

Freedom to Access Information as a Fundamental Human Right and the Role of the Ombudsman for Human Rights in Its Protection

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Summary

This paper explores the fundamental human right to free access to information as protected by the European Convention on Human Rights (ECHR) and the Constitution of Bosnia and Herzegovina. The right to information is crucial for ensuring transparency, enabling informed citizen participation, and holding public authorities accountable. Despite its fundamental nature, the realization of this right often faces significant challenges, including bureaucratic hurdles and resistance from authorities. The Human Rights Ombudsman of Bosnia and Herzegovina plays a crucial role in safeguarding this right. The Ombudsman institution is responsible for addressing grievances related to access to information, mediating disputes, and advocating for improvements in compliance with human rights standards. This paper examines the legal protections provided by the ECHR and the constitutional framework of Bosnia and Herzegovina, highlighting the role of the Ombudsman in protecting the right to free access to information.

Keywords: *Free Access to Information, Human Rights, European Convention on Human Rights, Constitution of Bosnia and Herzegovina, Human Rights Ombudsman, Transparency, Democratic Governance*

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A. INTRODUCTION

In contemporary democratic societies, the right to free access to information (freedom to access information) is a cornerstone of transparent governance and an informed citizenry. Recognized as a fundamental human right, this principle is enshrined in international legal instruments, notably the European Convention on Human Rights (ECHR) and various constitutional provisions. Within the context of Bosnia and Herzegovina, the Constitution explicitly guarantees this right (as part of Article II/3.h) of the Constitution), reflecting the nation's commitment to uphold the standards of human rights protection established by the international community.

The significance of free access to information extends beyond mere transparency; it underpins the very fabric of participatory democracy by enabling citizens to make informed decisions, engage in public discourse, and hold governmental entities accountable. As such, the effective implementation and protection of this right are imperative. However, despite its fundamental status, the realization of free access to information often encounters substantial challenges, ranging from bureaucratic inertia to overt resistance by public authorities. In Bosnia and Herzegovina, the The Institution of Human Rights Ombudsman of Bosnia and Herzegovina plays a crucial role in safeguarding this right. Established to ensure the protection and promotion of human rights, the Ombudsman Institution is tasked with addressing grievances, mediating disputes, and advocating for systemic changes to enhance compliance with human rights obligations.¹ This paper examines the dual framework of legal protections provided by the ECHR and the Constitution of Bosnia and Herzegovina, with the current laws on freedom of access to information in Bosnia and Herzegovina (of which there are three, one on state level, and two at the level of entities – Republic of Srpska and Federation of Bosnia and

¹ ZAKON O OMBUDSMENU ZA LJUDSKA PRAVA BOSNE I HERCEGOVINE [Law on the Human Rights Ombudsman of Bosnia and Herzegovina], „Službeni glasnik Bosne i Hercegovine“, br. 19/02, 35/04, 32/06, 38/06 – ispr., 50/08 – dr. zakon i 61/23 – *See* Art. 1(2) of the Law.

Herzegovina),² alongside the practical role of the Ombudsman for Human Rights in upholding the right to free access to information.

Through a detailed analysis of relevant provisions of the positive laws, and relevant case law of the European Court of Human Rights (ECtHR), the Constitutional Court of Bosnia and Herzegovina, and the Ombudsman's interventions, this study seeks to elucidate the mechanisms through which the right to free access to information is protected and the challenges that persist in its enforcement. The findings aim to contribute to a deeper understanding of the interplay between legal frameworks and institutional mechanisms in promoting transparency and accountability, ultimately reinforcing the essential nature of free access to information as a fundamental human right.

B. FREEDOM OF ACCESS TO INFORMATION – FUNDAMENTAL MECHANISM FOR CIVIC ACTIVISM

Freedom of access to information is a *conditio sine qua non* in a democratic society, serving as a fundamental constitutional right. It manifests both as an independent right and as an integral component of the right to freedom of expression as delineated in Article 10 of the ECHR and in Article 10/3.h) of the Constitution of Bosnia and Herzegovina.³ This right is a cornerstone of democratic citizenship, playing a crucial role in ensuring the rule of law and fostering good governance. Access to information empowers citizens to scrutinize their elected representatives and guard against abuses of power. It also

² ZAKON O SLOBODI PRISTUPA INFORMACIJAMA NA NIVOU INSTITUCIJA BOSNE I HERCEGOVINE [Law on Freedom of Access to Information at the Level of Institutions of Bosnia and Herzegovina – LFAI B&H], „Službeni glasnik Bosne i Hercegovine“, br. 61/23; ZAKON O SLOBODI PRISTUPA INFORMACIJAMA [Law on Freedom of Access to Information – LFAI RS] „Službeni glasnik Republike Srpske“, br. 20/01; ZAKON O SLOBODI PRISTUPA INFORMACIJAMA U FEDERACIJI BOSNE I HERCEGOVINE [Law on Freedom of Access to Information in Federation of Bosnia and Herzegovina – LFAI FB&H], „Službene novine Federacije Bosne i Hercegovine“, br. 32/01 i 48/11.

³ The protection of this right is provided for in Art. 19 of the UNIVERSAL DECLARATION OF HUMAN RIGHTS, Art. 19 of the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, as two global international human rights instruments, as well as in Art. 13 of the American Convention on Human Rights and in Art. 9 of the African Charter on Human and Peoples' Rights, as regional instruments.

facilitates citizen participation in setting governmental priorities, thereby reinforcing the principles of good governance.⁴ Good governance entails an open government operating on the principles of effectiveness, transparency, and lawfulness.

To actualize the concept of good governance, governmental institutions bear the responsibility of ensuring the transparency of their operations. This involves providing timely and comprehensive information about their activities to the public. Meeting the needs of citizens requires that these institutions prioritize accessibility and transparency, thereby fostering an environment where the public can actively engage with and influence governmental processes. The obligation to ensure transparency is not merely procedural but substantive, requiring that governmental institutions cultivate a culture of openness.⁵ This includes making information readily available and easily understandable to the public. Such measures are essential for promoting accountability, preventing corruption, and enhancing the legitimacy of governmental actions. By adhering to these principles, governments can build trust with their citizens and create a more participatory and responsive political system.

Every natural and legal person has the right to request access to information held by public bodies, and these public bodies are obligated to provide the requested information.⁶ This right, as enshrined in the positive legislation

⁴ TROPINA GODEC, Ž., Informiranost građana i slobodan pristup informacijama javnog sektora, *Hrvatska i komparativna javna uprava*, Vol. 49, No. 2, 2009, p. 324.

⁵ ĐURMAN, P., Europeizacija javne uprave i načelo otvorenosti, *Godišnjak Akademije pravnih znanosti Hrvatske*, Vol. VII, No. 1, 2016, pp. 349-356.

⁶ Art. 4. LFAI RS; Art. 4 LFAI FB&H. The „old“ LFAI B&H included a provision that explicitly guaranteed every person’s right to access information. However, the new law, which has introduced several disadvantages already evident in practice, has modified this provision. The new law no longer explicitly guarantees the right of every person to access information, focusing instead on the obligation of institutions to provide information to citizens. One significant shortcoming of the new law is its restricted scope, as it only applies to the „institutions of Bosnia and Herzegovina“. This limitation aligns with a broader policy of constraining the competencies and powers of state institutions and seems to diminish the status of the state itself. The terminology used in the new law, such as „at the level of the institutions of Bosnia and Herzegovina“ or „in the institutions of Bosnia and Herzegovina“, contrasts with the more straightforward reference to the „Law of Bosnia and Herzegovina“ found in the old law. Additionally, the old law’s provisions applied to the Brčko District of Bosnia and Herzegovina, ensuring a more comprehensive application of the right to access information. The new law’s

of Bosnia and Herzegovina, aligns with the standards established by the ECtHR. The right to free access to information, though not explicitly stated in the ECHR, is derived from Article 10, which guarantees freedom of expression.⁷ According to the ECtHR, the right to freedom of expression encompasses the freedom to hold opinions and to receive and impart information and ideas.⁸ Consequently, individuals may request information from public authorities as a necessary component of exercising their freedom of expression. In practice, this means that the right to access information is intrinsically linked to the broader framework of democratic freedoms.⁹ By ensuring that individuals can obtain information from public bodies, the legal system upholds the essential democratic principles of transparency and accountability. This access enables citizens to engage fully in public discourse, make informed decisions, and hold their government accountable. The ECtHR has reinforced this interpretation, affirming that access to information is crucial for the effective exercise of the freedom of expression and the overall functioning of a democratic society.

In this context, the ECtHR considers that „the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him“. Additionally, „the right to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion“. The Court further clarifies that Article 10 of the ECHR does not grant an individual a general right of access to information held by a public authority nor does it obligate the Government to provide such information.¹⁰ However, specific circumstances may give rise to such a right or obligation.

omission of such coverage represents a step backward in ensuring uniform access to information across the entire country. This regression undermines the principles of transparency and accountability, as it restricts the legal framework's reach and effectiveness in protecting citizens' rights to access public information.

⁷ MIJOVIĆ, Lj. S., Internet i sloboda izražavanja u praksi Evropskog suda za ljudska prava, *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol. LIV, No. 3, p. 1025.

⁸ OFAK, L., Pravo na pristup informacijama kao pravo zaštićeno Europskom konvencijom i drugim međunarodnim ugovorima za zaštitu ljudskih prava, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 37, No. 2, 2016, p. 936.

⁹ TOPLAK, J., BREZNOVIK, B., Kašnjenje informacije je nedostatak pravde: Dugačke procedure sprječavaju pravo na pristup informaciji, *Informatologija*, Vol. 52, No. 1-2, 2019, p. 2.

¹⁰ EUROPEAN COURT OF HUMAN RIGHTS, Judgement (Merits and Just Satisfaction) in Case of *Magyar Helsinki Bizottság v. Hungary* [GC], App. No. 18030/11, 8th November 2016, § 156.

Firstly, when the disclosure of information has been mandated by a judicial order that has gained legal force. Secondly, a right of access may arise in situations where access to information is essential for the individual's exercise of their right to freedom of expression, particularly „the freedom to receive and impart information“. In these cases, the denial of access to information constitutes an interference with that right.¹¹ Therefore, while the ECtHR acknowledges the importance of the right to receive information, it emphasizes that this right is not absolute. It primarily protects individuals from governmental restrictions on receiving information from willing sources, rather than imposing proactive duties on the state. Nevertheless, under certain judicially mandated conditions or when access is crucial for exercising freedom of expression, the obligation to provide information can indeed be invoked.

Freedom of access to information, as aforementioned, is an essential pillar of democratic governance, and playing a critical role in empowering citizens and facilitating civic activism. This right, enshrined in various international human rights instruments and national legal frameworks, provides individuals with the ability to obtain information held by public authorities. This access is not only a manifestation of the broader right to freedom of expression but also a necessary condition for the effective functioning of a participatory democracy.

Firstly, access to information is a prerequisite for informed citizenry. In a democratic society, citizens must be equipped with accurate and comprehensive information to engage meaningfully in public discourse, make informed electoral choices, and participate in decision-making processes.¹² Without access to relevant information, public debate can be stifled, and the democratic process undermined. Informed citizens are better positioned to scrutinize government actions, question policies, and advocate for changes, thereby enhancing the responsiveness and accountability of public institutions. *Secondly*, freedom of access to information underpins the ability of civil society organizations and activists to monitor and challenge governmental actions.¹³ These entities often rely on public records, official documents, and data to conduct

¹¹ See generally EUROPEAN COURT OF HUMAN RIGHTS, Judgement (Merits and Just Satisfaction) in the Case of *Cangi v. Turkey*, App. No. 24973/15, 29th January 2019, §§ 30-45.

¹² ĐURMAN, *Evropeizacija javne uprave i načelo otvorenosti*, pp. 355-356.

¹³ See KING, C. S., FELTEY, K. M., O'NEILL, B. S., The Question of Participation: Toward Authentic Public Participation in Public Administration, *Public Administration Review*, Vol. 58, No. 4, 1998, p. 317.

research, expose corruption, and advocate for policy reforms. For instance, environmental activists may require access to government reports on pollution levels to campaign for stricter environmental regulations. Similarly, human rights organizations might need information on law enforcement practices to address issues of police misconduct or abuse. By facilitating access to such information, this right enables civic actors to hold authorities accountable and demand transparency. *Thirdly*, access to information is instrumental in combating corruption and promoting good governance. Transparency is a fundamental aspect of the rule of law, ensuring that governmental actions are open to scrutiny. When citizens and activists can access information about government spending, procurement processes, and policy implementation, it becomes more difficult for corrupt practices to go unnoticed. This oversight helps deter corruption and fosters a culture of integrity and accountability within public institutions. The presence of robust mechanisms for accessing information can thus serve as a powerful deterrent against abuse of power and financial misconduct.

The judicial interpretation of access to information rights also plays a significant role in reinforcing civic activism. The ECtHR, for example, has elaborated on the conditions under which access to information must be provided, recognizing its importance for the exercise of freedom of expression (which we will discuss later). Cases such as *Magyar Helsinki Bizottság v. Hungary* highlight that denying access to information, or providing misleading or insufficient information, constitutes an interference with the right to freedom of expression.¹⁴ This judicial recognition strengthens the legal framework supporting civic activism, ensuring that public authorities are held to their transparency obligations. Also, access to information fosters a culture of participation and inclusivity. When individuals feel that they can obtain the information they need, they are more likely to engage with public institutions and participate in governance. This participation is crucial for marginalized and vulnerable groups, who might otherwise be excluded from decision-making processes. By ensuring that all citizens have the information necessary to advocate for their rights and interests, access to information promotes a more inclusive and equitable society.

¹⁴ TOPLAK, BREZNOVIK, *Kašnjenje informacije je nedostatak pravde: Dugačke procedure sprječavaju pravo na pristup informaciji*, p. 2.

In light of the preceding, freedom of access to information is a fundamental mechanism for civic activism, underpinning informed citizen participation, enhancing accountability, combating corruption, and fostering inclusivity. It is a cornerstone of democratic governance, essential for the protection and promotion of human rights, and a vital tool for empowering citizens and civil society to effect change.

C. THE ROLE OF OMBUDSMAN OF BOSNIA AND HERZEGOVINA IN PROTECTION OF THE FREEDOM TO ACCESS INFORMATION RIGHT

Prior to the enactment of the new Law on Freedom of Access to Information at the state level in Bosnia and Herzegovina, the Ombudsman held a significantly broader mandate. This was largely due to the Ombudsman's role as an appeals body under the previous legislation, functioning as a quasi-judicial „third instance body“ for matters related to information access.¹⁵ However, with the introduction of the new law, this appellate competence has been transferred to a newly established special Appeals Council at the state level. Consequently, the Ombudsman's responsibilities have been narrowed within this specific domain. Nevertheless, the Ombudsman retains the authority to conduct investigations into violations of human rights and fundamental freedoms under the overarching jurisdiction granted by the Law on the Ombudsman for Human Rights of Bosnia and Herzegovina. Additionally, the Ombudsman continues to serve as a special appellate body under the entity-level laws on freedom of access to information.¹⁶ This dual role underscores the multifaceted nature of the Ombudsman's function in safeguarding human rights and ensuring transparency and accountability in governance. In the subsequent sections of this work, we will explore the practical application of the relevant legislation concerning investigations into alleged violations of the

¹⁵ States accept various mechanisms for the protection of the right to free access to information, among others, a special commissioner for information protection, an ombudsman, a legislative or parliamentary commissioner, an appeal panel under the government and others. *See* VAJDA HALAK, Ž., ROMIĆ, D., TRŠINSKI, Z., Pravo na pristup informacijama javne uprave u Republici Hrvatskoj i postupak zaštite ostvarivanja tog prava, *Mostariensia, Časopis za društvene i humanističke znanosti*, Vol. 20, No. 1-2, 2016, p. 231.

¹⁶ Art. 21-22 LFAI RS; Art. 21-22 LFAI FB&H.

right to free access to information. This will include an analysis of the procedural and substantive actions undertaken by the Ombudsman in such cases.

The right to access information, a cornerstone of transparent governance and civic engagement, can be compromised by various actions or omissions by public authorities. Empirical evidence indicates several prevalent issues. Firstly, there is a recurring reluctance among authorities to respond to requests for information. In instances where access to information is denied, authorities often fail to adequately apply the public interest test, which is a crucial mechanism to determine the extent to which information can be withheld.¹⁷ This test is sometimes conducted perfunctorily or entirely neglected. Moreover, procedural non-compliance is a significant concern. Authorities

¹⁷ See Godišnji izvještaj o rezultatima aktivnosti Institucije Ombudsmena za ljudska prava Bosne i Hercegovine za 2014. godinu, Institucija Ombudsmena za ljudska prava Bosne i Hercegovine, Banja Luka, 2015, pp. 40-43; Godišnji izvještaj o rezultatima aktivnosti Institucije Ombudsmena za ljudska prava Bosne i Hercegovine za 2015. godinu, Institucija Ombudsmena za ljudska prava Bosne i Hercegovine, Banja Luka, 2016, pp. 23-26; Godišnji izvještaj o rezultatima aktivnosti Institucije Ombudsmena za ljudska prava Bosne i Hercegovine za 2016. godinu, Institucija Ombudsmena za ljudska prava Bosne i Hercegovine, Banja Luka, 2017, pp. 27-30; Godišnji izvještaj o rezultatima aktivnosti Institucije Ombudsmena za ljudska prava Bosne i Hercegovine za 2017. godinu, Institucija Ombudsmena za ljudska prava Bosne i Hercegovine, Banja Luka, 2018, pp. 20-24; Godišnji izvještaj o rezultatima aktivnosti Institucije Ombudsmena za ljudska prava Bosne i Hercegovine za 2018. godinu, Institucija Ombudsmena za ljudska prava Bosne i Hercegovine, Banja Luka, 2019, pp. 24-28; Godišnji izvještaj o rezultatima aktivnosti Institucije Ombudsmena za ljudska prava Bosne i Hercegovine za 2019. godinu, Institucija Ombudsmena za ljudska prava Bosne i Hercegovine, Banja Luka, 2020, pp. 18-24; Godišnji izvještaj o rezultatima aktivnosti Institucije Ombudsmena za ljudska prava Bosne i Hercegovine za 2020. godinu, Institucija Ombudsmena za ljudska prava Bosne i Hercegovine, Banja Luka, 2021, pp. 22-26; Godišnji izvještaj o rezultatima aktivnosti Institucije Ombudsmena za ljudska prava Bosne i Hercegovine za 2021. godinu, Institucija Ombudsmena za ljudska prava Bosne i Hercegovine, Banja Luka, 2022, pp. 36-47; Godišnji izvještaj o rezultatima aktivnosti Institucije Ombudsmena za ljudska prava Bosne i Hercegovine za 2022. godinu, Institucija Ombudsmena za ljudska prava Bosne i Hercegovine, Banja Luka, 2023, pp. 29-38; Godišnji izvještaj o rezultatima aktivnosti Institucije Ombudsmena za ljudska prava Bosne i Hercegovine za 2023. godinu, Institucija Ombudsmena za ljudska prava Bosne i Hercegovine, Banja Luka, 2024, pp. 34-44. According to the Human Rights Ombudsman of Bosnia and Herzegovina, evaluating the public interest is the most challenging and crucial aspect of handling requests for access to information. When asked how they conduct the public interest test, the majority of public bodies responded that they have not yet encountered requests requiring them to assess the public interest. See Specijalni izvještaj o iskustvima u primjeni zakona o slobodi pristupa informacijama u Bosni i Hercegovini, Institucija Ombudsmena za ljudska prava Bosne i Hercegovine, Banja Luka, 2019, p. 35.

frequently fail to issue decisions within the legally prescribed timeframes,¹⁸ and when decisions are issued, they are often inadequately formulated, lacking the requisite legal rigor and clarity (or in the form of an act issued by an administrative body).¹⁹ It is essential to note that, in principle, access to information can be restricted either partially or fully based on specific circumstances. Nonetheless, there should be an effort to provide as much information as possible to the applicant, ensuring that restrictions are justified and proportionate.

The right to access information, while fundamental, is not absolute and may be subject to limitations.²⁰ In Bosnia and Herzegovina, these limitations are prescribed by both domestic law and the European Convention on Human Rights. The ECHR holds a unique status within the constitutional and legal framework of Bosnia and Herzegovina, being an integral part of the Constitution as stipulated in Article II/2. (... *These shall have priority over all other*

¹⁸ See generally TOPLAK, BREZNOVIK, *Kašnjenje informacije je nedostatak pravde: Dugačke procedure sprječavaju pravo na pristup informaciji*, pp. 1-8.

¹⁹ A notable issue within the implementation of freedom of access to information laws is the tendency of administrative bodies to issue documents such as „notices“, „responses“, or other acts – often without clear titles – that lack the essential elements of a formal administrative act. This practice raises significant concerns about procedural accountability. The laws governing freedom of access to information are classified as *lex specialis*, indicating that they constitute a specialized administrative procedure. According to the principles of legal interpretation, where specific legislation (*lex specialis*) is silent on certain procedural aspects, the provisions of the general law governing administrative procedures are applicable. This hierarchical relationship ensures that the overarching framework for administrative actions remains coherent and comprehensive. In this context, it is critical to address the legislative oversight that failed to stipulate the specific form of administrative acts for granting or denying access to information within the special law. Legal logic, therefore, necessitates the application of the general administrative procedure laws, which provides detailed guidelines on the format and content of administrative acts. This general law ensures that such acts meet the required standards of legality, clarity, and transparency. The failure to adhere to these standards not only undermines the procedural integrity of administrative actions but also adversely affects the rights of individuals seeking access to information. Properly formatted administrative acts should include key elements such as the legal basis for the decision, factual findings, and reasoning, as well as clear instructions on the right to appeal. By ensuring that these elements are present, administrative bodies can enhance the legitimacy and acceptability of their decisions, thereby fostering greater trust and compliance among the public.

²⁰ ELIJAŠ, D., MARKOVIĆ, S., TRGOVAC, S., *Pravo na pristup informacijama koje posjeduju tijela javne vlasti – kroz ustavnosudski aspekt i stajališta Europskog suda za ljudska prava*, *Zbornik radova Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 38, No. 1, 2017, p. 506.

laws). This incorporation means that the ECHR itself, along with all its protocols and the jurisprudence and standards established by the European Court of Human Rights, are constitutionalized and directly applicable within the country.²¹ The framework for limiting access to information in Bosnia and Herzegovina is defined by establishing specific exceptions, which are designed to balance the public's right to know with other legitimate interests. These exceptions are categorized as follows: (a) exceptions related to the functions of public bodies; (b) exceptions for confidential commercial information; (c) exceptions for privacy protection; and (d) exceptions determined after a public interest examination.²²

Exceptions Related to the Functions of Public Bodies. – This category allows competent public bodies to restrict access to information if its disclosure could reasonably be expected to cause significant harm to legitimate objectives. In the context of the Republic of Srpska and the Federation of Bosnia and Herzegovina, these objectives include: (1) interests of defense and security; (2) crime prevention and detection; (3) protection of the decision-making process (safeguarding the integrity of internal deliberations and the provision of opinions, advice, or recommendations within public bodies). This protection, however, does not extend to factual, statistical, scientific, or technical information.

Exceptions for Confidential Commercial Information. – When a request for information involves confidential commercial interests of a third party, the competent public authority must act swiftly to notify the third party of the request. This notification is done through an official letter detailing the nature of the request. If the third party responds within 15 days, asserting that the information is confidential and providing reasons for potential harm from disclosure, the public authority can establish an exception to protect these commercial interests.²³

Exceptions for Privacy Protection. – This exception is invoked when the requested information pertains to personal interests related to the privacy of a third party. The competent public authority must justifiably determine that

²¹ MIJOVIĆ, LJ., *Bosna i Hercegovina pred Evropskim sudom za ljudska prava*, Comesgrafika, Banja Luka, 2014, pp. 11-12.

²² Art. 5-9 LFAI RS; Art. 5-9 LFAI FB&H.

²³ Specijalni izvještaj o iskustvima u primjeni zakona o slobodi pristupa informacijama u Bosni i Hercegovini, pp. 21-25.

releasing the information would infringe on these privacy rights, thereby establishing the basis for the exception.

Exceptions Determined After a Public Interest Examination. – This special category of exception allows for the release of information if it is justified by overriding public interest, despite previously established exceptions. The competent public body must weigh the benefits and potential harm of disclosure, considering various factors such as:

- Non-compliance with legal obligations;
- Existence of any offense or judicial error;
- Abuse of power or negligence in official duties;
- Unauthorized use of public funds;
- Danger to the health or safety of individuals, the public, or the environment;

In making this determination, the public body assesses whether the public interest in disclosure outweighs the potential negative consequences. This assessment is crucial in ensuring that transparency and accountability are maintained, especially in cases involving significant public concern.

Public authorities often invoke exceptions to the right of access to information following a public interest test.²⁴ This test purportedly determines that the specific information requested does not serve the public interest. However, in many disputed cases, the implementation of the public interest test is superficial, involving merely a restatement of legal provisions without substantive analysis. Such practices not only undermine the principle of transparency but also constitute a violation of the right to a reasoned decision. The right to a reasoned decision is a fundamental component of the right to a fair trial, enshrined in Article 6 of the ECHR. Article 6 is one of the most significant procedural rights within the ECHR, encapsulating a range of guarantees

²⁴ The public body must scrutinize legality, proportionality, and necessity in a democratic society. According to the ECHR, it is essential to apply the tripartite test to ensure that the restriction of rights is legal, proportionate, and pursues a legitimate aim, while also being appropriate in a democratic society. Unfortunately, this also rarely happens in Bosnia and Herzegovina's practice. See generally RAJKO, A., Pravo na pristup informacijama javnog sektora i njegova ograničenja u demokratskom društvu, *Hrvatska i komparativna javna uprava*, Vol. 4, No. 2, 2002, pp. 405-461; LUČKA, D., *Tolerancija i njeni neprijatelji, Sloboda izražavanja i (ne)tolerisanje netolerantnih u demokratskom društvu*, Friedrich Ebert Stiftung, Sarajevo, 2022, pp. 68-76; KRSTIĆ, I., MARINKOVIĆ, T., *Evropsko pravo ljudskih prava*, Savet Evrope, Beograd, 2016, pp. 16-17.

designed to ensure fairness in judicial and other proceedings, including administrative and *sui generis* procedures. Among the guarantees provided by Article 6(1) of the ECHR is the right to a reasoned decision. In the context of the ECHR, „court decision“ is an autonomous term that encompasses not only judicial decisions but also the decisions of all other bodies.²⁵ The importance of a reasoned decision is aptly captured by the maxim often cited in English courts: „not only must justice be done; it must also be seen to be done“.²⁶ This principle underscores that a reasoned decision is vital not only for the parties involved but also for the general public, fostering trust in the administration of justice.

A reasoned decision serves a dual functional purpose. *Firstly*, it provides the parties with a clear explanation of the grounds for the decision, enabling them to understand the rationale behind it. This understanding is crucial for parties to effectively exercise their right to appeal or contest the decision. *Secondly*, it ensures transparency and accountability in the decision-making process, reinforcing the legitimacy of the authority’s actions. The failure to provide a reasoned decision, particularly in cases involving the denial of access to information, undermines these fundamental principles. When public authorities fail to substantively apply the public interest test and merely reiterate legal provisions without detailed justification, they violate the procedural rights guaranteed by the Convention. This practice not only deprives individuals of their right to a reasoned decision but also erodes public confidence in the fairness and integrity of administrative processes.

Given the paramount importance of the ECHR within the constitutional and legal framework of Bosnia and Herzegovina, it is imperative that the Ombudsman for Human Rights aligns its practices with the jurisprudence of the ECtHR. By adhering to the principles and recommendations established by the ECtHR, the Ombudsman can play a major role in guiding public bodies to comply with the standards set forth by the European Convention. It is noteworthy, however, that the Ombudsman of Bosnia and Herzegovina has not frequently invoked the mechanisms of the Convention for the protection of rights in its practice. To rectify this, the Ombudsman should consistently apply the principles and guidelines established by the ECtHR, particularly those articulated in the case of *Magyar Helsinki Bizottság v. Hungary* [GC]. This

²⁵ RAOSAVLJEVIĆ, P., NOVAKOVIĆ, F., *Evropski sistem zaštite ljudskih prava*, Univerzitet za poslovni inženjering i menadžment Banja Luka, Banja Luka, 2024, pp. 89-90.

²⁶ *R v Sussex Justices*, Ex parte McCarthy [1924] 1 KB 256, 259.

case provides a comprehensive framework for assessing whether and to what extent the denial of access to information constitutes an interference with an applicant's freedom of expression rights. The case of *Magyar Helsinki Bizottság v. Hungary* [GC] highlights four key criteria that must be considered cumulatively when determining the scope of these rights:²⁷

1. The purpose of the information request;
2. The nature of the information sought;
3. The role of the applicant;
4. The availability of the information;

These criteria, as established by the ECtHR, are cumulative, meaning that all must be satisfied for a comprehensive assessment.²⁸ By integrating these criteria into its evaluative processes, the Ombudsman can more effectively influence public authorities to act in accordance with the ECHR.

The Purpose of the Information Request. – In affirming the applicability of Article 10 of the ECHR, the European Court of Human Rights has underscored a critical dimension: the objective behind an individual's request for access to information held by public authorities. Specifically, the ECtHR has determined that this objective must be to facilitate the exercise of the individual's freedom to receive and impart information and ideas, as established in the case of *Magyar Helsinki Bizottság v. Hungary* [GC].²⁹ This determination necessitates a thorough examination of whether the access to the requested information constitutes an essential component in the exercise of the right to freedom of expression. In this context, the Court's interpretation emphasizes that the mere act of seeking information is not sufficient. Rather, it must be demonstrated that the information is integral to the individual's ability to participate in public debate, contribute to public knowledge, and engage in the exchange of ideas that are fundamental to a democratic society. Therefore, the analysis must consider the specific circumstances under which the information is requested and its direct relevance to the applicant's exercise of their freedom of expression.

²⁷ *Magyar Helsinki Bizottság v. Hungary* [GC], § 157.

²⁸ EUROPEAN COURT OF HUMAN RIGHTS, Judgement (Merits and Just Satisfaction) in Case of *Saure v. Germany*, App. No. 6106/16, 19th October 2021, § 34.

²⁹ *Magyar Helsinki Bizottság v. Hungary* [GC], § 158.

The Nature of the Information Sought. – The ECtHR asserts that the information, data, or documents for which access is requested must generally satisfy a public-interest test to necessitate disclosure under the ECHR. The determination of what constitutes a subject of public interest is contingent upon the unique circumstances of each case. Public interest pertains to issues that affect the public to such an extent that there is a legitimate concern or interest in them. This includes matters that capture public attention or significantly impact the community’s well-being. Issues capable of provoking substantial controversy, addressing important social questions, or presenting problems that the public has a legitimate interest in being informed about, fall within the realm of public interest. Importantly, the ECtHR clarifies that public interest should not be conflated with the public’s mere curiosity about the private lives of individuals, nor should it cater to a desire for sensationalism or voyeurism. The distinction is vital to ensure that the right to access information serves meaningful democratic engagement and transparency rather than indulging in trivial or intrusive interests. This principle was elaborated upon in the case of *Magyar Helsinki Bizottság v. Hungary* [GC], where the ECtHR delineated the boundaries of public interest in the context of freedom of expression and access to information.³⁰

The Role of the Person (Natural or Legal) Requesting Information. – The ECtHR has held that the particular role of the individual or entity requesting information is of paramount importance in the context of the two criteria discussed above: the purpose of the information request and the nature of the information sought. This principle is articulated in the case of *Magyar Helsinki Bizottság v. Hungary* [GC].³¹ The ECtHR recognizes that the requester’s role in „receiving and imparting“ information to the public assumes special significance. Journalists are traditionally acknowledged as playing this critical role, as evidenced by the rulings in *Roșianu v. Romania* and *Saure v. Germany* (dec.).³² Similarly, non-governmental organizations (NGOs) that engage in activities related to matters of public interest are also seen as fulfilling this role. Relevant cases include *Társaság a Szabadságjogokért v. Hungary*, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*, *Youth Initiative for Human Rights*

³⁰ *Magyar Helsinki Bizottság v. Hungary* [GC], §§ 161-162.

³¹ *Magyar Helsinki Bizottság v. Hungary* [GC], § 164.

³² EUROPEAN COURT OF HUMAN RIGHTS, Judgement in Case of *Roșianu v. Romania*, App. No. 27329/06, 24th June 2014, § 61; *Saure v. Germany* (dec.), § 35.

v. Serbia, and *Association BURESTOP 55 and Others v. France*.³³ Importantly, the ECtHR has emphasized that the right of access to information should not be restricted solely to NGOs and the press. This right extends to academic researchers, as affirmed in *Başkaya and Okçunoğlu v. Turkey* [GC], *Kenedi v. Hungary*, *Gillberg v. Sweden* [GC], and *Šeks v. Croatia*.³⁴ Authors who contribute literature on matters of public concern also enjoy this high level of protection, as seen in *Chaupy and Others v. France*, and *Lindon, Otchakovsky-Laurens and July v. France* [GC].³⁵ In contrast, when an applicant is a private individual without any demonstrable intent to contribute to public discourse or facilitate the dissemination of information, the Court may determine that the individual does not fulfill the requisite role. This was the conclusion in *Sioutis v. Greece* (dec.), where the applicant requested a copy of a judgment without arguing any contribution to public access or dissemination, and thus failed to meet the necessary criteria.³⁶

The availability of the Information. – The ECtHR has established that the readiness and availability of the requested information is a crucial criterion in determining whether a refusal to provide the information constitutes an „interference“ with the freedom to „receive and impart information“, as protected by Article 10 of the ECHR. This principle was notably articulated in *Magyar Helsinki Bizottság v. Hungary* [GC].³⁷ In *Társaság a Szabadságjogokért v. Hungary*, the ECtHR emphasized that the information sought was „ready and available“ and did not require the Government to collect any additional data,

³³ OFAK, *Pravo na pristup informacijama kao pravo zaštićeno Europskom konvencijom i drugim međunarodnim ugovorima za zaštitu ljudskih prava*, pp. 939-940.

³⁴ EUROPEAN COURT OF HUMAN RIGHTS, Judgement (Merits and Just Satisfaction) in Case of *Başkaya and Okçunoğlu v. Turkey* [GC], App. Nos. 23536/94 and 24408/94, 8th July 1999, §§ 61-67; EUROPEAN COURT OF HUMAN RIGHTS, Judgement (Merits and Just Satisfaction) in Case of *Kenedi v. Hungary*, App. No. 31475/05, 26th May 2009, § 42; EUROPEAN COURT OF HUMAN RIGHTS, Judgement (Merits and Just Satisfaction) in Case of *Gillberg v. Sweden* [GC], App. No. 41723/06, 3rd April 2012, § 93; EUROPEAN COURT OF HUMAN RIGHTS, Judgement (Merits and Just Satisfaction) in Case of *Šeks v. Croatia*, 39325/20, App. No. 39325/20, 3rd February 2022, § 41.

³⁵ EUROPEAN COURT OF HUMAN RIGHTS, Judgement (Merits) in Case of *Chaupy and Others v. France*, App. No. 64915/01, 29th June 2004, § 68; EUROPEAN COURT OF HUMAN RIGHTS, Judgement (Merits and Just Satisfaction) in Case of *Lindon, Otchakovsky-Laurens and July v. France* [GC], App. Nos. 21279/02 and 36448/02, 22nd October 2007, § 48.

³⁶ EUROPEAN COURT OF HUMAN RIGHTS, Decision in Case of *Sioutis v. Greece* (dec.), App. No. 16393/14, 29th August 2017, § 31.

³⁷ *Magyar Helsinki Bizottság v. Hungary* [GC], § 170.

reinforcing the significance of this criterion.³⁸ In contrast, in *Guerra and Others v. Italy* [GC], the ECtHR noted the absence of readily available information as a distinguishing factor.³⁹ In the case of *Yuriy Chumak v. Ukraine*, the Court considered that despite the extensive period covered by the requested data (approximately eleven years), it was fundamentally ready and available. The authorities did not communicate any practical difficulties or unreasonable burdens associated with gathering the data, thus supporting the applicant's claim.⁴⁰ Similarly, in *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*, the applicant association sought information on a series of decisions over time, which was not confined to a single document. The ECtHR examined whether the reasons provided by domestic authorities for refusing the request were „relevant and sufficient“. The ECtHR dismissed the domestic authority's argument about the difficulties in gathering the material, noting that these difficulties largely stemmed from the authority's choice not to publish its decisions.⁴¹ In *Šeks v. Croatia*, the applicant, a retired politician, requested access to classified presidential records for research on a historical book about the founding of the Republic of Croatia. Despite the potentially laborious process of declassifying documents involving multiple authorities, the ECtHR observed that there was no indication that the requested records were not ready or available.⁴²

The Ombudsman for Human Rights should apply the practice of the ECtHR for several compelling reasons, rooted both in legal mandates and the principles of effective human rights protection.

The Constitution of Bosnia and Herzegovina explicitly incorporates the European Convention on Human Rights and its protocols. Article II/2. of the Constitution states that the rights and freedoms set forth in the ECHR

³⁸ EUROPEAN COURT OF HUMAN RIGHTS, Judgement (Merits and Just Satisfaction) in Case of *Társaság a Szabadságjogokért v. Hungary*, App. No. 37374/05, 13th November 2008, § 36. See ELIJAŠ, MARKOVIĆ, TRGOVAC, *Pravo na pristup informacijama koje posjeduju tijela javne vlasti – kroz ustavnosudski aspekt i stajališta Europskog suda za ljudska prava*, pp. 520-521.

³⁹ EUROPEAN COURT OF HUMAN RIGHTS, Judgement (Merits and Just Satisfaction) in Case of *Guerra and Others v. Italy* [GC], App. No. 14967/89, 19th february 1998, § 53.

⁴⁰ EUROPEAN COURT OF HUMAN RIGHTS, Judgement (Merits and Just Satisfaction) in Case of *Yuriy Chumak v. Ukraine*, App. No. 23897/10, 18th March 2023, § 32.

⁴¹ EUROPEAN COURT OF HUMAN RIGHTS, Judgement (Merits and Just Satisfaction) in Case of *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*, App. No. 39534/07, 28th November 2013, § 46.

⁴² *Šeks v. Croatia*, § 42.

shall have priority over all other law. This constitutional provision mandates that the ECHR, as interpreted by the ECtHR, is directly applicable and takes precedence over domestic legislation. By including the ECHR within its constitutional framework, Bosnia and Herzegovina has established the ECHR as a primary source of human rights law.⁴³ This integration means that the principles and case law of the ECtHR are not merely persuasive but binding. The Ombudsman, as a national institution dedicated to human rights protection, must align its practices and decisions with the authoritative interpretations provided by the ECtHR.

Bosnia and Herzegovina is, also, a member state of the Council of Europe and a signatory to the ECHR, obligating it to uphold the rights and freedoms enshrined in the Convention. The ECtHR's jurisprudence provides authoritative guidance on how these rights should be interpreted and applied. By following ECtHR case law, the Ombudsman ensures that Bosnia and Herzegovina remains compliant with its international legal obligations. The ECtHR's extensive body of case law offers detailed interpretations and applications of human rights standards. This jurisprudence addresses a wide array of issues and provides nuanced insights into the protection of rights. The Ombudsman's adherence to these precedents helps to ensure that individuals' rights are protected effectively and consistently, fostering a robust human rights culture within the country (even in the absence of national legislation (completely or in terms of quality of the law according to Convention)).

Applying the practice of the ECtHR promotes legal certainty and uniformity in the protection of human rights. Individuals and legal practitioners can rely on a coherent body of law that is consistently applied across the country. This uniformity is essential for maintaining public confidence in the legal system and the protection of human rights. The Ombudsman's *credibility and legitimacy* are reinforced when its decisions are aligned with internationally recognized human rights standards. The adherence to ECtHR jurisprudence demonstrates the Ombudsman's commitment to upholding the highest standards of human rights protection, thereby strengthening its role as a guardian of human rights. The ECtHR's case law provides concrete examples (from all across Europe) and detailed reasoning that can *guide* the Ombudsman's *decision-making processes*. This guidance is invaluable in complex or novel

⁴³ Mijović, Lj., *op. cit.*, 12-15.

cases where domestic precedents may be lacking or unclear.⁴⁴ Furthermore, the ECtHR's jurisprudence serves as an essential educational and training resource for the staff of the Ombudsman's office. Familiarity with these cases ensures that the staff are well-equipped to handle human rights complaints in a manner consistent with international standards.

Keeping with the aforementioned, the Institution of the Human Rights Ombudsman of Bosnia and Herzegovina must apply the practice of the European Court of Human Rights due to the constitutional incorporation of the ECHR, the necessity to fulfill international obligations, and the practical benefits of ensuring effective, consistent, and credible human rights protection. By adhering to ECtHR jurisprudence, the Ombudsman reinforces its role as a significant institution in safeguarding human rights within Bosnia and Herzegovina.

Appendix: Tabular representation of the Human Rights Ombudsman actions regarding the right to free access to information for the period 2014-2023.⁴⁵

⁴⁴ Or they are completely absent, as is the case with the Constitutional Court of Bosnia and Herzegovina, whose judicial practice is notably deficient regarding the right to free access to information. Even in instances where this right is relevant and should be adjudicated, the Constitutional Court of Bosnia and Herzegovina fails to make a determination, instead linking it to another right, most commonly the right to a fair trial within a reasonable time. *See* CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA, Decision on Admissibility and Merits, AP-627/23, 18th April 2024. The Constitutional Court of Bosnia and Herzegovina might engage more thoroughly with this right if it were explicitly enshrined as a distinct provision within the constitution. However, the formal recognition of this right as a separate constitutional provision would inevitably generate a multitude of additional legal and interpretative questions. These would encompass considerations regarding the scope and limitations of the right, its interaction with other constitutional rights and principles, and the potential implications for legislative and judicial practices. Consequently, a comprehensive analysis and discourse would be required to address the complexities introduced by such an amendment to the constitutional framework. *See generally* RAJKO, A., Implikacije uvrštavanja prava na pristup informacijama javnog sektora u Ustav Republike Hrvatske, *Hrvatska i komparativna javna uprava*, Vol. 10, No. 3, 2010, pp. 629-648.

⁴⁵ Data obtained from the Annual Reports of the Institution of the Human Rights Ombudsman of Bosnia and Herzegovina for the period 2014-2023. Unfortunately, we were unable to obtain data specifically related to the implementation of recommendations related to the right to free access to information at the time of working on this paper.

Year	Total Complaints P/A	Total Number of Recommendations Issued
2014	218	28
2015	223	34
2016	291	49
2017	248	60
2018	340	50
2019	275	57
2020	231	87
2021	304	74
2022	308	76
2023	275	70
Total:	2713	585

D. CONCLUSION

The fundamental right to free access to information, as articulated in both international and national legal frameworks, serves as a bedrock for transparent governance and participatory democracy. The examination of the European Convention on Human Rights and the constitutional provisions of Bosnia and Herzegovina underscores the essential nature of this right in fostering informed citizenry, enhancing accountability, and promoting civic activism. The role of the Human Rights Ombudsman of Bosnia and Herzegovina is crucial in safeguarding this right, despite facing significant challenges from bureaucratic inertia and resistance from public authorities. The ECHR, while not explicitly stating the right to access information, derives it from the broader right to freedom of expression. This interpretation, supported by the European Court of Human Rights, positions access to information as integral to the exercise of freedom of expression. The ability of individuals to request information from public authorities is fundamental for democratic engagement, enabling citizens to scrutinize governmental actions, participate in public discourse, and make informed decisions. This legal foundation is mirrored in the Constitution of Bosnia and Herzegovina, which enshrines the right to free access to information, further cementing its importance in the national context.

However, the realization of this right in Bosnia and Herzegovina faces multiple hurdles. Bureaucratic resistance, inadequate application of the public interest test, and procedural non-compliance by public authorities are prevalent issues. The reluctance of authorities to provide information, coupled with superficial implementation of transparency obligations, undermines the principle of open governance. The Ombudsman's role, therefore, becomes crucial in addressing these challenges. By mediating disputes, advocating for systemic changes, and ensuring compliance with human rights standards, the Ombudsman institution strives to uphold the right to free access to information. The Ombudsman's mandate, although narrowed by recent legislative changes, remains significant. The new Law on Freedom of Access to Information at the state level has transferred appellate competence to a special Appeals Council, yet the Ombudsman continues to investigate violations of human rights and fundamental freedoms (while the role of the Ombudsman according to entity laws remained intact). This dual role at the state and entity levels highlights the institution's enduring influence in promoting transparency and accountability.

Legal exceptions to the right of access to information, while necessary to protect legitimate interests, must be carefully balanced against the public's right to know. The ECHR and national laws delineate specific circumstances under which information may be withheld, including interests of defense and security, protection of confidential commercial information, and privacy concerns. The public interest test is a critical mechanism in this balancing act, requiring thorough and substantive analysis to justify any restrictions on access to information. The ECtHR's jurisprudence, particularly in cases like *Magyar Helsinki Bizottság v. Hungary*, provides a robust framework for assessing the legitimacy of such restrictions, emphasizing the need for transparency and reasoned decision-making. The effectiveness of the Ombudsman in protecting the right to free access to information hinges on its adherence to these legal standards. By consistently applying the principles established by the ECtHR, the Ombudsman can enhance the transparency and accountability of public authorities. The case law of the ECtHR offers valuable guidance for interpreting and enforcing the right to access information, ensuring that any limitations are justified, proportionate, and necessary in a democratic society.

The right to free access to information is indispensable for the functioning of a democratic society. It empowers citizens, supports civic activism, and fosters good governance. The Human Rights Ombudsman of Bosnia and

Herzegovina plays a vital role in safeguarding this right, addressing grievances, and advocating for transparency. Despite the challenges, the continued commitment to upholding this fundamental right is essential for reinforcing democratic values and protecting human rights. The legal frameworks and institutional mechanisms must work in tandem to ensure that the right to free access to information is effectively realized, thereby strengthening the democratic fabric of society and enhancing the legitimacy of public institutions.

Sloboda pristupa informacijama kao temeljno ljudsko pravo i uloga Ombudsmana za ljudska prava u njezinoj zaštiti

Filip Novaković

Sažetak

Ovaj rad obrađuje pitanje prava na slobodan pristup informacijama kao temeljnog ljudskog prava zaštićenog Europskom konvencijom o ljudskim pravima (ECHR) i Ustavom Bosne i Hercegovine. Pravo na informacije ključno je za osiguranje transparentnosti, omogućavanje informiranog sudjelovanja građana i pozivanje javnih tijela na odgovornost. Unatoč svojoj temeljnoj prirodi, ostvarivanje ovog prava često se suočava sa značajnim izazovima, uključujući birokratske prepreke i otpor organa javne vlasti. Ombudsman za ljudska prava Bosne i Hercegovine ima ključnu ulogu u zaštiti ovog prava. Institucija ombudsmana odgovorna je za rješavanje pritužbi vezanih uz pristup informacijama, posredovanje u sporovima i zagovaranje poboljšanja u poštovanju standarda ljudskih prava. Ovaj rad ispituje pravne zaštite koje osigurava Europska konvencija o ljudskim pravima i ustavnopravni okvir Bosne i Hercegovine, ističući ulogu ombudsmana u zaštiti prava na slobodan pristup informacijama.

Ključne riječi: *slobodan pristup informacijama, ljudska prava, Europska konvencija o ljudskim pravima, Ustav Bosne i Hercegovine, Ombudsman za ljudska prava, transparentnost, demokratsko upravljanje.*