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ACCESS TO PUBLIC INFORMATION

INTRODUCTION

With the profound changes that after many years introduced democracy to our country, many issues – from economic reform to cooperation with international institutions, including the International War Crimes Tribunal in Den Haag – have been preoccupying many of us since last October.

One of our immediate needs is to regain confidence in institutions of justice and law that the previous regime has skillfully used as an effective instrument of legal repression (e.g. the notorious *Public Information Law* that *via facti* introduced censorship; the *University Law* that stripped the academic community of its autonomy, etc.). It is within this context that the issue of *accountability through transparency* in promoting access to public information has now come to public attention, not only as a fundamental human right, but as an efficient means in the struggle against political repression and corruption.

In this Policy Report, we shall focus on various aspects of the issues that form the subject matter of the basic human right pertinent to *the freedom of access to public information*, on one hand, and *privacy protection of personal data*, on the other. Following a general introduction and historical background, an overview of the existing legislation in FRY and Serbia, as well as an

assessment of the existing policy implementation will be presented. In this context, comparative reference will be made to policies, institutions and solutions that can be of principal and practical significance in recommending substantial policy and legislative reforms related to the issue.

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The concept of *Legal State* and the principle of the *Rule of Law* are paramount moral and legal values that are incorporated in the very foundation of Western, and particularly European civilization.[1] In respect to human rights, their significance is essential for implementing the notion of *legality* of government decisions, as without the framework of the legal state and the rule of law, no modern political and legal system can be imagined.

Originating in the mid-19th century, this concept rests on a normativistic legal model of regulating social relations. According to this model, general legal norms (materialized in statutes and other general legal acts, e.g. laws and regulations) prescribe the rules of social behavior. General legal norms are subsequently decomposed into concrete legal provisions contained in individual legal acts (e.g. administrative decisions, judicial ruling, etc.) that directly effect the behavior of individuals and legal entities. The main feature of the normativistic model is that the legitimacy of legal action (including the legitimacy of legislative, judicial and administrative action), *derives* from the legality of the legal acts. In other words, a legal decision (i.e. legal act) is legitimate by virtue of its legality. This model in its initial form, however, cannot be implemented today without peril to the idea of fundamental human freedoms and rights and the concept of

1 Lord Lloyd of Hampstead, M.D.A. Freedman, *Lloyd's Introduction to Jurisprudence*, Stevens Carswell, London/Toronto, 1985.

political pluralism and democracy (one needs only to have in mind racist or any other totalitarian regime that rests on „law and order"). Consequentially, the values of this concept today can only be seen as a *precondition* of democratic political and legal systems.[2]

As opposed to this formal concept of legality, modern concepts of legal legitimacy base their fundamental principles on the *idea of the rule of law and human rights*. The legality of government and administrative action, therefore, does not *ipso facto* include the legitimacy of these actions. In order to achieve legitimacy, government bodies, courts, administrative and pubic agencies must also achieve *in concreto* legitimacy of each action they undertake or decision they render, through various instruments and mechanisms of parliamentary, judicial and administrative control (e.g. parliamentary debate, hearings, judicial review, ombudsman interventions, etc.). Consequently, modern concepts of legal legitimacy, based on the idea of the rule of law and human rights derives from the premise that a government action is legitimate not by virtue of the status of the subject or legality of the procedure, but by virtue *of substantial values incorporated in these actions and decisions*.

Modern concepts of the legal system rest on models of government as a complex and dynamic system of human inter-action. In this model the government is projected as a complex and dynamic system of structures and procedures within itself, as well as an „open system" that communicates with other systems (e.g. the political and economic system) active in the social environment surrounding it. As a system of human inter-action that derives from the fact that individuals in society achieve

2 Alexander Blankenagel, Denis Galligan, Stevan Lilić, Sanford Levison, Andras Sajo, *Law, Public Administration and Social Change*, CEU Summer University, Budapest, 1997 (course material).

their interests either through mutual cooperation, or through mutual conflict, the main social function of the legal system, actively integrated into various patterns and forms of human behavior, is to regulate social processes. As realization of individual or group interests can either be achieved by domination or by compromise, the function of social regulation of a legal system plays an essential role in *neutralizing contingency* effects of illegitimate social behavior or conflict.[3]

Thus, the state today is not conceived as an *instrument of power*, but rather as an organization that is politically and technically dedicated to the *development and welfare* of society and the *quality of life* in general (bono publico), to rendering *public services* to its citizens and to *protecting human rights*. One of the most significant means of achieving these goals is by being „transparent", i.e. (politically and technically) capable of providing access to public information to its citizens and by protecting their privacy.

LEGISLATION

Democratic and accountable governments have a duty to render public services to its citizens. Two essential aspects of this duty are: a) to provide citizens with the possibility to access public information and b) to protect their right to privacy.

The state of affairs regarding access to public information and privacy protection in a particular country is usually best reflected by the existing legislation that regulates these issues. While some countries have enacted freedom of information and privacy protection legislation, others have done it only partially or still lack the essential

3 Niklas Luhmann, *Soziale Systeme, Grundriss einer allgemeinen Theorie*, Suhrkamp, Frankfurt am Main, 1984.

legal instruments. For example, in the United States there are many laws regulating both access to public information (i.e. The Freedom of Information Act) and privacy protection, while in other countries, e.g. Yugoslavia and Serbia there is practically no legislation on the right to access public information (while legislation on privacy protection exists).

Access to Public Information

Comparative overview

As a referential model on the issue of accessing public information, the *Freedom of Information Act* (FOIA) adopted in the US in 1966 (and amended in 1974, and 1996) is usually used.

Based on the premise that openness and transparency in government is a way to assist the citizen in making informed choices necessary for a democratic society to function, FOIA creates procedures that can be used by any citizen to obtain records kept by government agencies.

FOIA directs government agencies to disclose certain types of records and information and prescribes the relevant procedure (e.g. the organizational structure of the agency, how the agency functions and how decisions are made, etc.). Particularly, information on final administrative decisions, policy statements that were not officially published, as well as other official information can be obtained.

However, not all information can be accessed as the FOIA does not apply to the Congress, Federal Courts and the Executive Office. Also, as specifically mentioned in the Act, information that the agencies have may be exempt from public access. However, these exemptions are

explicitly enumerated (e.g. national security, trade secrets, military plans, medical files, etc.).

FOIA regulates the procedure for filing a request and appeal. If not satisfied, the citizen can also take the issue to court. There are organizations (e.g. the American Civil Liberties Union – ACLU) that provide interested persons with step-by-step guides on how to obtain public information provided by the Freedom of Information Act.[4]

In 1996, section 552 was extensively amended by the *Electronic Freedom of Information Act* (1996)" to up-date FOIA in regard to the new developments in technology (e.g. ...an agency shall make reasonable efforts to search for the records in electronic form or format...).[5]

Public Information Access Legislation in Yugoslavia and Serbia

We note that, although there exist provisions in respective laws of Yugoslavia and Serbia that proclaim that the „...work of the governmental agencies is accessible to the public", a law regulating access to public information has not insofar been adopted. Here are some examples as to how particular constitutional and legislative provisions in this country regulate these issues.

According to the *Constitution of FRY* (1992), the work of the federal agencies is accessible to the public. This can be limited or exempted only in cases provided by federal law (Art. 122). The *General Administrative*

4 www.aclu/org/library.html – *Using the Freedom of Information Act: step-by-step guide.*

5 www.usdoj.gov/oip/foia_updates/Vol_XVII_4/page2.htm – *The Freedom of Information Act, 5 U.S.C. § 552, As Amended By Public Law No. 104–231, 110* Stat. 3048, FOIA Update, Fall 1996.

Procedure Act,[6] for example, provides that: „Parties have the right to have insight to the documents of the case and to copy them at their expense. This is done under the supervision of an authorized person. (...) Records on decision-making, official reports, draft decision and other documents that are classified, under the condition that it might infringe public interest or interest of another party shall not be disclosed. (...) If a request for accessing these documents is denied, an appeal may be submitted (Art. 70).

The Constitution also provides that citizens have right to publicly criticize the work of government agencies and other organizations and their officials, and that the may submit requests, petitions and motions and have the right to receive an answer to them (Art. 44).

The *Constitution of Serbia* (1990) also contains similar provisions. The work of the administrative agencies is accessible to the public and can be limited or exempted only in cases provided by law (Art. 10). *The Law on Administrative Agencies*[7] repeats this constitutional provision and provides that the work of the administrative agencies is accessible to the public and can be limited or exempted only in cases provided by law. The work of the administrative agencies is subject to criticism by the citizens, as well as pubic control by the citizens prescribed by law (Art. 5). The agencies work publicly by supplying information to the public media, by publishing official material, and by assuring that the public is informed on vital matters. The agencies may deny information requests if thecontent represents government, military, official or business secrets. The decision is made by the official that is responsible for the agency (Art. 66).

6 *General Administrative Procedure Act,* Official Gazette FRY, no. 33/97.

7 *Law on Administrative Agencies*, Official Gazette of the Republic of Serbia, no. 20/92.

The Constitution of Serbia, as is the case of the Federal Constitution, provides that citizens have right to publicly criticize the work of government agencies and other organizations and their officials, and that they may submit requests, petitions and motions and that they have the right to receive an answer to them (Art. 48).

Freedom of Expression

The *Federal Constitution* contains a number of provisions that guarantee freedom of expression and forbid censorship. Freedom of confession, conscience, thought and public expression of opinion shall be guaranteed (Art. 35). Freedom of the press and other forms of public information shall be guaranteed. Citizens shall have the right to express and publish their opinions in the mass media. The publication of newspapers and public dissemination of information by other media shall be accessible to all, without approval, after registration with the competent authorities (Art. 36). Censorship of the press and of other forms of public information shall be prohibited. No one may prevent the distribution of the press or dissemination of other publications, unless it has been determined by a court decision that they call for the violent overthrow of the constitutional order or violation of the territorial integrity of the Federal Republic of Yugoslavia, violate the guaranteed rights and liberties of man and the citizen, or foment national, racial or religious intolerance and hatred (Art. 38). Freedom of speech and public appearance shall be guaranteed (Art. 39).

The *Serbian Constitution* contains similar provisions: The freedom of conscience, thought and public expression of opinion shall be guaranteed (Art. 45). The freedom of press and other public information media shall be guaranteed. Citizens shall have the right to express and make public their opinions in the public information media. Publication of newspapers and dissemination of

information by other means shall be accessible to everyone without seeking permission, subject to registration with the competent agency. The right to correction of published incorrect information which violates someone's right or interest, as well as the right to compensation for any moral and property damage arising there from, shall be guaranteed (Art. 46). The censorship of press and other public information media shall be prohibited. No one may obstruct the distribution of the press and dissemination of other information, except when the competent court of law finds by its decision that they call for the forcible overthrow of the order established by the Constitution, violation of the territorial integrity and independence of the Republic of Serbia, violation of guaranteed freedoms and rights of man and citizen, or incite and foment national, racial or religious intolerance and hatred (Art. 46).

With more than fifty years of totalitarian legacy, Yugoslavia, and particularly Serbia nave gone through a process of concentrated repression in the last three-year period. Political oppression by the Milosevic regime was based on traditional police repression, on one hand, and a sophisticated combination of legal and media repression, on the other. This type of repression is maybe best represented by the *Public Information Law* (October 1998),[8] that introduced a „new generation" of political repression through a specific form of financial censorship. Although this law was enacted in a formally „legal" manner and procedure, what it irrevocably lacked was political legitimacy.[9] After the fall of the Milosevic regime in October 2000, and the elections in Serbia in December 2000, the newly elected Serbian Parliament in

8 *Public Information Law,* Official Gazette of the Republic of Serbia, no. 36/98.

9 *Freeedom of The Press and The Public Information Law*, Belgrade, 1998.

early 2001passed a bill derogating the 1998 Public Information Law.

Privacy Protection

Protection of personal data as a part of the protection of basic rights and liberties of an individual, specifically the law on privacy, has been regulated for decades in most of Europe. Many technologically developed countries have enacted special laws for the protection of data[10] that regulate protection of personal data and privacy.

Even though some assess that these attempts to protect release of information have been partial and relatively limited, the effort that has been put forth by the *European Union* has been much more successful. The Union enacted the *Directive On Protection Personal Data* that came into force in 1998. It defines the framework of individual rights and information practices. The Directive provides that information practice be *just*, i.e. that individuals whose personal data is being processed *be informed* about this. It allows individuals to decide the way information on them may be used and it provides court protection and compensation for violation of those rights. Since the Directive puts certain limits on transfer of private information from the EU countries to those that do not have adequate privacy protection, the U.S. Federal Trade Commission pointed out that this might have a negative effect on information circulation between the U.S. and those countries.

The *OSCE* adopted internally accepted principles on privacy known as the *Code of Fair Information Practices.* These principles are: a) only necessary information will be gathered; b) when possible, information will be gat-

10 In certain states of the USA the first such laws were passed in early 70s. In Europe, Sweden passed the first law for protection of personal data in 1971, followed by Germany, France, Austria, Denmark, Norway, Finland, Luxembourg, and other countries.

hered directly from the individual who the information is referring to („data subject"); c) the data subject should be notified why the information is necessary; d) information can be used only for intended purpose) information may not be used for other (secondary) purposes without data subject's permission. The data subject must be allowed to review personal information and, if it is incorrect, correct it.

In a rather short time period, Europe has come to a sophisticated understanding of the right to privacy that includes the possibility of an individual to control the gathering process of relevant personal data, as well as to correct possible errors and particularly to oversee the use of the available data. For example, this is prescribed by *Article 13* of the Italian *Law 675* (December 31, 1996) which was formulated on EU directives.

Yugoslav Legislation

The *Constitution of Yugoslavia* guarantees the protection of personal data (Art. 33): Use of personal data is forbidden outside the scope for which it is collected. Everyone has the right to acquaint himself with the data relating to him, as well as for judicial protection in case of data misuse. Collection, processing, use, and protection of personal data is regulated with federal law.

In the *Constitution of Serbia* (Art. 20), there is also a guarantee on personal data. It is established that collection, processing, and using of personal data is regulated by law.

In October of 1992, the Federal Parliament ratified the *Convention on Protection of Persons with Respect to Automatic Processing of Personal Data.* Presently, this area is legally regulated by the federal *Law on Protection of Personal Data* (May 1998).[11]

11 *Law on Protection of Personal Data,* Official Gazette of FRY, no. 24/98.

POLICY IMPLEMENTATION

Access to Public Information Lacks Legislation

Although presently in Yugoslavia and Serbia there is no specific law or statute that regulates the access to public information (thus making government, and particularly executive and administrative decisions transparent and the responsible persons accountable), a certain degree of legal regulation does exist. These provisions, however, are scattered throughout numerous statutes and frequently are inconsistent and partial. On the other hand, there are serious difficulties in obtaining statistics on the implementation of these provisions. This situation speaks in favor of the need to adopt a single integral law on the right to access public information in this country. A focused public awareness campaign on the need for a law on the rights of citizens to have access to public government and administrative agency information is lacking. The simple fact that the citizen is at the same time a taxpayer is sufficient grounds to introduce legislation that would enable the citizen to have insight as to how and by whom certain decision are made. For example, the Constitution of Serbia speaks of „regular education financed by public funds" (Art. 32). This implies that citizens, on these grounds alone, automatically could have access to public information related to public education. Exemptions, as we have seen in the analysis of comparative legislation, must exist, but have to be very precisely defined and enumerated (e.g. national security, professional secrets, privileged information, etc.). A crucial question that relates to this issue is who is authorized to classify data and information as publicly accessible or not.

The issue of access to pubic information is a priority for countries in transition and reflects on other areas such

as protection of privacy, anti-corruption campaigns, administrative reform, etc.

As a first step in this direction it is worth considering the establishment of a network of „information offices" throughout the country where citizens could obtain necessary information regarding their most significant rights and duties (e.g. refugee status, tax duties, etc.).

Secret Dossiers on Citizens

An important question pertinent to the access to „personal" pubic information, particularly for countries that have had decades of totalitarian rule is the issue of access to „political" police files that were kept by the secret security police. The issue is highly sensitive, as personal files on citizens were kept in regard to their political and pubic activities that were not in accordance with the political line of the ruling establishment. Most former communist countries in Europe have enacted special legislation on this matter (e.g. Germany, Romania, Macedonia, the Czech Republic, etc.).

In Yugoslavia too, this issue is presently in public focus, as instead of a law that would provide access to this kind of information and protect the privacy of the individual and open the question of accountability of the government agencies, it is regulated to a decree that apparently raises more questions than it solves.

In November 2000 several NGOs – *The Yugoslav Lawyers Committee for Human Rights* (YUCOM, Belgrade), *Forum Iuris* (Novi Sad), *Center for Free Elections and Democracy* (CeSID, Belgrade) *Center for the Development of Legal Studies* (CUPS, Belgrade), *Forum for Ethnic Relations* (FER, Belgrade), *the Belgrade Center for Human Rights* (BCLJP, Belgrade) agreed to form the *2001 Initiative* that would focus on substantial reforms of the legal system. In December 2000, two press confe-

rences were held dedicated to the topics of secret dossiers.[12] In May 2001 a round table on the topic was organized by YUCOM and the Friedrich Ebert Foundation (FES) with the aim of initiating a public campaign on the „opening" of secret police files, having in mind particularly the experiences of former East-Germany.

The Serbian Government enacted a *Decree on Taking the „Confidential" Label off the Dossiers on Citizens of the Republic of Serbia Kept by the State Security Agency* (May 25, 2001).[13] Several days later, however, the Serbian Government enacted an amendment to this Decree changing its name to the *Decree on Making Accessible Certain Dossiers on Citizens of the Republic of Serbia Kept by the State Security Agency* (May 31, 2001).[14] In June, YUCOM filed motion before the Constitutional Court on grounds that the Decree(s) were unconstitutional and that the matter must be regulated by law. A book was published[15] on secret dossiers that included translations of the *Law on Dossiers of the Former German Democratic Republic* (1991), *Law on the Use of Personal Dossiers and Uncovering the Sekuritatea as the Political Police of Romania* (1999) and the *Law on Proceeding with Personal Dossiers Kept by the Secret Security Agency of Macedonia* (2000).

12 The first was organized by the *2001 Initiative*, and the speakers were: B.Kovacevic-Vuco, S.Lilic (YUCOM), R.Vasic (CUPS), S.Beljanski (Forum Iuris, Novi Sad). The other was organized by the Center for Antiwar Action.

13 *Decree on Taking the „Confidential" Label off the Dossiers on Citizens of the Republic of Serbia Kept by the State Security Agency,* Official Gazette of the Republic of Serbia, No. 30/01.

14 *Decree on Making Accessible Certain Dossiers on Citizens of the Republic of Serbia Kept by the State Security Agency,* Official Gazette of the Republic of Serbia, No. 31/01.

15 B.Milosavljevic, D.Pavicevic, *Secret Dossiers – Opening the Files of the Secret Service,* CAA, Belgrade, 2001.

Comparative experience and the situation in the country obviously demand that a special law on political dossiers be enacted.

Personal Data Protection

The *Law on Protection of Personal Data* (1998) regulates the protection of data of an individual (i.e. personal data).[16]

The protection of personal data, regardless of its form, includes acts and measures preventing illegal gathering, processing, keeping, use and exchange of personal data, and their taking out of the country (Art. 1). Personal data may be gathered, processed and used only for the purposes set forth in the Law, and for other purposes – only if based on a written consent from the citizen.

The citizen has the right to find out: which collections of personal data contain data referring to him; which data on him is being processed, for which purpose and on what grounds; who are the users of personal data referring to him and on which grounds.

The citizen has the right to demand from the body supervising the collection of personal data the following: the information concerning the existence of a collection of personal data and written proof (certificate) of personal data kept on him; redress of the data referring to him; correction of wrong data; deletion of data referring to him if the processing thereof is not in accordance with the law or respective contract; ban on use of wrong, outdated and incomplete data referring to him; ban on use of data from collections of data and similar databases if they are not used in accordance with the law or respective contract.

16 *Law on Protection of Personal Data,* Official Gazette of FRY, no. 24/98.

The body supervising the collection of personal data has the duty to act upon the citizen's request. Personal data, must be distinctly marked. The citizen cannot exercise these rights if such rights refer to collections of personal data kept in accordance with the regulations on criminal records and regulations regarding records relevant to the security of Federal Republic of Yugoslavia. A citizen whose rights set forth in this Law have been violated, or suffered damages as a result of use of gathered data in a way or for purposes contrary to the provisions of this Law may take legal action and file motion for damages before the court in charge (Art. 11–15).

Personal data regarding racial origin, national belonging, religious and other beliefs, political and syndicate determinations and sex life may be gathered, processed and released for use only under a written consent from the citizen. Personal data on the state of health and criminal records may be gathered, processed and released for use only in accordance with the law (Art. 18).

RECOMMENDATIONS

Bearing in mind the presented policy report in the field of the right to access public information as a fundamental human right and privacy protection, the following is of special importance: a) the first step in promoting the right to public information is initiating a wide campaign to raise public awareness on this issue and b) it is necessary to clearly define the subject matter (e.g. public information, privacy protection, secret police dossiers, freedom of expression etc.).

Thus, the following recommendations related to the right of access to public information can be formulated:

– It is necessary to initiate activities and procedures for adopting a separate *Law on (the Right to) Access to Public Information.*

- The legislation would refer to *information that is of public interest* and that is kept in official records and files of government agencies (while personal data would be protected).
- The experience so far, particularly in regard to the former socialist and communist countries, is that expert analysis (legal, sociological, political, public polls, etc) should rest with *the nongovernmental sector* and experts of one, or a consortium of NGOs, that would elaborate on the draft model law and initiate public debate.
- Adopting a Law on (the Right to) Access to Public Information would be one of the measures in the wider *public campaign for accountability of public officials, as well as the transparency of the decision-making process*. In this context, significant influence can be made on raising not only the individual, but also the general level of accountability and transparency of the public administration as a whole.
- A special recommendation concerns the introduction of the *ombudsperson* as the protection of the rights of citizens regarding the right to access public information.
- To really understand the significance of public information, it is very important to prepare and implement quality *citizen educational programs* regarding all aspects of public information access.
- In promoting the right to access to public information a special role can be played by *investigative journalism and the independent media* that can significantly contribute to raising public awareness on these issues.
- Establishing a network of *information offices* throughout the country where citizens could ob-

tain necessary information regarding their most significant rights and duties (e.g. refugee status, tax duties, etc.).

– Finally, adopting a Law on (the Right to) Access to Public Information should be incorporated within the *general framework of reforming the public administration, introducing new methodologies and technologies in their transparent communications with the citizens (introducing e-government).*