INFO- 2200
Primljeno/Received:2019-03-12

UDK: 342.727(497.4)(497.5)
Original Scientific Paper/Izvorni znanstveni rad

10.32914/i.52.1-2.1

INFORMATION DELAYED IS JUSTICE DENIED: LENGTHY PROCEDURES DENY THE RIGHT TO ACCESS INFORMATION

KAŠNJENJE INFORMACIJE JE NEDOSTATAK PRAVDE: DUGAČKE PROCEDURE SPRIJEČAVAJU PRAVO NA PRISTUP INFORMACIJI

Jurij Toplak, Boštjan Brezovnik
Faculty of Law, University of Maribor, Maribor, Slovenia
Pravni fakultet, Sveučilište u Mariboru, Maribor, Slovenija

Abstract
European Court of Human Rights ruled in 2016 that the European Convention on Human Rights includes a right to access information held by public authorities. While according to international documents the procedures for accessing information should be 'rapid', the courts have yet to rule on what 'rapid' means and when the procedures are so long that they violate rights of those asking for information. This article analyses the length of proceedings in access to information cases in Slovenia and Croatia. It shows that these two countries do not have a system of effective protection of rights because the authorities can easily delay disclosure of information for several years. It argues that lengthy procedures violate the right to access the information and the freedom of expression. It then presents solutions for improving access to information procedures in order for them to become 'rapid'.

Sažetak
Europski sud za ljudska prava presudio je 2016. godine da Europska konvencija o ljudskim pravima uključuje i pravo na pristup informacijama u posjedu javnih vlasti. Dok prema međunarodnim dokumentima postupci za pristup informacijama trebaju biti „brzi", sudovi tek trebaju odlučiti o tome što „brzo" znači i kada su postupci toliko dugi da krše prava onih koji traže informacije. U članku se analizira duljina postupaka u slučajevima pristupa informacijama u Sloveniji i Hrvatskoj. Pokazuje se da ove dvije zemlje nemaju sustav djelotvorne zaštite prava jer vlasti mogu lako odgoditi objavljivanje informacija nekoliko godina. Tvrdi se da dugotrajni postupci krše pravo na pristup informacijama i slobodu izražavanja. Predstavljena su rješenja za poboljšanje pristupa postupcima informiranja kako bi postali „brzi".

Introduction

Elections do not make a country democratic. Democracy is much more than that. A democratic society enables its members to supervise actions of the government, evaluate them, and discuss them. If a society hides government's actions or activities, it disables the evaluation, the control, and the debate. Access to data on government activities is a crucial element of freedom of expression. If the control, the evaluation, and the debate are disabled, voters cannot make an adequate and informed choice in elections. Therefore we cannot consider a society democratic if it hides government's actions. If the State does not assure a rapid procedure, there is no efficient or effective system of protection of human right.

In this article we test whether Slovenia and Croatia assure rapid procedures in cases when public officials refuse to disclose information. We

analyze the duration of all the access to information cases Slovenian Supreme Court has dealt with. In Croatia this is not possible because almost no cases came to the courts. We show that in Croatia the cases get stuck with the Information Commissioner. This article first describes the freedom of information as an internationally recognized human right. It then analyses the length of proceedings in access to information cases in Slovenia and Croatia. It shows that these two countries do not have a system of effective protection of rights because the authorities can easily delay disclosure of information for several years. It argues that lengthy procedures violate the right to access the information and the freedom of expression. Finally it presents solutions for improving access to information procedures in order for them to become 'rapid'.

Freedom of Information as a Human Right

Freedom of Information has been legally recognized as a right in Sweden in Finland for over two centuries. In most of the world, however, it was included in the legislation within the past thirty years./**1**/ In many of them this right is guaranteed by constitutions and by legislation, but not enforced in practice (Banisar 2006, Mendel 2008, 43-154, Riekkinen and Suksi, 2015, 81-202). Older international human rights instruments did not explicitly guarantee the right to access publicly held information, but international organizations' recent interpretations of these documents do recognize it as "a fundamental human right" (Joint Declaration 2004)/**2**/ and according to the 2011 interpretation of the UN Human Rights Committee, Article 19 of the ICCPR "embraces a right of access to information held by public bodies" (United Nations 2011)./**3**/ There is a general agreement among leading scholars, that under international law governments are required to respect it as a basic right (Mendel 2008, Bishop 2009, Hugelier 2010, Peled and Rabin 2011, Janssen 2012, Riekkinen and Suksi 2015). In Europe the right to access official information is legally recognized by the Council of Europe and by the European Union./**4**/ A proper Freedom of Information regime should be guided by the principle of maximum disclosure, public bodies should be under an obligation to publish key information, they must actively promote open government, and exceptions should be clearly and narrowly drawn and subject to strict tests (Mendel 2008, 31-37).

European Convention on Human Rights (ECHR) does not explicitly mention the freedom of access to information held by the government, but the European Court of Human Rights (ECtHR) has found violation of the Convention on several occasions before 2016 in cases where data ought to be disclosed under domestic law and where withholding the information resulted in breaching applicants' freedom of expression./**5**/

In its landmark decision Magyar Helsinki Bizottság v. Hungary, the Grand Chamber of the ECtHR in 2016 ruled that the ECHR guarantees a right to access the information held by the public authorities. According to the Court, the European convention "is a living instrument ... which must be interpreted in the light of present-day conditions."/**6**/ The Court relied on several different documents, which had guaranteed the right to access information and established that ECHR guaranteed this right, too, although the text of the convention did not explicitly mention this right. In both Youth Initiative and Magyar Helsinki decisions, when defining the right, the court relied on the Joint Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression of December 2004. This *Joint Declaration* reads, in the relevant part, as follows:

"The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is

accessible subject only to a narrow system of exceptions. …

Access to information is a citizens' right. As a result, the procedures for accessing information should be simple, rapid and free or low-cost."**/7/**

While international law uses the term "reasonable time" for other cases, for the access to information issues uses the term "rapid". The term "rapid" requires much shorter adjudication then the "reasonable time". While in many other areas compensation can rectify the breaches and grievances, timing is essential in access to information matters. Information delayed often means that the right is irreparably denied.

Access to Information Procedures in Slovenia and Croatia

In order for the procedures to be rapid, the legislature has to enact proper legal framework, and then the procedure has to be fast in all the phases: at the public body holding the information, at the Information Commissioner, and in the court.

Constitutions of both Slovenia and Croatia guarantee a constitutional right to access information held by public authorities.**/8/** Both countries have a similar system of protection of the right to access public information. In both countries, any individual or legal entity can request the information by a simple informal written request and requests submitted by email are permitted. In Croatia, a public body has to decide within 15 days. It has to either disclose the information or issue a written decision, which explains why the information was not disclosed. Slovenian public authorities have to do so 'immediately', and when 'immediate' decision is not possible, they have to decide within 20 working days, which equals to about a month. When they need more time to collect information, in both Slovenia and Croatia public authorities can prolong time for few more weeks. In both countries in case that access to information is denied, or the body does not issue any decision (so called administrative silence), the applicant can appeal to the Information Commissioner. While Croatian legislation states that the Comissioner has to decide on a case within 30 days, Slovenian law does not have a similar provision. Slovenia's first Information Commissioner, a lawyer and former journalist Nataša Pirc Musar was appointed in 2004 and served two terms, followed by another lawyer, current Commissioner Mojca Prelesnik, who was appointed in 2014. Croatia did not have an Information Commissioner until 2013, when the Parliament appointed a law lecturer dr. Anamarija Musa.

Slovenian Information Commissioner is very strong and well known body, partly because both individuals who have held the position over the past decade, have been very active and vigorous defenders of freedom of information. Their decisions have been regularly and widely covered by the media, and were usually well received by the public and respected by the government. Commissioner's office has a staff of 34 fully employed persons.**/9/** Croatian Commissioner, on the other hand, is struggling with lack of resources. Media reported about her complaints about having only five employees and insufficient funds. The first media coverage of the Croatian Commissioner's decision appeared in summer 2016, when she ordered that Cabinet and the National Bank should disclose certain information and both bodies ignored her decision.**/10/**

In both countries the decision of the Information Commissioner can be challenged in judiciary. In Slovenia the Administrative Court reviews the Commissioner's decisions and further challenge to the Supreme Court is possible. In Croatia, Commissioner's decision can be challenged at the Administrative Court, the decisions of which are final. While Slovenian law does not set any time limits for the courts, Croatian law states that its court has to issue a decision within 90 days. If one feels that their constitutional rights have been violated, in both countries they may ask the Constitutional Court to review the constitutionality of the courts' decisions.

Length of Proceedings in Slovenia

This part of the article tests how timely Slovenian freedom of information procedures are when the body holding the data tries to prevent data disclosure by all legal means. We tested the time spent in all three stages of the proceedings: with the government body withholding the data, with the Information Commissioner, and with the courts. Until now 18 freedom of information court cases reached a final Supreme Court decision. We analyzed the time spent by each body to reach a decision in each of these cases.

In 13 out of these 18, the government bodies holding the data denied the access and in most cases they did so before the 20-working-day deadline. In five cases the bodies did not respond to the request. After the appeal, the Information Commissioner's proceedings lasted between one and six months. Commissioner's proceedings are becoming quicker every year./**11/**

If authorities do not respond to the request for information within 20 working days, a requester may ask the Commissioner to react. Commissioner usually reacts within one or two days. It usually calls the appropriate body by telephone, explains the relevant legislation, consults with any issue the body may have, and asks them to examine the request. When the body still does not decide on the request, the Commissioner - usually within a day or two - asks the body to immediately examine the request. According to the Commissioner, non-responding bodies are rare.

While data-holding bodies and the Information Commissioner review the requests and appeals in a timely manner, the courts are much slower. Under Art. 23 of the Access to Information Act, courts have to rule in freedom of information cases 'urgently and with priority'. An average time spent before the Administrative Court and the Supreme Court was, however, 15 months and 11 months, respectively. Proceedings before both courts, meaning from the moment the lawsuit was filed until the Supreme Court decision was issued, lasted on average 28 months. With the Administrative Court, the longest of the 18 proceedings lasted over two years and with the Supreme Court they lasted over a year and a half. On average, persons requesting public data waited two years and ten months to reach a Supreme Court decision and to receive the data. On one occasion they waited over four years. Supreme Court continuously ruled that government bodies do not need to disclose the data until the Supreme Court reaches its decision, even if Administrative Court asked them to do so./**12/** It should be noted that these courts do not hold any hearings. They decide based on written documents submitted by the parties.

The time needed for the courts to decide access to information cases is getting longer. In 2009 the average proceedings, from the request until the Supreme Court decision, lasted two years and six months (30 months). By 2013 proceedings became slightly shorter, but in recent years they are becoming longer every year. The last five proceedings lasted on average 43 months or three years and seven months. Even if we disregard 13 months in one of the proceedings, in which the requester contributed to the lengthy proceedings by not reacting earlier to the non-responsive government body, the average proceedings lasted long 41 months. The chart presents average lasting of the last five proceedings from the day of the request until the day of the Supreme Court decision.

A case of schools' statistical data shows how severely constitutional rights to freedom of expression are denied by the slow proceedings. In 2012 a group of parents, civil society representatives, and academics, including the author of this article, asked for public disclosure of 2011 school-level statistical data of yearly external tests for Slovenian primary and secondary schools. The government refused to disclose the data until the Administrative Court in 2014 issued three decisions requiring the government to release the data. The government released the 2011 data in 2014, when the data was out of

date. A group immediately asked for a new data of 2013 and 2014 tests, but the government refused to release them and as of December 2018 the court proceedings are still ongoing./**13**/ The government will release the 2013 and 2014 data probably in 2018 or in 2019, but they will be out of date. If parents will ask for new data, they will probably get an out-of-date data few years later. After the recent proceedings lasted 27 months, requesters officially asked the Administrative Court to expedite its proceedings. The Court's president, however, found no violation and ruled that the proceedings were carried out 'urgently and with priority'/**14**/ and his decision was confirmed by the president of the Supreme Court.

With three steps - an administrative appeal, a lawsuit at the Administrative Court, and the appeal to the Supreme Court - a government entity can block the disclosure of information for several years. Such a procedure is not 'rapid' and a system allowing such procedures is inappropriate, unconstitutional, and it lacks effective protection of the constitutional right to access public data.

Length of Proceedings in Croatia

This part of the article examines length of proceedings at the Croatian bodies holding the data, at the Information Commissioner, and at Croatian courts.

Croatian authorities often do not respond to the requests for information. As a test, we submitted six requests with six different bodies and none of them responded within the 15 day deadline or within several weeks after the deadline./**15**/

Just like in Slovenia, when authorities are silent on a request, a requester in Croatia can ask the Commissioner to react. Contrary to the Slovenian Commissioner, who reacts within a day or two, Croatian Commissioner is much slower. It took her between 6 and 18 months to ask the silent body to examine our requests. When the Commissioner is asked by a requester to review the authorities' refusals to disclose the information, Croatian Information Commissioner is even slower. In a sample of first ten decisions of December 2016, time needed to decide on an appeal varied between three and 24 months with an average of 14 months.

Under Croatian law, the Administrative Court has to decide within 90 days after the lawsuit against a Commissioner's decision is filed./**16**/ Lawsuits are usually filed within a month of a Commissioner's decision. Administrative Court in most cases follows or slightly passes the 90-day deadline. Among the eight decisions, issued in 2017 so far, six decisions were made in less than five months after the Commissioner's decision, one was made within six and one within eight months. Average time between the Commissioner's and Court's decisions is four and half months./**17**/

Constitutional Court of Croatia examined 15 constitutional appeals against the Administrative Court decisions. In all 13 decisions issued before April 2016, the appeals were rejected without any discussion about freedom of information. In the last two decisions, however, the court annulled Administrative Court rulings and returned the cases to a government body, which was withholding the data. Interestingly, in these two decisions the court relied on the 2009 European Court of Human Rights decision/**18**/ in which it acknowledged a very narrow right to access information. This confirms that the scope of the constitutional right in Croatia is only as narrow as the right protected under the ECHR. The protection in Croatia is therefore - for now - much lower than in most of other European democracies. The proceedings in the 15 examined proceedings before the Constitutional Court lasted between 6 and 58 months with an average of 28 months.

The procedure before the Croatian Constitutional Court is very different from the procedure before the Supreme Court of Slovenia. While the decision of the Croatian High Administrative Court is final and data has to be released, in Slovenia both parties can appeal to

the Supreme Court and the data will not be disclosed until the Supreme Court decides. Proceedings at the Croatian Constitutional Court can only be innitiated by a person claiming to be a victim of a human right violation. Government bodies can therefore not appeal against the Administrative Court ruling. In both cases where the Croatian Constitutional Court found violation, however, court did not rule that data should be disclosed. It marely returned the cases to the lower bodies. These two cases have lasted 50 and 56 months, respectively, and requesters still did not yet get access to the data they requested.

Croatian authorities' dealing with requests for schools' statistical data show how ineffective the proceedings are. In 2013 Croatian media published news on Croatian secondary schools' external tests results. According to the article, a government agency called The National Centre for External Evaluation of Education (hereinafter 'the Centre') (Nacionalni centar za vanjsko vrednovanje obrazovanja NCVVO) analyzed the external tests' results and awarded the Zagreb First Gymnasium as a school with the highest average score. In February 2014 an academic researcher asked the Centre to send him the analysis mentioned in the article and the average score for each Croatian secondary school. The Centre responded that he should have used an official form to file such a request. The researcher told the Centre that no such form exists and asked the Centre to send the data. The Centre responded that he failed to include his address in the request. The researcher told the Centre that he did not fail to include his address and asked again the Centre to send the data, to which he did not receive any responses or the data. In March 2014 he sent several inquiries to the Centre, to which the Centre did not respond. He also sent a complaint because of Centre's administrative silence. In June 2014 he asked the Centre again to send him the same data and to send him the original data used to calculate the average schools' scores. He also asked for anonymized copies of all freedom of information requests the Centre received within the last year. He asked the Centre to decide on his request for several times but never received any response. In July 2014 it became obvious that the Centre does not respect the legislation and the researcher asked the Centre to send him copies of several schools-related documents, which, according to the legislation, the Centre clearly holds. He never received a response so he forwarded the requests several times to email addresses of many Centre's employees including the director and a person designated to handle the freedom of information requests. He never received a response. The Information Commissioner reacted and urged with the Centre several times to handle researcher's requests. On January 2015 the Centre sent a short letter to the researcher saying that based on the Ministry's order, schools' statistical data is not publicly available. It also told the researcher that he cannot obtain copies of the reports, because they are sent only to the parliament and to the Cabinet of Ministers. On December 2016 the researcher received the letter and appealed against it. In early June 2017 the Information Commissioner asked the Centre to follow the law and to either disclose the data or to reject the request with a formal administrative decision. The Commissioner asked the Centre to decide on the request within 15 days. As of December 2017 the Centre has not yet issued a decision.

In early November 2016 another researcher asked three different schools to send him average scores on external 'matura' examination. It is a simple information each school holds and these are extremely simple requests to handle. None of the schools sent the data. They, however, responded that Centre should manage the requests and they forwarded the requests to the Centre. In early December 2016, after the 15 day deadline passed, he called the Centre by phone several times and talked to the director's secretary. She confirmed the receipt of the requests and she confirmed that she talked to the director about them, but could not give any further information. He appealed to the Commissioner and in February 2017 the Commissioner urged the Centre to handle the requests. On Febrary 2017 this researcher, hoping that the Centre might have started following the laws within the past two years, sent the same request that

the abovementioned researcher had sent in July 2014. On June 2017 the Centre issued a formal adminstrative decision on the researcher's requests submitted in November 2016 and in February 2017. It was the first Centre's formal administrative decision after it had received a number of requests in a period of over three years. In the decision it rejected the requests because "the large volume of data and the complexity of requests would burden the work of the Centre" and requests represent "abuse of the right to access access". It also says that the Centre did not receive any of the researcher's requests before February 2017 and that "it will analyse the circumstances how this could have happened." The researcher appealed the Centre's decision and as of December 2017 the matter is still between the Commissioner and the NCVVO.

Because the Information Commissioner is so slow in reacting, because she often returns the matter to a lower level without deciding on a substance, and because she lets the government bodies ignore her decisions, citizens' constitutional rights are being violated. They cannot access the government information and cannot use their freedom of speech.

Conclusions

Under international law, freedom of information procedures should be rapid. In both countries, Slovenia and Croatia, there are serious obstacles present for the applicants in both legislation and practice. In both countries there is no effective mechanism to assure the applicants to access the data if the authorities choose not to share the data. In the cases of administrative silence, Slovenian Commissioner reacts within a day or two, while it takes a several months for the Croatian Commissioner to react. When it comes to the courts, Croatian administrative court is faster. It decides within three months. Slovenian administrative court, on the other hand, often decides after a year or two. The matter of lengthy freedom of information procedures is currently pending before the ECtHR. It would be highly beneficial for the transparency of the government, and for the human rights protection in Europe, if the Court decides that lengthy access to information procedures breach the Convention rights.

Notes

/1/ For a history of access to public documents and information in Finland in Sweden, and for excerpts of the constitutions from around the world, see Riekkinen, M. & Suksi, M. (2015). Access to Information and Documents as a Human Right. Turku: Åbo Akademi University, 6-25, 181-202.

/2/ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expession, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 6 December 2004.

/3/ UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, UN doc. CCPR/C/GC/34, para. 18.

/4/ Article 2 of the Council of Europe Convention on Access to Official Documents, 2009, and Article 42 of the Charter of Fundamental Rights of the European Union.

/5/ See *Társaság a Szabadságjogokért v. Hungary* (no.37374/05, § 14, April 2009, hereinafter referred to as "*Társaság*") or *Youth Initiative for Human Rights v. Serbia* (no.48135/06, 25 June 2013).

/6/ The living instrument doctrine evolved since the *Tyrer v. the United Kingdom* (25 April 1978, § 31, Series A no. 26) and was discussed at length in the *Magyar Helsinki*'s majority opinion as well as in its concurring and dissenting opinions.

/7/ Cited in *Youth Initiative for Human Rights v. Serbia* (no.48135/06, 25 June 2013), para 14.

/8/ Art. 38, Para 4 of the Constitution of Croatia and Art. 39, Para 2 of the Constitution of Slovenia.

/9/ The Information Commissioner of Slovenia, The Yearly Report 2017, https://www.ip-rs.si/o-pooblascencu/informacije-javnega-znacaja/letna-porocila/

/10/ Jutarnji list. HNB će od Visokog upravnog suda zatražiti da preispita odluku povjerenice za informiranje, 26. 7. 2016.

/11/ Information Commissioner's website includes a list of cases under review. At the time of writing of this article, all undecided cases were with the Commissioner less than three months.

/12/ See for example Decision of the Supreme Court of Slovenia X Ips 338/2016 of 7 Dec 2016.

/13/ Cdministrative Cour of Slovenia decision I U 1167/2014 of 28 Sept 2015 and I U 1878/2015 of 9 Nov 2016.

/14/ Administrative Court of Slovenia decision SuNP 7/2016 of 6 Dec 2016.

/15/ Requests were sent to the Zagreb District Court, Pula District Court, NCVVO, Varaždin Seconday School, Đakovo Secondary School, Dubrovnik Secondary School.

/16/ Article 26. Zakona o pristupu informacijama (NN 85/15).

/17/ All the decisions of the Commissioner and the courts are available at the Information Commissioner's website: http://tom.pristupinfo.hr/pregledsud.php

/18/ *Társaság a Szabadságjogokért v. Hungary*, 37374/05, of 14 April 2009.

Literature

1. Banisar, D. (2006). Freedom of Information around the World 2006. Privacy International.
2. Available at: http://www.freedominfo.org/documents/global_survey2006.pdf (June 18, 2018).
3. Bishop, C. A. (2009). Internationalizing the right to know: Conceptualizations of access to information in human rights law. Chapel Hill: University of North Carolina.
4. Hugelier, S. (2010). Freedom of Expression and Transparency: Two Sides of One Coin. *Jura Falconis Jg.*, *47*(1), 61-91.
5. Janssen, K. (2012). Open government dana and the right to information: opportunities and obstacles. *The Journal of Community Informatics*, *8*(2). Available at: http://ci-journal.net/index.php/ciej/article/view/952 (June 20, 2018).
6. Mendel, T. (2008). Freedom of information: a comparative legal survey. Paris: UNESCO.
7. Peled, R. & Rabin, Y. (2011). The constitutional right to information. *Columbia Human Rights Law Review*. *42*, 357-401.
8. Riekkinen, M. & Suksi, M. (2015). Access to Information and Documents as a Human Right. Turku: Åbo Akademi University.