

# **Analysis of the Draft of Freedom of Access to Information Act of BiH**

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*Freedom of Access to Information Act was adopted in November 2000. It has been amended three times so far, thus when this draft is adopted it will be the fourth time. The consultant of Internews in BiH analyzes the proposed amendments and concludes that they are a step backward. And this is why...*

At the initiative of Personal Data Protection Agency of Bosnia and Herzegovina (BiH) and based on decisions of the Council of Ministers of BiH, the Ministry of Justice of BiH published the Draft of Law on Amendments and Additions of the Freedom of Access to Information Act on May 10<sup>th</sup> 2013. After the Ministry published the Draft, it also announced public consultations lasting between May 10<sup>th</sup> and 31<sup>st</sup>.

Freedom of Access to Information Act of BiH (FoIA) was adopted in 2000 and it has been amended three times so far (in 2006, 2009 and 2011).

## **Basic characteristics of the Draft**

This Draft establishes principles of access to information in a way that differs from those contained in the Act till now, definitions of concepts in the Act are given in a different way, a whole segment referring to personal information is excluded (since the Law on the Protection of Personal Data regulates this more precisely), restrictions set to protect the right to privacy and other legitimate private interests are defined and finally, the Draft specifies the process of filing a complaint.

The principles for access to information, different definitions of concepts in the Act and exclusion of provisions which refer to personal information deserve a comparative and detailed analysis and require more time. Specifying the process of filing a complaint is justified and based on shortcomings noticed in the application of the Act.

The most disputable article is Article 4 of the Draft of Law on Amendments and Additions of the Freedom of Access to Information Act (restrictions set to protect the right to privacy and other legitimate private interests) which is contrary to the existing Act and its goals.

## **Restrictions set to protect the right to privacy**

Article 4 of the Draft has proved to be the most disputable because it entirely changed Article 8 of the Freedom of Access to Information Act and because it introduces restrictions regarding the access to information which refer to the protection of privacy and other legitimate private interests and, most importantly, because it restricts questioning public interest.

Article 4 of the Draft states:

*'Article 8 is changed and states:*

*'Article 8, Restrictions set to protect the right to privacy and other legitimate private interests.*

1. *A competent authority shall, in line with this law and special regulation referring to protection of personal data, restrict the access to information or a part of information if disclosing it would jeopardize the right to privacy and other legitimate private interests.*

2. *Exempted from paragraph 1 of this Article, public authority shall not restrict the access to information or to a part of information referring to:*

*a) using public funds, except the funds allocated to social insurance, health care and protection from unemployment;*

*b) conducting public function, which entails income, property and conflict of interest of public officials and their relatives included in the law which regulates prevention of conflict of interest;*

*c) court decisions in cases of general importance for the public such as the cases of war crimes, organized crime, corruption, terrorism, tax evasion and others which competent public body assesses as cases of general importance for the public;*

*d) name, last name and work position in public bodies;*

3. *Restrictions to access to information or a part of information due to protection of privacy lasts 70 years from its creation and at least 20 years from the death of a person to whom it refers, unless the person to whom the information refers or his/her spouse or [unmarried] partner, children or parents after his/her death agree in writing that the information is disclosed before this time period expires.'*

Article 8 of the current Freedom of Access to Information Act contained a rather scant provision: '*A competent authority shall claim an exemption where it reasonably determines that the requested information involves the personal privacy interests of a third person.*'

### **Analysis of restrictions to access to information**

As the proposed phrasing in the Draft states, the law introduces a new basic rule of withholding information in the case of a request for access referring to protection of privacy (paragraph 1: '*A competent authority shall, in line with this law and special regulation referring to protection of personal data, restrict the access to information or a part of information if disclosing it would jeopardize the right to privacy and other legitimate private interests.*').

It is true that the suggested changes state that '*Exempted from paragraph 1 of this Article, public authority shall not restrict the access to information or to a part of information...*' (paragraph 2, items a, b, c and d).

This is how paragraph 1 of Article 4 of the Draft introduces the rule of withholding information and, completely obvious, the automatism in the behavior of public authorities in all cases or requests for accessing information referring to protection of privacy and protection of other legitimate private interests, except in cases stipulated in paragraph 2. However, this approach is contrary to the basic goal and nature of the laws on free access to information around the world and so in our country, as they are based on a completely opposite principle – publishing information is a rule and withholding is an exception.

However, the Draft provides withholding as a rule and publishing as an exception. There is no doubt that this approach would give public authorities open hand for misuse of Freedom of

Access to Information Act and introducing restrictions for all cases except those which are stipulated as exceptions.

This definition of restrictions stipulated in Article 4, paragraph 1 of the Draft basically excludes Article 9 of the current Freedom of Access to Information Act (*Public Interest Test*) which based the principle of dealing with each request on each individual case and instead of this introduces the opposite principle – automatism. This is also contrary to goals and nature of the Freedom of Access to Information Act.

Although Article 8 of the current Freedom of Access to Information Act is rather scant, it has still kept the basic principle of dealing with requests based on each individual case and made public authorities obligated to conduct the public interest test (*'A competent authority shall claim an exemption where it reasonably determines that the requested information involves the personal privacy interests of a third person.'*)

The principle of automatism does not exist in current laws on free access to information (there are four in BiH, at the state level, entity level and in Brčko District). But it does exist in other laws which were passed later on and which restrict the right of the public to access information to a great extent, which is contrary to the nature of the law on free access to information (*lex specialis*) and contrary to provisions of these laws. FoIA (BiH Law, Article 26, paragraph 4) explicitly states: *'Legislation passed subsequent to this Act that is not specifically aimed at amending this Act shall in no way restrict the rights and obligations contained herein.'*

Therefore, instead of searching for a possibility to preserve basic values of the law on free access to information (publishing information is a rule and withholding is an exception) and to make other laws comply with them, this is how principles from other laws are introduced into FoIA. These laws (laws on protection of secret data, etc.) do not allow any exemptions regarding the self-imposed rule of withholding, they do not stipulate any public interest test and they do not make public authorities obligated even to answer the public in case there are requests for access to information or a part of information, nor does it allow courts examining in case public authorities still makes a negative decision.

### **Limitations for investigative reporting**

Stipulated changes of FoIA in the part which makes public authorities obligated to make exemptions regarding restrictions (Article 4 of the Draft, paragraph 2, item c: *'court decisions in cases of general importance for the public such as the cases of war crimes, organized crime, corruption, terrorism, tax evasion and others which competent public body assesses as cases of general importance for the public'*) are an additional limitation to the access to information for public and particularly for investigative reporting.

The phrasing *'court decisions in cases of general importance'* could block any publishing of information about such cases till the end of court proceedings and adequate court decisions, which would significantly deprive journalists of their rights and duties and public of being informed about all significant issues and particularly about all illegal activities in public bodies.

The European Court constantly points out that in relation to the interest protected by Article 10 of European Convention, the law must not allow arbitrary restrictions of freedom of expression and freedom of receiving and disseminating information and ideas. This is so because 'arbitrary

restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information '. The Court concluded that it is precisely gathering information which represents a preparatory phase in journalism thus it is 'a protected part of freedom of press' (*Tarsasag A Szabadsagjogokertv. Hungary*, as of 14 July 2009, par. 26-27, application 37374/05).

### **Conclusion**

The goal of changes of the law is protection of personal data and the right to privacy. According to documents of Council of Europe and European Union, the protection of personal data refers to the protection of processing such data and these documents do not contain anything which may suggest the need to block access to information automatically. On the contrary, introducing such restrictions is unacceptable and it is not in line with Article 10 of European Convention on Human Rights and Fundamental Freedoms.

On the other hand, protection of privacy as a right ensured by European Convention cannot be realized in the way to question other rights ensured by the same document. This means that realizing this goal (protection of the right to privacy) cannot justify the proposed solution in the Draft which fully brings into question the right to access information which is an integral part of the right to freedom of expression. On the contrary, when it comes to the right to information, it is always necessary to achieve the balance between protection of private life and privacy in relation to freedom of expression, that is, to conduct the public interest test in order to justify the interference in the right to freedom of expression due to protection of privacy.

With proposed changes of the FoIA, the Draft published by the Ministry of Justice of BiH can jeopardize basic democratic principles of an open government, make the fight against corruption impossible and the work of investigative journalism very difficult. Accepting the changes of the FoIA in the way they are proposed would be a step backward and it would enable serious misuses regarding restrictions of the right of the public to free access to information.