Name and family name, or name of the organization and institution:

Partners Serbia and the Coalition for Freedom of Access to Information

Name of the law to which you are sending remarks, proposals and suggestions: Draft Law on Free Access to Information of Public Importance

Date: December 25, 2024

1. General comments and suggestions to the Draft Law

Civil society organizations recognize issues in the implementation of the Law on Free Access to Information of Public Importance (hereinafter referred to as the LFAIPI, the Law), which have left the greatest consequences on bona fide applicants, i.e. the public interest as a whole. In this context, we believe that amendments to the Law can be a way to address the identified issues. However, we also point to the fact that proposals presented in the Draft LFAIPI, especially when observed in their entirety and in mutual correlation, lower the achieved level of the right of the public to know, and leave room for the excessive restriction of rights by bodies of public administration. The issue of so-called mass complaints or lawsuits is not a problem only in the field of access to information of public importance, which is why we believe that the solution to this issue must be systemic and that any potential amendments to the LFAIPI will not necessarily eliminate the issue of abuse. We believe that a way should have been found during the early stages of drafting of the regulation for a dialogue with all stakeholders and that a solution needs to be found through more active cooperation with the Serbian Bar Association for sanctioning this type of abuse of rights within bar associations.

We would like to indicate that it remains unclear why the working group in charge of amending the regulation has included the issue of the terms of office of the Commissioner and Deputy Commissioner in the Draft LFAIPI, in view of the fact that the stated goal was to ensure a "legal resolution of the issue of abuse of requests, which represents a huge problem for citizens, bodies of public administration, Commissioner for Information of Public Importance and Personal Data Protection, as well as courts". If, in addition to the defined goal of the process of amending the Law, the Ministry of Public Administration and Local Self-Government (MPALSG) also wants to address other shortcomings of the Law, we point out that there are other, more important shortcomings of the Law which affect the citizens' right to access to information of public importance. The most important issues in this field have for years been the failure to enforce Commissioner's decisions, and the related provision under which the Government ensures the enforcement of the Commissioner's decisions by implementing measures within its competence, one that has never been implemented in practice during the 20 years of implementation of the LFAIPI. Also, there is the issue of inefficient inspection supervision of the implementation of the LFAIPI, as well as impeded access to information on the operation of bodies of public administration over which the Commissioner has no jurisdiction in the complaints procedure. We would especially like to emphasize that the amendments to the Law represent an opportunity for implementing the GRECO recommendations from the fifth

evaluation round – the part referring to top executive functions. The document says that the top executive functions should be placed under the jurisdiction of the Commissioner, i.e. that the right to complain should be made possible even where information is denied by the President of the Republic or the Serbian Government.

We particularly emphasize that in view of the previous practice of unlawful application of the institute of abuse of rights by bodies of public administration, the institute of abuse of rights should be deleted from the Draft LFAIPI. Regulations that are adopted must keep up with the situation in the society and the level of development of institutions. Research conducted by the civil sector, media, and international organizations points to an increase in the closure of institutions, and to the fact that access to information of public importance most frequently depends on the political will or on decisions of individuals who head the institutions. In such an atmosphere, the introduction of the institute of abuse of rights can leave serious consequences on the already impeded access to information of public importance.

The efforts of the MPALSG, the Commissioner, and the entire Government should be focused on the improvement of proactive transparency, use of new technologies with the aim of ensuring access to information, and strengthening of the institutional capacity to implement the LFAIPI, rather than on proposing solutions that lower the already achieved level of rights.

A group of civil society organizations, including Partners Serbia, Transparency Serbia, Lawyers' Committee for Human Rights (YUCOM), Civic Initiatives, CRTA and Independent Journalists' Association of Serbia, has developed a set of alternative proposals which might help to resolve issues arising from the abuse of the right to access to information of public importance. These proposals also have a positive effect on other issues observed in practice, they strengthen procedures for exercising the right to access to information of public importance, promote cooperation between institutions and citizens, improve the institutional capacity for acting on requests for access to information of public importance, and raise the awareness of bodies of public administration about transparency and accountability.

Therefore, we are calling on the MPALSG and the Commissioner, as well as other working group members, to review the proposals carefully, to acknowledge the concerns of applicants that the introduction of the institute of abuse will impede their access to information, and to create sustainable solutions through wider dialogue and cooperation.

2. Specific parts of the Draft Law which you propose to amend and your amendment proposal

Deleting the last paragraph of Article 1 of the Draft Amendments to the LFAIPI, under which the institute of abuse of rights is introduced.

Amending Article 2 of the Draft, paragraph 3 and related paragraphs (proposals and explanations are provided in the text below).

Amending Article 4 of the Draft (proposals and explanations are provided in the text below).

Deleting the last paragraph of Article 4 of the Draft, introducing the possibility of rejecting a complaint because the complaint was not filed for the purpose of exercising the right of the public to know.

3. 3. Explanation of the proposal for amending the Draft Law

Article 1 of the Draft LFAIPI:

„A body of public administration may, by way of exception, deny access to information of public importance to an applicant if one or more mutually connected applicants, using one or more connected requests, obviously abuse the right to access to information, and especially if the body of public administration is burdened as a result of extremely frequent requests for obtaining the same or similar information to such an extent that the regular functioning of the body of public administration becomes either impossible or significantly impeded."

The institute of abuse of rights was deleted from the Law on Free Access to Information of Public Importance when the LFAIPI was amended in 2021. This was because this institute had been abused by bodies of public administration that unlawfully referred to this institute. According to the Annual Report of the Commissioner for 2021, 65% of all resolved complaints had been filed because of the abuse of rights by applicants. At the same time, almost all of these complaints were resolved in favor of the applicants. We recall the explanation which the MPALSG provided for the deletion of the institute of abuse in 2021:
"The way in which existing Article 13 of the Law tries to define the abuse of the right to access to information of public importance by listing possible types of behavior that would constitute such abuse is not the right approach for the elimination of negative examples of exercising the public's right to know. ***The frequent submission of requests or even the submission of requests for large amounts of information cannot be regarded as abuse*** **per se.** *In view of the fact that the right to access to information belongs to everyone, a possible refusal to comply with the request just because the same person has already requested some other information does not make any practical sense, because this information can be formally requested by somebody else on behalf of the applicant. The very act of resubmission of a request for the same information cannot serve as a sufficient reason for the rejection of the request, because the body of public administration might not have responded to the original request at all or in the manner requested (it might permit inspection but not the copying of a document or might provide transcripts but not the audio recording). Also, requests for large amounts of information cannot serve as a sufficient reason for the rejection of a request, because this is something that is assessed subjectively by the body of public administration.* ***In cases in which large amounts of information are requested from a body of public administration, there is already a legal possibility to set a longer time frame for action, which means that this cannot serve as a valid reason for the rejection of the request with reference to a possible abuse of the right."***

The need for deleting this institute is supported by the Commissioner's activity report for 2021, which says that:

"The adopted amendments to the Law regulate the area of free access to information of public importance in a significantly better way, enabling the easier, faster and more efficient exercise of this right, on the one hand, ***but also hindering the abuse of this right, which has been particularly pronounced in recent years."***

In view of the previous practical experience, one can reasonably assume that bodies of public administration would abuse the institute of abuse again.

The above-mentioned criteria for recognizing the elements of abuse of rights are insufficiently precisely formulated and leave much room for discretion to bodies of public administration, which is why this provision contains risk factors for corruption according to the Methodology for the Corruption Proofing in the Regulations, which has been developed by the Anti-Corruption Agency (see in particular Annexes 3 and 4 of the document - risk factors).

Furthermore, the introduction of this provision has wider negative consequences for the exercise of the right to access information of public importance and development of a culture of transparency and accountability of bodies of public administration, because it starts from the premise that every request should be viewed from the aspect of whether the applicant is abusing the right. This "teaches" first-instance bodies, especially the "small" ones that are affected the most by the current situation, to look for reasons for rejecting a request first. This is in complete contravention with the principles and spirit of the LFAIPI – and with the definition of information of public importance, according to which this is any information held by a body of public administration, created in the course of or in relation to the work of the body of public administration – as well as with Article 15 of the LFAIPI, which says that the applicant does not need to list the reasons for submitting the request, i.e., for seeking information. The introduction of the institute of abuse violates this provision, and shifts the burden of proof from the body of public administration to the applicant.

In addition to everything mentioned above, we believe that the introduction of the institute of abuse would not solve the issue because of which it was proposed. Bodies of public administration, which have little capacity, would have to explain carefully their decisions on the rejection of requests. Instead, a much more effective way to resist the pressure of a large number of requests for the same or similar information would be to post this information on their websites and then use the possibility referred to in Article 10 of the Law.

Moreover, even had this norm been precisely defined, the issue would have to be raised of its usefulness, together with the other proposed solution (that the parties bear their own costs in proceedings before the Commissioner). If this solution were adopted, the cause of submission of large numbers of requests for access to information (getting compensation in appellate proceedings) would be removed.

Article 3 of the Draft:

"The parties to the complaint procedure shall bear their own costs, unless the Commissioner decides during the complaint procedure that the costs of representation are necessary and justified."

A complex problem in exercising the right to access to information of public importance emerged when the Administrative Court changed its position and enabled the reimbursement of costs of the appellate proceedings. Although the proponents of the Law clearly have the intention to influence the motivation of "malicious" applicants through this modification, the question arises whether the proposed solution is sustainable, in view of the Law on General Administrative Procedure, and whether the attempt to find a solution to the identified problem will create another problem in practice. If adopted and reaffirmed in practice, this proposal would remove the identified problem.

Since one cannot say with certainty that this proposal will be adopted and/or later reaffirmed in practice through the decisions of the Administrative Court (as well as the Constitutional Court or the European Court of Human Rights), the proposal section will include proposals aimed at reducing the number of complaint procedures and simplifying the procedure for filing a complaint. If the aforementioned proposal on costs is included in the Law, the proposals listed below will complement it
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Article 4 of the Draft:

The new solution in Article 4 of the Draft introduces the possibility of the Commissioner rejecting a complaint because it was not filed in order to exercise the public's right to know.

"The Commissioner shall reject the complaint if, based on all the circumstances of the case, and especially the similarity of the requested information and the number of submitted requests and complaints, he determines that the complaint was not submitted for the purpose of exercising the right of the public to know."

We recall that the abuse of the right to access to information will be extremely difficult to prove in practice, in view of the fact that the criteria for determining abuse include the similarity of requested information and the number of submitted requests and complaints. Neither the proposal to introduce the institute of abuse of rights nor the proposed amendments provide an effective solution for the increase in the number of complaints submitted to the Commissioner, because the so-called "non-bona-fide applicants" will continue to submit requests and complaints. If the Commissioner gets the possibility to reject complaints for the above-mentioned reasons, which represent too wide and inappropriate criteria, this may cause further delays in his work, since he will be forced to invest significant resources in proving the abuse.

Also, there is a reasonable assumption that once the Commissioner's decisions are issued, non-bona-fide applicants will continue to file lawsuits to the Administrative Court, requesting the annulment of these decisions. This will mark the continuation of the negative practice according to which the Commissioner invests most of his resources in procedures involving "non-bona-fide" applicants, while bodies of public administration simultaneously get a new mechanism for unlawful denial of access to information of public importance. Under such circumstances, bona-fide applicants will be in a less favorable position in comparison with the current practice of exercising their rights.

PROPOSALS

Proposal 1: Instead of the introduction of the institute of abuse of rights, we propose the supplementation of articles referring to the procedure for exercising the right to access to information of public importance in the first instance and in the complaint procedure through the implementation of cooperation and negotiation measures

In practice, informal cooperation between applicants and bodies of public administration has already been partly developed, enabling them to jointly find the most suitable solutions for exercising the right to access to information, especially in situations where requests include large amounts of information or where bodies of public administration do not keep separate records on requested data. In order to improve this process further, we propose that Article 16 of the LFAIPI be supplemented in such a way as to formalize the possibility of inviting applicants to cooperation and negotiations. The aim of this supplement is to contribute to a more efficient realization of citizens' right to access to information, in accordance with the principles of good governance according to which bodies of public administration act professionally, respond to citizens' requests efficiently, build open relations with citizens and treat them with respect and care.

This amendment to Article 16 would include a possibility that a body of public administration invite the applicant to "informal negotiations" (cooperation) in order to review the request for access to information. This measure would have particularly positive effects on the improvement of the capacity to act on the requests by so-called "small" obligors of LFAIPI (e.g., local communities, schools, local health centers, etc.).

This and subsequent proposals, implemented together, can potentially have a positive effect on the exercise of the right to access to information of public importance and simultaneously encourage cooperation between citizens and bodies of public administration, thus turning them into collaborators, rather than adversaries. In contrast to this proposal, the reintroduction of the institute of abuse of rights would, in fact, encourage further confrontation, contribute to the closure of institutions, and affect the raising of awareness of bodies of public administration about the importance of transparency, accountability and work in the service of citizens.

Such an amendment to Article 16 can also be an argument when a decision on costs is made in second-instance proceedings. The refusal of an invitation to cooperate with a body of public administration with the purpose of acting on a request for access to information of public importance may be taken into account in the appellate proceedings when a decision is made on the costs of proceedings (if the proposal referred to in Article 3 of the Draft is adopted).

Proposal for amending Article 16 of the LFAIPI (Article 2 of the Draft) – Acting Upon a Request

Amendment to paragraph 3 and introduction of new paragraphs

If a body of public administration determines that the request refers to information contained in a large number of documents, which would make it difficult to act within the time frame referred to in paragraph 1 of this Article, **in accordance with the principles of good governance, it shall invite the applicant to cooperation for the purpose of exercising the right.** This invitation shall be sent within 5 days from the receipt of an orderly request. The body of public administration shall offer the applicant the opportunity to specify the request, to reduce it to a reasonable size, to inspect the documents before determining which copies of documents are required, **or to determine through cooperation the most appropriate way for the applicant to exercise the right to access to information in accordance with the capacity of the body of public administration**. If necessary, the body of public administration may organize a meeting with the applicant in order to clarify issues of importance for deciding on the request.

If the body of public administration and the applicant reach an agreement, the body of public administration will issue a decision specifying the manner and time frame for acting on the request.

The time frame for submitting information is 15 days from the receipt of an orderly request, which may be extended for up to 40 days if the body of public administration is unable to act on the request within 15 days for justified reasons.

If the applicant does not respond to the invitation of the body of public administration referred to in paragraph 3 of this Article within 3 days, it will be deemed that he/she has withdrawn the request and the procedure will be discontinued by a decision.

If the applicant rejects the proposal of the body of public administration regarding the manner in which the request is to be fulfilled, the time frame for acting by the body of public administration will begin to run from the date of receipt of the applicant's statement.

Proposal for amending Article 24 of the LFAIPI (Article 4 of the Draft) - Processing of a Complaint by the Commissioner

The Commissioner shall issue a decision on a complaint within 60 days from the date of receipt of the complaint, after allowing the body of public administration, and, if necessary, the applicant, to provide a written statement.
Notwithstanding paragraph 1 of this Article, in case of complaints against the failure of the bodies of public administration to act in accordance with Article 16 paragraph 2 of this Law, the Commissioner shall issue a decision within 30 days from the date of receipt of the complaint.
The Commissioner shall reject a complaint if it is inadmissible, untimely or if it has been submitted by an unauthorized person.

SUPPLEMENT:

For the purpose of exercising the right to access to information of public importance, the Commissioner may, if he deems it appropriate, invite the applicant and the body of public administration to an oral hearing in order to clarify facts in connection with the subject matter of the request and the manner of realization of the right, before he makes a decision on the complaint.

If the applicant refuses to participate in the oral hearing without a justified reason, the complaint procedure shall be discontinued.

Explanation of the supplement:

This proposal gives the Commissioner a new competence to implement a procedure within which all important issues related to the subject matter of the request and the manner of exercising the right would be clarified, before issuing a decision in the complaint procedure. Some kind of negotiations between the applicant and the body of public administration would primarily shed light on situations in which the applicant requests large amounts of information or in which the information is situated in a large number of documents, if the applicant does not know in advance which documents these are. These facts might also be insufficiently clear from the statement which the body of public administration provides to the Commissioner upon receiving the complaint. The aim of this procedure is a speedier and more efficient resolution of disputes, where the applicant has a greater chance of receiving the exact information he/she needs, and where the caseload of the body of public administration is reduced because it will focus on the submission and possible processing (e.g. anonymization) of only those documents that are in essence the subject of the request. This provision would also make it easier for the Commissioner to process the complaint, that is, to identify facts of importance for making a decision on the complaint. This article also enables the Commissioner to intervene in the initial stage of the complaint procedure, thus contributing to a more efficient exercise of citizens' right of free access to information.
In addition to the solutions that already exist in the Law, this would additionally encourage cooperation between citizens and bodies of public administration regarding the exercise of the public's right to know.

Indirectly, these changes would also be reflected on what has been proclaimed as the goal of the Draft - to put a stop to non-bona-fide applicants. Namely, one can expect that applicants whose only motive is to collect the costs of proceedings and who therefore submit a large number of requests and complaints would not be prepared to participate in hearings aimed at clarifying the subject matter of the request, in the context of information that the body of public administration really possesses. The introduction of the voluntary negotiation process would also give grounds for the Commissioner, in the process of deciding on the justification of awarding costs of the proceedings, to deny the reimbursement of costs of the proceedings. If the applicant refuses to participate in informal and voluntary negotiations in the first- and/or second-instance proceedings, the Commissioner can take these circumstances into account when deciding on the costs. We believe that the unwillingness to cooperate with the purpose of exercising rights would create more easily applicable criteria for deciding on the costs of proceedings, in connection with the resolution of the issue of non-bona-fide applicants.

The proposals from Article 16 and this article would introduce measures aimed at deterring non-bona-fide applicants from submitting requests and complaints, since additional opportunities and possibilities would thus be introduced for satisfying the right to access to information.

More importantly, these proposals promote cooperation between bodies of public administration and citizens, raise the capacity and knowledge of bodies of public administration for acting on requests for free access to information of public importance, and raise the awareness of accountability of bodies of public administration.

Similar mechanisms of informal cooperation exist in several countries. Some type of informal negotiations and mediation exists in different countries, such as the United States, Canada, United Kingdom, Spain, Norway, etc. Although most frequently this part of the process is not called mediation, there is an informal mechanism aimed at resolving conflicts regarding access to information of public importance.[1]

Proposal 2: Facilitating the procedure for filing a complaint – digitizing the procedure

This proposal refers to the introduction of an electronic service on the Commissioner's website that would improve the process of submitting complaints, making it simpler and more efficient for citizens. This service would enable simple, digital submission of complaints against decisions of bodies of public administration on requests for access to information of public importance and thus reduce the need for hiring lawyers. The electronic service would provide clear guidelines and interactive tools that would help users to draft and submit complaints on their own, with minimal effort and without complicated legal procedures. This would significantly facilitate the procedure for citizens, ensuring speedier and more efficient access to the right to free access to information.

Citizens would be able easily to enter relevant information related to a request that has not been fulfilled, as well as reasons why they are not satisfied with the response of the body of public administration. Under the proposal, this e-service would guide users through the steps of the complaint procedure, from entering basic data on the request for access to information of public importance, through reasons why they are dissatisfied with the action of the body of public administration, to generating the final text of the complaint. This service should also make it possible to monitor the course of the complaint procedure and enable the user to receive feedback on the status of the complaint.

It is important to note that during processing, the Commissioner is not restricted by the applicant's allegations, but that the burden of proof is on the body of public administration, which is why the applicant does not need to have any knowledge of the law or to hire a lawyer to file a complaint. A simplified procedure for filing complaints as a result of the creation of a digital service would be another reason for making the hiring of lawyers unnecessary, which would have a positive effect on the reduction of the abuse of rights.

[1] See the paper: Managing Access to Public Information Conflicts. Is Mediation a Solution? Lessons from the Catalan Experience: https://www.redalyc.org/journal/5038/503865772012/html/#fn0

Additionally, this system would facilitate the implementation of the provision contained in Article 3 of the Draft LFAIPI, according to which each party in the complaint procedure shall bear its own costs, by giving the Commissioner another mechanism for deciding in the reasoning of the decision on costs that the applicant should pay his/her own costs, because he/she decided to hire a lawyer despite the existence of a simple mechanism for filing an appeal.

Proposal 3: Solving the issue of insufficient capacity of so-called "small" bodies of public administration to act upon requests for free access to information of public importance

It should be reviewed whether there is a way to apply a special regime on the so-called "small" bodies of public administration when they decide on requests. Wherever this is possible, such as in local communities, the processing of requests should be transferred to municipalities, i.e., local self-government units which the local community is a part of. Wherever possible, so-called "small" bodies of public administration should introduce/appoint a person in common for processing requests for access to information of public importance. If necessary, at the municipal, i.e., local self-government level, a special workplace for similar entities that have obligations under the Law should be created for a person who would be in charge of processing requests for access to information of public importance.

Additional training of so-called "small" bodies of public administration can be implemented through the development of guides and other training materials by the Commissioner, with the aim of building the capacity to process requests of bodies of public administration that have been included among the entities that have obligations under the LFAIPI after the 2021 amendments, or under other regulations. New regional offices of the Commissioner should be granted a role in the training of bodies of public administration.

Additional note:

Although GRECO recommendations explicitly refer to the top executive functions alone, one should be aware that the only reason for this lies in the fact that, within its evaluation, GRECO reviewed only the anti-corruption mechanisms in this sector. From the aspect of implementation of the Law, there is no justified reason why any of the bodies of public administration should have a different complaint procedure regime. Furthermore, this means that the Commissioner needs to establish its jurisdiction over all bodies of public administration, including the National Assembly, the President of the Republic, the Government of the Republic of Serbia, the Supreme Court of Cassation, the Constitutional Court, the National Bank of Serbia and the Republic Public Prosecutor, like the civil society has been proposing since the adoption of the Law (in 2004) and like it is envisaged in the proposed amendments to the Law submitted in the shape of a popular initiative in 2007[2].

[2] http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi_zakona/3872-07.zip

In contrast with the introduction of the institute of abuse of rights, whose deletion from the Draft we are requesting, the above-mentioned proposals, which can be implemented either cumulatively or individually, would have a positive effect on other issues observed in practice while also solving the issue of abuse of rights. Also, the cumulative implementation of all these proposals would result in the reduction of the number of filed complaints and reduce the caseload of the Office of the Commissioner when processing complaints from bona-fide applicants. According to their nature, these proposals are affirmative, they strengthen the procedures for exercising the right to access to information of public importance, promote cooperation between institutions and citizens, raise the capacity of institutions for processing requests for access to information of public importance and raise the awareness of bodies of public administration about transparency and accountability.