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Partners for Democratic Change Serbia

Comments on the working version of the Draft Law on Amendments to the Law on Free Access to Information of Public Importance, posted at the website of the Ministry of State Administration and Local Self-Government on October 28, 2024

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Introduction:

Partners for Democratic Change Serbia (Partners Serbia) welcomes the efforts of the Ministry of State Administration and Local Self-Government (hereinafter referred to as: the MPALSG) aimed at initiating the process of amending the Law on Free Access to Information of Public Importance. Being an organization committed to the values of transparency and openness, which has dealt with the promotion, monitoring of the situation and public advocacy in the field of free access to information of public importance since our establishment, we are aware of the issues in the implementation of the Law, which have left the greatest consequences on bona-fide applicants, i.e., public interest as a whole. In this context, we believe that amending the Law can be one of the ways to address identified issues. However, we also point to the fact that the presented proposals, especially when viewed in their entirety and in correlation with each other, diminish the already achieved level of the right of the public to know and leave room for an excessive restriction of this right by authorities. We stress in particular that some of the proposed solutions have not been harmonized with the existing legislative framework.

We emphasize that such solutions partly result from the uniform composition of the Working Group, which, in addition to representatives of the Commissioner for Information of Public Importance and Personal Data Protection (hereinafter referred to as: the Commissioner), is made up only of representatives of government authorities, i.e. obligors of the Law. Despite being based on (we assume) many years of practice and expertise, their perspective, nevertheless, represents just one of the aspects of this complex mechanism. We believe that the inclusion of "beneficiaries" of the Law, i.e. representatives of the academic community, the judiciary, professional associations, civil sector and the media, could have additionally improved the quality of resulting solutions, to which Partners Serbia pointed to in a letter drafted on behalf of the Coalition for the Freedom of Access to Information and the National Convention on the European Union and sent to the MPALSG on October 14, 2024.

In view of all this, in the text below we will present our comments on and proposals with regard to the already proposed solutions.

~~**Life, Health, Personal Safety, Administration of Justice, Defense of the Country, National and Public Security, Economic Welfare of the Country and Secret, Intellectual and Industrial Property, Artistic, Cultural and Natural Assets and the Environment**~~ **GROUNDS FOR RESTRICTING THE RIGHT TO ACCESS TO INFORMATION OF PUBLIC IMPORTANCE**

Article 9

A body of public administration may deny access to information of public importance to an applicant, if that would:

1) Endanger life, health, safety, or some other important personal property;

2) Endanger, hinder or aggravate the prevention or discovery of a criminal offence, prosecution of such offence, conducting of preliminary criminal proceedings, conducting of court proceedings, enforcement of a judgment or the carrying out of a sentence, carrying out proceedings in terms of the law that governs competition protection, or some other legally regulated proceedings, or fair treatment and fair trial, until the finalization of proceedings;

3) Seriously endanger the defense of the country, national or public security, international relations or breach some rules of international arbitrations law;

4) Substantially undermine the capacity of the state to manage economic processes in the country, or substantially aggravate the realization of justified economic interests of the Republic of Serbia, or hinder or could hinder the carrying out of monetary, foreign currency or fiscal policy, financial stability, management of foreign currency reserves, supervision over financial instruments or issuing of banknotes and coins;

5) Make available a piece of information or a document that, by regulations or an official act based on law, is ordered to be kept as confidential or represents a business or professional secret, or publish the data received in the procedure of representation without consent of the person who was represented, in accordance with the law that governs the work of the state attorney's office, and if such data, if published, could cause serious legal and other consequences to the legally protected interests which outweigh the right of the public to know;

6) Violate the right of intellectual or industrial property; endanger the protection of artistic, cultural and natural assets;

7) Endanger the environment or rare plant and animal species.

A BODY OF PUBLIC ADMINISTRATION MAY RESTRICT TO THE APPLICANT THE ACCESS TO INFORMATION OF PUBLIC IMPORTANCE IF, ON THE BASIS OF THE AMOUNT OF INFORMATION REQUESTED, THEIR SIMILARITY AND OTHER CIRCUMSTANCES, IT CONCLUDES THAT THE REQUEST WAS NOT SUBMITTED FOR THE PURPOSE OF EXERCISING THE RIGHT OF THE PUBLIC TO KNOW.

Article 9:

We propose the deletion of the new paragraph enabling the body of public administration to restrict access to information of public importance.

Explanation:

The proposed solution is contrary to Article 4 of the Law on Free Access to Information of Public Importance (hereinafter referred to as: the Law), which stipulates the legal presumption of JUSTIFIED INTEREST OF THE PUBLIC TO KNOW, and Article 8 of the Law, under which this right may be restricted only for the purpose of protection against a serious violation of a preponderant interest based on the Constitution or the law. The body of public administration is not competent for determining the purpose of submission of a request for access to information of public importance: its duty is, rather, to act on a request if it refers to information of public importance and if there is no conflicting interest that

outweighs the right of the public to know. This solution is also in contravention with Article 15 of the Law, under which the applicant is not required to state the reasons for requesting information.

It is particularly important to emphasize that this solution is also in contravention with the 2021 amendments to the Law, from which the abuse of right was removed because bodies of public administration had used this possibility to restrict the rights of applicants unlawfully and especially because the provision had been insufficiently precise, making its correct implementation in practice much more difficult. We recall the Explanation for the removal of the instrument of abuse of right, prepared by the Ministry of State Administration and Local Self-Government when the 2021 Draft Law on Free Access to Information of Public Importance was presented:

"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, **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 because of a possible abuse of the right. In addition to this, in the age of rapid development of science and technology and electronic communications, the size of a document, i.e., the amount of requested information, should not be a problem for most bodies of public administration."

This Explanation prepared by the Ministry of State Administration and Local Self-Government, which had proposed both amendments to the Law, briefly summarizes why the abuse was deleted from the Law, and why criteria such as the amount of requested information and similarity of information cannot be the reasons for the rejection of requests for access to information of public importance.

More importantly, the explanation of this draft inexplicably omitted to mention that the abuse of rights was frequently used by first-instance authorities as a reason for denying access to information of public importance.

Reports on the Commissioner's activities from the period before the revocation of the abuse of right indicate that bodies of public administration had frequently used this instrument to prevent the exercise of the right of the public to know.

The 2021 Report on the Activities of the Commissioner says:

"The main obstacles to exercising the right to access to information in 2021 were: the impossibility of administrative enforcement of the Commissioner's decision, inadequate responsibility and difficult implementation of the Commissioner's authority, a large number of cases of abuse of rights from LFAIPI, **also a significant increase in unjustified referrals of bodies of public administration to the abuse of rights from LFAIPI ('abuse of abuse of rights')."**

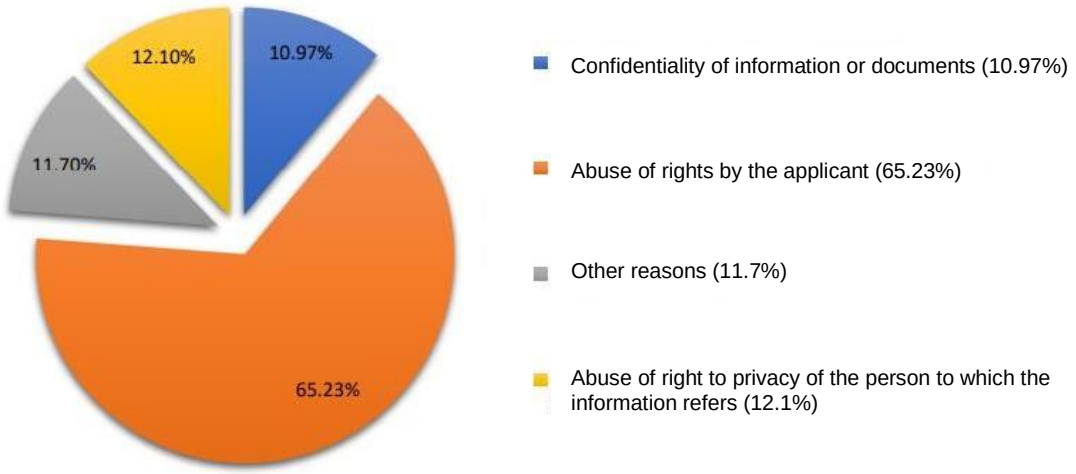
"In 2021, in cases in which the decision rejected the requests of applicants as unfounded, the authorities

more often invoked the abuse of rights by applicants than in 2020."

In more than 50% of the complaints which the Commissioner resolved in 2021, the most frequent reason for the rejection of requests for access to information of public importance was the abuse of rights.

Below is a copy of a chart from the Commissioner's report:

Chart 9 – Reasons for rejecting applicants' requests in resolved complaints



For this very reason, the following was said in the introduction to the Commissioner's activity report:

"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 rightly assume that bodies of public administration would abuse the instrument of abuse again.

At this point, it is very important to say that this Draft can largely solve the issue of requests for large amounts of information through the proposed amendment to Article 16 paragraph 3. Indeed, if a body of public administration determines that a request refers to information contained in a large number of documents, it can invite the applicant to "**REDUCE** THE AMOUNT OF REQUESTED INFORMATION AND DOCUMENTS REFERRED TO IN THE REQUEST **TO A REASONABLE SIZE** WITHIN 8 DAYS or to **inspect** the documents before determining which copies he/she needs **AT THE TIME AND PLACE DETERMINED BY THE BODY OF PUBLIC ADMINISTRATION**.

This, like it is said in the explanation of the amendment to this paragraph: "[…] **solves the practical problem that bodies of public administration face when requests are formulated in such a way that they encompass access to a large number of documents, which would burden the operation of bodies of public administration.** In this case, it would be completely appropriate and reasonable for the body of public administration to address the applicant, to draw his attention to the volume of the request and resulting difficulties, and to suggest to him/her to specify the request, with the aim of narrowing its volume, or to inspect the requested documents in order to decide which of the many

documents he/she really needs. The imposition of an 8-day deadline for reducing the amount of requested information to reasonable size and the granting of possibility to inspect it at the time and place determined by the body of public administration, will overcome the observed problems in dealing with individual requests."

Furthermore, since the explanation given for the reintroduction of the instrument of abuse of right is the issue which resulted from the change of position of all Administrative Court judges made in Belgrade at the 105th session on June 21, 2022, which enabled the position that complainants are entitled to the reimbursement of costs of representation in the complaint procedure before the Commissioner, which in practice led to the abuse of the right to access to information of public importance, we would like to point out that this problem cannot be prevented through the reintroduction of the instrument of abuse for several reasons:

- It would be unlawful for a body of public administration (first-instance authority) which acts on a request for access to information of public importance to review the reasons for the submission of a request for access to information and thus determine cases of abuse (see the explanation above).

- Even if first-instance authorities started re-examining the reasons for the submission of requests, a valid question is which criteria would be used for determining the abuse of the right in the context of obtaining financial gain. The abuse of the right, as stated above, has been deleted from the Law because the number and similarity of requests cannot serve as criteria for the restriction of this right. Financial gain is not something that can be introduced as a criterion for the restriction of the right either, so one has to wonder how financial gain would be proven in practice if it is not introduced as a specific criterion for the restriction of the right.

- The explanation of these amendments to the Law states that this type of abuse affects the most "[…] "small" bodies of public administration, such as local communities, social centers, preschool institutions and schools and health centers," which do not have the capacity to respond to requests in a timely manner, so one has to wonder how these obligors of the Law, which, therefore, have neither the capacity nor legal teams, will be able to justify the abuse of right in their decisions to reject requests. Indeed, the Law clearly says that bodies of public administration must issue a decision which includes a written explanation of the reasons for the rejection of the request. Over the years of practice, high standards have been introduced regarding the explanation provided for denying access to information, mandating the application of a three-part test of public interest. Since "small" bodies of public administration do not have the relevant knowledge for implementing this test, the current situation could become even worse and applicants would continue to file complaints to the Commissioner just because a body of public administration has failed to prove the absence of the public interest. One should also add that the introduction of the instrument of abuse of right will result in cases of abuse of this instrument (like it happened in practice in 2020 and 2021), which will, in turn, increase the number of complaints to the Commissioner and even further increase the caseload of this institution.

- The last thing mentioned is also linked with a proposal from this Draft – Article 24 – according to which the Commissioner should be granted the possibility to reject complaints "IF, BASED ON ALL CIRCUMSTANCES OF THE CASE AND ESPECIALLY SIMILARITY OF THE REQUESTED INFORMATION AND THE NUMBER OF SUBMITTED REQUESTS AND COMPLAINTS, HE/SHE DETERMINES THAT THE COMPLAINT WAS NOT SUBMITTED FOR THE PURPOSE OF EXERCISING THE RIGHT OF THE PUBLIC TO

KNOW". In view of the fact that the assessment of circumstances of the case depends on the **explanation of the decision rejecting the request** prepared by the first-instance authority, we do not see how this change will help to solve the problem of abuse of the right to access information of public importance with the aim of obtaining financial gain, if we know that "malicious" applicants, in fact, target "small" bodies of public administration which do not have the capacity to provide a legal explanation to the rejection of a complaint.

If rightly used, the amendment of Article 16 paragraph 3 might reduce the abuse of the right in practice. On the other hand, **the introduction of the instrument of abuse of right will certainly have a negative effect on the realization of the right to access to information of public importance, because we know for a fact from the Commissioner's report that this had been the most frequently used legal basis for rejecting requests for access to information of public importance.**

We note that in addition to the amendments to the Law, the responsibility for this problem is also borne by the Bar Association of Serbia, which prescribes the norms of professional behavior of private attorneys and imposes sanctions for their violation. The Bar Association of Serbia and its chambers are required to use their competences to identify violations of duties and good reputation of the legal profession, which have been noted in the explanation of the amendments to this Law, as well as described in the reports on the activities of the Commissioner for 2022 and 2023.

Right to Complaint

Article 22

The applicant may lodge a complaint to the Commissioner, should:

1) the body of public administration dismiss or reject the applicant's request, within a 15 day time limit from the delivery of the ruling or another act;
2) the body of public administration, contrary to **TIME FRAMES REFERRED TO IN** ~~Article 16, paragraphs 1-3 of~~ the present Law, fail to respond to applicant's request within the prescribed time limit;
3) the body of public administration, contrary to Article 17 paragraph 2 of the present Law, condition the drawing off a copy of the document containing the requested piece of information on the payment of fee that exceeds the amount of necessary cost of making that copy;
4) the body of public administration fail to provide the insight in the document containing the requested piece of information in the mode specified by Article 18 paragraph 1 of the present Law;
5) the body of public administration fail to provide the insight in the document containing the requested piece of information, and/or fail to draw off a copy of that document in the mode specified by Article 18 paragraph 4 of the present Law or
6) the body of public administration aggravate or hinder in some other way the applicant in effecting the right to free access to information of public importance, contrary to the provisions of the present law.

THE PARTIES TO THE COMPLAINT PROCEDURE SHALL BEAR THEIR OWN COSTS.

No complaint may be lodged against the ruling of the Commissioner deciding on the request submitted to the Commissioner as a body of public administration.

There shall be no complaint against a ruling of the National Assembly, President of the Republic, Government of the Republic of Serbia, the Supreme Court ~~of Cassation~~, the Constitutional Court of Serbia, National Bank of Serbia, and the Republic Public Prosecutor.

An administrative dispute may be instituted in conformity with the law, against the ruling specified in paragraphs 2 and 3 of the present Article.

The court shall ex officio notify the Commissioner of the initiation of an administrative dispute against the ruling referred to in paragraph 3 of this Article**.**

Article 22:

We propose the reconsideration of the proposed paragraph, which reads "The parties to the complaint procedure shall bear their own costs."

Under these amendments, Article 22 would be modified in such a way that the parties to the complaint procedure would bear their own costs, and this change has the potential to reduce the volume of complaints filed. The explanation of this amendment says: "The direct goal of new paragraph 2 is to determine a fair fee for the second-instance complaint procedure held by the Commissioner." This is in accordance with the Law on General Administrative Procedure, which in Article 85 paragraph 3 says that the parties bear their own costs when first-instance proceedings are initiated by a motion of a party. In view of the fact that the procedure for exercising the right of access is a single-party procedure, in which there is no need to prove any interest, this solution will prevent different interpretations of the

loophole of whether the party is entitled to the costs of representation of the complaint or not, and the number of requests submitted for dishonorable motives (lucrative interests, intention to collect expenses, rather than the intention to ensure the exercise of the right of the public to know, etc.) will also be reduced."

We believe that the proposed amendment is not in accordance with the Law on General Administrative Procedure, because the proponent quotes the paragraph referring to the first-instance procedure, rather than the second-instance appellate procedure. Namely, Article 85 paragraph 6 of the Law on General Administrative Procedure clearly defines who bears the costs of the second-instance procedure. According to this paragraph, if an appeal is rejected or dismissed, the costs of second-instance proceedings are borne by the appellant, while, if the appeal is accepted, costs are borne by the authority that made the first-instance decision. In view of this, the proposed amendment would be unlawful.
Although the intention of the proponent of the Law is clearly to make an influence on the motivation of "malicious" applicants through this change, the question is whether the proposed solution is sustainable in view of the Law on General Administrative Procedure, and whether the attempt to find a solution for the perceived problem would create another problem in practice.

Also, we want to point out that proposals that have appeared in the public before – to eliminate costs in relation to these procedures – are also worth considering.

Article 24.

The Commissioner shall issue a ruling without delay, and no later than within 60 days, **WHICH START TO RUN ON THE NEXT WORKING DAY** from the date of receipt of the complaint **BY THE CLERK'S OFFICE OF THE COMMISSIONER,** after he enables the body of public administration, and if necessary, the applicant, to submit a written statement.

Notwithstanding paragraph 1 of this Article, upon a complaint due to non-action of a body of public administration in accordance with Article 16, paragraph 2 of this Law, the Commissioner shall issues a ruling within 30 days from the day of receipt of the complaint.

IT SHALL BE CONSIDERED THAT THE COMMISSIONER HAS SENT THE DECISION ON THE COMPLAINT ON THE DAY WHEN IT LEAVES THE CLERK'S OFFICE OF THE COMMISSIONER, THAT IS ON THE DAY WHEN IT IS SENT BY E-MAIL.

The Commissioner shall dismiss a complaint that is inadmissible, untimely and filed by an unauthorized person.

The body of public administration shall prove that it has acted in accordance with its obligations under this Law. Upon determining that the complaint is founded, the Commissioner shall issue a ruling ordering the body of public administration to provide the applicant with free access to information of public importance.

When, regarding the complaint due to non-compliance with the request (silence of the administration), he determines that the complaint is founded, the Commissioner shall issue a ruling ordering the body of public administration to act upon the request within a certain time limit.

If, in the procedure on complaint against the ruling on rejection of the request related to classified data referred to in Article 9 item 5 of this Law, the Commissioner finds that the reasons for which the data was determined as secret have ceased, i.e., that the data has not been classified as secret in accordance with the law which regulates the determination and protection of classified data, he shall issue a ruling to sustain the complaint and order the body of public administration to revoke the confidentiality of the requested data and provide the applicant with access to that data.

In the complaint procedure referred to in paragraph 7 of this Article, the Commissioner shall inspect the case file to which the complaint relates in order to fully determine the factual situation necessary to resolve the complaint.

If the body of public administration, after the complaint due to non-compliance with the request was filed, and before the decision on the complaint has been made, provides the applicant with access to information or acts on the request in another way, the Commissioner shall issue a ruling to suspend the complaint procedure. The complaint procedure shall also be suspended when the applicant withdraws the complaint.

In case of passing the ruling referred to in paragraph 6 of this Article due to non-compliance with the request, the Commissioner, in accordance with the law regulating the misdemeanor procedure, shall issue a misdemeanor warrant due to the committed misdemeanor referred to in Article 47 of this Law.

THE COMMISSIONER SHALL REJECT THE COMPLAINT IF, BASED ON ALL CIRCUMSTANCES OF THE CASE AND ESPECIALLY SIMILARITY OF THE REQUESTED INFORMATION AND THE NUMBER OF SUBMITTED REQUESTS AND COMPLAINTS, HE/SHE DETERMINES THAT THE COMPLAINT WAS NOT SUBMITTED FOR THE PURPOSE OF EXERCISING THE RIGHT OF THE PUBLIC TO KNOW.

Article 24:

Article 24 paragraph 1: should be harmonized with paragraphs 2 and 3 with regard to the submission of complaints by e-mail, so that the Article should read:

The commissioner shall issue a ruling without delay, and no later than within 60 days, WHICH START TO RUN ON THE NEXT WORKING DAY from the date of receipt of the complaint BY THE CLERK'S OFFICE OF THE COMMISSIONER, (and the following should be added) OR THE DAY WHEN IT IS SENT BY E-MAIL, after he enables the body of public administration, and if necessary, the applicant, to submit a written statement.

Article 24, paragraph 12:

We propose the deletion of the proposal referred to in Article 24 paragraph 12, which expands the powers of the Commissioner and introduces the possibility of rejecting the appeal IF, BASED ON ALL CIRCUMSTANCES OF THE CASE, AND ESPECIALLY 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 PUBLIC'S RIGHT TO KNOW.

Explanation:

Like in the explanation of reasons why we believe that the instrument of abuse should be deleted from Article 9, at this point we will also note that the similarity of requested information and the number of submitted requests cannot be the reason for denying the right to access information of public importance. Other circumstances of the case through which it might be determined that the complaint was not filed for the purpose of exercising the public's right to know have not been specified. Also, the way in which the proposed paragraph was formulated does not make it clear whether this instrument would also refer to complaints against the so-called silence of the administration, or only to complaints filed against the rejection of a request. The explanation for the introduction of this paragraph says the following:

"The abuse of the right to complain is evident primarily from the enormous number of complaints filed, which far exceeds the number of complaints filed per average appellant. (...) In the second-instance procedure, the Commissioner determines if a complaint has not been submitted for the purpose of exercising the public's right to know **by paying special attention to cases involving requests for similar information and the number of submitted requests and complaints.** Like in the proposed new paragraph 2 of Article 9 of the Law, bodies of public administration and the Commissioner have consequently been given the opportunity, based on all circumstances of the case, to have a legal remedy against future unforeseen situations of abuse by non-bona-fide applicants."

As already described, neither the number of submitted requests, nor the number of submitted complaints can serve as the reason for denying the right to access to information of public importance. In the second-instance procedure, the Commissioner determines whether the requested information represents information of public importance, and whether the first-instance authority has proven the existence of an interest that outweighs the right of the public to know.

We particularly emphasize that such a system of restriction of a legal remedy is unknown in our legal system, and that the right to a legal remedy, as a fundamental procedural right, is recognized and guaranteed by national and international legal acts, as well as by the Constitution of the RS. The right to a legal remedy is recognized to legal entities whose rights, obligations or legally-based interests have been decided on in proceedings before courts, bodies of public administration and holders of public powers. Likewise, the Law on General Administrative Procedure does not envision the instrument of abuse as a possible basis for denying the right to a legal remedy, or the citizens' right in the administrative procedure.

The restriction of the right to a legal remedy is disputable in view of the Serbian Constitution and international law with regard to the right to legal protection of citizens and the right to access to information of public importance. Such a provision is excessive and contrary to the principles of legal

certainty, especially if clear criteria for determining abuse are not defined. In order to comply with legal standards, the introduction of such a provision would have to be precisely defined, which is currently not the case, as well as proportionate and based on clear procedural guarantees that would prevent possible arbitrary or groundless rejection of complaints.

INDEPENDENT ARTICLES:
B) THE COMMISSIONER FOR INFORMATION OF PUBLIC IMPORTANCE AND PERSONAL DATA PROTECTION, WHO PERFORMS THIS FUNCTION ON THE DATE OF ENTRY INTO FORCE OF THIS LAW, MAY APPLY FOR CANDIDACY FOR THE COMMISSIONER, RESPONDING TO A PUBLIC INVITATION, REFERRED TO IN ARTICLE 30 PARAGRAPH 3 OF THE LAW ON FREE ACCESS TO INFORMATION OF PUBLIC IMPORTANCE (OFFICIAL GAZETTE OF THE RS, NO. 105/21).
V) DEPUTY COMMISSIONER FOR INFORMATION OF PUBLIC IMPORTANCE AND PERSONAL DATA PROTECTION, WHO PERFORMS THIS FUNCTION ON THE DATE OF ENTRY INTO FORCE OF THIS LAW MAY BE NOMINATED FOR THE DEPUTY IN ACCORDANCE WITH ARTICLE 33 PARAGRAPH 1 OF THE LAW ON FREE ACCESS TO INFORMATION OF PUBLIC IMPORTANCE (OFFICIAL GAZETTE OF THE RS, NO. 105/21).

Independent Articles B and V.
We believe that the proposed solutions are unfounded for the following reasons:

Explanation:

Starting from the explanation of the proposed solution, which says:

"After the adoption of the Law on Amendments to the Law on Free Access to Information of Public Importance (Official Gazette of the RS, No. 105/21), the requirements for election to the position of Commissioner and Deputy Commissioner, their terms of office, method of election to these offices and termination of the terms of office, including the inability to reapply for these offices have changed considerably. This change occurred during the term of office of the Commissioner and Deputy Commissioner who were elected in accordance with the provisions of the Law on Free Access to Information of Public Importance (Official Gazette of the RS, no. 120/04, 54/07, 104/09 and 36/10). These amendments brought these persons in a potentially discriminatory position against other persons who will become candidates once the first elections for Commissioner and Deputy Commissioner are held in accordance with the provisions of the Law on Amendments to the Law on Free Access to Information of Public Importance (Official Gazette of the RS, No. 105/21)."

We believe that claims that persons in the office of the Commissioner and Deputy Commissioner might be brought in a potentially discriminatory position are unfounded. The Law on the Prohibition of Discrimination defines the concept of discrimination as "any unwarranted discrimination or unequal treatment, that is to say, omission (exclusion, limitation or preferential treatment) in relation to individuals [...], on the grounds of [...] real or presumed personal characteristics ." The fact that a person holds a public office does not represent a personal characteristic, within the meaning of the Law on the Prohibition of Discrimination, so placing him/her in a less favorable position when applying for a new term of the same office cannot be regarded as discrimination.

In view of the competences of the Commissioner for the Protection of Equality (Article 33 of the Law on the Prohibition of Discrimination), we suggest that the Working Group ask the Commissioner for the Protection of Equality for an opinion on whether the solution which is sought to be amended contains discriminatory provisions.

Also, the explanation of the proposed solution says:
"Moreover, if such a solution were not adopted, it would put the institution of the Commissioner in an

unequal position with another independent institution – the institution of the Protector of Citizens (Ombudsman), in view of the fact that the new Law on the Protector of Citizens (Official Gazette of the RS, No. 105/21) has also significantly changed the requirements for election to the office of the Protector of Citizens and Deputy Protector of Citizens, length of the term of office and method of election to and termination of these offices, including the inability to apply for another candidacy, with the difference that this law specifically stipulates that the Protector of Citizens and the Deputy Protectors of Citizens who were elected to that position under the old law can be re-elected under the new law. Since these are two significant independent institutions, it is important that the requirements for election to these offices should be equal."

Although both institutions – the Protector of Citizens and the Commissioner – are independent, in our legal system they have not been established in such a way as to be equal. The Protector of Citizens was established under the Constitution of the Republic of Serbia, while the Commissioner was established by law. Therefore, the terms of office of the Protector of Citizens and the Commissioner are understandably not the same. To that end, the equality of the institution of the Commissioner should be determined in relation to (compared to) other independent institutions established by law: the Commissioner for the Protection of Equality and the Agency for Prevention of Corruption. Specifically, the Commissioner for the Protection of Equality and the Director of the Agency for Prevention of Corruption can perform these functions for a maximum of 10 years (two terms of office of five years each).

It is important to emphasize why one term of office was introduced instead of two. This solution was developed in accordance with the so-called Venice principles. The explanation of the Draft introducing this change says: **"the proposed solution is also aimed at preventing the so-called "professionalization" of the discharge of duties of the Commissioner, if the same person stayed in this office for two full terms, that is, for as many as 14 years".** The Venice principles emphasize the importance of independence and accountability of public institutions. In this context, they support the idea that long terms of office, without limitations, can undermine the independence and efficiency of institutions.

At this point, it is extremely important to note that staying in office for such a long time results in the concentration of power in the hands of individuals, which reduces the independence of institutions and increases the risk of abuse of power. Therefore, there is an international trend to limit the number of terms for all public offices, and especially those that are independent and subject to less checks by other bodies of public administration. Respecting the legitimate expectations of the current Commissioner and Deputy Commissioner at the time of their first candidacy, they, as prominent individuals, defenders of independence in the operation of the institution of the Commissioner, in addition to legitimate expectations also have the responsibility to promote and observe solutions of broader social significance and interest.

In addition to the stated reasons because of which we believe that the proposed solution should be abandoned, we will quote another one that refers to the goals desired to be achieved through the current process of amending the Law.

The framework of amendments and the purpose of establishment of the special Working Group for the preparation of the Draft Law on Amendments to the Law on Free Access to Information of Public Importance, as stated in the notification of the Ministry of State Administration and Local Self-Government, is to ensure a "legal resolution of the issue of abuse of requests, which represents a huge problem for citizens, authorities, the Commissioner for Information of Public Importance and Personal Data Protection and the courts." The explanation of proposed solutions also mentions the issue of abuse and points to detrimental consequences if this issue is not eliminated.

However, the explanation does not make it clear how the proposed independent articles will help to solve this problem.

If, in addition to the defined purpose of the process of amending the Law, the MPALSG plans to address other shortcomings of the Law, we stress that there are other, more important shortcomings of the Law that have a negative effect on the right of citizens to access information of public importance. The most important issues in this field have for years been: failure to enforce the Commissioner's decisions, inefficient inspection supervision of the implementation of the Law, as well as impeded access to information about the operation of bodies of public administration in relation to which the Commissioner has no jurisdiction in the complaint procedure.

To this end, if the MPALSG wants to initiate the process of making more comprehensive amendments to the Law, we propose that the term of office and composition of the Working Group be redefined and that extensive consultations be conducted with all stakeholders, in order to determine the desired goals which should be achieved by amending the Law. We especially emphasize that the amendments to the Law are an opportunity to implement GRECO recommendations from the 5th round of evaluation – the part that refers to executive authorities. This document states that "rejections of requests for information from the Government and Presidential administration should be open to appeal with the Commissioner for Information of Public Importance and Personal Data Protection, which is currently not the case."

In view of everything stated in this document, and primarily:

- **The possibility that proposed solutions might result in greater abuse of rights than the currently existing.**
- **The fact that proposed solutions are not in accordance with the legal order.**
- **The missed opportunity to address all problems in the implementation of the Law on Free Access to Information of Public Importance.**
- **The fulfilment of GRECO recommendations.**
- **The need to create space for dialogue and consensus on mapped issues and proposed solutions.**

We invite the proponents of the Law to redefine this process of amending the Law, to include a wider circle of stakeholders in the Working Group, and to use the process of amending this Law to create good and sustainable solutions that will not be detrimental for the achieved level of the right of the public to know.