FREE ACCESS TO INFORMATION IN SERBIA: EXPERIENCE, PROBLEMS AND PERSPECTIVES
FREE ACCESS TO INFORMATION IN SERBIA: EXPERIENCE, PROBLEMS AND PERSPECTIVES

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This Working Paper was prepared for the conference “Civil Society for Responsible Authority”, to be held on February 4th and 5th in Belgrade. Working Paper will provide a basis for participants’ dialogue in this area, identification of key problems and the formulation of specific recommendations. Conferences conclusions will be used in the preparation of the Final version of this Paper.

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Introduction to the rights of access to information

Right of free access to information which, after a certain period of time, has been distinguished as a separate right from the freedom of expression, right of privacy (private and family life) and right to fair trial as the fundamental human rights, have been established as the result of the development of modern legal state and participatory democracy, a citizen being the “fourth power” and an active participant in social processes.¹

This right guaranteed either by the constitution or by the law exists in over hundred countries today. It is an integral part of many important international documents as well.

The right of access to information has been for the first time as such recognised in Serbia by the Charter on Human and Minority Rights, which was a part of the constitutional arrangement of the former State Union of Serbia and Montenegro.² Law on Free Access to Information of Public Importance (LFAIPI) in Serbia has been adopted in November 2004. It was preceded by multiannual campaigns of civil society organisations and major engagement by OSCE and Council of Europe. Since 2004, the main civil sector representatives in this area have acted successfully in promoting new statutory right through the Coalition for Access to Information, which originally consisted of six organisations from Belgrade and six from other cities in Serbia.³ The legal text adopted has been based on the Model that was drawn up by Centre for Promotion of Legal Studies (CUPS), one of the organisations, in 2002.⁴

There is a general consent among domestic experts that Serbia thus got a high-quality law, which was to a significant extent complied with international standards in this area. The quality of the legal provisions has been recognised internationally.

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¹ Dejan Milenković, PhD, Manual for application of the Law on free access to information of public importance, Belgrade, 2011.
³ See more at: http://www.transparentnost.org.rs/index.php/sr/list/156
through the results of the Access Info organisation survey from 2012. Today, six years later, Serbian legal framework in this area is considered third best in the world, with 135 out of possible 150 points for measuring the compliance with international standards and good practice. The main values of this legal framework can be observed in the fact that the Law does not recognise absolute exemptions, yet orders the public authorities to establish for each specific case if there is some other justified and overriding interest, based on the Constitution and the law, due to which it would be necessary to deny the public the right to know in the democratic society.

In that regard the facts are also important that the right of access to information is guaranteed without discrimination as regards the applicants, so they are not demanded to prove justified interest to ask for information or the reasons they are doing so. It is no less important that exercising the right of access to information is in principle free of charge and only the necessary costs of copying and sending of documents can be charged, and for the privileged cases (for example, requests by the media, journalists and human rights organisations) not even that. Finally, the important element of the legal provision is that it was a basis for establishing the independent national authority (Commissioner), who decides on the complaints of the unsatisfied applicants for information, and promotes the exercise of this right in every other way (for example through proactive publishing of information).

In order to guarantee the effective exercise of the right of access to information, other regulations are also very important. First of all, it is the constitutional guarantee, so as to prevent the current legislator to abolish or diminish this right by its decision. Furthermore, it is necessary that the legal system is unique. This unity is best ensured by applying the provisions of the Law on Free Access to Information without exception as regards the exercise of this right, with no possibility that the other law may prescribe the prohibition to demand some information in possession of the authorities or by prescribing obligations to the authorities to reject that request. Procedural and penal norms from other regulations are of no less importance. The functioning of the enforcement system often depends on the quality and compliance of these norms in practice for enforcing decisions that order enabling the access to information.

The scope of exercising the right of access to information depends on the provisions of many other regulations establishing the scope and quality of information that the

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public authorities must establish and the rules on the form of drawing up the information and the period of their storage. The norms from other regulations significantly influence the scope and efficiency of exercising this right, first of all the one concerning the classified information and personal data protection. Finally, all other provisions which establish the prerequisites for the work of national authorities (budget, possibilities to hire qualified staff, independence from political and other influences and other) are relevant.

The right of access to information has been based on several presumptions. First of all, the national authorities or anyone conferred with the exercise of public powers by the people, directly or indirectly, have received that trust for the purpose of achieving general welfare, therefore have the obligation to expose their work to the supervision by the citizens. One form of supervision is the right to receive information in the possession of public authorities. Besides, these authorities manage the public funds so the information they obtain are the result of using public funds and represent the public resources.

The right of access to information shall be exercised by sending request or by direct examination of the data that the public authorities have published in advance, without waiting for the individual requests, and whether this is legally binding or not.

Application of the law and key issues

The best testimony on the application of the law in practice and its problems could be found in the annual reports of the Commissioner for Information of Public Importance and Personal Data Protection, publications and periodical announcements by the representative of this institution. Moreover, the important insight on these matters could be found in the results of the non-governmental organisations research, the media that exercise this right and the positions of the international organisations.

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6 This institution was, inter alia, included in the “Institutional barometer” published by the Coalition prEUgovor in December 2018, http://preugovor.org/Institutional-Barometers/1481/institutional-barometer.shtml
Problems in the work of the Commissioner

The Commissioner for Information has submitted thirteen annual reports to the National Assembly of the Republic of Serbia. As noted in the Report submitted in 2018, the previous year “probably was the hardest ever for the functioning of this institution”. The capacities and working conditions of this institution have decreased during the years, and still there are the cases of severe interference.

Public authorities (non) performance on the requests and decisions of the Commissioner

During 2017, the Commissioner had over 93% of successful interventions, but “we cannot be happy with that”. The 61% of the proceedings have been terminated by suspension, since even without the formal decision of the Commissioner, the authority has provided previously denied information, as soon as it has received the complaint to the response and faced the fact that the applicant has requested legal protection. On the other hand, for the cases the Commissioner has passed decision ordering the access to information, in 2017 the enforcement percentage was only 78%. As the Commissioner has assessed this “testifies for the completely willing, deliberate ignoring of the legal obligations by the public authorities”.

This problem “must to the greatest extent be explained by the lack of support that other national authorities were obliged to provide to the Commissioner”. Namely, “Neither the Administrative Inspectorate in the Ministry of Public Administration and Local Self-Government, responsible for the initiation of misdemeanour proceedings against offenders, nor the judicial authorities had an adequate response to the fact that the law was massively violated”. Therefore, “misdemeanour proceedings have been initiated in the number much smaller than

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8 One of the examples is the situation at the end of 2017, when “Ministry of Finance prepared, the Government supported and the National Assembly defined the budget in which the amount allocated for the salaries of the employees in the Commissioner’s Office was insufficient for the existing number of employees”.

9 Ibid.

10 Ibid.
the number of actually committed violations, rarely and selectively, and in most cases terminated due to the statute of limitations which expired”. The Commissioner has stated as “bizarre” that in the year “in which there were at least several thousand violations of the law, the Administrative Inspectorate initiated 11 proceedings, and that the citizens, as injured parties, initiated 401 proceedings”.11

Also, “Serbian Government had an irresponsible attitude towards the legal obligation that in case of need, if the Commissioner could not enforce his decision applying available measures, the Government would ensure the enforcement of the decision by direct enforcement”. During 2017, the Commissioner asked the Government do to it 43 times, each time with no results.12

The National Assembly, which is in the position to influence the improvement of this situation, contrary to the law and its own Rules of Procedure, fails to consider the annual reports of the Commissioner for four years in the row. It has been three years already that these reports were not considered by the Culture and Information Committee which should prepare the proposal for the conclusions for the National Assembly.

The Commissioner emphasises it is “very worrying to maintain the chronic problems related to the exercise of the right of the public to information on the major economic moves made by the government, i.e. public authorities, concerning the disposal of large financial or material resources”.

**Large number of requests and complaints**

Contrary to reasonable expectations that in time the majority of documents will be proactively published and due to this the interested parties would have to submit fewer requests to exercise the right of access to information, the number of requests is still increasing. Moreover, the expectations that the established system of legal protection and increased knowledge within the public authorities could bring about the decreased number of complaints because of citizens’ impossibilities to exercise the right at first instance with the public authorities, this number is also not decreasing.

At the beginning, in 2005, there were about two thousand requests referred to the public authorities, and in 2017 that number has exceeded 31,000. However, one

11 Ibid.
12 Ibid.
should bear in mind that we cannot have the whole picture on the basis of this information, since they are based on the information which the very public authorities deliver to the Commissioner and in the last year observed only 786 out of 2,906 public authorities have submitted these reports. One can assume that the number of registered requests for the access to information is not significantly smaller than the total number, since among the authorities submitting the report there are, among other, those who receive the largest number of requests, by examining other parameters (e.g. number of received complaints).

In 2017, due to the violation of rights there were 5.5% more complaints lodged in comparison to the previous year, in total 3,680. Such a large number of complaints, the Commissioner appropriately interprets as the confirmation of the conclusion that “the right of a free access to information of public importance, without lodging complaints and engagement of the Commissioner, is still exercised with difficulties to a large extent”, and this is simultaneously “a confirmation of the trust of the citizens in the work of this independent national authority”\(^\text{13}\).

Apart from the increase of the number of cases where the right of access to information cannot be exercised without lodging complaints which represents quite a problem, it is worrying that the positive trend established in the period 2004-2015 has ceased when the applicants would only exercise their right after lodging the complaint. While in 2015 the share of these cases was 95.8%, in 2017 it dropped to 93%.

The most frequent form of denying rights is the unlawful ignoring of the requests, which are almost similar in number with the negative responses which were not given arguments and were not followed by the adoption of the required decision denying that right. As it happens, 85.4% of the total number of complaints that the Commissioner resolved in 2017 concerns exactly these cases, and only 13.6% refer to the situations when the public authorities deny the right through the decision or the conclusion. This is related to the information that the citizens’ complaints were mainly justified – 86.4% cases. The reasons for denying information in the decisions are most often confidentiality and possible privacy violation.

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\(^{13}\) *Ibid.*
Enforcement of decisions

In 2017, the enforcement of the Commissioner’s decisions has become non-implementable. This came about due to ignoring the competences and denying the cooperation by other authorities in delivering data necessary for executing enforcements or the interpretation of the legal provisions. This problem concerns the Law on General Administrative Procedure, both former and the latest, which came into force on 1 June 2017\textsuperscript{14}.

By the previous rules, the Commissioner has imposed the fines to the public authorities by the means of the decision, in the amount ranging from twenty to two hundred thousand dinars. These fines “have resulted in some effects”, although “they were not possible to collect if the authority would not pay them voluntarily”\textsuperscript{15}.

However, as time went by, all potentially competent authorities for executing enforcement or collection of public revenues have declared themselves incompetent for the collection of fines imposed by the Commissioner. This has been done by the Tax Administration\textsuperscript{16}, National Bank of Serbia\textsuperscript{17}, Misdemeanour Court in Belgrade\textsuperscript{18}, regular courts, as well as the Chamber of Public Executors\textsuperscript{19}. Therefore this type of legal coercion became non-implementable.

Following 1 June 2017, the beginning of the application of the current Law on General Administrative Procedure, the manner for defining the basis for calculation of fines in the administrative enforcement procedure has been amended, which should for the majority of cases lead to their major augmentation. Namely, these fines now range from a half of the monthly income of a legal person to ten per cent of the legal person annual revenues realised in the Republic of Serbia in the previous year.

\textsuperscript{15} Ibid.
\textsuperscript{16} Letter of the Tax Administration of the Ministry of Finance, No. 037-00089/2010-08 of 27 January 2011.
\textsuperscript{17} Letter of the National Bank of Serbia, No. IX-1353/17 of 24 August 2017.
\textsuperscript{18} Letter of the Misdemeanour Court in Belgrade, VIII Su. No. 1/2017-1568 of 26 September 2017.
\textsuperscript{19} Note No. 07-00-1/2017-04/71 of 18 September 2017.
Instead the threat of imposing these fines giving the positive impact to the proceedings of the authorities, the new legal provisions have been completely disabled even the passing of decisions. This time, the problem occurred in relation to the definition of the basis for fines. The Ministry of Finance has refused to deliver to the Commissioner the data on “the annual realised revenues for the public authorities for the previous year”. While the Treasury of the Ministry referred to the Ministry, since they “do not hold the data”, in February 2018 the Ministry has responded that “such data does not exist”, and that “the Law on Budgetary System does not define the term of total revenues of the budget beneficiaries”. This major deficiency in the system could be reflected in the application of other laws and should be remedied as soon as possible.

Pursuant to Article 28 paragraph 4 of the Law on Free Access to Information of Public Importance, if need arises, the Government shall enable the administrative enforcement of Commissioner’s decisions. From 2010 to 2017, according to the information of the Commissioner, the Government has been referred with 173 requests for ensuring the enforcement, but it has failed to do that for any case. Among other, contracts in relation to the services of marketing, advertising, public relations, sponsorship and donations which the PE “Železnice Srbije” (Serbian Railways) had concluded in the period 2011-2013, were to be made available in this manner; the information from the contract and annexes to the contract on procuring raw material which “Železara Smederevo” Ltd. (Smederevo Steelworks) had concluded with a certain company in 2013 and 2015, and the information on performed payments; certain information of the Anti-Corruption Agency regarding the control of property and revenues of the Mayor of Belgrade in 2016; information from the contract on public procurements of PE “Srbijagas” concluded with a certain company.

Denying information to the Commissioner

The cases when the Commissioner was denied the possibility to use the authority under Article 26 of the law for the purpose of passing a decision on the complaints and inspecting the documentation by the public authorities are underlined as the radical violation of the law. In the past years, the Commissioner used this authority with no major issues in the manner that the public authorities, at his request

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20 Letter by the Ministry of Finance the Treasury, No. 401-00-788-2/2017-001-007 of 31 October 2017.
submitted for inspection the required documents for the purpose of identification of the factual state necessary for deciding on the complaint. The only exception was the case of the contract on managing “Železara Smederevo”\textsuperscript{21}, when the Ministry of Economy refused to fulfil the legal obligation, without any consequences. However, in 2017 even six public authorities refused to provide the Commissioner with the requested documents. These included Anti-corruption Agency, Faculty of Law in Novi Sad, Ministry of Foreign Affairs, Ministry of Energy and Mining, PE “Jugoinport SDPR” and Ministry of Defence – Military Security Agency.

**Misdemeanour proceedings and penalties**

The Commissioner evaluates that “the absence of misconduct liability or any other liability for the violation of this right, undoubtedly encourages those responsible persons in the public authorities to continue with it, convinced that they will not bear any consequences”. It is believed this is the main cause of a very large number of complaints with the Commissioner. On the other hand, “the objective inability of the Commissioner to resolve all the complaints within the deadline defined by the law, justifiably brings about the dissatisfaction of citizens and additionally burdens the work of the Commissioner’s Office”\textsuperscript{22}

As for the judicial prosecution, the problem arises from the unequal practice and punitive policy. It especially concerns the active legitimacy of injured parties to file a request for the initiation of a misdemeanour procedure, and especially if they have not previously, in the administrative procedure, used the institute of complaint with the Commissioner, as certain misdemeanour courts have taken the unfounded position to reject such requests despite the position taken by the Supreme Court of Cassation on 6 December 2016 concerning this matter\textsuperscript{23}. According to the position of the Court, the denial of an adequate response to the applicant requesting information constitutes a violation of personal right. Due to this, the applicant has a status of the “injured party”, therefore has the authorisation to personally file a motion for initiation of a misdemeanour procedure. Apart from the injured party,

\textsuperscript{21} More details could be found in the 2016 Commissioner’s Report: https://www.poverenik.rs/en/o-nama/annual-reports/2568-commissioner%E2%80%99s-2016-annual-report.html.

\textsuperscript{22} The 2017 Commissioner’s Report.

\textsuperscript{23} II Su-17157-16.
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these requests may be submitted by the public prosecutors and the authorities supervising the application of the law that was violated.

Hereby we would like to remind that the law does not provide the Commissioner with the general authority to supervise the implementation of the law. This is, *inter alia*, negatively reflected in penalisation for the violation cases, since the institution with the greatest possible knowledge of the committed violations does not have the authority to initiate the proceedings for their penalisation.

The imposed sentences were mostly closer to the legal minimum, and very often in the appeal proceedings there was a suspension of proceedings due to the expired statute of limitations.$^{24}$

National Assembly and the Commissioner – missed chances

The 2014 non-implemented conclusions

In 2014, for the last time, two parliamentary committees$^{25}$ have drawn up the conclusions which were adopted by the National Assembly. In these conclusions it is noted that “in the 2013 Report on the implementation of the Law on Free Access to Information of Public Importance, as in the ones before, the situation in the area of free access to information of public importance has been explained, with the assessment that the significant results have been achieved in the area of protection and affirmation of rights to free access to information of public importance”. The conclusions of the other committee have welcomed the results “of the Commissioner contributing to the realisation of the democratic control of the government by the public”.

However, considering that the Commissioner for Information of Public Importance and Personal Data Protection has assessed that the key requirement of the future progress in exercising of citizens’ rights shall be to change the practice of slow and passive relationship of the competent public authorities and holders of public powers towards the citizens of Serbia requests, the National Assembly has *invited the competent authorities and holders of public powers to undertake necessary*

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$^{24}$ The 2017 Commissioner’s Report.
$^{25}$ This refers to the Committee on Human and Minority Rights and Committee on Judiciary and Public Administration.
measures for the realisation of the Commissioner’s recommendations which are referred to in the Commissioners’ Reports year after year.

In 2014, the National Assembly has, starting from the Commissioner’s assessments, “invited the Government to re-examine the valid provisions and suggests the new provisions in the Law on Free Access to Information of Public Importance for the purpose of the efficient application of the principles” from this law. “It shall be necessary to regulate the system of obligatory obtaining of the Commissioner’s opinion in the legislative procedure, align the misdemeanour fines with the law that regulates the misdemeanours and make the positions uniform so as to prevent the practice of different interpretation of the particular legal provisions”. The other committee also indicated that “there is a room for improvement of regulations on the free access to information of public importance”.

The National Assembly noted that “the Government shall, in accordance with the appropriate legal provisions, ensure the coercive enforcement of binding, final and enforceable decisions of the Commissioner and that it shall, by using the existing legal mechanisms, through the competent ministry, take actions within its sphere of competence, by initiating proceedings for establishing the liability for failures in the work of public authorities, including the responsibilities of the public officials who failed to carry out duties in accordance with the law”.

The conclusion of the other parliamentary committee similarly mentions that “the National Assembly notes that it shall be necessary for all competent public authorities to take necessary measures for the purpose of fully implementing the Commissioner’s recommendations, and in particular to avoid so called “administrative silence” and unjustifiable reference to the confidentiality of data, which are, as the Commissioner said, the most frequent reasons of the complaints referred to the Commissioner in the area of access to information of public importance”.

The attention of the Government has been drawn to “the obligation to adopt bylaws as soon as possible so as to ensure the implementation of the law that regulates the personal data secrecy, as without these regulations this law is inapplicable”. The other committee conclusions refer to previously given recommendations for adopting these bylaws which were never followed.

The National Assembly has undertaken that “for the purpose of creating the consistent legal system in the area of free access to information of public
importance, in its legislative activities it must endeavour to ensure the respect of basic principles of free access to information of public importance as regards the proposal for specific legal provisions, especially if has been indicated by the Commissioner”. Moreover, it has undertaken that “in the framework of the control over the work of the Government it shall contribute to the consistent implementation of the law in this area”.

The Assembly reminded the Government of the obligation “to create the conditions for the full independence of the work of the Commissioner for Information of Public Importance and Personal Data Protection as soon as possible, by ensuring the appropriate premises and other material resources,” so as to enable this institution to execute its powers in full capacity.

The Assembly has in principle supported “the efforts and activities of the Commissioner for Information of Public Importance and Personal Data Protection in exercising and further improvement of the rights of free access to information of public importance”.

Under this conclusion, the Government undertakes to submit the report on the implementation of these conclusions to the National Assembly no later than six months. This decision was actually adopted at the sitting of 5 June 2014 yet the Government has not reported on their implementation by 5 December that year, and as far as it has been known, has not done it later either.

Transparency Serbia assessed these conclusions as most complete and long-ranging, indicating that the lack of monitoring was the main reason behind the Assembly repeating some of the previous years’ conclusions. Actually, the National Anti-Corruption Strategy has recognised the importance of this matter and provided for the introduction of the Government legal obligation to report on the implementation of these Assembly conclusions, with May 2015 as the deadline.

26 The 2014 Conclusions No. 42 and 43 of 5 June 2014.
The 2015 diluted conclusion

Only a year later, the situation has severely aggravated. Instead of former almost plebiscitary support to the implementation of the Law on Free Access to Information of Public Importance, different proposals appeared. It resulted in the meaningless conclusions of the Culture and Information Committee, which have demonstrated the lack of willingness to carry out the control of the executive power. The conclusions discussed\(^2\) originated from the (opposition) Chairperson of the Committee, and also from one deputy who is a representative of the opposition. However, neither of the two proposals was accepted, but the version proposed by the deputies from the ruling party.

In point 2 the Committee noted that “the executive public authorities’ duty is to implement the legal provisions related to ensuring the right of free access to information of public importance”. This seems redundant – the legal obligations have been already stipulated, so their strength will not increase if they are emphasised in the Assembly conclusion, especially if they are written in such an abstract manner.

The original proposal of the conclusions has, contrary to that, predicted that the National Assembly recognises the duty of “competent authorities of the executive power” (actually referring to the Administrative Inspectorate of the Ministry of Public Administration and Local Self-government) to “consistently undertake legal measures as regards the penalisation of the violations performed by the liable parties, in relation to guaranteeing the right of free access to information of public importance”, and “that the duties of the national authorities and holders of public powers are to respect recommendations, and enforce final and binding decisions of the Commissioner in line with their competences.”

The conclusion should facilitate solving the situation for two serious problems – the multiple violations of the Law on Free Access to Information of Public Importance each year, which are larger in number in comparison to the misdemeanour proceedings initiated, and the situation in which although the Commissioner’s decisions are binding, final and enforceable, in some cases they remain unenforced for years.

The parliamentary committee has recommended to the Government to deliver data to the National Assembly on the number of recommendations that the Commissioner has sent to the authorities, number of enforced and unenforced recommendations, as well as the reasons for non-performance as regards the recommendations of the Commissioner. On the other hand, the original proposal of the conclusion included the Government’s duty to report to the National Assembly every six months on that matter.

The point of the previous proposal of the Chairperson of the Committee has completely disappeared – recommendation to the Government that “it should recommend amendments of the Law on Free Access to Information of Public Importance as soon as possible, thus ensuring: that the application of the Law shall be extended to the physical persons that were conferred with carrying out tasks under the public law (including public notaries and executors); that the Commissioner authority for giving opinion in the legislative procedure shall be established including the submission of the request for initiating the misdemeanour proceeding due to the violation of the right of free access to information of public importance; that the manner of coercive enforcement of the Commissioner’s decisions shall be prescribed”.

The conclusion, even “diluted” as such, has not been adopted, from 22 May 2015 to this day\(^\text{30}\).

**The relationship towards the Commissioner and other independent bodies**

This is a symptom of the prevailing relationship of the Assembly towards the controlling authorities of the Government, although it is obvious that the treatment of the Commissioner’s institution is by far the worst. The Assembly has not discussed the implementation of its conclusions in relation to the previous reports for none of the cases, even when the Government was obliged to submit that type of the report (2014). Certain independent bodies’ reports for 2015 have been considered at the sittings of the Committee by the end of September 2016. The parliamentary committees have suggested the conclusions only for certain annual reports (those submitted by the Fiscal Council, State Audit Institution, RATEL and Energy Agency),

but they have not done the same for the majority of independent supervisory bodies. The 2016 reports have also been randomly observed.

The parliamentary committees have suggested conclusions for certain authorities and bodies, and that includes RATEL (September 2017), Security Information Agency (August 2017), the Republic Commission for Protection of Rights in Public Procurement Procedures and the Fiscal Council (July 2017). The conclusion suggested for the Report of the State Audit Institution contains some useful recommendations, but without the Government obligation to report on its implementation. On the other hand, from April to September 2018 the Committee on Finance, State Budget and Control of Public Spending has adopted the conclusions with a proposal to the National Assembly to accept the 2016 and 2017 Annual Reports on work of Anti-Corruption Agency, as well as the 2017 Annual Report on the work of the Republic Commission for Protection of Rights in Public Procurement Procedures. The Assembly has not taken into consideration these conclusions at its plenary sittings yet31.

The insights of the former Chairperson of the Committee

Long-time Chairperson of one of the parliamentary committees that has regularly considered the Commissioner’s Report32, even before such an obligation was introduced to the National Assembly Rules of Procedure, evaluates that Serbia generally has well-regulated legislation in this area. “We have done everything we were obliged through the EU accession process to align in this area”. However, we have problems in the implementation. “Even those who are to implement laws often do not know which rights these laws refer to”, or even “obstruct the implementation of the law”33.

He noted that “each committee mostly depends on its chairperson”, and estimates that “the current Chairperson does not want to get too involved in his work, they do not want to carry out tasks in their job description, what is clearly written in the Rules of Procedure”. Problem is observed in the fact that the deputies do not use their most important leverage – power conferred by the law and the rules of

32 Meho Omerović, former Chairperson of the Committee on Human and Minority Rights.
33 The interview with Meho Omerović, conducted for the purpose of this research.
procedure and that is the control of the executive power. It “would have to oblige the ministers by the Rules of the Procedure to be present at the sittings of the Committee”, since otherwise the representatives of the ministry without authority to approve anything whatsoever will be present at these sittings. “The discussions at the sittings would have to be more precise, as the real dialogue, by reacting to the latest developments and not only sitting and waiting for a law in this area, and then the deputies of the ruling majority are forming the presence quorum, mostly staying silent and voting in the manner they are ordered to”.

“Representatives of the authorities, the ruling coalition, somehow fail to understand that the independent bodies are actually their most important allies in working for the best interest of the citizens, as they are constantly repeating, which is the control over the law implementation.”

The problem regarding the independent public authorities concerns the irregular manner of appointment and removal of the key people in these authorities, duration of their term of office, different competences and salaries, which is not logical. The former Chairperson of the Committee has doubts when it comes to solving the problem of political appointment through open competition, since the politicians are appointing the members of the competition commission. The solution “may be to change the proposers”, so these would not include only the parliamentary groups. “For example, why the proposal should not come from the holders of this office whose term of office expires, why are they to be denied the right of proposal? Now everything boils down to the influence of political parties and their power to promote their own”.

The procedure of amending the laws

A long waiting period

The procedure of amending the law is taking unexpectedly and unnecessarily long. The need to amend certain provisions of the Law on Free Access to Information of Public Importance (LFAIPI) has been clearly detected during the public hearings held in summer 2003, when the draft law was presented for the first time, and in summer 2004, when the paper on this law was published. The deficiency which spurred many discussions at the time of the law adoption, and which was not resolved to the day, even though it had been amended and received the support of the relevant committee for its approval, refers to the provision of Article 22 paragraph 2 of the
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Law. This provision excludes the possibility that the unsatisfied applicant who requests information could address to the Commissioner after one of the six highest government bodies denies the right to information to the applicant (National Assembly, Government, Supreme Court, Republic Prosecutor, Constitutional Court, President of the Republic). Moreover, there is a tendency to extend the scope of bodies that cannot be appealed against to another one – National Bank of Serbia.

The proposal for the LFAIPI amendments prepared by the group of non-government organisations has been in the Assembly procedure for more than ten years, and 35,870 citizens have backed it up by their signature. On 22 November 2007, this law proposal has been delivered to the National Assembly, but it was never included in the agenda of the legislative body. Some of the proposals from this act could be found in the later amendments proposed by the Government. However, certain proposals are still relevant today, such as the previously mentioned deletion of Article 22 paragraph 2.

During 2011 and 2013, there was a broader attempt to amend the legal norms recognised as the largest obstacles in practice followed by the support of political will, at least at the level of the competent ministry. The proposal on the amendments to the law entered in the procedure at the time. However, before the National Assembly has even started the discussion on it, there were the elections, and after several months of negotiations the new Government has been established, so the law proposal was automatically withdrawn. Although no one from the new Government has openly indicated that something is problematic about that law proposal, it never came back to the procedure.

If we take into consideration the good quality of this proposal, the law amendments could have been carried out quickly. Instead, they were planned in the framework of strategic anti-corruption acts in 2013, then in 2016 within the Action Plan for

36 http://www.srbija.gov.rs/extfile/sr/166823/pz_informacije_od_javnog_znacaja00595_cyr.zip
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Chapter 23 in the negotiations between the Republic of Serbia and the European Union as well. The deadlines for law amendments in these acts were too long to begin with, and later on deadlines were postponed and missed. The amendments to this law were planned or mentioned in other strategic documents of the Republic of Serbia, as regards the reform of public administration and Open Government Partnership.

Narrow understanding of the reforms

Besides the delay in the legal reform, its narrowly set objectives were the additional problem. Namely, in the recommendation from the European Commission, which needed to be answered in the Action Plan for Chapter 23, the problem of access to information has been detected, but not as a general one, yet as something related to specific areas only. Apart from that, some areas in which the access to information has not been sufficiently achieved were falsely identified as most problematic. For example, this referred to the information on the contributions the political parties received from abroad. Namely, if these contributions were reported, they could be found at the Anti-Corruption Agency website. When not reported in the official reports, they are in the possession of the political parties, which do not have the status of “the public authorities”.

However, it is more problematic that the main activities are focused on the change of the law, despite main problem being the absence of willingness to implement it. This absence is the most visible in the final instances of decision making, when nothing else could help. When the public authorities fail to comply with the binding decision of the Commissioner for information, the only thing left is that the Government of Serbia, in accordance with the law, “shall ensure the enforcement”, but that never happened. In case of inaction by the public authorities and the government, there is an option for the National Assembly to act through its authority using the possibility to initiate the procedure for establishing the liability of the public officials who violate their legal obligations. That possibility could be explored anytime the parliamentary committees consider the annual report of the Commissioner for Information, which are to be used to define the conclusions and organise their monitoring. There was no effect even when the parliamentary

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committees have defined useful conclusions and the Assembly adopted those (2014). The Assembly has not monitored the implementation of given recommendations by the Government and other bodies even in the basic manner, nor has acted in accordance with them.

The Action Plans do not predict comprehensive changes at the normative level either. The definitions of the reform objectives are quite narrow, even for the Law on Free Access to Information of Public Importance, and the need to amend other regulations which influence the exercise of rights for access to information was not even mentioned\(^{38}\).

**Not implementing the obligations from the Action Plan**

The obligations from the Action Plan have not been completely observed both for the deadlines and the other matters. Drawing up the Draft should be preceded by the analysis of the application of the norms for certain situations (as regards public procurement, privatisation and other). However, the Ministry of Justice responsible for this activity, has obtained that analysis only after the Draft has been practically prepared (2018), then sending this analysis to the Ministry of Public Administration and Local Self-government, as the body responsible for the following activity – preparing the draft amendments to the law. This analysis does not deal with all aspects of law application, and it does not cover all matters specifically mentioned in the Action Plan for Chapter 23.\(^{39}\) Deadline for making the analysis was the third quarter of 2016.

The law making process also took exceptionally long time. So, for example, in November 2015, Transparency Serbia was invited by the representatives of the Ministry of Public Administration and Local Self-government to present its

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comments, well earlier than the Working Group was actually established. According to the data from the Ministry, the Working Group was established on 2 November 2016, just before the expiration of the deadline for adoption of law amendments (last quarter of 2016). During 2017, the Group met for eight times, and then held the consultation with the Commissioner. From 5 to 15 February 2018, the law concept was published, actually the draft of main planned amendments without accompanying explanation. In accordance with the good practice to initiate discussion as soon as there is a concept of the law, and before drawing up the exact provisions, the consultations on this document have been organised.\(^ {40}\)

Public consultation on the amendments to the law

Many participants gave their proposals and comments for the improvement of the draft law. The participants of a massive successful action of civil society organisations in the form of platform *Serbia gets its information* – “*Srbija do informacije*” gave the majority of comments. The civil society has namely formulated “the red lines” – the provisions from the Draft that must not be found in the amended Law, and the provisions that should have to be included in the Draft law,\(^ {41}\) as well as the set of specific examples for amending the Draft. The Ministry of Public Administration and Local Self-government has published the Report upon the expiry of the public consultation period, within the deadline for drawing up such report as envisaged by the Government Rules of Procedure.\(^ {42}\) However, the content of this report does not include all matters that should have been considered. Namely, the results of the public consultation process should have been the acceptance, and/or the argumentative rejection of given proposals and drawing up of the text to be submitted for the Government consideration, or at least drawing up of the new draft of the law, which would require organising new public consultation.\(^ {43}\)

\(^{40}\) See: http://www.mduls.gov.rs/doc/POLAZNE%20OSNOVE%20ZA%20IZRADU%20NACRTA%20ZA%20IZMENA%20DA%20DOPUNAMA%20ZA%20ZAKONA%20OD%20SLOBODNOM%20PRISTUPU%20INFORMACIJA%20OD%20JAVNOG%20ZNACAJA.docx

\(^{41}\) See: https://srbijadoinformacija.rs/zahtevi-2/

\(^{42}\) See: http://www.mduls.gov.rs/doc/rasprave/220318/Izvestaj.docx

\(^{43}\) According to this Report “the comments improving the legal text within the meaning of language and legal and technical requirements have been accepted”. After listing articles of
In the meantime, the representatives of the Ministry have announced that the draft shall soon become the proposal, but this did not happen yet although the deadlines have expired\(^{44}\). Judging by some statements of the representatives of the Ministry, it can be concluded that some of the most disputable items in the existing Draft have been included in it by the proposal or by other authorities or “political elites” insisting. During 2018, it became known that the Ministry has prepared the new Draft and has distributed it to other authorities for their opinion\(^{45}\).

**General quality assessment of the Draft law**

The Draft law, which is being planned and adopted in order to enhance the public manner of public authorities work and the exercise of the right of access to information, includes some provisions that will narrow down the scope of that law and slow down its realisation. That opens the possibility to contest provisions from the point of view of the Constitution. Namely, in Article 20 paragraph 2 of the Constitution of the Republic of Serbia, it is said that “attained level of human and minority rights may not be lowered”. The “right to information” is one of the human rights, as said in Article 51 paragraph 2 of the Constitution that “Everyone shall have the right of access information kept by state bodies and organizations with delegated public powers, in accordance with the law.” This right has become operational precisely through the Law on Free Access to Information of Public Importance.

On the other hand, the Draft contains some good provisions. However, there are fewer changes in this regard compared to the document which was a starting point


for drawing up the text (the 2012 Proposal). Apart from that, it is obvious that in the procedure of drawing up the Draft the recommendations from the relevant international organisations and the comments to the recommendations given by SIGMA\textsuperscript{46} have not been respected.

**Expanding and shrinking of the circle of public authorities**

The changes in the definition of the “public authorities” are partially positive, since the exercise of the right is facilitated or extended to the subjects that are currently not under the Law. These provisions include the following: the subjects of the right shall include the city municipalities, natural persons vested with public powers (e.g. notaries), physical and legal persons performing “activities of general interest” (e.g. public utilities) as well. The most important positive change is cancelling the distinction between the categories of “public authority” and other authorities. Due to this change, all public authorities shall be obliged, *inter alia*, to write, publish and update their information booklets.

On the other hand, the right to information has been restricted in several ways. As for the holders of public office, if the current text shall be adopted, the only possible information that could be requested are the one referring to execution of public powers, not including other information that refer to their work. Although this amendment is justified, there will be many dilemmas when establishing if some documents referring to the general business of the economic entities also refer to the execution of their public powers.

Political parties and religious communities are also excluded from the application of this law, which might be justified by specific characteristics of these organisations operations. However, the manner this has been explained in the reasoning of the Draft law does not justify it completely.

The most damaging is the provision under which the public authorities shall not mean company with share capital “that operate at the market in accordance with the regulations on companies”, even when a state is a member or a shareholder of such enterprise. Consequently, many enterprises which dispose of significant public property would be exempted from the obligation to ensure the access to information only for the reason they have changed the legal form of their

\textsuperscript{46} The experts from this organisation have given harsh criticism during the round table on 27 March 2018.
organisation at some point. It usually refers to change of status from public enterprise to company with share capital for the purpose of potential privatisation and recapitalisation. The example could include the enterprises such as “Telekom Srbija”, Air Serbia, “DIPOS” and “Železnice Srbije”. Enterprises changing their property form is usually a discretionary decision. It depends on the discretionary assessment of the Government of Serbia and local assembly whether it would serve the purpose to change the organisational form of the enterprise. After changing the organisational form, the enterprise may remain in complete or partial ownership of the state for unlimited period of time. Therefore, excluding this category of state-owned enterprise would lead to the severe diminishing of transparency of public sector work, on the basis of the discretionary political decisions.

From the point of view of fulfilling the public interest, when it comes to state-owned enterprises, the legal reform should take the other direction. Namely, the state has minority ownership in many enterprises which dispose of significant public resources or state and local self-governments are their loan guarantors. Therefore, business operations of these enterprises, regardless of the state ownership share, can directly influence the fulfilling of public interest to a greater extent in comparison to business operations of many companies fully owned by the state.

By the end of November 2018, as an argument in favour of this limitation of the right of access to information, and after civil society stating its arguments, minister Ružić said the following: “If the Constitution guarantees equality in operations for all enterprises, including those joint-stock companies where the government, autonomous province and local self-government are a part of, why would the state practically “shoot itself in the foot” with this new law by publishing sensitive business information”.

Concerning this argument, it should be mentioned that the existing Law on Free Access to Information of Public Importance already includes the possibilities for protecting the legitimate interests of public enterprises that operate on the market, when they would be threatened by the disclosing of information that could interest their competitors. It shall be necessary only to properly justify their reasons which should be also founded on the legal basis that the legislator has recognised. There

is no justification for the explanation that exempting the enterprises from the access to information means protecting the constitutional guarantee of equality in operations for all enterprises even from the point of view of the unity of legal system. Namely, other laws prescribe special rules for some associations of capital in state ownership (e.g. application of some provisions of the Law on Public Enterprises), which do not apply to private enterprises. If there is a problem of constitutionality, it could have been examined for the past 12 years, ever since LFAIPI is in force. However, none of the public authorities has instituted this proceeding. Finally, even if there might be an obstacle due to constitutionality, there are other constitutional principles, such as right to information and prohibition of lowering attained level of human and minority rights, which must be also observed.

The suggested amendments of Article 3 include a useful proposal to treat the persons “carrying out tasks of public interest” the same as the public authorities. This norm has been more precisely defined in the Draft of December 2018, so as to remove any doubts as regards false interpretation that appeared in a part of the public\textsuperscript{48}.

During the preparation of the Draft, the experts of SIGMA organisation have stated their opinion against the most disputable provisions from Draft law, and then in their opinion again in November 2018.\textsuperscript{49} Concerning the amendments of Article 3 of the Law laying down the notion of public authority body, they believe that “some improvements have been achieved and noticeable”, since “the scope of entities included in the notion of the public authority bodies has been expanded”. “However, the provision that exempts the companies with major or full state equity share from the definition of public authority bodies makes this article completely unrelated to almost all legal provisions in the comparative law, decreasing the current level of the right of access to information in the Republic of Serbia, opening the possibilities of abuse and potential cover up of illegality in the work of these companies, and is in contravention of the principle of openness and transparency of


\textsuperscript{49} Third preliminary Draft law amending the Serbian law on free access to information of public importance (2018). Public authorities under the law, the appeal to the Constitution court and the Commissioner’s decisions enforcement, SIGMA Comments of 13 November 2018, non-published document
European administrative area that is something the Republic of Serbia is trying to meet on its road to the full-fledged membership to the European Union. Therefore this provision should be completely excluded from the Draft”.

**Administrative dispute against the Commissioner’s decisions**

The Draft of March 2018 provided for supplementation to Article 27 that would enable public authorities to initiate administrative dispute against the Commissioner’s decisions. This rule would significantly threaten exercise of rights of access to information of public importance so it should not be accepted, even if it would have been established it is in accordance with the Constitution, other regulations, the intention of the original lawmaker and other countries practice, as stated occasionally. The amended December Draft does not include that novelty.

It is noteworthy to draw the attention to the fact that some public authorities may address the Republic Public Prosecutor that always has the power to initiate administrative dispute for the purpose of protecting public interest. The Administrative Court usually would not admit these complaints, and even Republic Public Prosecutor would not always accept the authorities’ arguments for lodging the complaint.

**Enforcing the Commissioner’s decisions**

Article 28 and Article 28a stipulate the norms on administrative enforcement that would definitely improve the situation compared to the current situation, but would not solve the problems completely. The Draft that would contain some provisions with regard to the previous provisions of Law on Administrative Procedure (LAP) could potentially enable imposing of fines, which is not the case now. That conclusion is still questionable since the provision from the Draft has not been aligned with the provisions of Article 198 of the (new) Law on General Administrative Procedure, and the explanation does not contain any information on that matter. Namely, the referred LAP article, unlike the provisions on the

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50 Which was disproved by the representatives of the Administrative court in the public discussion on the amendments of LFAIPI.

51 Professor Saša Gajin expressed this opinion in the unpublished analysis of LFAIPI at the beginning of 2018, as well as at the roundtable held within the public consultation on the law amendments. The analysis referred has been presented in the reports as the implementation of Activity Point 2.2.5.1. in the Action Plan for Chapter 23, and this activity was under the obligations of the Ministry of Justice.
enforcement of non-financial obligations from previous regulations, shall link fines for non-performance with the salary/income amount and not with nominal financial amounts. Moreover, Article 198 of LAP does not recognise the limitations as regards the maximum amount of the fine imposed.

The concept of fines that are directed (at least initially) at the public authority, and/or budget and other public resources, is not good, at least unless it would be guaranteed that in practice the authority which pays such a fine would have a possibility to redress and file claims for compensation against persons responsible for each specific case.

The experts from SIGMA think in the similar manner: “Since imposing fines for the public authority bodies does not serve the purpose as regards their funding from the budget, and since the previous provision has not brought about the enforcement of the Commissioner’s decisions, taking into consideration the specific position of the Commissioner as the authority *sui generis*, it would be worthy to consider other mechanisms, that could be introduced instead of the one proposed in Article 28a. If this provision remains, it is required to determine the authority by law that would be in charge for enforcement of fines”.

It is regrettable that it was not considered to amend Article 45 of the existing Law in the Draft so as to confer the Commissioner with a performance of inspection supervision (similar to the one concerning the personal data protection) or at least with a right to directly lodge a request for initiation of misdemeanour proceedings and not use the Administrative Inspectorate as the intermediary authority, thus the current mechanism will remain for the future, although it does not work in the practice”.

**Opinions on the regulations**

It is beneficial that in Article 25 the Commissioner would have a new competence to “7) give opinion on the draft laws, if they regulate the matters relevant for the exercise of right of access to information of public importance”. However, this amendment is not enough. Namely, it has occurred in practice that the Draft law

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52 Third preliminary Draft law amending the Serbian law on free access to information of public importance (2018). Public authorities under the law, the appeal to the Constitution court and the Commissioner’s decisions enforcement, SIGMA Comments of 13 November 2018, non-published document
would be significantly amended during the process of drafting which means that a threat would appear for the exercise of rights to access to information with the amendments not contained in the initial draft that was distributed to the Commissioner for the opinion. Also, some law proposals never go through the phase of “draft”, but come as direct proposals of members of parliament and other relevant proposers.

The practice demonstrated that some bylaws also strive to restrict the law on access to information. Even if the provisions of the competent authorities are not influenced by these norms for the specific case, the bylaws norms can significantly discourage the applicants requesting information. In this regard, it is worth reminding that the interventions of this authority were beneficial and for several times contributed to the exclusion of the norms from regulations and rulebooks which were unjustifiably restricting the right of access to information.

Overview of other provisions from the Draft

As for the other planned amendments to the law, there are some positive and some which might have negative consequences. The most positive changes concerning the manner of publishing the information booklets (open format data) should be emphasised.

Although they were improved, the rules on “abuse of rights” of applicants are still possible to be abused by the public authorities themselves.

The norms on separating information (e.g. if the part of the requested document is confidential), are not precise enough, since the duty of public authorities to pass decisions which (partially) deny the access to the information is not mentioned.

Some of the potential reasons for rejecting the request could be too broadly or inappropriately interpreted. For example, this refers to “commercial interests” (anybody’s), which the public authority could referred to when denying this citizens’ constitutional right.

It was already mentioned there is an intention to expand the circle of bodies that cannot have their decision appealed before the Commissioner. The exemption of the National Bank of Serbia is neither logical nor justified. Namely, there are other public authorities, mentioned in the Constitution, and their decisions can be appealed. Also, the situation that the decisions on the matters decided by the NBS as the competent authority (e.g. as regards issuing banks with a licence to work)
cannot be appealed is not at all comparable with application of LFAIPI, where NBS is acting as any other public authority, which is not at all similar to the matters that only the National Bank has the competence to judge if the decision was right.

The Commissioner has warned of the dangers caused by limiting the possibility of this authority to examine the facts, when it comes to confidential information.\(^{53}\)

**Status and appointment of the Commissioner**

**Basic rules for appointing the Commissioner**

The Law on Free Access to Information has provided for a big innovation in 2004 to bolster the institutional system of Serbia by establishing new public authority, the Commissioner for Information of Public Importance. The Commissioner was defined as “an autonomous government body independent in the exercise of its powers”. The authority was established “for the purpose of exercising the rights of access to information of public importance held by public authorities”.\(^{54}\)

Although now, 14 years after, the existence of such an institution could be taken for granted, this practice has not been globally present at all. Namely, in many countries the protection of the right of access to information is provided by the courts or independent authorities with other competences in the protection of citizens’ right (e.g. Ombudsman). The existence of independent public authorities, apart from those defined by the very Constitution, could have be even less assumed in (case of) Serbia. At the time Serbia got its first Commissioner, it still did not have the institutions of the “fourth branch of government” which are definitely more usually found in other countries, such as the Ombudsman and State Audit.

As for the requirement for the appointment, the manner of appointment, reasons and the procedure of removal of the Commissioner for information, the Law sets out the rules similar to those applicable to majority of other officials appointed by the National Assembly. So Article 30 provides that the Commissioner would be appointed by the National Assembly of the Republic of Serbia and that this

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\(^{54}\) LFAIPI, Article 1 paragraph 2.
appointment shall be done by a majority of votes of all deputies. The original text did not define the majority for the appointment of the Commissioner\textsuperscript{55}.

The Law determined that there is only one proposer of the future Commissioner – the parliamentary committee of the National Assembly responsible for information. Proposal of the National Assembly working body is one of two usual options for this type of situation in the legal system of Serbia. Other usual option is that the candidate for this office would be proposed to the National Assembly by some other body – e.g. High Judicial Council is proposing judges who are appointed to the office for the first time, the President of the Republic suggests new Government prime minister-designate.

The Law on Free Access of Information of Public Importance could have gone a step further in defining the manner of appointing the head of the Commissioner institution, by closely regulating the procedure that shall be used by the parliamentary committee of the National Assembly to find the best possible candidate. A year earlier (in 2003) those rules were defined for appointing of some members of the Republic Broadcasting Agency\textsuperscript{56}.

**Examples of somewhat better practice**

A decade later, the legal system of Serbia got a better example when it comes to appointing the best possible candidate for the office. Namely, riding the wave of anti-corruption promises of the new ruling Serbian Progressive Party the 2012 Law on Public Procurement\textsuperscript{57} was adopted on the proposal of the parliamentary group

\textsuperscript{55} In 2006, when the norm by which all officials in the Assembly are appointed by the majority vote from the total number of deputies was introduced by the Constitution, that norm was (unnecessarily) included in the Law in 2007.

\textsuperscript{56} However, there is a big difference. The members of the Council of former RBA, who were appointed by the Assembly Committee on the proposal from some proposers with powers, were recognised as the candidates of some specific group of the interested parties (e.g. journalist and media associations). On the other hand, some members of RBA Council were appointed on the proposal of public authorities. The aim was to ensure representativeness and balance in the composition of the collective body between the candidates proposed by the public authorities and the ones proposed by non-state entities. Also, the Commissioner is an independent body and does not represent interests of no other institution or a social group, so there are different reasons why the circle of proposers should be expanded which also include – reducing political influence and ensuring the wider circle of good quality candidates.

\textsuperscript{57} Law on Public Procurement, "Official Gazette of RS", No. 124/2012, 14/2015 and 68/2015.
of that party, which predicted a big innovation – appointment of the members of the independent public authority at the competition implemented by the competent parliamentary committee. It refers to the President and eight members of the Republic Commission for Protection of Rights in Public Procurement Procedures, heads of independent body, which, similar to the Commissioner, decide on the complaints. After finishing the competition, the competent parliamentary committee shall set out the proposal that all deputies shall vote on in the end.

**Requirements for the appointment of the Commissioner**

Under Article 30 of LFAIPI the requirements established for the candidates to be appointed to the position of the Commissioner are as follows:

- established reputation and expertise in the area of protecting and promoting human rights;
- fulfilling the requirements for employment in government agencies;
- a bachelor’s degree in law;
- at least ten years of relevant work experience.

The negative conditions would include holding office or employment in other government body or a political party. The Commissioner shall be appointed to a seven-year term of office, for maximum two terms.

The prescribed requirements are common as regards the relevant working experience for this type of office, and the request for expertise in the area of law is also justifiable considering the type of decisions adopted by the Commissioner. The established reputation and expertise in the area of protecting and promoting human rights would be the only specific requirement for the appointment that could be considered as the key criteria for selection in the case of the competition.

This requirement could be disproved because of the insufficient definition “established expertise”, which is the subject of the interpretation of the parliamentary committee. Still, this is not the only example of setting such or similar requirement for the appointment of some official, and it would be difficult for the legislator to define in detail all important aspects of meeting this requirement, even if the wish to reduce the space for discretion would exist. Chief danger and lack of
logic in the legal provision lies in the fact that persons who are determining whether a person is an expert in some area actually are not themselves experts in that area. It is even more disputable that specific expertise in the area of human rights is required. On one hand, the Commissioner really protects some human rights recognised in international conventions, the Constitution of Serbia and the laws. However, it does not mean that the experience in protecting any human right would be equally relevant for carrying out tasks of this office. On the other hand, setting this requirement disables the appointment of a person as a Commissioner with a specific experience in some other areas that are highly relevant for the work of this institution, such as for example processing of the confidential data and the public manner of public authorities’ work.

It is getting complicated after the adoption of the Law on Personal Data Protection. Namely since 2008, the Commissioner has received a new scope of competences as regards the personal data protection. Article 58 of this Law provides that “the head office, appointment, termination of office, procedure for removal, the status of the Commissioner, the Deputy Commissioner and the expert service, funding and reporting shall be governed by the provisions of the Law on Free Access to Information of Public Importance.” In other words, taking into consideration that the Commissioner “has assumed” the competences of the personal data protection, no additional requirements have been set as regards the specific expertise in that area.

However, the new law adopted in 2018 includes the additional, more specific requirement: Article 75 requires that apart from the requirements for the appointment of the Commissioner, stipulated by the law governing free access to information of public importance, the Commissioner must have the required expert knowledge and experience in the area of personal data protection”.

The requirement for specific expertise represents the logical development of the normative. Namely in both 2004 and 2008, when first laws in these two areas within the competence of the Commissioner have been adopted, it was not realistic to set the requirements for specific expertise in exercising the rights which were not

58 Law on Personal Data Protection, "Official Gazette of RS", No. 97/2008, 104/2009 – other law, 68/2012 – Constitutional Court Decision and 107/2012. This refers to the law that should have been in force by 20 August 2019, when the new Law on personal data protection would enter into force ("Official Gazette of RS", No. 87/2018).
regulated before or were only regulated by the laws that in reality have not been applied. However now, more than a decade later, the broad circle of persons who gained expertise related to the right of access to information and personal data protection have been created, primarily inside the institution of the very Commissioner, and other public authorities with duties under provisions of these two laws, in the active part of non-government sector, among legal representatives of parties and inside the academic community. Therefore the only logical solution would be to set the requirement for the specific expertise from the point of view of the protection of right of access to information, as it was done for the personal data protection area.

Legal framework for removal from office

In the current legal framework, pursuant to Article 31 of LFAIPI, the Commissioner office terminates upon expiration of his/her term in office, on his/her personal request, upon turning sixty five years of age or upon removal from office. The decision on the termination of the office of the Commissioner shall be adopted by the National Assembly, by a simple majority of votes of all deputies. A Commissioner shall be removed from office if he/she has been sentenced to imprisonment for a criminal offence, in the event of permanent incapacity, if he/she holds an office in a government body or a political party, or is employed with them, if he/she no longer holds the citizenship of the Republic of Serbia, or if he/she fails to perform his duties with due competence, diligence and responsibility.

The motion for removal of the Commissioner shall be initiated on the initiative of one third of deputies. The parliamentary committee in charge for information shall set out if there are reasons for removal and notify that to the National Assembly. Judging by these provisions it is concluded that the procedure for removal is somewhat more difficult than the appointment procedure. For the appointment it is enough that the majority of members of a parliamentary committee gives support to the candidate in the first phase, while before the removal at least 84 deputies must vote for it.

The Parliamentary Committee on Information also notifies the National Assembly on the Commissioner requests to be relieved of duty or if he/she has reached the statutory age for termination of office. If the National Assembly does not decide upon a request within 60 days, it shall be deemed that a Commissioner is terminated with effect on expiration of that period. In other situations, a Commissioner’s office
shall be terminated as from the date specified in a pertinent decision passed by the National Assembly.

**Commissioner’s appointment in the Draft amending the Law**

The Draft from March 2018 amending the Law on Free Access to Information of Public Importance provides for changes in relation to the procedure of appointment and removal of the Commissioner.

Potentially harmful rules are suggested for Article 30. Namely, new paragraphs 2 and 3 stipulate that “every parliamentary group in the National Assembly shall have the right to propose to the parliamentary committee its candidate for the Commissioner, and more parliamentary groups may suggest a joint candidate”, so “the proposal for the appointment of the Commissioner shall be laid down by a majority of votes of all members of the committee”.

It is obvious that actually parliamentary groups have the power in proposing the candidate to be appointed to this office, so making a more precise definition in the Draft only supports the current practice anyhow, and that actually fills in the legal gap – the absence of the procedure to be followed by the Culture and Information Committee for finding the candidate for the Commissioner’s office.

However, specific mentioning of the parliamentary groups as the proposers could be also interpreted that no one else has the power to propose the candidate to the parliamentary committee. Although in any case the final decision would be the result of the political will or the political agreement of all stakeholders (majority members of the committee), there is no reason to limit the possibility of the committee to learn about the good quality candidates through other means, and not only from parliamentary groups.\(^{59}\)

**Removal from office in the Draft amending the Law**

The 2018 Draft amending the Law includes some disputable points in relation to the removal of the Commissioner. In Article 31, the paragraph 6 is arguable in relation to determining “incompetent and irresponsible work” which might be one of the

potential reasons for removal. The provision stipulates that the parliamentary committee shall establish if there were reasons for removal by a majority of votes of all members. Upon determining there are no reasons for removal, it shall notify the National Assembly. If determining there are reasons, it shall submit the proposal of the decision on the removal to the National Assembly. Paragraph 7 stipulates that the Commissioner has the right to address the deputies at the sitting of the parliamentary committee and at the sitting of the National Assembly when the proposal for his/her removal is being considered.

Although the final decision on the removal of the Commissioner belongs to the deputies beyond any doubt, is it necessary to ensure that the deputies receive appropriate information on the statements referring to the Commissioner incompetent job performance. Otherwise, they will base their decision only on the text proposal for removal of the Commissioner and his/her statement. Consequently, it would be reasonable to organise a public hearing in relation to these matters so the experts from the area of access to information from Serbia and international organisations dealing with these matters could express their opinion, and maybe even the representatives of relevant institutions. In this case it must be the Constitutional Court, a body responsible for re-examining the decision of the Commissioner for particular cases. Anyway, it would be better to relate the reasons of incompetence and irresponsibility to some tangible indicators, such as the decisions of competent courts or other supervisory bodies which indicate the existence of such circumstances. This would for sure not mean that their decision would suffice to determine that the work of the head person of the institution of the Commissioner is to be qualified as “incompetent” or “irresponsible”.

Civil society initiative

Second seven-year term of office of the Commissioner Rodoljub Šabić, who is a head of this institution from the time it was established, shall expire on 22 December 2018. The procedure of appointing the new Commissioner has not started on time, although the holder of this office warned about that on time.60

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60 https://twitter.com/RodoljubSabic/status/1054635716486029312
Free Access to Information in Serbia: Experience, Problems and Perspectives

A group of over 60 civil society organisations has sent an open letter to the members of the Culture and Information Committee in November 2018. In the letter, the organisations recall bad past experience and adverse consequences for the work of public authorities when the appointment of their head officers is delayed which was the case for many public authorities so far. The most extreme example probably was the case of Anti-Corruption Agency, which for some time had only two out of 9 members of the Committee stipulated by the law, and at the same time had neither the director nor the deputy director. There is less danger at this moment as regards the work of the Commissioner institution, since there is one (out of two stipulated) Deputy Commissioner. Second seven-year term of office of the current Deputy Commissioner actually started in April 2013.

Civil society organisations have asked the Culture and Information Committee of the National Assembly of the Republic of Serbia:

- to initiate the procedure for the appointment of the new Commissioner as soon as possible;
- to turn the procedure of appointing the best possible candidate for this office into open procedure, like the legal provisions for the appointment of the President and the members of the Republic Commission for Protection of Rights in Public Procurement Procedures, by inviting openly all interested parties who meet the requirements to submit proofs of their qualification, consider received applications and publish results of that consideration;
- to specify the legal requirements for the appointment, and in addition to the general expertise and experience in the protection and promotion of human rights, give advantage to the candidates with a specific expertise and experience as regards the protection and promotion of two human rights under Commissioner’s competence (right to access to information and right to personal data protection);

62 See: https://www.poverenik.rs/sr-yu/onna/%D0%BE%E6%D1%80%D0%BD%0%B0%D0%B7%0%B0%D1%86%D0%B8%D1%98%D0%B0-2/54-ostalo/biografije-lat/91-stanojla-mandi.html
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- for the purpose of making an argumentative decision on the proposal which is to be referred to the National Assembly, to interview the best candidates at sitting that will be open to the public;
- to explain by each requirement the proposal of the decision on the appointment of the best candidate.

Initiators have subsequently suggested the criteria for the process of the Commissioner’s appointment and securing the public participation in the process.63

(Non) activities of the parliamentary committee

Some deputies, members of the parliamentary committee, reacted to this proposal, and one of them has sent a formal proposal to put the appointment of the Commissioner on the agenda along with the positive assessment on the work of the current Commissioner and this institution in general64. That proposal was not accepted, since only 5 out of 13 present members of the committee had voted for it, while the others abstained from voting. At the very end of the Committee sitting of 26 November 2018,65 its Chairperson addressed the members in the following words: “Before closing this meeting, I would just like to say, it is really our obligation to initiate the procedure for appointing the Commissioner, which will be done in reasonable time and in legal manner. Since the representatives of the opposition are against this rule for the appointment, which was used to appoint the former Commissioner, this demonstrates that we have an agreement he has done a terrible job, which means that under the procedure he was appointed he did not work properly, so you really cannot say that you are satisfied with his work”.

64 Branka Stamenković, a deputy, whose speech, along with the procedure of voting on the proposal, could be listened here (first five minutes): http://www.parlament.gov.rs/22._sednica_Odbora_za_kulturu_i_informisanje.35335.941.html
65 Mirko Krlić, Chairperson of the Committee, audio and video recording, the last minute of the recording: http://www.parlament.gov.rs/22._sednica_Odbora_za_kulturu_i_informisanje.35335.941.html
At first sight, it is quite obvious that the Chairperson of the Committee “came to the irrelevant conclusion”. Namely, the deputies’ assessed, as well as a large part of the public, that the current Commissioner has properly done his job. Considering that the procedure for appointment to the office does not provide sufficient guarantees for the best candidate selection, it could be concluded that the Commissioner did a good job, despite the fact that the manner of the appointment by the law does not guarantee the protection from the political influence, and not due to it.

Also, it is obvious that since the legal procedure for the appointment of the Commissioner is not well explained and good, no conclusion could be drawn on how the Commissioner really did in practice. The annual reports of this institution could provide information of its work, which, inter alia, should be considered by the Culture and Information Committee. In the last years, the parliamentary committees have neither established any deficiency in these reports, nor have the deputies initiated the procedure for alleged deficient work of the Commissioner. On the contrary, whenever the reports of the Commissioner were deliberated, they have received the support of the parliamentary committee and the National Assembly as a whole.

In relation to that, it is worth reminding of the observation from the 2017 Commissioner Report: “Along with all existing chronic issues in the last year, the work of the Commissioner was particularly made difficult by the fact that the Commissioner’s activities, which were not affirmative for the government bodies, i.e. legal measures undertaken by the Commissioner on that basis, often caused fully unjustified criticism against the Commissioner, improper insinuations and even obvious lies or, even worse, the competent authorities denied the Commissioner with the cooperation and thus prevented the Commissioner to undertake measures stipulated by the law.\textsuperscript{66}

\textsuperscript{66} The Commissioner’s Report mentions that when deliberating the 2016 Commissioner Report at the sitting of the Committee on Human Rights, the institution of the Commissioner and him personally have been exposed to the negative campaign on the occasion of the alleged candidacy of the Commissioner for the Mayor of Belgrade. Also, during the sitting, the Speaker of the National Assembly has stated and repeated false data on the amount of the Commissioner’s salary, by doubling its amount, despite the fact that this amount in prescribed by the Law, and the decision on the salary is adopted by the Assembly, meaning the competent Committee and this information is available at the website of the Commissioner.