

ACCESS TO INFORMATION PROGRAMME

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THE RIGHT OF ACCESS TO INFORMATION

CONCEPT ON LEGISLATION

I. GENERAL

1. International regulation

Access on the part of citizens to information held by state bodies is a fundamental right and is ordered as incorporated in the freedom of expression and information. To freedom of expression and information corresponds the obligation of the state to refrain from actions which obstruct it. To the right of access to information corresponds the obligation of the state to provide for the access by law.



Numerous international instruments to which Bulgaria is a party, establish an obligation for protection of the right of access to information. Article 19 of the Universal Declaration of Human Rights says: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers “. This right is also provided for by article 19 and article 17 of the International Covenant on Civil and Political Rights (hereinafter ICCPR) and the Convention on the Rights of the Child 1989. The provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR) and the practice of the European Court on Human Rights are in the same vein. In this respect it is also important to consider Recommendation No. R (81) 19 of the Committee of Ministers of the European Council dated 25.11.1981, which states the principles that underlie the right of access to information.

2. Freedom of information and right of access to information

During its first session, in 1946, the General Assembly of the United Nations unanimously adopted a resolution on freedom of information which says: “Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated.”¹. What does “freedom of information” mean? Different international documents define its content in a broader or narrower sense. This varies from the broader meaning of freedom of expression and information as a whole² through the freedom to seek, receive and disseminate information³ to the narrower sense of freedom to seek and obtain information⁴. The narrowest definition of “freedom of information” implies the right of each individual to inspect or copy documents held by government bodies⁵. In view of a greater precision and preclusion of ambiguity, the latter can be defined as the right of “access to information”⁶.

3. Constitutional regulation

The Constitution of the Republic of Bulgaria protects the right of every individual to have access to information held by state bodies. Article 41 para. 2 of the Constitution says:

“Citizens shall be entitled to obtain information from state bodies and agencies on any matter of legitimate interest to them which is not a state or other secret prescribed by law and does not affect the rights of others.”

This right is not only acknowledged for “all”, it is also a “general right” i.e. it encompasses the overall volume of information held by all bodies with the exception of the information expressly defined by the Constitution as limited for access. A number of European countries’ legal systems, namely those of Sweden, Netherlands, Spain, Portugal, Austria, Hungary, Estonia, Belgium, Romania have similar constitutional provisions.

The right of information protects numerous and varied interests. It is difficult to identify the interest in any concrete case. Besides, a discretion of the administration to judge whether an interest is proved or not, creates the danger of abuse. Normally, the person who demands the information is not familiar with its content, unlike the state body, which also obstructs the justification of the interest. Moreover, nowhere does positive law provide for a judgment whether there exists an interest in the exercise of a fundamental human right.

Consequently, the condition that the requested information should not be exempted from the right of access, and the procedure, which the law requires for

exercising the right of access to information , give the scope of legitimate interest⁷.

In its Decision No. 7/96 the Constitutional Court recommends the working out of a statute on access to information:

“... in direct reference to the constitutional text, there can be articulated an obligation of the state to regulate by law the access to information, this obligation being classified, and to differentiate, for instance, an obligation of state bodies to publish official information (so-called “active transparency”) and an obligation to ensure access to sources of information (so-called “passive transparency”).”

As yet Bulgaria has no law providing for this “general right”. There is legislation, though, providing for the so-called “special right”, allowing access to information in a separate sphere of administration. Such a provisions are contained in chapter 2 of the Environmental Protection Act. Recently passed, the Personal Identification Documents Act also provides for a right of access to personal data information collected by the state. The procedure grounds for defense of the right of information is provided for by the Administrative Procedure Act. A number of other legislation and executive ordinances incorporate provisions which in certain cases regulate the right of access to information in separate spheres of administration. With regard to this, it would be worth mentioning the right of access to public registers. Recently passed, the State Administration Act provides for the right of citizens to get information held by the administration of state authority. Two kinds of obligation are subject to regulation - disclosure of information related to the performance of duties of the respective administration⁸ and granting of information beyond the cases covered by the first hypothesis⁹. The obligation, bound to satisfy the right of information, weighs on the administration not only of the executive but also of the other state organs.

4. Public need and the right of access to information

Public interests that account for the existence of a right of access to information are varied as regards why and who demands information¹⁰. Thus, the access of certain bodies of authority to information held by others, ensures effective state administration. The access to information of a party to legal relationship determines the efficient execution of a given public or private right of this party - this can be the right of defense within a civil or criminal case, the right of civil service, the right of security in civil exchange as regards business transactions or real estate transactions, etc. Designed as personal is the interest of a person for access to his or her personal data which the state keeps, in view of rectification or gaining of information previously unknown.

Public access, or access of members of society, is justified by reason of the interest in exact performance of the duties of the corresponding administration, the contribution to public debate and conversance of society, preclusion of the abuse of authority and corruption, guarantee of effective participation of citizens in the decision-making process, creating conditions for knowledgeable electorate. Namely this interest, which is instrumental in the functioning of a democratic society, underlies the right of access to information as one of the human rights.

The government of the Republic of Bulgaria gave clear statement of its will to regulate the right of access to information with the aim of “increasing the efficiency of information policy”. In the Strategy for setting up of a modern administrative system, adopted by Decree No. 36/98 of the Council of Ministers, one of the means for the increase of said efficiency is pointed out to be:

“development of access to information legislation responding to the constitutional

right of citizens to be informed”.

The need of such a law is accounted for by the aim to structure more efficient administration. This, though, is only one of the outlined interests that the right of information protects. The basic interest, closely related to the said one, but wider in scope and acknowledged in international law, as well as in the legislation of a number of democratic countries, is that the members of a democratic society know how the state bodies, directly or indirectly elected by them, perform their entrusted duties. The effective functioning of the administration is only one effect of such a control.

II. PRINCIPLES OF A FUTURE LAW ON THE ACCESS TO INFORMATION

1. Objective of the future law on access to information

For each country the objective of such a law is, firstly, to achieve openness and publicity in the activity of the administration through the establishment of a general right of the public of access to information held by state bodies. In some cases it also provides for the access to personal data, accumulated by the state¹¹, as well as for the access to information related to any interest in the sphere of civil service, legal proceedings, civil and business relations. This law is *lex generalis* and is applied subsidiarily in relation to law that grant special provision to access to information such



as that pertaining to state archive, the registers, etc. It incorporates the material and procedure norms providing for the legal relation.

A fundamental principle in the legislation of all countries is the right of all natural and legal persons to obtain information from state bodies. This is a general right, i.e. it encompasses the bulk of information contained in all state bodies in as much as it is not an exemption prescribed by law.


Citizens are under no obligation to prove their interest in the obtaining of information.

In all legislations the access to information is defined as access to documents. The definition of document, though, is broader than that in Bulgarian Civil Procedure Code. It encompasses every record kept by a state body, including those accomplished through technical means¹².

The right of information encompasses two types of obligations for its granting. First, dissemination of information which by force of law is to be made public or published. With the second type the obligation is executed after the right has been exercised through making a request for information. These two are known as “active” and “passive” aspects of the obligation of the state to grant information. The laws on access to information provide for both.

2. Who is entitled to obtain access to information

By rule, the right to access information is acknowledged to everyone. In various countries “everyone” denotes only citizens or is extended to include the category of non-residents. Canadian law grants the right of access to information only to



Canadian citizens and at the same time opens a possibility the range of individuals entitled to this right to be widened by decision on the part of the executive authority (governor). American and Hungarian law, in a manner similar to the American and Czech draft projects, grant the right of freedom of access to information without limitations as to citizenship. These grant the right both to natural and legal persons.


The Constitution of the Republic of Bulgaria grants citizens the right of information held by state bodies. In chapter two of the Constitution the notion of citizen(s) is often synonymous to “everyone” but not to “Bulgarian citizen”.¹³

Irrespective of the interpretation of what “citizen” implies in the text of article 41, para. 2 of the Constitution, article 70, para. 1, seq. 2 and 3 of the Personal Identification Documents Act, acknowledges the right of access to information kept in information funds of personal data and extends it to include non-citizens as well. The right to direct inquiries to the administration is acknowledged for legal persons in Article 2, para. 4 of the State Administration Act.

In its very essence the interest protected by the right of information requires the latter to be exercised by a maximum range of subjects.

3. Entities obliged to grant information

Domestic legal systems adopt varying approach when defining the entities obliged to grant information. Some establish an obligation for the executive authority only. In such a way, according to the Freedom of Information Act of the USA, obliged to grant information are the so-called agencies, i.e. all bodies of executive authority which take decisions on a collegial principle. In countries like Sweden and Switzerland the obligation is extended to include the three branches of state power.




In Australia it is entrusted to executive authorities and their administration, as well as to court administration. In unitary states the obligation encompasses both central and local administration bodies.

Some legal systems entrust certain obligations for the granting of information to entities which are not bodies of authority. In Australia and the United States this obligation is extended to include corporations over which the state exercises control. In Sweden it encompasses companies and non-profit legal persons who are charged with specific activities in exchange for resources from public funds. According to Danish Act on openness in public administration, the obligation of granting information encompasses public utilities and companies, engaged in generation, transmission and distribution of electricity over certain voltage, supply of natural gas, supply of thermal power above certain capacity of the works. The respective minister can - with the approval of the minister of justice - extend the obligation for granting of information over companies, partnerships etc.

In United Kingdom, the draft project does not use the method of defining the persons under obligation, but enumerates them thoroughly and among these come state hospitals and schools, royal botanic gardens, the British Bureau on Atomic Energy, national electronic media, private organizations which carry out duties committed by the state - for example agencies for child adoption. Information is due also for privatised utilities.

Bulgarian constitution commits the obligation of granting information to state bodies and establishments. The State Administration Act limits the scope of committed entities to include the administration of bodies of authority. At the same time it encompasses the administration of all state bodies, including those of central and local administration.




It seems, the reason why the obligation is not committed to the bodies of authority is the tendency to preclude increase of their workload by tasks beyond their habitual activity which would hamper its execution. This argument has its grounds. It is important, though, to prevent an unreasonable exclusion, for example, of the ministerial acts from the scope of accessible information. There is nothing to obstruct the respective administration to concede these acts. A legislative solution to the converse would contradict the very essence of the right of information.

The degree of public interest makes it necessary to state the problem of regulation of an obligation for the granting of information on the part of certain entities which are not bodies of authority. This interest is directed to companies and non-profit legal persons who perform certain activities in exchange of which they receive state or local community resources by force of the State and Community Orders Act, the Social Support Act, etc.

It is also aimed at enterprises performing so-called “public service” such as central heating, gas supply and telecommunication services. The grounds for this interest is not so much the fact that these enterprises are usually monopolistic but more so the issues of availability in satisfying quantities and reasonable price of vital for the population products. In a future law treating the access to information the concept of “public services” should be defined.

Schools and public health institutions are legal persons set up by special order. In terms of structure they are most similar to the so-called former “establishments”. The state controls their activity in execution of its obligation to actively assist in the realisation of the right of everyone to health care and education. Therefore, public interest in accessible information is justified.



The interest in regard to enumerated above categories of entities, other than bodies of authority, relates primarily to their financial status in view of familiarity with the policy of administration and public control over the abuse of power and corruption.


As to their obligation to grant information, this category of entities are habitually conferred as state bodies.

4 . Subject of the right of access to information

The scope of accessible information is outlined by the definition of information for the purpose of this law. There exists, though, another element relevant to the question: what part of the information available with a committed entity is accessible in the sense of this law. In other words, in what way are we to specify the concept of “available”: “all held” or “held within the limits of competence”. The solution of each one of these questions reflects on the scope of information that represents the subject of access.

4.1. Defining the subject

In reviewed national legal systems the access to information is access to documentary information. The access to documentary information is differentiated from the access to non-documentary information which comprises the access to meetings of collegial bodies, to buildings of bodies of authority, etc. and is beyond the scope of legislation of freedom of information. On the other hand, the concept of “document” in the meaning of these legislations is wider in meaning as compared to “document” in terms of Bulgarian law. Apart from information made material on paper, these comprise also information in any other storage device in the form of sound




recordings, video recordings, etc. With the development of technology “documentation” goes further to include still more modes of storage of information which fact puts the question whether information stored on a computer disc is “documentary”.

In view of the objectives of a future legislature on the access to information, it is advisable to assign broader meaning to what is implied in the concept of “document”. For example, in order to define the subject of the right of access to information, Canadian law applies the term “record” and defines it as “any piece of correspondence, memorandum, book, plan, map, drawing, diagram, painting or graphics, photography, microfilm, sound recording, video cassette, readable machine recording, and any other documentary item, irrespective of its physical form or characteristics, as well as any copy of these”.

4.2. What is the meaning of information held by a state body

All reviewed legislations on the access to information define the scope of accessible information either by the fact that it is to be found with the state bodies or through the competence of the state body. For example, Australian and Canadian law define accessible information which is in the possession of the respective body of authority. On the other hand, American¹⁴, Hungarian and Irish laws and the draft projects of the United Kingdom and Czech Republic define as accessible the information which falls within the scope of competence of the committed body¹⁵. Whether an item of information is within the scope of competence of the state body is a question of law, while its being in the possession of the state body is a question of fact.

In Bulgarian law, the Environmental Protection Act has accepted the approach of competence in order to define accessible information¹⁶.



Each of the two types of approach in defining the scope of accessible information has its advantages and disadvantages. It is supposed that information, the accumulation and structuring of which is within the competence of the state body, is held in its archives. This makes it easier for those exercising the right of information to identify the desired document, the respective administration - to grant it, and the organ charged with control - to decide the legal argument.

The basic problem with the approach of “information related to competence” is that if an item of information is kept in an archive and is not “related to competence”, it cannot be subject of the right of access. Similarly, if copies of one and the same document can be found in more than one archive, these cannot be requested of all these places.

The problem with requirements for granting information which is not held by competence, is in its most part solved by the existing in article 8 of the Administrative Procedure Act obligation for forwarding of submitted application by order of competence. Information which is held in the archive of a department without being “related to the scope of competence” most probably is held also in another department where it can be “related to the scope of competence”. It is not difficult to establish which information is “within the scope of competence” in as far as the State Administration Act defines the structure of competence of each state body¹⁷. Apart from that, duties and tasks of state bodies are regulated by numerous acts of law and ordinances.

On the basis of the above, we can accept that the approach for granting of information related to competence is more appropriate.

5. Limitations of the right of access to information


5.1. Formulation of the issue

The right of information is not absolute, it is subject to certain limitations. These are necessary by reason of the conflict of interests in the course of which giving priority to one leads to the undermining of another. Since this is unavoidable, the role of the legislature is to set the delicate balance between the right of information and other protected by law interests, some of which are acknowledged as human rights by force of international documents.

As we mentioned above, in some national legal systems (Australia, Canada, USA) the subject of the right of access to information is defined through “record”. In these legislations the issue of which information is beyond the subject of the right of access to information differs from the issue of limitations of the right¹⁸. The difference lies in that the information which falls within the limitations is comprised in the subject of the right but it is expressly pointed out as an exception. This is why limitations have to be comprehensively enumerated in a future law on the access to information and the interpretation of their content to be restrictive.

All national legal systems, without exception, provide for limitations of the right of access to information¹⁹. Some of the arguments for these limitations are present in all reviewed laws, other offer variations. All of these are unanimous on the issue of protected interests: of personal privacy, of business, of the state.

Some national legislations extend the limitations of the right of access to information to include not only definite categories of information, but also the overall information held by a given state body as a whole²⁰. Thus, the criterion for assess-




ment of the protected interest is being sidestepped by the abstract declaration that the entire documentary information of a given body is an exception to the right. This approach in the concept of a draft project worked out by the government of the United Kingdom is rightfully criticized²¹.

The International Covenant on Civil and Political Rights outlines the scope of permissible limitations of the freedom of expression, of seeking, receiving and dissemination of information and the right of access to information²². These limitations have to be provided for by the law and needed for the protection of the following interests: the rights and reputation of others, national security or public order, public health and morality. Domestic law can moderate/restrict but not broaden this scope.

The Constitution establishes limitations of the right of information in cases when information affects the rights of third parties or falls in the categories of state or other protected by law secret. The other ordinances cannot go beyond the sphere of limitations thus outlined.

The approach of the legislator when establishing the limitations of the right as per article 41, para. 2, differs from the approach when establishing those as per articles 39, 40 and 41, para. 1. The latter follow the reason behind the respective texts of international agreements, regulating basic human rights and freedoms and point to the interest on the grounds of which the respective right is subject to limitation. The text of article 41, para. 2 points to one definite interest - “non-violation of the rights of others”, and a means for protection of interests, such as “state or other protected by law secret”. The difference between those two concepts is contained in that the interest points as to why a limitation is introduced while the secret points as to in what way this interest is protected. For example, behind the protection of state secret there lie the interests of defense, internal security and state economy. These are the



three section/provinces comprising categories of facts, evidence and subjects representing state secret of the Republic of Bulgaria²³. Behind the protection of business secret there lie the interests not to violate loyal competition, i.e. to provide for security of economic interchange and efficiency.

This peculiarity in listing the limitations in article 41, para. 2 of the Constitution contains the potential provision for the legislator to include new interests, substantiating limitation of the right of information. It will be sufficient these to be protected by state, official, private, business, bank secret. Such a tendency, however, cannot be noticed, so far as Bulgaria is being democratized. The law on the access to information, though, should explicitly state the difference between protected interest and the secret as a means for protection of this interest.²⁴

5.2. Protected interests

Limitations stipulated in legislations reviewed so far, protect various categories of interests, related to national security, personal privacy, business, confidential international agreements, preliminary proceedings on criminal cases. Most often the detailed provision for such a protection is not contained in the legislations on the access to information. It is essential, though, these to be explicitly listed as limitations of the right of access to information.²⁵ This enumeration/denomination should be comprehensive. Each further decision of the legislative authority to add to the limitations should abide by the Constitution, on one side, and be expressly reflected in the legislation on the access to information, on the other.

The regulation of limitations of the right of the access to information is a prerogative




of legislative authority.

Some legislations provide for the possibility the state body subject of demand for information which falls under the limitation “national security”, to decide by expedience whether to grant it or not. The body takes this decision on the basis of balance between competing interests of the person demanding the information and the state. This question can be put also before a higher administrative or judicial body in case of appeal following the refusal for granting information.²⁶

In Bulgarian law this mechanism can find application in the process of classifying of information as secret. The legislator can bestow certain freedom to executive authority in the assessment whether a given document should be denominated as secret or not. The limits of this independence cannot go beyond those defined by the legislator categories of information comprising state secret.

5.3. Personal data

Stipulated in the Constitution restriction of the right of access in cases when the information “infringes upon rights of third parties” comprises two interests - one related to the protection of personal data and business interest from protection of competitors. Protection of personal data is an essential limitation of the right of access to information because it is a part of the protection of inviolability of person. This interest is protected as a fundamental human right in article 8 ECHR and article 17 of ICCPR. Consequently, this limitation is of considerable significance as far as the interest is protected separately in the system of fundamental human rights. The regulation of personal data in Bulgaria is not unified. There is no legal definition of personal data which would outline the scope of information included in it. The Access to Documents of the Former State Security Act defines as personal and fami-



ly secret “all information of a concerned person or his next of kin and husband (wife) which is not public in character”. The Personal Identification Documents Act Documents Act stipulates the scope of information contained in the identity papers. Article 70 of this act limits the access of third parties to information. A secret “dangerous for the good name of another” and that of adoption is protected by the corpus of article 145, para. 1 and 2 of the Penal Code. Physicians are bound not to publicize information concerning the state of health of patients. Otherwise they are liable as per article 284 Penal Code. Tax officials are bound not to publicize information concerning the revenues of citizens.

It is exigent to make a uniform definition of personal data in view of establishing the borderline between right of information and this limitation.²⁷

The right of information of each person to his or her personal data, held by the state, is regulated everywhere and proceeds as an obligation by force of international agreements, voicing fundamental human rights. The access to information representing personal data is not automatically restricted (see above). In such cases notification of the affected person is obligatory.

There arises the problem for greater openness of persons executing authority and especially of those of elective office. The solution of this issue largely depends on the scope of the “personal data” definition. For example, there are grounds to reckon that the concept of “personal data” invested in the international documents for the fundamental human rights does not include information about property. A national legislation cannot reduce the scope of the concept but can broaden it. Consequently, it is absolutely permissible data relating to the property of such a category of persons to be subject of the right of access.²⁸

5.3. Instruments of protection

a) State secret

The interest of national security assumes its protection through the institute of state secret. The scope of this interest is determined by the legislator.²⁹ Included in the currently effective list of particular interests falling within the limits of “national security” are those related to defense, foreign policy and domestic security, such of economic character³⁰. Every one of these interests is defined in terms of scope by several expressly and explicitly enumerated categories of information. This approach is the best possible which differs from of question whether the presence of each category information in this list is pertinent.

The protection of these interests through state secret is effected in an interdiction of publicizing of the respective categories of evidence. This is a legislative restriction not only for the right of access to information but also for the right to publicize it and in certain hypotheses - for that of obtaining information³¹.

A document becomes an item of state secret not from the moment of issuing but when it is made secret. Modern legal systems provide for a term of induction of an item of secret. The interest to protect information by state secret cannot last forever - but at a certain moment it falls out.

In view of prevention of administrative arbitrariness it is imperative to provide for judicial control over extension of denomination of secret. Otherwise, the list of the legislator turns into a wish. Wishful thinking Legal interest behind the argument against turning secret of a document in court is the alleged infringement of the right

of information, i.e. we must have a refusal for a document to be presented³².


In setting the line of differentiation between the right and its limitation there exists practice of assessment whether the information contained in a document soon to be turned secret falls entirely within the frame of limitation or only part of the information falls within this frame. In the second case only the information beyond the limitation will be granted while the secret information is deleted from the corresponding copy of document³³.

Withholding information of undoubted public interest which has been legally denominated secret, is a problem³⁴. Public interest can be connected to the uncovering of a crime committed by an official. In such cases it is advisable that the court decide whether the interest of publicizing or the interest of non-publicizing of information is of greater substantiality³⁵.

b) Official secret

Interests protected by official secret are various. The legislator has not classified the regulation. Executive authority has not done it either and it is the institution that in a number of cases declares an information item official secret by means of ordinances regulations and even through individual acts³⁶. Court practice goes far back to the theme before the adoption of the new Constitution and the ratification of International agreements on human rights and this is the reason why it reflects an out-dated notion³⁷.

The institute of official secret being also means for protection of interests, these have to be identified. These are the interest related to obviation of concealment and destruction of evidence, threatening of witnesses, etc. - so-called “inquiry secret”, the interest in protection of loyal competition - “secret of tax information and informa-



tion of State Financial Control, the interest of retaining personal data - “secret” of physicians and tax bodies³⁸, etc.

The protection of these interests through official secret is expressed in a prohibition of publicizing the respective categories of evidence. Similar to state secret, this is a legal restriction not only on the right of access to information but also on the right of imparting information.

Protected interests and information categories covered by these have to be expressly listed as in the hypothesis of state secret. The present state of the regulation leaves a vague notion what exactly official secret is, which makes it difficult to define the boundary between the right of information and the limitation of this right. Realization of punitive amenability for publicizing or release of such evidence as per article 284 Penal Code³⁹ .

The text in the Constitution reading “other secret protected by law” demands that both the interests protected by official secret and the regulation of the instrument for their protection - the institute of official secret, be regulated by law.

c) Business secret

The institute of business secret protects the interests of loyal competition and confidentiality of business relations but does not affect directly the right of access to information. It proclaims as against the law conduct the publicizing of a definite type of information which opens before the afflicted party the way of court defense. When such information is publicized by a state officer within the scope of his duties, there occurs the liability for announcement or promulgation of evidence comprising official secret.

6. Methods of granting information


Information can be granted either through the submission of a request or on the initiative of the respective state body. As regards this differentiation, these are sometimes denominated as “passive” and “active” aspect of access. Most national legal systems provide for both ways. Some legislations though provide for the “passive aspect” only⁴⁰.

In its decree No. 7/1996 the Constitutional Court states the grounds for the obligation to provide for the access to information in respect both to the “active” and “passive transparency”.

6.1. Active aspect

Obligations to publish and publicize concrete information can be found to exist in all spheres of administration in Bulgaria - starting with the obligation for publication of weekly and monthly balance of “Emission” department of the Bulgarian National Bank to the obligation for publication of information about disasters and calamities. Laws on freedom of information however state an obligation for the granting of definite category information. This information includes description of the structure and competence of a given department, the text of law which regulates its activity, the service it performs, the acts it issues and the categories of information it processes. It is obligatory to present also a description of procedure of rendering service, information included. Listed information is free of charge.

Apart from the above, departments can be bound to grant other categories of information which will be subject to charge, such as brochures, etc. 41



A future law on the access to information should assign to entities under obligation to publish and publicize information which might affect the rights, life, health and interests of an indefinite circle of people.

In view of efficiency of granting of information and when required by citizens and legal persons, it is necessary to set up registers and information data bases for the documents issued by the corresponding department. These registers should be accessible for everyone.


6.2. Passive aspect

A basic task before the law on access to information is to provide the procedure for access. The application to receive certain information can be presented in verbal or written form. Legislations, demanding written form, point out defined requisites of submitted application. This is undertaken to assist the administration in the performance of its duties and also the person exercising the right of information when seeking protection. In this respect our legislation, regulating civil service, manifests no essential divergence.

7. Exercising and defense of the right of information Procedure

7.1. Application for information

In their treatment of the access to information, all laws reviewed so far provide for a written form of the request for information. The application has to include enough data so as to identify both the applicant and the demanded information. In view of prevention of excessive formalism, the application should include no more than the



following requisites: name, father's name and family name of the applicant, Unified Civil Number, address, description of required information, whether the person desires to use express service, signature of the applicant.

7.2. Subject of the request

A request can be formulated by indication of a certain document or indication of the issue on which the information held is required. In the second case the body has to perform two different types of service - to indicate the information held and consequently grant it in accordance with the request.

When the applicant has indicated only the issue on which he requires the information, the body has to grant the following information: enumeration of documents which affect the issue in question; charge for the service and the procedure of calculation. Information is granted by letter of notice within 7-day term. After considering what number of listed documents he requires, the applicant forwards a new statement indicating the concrete documents. The body is bound to grant them within a term no longer than 14 days.

7.3. Frames of disclosure

There exist two basic frames of disclosure - review of information in the respective archive and reading of the required documents or receipt of a copy. The method of copying depends on the type of storage device. By rule, an applicant has the right to choose the type of access, for in cases of information to be charged, this affects the price.

7.4. Terms

The term of granting the information should be defined by the law. At present the Administrative Procedure Act stipulates a 7-day term for performing the service, or 1 month if it is necessary to notify persons whose rights are affected. Article 12 Environmental Protection Act, stipulates a term of 14 days.


Determining the terms should imply certain flexibility. For example, the term of forwarding a letter of notification stating the list of accessible documents should not exceed seven days. The term within which a body grants the documents should not exceed 14 days. In case of requirement of a definitely identified document, it should be granted within the shortest possible term.

7.4. Cost of granting

In some of the legislatures reviewed, the applicant is bound to pay a fee for submission of the application and a fee for the receipt of information. There exists a possibility for partial or full exemption from payment. British Code of Practices provides for the possibility each body to determine independently the charge of required information. A fixed fee is set for an ordinary information service, and a complementary fee for information the supply of which is connected with greater effort and expenses.

It is advisable to set a fixed fee which the applicant is to pay upon receipt of information but it should not exceed the expenses for copying and the cost of medium in which information is rendered.

There arises the question is it possible journalists to be exempted from such fees. In



such a case there arises the problem of abuse of official status - journalists requiring free of charge information for personal use. This can be precluded by stating a requirement when journalists seek information for official use, the application to be presented on behalf of the media employing the corresponding journalist .


It is pertinent to set a higher fee in cases when information is required within shorter terms. We reckon, the law should concede an opportunity each of the entities obliged under this law to independently determine the express service fee.

7.5. Control over the access to information

All reviewed legal systems provide for control of execution of the law. Control on refusal to grant information can be either administrative or legal, legislations of Australia, Hungary, United Kingdom and Canada provide for the office of commissioner or ombudsman as a supplementary for of control over refusal of access to information.

Current Bulgarian legal regulation provides for the opportunity of both administrative and court appeal of individual administrative acts. Subject to such control are the explicit, as well as tacit refusals on the part of administration. The Environmental Protection Act and Identity Documents Act for Bulgarian citizens which provide for a right of access to certain information, expressly refer to Administrative Procedure Act. This is a clear inference that as regards the comprehensive right of access to information which is to be provided for in a future law on the access to information, the general order of control over administrative acts will be applied.

The information and protection of personal data commissioner or ombudsman differ from the commissioner or ombudsman on protection of human rights. Unlike the



other fundamental human rights, the right of access to information demands active performance of duties on the part of the state. Its activity in this respect falls within the scope of administrative law. This requires concrete assistance in a number of cases, including direct contact with the respective administration, control on the spot and review of documentation.

Most often applied is the practice the commissioner (ombudsman) to be elected by the executive authority.

There exist two variants of regulation of this body in dependence of its invested power: to act as jurisdiction or assist the effective exercise of the right, issuing recommendations for the respective bodies. Having accomplished the review, it passes judgment on the legal justification of the refusal to disclose information. In view of its accumulated practical experience, there is high probability its decision to coincide with that of the court. Practice shows that administration tends to abide by the recommendations because if acting conversely, it will be bound to pay the expenses of a lost case.

The commissioner (ombudsman) assists those exercising the right of information. His activity can spare time and effort for the collection of evidence. His power to have access to information, inaccessible for citizens, is also of valuable assistance.

In Canada and Australia the ombudsman can act as attorney or appear as a party in a case of appeal against a refusal to disclose information.

Apart from above listed powers, by way of rule the commissioner (ombudsman) regularly submits a report before the legislative authority on the number and nature of cases of refusal to disclose information, as well as on the measures he has undertaken

and attained results.

NOTES

¹ Resolution 59 (I).

² Chapter 4, 1947 Report of the subcommission on freedom of information and the press at the United Nations, addressed to the Commission of Human Rights.

³ Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, article 19 of the International Covenant on Civil and Political Rights.

⁴ Article 5 of the Basic German Law (Grundgesetz), article 1 para. 2 of chapter 2 of the Document of the government of Sweden (Regeringsform).

⁵ The expression is used in this sense also in the legislation of the USA, Australia, etc. See also Patric Birkinshaw, *Freedom of Information. The Law, the Practice and the Ideal*, London, 1988.

⁶ See Council of Europe, *Consultant Study on Access to Official Information* by Ton Beers, Strasbourg 1996, 7.

⁷ in Hungarian law information of public interest is any information that falls within the scope of the right of access. See below “Scope of information subject to the right of access.

⁸ Article 2, para. 3 of the State Administration Act.

⁹ Article 2, para. 4 of the State Administration Act

¹⁰ Compare: Council of Europe, Consultant Study on Access to Official Information by Ton Beers, Strasbourg. 1996, 8-10.

¹¹ Refer to Hungarian, Australian, French, Canadian law on the access to information.

¹² Ref. Australian law.

¹³ “citizen(s)” is used as a synonym of “everyone” in article 30 (3), article 44 (1), article 44 (1), article 56 (1), article 57 (1) and (3), article 58 (1). This is implied either by the reason of the text - the right of state bodies to detain a citizen and his right to appear before a judicial authority within 24 hours, or by the corresponding obligations under international law, which the Republic of Bulgaria has undertaken in relation to every individual. Ordinarily, the social, economical and cultural rights refer to Bulgarian citizens only, which are similarly denominated “citizen(s)”.

¹⁴ In their practice American courts of justice adopt such a solution in arguments to what extent documents, which are at the disposal of the state body but are not related to its duties, represent subject of the right of access. This holds valid also for cases when the state body financed their publication but does not own them or these were at its disposal but no longer are.

¹⁵ For example, information held by state bodies by reason of their labour legal relations with employees in administration, is beyond the scope of competence.

¹⁶ Article 8 and article 11 of the Environmental Protection Act.

¹⁷ American courts of justice accept that “a document of a state body”, i.e. within the scope of access, is not only the one issued by the respective body but also any document, acquired in the process of performance of its duties.

¹⁸ It is possible for the information to be beyond the subject of the right of access (see item 4 of the present Concept). For example, before information on magnetic



media to be included in the definition of “record”, under American law the administration refused to grant this kind of information because the required information was beyond the subject of this right.

¹⁹ In the United States subject of exception is the information referring to: 1) national security; 2) internal rules of agencies; 3) information exempted by other statutes; 4) business information; 5) inter- and intra-agency memoranda; 6) personal privacy; 7) law enforcement records; 8) records of financial institutions; 9) oil well data.

²⁰ For example, the Department of security in Australia.

²¹ See the arguments of Article 19 and Campaign for freedom of information on the concept of the government.

²² Unlike Article 10 of the ECHR Article 19 of the ICCPR expressly includes the right of access to information using the verb “seek” and not only “receive” information.

²³ A list of facts, evidence and subject, comprising state secret of the Republic of Bulgaria, adopted by decree of the National Assembly, published in State Gazette 31/1991, latest amendment 99/1992

²⁴ In R 30-90 BK the Supreme Court of the Republic of Bulgaria makes this implicit differentiation: “the act as per article 357, para. 1, Penal Code, concerns the state in the broadest meaning of this concept, while the act as per article 357, para 2 Penalty Code - its security only”. It is another matter that under the present regulation system wording similar to “the interests of the state in the broadest sense” cannot exist.

²⁵ Legal systems, herein reviewed, without exception, adopt this approach.

²⁶ See Australian law.

²⁷ The Czech draft project defines personal data as “Information evidencing the private life of natural persons, their racial origin, nationality, political affiliations and membership in political parties, religion, conviction, state of health, sexual life and

property.

²⁸ The policy of greater openness for persons executing state authority is also covered in the Access to Documentary Information of former State Security Act.

²⁹ List of facts, information and objects, which represent state secret of the Republic of Bulgaria, adopted by force of decree of the National Assembly, published State Gazette No. 31/1991, amendment issue No 99/1992. It is exigent for the rank of the act restricting the constitutional right to be a law.

³⁰ These interests are not expressly stated as comprising the interest of national security. This is drawn, though, from their obvious character as well as from the impossibility to be otherwise substantiated taking into consideration the scope of permissible limitations provided by article 19, para. 3 International Covenant on Civil and Political Rights.


³¹ In the text of article 41 para 1, though, the restriction is outlined not through the means for protection but through the protected interest - “national security”.

³² At present we also have a provision for the possibility to present as evidence in a criminal trial documents and objects comprising state secret. As per article 262 of Criminal Procedure Code in such instances the case is tried in camera. Canada has an accomplished procedure which ensures prevention from publicizing of information comprised in secret documents presented in court. The document is reviewed at a session in camera in the presence of procedure representative of the respective state body and an appointed by the court representative of the claimant.

³³ This possibility is provided for in the laws of the USA, Australia, Canada, etc.

³⁴ Canadian legislator provides for the possibility the competent state body to use its judgment whether to announce information representing a legally protected secret in view of strong public interest.

³⁵ See Johannesburg principles. The text of article 357 Penal Code stipulates that



there is crime only if the doer “is aware that infringement of the interests of the Republic of Bulgaria can ensue”. The question is still standing, though, for those cases in which the intellectual content of awareness is present but it comes to be proved that the interest of publicizing is more substantial. In such a case the act would not be dangerous for the public.

³⁶ See ordinance No.100-00052/13.01.1997 of the Bulgarian National Bank Director.

³⁷ In R 488-81-II the Supreme Court elaborates: “Official secret incorporates the evidence related to the activity of the official and which in their essence and in view of the normal functioning of an office should not be revealed before non-authorized persons”. Obviously, under the availability of a fundamental human right of information, we cannot define an exception like: information which “in its essence” should not be publicized.

³⁸ When the obligation for non-publicizing of personal data is entrusted to state officials employees, the interest is protected through the instrument of “official secret” (article 284 Penal Code) and when it is entrusted to citizens - through the institute of personal secret (article 145 Penal Code).

³⁹ In case of violation under article 357 and following, Penal Code, awareness of doer is established by the fact that the document he/she obtained evidence from, had been classified. With the case of official secret there is not.

⁴⁰ Such differentiation can be observed in Sweden, Finland, Norway and Denmark.

⁴¹ See Australian law