allow direct insight into their work with respect to matters from which the public must be excluded, or with respect to information subject to limitations of the right to access according to the provisions of that law.

d) Protection of persons authorized to access information and official oversight

In the area of protection and oversight instruments, it is necessary to undertake at least the following two measures:

1) Widening the inspection of all forms of exercising the right to access information

2) Introducing an institute which would enable a person authorized to access information to lodge a direct objection to a head of a public body due to non-action or insufficient action with respect to proactive responsibilities, with the right of having that objection decided upon by an administrative act and with the higher-instance and judicial protection which follows such an administrative act.⁸¹

⁸¹ Compare the aforementioned Article 156 of the Croatian Law on General Administrative Procedure.

9.

Epilogue

The proposed interventions to the text of ZOSPI would probably lead to the need to amend parts of the remaining provisions of the Law (particularly regarding the limitation of access and the public interest test, possibly also regarding a complaints body), but the above is not the subject of this study, nor are non-legal measures which would logically follow the improvement of regulation of proactive transparency, such as educational, popularization, organizational and similar measures.

In any case, as much as the proposed measures might seem an important and ambitious intervention into the Bosnian-Herzegovinian legislation, they are only minimal steps in catching up with the proactive segment of the right to access information and its widely accepted standards and enabling citizens and legal persons in BiH to truly exercise their right to access information in the proactive component of that right. Such interventions are most often a simultaneous test of the existence of political will for the true development of a democratic society, legal state and a public sector open to the users of its services.

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