

A NEGLECTED STANDARD IN BOSNIA AND HERZEGOVINA: THE PROACTIVE DIMENSION OF THE RIGHT TO ACCESS INFORMATION

Author: Nermina Voloder

The legal framework on the right to access information in Bosnia and Herzegovina does not contain an established duty of public institutions to voluntarily disclose information in their possession relevant to the public, even without a specific request. Such a legal framework deviates significantly from recent international standards in this area, which stipulate that public institutions must not only reply to individual requests, but that they should proactively disclose certain categories of information in the public interest. The concept of proactive transparency is not adequately regulated in such a legal framework, which is reflected, among other things, in the fragmentation and only partial regulation of the duty of proactive disclosure of information in the public interest, as well as in the lack of legal protection of information users. An analysis of regulations relevant to the proactive segment of the right of access to information indicates the necessity of establishing in law minimal standards relating to the content and quality of the publication of information in the public interest.

MAIN FINDINGS

1. INTRODUCTION

The Freedom of Access to Information Act (subsequently FOIA), enacted at the state level in 2000 and at the entity level a year later, established the right of each individual in Bosnia and Herzegovina (BiH) to access information controlled by public bodies. Information in the possession of authorities is defined as a public good and the public access to it as a necessary precondition of democratic processes. According to those principles, FOIA establishes the right of access to a wide spectrum of public information, with the possibility of limiting that right when there are justified, legally established reasons for such a limitation. Nevertheless, despite

the formulation that “public authorities have a corresponding obligation to disclose information”,¹ the FOIA laws of BiH have regulated the access to information solely as the right of an individual to seek information which is in the possession of public authorities by filing a written request. The text of the Act and the subsequent changes and amendments do not stipulate proactive publication of information on public authorities’ own initiative, although this practice has been adopted as an indispensable part of open and transparent government in an increasing number of countries.

In the absence of such regulations in FOIA legislation in BiH, this Policy Brief, based on a larger study soon to be published by

¹ “Zakon o slobodi pristupa informacijama u Bosni i Hercegovini” [Freedom of Access to Information Law in Bosnia and Herzegovina], *Official Gazette of BiH* 28/00, 45/06, 102/09, 62/11 and 100/13, Article 2, Section b.



KEY RECOMMENDATIONS

1. It is necessary to legally proscribe the minimum information that public authorities are obliged to proactively disclose on their websites.
2. To enable effective transparency, it is necessary to define quality standards of disclosed information, so that information is not only published, but correct, relevant and understandable to the wider public.
3. Relevant authorities in Bosnia and Herzegovina should establish a central website intended for the disclosure of all information that public authorities are obliged to proactively disclose.
4. It is necessary to widen the oversight of all forms of the exercise of the right of access to information, including the proactive dimension of that right.

Analitika,² provides an overview and analysis of current regulations in BiH relevant to the proactive segment of freedom of access to information, and identifies key limitations and shortcomings in that domain. The conclusion to the Brief contains framework recommendations for the improvement of framework regulations and the mechanisms for enabling the proactive dimension of the right to freedom of access to information.

2. THE IMPORTANCE OF PROACTIVE TRANSPARENCY, INTERNATIONAL STANDARDS AND GOOD PRACTICES

In this context, the proactive disclosure of information relates to the duty of public authorities to voluntarily, and in the absence of individual requests, disclose certain types of information in the public interest. The proactive approach brings significant benefits for those who seek and

use the information, as well as for public administration. Citizens, legal persons and public sector organizations are thereby able to directly access information and accordingly monitor the work of authorities more efficiently, without being subjected to administrative procedures and costs which may arise in such a process. On the other hand, the administration is significantly relieved in terms of processing individual requests, as, in the case of proactive publication, only one decision, regarding the publication of a certain information category, is necessary, rather than a range of decisions regarding individual requests for information.³ In addition, no system of transparency can be based solely on individual requests, as such an approach leads to significant inequality in the access to public information.⁴ Under those circumstances, only a small number of citizens – those who have filed requests for access to information – are able to use that information to make quality decisions and actively participate in public processes. In order to avoid that,

² The policy brief is based on the study entitled *Proactive Transparency in Bosnia and Herzegovina: Conditions and Perspectives in the Light of International Standards and Comparative Solutions* by Alen Rajko, to be published by Analitika – Center for Social Research (in preparation).

³ Mario Savino, *The Right to Open Public Administration in Europe: Emerging Legal Standards*, SIGMA Papers, no. 46 (Paris: OECD Publishing, 2010), p. 33.

⁴ Access Info Europe, *Open Government Standards: Transparency Standards* (Madrid: Access Info Europe, 2014), p. 6.

public authorities should, on their own initiative, provide simple, timely and efficient access to all important information in their possession.

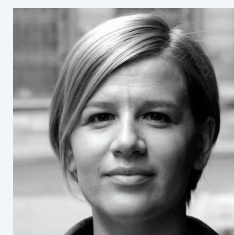
The benefits of proactive publication of information are also reflected in international standards relating to the freedom of access to information, which more and more explicitly stipulate the duty of proactive publication of information. For example, the Council of Europe Convention on Access to Official Documents, which BiH ratified in 2012 (but which has not yet come into force), stipulates the publication of information in the possession of public authorities on their own initiative, with the aim of promoting transparency and enabling informed public participation in the discussion on matters of public interest.⁵ The Convention refers to some of the best practice legal solutions in certain countries, which legally bind public authorities to disclose information about the “structure, personnel, activities, rules, policies, decisions, delegating responsibilities, information on right to access information and the ways of lodging requests for access to official documents, as well as other information in the public interest.”⁶

The activities of non-governmental organizations and multilateral initiatives especially contribute to the concretization of international standards in this area. For example, Article 19, an organization which deals with the protection of freedom of speech and information, has developed a list of principles based on the best legal solutions to the freedom of access to information in the world.⁷ According to this document, public institutions should be obliged to disclose a minimum of the following information categories:

- Operational information on how a public authority functions, including the costs, auditors’ reports, standards and achievements, especially in the case of a public authority that provides direct services to the public;
- Information on citizens’ requests and complaints to the public authority;
- A guide on how the public can participate in the discussion of important legislation proposals or public policy;
- The type of information held by public authorities and the manner in which such information is held;
- The contents of any decision or policy which has an impact on the public, together with the reasons and materials on which the decision was reached.

By analyzing the best comparative legal solutions which include proactive transparency, as well as relevant international instruments, Darbshire widens this list and suggests that public authorities should proactively disclose information about staff, public procurement, subsidy recipients, expenditure and income, as well as minutes of parliamentary sessions, court decisions, strategies, plans, publications, registers, lists and databases.⁸

The practice in other countries also suggests a widening reach and importance of the principles of proactive transparency. A significant number of countries across the world, including countries in the region, have established suitable legal frameworks which stipulate proactive measures for the exercise of the right to access information. According to a recent analysis of the legal frameworks of 26 European countries, a large majority of laws stipulate a significant number of proactive



Nermina Voloder is a project coordinator and research assistant at Analitika – Center for Social Research. She holds an MA degree (2013) from the European regional programme “Democracy and Human Rights in South-East Europe”, a joint postgraduate programme of the University of Sarajevo and University of Bologna. She holds an undergraduate degree in journalism from the Faculty of Political Science, University of Sarajevo. She has five years professional experience in the media.

⁵ Council of Europe, “Council of Europe Convention on Official Documents”, CETS, no. 205.

⁶ Council of Europe, Council of Europe Convention on Official Documents: Explanatory Report.

⁷ Article 19, *The Public’s Right to Know: Principles on Freedom of Information Legislation* (London: Article 19, 1999), p. 3.

⁸ Helen Darbshire, *Proactive Transparency: The Future of the Right to Information?: A Review of Standards, Challenges and Opportunities* (Washington: World Bank Institute, 2011), p. 21.

measures, while in only five countries relevant laws do not contain such measures.⁹ The results of an Organization for Economic Co-operation and Development (OECD) survey conducted in 32 states show that information about the structure and functioning of public authorities, budget information and annual reports of government departments are proactively disclosed in all OECD member states, with rare exceptions.¹⁰

States in the region largely follow the aforementioned trend in the area of access to information. Namely, freedom of access to information laws in Serbia, Croatia, Slovenia, Macedonia and Montenegro stipulate a whole range of proactive measures, including determining the minimum mandatory content on the websites of public authorities.¹¹ The Freedom of Information Law of Croatia obliges public authorities to disclose 15 categories of information on their websites, including minutes of government institution meetings, information on sources of financing, budget and budget execution, information on subsidies awarded, grants and donations, as well as lists of recipients and the amount of financing.¹² In addition, all states in the region, except for Macedonia, have established some form of inspection of the execution of proactive transparency measures.¹³

As the analysis will further show, the legal framework in BiH contains some elements of proactive measures, but the level and quality of the regulation of such measures does not even remotely correspond to the aforementioned international standards and positive trends in the legislature of other states, especially in Europe.

3. EVALUATION OF THE NORMATIVE FRAMEWORK IN BOSNIA AND HERZEGOVINA

A systematic analysis of relevant regulations in BiH shows that the legal regulation of the proactive dimension of exercising the right to access information in BiH is lacking in the following ways:

1. *Inadequate Regulation of the Right to Access Information*

Inadequate regulations in this area in BiH are firstly manifested in neglecting the obligation of proactive publication of information in the possession of public sector institutions. It is true that the FOIA in BiH contains some elements of proactive transparency. Specifically, the law was enacted to ensure that “each person has the right to access information at the highest possible level according to law and that public authorities have a corresponding obligation to disclose information.”¹⁴ The part of the law which covers the aims of its enactment contains a provision that information controlled by public authorities represents public goods of value and that public access to such information promotes greater transparency and responsibility of those public authorities. Finally, according to Article 2 of FOIA in BiH, “the law is interpreted with the aim of easing and promoting, to the fullest extent and without delay, the publication of information controlled by public authorities at the lowest acceptable price.” However, it is important to note that neither FOIA in BiH, nor the relevant entity-level laws, explicitly state the obligation of disclosing information on the initiative of the public

⁹ Right2INFO – Good Law and Practice. “Administrative Information and Proactive Publication”.

¹⁰ Organisation for Economic Co-operation and Development (OECD), *Government at a Glance* (Paris: OECD Publishing 2013), p. 143.

¹¹ For more information, see: Rajko, *Proactive Transparency in Bosnia and Herzegovina*.

¹² “Zakon o pravu na pristup informacijama” [Freedom of Information Law], *Official Gazette of Republic of Croatia* 25/13, Article 10.

¹³ For more information, see: Rajko, *Proactive Transparency in Bosnia and Herzegovina*.

¹⁴ “Freedom of Access to Information Law in BiH”, Article 2.

authorities. According to the law, filing a request is a condition of access to public information, even when such information is in the wider public interest. Furthermore, the law does not stipulate even the minimum level of information each public authority should disclose proactively, which is a significant shortcoming, bearing in mind international standards and comparable experiences.

2. Inadequate Legal Protection of Information Users

Citizens, legal persons, civil society organizations and even public authorities themselves do not have adequate legal protection regarding proactive measures in the area of the right to access information. Since 2013, when the final changes and amendments of the state-level FOIA were adopted, supervision of the enforcement of this law was entrusted to the Administrative Inspectorate of the Ministry of Justice of BiH. However, even in the case of inspection, the law treats citizens and other users of information as “request submitters”. As a result of such a formulation, a public authority is subject to criminal proceedings or a corresponding fine if the authority does not respond to an individual request. However, public authorities will not be sanctioned if they do not voluntarily provide information to the wider public, regardless of its importance. Besides the fact that the possibility of control of proactive publication is not precisely defined in the responsibilities of the Administrative Inspectorate, there are also no other legally binding instruments for supervising the implementation of such measures, such as a freedom

of information officer or an information agency.¹⁵

3. Fragmented Standardization of Proactive Transparency

The responsibility of the proactive disclosure of information is proscribed by several acts which only partially deal with this problem.¹⁶ Proactive measures can be found in the Law on Administrative Procedure BiH (ZUP), which proscribes the obligation of enabling access to information and establishes that administrative bodies and public institutions must enable parties’ access to “necessary data, prescribed forms, public authority websites and provide them other notices, advice and professional assistance.”¹⁷ Article 6 of the Administrative Law,¹⁸ as a systematic law covering most public authorities, contains a general provision on access to the work of public authorities, which has the capacity to be one of the foundations of the regulation of proactive disclosure of information in possession of public authorities. However, one reinterpretation of one act of this law is not sufficient for comprehensive regulation of this area. In other words, although existing regulatory fragments support the concept and practice of proactive transparency, a coherent normative framework is lacking in this area.

4. Lack of Adequate Regulations

Important segments of proactive transparency are regulated by inadequate legal acts, which are not at the appropriate level in terms of the hierarchy of legal acts. For example, proactive measures relating to public consultations in the

¹⁵ The institution of a Freedom of Information Officer, which oversees the monitoring of the exercise of the right to access information exists in Serbia and Slovenia and more recently in Croatia, while in Montenegro, the responsible body is the Agency for the Protection of Personal Data and Free Access to Information.

¹⁶ Analitika – Center for Social Research, *Proactive Transparency in BiH: From Cacophony towards Harmonization* (Sarajevo: Analitika, 2014).

¹⁷ “Zakon o upravnom postupku” [Law on Administrative Procedure], *Official Gazette of BiH* 29/02, 12/04, 88/07, 93/09 and 41/13, Article 6, Section 1.

¹⁸ “Zakon o upravi” [Administrative Law], *Official Gazette of BiH* 32/02 and 102/09.

process of drafting laws, as well as the openness of public authorities' sessions, are regulated by bylaws. Specifically, rules on public consultation in the process of the drafting of laws oblige relevant public authorities in BiH to publish specific bills on their websites, giving the opportunity to all interested parties and citizens to comment.¹⁹ Mandatory content of official websites is also proscribed by instructions, which serve as general guidelines for determining mandatory information content and the standardization of the public authorities' internet presence.²⁰ In summary, although some bylaws in BiH proscribe individual proactive measures to a certain extent, and in some cases with sufficient quality and detail, such practice is not in accordance with the tendencies in the practice of other states, which suggests that this area should be regulated by an act at the appropriate level in the legal hierarchy – that is, a law.

5. Inadequate Institutional Framework

There is no public authority at BiH level responsible for gathering centralized information and documentation which would support proactive transparency. Judging by the example from the Republic of Croatia,²¹ such a body could, as part of its activities, and among other things, proactively disclose relevant official documentation, guidelines for communicating with public authorities and public officers as well as

the oversight of their work, information on political parties subject to publication, etc. Websites on which public information is disclosed have been established as a result of the work of such authorities and have been used as a tool for releasing information from one point in a growing number of countries, while offering users the possibility to seek and find specific information on the activities of various public institutions.²² Initial activities in BiH towards centralizing public authorities' data on the internet have been undertaken by establishing a central website of the public administration of Republika Srpska (<http://www.esrpska.org>), which should develop into a service for the users of public services. However, other levels of government in BiH have not yet undertaken even those initial steps.

4. RECOMMENDATIONS

In order to improve the existing normative framework in BiH, it is firstly necessary to amend FOIA as the most appropriate law for the overall regulation of proactive measures. Accordingly, recommendations for improving the legal framework inevitably include the following legal interventions:

1. Proscribing the minimum content of information which public authorities must proactively disclose on their websites. Accordingly, it is necessary to start a process

¹⁹ "Pravila za konsultacije u izradi pravnih propisa" [The Rules on Consultation in the Development of Legal Regulations], *Official Gazette of BiH* 81/06, Article 6; "Uredba o pravilima za sudjelovanje zainteresirane javnosti u postupku pripreme federalnih pravnih propisa i drugih akata" [Decision on the Rules for the Participation of Interested Public in the Process of Preparing Federal Legal Provisions and Other Acts], *Official Gazette of the Federation of BiH* 51/12, Article 9, Section b; "Smjernice za postupanje republičkih organa uprave o učešću javnosti i konsultacijama u izradi zakona" [Guidelines for the Activities of Republic Authorities in Public Participation and Consultations in the Drafting of Laws], *Official Gazette of Republika Srpska* 123/08.

²⁰ "Uputstvo o izradi i održavanju službenih internetskih stranica institucija Bosne i Hercegovine" [Guideline on the Development and Maintenance of Official Websites of Bosnia and Herzegovina], *Official Gazette BiH* 21/09. Also see: Agency for an IT Society of Republika Srpska, Preporuke za izradu i održavanje veb prezentacija institucija Republike Srpske [Guidelines for the Development and Maintenance of Web Presentations of Republika Srpska] (Banja Luka: Agency for an IT Society of Republika Srpska, 2011).

²¹ See Croatian Information-Documentation Referral Agency, <http://www.hidra.hr> (The website will soon be replaced by the website <http://www.digiured.hr>).

²² The most successful example of a centralized website for transparency is the British website <http://data.gov.uk>. The concept for this website was used as a model for initiating similar projects in other states.

of gradual specification and harmonization of standards for publication, which also requires consultations with a wider circle of interested parties. It is necessary to identify the types of information that each authority should disclose at their own initiative, according to best practice legal solutions in the world.²³

2. Proscribing quality standards of proactively disclosed information. When proactively disclosing information, it is not only the type of disclosed information that is important. The way it is disclosed is equally important. Accordingly, published information must be correct, relevant, timely, understandable to the wider public and made available primarily on the internet, but also via other channels, such as media, libraries, offices, etc.

3. Proscribing technical and other standards regulating the availability of proactively disclosed information. As well as the necessity for free access to relevant information it is also necessary to enable easy and equal access to information for all users, by utilizing the benefits of the medium of the internet.

4. Proscribing deadlines for proactive publication of information and for updating the information, as well as for subsequently making prior versions of the information available. The guiding principle in this segment of regulation is that information needs to be disclosed as soon as

possible, if possible immediately after it is gathered, as the timely publication and updating of information increases its value to the public accessing such information.

5. Establishing a central website for the publication of information which public authorities are obliged to disclose on a proactive basis. A centralized website for the publication of information, as well as establishing authorities for its oversight, would yield multiple benefits even in the current, incomplete normative framework, and would certainly be of even greater importance in the case of thorough standardization of proactive transparency in BiH.

6. Widening oversight of all forms of the exercise of the right to access information. As proactive publication of information is an integral part of the right to access information, an oversight body should be authorized to monitor whether public authorities are adequately fulfilling the obligation to proactively disclose information, based on clearly defined parameters.

7. Enabling complaints to the heads of public authorities, or to an independent oversight body, if the institution is not disclosing the minimum information which it is legally bound to disclose and regularly update. Decisions on citizen complaints should be reached in a process which allows appeals or possible dispute resolution in court.



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²³ See footnotes 9, 10 and 11 and accompanying text.

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For more information,
please contact:

Analitika – Center for
Social Research
www.analitika.ba
info@analitika.ba

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