

LEGISLATIVE PROPOSAL

OF AMENDMENTS TO THE ACT ON THE RIGHT OF ACCESS TO INFORMATION

Article 1

Article 1 of The Act on the Right of Access to Information (*The Official Gazette*, no. 172/03) is amended and it states:

«This Act regulates the right of access to information possessed, disposed of or controlled by public authorities, prescribes the principles of the right of access to information, exceptions to the right of access to information and procedures for the exercise and the protection of the right of access to information, special provisions on the bodies of public authority and penalty clauses»

Comment:

The purpose of the amendment to this Article is to reflect the true content of the Act. The determinants contained in the text of the Act and in the heading are therefore added to the provision of the Article.

Article 2

Article 2 of the Act is amended and it states:

«The objective of the right of access to information is to ensure the exercise and protection of the interest and the right of the public to know, in order to make a free and democratic society possible as well as a transparent and open system of government.»

Comment:

The amendment of this Article establishes as the purpose of the Act «the exercise and protection of the interest and the right of the public to know, in order to make a free and democratic society possible as well as a transparent and open system of government» Thus, the criteria is set for evaluating the purpose of publishing information or the purpose of access to information. Such phrasing reflects the interrelationship of the regulated right and the exercise and protection of the right of the public to gain access to the information in possession of the bodies of public authority for the purpose of creating a free and democratic society, and a transparent and open system of government. This puts the right of access to information within the democratic framework of a free society and in the context of controlling the system of governance. This phrasing may better serve as a guide for understanding the meaning of the provisions of the Act and is thus more appropriate than the phrasing of the provision of the existing Act on the Right of Access to Information which gives a very technical description of the right regulated by the Act.

Article 3

Article 3 Paragraph 1 Clause 1 of the Act is amended and it states:

«1) «The beneficiary of the right to information» is any domestic or foreign, physical or legal person, as well as any potential claimant of special rights and duties.»

Comment:

In Article 3 Paragraph 1 Clause 1 of the Act the phrase at the end «who requests access to information» must be omitted since a person is entitled to the right to information even when he/she does not request access to information (for example, it is obligatory to publish information on the Internet on regular basis which means that in this situation there is no «request» for access to information but there are still «beneficiaries» that can access the information.

Instead of the above phrasing, it should be stated «as well as any potential claimant of special rights and duties», which is in accordance with the provisions of the Act on Civil Procedure in relation with institute ius standi, and it can refer to, for example, a residents of a building, a group of citizens and similar.

Article 4

The heading above Article 4 is amended and it states:

«THE PRESUMPTIONS OF PUBLICITY, FREE ACCESS, RESTRICTIVNESS AND PROPORTIONALITY OF RESTRICTIONS»

Comment:

The heading above Article 4 must be changed since it currently states « The Assumptions of Public and Free Access and Restrictions» which would mean that, apart from the assumption of public and free access, there is also an assumption of restrictions. By adding the terms restrictivness and proportionality of restrictions the heading would reflect the full and real meaning of the provision of this Article of the Act.

Article 5

Article 4 Paragraph 4 of the Act is amended and it states:

«(4) Exceptionally, the right of access to information may be limited in cases and in the manner prescribed by this Act, if deemed necessary for the protection of a compelling legitimate interest based on the Constitution or law and necessary in a free and democratic society.»

Comment:

The phrase «if deemed necessary for the protection of some compelling legitimate interest based on the Constitution or law and necessary in a free and democratic society» is added to this Article and it serves as a part of the proportionality test, that is the criteria, in assessing whether the right of free access to information can be limited. Based on the European Convention on the Protection of Human Rights and Fundamental Freedoms, and this formula is in accordance with the limitation clauses of certain provisions of that Convention, the phrase «necessary in a free and democratic society» presents a standard for the proportionality test in its narrow meaning. Adding this phrase to the existing Act on the Right of Access to Information presents only one of the elements of the overall proportionality test which creates a whole in combination with the phrase that is added to Article 6 of this Proposal. Thus, the phrasing of this Article regulates the possibility of limitation as well as the method and conditions for the implementation of limitations of this right (hence, there needs to be a compelling and legitimate interest based on the Constitution or some other law and the suggested limitation must also be necessary in a free and democratic society which corresponds to the framework mentioned in Article 2- The purpose of the Act), while Article 6 regulates the scopes, that is, a very limited scope of limitations of this right.

It is also important to emphasize that limiting the right of access to information is possible only by the standards stipulated by the Act on the Right of Access to Information, and not by the standards introduced by any other law which would thus circumvent the cogent limitation provisions from Article 8 of the Act on the Right of Access to Information.

Article 6

In Article 4 of the Act after Paragraph 4 a new paragraph is added which states:

«(5) All limitations of the right of access to information from Paragraph 4 of this Article must correspond to the nature of the need for limitation in every individual case and they must not be interpreted in a way that would lead to a suspension or limitation of the right of access to information to the extent greater than the one provided for in Paragraph 4 of this Article.»

Comment:

This Paragraph introduces a second element of the proportionality test which continues on to the part mentioned in the previous Article. This is an issue of defining the framework of the limitation of the right of access to information, as a limitation of a constitutional, human right on which the right of access to information is based. Without interventions mentioned in this and the previous clause the very purpose of this Act is disrupted and the significance of the right of access to information as a human and constitutional right is diminished. Hence, the limitation of the right of access to information must be in accordance with the need for limitation, which shall be assessed in every individual case (and shall not be defined by an open phrase in the Act) and the final result of the limitation must not be such that it would suspend or completely limit the right of access to information.

Article 7

The heading above Article 5 of the Act is amended and it states:

«COMPLETENESS, ACCURANCE, TIMELINESS AND EXTENSIVENESS OF INFORMATION »

Comment:

This heading is changed in order to correspond to the text of Article 5 which, as mentioned below, is also changing, with a comment provided with that Article.

Article 8

Article 5 of the Act is amended and it states:

«Information provided, or published, by public authorities must be complete, accurate, timely and extensive.»

Comment:

In the adopted Act on the Right of Access to Information important definitions of the term information, which was one of the crucial components of the Legislative Proposal of the coalition of non-governmental organizations, were omitted and they must be established by this Act. This includes the standards of timeliness and extensiveness of the information that is provided.

In other words, it must be insisted that the information which is not timely in essence is not to be considered as information of interest to the beneficiaries. For example, information that is made available after a certain number of years cannot form the basis for making decisions in a truly democratic society.

Furthermore, it is self-explanatory that information must be accurate and complete, as it is currently stated in the Act. However, it is necessary for the provided information to meet an additional extensiveness criteria. Hence, it should not only present a complete response to a given query, it should also extensively provide the context of the information. For example, as an answer to the query whether or not a given plot of land is a building site, it is not sufficient to reply that it is a building site if the information provider is aware that within a short period of time there will be a refuse dump built near that site, since such extensive information significantly changes the context of the completeness of the information about the building site. By becoming aware of this extensive context, the information seeker might make a different decision from the one he/she would make on the basis of complete, but not extensive information.

Article 9

Article 6 Paragraph 2 of the Act is amended and it states:

«(2) The bodies of public authority shall not place any beneficiary in a more favorable position in that they provide information only to that beneficiary, or provide information to that beneficiary earlier than to other beneficiaries. »

Comment:

Should a special provision about equality from Paragraph 2 of this Article be kept, beside the general provision from Paragraph 1, then it must not only be limited to a case of earlier, but also exclusive providing of information. The purpose of this special provision is to prohibit the customary practice of exclusive providing of information to certain beneficiaries, which is most frequently the media.

Article 10

Article 8 of the Act is amended and it states:

«(1) Bodies of public authority shall deny the right of access to information if the information has been declared a state, military, official, professional or business secret by law or on the basis of criteria established by law, or if it is protected by the law regulating the area of the protection of personal data, or if there is any well-founded suspicion that its publication would:

- 1) make it impossible to take measures or carry out action to prevent and uncover criminal acts or for the prosecution of perpetrators of criminal acts,
- 2) make it impossible effectively, independently or impartially to conduct court, administrative or other legally established proceedings, to execute court decisions or penalties,
- 3) disable the work of bodies who carry out administrative supervision, or supervision of legality,
- 4) cause serious damage to the life, health and safety of people or the environment,
- 5) disable the implementation of economic or monetary policy,
- 6) endanger the right of intellectual property, except in cases of the express written consent of the author or owner

(2) If denying access to information and rendering a decision by which the beneficiary's request for information is rejected would make possible or hide a violation of the Constitution or law by the body of public authority, the body of public authority may not deny access to information and render a decision to reject the beneficiary's request by referring to the case from Paragraph 1 of this Article. Such information must be published for the protection of public interest.

(3) Information to which the right of access is denied for the reasons stated in Paragraph 1 Clause 6 of this Article, becomes available to the public when so decided by the person who would suffer damage if the information were revealed, but no longer than 20 years from the day that the information was generated unless a longer term is prescribed by law or other regulation.

(4) The body of public authority shall grant access to those parts of information which, considering the nature of their content, may be published.

(5) Information is made available to the public when the reasons listed in this Article for which the body of public authority is denying access to that information are no longer valid.»

Comment:

The new organization of this Article is partially based on the existing regulation of the Act. However, former Paragraphs 1 and 2 of this Article are combined into one Article while the limitations of the right to information, if that information is proclaimed a state, military, official, professional or business secret by law or on the basis of the criteria established by the law, or if it is protected by the law which regulates the area of protection of personal data, are no longer absolute. Hence, there is no obligation for the body of public authority to deny access to information, there is only relative protection, meaning the possibility of such denial of access as it was previously stated in Paragraph 2.

Paragraph 2 presents the implementation of the public interest test in the Act on the Right of Access to Information. This test is an important component of almost all laws that regulate the right of access to information in the world.

The public interest test stipulates that in case of denying access to information by rendering a decision denying the beneficiary's request, if this denial would enable or cover up a violation of the Constitution or law by the body of public authority, the body of public authority shall not be allowed to deny access to information by referring to the reasons for which information may be denied.

Such denials of access may not be allowed in order for public interest to be protected, or if public interest is the reason why the public must be informed about a violation of the Constitution or law committed by the body of public authority.

According to the public interest test, the bodies of public authority themselves must ex ante examine whether their denials of access to information may be covering up acts that are not in accordance with the Constitution or law. The test also serves the purpose of judicial review, ex post, of the legality of the decisions in which the body of public authority has denied access to information.

Such conception of the public interest test points to the need for constant effort in the Republic of Croatia to devise a modern and good quality regulation for all forms of classifying information and for the regulation of the protection of privacy and personal data. This is the best way of ensuring that the authority that these laws grant is not used in a way which would cover up the violations of the Constitution and law.

Article 11

Subheading above the heading above Article 9 is amended and it states:

«THE PROCEDURE FOR THE EXERCISE AND PROTECTION OF THE RIGHTS OF ACCESS TO INFORMATION»

Comment:

Subheading «Procedural Provisions» is changed to «The Procedure for the Exercise and Protection of the Rights of Access to Information» which better reflects the real content of the provisions of the following Articles, particularly in the parts that do not only deal with the procedural provisions for the exercise of the right of access to information, but also with the provisions which protect the right of access.

Article 12

Article 12 Paragraph 1 of the Act is amended and it states:

«(1) On the basis of an oral or written request, the body of public authority is obliged to enable the applicant to gain access to the information on the same or the following day as a rule and within no more than 15 days from the day the request is submitted.»

Comment:

This change is intended to advise the bodies of public authority that the 15 day time limit which is the legal time limit for providing access to information should not also be the time limit for the right of access to information to be consumed. Hence, the phrase «on the same or the following day as a rule» is added to the provision to establish that the use of the right of access to information must be made possible within the shortest possible time period, immediately or on the following day.

Article 13

Article 13 Paragraph 1 of the Act is amended and states:

«(1) If the body of public authority does not possess, dispose of or have control of the information but does know which body is competent, it shall without delay, and no more than 8 days from receiving the request, forward the request to the body of public authority which does possess, dispose of or control the information, and shall inform the applicant accordingly in an official decision.»»

Comment:

This amendment provides that, in case of passing the request for the exercise of the right of access to information from one body of public authority to another, the applicant shall receive a notice in the form of an official decision, with all the elements and characteristics that an official decision has within the framework of the legislation of the Act on General Administrative Procedure, which enables the applicant, in case of passing of the request to another body of public authority, to have control over that transfer as well.

Article 14

Article 14 Paragraph 2 of the Act is amended and it states:

«(2) The body of public authority shall without delay, within no more than 8 days, by conclusion inform the applicant of the extension of the time limit, and give the reason for the extension of the time limit.»

Comment:

This amendment provides that, in case of extending the time limits for the exercise of the right of access to information, the applicant shall receive a notice in the form of a conclusion with all the elements and characteristics that the conclusion has within the framework of the legislation of the Act on General Administrative Procedure, which enables the applicant, in case of an extended time limit, to have control over that extension as well.

Article 15

Article 15 Paragraph 1 of the Act is amended and it states:

«(1) The body of public authority is obliged to render a decision on the granting of the request for access to information when there are no reasons from this Act to deny access to information.»

Comment:

The reason for introducing the obligation of rendering a separate decision in cases when the request is granted, is that the body of public authority may submit to the applicant information that was not requested, which means that it can formally (but not substantially) grant the request. In such cases, a decision must also be rendered in order to enable the applicant to seek legal remedy.

The Slovenian law, for example (although there is no decision about granting the request) stipulates that a compliant may be filed even in cases when the request was granted.

Article 16

Article 15 Paragraph 2 of the Act is amended and it states:

«(2) The body of public authority shall render a decision on the denial of a request:

- 1) if it is a case as in Article 8, Paragraphs 1 of this Act,
- 2) if the body of public authority does not dispose of and does not control the information nor have any knowledge where the information may be found,
- 3) insofar as the same beneficiary has been allowed access to the same information within 60

days of the submission of the request.»

Comment:

The change of this Paragraph takes into consideration certain changes in the text of the Act, for example combining Paragraphs 1 and 2 in Article 8 of this Act.

Article 17

Article 16 Paragraph 2 of the Act is amended and it states:

«(2) The body of public authority is obliged to render a separate decision on the request for any additions or corrections of the given information..»

Comment:

In cases when an addition or correction of the information provided is requested, the body of public authority must render a decision on that request in case of both denying and granting of the request. The purpose of this decision is to provide the applicant with legal protection or to enable him/her to seek legal remedy since, even in cases when the request is granted, the body of public authority may with a correction and addition provide the applicant with information that was not requested. In other words, it can formally (but not substantially) grant the request, and there shall be a decision rendered in that case as well in order to make it possible for the applicant to seek legal remedy.

Article 18

Article 19 Paragraph 1 of the Act is amended and it states:

«(1) The body of public authority has the right to reimbursement by the beneficiary of material costs in relation to the supply and service of the information requested, which cannot be an obstacle in the exercise of the right of access to information.»

Comment:

The purpose of this change is to make sure that high amounts of material costs do not present an obstacle in the exercise of the right of access to information. Exemption is made when the right of access to information can be exercised without material costs or when the amount of costs is smaller than the actual material costs.

Article 19

To Article 19 after Paragraph 1, a new Paragraph 2 is added and it states:

«(2) The criteria for determining the amount of reimbursement from Paragraph 1 of this Article shall be determined through a by-law by the Ministry competent for administrative affairs.»

Comment:

This addition is intended to influence the standardization of the regulation of the material costs by the bodies of public authority in the Republic of Croatia in order to prevent charging different fees for the same request when the material costs are the same. This would also prevent any obstacles to the exercise of the right of access to information which may be created by charging different fees or by setting fees that are significantly higher than the material costs.

Article 20

Article 21 of the Act is amended and it states:

«(1) In order to ensure the public nature of their work, bodies of public authority are obliged to determine in their general acts the conditions under which they allow direct insight into their work by the public, especially by direct attendance of their sessions and meetings.

(2) The bodies of public authority are obliged to inform the public on:

1) the agendas of sessions or meetings and the time they are held, the manner of work of the body of public authority and the possibility of direct insight into their work,

2) the number of persons who may be simultaneously given direct insight into the work of the body of public authority, especially by direct attendance of their sessions and meetings, in that account shall be taken of the order in which requests are submitted.

(3) The bodies of public authority are not obliged to provide direct insight into their work if it is a question of matters from which the public may be excluded by law, or information exempt from the right of access to information according to the provisions of this Act.»

Comment:

The aim of the amendment of this Article is to demonstrate first and foremost, that direct insight of the public into the work of the bodies of public authority may be exercised by direct attendance of the sessions and meetings of a body of public authority. The amendment also changes the phrase from Paragraph 3 from "must be excluded" to "may be excluded" since changes have been made in the relevant provisions of the Act.

Article 21

Article 2 Paragraph 4 of the Act is amended and it states:

«(4) The body of public authority shall by a separate decision, organize a catalogue of the information it possesses, disposes of or controls, containing a systemized overview of the information with a description of the content, intent, manner in which it may be obtained and the time needed to exercise the right of access to information»

Comment:

This amendment introduces the term information at the end of the provision of Article 2 Paragraph 4. Hence, it now states «exercise the right of access to information», a legal term established in Article 3 Paragraph 1 Clause 5.

Article 22

The heading above Article 23 of the Act is amended and it states:

«EXEMPTION FROM RESPONSIBILITY»

Comment:

The heading is changed so that it corresponds to the text of Article 23 which is, as mentioned below, also changed with a comment made with that Article.

Article 23

Article 23 of the Act is amended and it states:

«The responsible person and an information officer in the bodies of public authority who in good faith and in order to inform the public completely, accurately, timely and extensively, allow access to certain information beyond the boundaries of their authority, may not be held responsible and are not subject to the restrictions in Article 8 of this Act.»

Comment:

This amendment introduces an exemption from responsibility for the responsible person in the body of public authority as well as for the information officer. The exemption from responsibility is also related to complete, accurate, timely and extensive informing of the public as Article 5 now states in accordance with the changes and amendments from Article 7 of these Amendments.

Article 24

Article 26 Paragraph 1 of the Act is amended and it states:

«(1) Bodies of public authority shall be penalized for violation with a fine of 20,000.00 to 100,000.00 kunas if they:

1) do not allow or limit the exercise of the right of access to information contrary to the provisions of this Act,

- 2) do not keep a separate official register of the requests, proceedings and decisions on the exercise of the right of access to information (Article 18),
- 3) do not designate an information officer with authority to make decisions on the exercise of the right of access to information (Article 22 Paragraph 1),
- 4) do not organize a catalogue of the information they possess, dispose of or control, containing a systematized overview of the information, with a description of the content, intent, how it may be obtained and the time needed to exercise the right of access to information. (Article 22 Paragraph 4.).»

Comment:

Fees must apply to all the bodies of public authority. Legal persons with public authority, as the Article now states, are only one category of obligees of the right of access to information, as defined in Article 3 Paragraph 1 Clause 2 of the Act on the Right of Access to Information.

Furthermore, this amendment explicitly states that the failure to keep a separate official register of the requests, proceedings and decisions on the exercise of the right of access to information, failure to designate an information officer with authority to make decisions on the exercise of the right of access to information, as well as the failure to organize a catalogue of the information that it possesses, disposes of or controls, containing a systemized overview of the information with a description of the content, intent, how it may be obtained and the time needed to exercise the right of access to information, shall also be considered a criminal offence and shall be penalized with a fine.

Article 25

Article 26 Paragraph 2 of the Act is amended and it states:

«(2) For violations in Paragraph 1 of this Article, the responsible person and the information officer in the bodies of public authority shall be penalized with a fee in the amount of 5,000.00 to 10,000.00 kunas.»

Comment:

Fees must apply not only to the responsible person in the body of public authority, as the Article now states, but this prescribed responsibility must also be attached to the information officer as the person who indirectly performs duties closely related to the decisions about the exercise of the right of access to information.

Article 26

Article 26 Paragraph 4 of the Act is amended and it states:

«(4) For violations in Paragraph 3 the responsible person and the information officer in the body of public authority shall be penalized with a fine of 5,000.00 to 10,000.00 kunas or imprisonment for up to sixty days. »

Comment:

Fees must apply not only to the responsible person in the body of public authority, as the Article now states, but this prescribed responsibility must also be attached to the information officer as the person who indirectly performs duties closely related to the decisions about the exercise of the right of access to information.

Article 27

A new Paragraph 5 is added to Article 26 following Paragraph 4 and it states:

“(5) For violations in this Article the responsible person and the information officer in the body of public authority shall be, apart from the fee, disciplinary accountable according to the provisions of the General Act passed by the body of public authority.”

Article 28

Committee for Legislation of the Croatian Parliament is authorized to determine and publish the revised text of the Act on the Right of Access to Information.

Article 29

This Act shall come into force on the eighth day after it is published in *The Official Gazette*.