Montenegro
Agency for Prevention of Corruption

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Pursuant to Articles 78 and 79 of the Law on Prevention of Corruption ("Official Gazette of Montenegro", No. 53/14 and 42/17) and Article 10 of the Statute of the Agency for Prevention of Corruption, acting ex officio, the Agency for Prevention of Corruption adopts:

OPINION ON THE LAW ON FREE ACCESS TO INFORMATION ("Official Gazette of Montenegro", no. 44/2012 and 30/2017)

Bearing in mind that the right to access information held by state authorities and organizations exercising public powers is a right guaranteed by the Constitution and recognized as one of the fundamental rights of citizens in every democratic society, the Agency is of the opinion that it is necessary to expand Article 12 of the Law so that the authority is encouraged to publish and update all information of public importance in an easily accessible place, in a timely and proactive manner, all in order to increase the transparency of the work of the authority, thereby inevitably contributing to the strengthening of public trust in the work of those authorities.

Furthermore, when it comes to the harm test for information disclosure, which is regulated by Article 16 of the Law, it is necessary to provide guidelines or criteria in the relevant article of the Law, or to adopt them, which would be guidance in each individual case for the person who is competent to carry out the harm test for disclosure information. This way, the established criteria or guidelines would reduce the discretionary powers of the authorities in assessing the circumstances in which, in each individual case, pointing to concrete and real reasons, it is determined that the possible publication of the information in question would significantly threaten the interest from Article 14 of this Law , that is, it would cause harmful consequences for the interest, which is of greater importance than the interest of the public to know or possess that information.

The Agency's opinion is that, in addition to the above, it is necessary to define guidelines that will contribute to the development of a uniform practice and to the elimination of possible flatness when it comes to the "prevailing public interest" for some information to be published, which is regulated by Article 17 of the Law in question, especially appreciating the legislator's intention to introduce proportionality in the sense of enabling access to information in the case of a prevailing public interest, as opposed to limiting access to information from Article 14 of the Law.

Additionally, and bearing in mind the importance of assistance to the applicant, which is regulated by Article 20 of the Law, it is necessary to clearly and precisely prescribe the actions of the authorities when they receive an incomplete or incomprehensible request, the elements that must be contained in the instruction in order to eliminate the deficiencies, and clearly state the deadlines for all planned actions so that the assistance to the applicant is real, that is, expedient, and the basic idea of the Law, that is, enabling access to information, is fulfilled.

What the Agency recognizes as a significant shortcoming of the existing regulation refers to the need to define the principle of abuse of the right to free access to information, which would prevent any intention of a natural or legal person to abuse the said right by usurping the institutes prescribed by the Law, and directly affect the regular functioning of institutions that perform public functions with administrative burden, which ultimately leads to its financial exhaustion.

Through the implementation of investigative preventive anti-corruption activities with the aim of building and strengthening the prevention of corruption through the existing normative and strategic framework, starting from March of this year, the Agency consulted the authorities on several occasions in relation to the amount of court costs paid by the authorities in disputes related to exercising the right to free access to information in the period from January 01. 2016 until March 1, 2022. The analysis of the responses received by more than a hundred authorities, in relation to the request in question, determined that the amount involved was around 1,000,000.00 euros in court costs that the authorities paid out of taxpayers' money in the relevant period in disputes related to exercising the right to free access to information, which could potentially be a consequence of the lack of the principle of abuse of the right to free access to information in the Law itself.

In this regard, the Agency’s opinion is that in the Law itself it is necessary to establish the principle of abuse of the right to free access to information, and in addition to the above, prescribe guidelines on the basis of which it will be possible to detect the mentioned abuse, which would include criteria related to the fact that it is about one or more interrelated applicants, who through one or more functionally related requests are clearly abusing the right to access information contrary to the purpose and goal of the law, as well as about frequent requests for the delivery of the same or similar information or requests that require a large amount of information that burdens the work and regular functioning of the authorities, or if the requests are obviously unreasonable or disturbing.

RATIONALE

I PROCEDURE

The Law on the Prevention of Corruption regulates the responsibility of the Agency for the Prevention of Corruption (hereinafter referred to as the Agency) to, pursuant to Article 78 paragraph 1 of the Law on the Prevention of Corruption:

- "…give initiatives for amending laws, other regulations and general acts, in order to eliminate possible risks of corruption or their alignment with international standards in the field of anti-corruption;
- "give opinions on draft laws and other regulations and general acts for the purpose of their alignment with international standards in the field of anti-corruption;"

Also, Article 79 of the Law establishes that the Agency may, on its own initiative or at the request of an authority, company, legal entity, entrepreneur or natural person, give an opinion in order to improve the prevention of corruption, reduce the risk of corruption and strengthen ethics and integrity in the authorities and other legal entities, which contains an analysis of the risk of corruption, measures to eliminate the risk of corruption and prevent corruption.

In its Opinions, the Agency may refer to the provisions of the Constitution and relevant laws, but not in the sense of assessing constitutionality and legality, but in the sense of applying and achieving the purpose of Article 79 of the Law on Prevention of Corruption. Also, in order to strengthen the mechanisms of prevention of corruption, which are recognized by international conventions and documents, the Agency tries to point them out in its opinions and, acting on recommendations, introduce and strengthen institutes of prevention of corruption in the Montenegrin legislation.

Article 6 paragraph 1 item 1 of the Law on Prevention of Corruption states that the public interest is a material and immaterial interest in the welfare and prosperity of all citizens under equal conditions.

The Constitution of Montenegro ("Official Gazette of Montenegro", No. 1/07, Amendments I to XVI - 38/2013-1) in Article 51 regulates access to information as one of the political rights and freedoms, and states that everyone has the right to access information held by state authorities and organizations that exercise public authority and determines that the right to access information can be limited if it is in the interest of: protecting life; public health; morality and privacy; conducting criminal proceedings; security and defense of Montenegro; foreign, monetary and economic policies.

Free access to information is one of the most important institutes that reflect the legislator's intention to make the work of authorities transparent and at the same

time satisfy the principle of the public “to know”, i.e., to be informed in a timely and accurate manner about issues on which authorities make decisions, or to be informed with the data on the basis of which they create their action policies.

In this regard, and in accordance with Articles 78 and 79 of the Law on Prevention of Corruption (“Official Gazette of Montenegro”, No. 53/14 and 42/17) and Article 10 of the Statute of the Agency for Prevention of Corruption, acting ex officio, the Agency recognized the interest to carry out the procedure ex officio, review the provisions of the Law on Free Access to Information (“Official Gazette of Montenegro”, no. 44/2012 and 30/2017), and by giving recommendations contribute to improving the quality of future legal solutions in this area.

II ANALYSIS OF THE RELEVANT PROVISIONS OF THE LAW ON FREE ACCESS TO INFORMATION (“Official Gazette of Montenegro”, no. 44/2012 and 30/2017)

Article 1 paragraph 1 of the Law on Free Access to Information states that the right to access information and reuse information held by public authorities is exercised in the manner and according to the procedure prescribed by this law, and Article 2 of the Law states that access to information held by public authorities is based on the principles of free access to information, transparency in work of public authorities, the right of the public to know and equality of requests, and is carried out at the level of standards set out in ratified international agreements on human rights and freedoms and in generally recognized rules of international law. The right to access information, rightfully so, is one of the fundamental rights of citizens in every democratic society, and the openness and transparency of the work of authorities and the proactive and timely publication of information is imperative in every modern society. The principle of transparency is also a kind of control mechanism of the work of authorities by the public, which contributes both to the improvement of the quality of services provided by authorities and to their efficiency.

In this regard, and when it comes to Article 12 of the Law, which regulates proactive access to information, in the relevant Article of the Law, special importance should be given to the mentioned principle of transparency of the work of authorities, which is stated in Article 2 of the Law, in such a way that Article 12 should be expanded so that the authority is encouraged to promptly and proactively publish and update information of public importance, which is specified by law, in an easily accessible place. Here, it is necessary to include all possible information that the authority should publish, with the aim of increasing the transparency of the work of the authorities, which inevitably contributes to strengthening the public's trust in the work of those authorities.

Furthermore, when it comes to the harm test for disclosure of information, which is regulated by Article 16 of the Law, and which further regulates the restriction of access to information in the event that its disclosure would significantly threaten the interest from Article 14 of this Law, i.e., when there is a possibility that the disclosure of information would cause harmful consequences for an interest that is of greater importance than the interest of the public to know that information, unless there is a prevailing public interest prescribed by Article 17 of this Law, the relevant Article of the Law needs to be expanded and further elaborated.

Specifically, in the subject article of the Law, it is necessary to prescribe guidelines and criteria, i.e., their adoption, which would guide the person who is competent to carry out the harm test, with the aim of reducing discretionary powers and creating conditions so that all persons can exercise the right to free access to information in an equal and fair manner. This issue is particularly important, as the harm test should be carried out in each individual case, with due care, to weigh the circumstances by which it is determined if the possible publication of the information in question would significantly threaten the interest from Article 14 of this Law, i.e., when there is a possibility that the disclosure of information would cause harmful consequences for an interest that is of greater importance than the interest of the public to know that information.

In this regard, and as the result of the harm test consequently conditions exercising the right to access information, as well as the very transparency and openness of the authorities to the public, it is necessary to regulate and specify by law broad discretionary powers given to the authorities through the application of this institute, and to determine the criteria or guidelines that will guide the person appointed to conduct the harm test in each individual case.

Also, regarding the earlier recommendation, it is necessary to define criteria or guidelines, which will contribute to the creation of a uniform practice, and to the elimination of possible flatness when it comes to the “prevailing public interest” for some information to be published, which is regulated by Article 17 of the Law in question, particularly appreciating the legislator's intention to introduce a balance by enabling access to information in order to protect the public interest, as opposed to restriction of access to information from Article 14 of the Law due to this prevailing public interest.

When it comes to Article 20 of the Law, which refers to assisting the applicant, especially paragraph 2 of this Article, which states: “If the request for the information is incomplete or illegible and therefore it cannot be acted upon, the authority shall invite the applicant to correct the deficiencies in the request within 8 days from the date of submission, and give him/her instructions on how to remedy the deficiencies”, the stated paragraph of the Law and the entire institute of assistance to the applicant need to be specified and adapted in such a way that corresponds to the expected function.

Specifically, it is necessary to clearly and precisely prescribe the actions of the authorities when they receive an incomplete, or incomprehensible request, the elements that must be contained in the instructions in order to eliminate the deficiencies, and clearly state the deadlines for all the planned actions so that the assistance to the applicant is real, that is, expedient, and the basic idea of the Law, that is, enabling access to information, is fulfilled.

Although the ideal of every democratic society should be the achievement of the highest possible level of openness and transparency of authorities, in order to enable control over their work by the public, and increase their responsibility and the quality of the services they provide, that is, the exercise of the rights prescribed by laws, and increased citizens' trust in public administration, the counterbalance and the thing that preserves this “ideal” should be defined through the principle of abuse of the right to free access to information.

Namely, through articles 31 (deadline for decision on the request), 32 (deadline for execution of the decision), 34 (right to appeal), 37 (procedure of the first-instance authority upon appeal), 38 (procedure of the Agency upon appeal), 42 (obligation to submit acts and data), 44 (judicial protection) of the Law, deadlines for action, i.e. resolution of requests for free access to information, i.e. re-use of information are regulated.

Thus, in Article 31 of the Law, when it comes to the deadline for deciding upon the request, it is said that the deadline is 15 days from the day of submission of the adequate request, and that the specified deadline can be extended for 8 days, provided that:

1) the request refers to exceptionally voluminous information;
2) the request for access to information refers to classified information;
3) tracking the requested information entails search through a large volume of information and therefore disturbs performance of regular activities of the public authority.

Also, Article 32 of the Law states that the public authority is obliged to execute the decision within three working days after the decision has been delivered to the applicant or within three working days after the day when the applicant has submitted a proof of payment of costs of procedure, if such costs have been specified in the decision.

Additionally, in Article 38 of the Law, it is stated that the Agency for Protection of Personal Data and Free Access to Information is obliged to issue a decision upon the complaint against a decision on the request for access to information and to deliver it to the complainant within 15 working days as of the day on which

the complaint is submitted, and Article 42 of the Law stipulates that public authorities are obliged to submit to the Agency data about petitions, acts and undertaken measures referred to in Article 41, paragraph 1 of this Law (Information system of the information access), within 10 days as of the day when they are submitted, created, or undertaken.

Taking into account the obligations provided for authorities by the Law on Free Access to Information, and bearing in mind that since March of this year, the Agency for Prevention of Corruption has been conducting an analysis of the amount of court costs paid by authorities in disputes related to exercising the right to free access to information in the period from January 1, 2016 to March 1, 2022, and as the received documentation indicates that, in relation to the request in question through the responses of over a hundred authorities, it is about the amount of around EUR 1,000,000.00 for the requested period, the Agency is of the opinion that it is necessary to consider the possibility of envisioning an institute that would monitor and eliminate frequent abuses of the right to free access to information.

In this regard, and bearing in mind that the judicial protection of requests for access to information or the reuse of information is regulated in accordance with the law governing administrative disputes, the Agency took into consideration current solutions provided for in the Draft Law on Amendments to the Law on Administrative Disputes, which was established by the Government on June 23, 2022, which is currently in the parliamentary procedure.

Namely, by looking at the solutions contained in the Proposal of the aforementioned law, the Agency recognizes the intention to partially solve this issue through the amendment of Article 39 (Article 17 of the Proposal of the Law), with regard to the costs of the procedure, where the court is given the possibility to exceptionally, if the same party has filed multiple lawsuits against the same defendant, issue a decision on merging the proceedings, and the court can award the costs of the proceedings as if a single lawsuit had been filed. As stated in the Explanatory Memorandum of the Proposal of the Law, the aforementioned provision is proposed in order to prevent the abuse of procedural rights by parties who initiate a large number of proceedings before the Administrative Court against the same defendant, solely for the purpose of exercising the right to reimbursement of court costs, which, according to the proponent of the regulation, will improve the efficiency of the work of the Administrative Court.

In addition, what the Agency recognizes as a quality solution with the aim of improving the court's actions in these cases is the change that was proposed in relation to Article 28 of the current Law on Administrative Dispute, where it is said

(Article 12 of the Draft Law) that, except for paragraph 2 of this Article, the administrative court can resolve the dispute without conducting an oral hearing if, among other things, the lawsuit was filed due to the administration's silence, and if the court decides that the public law authority should be obliged by the verdict to decide on the party's request;...

Preventing the abuse of the right to free access to information is important in order to enable the effective exercise of the right of citizens to free access to information in order to protect the public interest, but also to prevent any possible intention of an individual to abuse the said right by usurping the foreseen institutes, and directly affect the regular functioning of institutions that perform public functions by administrative burden, which ultimately leads to significant financial exhaustion.

When it comes to comparative practice, and through the Law on Amendments to the Law on Free Access to Information of Public Importance ("Official gazette of RS", No. 51/06 - officially refined text, 117/06 - ZDavP-2 , 23/14, 50/14, 19/15 – dept. US, 102/15, 7/18 and 141/22), the Republic of Slovenia states the following in Article 5 item 5 of the Law in question: The authority may exceptionally deny the applicant access to the requested information, if the applicant with one or more functionally related requests clearly abuses the right to access information of a public nature in accordance with this law, or it is obvious that the submitted request or requests are of a violent nature.[1]

When it comes to the Republic of Croatia, the issue of free access to information is regulated by the Act on the Right of Access to Information ("Official Gazette" 25/13, 85/15 and 69/22)[2] where, when deciding on the request, in Article 23 paragraph 6 item 5 it is stated that "The public authority shall reject the request by decision if one or more interrelated applicants, through one or more functionally related requests, clearly abuses the right to access information, and especially when due to frequent requests for the delivery of the same or similar information or requests that require a large amount of information, the work and regular functioning of the public authority is burdened".

Also, Portugal in Law No. 26/2016 of August 22, 2016, in Article 15 paragraph 3, and when it comes to responses to requests for access to information, states that

[1] Article 5 of the Act on Amendments to the Act on Access to Public Information (Official Gazette of the Republic of Slovenia, No. 7/18) (principle of free access) -... (5) The authority may exceptionally deny the applicant access to the requested information, if the applicant, with one or more functionally related requests, clearly abuses the right of access to information of a public nature under this Act, or it is obvious that the request or requests are of a violent nature http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO3336

[2] https://www.zakon.hr/z/126/Zakon-o-pravu-na-pristup-informacijama

entities are not obliged to fulfill requests that, given their repetitiveness and systematic nature or the number of requested documents, are clearly offensive, without questioning the applicant's right to appeal.[3]

Bearing in mind the Montenegrin ten-year practice in the application of the Law on Free Access to Information, as well as part of the aforementioned comparative practice, it is necessary to consider the introduction of the institute of abuse of the right to free access to information, and to find an adequate normative measure, that will detect this abuse, while taking care in each individual case not to jeopardize the right of the citizen, i.e., the public, to be informed.

In this regard, the Agency is of the opinion that it is necessary to prescribe the conditions on the basis of which it will be possible to detect the abuse in question, which would include criteria related to one or more interconnected applicants who, through one or more functionally related requests, clearly abuse the right to access information contrary to the purpose and goal of the law, as well as whether it is a question of frequent requests for the delivery of the same or similar information, or requests that require a large amount of information that burdens the work and regular functioning of authorities, i.e., if the requests are obviously unreasonable or disturbing.

It is especially important to bear in mind the role of the Agency for Protection of Personal Data and Free Access to Information, as well as the Council of the Agency due to the competences entrusted to them by the Law on Free Access to Information, through Article 39 and 40 of the Law, where they would be the ones who would draw up the guidelines related to detecting the abuse of the right to free access to information and be the supervisory bodies in the whole process, in order to prevent unjustified reference to this legal basis with the aim of limiting free access to information, and to ensure that it is adequately applied.

V FINAL ASSESSMENTS

Bearing in mind that the right to access information held by state bodies and organizations exercising public powers is a right guaranteed by the Constitution and recognized as one of the fundamental rights of citizens in every democratic

[3] Law no. 26/2016 of 22 August 2016
https://www.parlamento.pt/sites/EN/Parliament/Documents/Lei26_2016.en.pdf ;
CADA - Comissão de Acesso aos Documentos Administrativos (https://www.cada.pt/traducoes/about-us-commission-for-access-to-administrative-documents-cada)

society, the Agency is of the opinion that it is necessary to expand Article 12 of the Law so that the authority is encouraged to promptly and proactively publish and update all information of public importance in an easily accessible place, all with the aim of increasing the transparency of the work of the authority, which inevitably contributes to the strengthening of public trust in the work of those bodies.

Furthermore, when it comes to the harm test for disclosure of information, which is regulated by Article 16 of the Law, it is necessary to provide guidelines or criteria in the relevant Article of the Law, or to adopt them, which would be managed in each individual case by the person who is competent to carry out the harm test for disclosure of information. In this way, and with the established criteria or guidelines, the discretionary powers of the authorities would be reduced in weighing the circumstances in which, in each individual case, pointing to concrete and real reasons, it is determined that the possible publication of the information in question would significantly threaten the interest from Article 14 of this Law, or cause harmful consequences for the interest, which is of greater importance than the interest of the public to know or possess that information.

The Agency is of the opinion that, in addition to the above, it is necessary to define guidelines that will contribute to the creation of a uniform practice, and to the elimination of possible flat-rates when it comes to the "overriding public interest" for some information to be published, and which is regulated by Article 17 of the Law in question, especially appreciating the legislator's intention to introduce proportionality in terms of enabling access to information in the case of an overriding public interest, as opposed to limiting access to information from Article 14 of the Law.

Additionally, and bearing in mind the importance of the institute in helping the applicant, which is regulated by Article 20 of the Law, it is necessary to clearly and precisely prescribe the actions of the authorities when they receive an incomplete or incomprehensible request, the elements that must be included in the instruction in order to eliminate the deficiencies, and clearly state the deadlines for all planned actions so that the assistance to the applicant is real, i.e., expedient, and the basic idea of the Law, i.e., enabling access to information, is fulfilled.

What the Agency recognizes as a significant shortcoming of the existing regulation refers to the need to define the principle of abuse of the right to free access to information, which would prevent any intention of a natural or legal

person to abuse the said right by usurping the institutions provided for by the Law, and directly affect the regular functioning of institutions that perform public functions by administrative burden, which ultimately leads to its financial exhaustion.

Through the implementation of investigative preventive anti-corruption activities with the aim of building and strengthening the prevention of corruption through the existing normative and strategic framework, the Agency, starting from March of this year, consulted the authorities on several occasions in relation to the amount of court costs paid by the authorities in disputes which refer to the exercise of the right to free access to information in the period from January 1, 2016 to March 1, 2022. Analyzing the responses received from more than a hundred authorities, in relation to the request in question, it was determined that the amount involved is approximately EUR 1,000,000.00 in court costs, which the authorities paid out of taxpayers' money in the relevant period in disputes related to the exercise of the right to free access to information, and which could potentially be a consequence of the lack of the principle of abuse of the right to free access to information in the Law itself.

In this regard, the Agency is of the opinion that in the Law itself it is necessary to establish the principle of abuse of the right to free access to information, and in addition to the above, prescribe guidelines on the basis of which it will be possible to detect the abuse in question, which would include the criteria related to the fact that it is one or more interrelated applicants, who through one or more functionally related requests are clearly abusing the right to access information contrary to the purpose and goal of the law, as well as frequent requests for the delivery of the same or similar information or requests that require a large amount of information that burdens the work and regular functioning of authorities, i.e., if the requests are obviously unreasonable or disturbing.

It is especially important to bear in mind the role of the Agency for the Protection of Personal Data and Free Access to Information, as well as the Council of the Agency due to the competences entrusted to them by the Law on Free Access to Information, where they would be the ones who would draw up the guidelines related to detecting the abuse of the right to free access to information and be the supervisory bodies in the whole process, in order to prevent unjustified reference to this legal basis with the aim of limiting free access to information, and to ensure that it is adequately applied.

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Submitted to:
- The Parliament of Montenegro
- The Government of Montenegro
- Council of the Agency for Prevention of Corruption
- Agency for Personal Data Protection and Free Access to Information
- Ministry of Public Administration
- a/a

Expedited on:
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