# Access to public information and the new EU member states

- a transnational approach -

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## Executive Summary

Starting from the belief that think tanks' and NGOs' research activities depend to a large extent on the manner in which free access of information of public interest takes place, the present projects aims to analyze and identify the legal framework and procedural/institutional framework within which these research activities develop in Romania , Latvia and the Czech Republic. Since all three countries are full-fledged E.U. member states, the focus of the research is on both national and European legislation and practices.

Thus, the aims of the project are: to inquire the present situation of the framework in which research activities develop with respect to the freedom of information acts, to present a set of main findings and a body of recommendations addressing both think tanks' engaged in research and public institutions. The purpose of this project is to raise awareness about the importance of having an effective enforcement of the laws regulating the access to public information and the three partner organizations involved in the project are committed to place this matter as highest as possible on the national agendas, but also on the European agenda.

The legislation regarding access to public information is, undoubtedly, of special importance. The public trust in the institutions is tightly connected to their level of transparency and considering that during the recent years institutions have been confronted with a decline in public trust, it becomes of outmost importance for the institutions to speed up efforts of regaining public confidence. Providing the proper information to citizens at the right time and in the right format is maybe the best way to do it.

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# I. Access to public information in the Czech Republic, Latvia and Romania

## I.a. Similarities

As documented by the present study, the issue of access to public information is still problematic in new member states of the European Union. Some of the reasons for that can be found in the common background and have to do with the incomplete reform of the public administration after the dissolution of socialism. The comparative research has shown a number of similar features that characterize the lack of transparency of public institutions. Maybe the most important of these is related to the misinterpretation **derived from simultaneously implementing FOIA and other laws regulating the protection of personal data or the classified information**.

All three countries have got a FOIA for several years (Latvia since 1998, Czech Republic since 1999, Romania since 2001), but, as a counterbalance, also all of them have got laws that prevent public access to a series of classified data. These laws were issued after the adoption of FOIA in order to prevent the use in excess of freedom to information except Latvia where FOIA was introduced as a counterbalance of the national classified information Law.. However, the result of what was initially meant as creating a counterbalance was in reality creating a misbalance, as the provisions of the laws regulating the classified documents have started to be used improperly.

The extent to which a piece of information is considered public or classified data is subject to two strata of interpretation: firstly, the civil servant in the public authority responsible for dealing with FOIA-based requests, if such person is appointed, has to make his/her own decision whether the information that is requested enters the sphere of information of public interest, or, on the contrary, is rather a classified document. In Latvia though, according to the law, there are no FOIA designated civil servants thus interpreting the inquiry relies on whoever receives it.

Although institutions in the three countries are required to keep registries of the types of documents that are considered classified, such a list does not always exist, or, if it exists, it does not clearly specify the types of documents or specific content, but rather presents them in a general form. Consequently, it is often up to the civil servant to decide whether the inquiry should be answered positively or not. This is proven also by the fact that there is no unitary practice at the level of public institutions: when the researchers requested the same content different institutions reacted in different ways, some of them providing the requested information, while others responded that they are in no position to do that because they are prevented by the regulations regarding the protection of personal data or the classified documents.

Moreover, the phenomenon of a lack of unitary practice has contaminated the justice courts as well. The courts represent the second level of interpretation of the laws, when they are

appealed to by appellants who are unsatisfied with the kind of reply they got from the public institutions following their inquiries for public sector information. Due to the fact that there have not yet been enough cases brought to justice and the imperfect communication within the judiciary system, the access to information has no unified and coherent jurisprudence. Needless to say that this constitutes an important impediment for moving forward towards improving the relations between the citizens and the public institutions that are expected to represent their interest in a transparent manner.

Both at the level of the civil servants responsible for dealing with FOIA-based requests and at the level of courts of justice, it has to be understood that the right to information represents one of the fundamental freedoms in a democracy and, as provided for in the regulations of the Council of Europe and of the European Union, as well as in the jurisprudence of the European Court for Human Rights, any derogation from this principle has to be rightfully justified in a democratic society. In other words, free access to public information is the rule, while punctual restrictions on the grounds of personal data protection or classified documents are the exceptions from it, and not the other way around.

The issue of the ways of appeal by the requestor has in itself been approached in the comparative study. In all the three countries the reaction at hand for a citizen that is unsatisfied with the reply (or the lack of it) of a public institution is the administrative complaint. In this situation, the case will be brought to an administrative court. However, while in the Czech Republic and Latvia this is a legally necessary step before bringing the case to a judiciary court, in Romania one can sue the institution as such without having to firstly fill in an administrative complaint. The experience has shown that in most cases this is actually the most effective mean of solving the problem, as once the public institutions are notified about the law suit intended to them they tend to realize the seriousness of the matter and send the information required in the first place, in exchange for giving up the legal action. Having been already confronted with a number of law suits over the past few years, the institutions have become aware of the consequences of not complying with the legal provisions and try to avoid them. However, as the information provided by the central administration shows, no disciplinary actions have been applied to civil servants for not properly implementing the FOIA in any of the ministries in Romania during the last four years. This is caused rather by the solidarity and similarity of opinions between the management of the institutions and the civil servants, than by a proper implementation of the law. Consequently, the civil society has to focus on raising awareness regarding the legal provisions and he rightful interpretation of the law not only among the civil servants in charge of applying the FOIA, but also among the managers of the public institutions.

In Romania and the Czech Republic public institutions are expected to draft a yearly report on the implementation of FOIA. There is no such mandatory responsibility prescribed by the Latvian law, where annual reports are very general, without necessary referring to FOIA. However, only in Romania a standard format for this report has been drafted (by the Agency for Governmental Strategies). This sort of standard format of the reports facilitates

significantly centralization of information and understanding the trends in terms of transparency in public institutions.

Although the FOIA and the subsequent laws regulating the protection of personal data and of classified documents were have been in force for many years, there is yet no register centralizing the documents of the central administration which are public. Such a document would help the citizens find in one single place the information they need instead of wondering from one institution to another in case they don't know which the exact institution that holds the respective document is. Still this would require a whole new set of institutions within the public administration.

Moreover, a particular problem arises when the requester does not know exactly the document that he/she needs, but only some general specifications of the information that is necessary. In such cases, there can be two main approaches: either the requester can firstly send the request and then follow up in person or by phone, or he/she can firstly go to the specific authority and ask for advice and formulate the request only afterwards. While in the Czech Republic and Romania the former approach seems to be preferred, in Latvia there seems to be a tighter connection between the NGOs, as regular inquirers, and state institutions. In Latvian case the civil servants advice the inquirers on how to formulate the request so as the institution can better understand the needs and reply accordingly. On the other hand one can argue that this practice actually alters the process of acquiring the right and full information that a requester is entitled to get, as by providing advice on how exactly to formulate the request the civil servant can prevent the inquirer to ask certain information that the institution is uncomfortable with providing, although legally obliged to.

Nonetheless, the experience in all three countries has shown that direct contact, either by phone or in person, between the inquirer and the civil servant responsible for providing the required information facilitates significantly the process of transmission of information. This is firstly due to technical reasons, as sometimes the answer can be given right away, if the inquiry regards an issue that the civil servant is very familiar with. Secondly, and most importantly, a direct discussion can help the civil servant clarify what the requester really wanted to know. It can also act as a psychological pressure since a follow up of the initial request shows the civil servant that the inquiry is really important to that person and that he/she will not give up the demarche of getting it. Moreover, this sort of discussion can provide the opportunity for the civil servant to understand the purpose of the inquiry. Even though in none of the three countries the FOIA does not require that the inquiry should necessarily be motivated, the experience in Czech Republic, Latvia and Romania has shown that civil servants are a lot less reluctant in providing the information once they understand what the final goal of the project is.

Throughout its work, IPP Romania has been confronted with a number of cases when public institutions have provided the information in a non-intelligible format. This way it was thought that a middle way can be found between complying with the provisions of the law

but still not-providing the information. The experience of PROVIDUS was that answers were intelligible but not providing the whole set of needed data . This brings us to the issue of what do one understands by “freedom of information”. Keeping the spirit of the FOIA acts, freedom of information means getting the full information through a substantial reply concerning the issue in question and in a proper format that can be of real use to those who have requested it.

**II.b Differences**

The differences that the study underlines are more at the technical level, but nevertheless important as they bring out the differences in the extent in which access to public information is facilitated. For a start, the Czech Republic seems to have moved a step forward and implemented the system through which request via virtual means (email) are accepted on regular basis. Moreover, the answers from the institutions are also sent electronically, which helps the requester to centralize and manage it. In the mean time, in Latvia although the inquiry is sent via regular mail, answers (especially those including voluminous data) are provided electronically. The main problem in Latvia is not the unwillingness of the institutions, but their capacity to keep record of electronically sent inquiries. In Romania, this practice is not spread, many of the institutions still having to operate with printed requests. This causes a lot of inefficiency both in the work of the institutions and that of the requesters. In some cases this is done against the special requests of NGOs which require information in an electronic format, even though the public institutions themselves have it in such a format. In order to discourage similar requests, public institutions resort to this practice which forces the NGOs to spend a lot of effort in re-assembling the data in an electronic format. In Latvia public institutions seem to prefer providing information electronically, although when a case is brought to court, the judgments are always issued in print due to the specific requirements that pertain to their dissemination.

Practice in Romania differs from the one in the Czech Republic in terms of the categories of costs associated to the requests. While in Romania the legal provisions allow the public institutions to ask the inquirer to cover the costs of the photo copies, in the Czech Republic the authorities are entitled to ask the inquirer to cover also the costs of the work of civil servants for collecting the required data. If organizations may afford paying for such costs, for the ordinary citizens this can be a real impediment.

The legal deadlines for the institutions to provide the information are slightly different. In Latvia and Czech Republic the institutions are expected to provide the answer within 15 days from the receipt of the request, while in Romania the deadline is 10 days. However, in all cases institutions are allowed to ask for an extension up to a total of 30 days, in situations which documenting requires additional effort. Despite this, not all institutions comply with the ultimate 30-day deadline in any of the three countries. IPP has had over the years a huge number of law suits intended to public institutions for not complying with the legal deadline. However, unlike in Romania where the 30-day legal deadline is clearly stated, in Latvia for instance there is still confusion concerning this aspect due to the overlapping of several regulations.

## II. Access to Public Information in Czech Republic

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### II.a Legislation and practices

#### II.a.1. Introduction

Although the constitutional principles of the individual Member States of the European Union substantially vary, some common principles may be identified which shape the functioning of the State administration. These principles should constitute important limitations on the activities of the State administration and they should serve to reduce the traditional perception this institution as a sort of aristocracy. This type of traditional concept of performance of the public administration is clearly obsolete and is being replaced by a model of the public administration as a service for citizens. If possible, all processes in a democratic society should be public, open to external control and transparent and the outputs of these processes should be published. In theory, we speak about the openness, transparency and publicity principles. All these principles together constitute one of the substantial aspects of "good governance" or "good administration".

Openness and transparency also need to be delimited by clearly defined and comprehensible, generally binding and enforceable rules that are not mutually contradictory. Only in exceptional and legitimate cases may some matters be considered to be secret or confidential and thus exempted from the openness and transparency principles. The provisions limiting the right to information must be codified to ensure good orientation in the legal order and to facilitate the interpretation of legal regulations. However, it is rather difficult to achieve a balance between secrecy and disclosure of certain facts and this aspect is frequently discussed in legal theory. The conflict between free access to information and the right to protection of personal data, discussed below, is an example.

The massive use of the Internet and other modern communication technologies has led to a relatively new perception of access to information as defined by the national and European generally binding legal regulations. The right of access to information may be viewed as one of the pillars of "good governance", as it ensures a certain informal supervision over the functioning of the public administration. This is affected either by disclosure of the final information that is available to a public institution or by the possibility of any person to participate as an observer in a meeting, on the basis of which a decision is taken. The possibility of personal participation of individuals - observers - in such meetings or the possibility of subsequently becoming acquainted with the result thereof to some extent ensures that the meeting will comply with the applicable rules and that the presence of non-participating persons not known to the participants will have a favourable influence on the quality of the participants' activities, as well as their responsible approaches towards the matter in hand.

The utilization of the right of access to information, together with the use of information technologies, leads to a certain change in the relationship between the Government and the citizens. At the present time, citizens may become acquainted with various documents without having to leave their homes and they may also manage their affairs through the Internet, instead of visiting the office during its opening hours. A certain vision of the future

can be drawn from the above facts, where the representative form of democracy will be supplemented by the second pillar - direct participation of citizens in the administration of public affairs.

**II.a.2. Conceptual framework - Definitions of the following key terms, according to national FOI laws information of public interest**

In the Czech legislation, the right of access to information is perceived as one of the fundamental political rights and is defined in Art. 17 of the Charter of Fundamental Rights and Freedoms (Act No. 2/1993 Coll.). The fifth paragraph thereof states: "Organs of the State and of local self-government shall provide in appropriate manner information on their activity. The conditions and the form of implementation of this duty shall be set by law." This implementing law, Act No. 106/1999 Coll. on free access to information, implements Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information. The purpose of the Act is stipulated in its Section 1, which states that: "... the Act regulates the terms and conditions of the right to free access to information and defines the basic terms and conditions under which information is provided." The Act does not provide for the functioning of the public administration or describe the processes ensuring transparency and how the Act contributes to democratization of society; it does not even expressly mention the relation to the above-mentioned constitutional principles. Its purpose must be interpreted in the context of paragraph 5 of Art. 17 of the Charter of Fundamental Rights and Freedoms and the obligation of governmental agencies and the territorial self-government bodies to provide reasonable information on their activities stipulated therein.

The bodies that are obliged to provide information relating to their competences pursuant to Section 2 are the following:

a. Governmental agencies

b. Territorial self-governing bodies

c. Public institutions managing public funds and

d. Bodies that have been authorized by the law to decide on the rights, interests protected by law or duties of natural persons and legal entities in the public administration sector, solely within the scope of their decision making.

The right of access to information is limited by another right defined in Art. 10 (3) of the Charter. The provision states that "everyone has the right to protection against unauthorized collection, publication or other misuse of his data."

The right of access to information and the right of protection of personal data should be interpreted complementarily and, in practice, it is necessary to find a certain balance between

these rights. Court practice, in particular the jurisprudence of the Constitutional Court, may serve as an important guide in exercising these rights.

The above-mentioned Act also originally contained provisions on the protection of personal rights and privacy, stipulated in its Section 8. However, this Section was deleted by the new Personal Data Protection Act (Act No. 101/2000 Coll.), which stipulated that free access to information does not apply to the **provision of personal data**.

Personal data shall mean any information on the basis of which a data subject may be directly or indirectly identified in particular on the basis of a number, code or one or more factors specific to his/her identity. This protection applies solely to natural persons; data on legal entities are public by their nature and are not subject to protection.

Personal data may be disclosed in two possible ways:

- Making personal data anonymous - which means that the specific data is processed so that it can no longer be linked to a specific subject, i.e. the specific subject cannot be identified on the basis of this data

- Consent to data processing - the subject concerned signs a declaration in advance, giving his/her assent to his/her personal data processing in a certain matter

- The second important limitation of a free access to information is a **trade secret**. It is provided for by Section 17 of the Commercial Code and must comply with the following characteristics

- It contains information of technical or commercial nature relating to a business

- It has a certain potential value

- The information is not generally accessible

- The entrepreneur wishes to keep the information secret and actually does so.

**II.a.3. Manner of formulating the requests (oral, in writing, via electronic mail)**

A request can be made either in oral or written way. A written request has to be answered in a written way too while oral questions can be simply responded orally. Oral requests are not included in the annual reports which each institution enumerated by the law has to elaborate. The law on FOI presumes the electronic communication between an applicant and a subject of state administration too. In such a case a subject of state administration can answer via electronic post but if a decision not to provide information has to be delivered by regular mail on the applicant's address.

**II.a.4. Timeframe of requests: Clear and detailed explanation of the time span allowed by the national laws for the institutions to provide an answer, to refuse an answer, to ask for an extension of the period in which they could give an answer (art. 14).**

The exact timeframe is specified in the methodological guideline which has been approved by the government and is obligatory for all state institutions and agencies with the exception of self-territorial regional bodies and municipalities. The day to lodge a request is the day of delivery of a request. A subject of state administration has to ask for some additional information within 7 days. In case such complementary information has not been delivered a subject of state administration can refuse the request within 30 days from lodging a request. In case such a request has not been refused a subject of state administration has to provide the requested information within 15 days from lodging a request. The lapse of 15 days can be extended by maximum of 10 calendar days in case of serious reasons, i.e.:

- Searching and collecting requested information at other offices
- Request for a large number of information in a single request
- Necessity to consult with another subject of state administration (or more departments at one institution).

An applicant has to lodge an appeal against the decision not to provide information with 15 days from delivery of such a decision.

**II.a.5. Restrictions - Specifying those areas of information and documents which are explicitly identified by the FOI law as not being covered by its provisions.**

The FOI act enumerates several cases where free access to information is limited:

- **Classified information** (art. 7) as defined in details e.g. in the law no 412/2005 Coll. On protection of classified information
- **Personal data** (art. 8a) - see for more in the part 1 of this study
- **Trade secret** (art. 9) - see for more in the part 1 of this study

- **Property of individuals** (art. 10) - data of individuals collected in the framework of tax, pension, social-care and health-care laws cannot be provided under no circumstances.

- Information relating exclusively to **internal rules** of a subject of state administration can be limited.

- Information whose publishing could **violate an intellectual right.**

**Many other cases:** e.g. ongoing penal procedure, tasks of information services, preparations and results of audits of the Supreme Court of Auditors.

**II.a.6. Sanctions for the wrong application of FOI law (art. 16a)**

Applicant who has not been satisfied with the provided information or with the procedure according to FOI law can lodge a complaint within 30 days from delivery of decision or information. Such a complaint can state that:

- The information has not been provided or has been provided only partially.

- The information has been provided partially and the rest of request has been refused.

- The applicant does not agree with an amount of payment for providing information.

It is a superior body of particular subject of state administration that is deciding on such a complaint. It can either confirm the decision of an inferior body or revise the decision and make an inferior body to provide requested information or provide requested information itself.

It is necessary to add that article 16a is quite new and it is a part of amendment of the FOI act which has come into effect on January 1, 2006.

**II.a.7. The legal protection system of the FOI law (art. 15, 16)**

- Description of the national procedures through which the non-replies to the requests can be appealed.

Basically, there are two possibilities of an appeal procedure (art. 16).

- Administrative appeal - an applicant can lodge an appeal to superior institution which decides on eligibility of such a request. The whole appeal procedure according to art. 16 par. 2 and 3 of the FOI act has to be processed within 30 days.

- Judicial appeal - an applicant can lodge a lawsuit and the court can revise the administrative decision of a responsible body not to provide information.

Sanctions within the institution, of the personnel responsible for making the information public. What type of disciplinary measures can be taken against those not fulfilling their responsibilities in making public the requested information? - Neither the FOI act nor the methodological guidelines on free access to information defines any sanctions for any individuals who failed to provide information. It might be any mentions in the internal documents of individual bodies of state administration it is not from the legal point of view generally binding document.

Sanctions of the institution - again, there are no specific sanctions for an institution which fails to provide any information and lost the case before a court. It depends on the court decision; the sentence usually forces a subject of state administration to do something, i.e. provide concrete information plus all the costs can be paid to a party which wins the case.

- If possible, identifying a specific jurisprudence established in this particular respect.

In the Czech Republic the courts seem to decide on “ad hoc” basis and have not established any consistent and coherent jurisprudence in this area.

The cases which are monitored and commented by media and NGO watch dogs can be sorted in the following way:

- A subject which has been requested, refuses to provide information and argues that **it is not part of public (state) administration** (e.g. Academy of Science, National Property Fund)

- **Procedural obstacles** from subjects which have been requested - e.g. wrong definition of applicant (individual or legal entities), excessive extension of time for providing information, asking for deposit when applicant requested a larger amount of data.

- **Personal data protection -** a requested body argues that a list of specialists, experts or members of selection committee cannot be provided because of personal data protection of these people.

- **Partial information -** rest of request has not been formally refused - wrong procedure

- **II.a.8. The issue of the proactive publication of information of public interest (art. 3).**

- Specifying the type of information and documents that according to the FOI law should be made public.

Article 3 of the Czech FOI act enumerates the information which should be easily and publicly accessible.

- Function of particular body of state administration, organizational structure, hierarchy, location of place for communication with a broad public;
- Procedural information according to FOI act, i.e. appeal procedure, lapses, conditions etc;
- Internal rules that are connected with providing information according to this law;
- Annual reports for previous years;
- Guidelines for charging applicants for providing a large number of information;
- Address of electronic post office.

**III. a. 9. The issue of the annual report each institution should have regarding its requests based on the FOI law.**

Although the Czech FOI act clearly defines (art. 5 let. g) that each stated institution of public administration has to regularly publish its annual report with a content mentioned in the article 18, the situation varies and not all the institutions perfectly meet the bellow-mentioned criteria.

Annual report has to include:

- Number of requests and number on decisions on refusal to provide information
- Number of appeals against decisions on refusal.
- Copy of substantial part of court sentences and overall costs for legal disputes including costs for own employees and legal advice.
- Number of complaints according to art. 16 a - wrong application of providing information, reasons to have been lodged and ways how the complaints have been handled.

Annual reports of individual state bodies are either published since the FOI act has come into force in 2000 or since 2004. It is hard to say if those of state bodies whose annual report is not currently accessible online, has elaborated and published it properly.

Overall number of requests varies from an institution to institution as well as in time. Generally, central ministries are requested more often than other state bodies. The numbers are calculated in hundreds at state bodies, thousands at most of ministries and it is Ministry of Foreign Affairs that indicates hundred thousands request per year (e.g. 119,000 requests in 2004; 128,000 in 2005; 225,000 in 2006). It is not easy to find any clear reason why this ministry is standing aside. As for the form of request electronic post significantly prevails to

regular mails. For instance, Ministry of Education, Youth and Sport mentions in its annual report from 2006 that 99% of all requests (out of 5,500) are delivered electronically, i.e. emails or phone-calls. Even though the phone-calls cannot be considered to be requests according to the FOI act most of ministries regularly respond these questions too. Of course, no phone-calls are calculated in any annual reports. In some annual reports some additional information can be found, e.g. if certain institution charge applicants when providing information of a larger number, how many thank letters did a certain institution get from the applicants etc.

Brief Analysis of annual reports statistics:

- Inclusion of annual report (AR) according the FOI act in the general annual report - 3 ARs out of 66 examined ARs;

- Number of requests and number on decisions on refusal to provide information - no failures in annual reports;

- Number of appeals - in 54 annual reports sufficient information, in 12 annual reports no mentions on appeals;

- Copy of substantial part of court sentences - in 15 ARs sufficient information, in 5 ARs insufficient or missing information, in 46 ARs no legal disputes mentioned;

- Costs for legal disputes including costs for own employees and legal advice - in 3 ARs sufficient information, in 17 ARs!! missing information, in 46 ARs no legal disputes mentioned;

- Number of complaints according to art. 16a - only ARs from 2006 examined, in 8 out of 24 ARs sufficient information, in 2 ARs missing information, in 14 ARs no complaints mentioned.

- In order to summarize the annual reports and situation concerning the practice in providing information according to the FOI act we can conclude that most of requests is processed properly and an applicant is satisfied with the answer. Administrative appeal procedure guarantees everybody to lodge a complaint which can stimulate a certain state body to provide requested information in order to prevent potential legal dispute. It might be a reason why law disputes are quite rare and its number is yearly calculated in tens.

**II. a. 10 The issue of the costs required for the provision of documents**

The Czechs' FOI act defines the costs for providing information in its article 17. Subjects that are providing information can charge to an applicant a certain amount which must not exceed the real costs of copying, purchase of data carrier and correspondence costs. In case of exceptionally large search for information a certain state body can charge some personnel

costs to an applicant too. In case a state body decided to charge the provision of information, this fact has to be announced in advance in a written way including estimation of costs. If a state body fails to inform an applicant in advance on this fact it loses right to charge this case. Provision of charged information is conditioned by the payment from the side of an applicant. If an applicant fails to pay the costs a concrete state body will put this case away.

Practice at individual ministries and other examined state bodies do not seem to be very unified at all. While only three ministries publish their table of charges, other three of them explicitly mention that they do not charge applicants at all. All other institutions do not provide any information whether they charge and/or what is the price list. It is necessary to add that the article 5 let. F of the FOI act stipulates a duty to make such information public. Here is the sample of prices mentioned in the tables of charges, e.g. 1 copy in A4 format - 2 CZK (0,08 €); 1 burnt CD - 70 CZK (2,8 €); 1 man/hour - 180 CZK (7,2 €). Even though information how much money has been charged during the year is not mandatory in the annual reports, some ministries disclose it there. The amounts range from 1,200 CZK (48 €) to 6,400 CZK (256 €). It means that the fees for provisions of information are charged only in exceptional cases (approximately in tens per year).

In the Czech jurisprudence there are a couple of cases which are dealing with the litigations on costs for provision of information. The courts insist that a state body which has been requested, has to estimate the costs for provision of information as precisely as possible. It is against the law to require some deposits in case an applicant asks for some more complicated package of information.

**II.a.11. The issue of the existence of a public register that all institutions should use in order to make public the documents it produced and can be of interest for citizens**

In the Czech Republic there is not such a register which collects documents of all (or parts of) state bodies. It is unlikely that such a discourse in the Czech society has even started. The general access to documents is to be secured by individual state bodies including ministries, state agencies and other bodies of state (public) administration. As for some particular public registers one has to mention two of them which significantly contribute to better transparency in a business area and property rights. First of them is a judicial register of economic subjects of different forms (e.g. limited companies, stock companies but also foundations and endowment funds etc.). This register consists of detailed information of a concrete company (whatever legal form), names of members in executive bodies and supervisory bodies with a history in time (since 1995), address and ID of a company and its economic activities. Currently further innovations are implemented in this register; one of the most important ones is a digitalization of register of documents related to companies, e.g. company by-laws, annual reports, yearly balance of accounts etc. The second register is called “Real Estate Cadastre” and collects all relevant data concerning the property of real estates in the Czech Republic and legal relations to them. The register do not contain only data on owners, other rights, limitation of property rights but also fully digitalized maps of all the

territory of Czech Republic. Whoever can find basic information in this register for free even though the full access to it is charged (50 CZK per document).

**II.b. Quantitative Research**

This part of research on the practice in providing information by the Czech ministries and other central state institutions has been conducted from January 18, 2008 till February 12, 2008. The requests have been sent in three packages, i.e. January 18, January 24 and January 28, 2008. In this research we have focused on the following aspects:

- Whether the institution has responded (formal view)
- In which form the information has responded (letter, email, other forms)
- What is the time-limit within the institution has responded
- What is the quality of provided information (general analysis)

As for the list of institutions which have been approached, we have decided to include as many central bodies of state administration as possible. On the methodological basis of the international comparative project we have not involved any self-governing regional and municipal institutions even though the respective law on the free access to information also enumerates these bodies of public administration in a broader sense as ones which are bound by this act's provisions.

In the Czech Republic there are 14 central ministries and 11 other central bodies of the state administration including the Government office. **All 25 institutions have been requested** (see table 1).

**Table 1**

| Acronym | Name | no of request |
|---|---|---|
| CBU | Czech Mining Office | 2 |
| CUZK | Czech Cadastral and Survey Office | 2 |
| ČSU | Czech Statistical Office | 2 |
| ERU | Energy Regulatory Office | 2 |
| KCP | Committee for Securities (Czech National bank) | 2 |
| MD | Ministry of Transport and Communications | 2 |
| MF | Ministry of Finance | 6 |
| MK | Ministry of Culture | 3 |
| MMR | Ministry of Regional Development | 5 |
| MO | Ministry of Defence | 3 |
| MPO | Ministry of Industry and Trade | 2 |
| MPSV | Ministry of Labour and Social Affairs | 1 |
| MSp | Ministry of Justice | 4 |
| MŠMT | Ministry of Education, Youth and Sport | 3 |

| Acronym | Name | no of request |
|---|---|---|
| MV | Ministry of Interior | 2 |
| MZd | Ministry of Health | 3 |
| Mze | Ministry of Agriculture | 2 |
| MZV | Ministry of Foreign Affairs | 5 |
| MŽP | Ministry of Environment | 2 |
| NBU | National Security Authority | 2 |
| SSHR | Administration of the State Material Reserves | 2 |
| SUJB | State Office of Nuclear Safety | 2 |
| UOHS | Office for Protection of Competition | 2 |
| UPV | Office of Industrial Property | 2 |
| | Government Office | 3 |
| | | 66 |

As seen from the table 1, a total number of **66 requests were sent**. Some requests have contained only one question and in some of them more questions have been included, e.g. two, three or four questions (see the first and second row of table 2). Some requests (questions) have been formulated in a very simple way and did not expect much time to provide appropriate answer; some of them have been more complicated and it was quite clear in the beginning that the respective institutions will have to conduct own research in collecting relevant data. Some requests have been conceived as individual questions leading to a unique expertise which the respective state institution disposes; some of them have been called "group questions" since the same request have been sent to 25, respectively 22 institutions throughout their expertise. The group questions then have established a good platform to assess especially the quality of provided responses. (For all detailed questions / requests see the annexes).

This approach should have reflected and simulated as much as possible the reality in which the state institutions received the requests from citizens. The first general overview of field research can be seen from the table 2.

**Table 2**

| General information | Individual request | Group request | total | % |
|---|---|---|---|---|
| Number sent requests | 19 | 47 | 66 | |
| Number of sent questions | 38 | 94 | 132 | |
| Number of received responses | 14 | 43 | 57 | 86,4% |
| Number of non-received responses | 5 | 4 | 9 | 13,6% |
| Institutions which failed to provide information | MMR (3), MF, MZd | MMR (2), MF, MZd | | |

The most important information is the overall response rate, i.e. how many institutions have responded the requests and provided some information regardless the time-limit (see for more bellow). **While 86.4 per cent of institutions have responded, 13.6 per cent of institutions failed to provide any information at all.** It means that nine requests have not been answered. It is very interesting that it is only three institutions (Ministry of Regional Development, Ministry of Finance, and Ministry of Health) that failed to do it.

**What could be the reasons that the sinners have been repeatedly appeared?** There are probably more reasons for that. Firstly, due to some government coalition clashes the Ministry of Regional Development has remained without a minister for a couple of months which might have decreased the morality of responsible civil servants. Secondly, both the Ministry of Regional Development and the Ministry of Health have indicated some technical problems with accepting the security certificate of electronic signature (all requests have been sent via email with certified electronic signature, see for more bellow - table 3). This fact could discourage responsible persons from dealing seriously with the delivered requests. Thirdly, certain lesser will, ability (internal processes wrongly set?) or carefulness to be engaged in responding the citizen's requests can be indicated. Ministry of Finance (MF) could be a good example of this third reason. Every state institution has to establish an electronic post office which collects all the requests coming from the citizens. MF together with the Ministry of Foreign Affairs is the only institutions which does not collect any e-mails but operates a special online website form which a citizen can fill in and submit. On one side it is friendly to a citizen; on the other hand it is natural that there is no copy which has remained to a questioner as a proof. In such a case it is difficult to prove that the appropriate request has been really delivered.

As for the form of requests **solely electronic mails have been used** since this is a form which is explicitly enumerated by the respective law on free access to information. In such a case a subject of state administration can answer via electronic mail with the exception to make a decision not to provide information. Such a decision has to be delivered by regular mail on the applicant's address. Generally, in the Czech Republic there is an intensive public debate on friendly public administration, i.e. inter-connection of state bodies and databases, remote access to offices etc. Therefore the electronic mails have been selected to test the preparedness of state administration to handle this way of communication.

The first impression was ambiguous. After we had sent the first package of requests on January 18, 2008 many automatic responses were delivered saying that the certified electronic signature which we had used, have not been accepted, i.e. it is not valid, it has expired or it has been certified by a non-accredited provider. We have consulted these problems with our electronic signature provider (www.eIdentity.cz) and a responsible person of this private company has voluntarily started communicating with respective state bodies to resolve the problems. Finally, we were informed that many state bodies do not sufficiently and regularly update their lists of qualified system certifications because they miss the technical knowledge how to do it and / or they are not forced to communicate with citizens

using the electronic signature. (In general, the certified electronic signature is usually needed for a communication when a state authority has power to decide about the citizen's rights or duties, e.g. social allowances, taxes etc.).

Therefore it would have been surprising so that a certain institution would have required the certified electronic signature for a provision of information. Since the respective law on the free access to information (no 106/1999 Coll.) does not legitimate a state body to ask for a certified electronic signature and simultaneously it is not any case of execution of state power to decide about the citizen's rights or duties we do not suppose that a state body has such a right. But in reality we have uncovered three ministries (Ministry of Interior, Ministry of Agriculture and Ministry of Labour and Social Affairs) which required the certified electronic signature when asking for information. On the other despite such requirements all of above-mentioned ministries have responded properly and on time even though the certified system signature has not been accepted.

**Table 3**

| Form of communication | individual request | group request | total | % |
|---|---|---|---|---|
| **Requests** | | | | |
| emails | 12 | 43 | 55 | 83,3% |
| website online form | 7 | 4 | 11 | 16,7% |
| **Answers** | | | | |
| Emails | 9 | 33 | 42 | 63,6% |
| Letters | 6 | 11 | 17 | 25,8% |
| both (MV only) | 1 | 1 | 2 | 3,0% |

In the table 3 we can also see the form of communication between a questioner and a state body. While 55 requests have been sent as emails, for 11 requests a special online website form has been used (technical solution used solely by the Ministry of Finance and the Ministry of Foreign Affairs).

As for the responses we have stated that the respective law on FOIA presumes the electronic communication between an applicant and a subject of state administration on the same level as written correspondence delivered via regular mail. In such a case a subject of state administration can respond via electronic mail too with the exception to make a decision not to provide information. Such a decision has to be delivered by regular mail on the applicant's address. Nevertheless 25.8 per cent of requested state bodies have preferred to use the regular mails although the majority of institutions have answered via emails (63.6 per cent). The only Ministry of Interior has used the both forms of communication in order to secure that the response has been properly delivered.

As for the **time-limit** according to the free access to information act a **respective subject is bound to provide requested information within 15 days**. Out of 57 delivered responses only one has exceeded this time lapse (i.e. 1.5 per cent). The average time for a provision of information was 7.2 days. Almost half of requests (45.6 per cent) have been responded within five days, while 15 responses (26.3 per cent) have been answered between 6$^{th}$ and 10$^{th}$ days and other 15 responses (26.3 per cent) between 11$^{th}$ and 15$^{th}$ days (see in table 4 bellow).

**Table 4**

| Time | individual request | group request | total | % |
|---|---|---|---|---|
| Time for providing information (in days) | 9,1 | 6,5 | 7,2 | |
| Number of responses beyond the term (15 days) | 1 | 0 | 1 | 1,8% |
| Number of responses within 5 days responded | 3 | 23 | 26 | 45,6% |
| Number of responses responded between 6th and 10th day | 5 | 10 | 15 | 26,3% |
| Number of responses responded between 11th and 15th day | 5 | 10 | 15 | 26,3% |

**Table 5**

| Quality of responses | individual request | group request | total | % |
|---|---|---|---|---|
| answered fully | 10 | 36 | 46 | 80,7% |
| answered partly | 2 | 7 | 9 | 15,8% |
| non-answered | 2 | 0 | 2 | 3,5% |

In the table 5 we examine the overall quality of provided information. **The category "answered fully" means that the respective subject has responded directly and covered all sub-issues in the request**. It is plausible that over 80.7 per cent of accepted responses have been ranked in this category. The extent of responses has naturally varied from one or two simple sentences to large studies with many annexes and complementary documentation. It has been connected with the requests and questions. While some of them targeted at simple and clear information (usually close questions presuming yes or no answer), some questions were focused on more complicated issues including some databases and further documentation.

In this connection it is worth mentioning that it was the only institution (Ministry of Interior) that drew our attention to the fact that the services to collect data will be charged. This information was delivered in accordance with the FOIA act's provisions, i.e. in a written form sent by regular mail. The response included the explanation (Ministry does not keep a specific statistics on this issue), the extent of work (20 hours) and estimation of costs (208 CZK per

hour - approx. 8 €). After such a notification we have given in and have no more insisted to get the respective information.

The second package of responses (15.8 per cent) is considered to be “answered partly”. It means that 1) The request has consisted of several questions and one or more of them have remained unanswered; 2) Some answers have been assessed as insufficient, i.e. information are too general, not clear enough, the interpretation of provided information is not explicit; 3) The answer has included only reference to another competent person who is in charge to provide the respective information.

Methodologically it is necessary distinguish the level of provided references. Sometimes it can occur that such a reference is sufficient, e.g. the question “Is there any internal anti-corruption plan at your institution?” can be correctly answered in the following way - “Yes there is, you can find this document at - website link”, but the following reference answer is supposed to be provided wrongly - “This information is going to be provided my Mr. / Ms. X. We suppose that the subject of state administration is bound to provide clear and explicit information or at least directly referred to an easily accessible public space where such information is available.

The last category of non-answered questions (only two responses, i.e. 3.5 per cent) contains only two responses. The first one is the case described above (Ministry of Interior which asked for clarification and estimated the costs for collection of data), the second one is the case of a reference answer to a competent civil servant mentioned in previous paragraph.

**II.c. Conclusions**

During the field research we have found out that not all the state bodies are sufficiently prepared to accept the secured electronic communication with citizens. Even though all of them fulfil the provision of FOIA act and set the electronic post office, they do not properly update the qualified system certificates and that is why the electronic signature can be assessed as invalid.

One of the most important findings of this research is an overall response rate (86.4 per cent). It is clear that some deficiencies have been detected; most of them are probably caused by poor IT support and insufficient update of qualified system certificates.

Time-limit (15 days) within which the institutions have responded, can be assessed as sufficient since only in one case (1.8 per cent) the law time lapse has been exceeded.

Quality of provided information has varied and approximately one fifth of responses (19.3 per cent) have been assessed as insufficient. It is clear that it especially depends on a concrete civil servant who is providing the respective information. In many cases it occurred that a civil servant intended to provide as much general information as possible but in the end he/she forgot to directly answer the original question.

## Annex 1 - List of individual requests and questions (to institutions according to their competences)

| | Text of requests | Institution | Questions | Emails | Web | Sent | Received | Email | Mail | Time ( day) | Quality |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | Has any personal audit been conducted at your institution within last three years? Is the final report of this audit available?<br>What was the most important follow-up ? | MZV | 3 | 0 | 1 | 17.1.2008 | 21. 1. 2008 | x | - | 4 | ok |
| 2 | Has any personal audit been conducted at your institution within last three years? Is the final report of this audit available?<br>What was the most important follow-up? | MF | 3 | 0 | 1 | 17.1.2008 | 28.1.2008 | - | x | 11 | partly |
| 3 | What is the average time of trials (civil procedure) in individual court districts? What is the average time of trials (criminal procedure) in individual court districts? What is number of judges in CZ? What is ideal figure (planned)? | MSp | 4 | 1 | 0 | 17.1.2008 | 1. 2. 2008 | - | x | 15 | ok |
| 4 | How many civic associations were registered in 2006? How many civic associations were deleted from the registry in 2006? According to the procedure §12/1a and §12/1b? | MV | 3 | 1 | 0 | 17.1.2008 | 23. 1. 2008 | x | x | 6 | no |
| 5 | What are yearly funds for churches and religious associations? What is the average wage of a churchperson? Representatives of which churches and religious associations are paid from the state budget? Is there any list of registered churches and religious associations? | MK | 4 | 1 | 0 | 17.1.2008 | 18. 1. 2008 | x | - | 1 | ok |
| 6 | Is there any official translation of European Security Strategy into Czech language? If yes, why is not published? If not, what are the reasons? | MOb | 3 | 1 | 0 | 17.1.2008 | 23. 1. 2008 | x | - | 6 | partly |

| | Text of requests | Institution | Questions | Emails | Web | Sent | Received | Email | Mail | Time ( day) | Quality |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 7 | Which foundations obtained sources from Foundation Investment Fund? What were the amounts for individual foundations? Which selection criteria have been applied? | MF | 3 | 0 | 1 | 17.1.2008 | 1.2.2008 | - | x | 15 | ok |
| 8 | What types of genetically modified plants can be cultivated in CZ? What is the area on which GMO are cultivated? Has the relevant legislation been changed for the current year (2008)? | MZe | 3 | 1 | 0 | 17.1.2008 | 31. 1. 2008 | - | x | 14 | ok |
| 9 | What is strategy of ministry for pre-financing the projects from Integrated Operational Program? | MMR | 1 | 1 | 0 | 17.1.2008 | No answer | | | | |
| 10 | What is the supply of vaccines against bird flu in the country? (more questions) | MZd | 2 | 1 | 0 | 17.1.2008 | No answer | | | | |
| 11 | Which foundations obtained sources from Foundation Investment Fund? What were the amounts for individual foundations? Which selection criteria have been applied? | Government office | 3 | 1 | 0 | 17.1.2008 | 6.2.2008 | - | x | 20 | ok |
| 12 | How much do we spend on humanitarian aid for African countries? Table of countries available? | MZV | 1 | 0 | 1 | 24.1.2008 | 30.1.2008 | x | - | 6 | ok |
| 13 | How much do we spend on humanitarian aid for African countries? Table of countries available? | MF | 1 | 0 | 1 | 24.1.2008 | No answer | | | | |
| 14 | How many projects from cohesion funds have been finished?<br>Is there any statistics, list of projects supported by EC within Cohesion fund, incl. amount, indicators and short summary? | MMR | 2 | 1 | 0 | 24.1.2008 | No answer | | | | |
| 15 | How much do we spend on development aid for African countries? Table of countries available? | MZV | 1 | 0 | 1 | 24.1.2008 | 30.1.2008 | x | - | 6 | ok |
| 16 | How many cases did CZ lose at European Court of Human Rights and how much did we have to pay as compensations? Is there any updated database of cases? | MSp | 2 | 1 | 0 | 24.1.2008 | 1. 2. 2008 | x | - | 8 | ok |

| | Text of requests | Institution | Questions | Emails | Web | Sent | Received | Email | Mail | Time ( day) | Quality |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 17 | How much do we spend on development aid for African countries? Table of countries available? | MF | 1 | 0 | 1 | 24.1.2008 | 8.2.2008 | x | - | 15 | ok |
| 18 | What is the categorization of educational contests for secondary school students? What is the procedure for being categorized as a contest A-C? Is there any official tender or selection process where such competitions are chosen for 2008/2009? | MŠMT | 3 | 1 | 0 | 24.1.2008 | 25. 1. 2008 | x | - | 1 | no |
| 19 | How many projects financed from JROP have been stopped due to failure to meet indicators, activities of the approved project? How many projects financed from JROP have been stopped due to failure to meet financial requirements, i.e. abuse of funds, poor accountancy standards etc.? Are there some other reasons for finishing the concrete projects? Statistics? | MMR | 3 | 1 | 0 | 24.1.2008 | No answer | | | | |
| | **Total** | | **46** | **12** | **7** | | | | | **9,4** | |

**Annex 2 - Is there any internal anti-corruption plan at your institution? Is there any possibility to announce a corruption behaviour anonymously (whistle-blowing)?**

| Institution | Sent | Received | E-mail | Mail | Time (in days) | Quality | Two questions answered | Internal anti-corruption plan | Whistle-blowing | Details |
|---|---|---|---|---|---|---|---|---|---|---|
| ÚOHS | 24.1.2008 | 1.2.2008 | x | - | 9 | OK | yes | yes | yes | email |
| Government office | 24.1.2008 | 31.1.2008 | x | - | 8 | OK | yes | no | yes | |
| ERÚ | 24.1.2008 | 30.1.2008 | x | - | 7 | Ok | yes | yes | yes | mail boxes |
| MZV | 24.1.2008 | 30.1.2008 | x | - | 7 | OK | no | unclear | yes | tel a email + 199 |
| MŠMT | 24.1.2008 | 28.1.2008 | x | - | 5 | OK | yes | yes | yes | email, post |
| NBÚ | 24.1.2008 | 28.1.2008 | x | - | 5 | partly | yes | unclear | yes | email, post |
| MŽP | 24.1.2008 | 28.1.2008 | x | - | 5 | OK | yes | yes | yes | phone and email |
| ČSU | 24.1.2008 | 25.1.2008 | x | - | 2 | OK | yes | no | no | only anonymous annual public inquiry |
| MSp | 24.1.2008 | 25.1.2008 | x | - | 2 | OK | yes | yes | yes | phone and email |
| ČUZK | 24.1.2008 | 25.1.2008 | x | - | 2 | OK | yes | yes | yes | phone and email |
| MF | 24.1.2008 | 24.1.2008 | x | - | 1 | partly | no | unclear | yes | own anti-corruption phone line |

| Institution | Sent | Received | E-mail | Mail | Time (in days) | Quality | Two questions answered | Internal anti-corruption plan | Whistle-blowing | Details |
|---|---|---|---|---|---|---|---|---|---|---|
| ÚPV | 24.1.2008 | 24.1.2008 | x | - | 1 | partly | no | unclear | unclear | |
| MZd | 24.1.2008 | 6.2.2008 | - | x | 14 | OK | yes | yes | no | anonymous announces not examined |
| MPO | 24.1.2008 | 5.2.2008 | - | x | 13 | OK | yes | no | yes | several possibilities |
| MK | 24.1.2008 | 6.2.2008 | x | - | 14 | OK | yes | yes | no | use of anti-corruption phone line of MF, MV |
| ČNB | 24.1.2008 | 6.2.2008 | x | - | 14 | OK | yes | yes | yes | email, post |
| MD | 24.1.2008 | 1.2.2008 | x | - | 9 | OK | yes | yes | yes | email, post, phone + 199 |
| SSHR | 24.1.2008 | 1.2.2008 | x | - | 9 | OK | yes | yes | no | common phone lines TI 199 |
| ČBÚ | 24.1.2008 | 1.2.2008 | - | x | 9 | partly | no | unclear | unclear | |
| SJÚB | 24.1.2008 | 31.1.2008 | - | x | 8 | OK | yes | no | yes | internal phone line 199 |
| MF | 24.1.2008 | No answer | | | | | | | | |
| MMR | 24.1.2008 | No answer | | | | | | | | |

**Annex 3 - Is there any guidelines at your institution regulating which information are to be disclosed? Is there any designated person at your institution who is responsible for responding the requests according to the FOIA act?**

| Institution | Sent | Received | E-mail | Mail | Time (days) | Quality | Two questions answered | Designated person | Internal rules on disclosure of information |
|---|---|---|---|---|---|---|---|---|---|
| SSHR | 28. 1. 2008 | 1.2.2008 | x | - | 4 | OK | yes | yes, spokeswoman | yes |
| ČUZK | 28. 1. 2008 | 31.1.2008 | x | - | 3 | OK | yes | yes | no |
| ČSÚ | 28. 1. 2008 | 31.1.2008 | x | - | 3 | OK | yes | yes, information services department | yes |
| MŽP | 28. 1. 2008 | 31.1.2008 | x | - | 3 | OK | yes | yes | yes |
| NBÚ | 28. 1. 2008 | 30.1.2008 | x | - | 2 | partly | yes | yes | unclear |
| ERÚ | 28. 1. 2008 | 30.1.2008 | x | - | 2 | OK | yes | yes | no |
| MŠMT | 28. 1. 2008 | 30.1.2008 | x | - | 2 | partly | yes | yes | unclear |
| Government office | 28. 1. 2008 | 30.1.2008 | x | - | 2 | OK | yes | no | no |
| ÚOHS | 28. 1. 2008 | 30.1.2008 | x | - | 2 | OK | yes | no (competent department) | yes |
| MK | 28. 1. 2008 | 29.1.2008 | x | - | 1 | OK | yes | yes, information department | yes |
| ČNB | 28. 1. 2008 | 29.1.2008 | x | - | 1 | OK | yes | yes, department of communication | yes |
| MSp | 28. 1. 2008 | 29.1.2008 | x | - | 1 | OK | yes | yes, PR department | no |
| ÚPV | 28. 1. 2008 | 31.1.2008 | x | - | 3 | OK | yes | no (competent department) | yes |
| ČBÚ | 28. 1. 2008 | 1.2.2008 | - | x | 4 | OK | yes | no (competent department) | no |

| Institution | Sent | Received | E-mail | Mail | Time (days) | Quality | Two questions answered | Designated person | Internal rules on disclosure of information |
|---|---|---|---|---|---|---|---|---|---|
| MF | 28. 1. 2008 | 8.2.2008 | - | x | 11 | OK | yes | yes, information department | no |
| MZV | 28. 1. 2008 | 1.2.2008 | x | - | 4 | OK | yes | yes, department of public information | no |
| MO | 28. 1. 2008 | 11.2.2008 | x | | 14 | OK | yes | yes, department of communication strategy | yes |
| MPSV | 28. 1. 2008 | 11.2.2008 | - | x | 14 | partly | yes | no, particular departments | no |
| MV | 28. 1. 2008 | 6.2.2008 | x | x | 9 | OK | no | no + PR + Press department | yes |
| SÚJB | 28. 1. 2008 | 11.2.2008 | - | x | 14 | OK | yes | no (ad hoc) | no |
| MD | 28. 1. 2008 | 12.2.2008 | x | - | 15 | OK | yes | yes (press section of the department of external relations) | no |
| MPO | 28. 1. 2008 | 6.2.2008 | - | x | 9 | OK | yes | yes, press section, cabinet of the minister | yes |
| MZe | 28. 1. 2008 | 11.2.2008 | - | x | 14 | OK | yes | yes + other mandated persons | no |
| MZd | 28.1.2008 | No answer | | | NO | | | | |
| MMR | 28.1.2008 | No answer | | | NO | | | | |

## III. Access to Public Information in Latvia

by Linda Austere, Providus

### III.a. Legislation and Practices

Latvia was amongst the first countries in Eastern Europe to adopt legislation that provides its citizens the right to access information generated and held by government agencies. The Freedom of information law (henceforth - FOIA) was adopted on November 11, 1998 and establishes the basic principles of access to public sector information, as well as the related procedures.

#### III.a.1. The structure of the law

The purpose of the Law is to ensure a public[1] access to information, which is at the disposal of institutions or which an institution in conformity with its competence has a duty to create. Implementation of the law is underlined by the ***presumption of openness***, which means that information shall be accessible to the public in all cases, when the FOIA does not specify otherwise.

#### III.a.2. The scope of application

The law adopts a liberal approach towards defining the scope of the right of access to PSI. The scope of the law is defined by a broad notion of ***information*** explained as "information or compilations of information, in any technically possible form of fixation, storage or transfer". Therefore is not the physical form of information, e.g. existence of a document, but rather the content - an item of information, irrespective of its physical medium - which defines the existence of the right to obtain PSI. Two additional criteria provide that the information to which the law applies must be *documented* and within the *circulation* of information of institutions. Both criteria are administrative in nature and facilitate a more effective and responsive implementation of the law. The notion of circulation refers to a full life-cycle of information within an institution (initiation - destruction) and therefore alludes to the fact that the right to access is not bound to a particular stage of implementation of a public function, which the required information may describe. The notion of documentation, wile more elusive, bounds the right to an existing item of information as the law applies solely to such information that the agency is able to locate within its records/registers. The notion of documentation attempts to separate the rights related to PSI and which therefore forms a separate function of government, from the right to enjoy information services which the government chooses to offer within the.

Determining the scope of entities/persons who are obliged by the law, FOIA adopts a functional definition of ***institution***. The institution, for the purposes of this law is every entity and person that implements functions and tasks of the public administration. The definition used in the FOIA corresponds with the norms of the law on Administrative procedure and

[1] The notion "public" denotes to those not holding a direct interest in the solution of a particular issue - e.g. an administrative procedure.

renders the law responsive to the challenges posed by reforms of public administration where certain tasks (services) are turned to the hands of private or specialized entities.

The law provides that ***anyone*** is entitled to request access, and information should be provided observing the principle of equality. Hence, the right is not limited to citizens or residents of Latvia. There is, however, a formal requirement to provide a postal address in Latvia for the written reply.

**III.a.3. Classes of information and principles of classification**

The scope of the FOIA - types and content of public sector information that can be accessed under the law - is largely determined by the content of a state secret provided for in the law on State secret. Information that does not fall in one of the categories of state secret[2] is subject to the regulation of the FOIA. For the purposes of the FOIA, however, information held by the institutions is divided in ***generally accessible*** and ***restricted access*** information.

Generally accessible information is that, "which is not categorised as restricted access information." The latter comprises information "intended for a restricted group of persons in relation to performance of their work or official duties and the disclosure or loss of which, due to the nature and content of such information, hinders or may hinder the activities of the institution, or causes or may cause harm to the lawful interests of persons." Hence, the institutions can apply the status of restricted access both based on the argument of the content information and some on the some characteristics (e.g. structural or administrative) of the information. The amount of information, which is freely available, depends on the interpretation of norms defining groups of restricted access information.

**III.a.4. The scope of the restrictions**

There are two main rationales behind the restrictions of access to public sector information: the quality of work public institutions and protection of the rights and interests of private individuals and entities. As a constitutional right, access to information can only be restricted with a due reference to the law. The FOIA provides for interests and specific groups of information that may be classified as restricted. The law requires a head of an institution to issue a separate list of restricted access information. During this process the norms defining restrictions are applied to the actual content of information held by the respective institution forming (in theory) a guideline for classification/de-classification of information on a daily basis.

There are several groups of restrictions:

**III.a.5. Restrictions determined by law**

Article 5, Section 2.1 of the law provides that the status of restricted access can be established by law. It implies that the FOIA is not exclusive in determining the scope of

[2] The Law on State Secret (in force since 29.10.1996) determines the principles of classification, but a more precise content is provided in the Regulations of the Cabinet of Ministers - The list of State Secrets (continuously updated)

classified information and the legislator has been vested with the discretion to add other exemptions. The FOIA does not determine limitations regarding the restrictions included in other laws, yet basic legal analysis suggests that any further restrictions must conform to Article 116 of the Constitution, which determines the legitimate interests that may justify restrictions of constitutional rights.[3] In practice such laws either clarify or complement the exemptions in the FOIA. The approach to such exemptions has not been consistent, as the laws tend to define both restrictions (applying the status of restricted access to particular information) or establish the scope of information that is freely accessible under the FOIA. [4]

### III.a.6. Protection of privacy

The law protects information about the private law of a person (Article 8). While there is no law in Latvia aspiring to define the notion of private life, there are several legal acts that define various elements of it - e.g. personal data[5] or information which is prohibited to be published in the media.[6] The precise content of these restrictions is clarified in the practice of courts; this restriction is mostly applied considering information, which contains personal data.

### III.a.7. Information for internal use

Article 6 of the law provides that the status of restricted access applies to information, "which is necessary to an institution for the preparation for resolution of matters". An important principle is included in section 3 of the article, providing that: "the status of restricted access information may be applied to information for the internal use of institutions during the process of preparation of matters only up to the time when the institution takes a decision regarding the particular matter, or when a document which has not been classified as a restricted access document is sent to an addressee". It follows that the status of restricted access terminates once the conditions set forth by the law are met. The status "for internal use" is one of the examples where regardless of its content the restriction applies to a group of information solely by virtue of its administrative character (nature of the information).[7]

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[3] In its judgment No. 04-02(99) the Constitutional Court of Latvia has held that right to access public sector information is a constitutional rights - inalienable part of freedom of expression (Art.100 of the Constitution). Available from: http://www.satv.tiesa.gov.lv/?lang=2&mid=19 [last viewed: 05.02.2008]

[4] The law regulating the procedures of public procurement establishes in detail content of information which is thought generally accessible, while the law on European Structural funds determine both the information access to which should be restricted and information which ought to be generally accessible to all interested.

[5] Personal data protection law, in force since 06.04.2000

[6] On the press and other mass media, in force since 14.02.1991

[7] In many countries, especially document-based systems of access, as well as international soft law documents, such information is altogether excluded from the scope of the FOIA, for example Recommendation (2002)2 of the European Council "On access to official documents". Available from: http://www.coe.int/T/E/Human_rights/rec(2002)2_eng.pdf [last viewed 03.02.2008]

### III.a.8. Commercial secrets

The FOIA protects commercial secret of a third person (Article 7). Definition of a commercial secret is provided in the Commercial law (Art.19). The competence to determine the status of such information is vested only with the commercial entities: "a merchant in transferring information to an institution shall indicate whether the information is a commercial secret and what is the legal basis for such a status." If an institution has received application for information that contains commercial secret it is obliged to consult the owner of such information and, akin to release of personal data, receive their consent. The FOIA also establishes that information which concerns implementation of functions or tasks of the public administration may not be deemed a commercial secret. The latter addresses largely operations and circulation of information within bodies such as state owned enterprises, those fulfilling delegation as well and other private subjects, fulfilling public functions or tasks.

### III.a.9. NATO and EU documents

This group of restricted access information comprises documents, which are designated as "NATO UNCLASSIFIED" or "LIMITE" (article 5, section 2.7). The objective of this restriction is to guarantee a uniform and sufficient level of protection of information classified by other - international - bodies regardless of whether the actual content of such documents would be deemed protected under the national legislation.

### III.a.10. Information for official use only

According to article 8, this exemption is covers of a broad group of information. The norm encompasses "protected information created in Latvia, which is associated with State security and does not contain official secrets". The scope or content of information falling into this category has not been specified. It is clear, however, that the notion of "state security" provides a wide array of possibilities for interpretation and therefore exemptions.8 And information "created by a foreign state, international organization or the institutions for official use only". Research suggests that the two parts of the definition of restriction are in fact referring to the same object. While the first has introduced the concept or RESTRICETD in Latvian legislation, the second stipulated that regardless if legislative differences, it is the duty of Latvia is to respect classification applied to an item of information by another country.9 As opposed to other legislatures, the definition included in the FOIA bears little instrumental and interpretative value and need substantive clarifications.10

[8] A practical example here is the estimate documentation of the renovation of the presidential residence. While parts of the document are legitimately restricted, due to the concerns of national security and wellbeing of the president (e.g. the materials used in renovation, that may reveal information on whether the glass is bullet proof or walls especially re-enforced or information on the security systems), other parts of the same information are rightfully accessible to the public.

[9] Classification "Restricted" is used widely in different countries,

[10] The overall rules of classification provide that the release of RESTRICTED information may cause "undesired effects". In the United Kingdom, for example, RESTRICTED information is described as such where the release will have effects such as significant distress to individuals, adversely affecting the effectiveness of military operations, or to compromise law enforcement (Official secrets act)

### III.a.11. Certifications, examinations - assessment processes

The aim of the restriction provided in article 5, section 2.5. of the law is to guarantee the objectivity of evaluation and ensures the equality of those taking part in the assessment procedure. The restriction protects the individual opinions of evaluators, assuming that anonymity allows avoiding pressure. While this norm is predominantly to be considered a general regulation, later detailed in special laws, institutions may rely on principles of objectivity and equality, and apply it independently where there is no special law. The examples of the latter are: law on public procurement, law on EU Structural funds, laws and regulations regarding education of all levels, especially testing procedures, and last but not least, regulation of naturalization procedure in Latvia as far as it concerns examination procedures.

There are no absolute exemptions in Latvian FOIA. All restrictions are subject to the proportionality test as described in the Administrative procedure law.[11] However the lack of coherent principles and structure in defining the restrictions renders the scope of restrictions obscure.

### III.a. 12. Accessing information

*Duty to publish*

According to the FOIA (article 10) an institution shall, taking into account the principles of good administration, provide information on its own initiative. The above applies to generally accessible information, content of which remains at the discretion of the particular institution.[12]

*Forms and formalities of the request*

Persons interested can require information both in written and orally. In case of the latter, if information cannot be granted instantly, the institution, following the principles of good administration, must help the applicant to formulate a written request. An applicant is not required so state or justify their interest in particular information. The institution may not decline the request where such information is absent.

[11] Art. 66 of the law, establishes the content of the "considerations of usefulness" akin to "public interest test" present in FOI legislation in other jurisdictions. Such considerations are a mandatory element of all unfavorable administrative acts, including refusals to grant access to public sector information.

[12] Regulation No. 171 of the Cabinet of Ministers of March 6, 2007 "Procedures by which Institutions Place Information on the Internet" provide for the necessary minimum of information institutions are required to render accessible on their Interned web pages.

All requests must contain: name, surname or designation, the place of domicile, place of residence in Latvia or legal address of the applicant. The requests shall be signed.[13] Absence of the necessary formal elements may result in a legitimate inaction of the institution, as the application is considered anonymous. Restricted access information can only be requested in writing. In addition to the above the application must also contain explanation of the need to receive the particular information as well as the intended purpose and form of use of the data.

*Forms of granting access to information*

The institution may grant information in writing, via means of electronic communication or orally. In doing so, the institution to the extent possible, observes the means preferred by the applicant. In case of the institution does not hold the requested information, it issues a formal notification on the place/ institution whose competence it is or that may hold the required information. The FOIA provides for the right of partial access (article 10, section 4) in case if entirety of requested information contains data classified as restricted access information.

*Timeframe*

Institution must grant access to information or issue a refusal within 15 days from the receipt of an application. The time of reply may be extended to 30 days in case fulfilling the request requires a substantive search or processing of information.

*The form and contents of the refusal*

Refusal to grant access to information under the FOIA is an administrative act and must be formulated in written, observing the rules of the Administrative procedure law.[14] Failure to answer (tacit refusal) or failure to reply within the allotted time is an illegal physical action, subject to the possibility to an administrative appeal.

**III.a.13. Implementation, monitoring and appeals procedures**

An applicant can challenge the decision of an institution, both the administrative acts and physical action. The appeal is regulated in the Administrative procedure law and proceeds in two consecutive stages - an administrative appeal to a higher institution followed by the appeal to the administrative court. Apart from the cases where there is no higher institution and tacit refusal, the administrative appeal is obligatory.

While the article 19 of the law establishes that “Compliance with this Law shall be supervised the Data State Inspectorate according to the procedures specified in regulatory enactments.” *De facto* the Inspectorate is not vested with sufficient competencies or resources to act as the guardian of the FOIA.

[13] The Supreme Court has ruled that in case if application forms a legal entity (non-governmental organization) a reply cannot be denied on the grounds that the letter does not contain an Annex with official authorization to sign documents. Requests under FOIA are exempt from the general principle of administrative procedure.
[14] Administrative procedure law, in force since 14.11.2001

### III.b. Quantitative Research

#### III.b.1. General information/presentation of institutions

A freedom of information law (FOIL) can serve as a valuable tool for a policy researcher. The above is true with regard to both information held by national institutions and supranational institutions that hold variety and wealth of information highly relevant to policy researchers. FOIL is arguably an attractive part of a research methodology. It allows the researcher to access information that in majority of cases cannot be compiled or attained through other - non-public - sources. The quality, time-span and trustworthiness of information are yet another argument that encourages the use of FOIL in policy research.

Testing this hypothesis in practical research reveals, that there are several, mostly procedural, aspects of the relevant legislation both on national level in Latvia and in the institutions of European Union, that allows to conclude that FOIL may be a valuable yet an unreliable tool:

- **The right to information confused with the right to substantial reply.** Provision of information within the framework of FOIL appears to be closely intertwined with the concept of "substantial reply" encompassed in the Constitution (Art. 104) and legislation of Latvia (Law of Applications) where provision of information means primarily the duty to explain. While the above frequently adds quality data to the reply, it cannot serve as substitute information in the sense of FOIL. Explanation does not substitute for information.

- **Flaws in interpretation of the procedural duties of institutions under the FOIL and the general administrative law**, especially when it comes to the time of reply. While the timeliness of replies has not been a major concern in the context of requests overviewed here, the situation effectively does not allow planning for FOI replies as a source of information for research.

- **Tacit refusals** are a serious challenge for purposes of comparative surveys as well as general quality of data.

- **EU law establishes the right to access registered documents as opposed to information used in national legislation**. The experience suggests that the requests for information in this case, especially information for research, must be formulated very precise (knowing almost exactly what document is necessary). It limits the possibility to explore themes.

- **There is little possibility to plan or rely on even an approximate time of reply** from an EU institution due to the specifics of procedure.

*Abbreviations*

| | |
|---|---|
| **EU** | European Union |
| **Latvian Television LTD (public service broadcaster)** | Television |
| **Ministry for Children and Family Affairs** | Family |
| **Ministry of Agriculture** | Agriculture |
| **Ministry of Culture** | Culture |
| **Ministry of Defence** | Defence |
| **Ministry of Economics** | Economics |
| **Ministry of Education and Science** | Education |
| **Ministry of Finance** | Finance |
| **Ministry of Foreign Affairs** | Foreign affairs |
| **Ministry of Health** | Health |
| **Ministry of Interior** | Interior |
| **Ministry of Justice** | Justice |
| **Ministry of Regional Development and Local Government** | Regional development |
| **Ministry of the Environment** | Environment |
| **Ministry of Transport** | Transport |
| **National Radio and Television board** | Radio and TV board |
| **Naturalization Board (Ministry of Justice)** | Naturalization Board |
| **OLAF** | The European Anti-Fraud Office |
| **Secretariat of Special Assignment Minister for Social Integration** | Integration |
| **Secretariat of Special Assignments Minister for Electronic Government Affairs** | E-secretariat |
| **State Land Service (Ministry of Justice)** | Land Service |

### III.b.2. Summaries of requests and replies

*Summary of requests and replies of the national institutions*

| Nr. | Institution | Information requested | Reply | Date of request | Date of reply |
|---|---|---|---|---|---|
| 1. | Integration | How many officials have reported a conflict of interest situation in accordance to Article 21 of the law on Prevention of Conflicts of interests? (2007) [15]<br><br>How many officials have refused to carry out an order, arguing that it is illegal? (2003 - 2007) | - One official<br>- No reported instances | 10.01.2008 | 30.01.2008 |
| 2. | Transportation | *Ibid.* | - Not documented since the law does not provide for a specified form in which such information must be submitted to a higher official. | 10.01.2008 | 12.02.2008 |

[15] Article 21 of the Law on Prevention of Conflict of Interest in Activities of Public Officials provides: Public officials shall without delay provide information **in writing** to a higher public official or collegial authority regarding:

1) their financial or other personal interest, as well as financial or other personal interest of their relatives or counter-parties regarding the performance of any action included in the duties of their office;

2) commercial companies the shareholder, stockholder, partner, member of a supervisory, control or executive body of which the public official is or his or her relatives are, or on the fact that the public official himself or herself or his or her relative is an individual merchant who receives orders from the relevant State or local government authority for the procurement for the State or local government needs, State or local government financial resources, credits guaranteed by the State or local governments or State or local government privatization fund resources, except the cases where they are allocated as a result of an open competition.

| Nr. | Institution | Information requested | Reply | Date of request | Date of reply |
|---|---|---|---|---|---|
| | | | Codification of the requested information, since not undertaken otherwise, would be contrary to the principle of good and effective administration | | |
| 3. | Foreign Affairs | *Ibid.* | - No such information. The Ministry informs about the areas of risk identified and preventive mechanisms used to avoid such situations altogether | 10.01.2008 | 11.02.2008 |
| 4. | Education | *Ibid.* | - There have been 27 cases of reports submitted in accordance with Art. 21 procedure (Year 2007).<br>- No reports on illegal orders | 10.01.2008 | 05.02.2008 |
| 5. | Agriculture | *Ibid.* | - No reported instances in both cases | 10.01.2008 | 18.01.2008 |
| 6. | Internal affairs | *Ibid.* | - No reported instances in both cases | 10.01.2008 | 29.01.2008 |
| 7. | Environment | *Ibid.* | - No reported instances in both cases | 10.01.2008 | 28.01.2008 |
| 8. | Culture | *Ibid.* | - No answer about conflicts of interest<br>- No reported instances about illegal orders (June 2006 - February 2008) | 10.01.2008 | 01.02.2008 |
| 9. | Family | *Ibid.* | - No reported instances in both cases | 10.01.2008 | 25.01.2008 |
| 10. | Regional development | *Ibid.* | - No reported instances in both cases | 10.01.2008 | 31.01.2008 |
| 11. | Health | *Ibid.* | - No reported instances in both cases.<br>The ministry provides an explanation how odds of illegal orders are minimized through the system of internal controls | 10.01.2008 | 05.02.2008 |
| 12. | Finance | *Ibid.* | - 42 officials in the State Revenue Service and one official in the Central Statistics Bureau of Latvia<br>- No reported instances | 10.01.2008 | 25.01.2008 |
| 13. | Justice | *Ibid.* | - No reported instances in 2007 | 10.01.2008 | 30.01.2008 |

| Nr. | Institution | Information requested | Reply | Date of request | Date of reply |
|---|---|---|---|---|---|
| | | | - No reported instances in 2003 - 2007 | | |
| 14. | Economics | *Ibid.* | - | 10.01.2008 | - |
| 15. | Defence | *Ibid.* | - | 10.01.2008 | - |
| 16. | E-secretariat | *Ibid.* | - | 10.01.2008 | - |
| 17. | Justice | On system of remuneration<br>Regulations regarding additional remuneration<br>Several contracts, in particular "government agreements" and reports on their implementation submitted by the contractor | The ministry has provided a very thorough explanation on each of the questions as well as all the requested documents that were available in its registries. With regard to the one missing document, that the ministry was therefore unable to supply, there is a statement of reasons as to what might have caused the absence of such information. | 10.01.2008 | 29.01.2008 |
| 18. | Naturalization board | On the system of controls applying to the "government agreements" concluded within the Naturalization Board<br>A copy of a particular "government agreement"<br>A report on implementation of the requested government agreement | The institution has provided an explanation regarding all questions included in the request as well as copies of all requested documents. Additional information is included, which provides the context for the received information and helps to interpret the situation within the institution | 10.01.2008 | 25.01.2008 |
| 19. | Land Service | Internal regulation on remuneration and material stimulus for the officials of the Land service and<br>Information on the related set of criteria, as well as copies of several government agreements and reports submitted about their implementation | The institution has provided a thorough reply, explaining the content of the requested documents, as well informing about more recent amendments/versions, and supplying those in addition to the requested. When information that cannot be discharged due to factual burdens, the reasons are explained. | 10.01.2008 | 30.01.2008 |
| 20. | Radio and TV Board | The requested information addressed the issue of the use of radio spectrum after a full switchover to digital television and turning off the analogous broadcast. | In its reply the institution has not addressed the first question about the policies on use of the free spectrum after the digital switchover. | 10.01.2008 | 30.01.2008 no information |

| Nr. | Institution | Information requested | Reply | Date of request | Date of reply |
|---|---|---|---|---|---|
| | | Since digital broadcasts take up significantly less of the most valuable spectrum than analogous broadcast, the use of the free spectrum becomes both an important economic as well as policy issue.<br>Another question in the request addresses the position of Latvia regarding the newly adopted EU directive "Audiovisual media services directive" | The institution has notified PROVIDUS that it does not prepare the position of the Republic of Latvia on EU directives, and that the competent institution in the present case is the Ministry of Culture. | | |
| 21. | Integration | A research report on *Discourses of politicians, journalists, supporters and adversaries with regard to Riga gay prides.* The report was allegedly ordered, yet never published | PROVIDUS requested information - a study - with the name of its author and the title that had become known amongst the experts interested in integration policies. The Secretariat's reply stated that such study had never been undertaken (neither the author nor the title of the document had been recognized). The Secretariat informed, however, on a different study, supposedly addressing the same issued had been commissioned. The authors as well as the name of the study were stated in the reply.<br>The reply was received on 09.03.2008 providing that the document will be sent over email "in the coming days". | 10.01.2008 | 11.03.2008 |
| 22. | Agriculture | Information about receivers of subsidies for producing bio-fuel in years 2006 and 2007 (first half) | The reply of the ministry provides a detailed insight about the amount as well as receivers of the subsidies in Latvia in the period of 2006 and 2007. Where information cannot be discharged due to administrative reasons, the Ministry has provided a thorough explanation. | 10.01.2008 | 06.02.2008 |

| Nr. | Institution | Information requested | Reply | Date of request | Date of reply |
|---|---|---|---|---|---|
| 23. | Foreign Affairs | Correlation tables on implementation of e-commerce directive (2000/31/EC) in Latvia as well as information about Latvia's position regarding the Directive 2007/65/EK (Audiovisual media directive).<br>As well as copies of the replies prepared by the Republic of Latvia to the questionnaire of European Commission intended to inform the preparation of three annual reports on migration and integration in the EU member states | The Ministry has provided explanation of all questions. PROVIDUS has not received the three questionnaires, since the responsible institution has not supplied those. The request in this part has been forwarded to the competent institution.<br>The remaining two questions have been answered (a substantial reply).<br>The ministry has indicated the competent institutions responsible for implementation of EU legislation in Latvia. While no other institutions holding such information have been indicated; no copies of documents have been received about the third question, but a descriptive reply. | 10.01.2008 | 8.02.2008 |
| 24. | Finance | Information describing the impact of the reform of the system of remuneration within the public service. Specifically extracts from the circulars gathered by the Ministry describing levels of salaries of certain groups/levels of public officials at specified moments of time | Compiling the requested information takes additional efforts and resources, therefore the Ministry extended the timing of reply to 30 days as provided in the FOIL. The reply is very specific and provides detailed answers to all questions in the application for information | 10.01.2008 | 19.02.2008 |
| 25. | Interior | The indicators used to evaluate the work of the Ministry and institutions in its supervision | The Ministry has provided a copy of the system of indicators used to evaluate the work of the institution. | 10.01.2008 | 16.01.2008 |

**III.c. Conclusions and recommendations**

III.c.1. The nature and content of requests

The questions/requests addressed to the institutions correspond directly to the fields of research interest and the ongoing research activities of PROVIDUS. Within the framework of the good governance program, and anti-corruption research in particular, we asked all ministries to provide the statistics on implementation of a once highly debated article of the law on prevention of conflicts of interest in public administration. The researchers of criminal justice program requested the information the plans of work and especially the quantitative indicators for evaluation of the work of the ministry - information requested annually. In the field of European policy our researcher formulated a request to obtain copies or the reports of Latvia submitted to the EU about the current state of migration policy in Latvia in the last three years, necessary to inform an ongoing research project.

Another set of requests responded to topical issues on the social agenda. The most visible amongst those were the effects of reforming the system of remuneration intended to mitigate the differences between the public and the private sector. Another set of information was intended to complement the content of our analytical portal www.politika.lv, especially the new environmental topic. PROVIDUS requested information on the size and the receivers of subsidies for producing bio-fuel in Latvia. While requests for research reports created under the auspices of ministries, e.g. the research report on discourses of media and politicians on the highly controversial gay prides in Riga, were intended to inform the tolerance debate.

Finally, several requests were made to gather the information necessary to help fellow research institutions, conducting comparative studies on EU countries, in particular regarding media policy in Latvia.

There were two main types of questions asked. Firstly, the majority of requests (addressed to all ministries) required gathering statistics on occurrence of certain practices within ministries (reporting a conflict of interest situation), hence the form of the reply (explanation or a hard copy of a document) was irrelevant. Secondly, the main aim of the request was to obtain hard copies of information.

III.c.2. Timing of reply

The FOIL establishes that an institution must provide information or issue an administrative act in case of refusal, within 15 calendar days. In case where the nature of the request requires additional processing of information or the request is voluminous, the institution can extend the reply to 30 calendar days. It is important to note, however, that the FOIL is an older special law in relation to the Administrative procedure law that requires institutions to reply to a person (e.g. issue an administrative act) within one month upon the receipt of an application. While the latter is not the applicable norm to the FOI requests, it is an important explanatory variable, when considering and evaluating the administrative practices.

The majority of replies was provided within the timeframe set by the FOIL or exceeded it insignificantly (Table 1). The total number of replies reviewed below is 22.

Table 1 Timing of replies in calendar days

| Timing of reply | Days | % of all replies |
|---|---|---|
| Up to 15 calendar days* | 5 | 23% |
| 16 to 20 | 8 | 36% |
| 21 to 25 | 2 | 9% |
| 25 to 30 | 3 | 14% |
| 30 and more | 4 | 18% |

** Required by law*

Table 1 illustrates that the majority 8 out of 22 replies were prepared in 16 to 20 days from the request, while 5 of replies comply exactly with the timeframe provided in the Law. Every forth reply was prepared within the timeframe provided by the general legal framework - the Administrative procedure law. A relatively minor number or replies exceed both the timeframe provided by the special law, the FOIL, and the general rule of one month.

The experience shows that while all requests contained an email address, and when the information requested was expected to be voluminous, a preference to electronic dissemination was clearly stated in the letter, the institutions are reluctant to use the electronic form. The experience also show that the efficiency gains may be significant, thus the Ministry of Interior replied within six days from the request, sending a full set of quantitative indicators utilized to evaluate the work of the institution.

Three institutions have not replied or notified about the reasons of not replying to the request for information (see details 14-16 in Summary of requests and replies part above), one institution has issued reply that indicates the institution that holds information sought for, however, did not transfer the request to the competent institution, as provided in the Administrative procedure law (National Radio and Television Board).

In replying to the request many institutions show a high standard of complying to the principle of good administration. The answers received reveal that institutions frequently create a new set of data in order to fulfil the request, especially when it concerns the statistical information on the work or internal procedures of the institution. Conversations with the officials preparing a particular reply, suggest that such need is frequently linked to technical problems, for example, when different sets of data related to the same topic are processed in separate databases with different technical characteristics. While the peculiarity of the Latvian FOIL is that the law requires “generating” information which the institution ought to but has not produced, the actual practice tends to exceed this requirement. A reply to a FOIL request most commonly provides a substantial (explanatory) answer to the question, or background information for interpretation of the information supplied (information contained in the hard copies).

III.c.4. Communication with institutions

As a practice of good administration the FOIL requires the institution to specify the content of the request if it has not been sufficiently explained in the original request. In practice the

possibility is often utilized in order to specify the amount or time-span of the data requested, or explains the limitations of the institution and attempt to find a compromise.

On several occasions discussion with the officials considering a particular FOIL request led to a reply of a much higher informative and research value, as the researcher was allowed to gain insight and explanation in the nature and, occasionally, form of information the institution holds on the particular topic. The most illustrative example here is the data from the unified circulars gathered by the Ministry of finance, which describe the levels of remuneration in public institutions, organized according to the classificatory of professions in Latvia. Only after the conversation with the person in charge of the reply it was possible to formulate the request in a way that allows the data to be compared with the information on remuneration of the same type of work in the private sector.

While all requested information was generally accessible according to the FOIL - the status that allows the requestor to withhold from specifying the reasons for the request, the practice shows that institutions feel more comfortable to relinquish information if they are aware of the purposes for the request and the use of information.

III.c.4. Research value of the information received

It is commonly argued that FOI requests yield information of a high value to research, chiefly due to its official nature and the inherent trustworthiness. The information received through FOI requests described above has proven to be a valuable source of both arguments and data for the ongoing research and publications.

III.c.5. Key challenges

1. Provision of information within the framework of FOIL appears to be closely intertwined with the concept of “substantial reply” encompassed in the Constitution (Art. 104) and legislation of Latvia (Law of Applications) where provision of information means primarily the duty to explain. While the above frequently adds quality data to the reply, it cannot serve as substitute information in the sense of FOIL. Explanation does not substitute for information.

2. There appears to be confusion in interpretation of the procedural duties of institutions under the FOIL and the general administrative law, especially when it comes to the time of reply. While the timeliness of replies has not been a major concern in the context of requests overviewed here, the situation effectively does not allow planning for FOI replies as a source of information for research.

3. Tacit refusals still persists as a problem and pauses a serious question for purposes of comparative surveys as well as general quality of data.

# IV. Access to Public Information in Romania

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## IV.a. Legislation and Practices

IV.a.1. The legal framework

The development of Romanian legislation regulating the free access to documents of public interests has been marked by a significant breakthrough in 2001 when a Freedom of Information Act has been passed by the Romanian Parliament. After long and intense efforts on the part of civil society, Law no. 544/2001 has been adopted, its provisions regulating the free access to information and to documents of public interest. The coming into being of this particular law was followed by the adoption in February 2002 of the so-called "methodological norms", regulating its implementation and clarifying a set of issues related to the required standards in applying the principle of institutional transparency.

For the sake of conceptual and argumentative coherence the terms "Romanian Freedom of Information Act" and "Law no. 544/2001" will be used interchangeably along the lines of the present analysis. Whereas the former denomination is mostly used in the literature dealing with the issue of institutional transparency, the latter term is employed within the Romanian legal and think-tank based research environment.

In order to provide the reader a comprehensive view over the basic principles lying behind the Romanian Freedom of Information Act, a review of several legal definitions of key issues such as "public information", "public document" or "public authority" is required.

Thus, according to article 1 of the Romanian Freedom of Information Law, the "free and unrestricted access to information of public interest of anyone interested in it, represents one of the fundamental principles of any relationship between individuals and public authorities". Article 2, letter a) of the same law defines "public authority or public institution" as "any public authority or organization, as well as any autonomous organization (REGIE) using public financial resources and developing activities on the territory of Romania".

Letter b) of the same article mentions that "by information of public interest the present law refers to any information related to or resulting from the activities of a public authority or public institution, regardless of the frame, form or way of expression of the information". In an attempt to address the intricate relationship between public information and data having a private character, the same article refers to the information regarding "personal data". According to these legal provisions by "personal data" one shall understand "any information about an identified or identifiable physical person".

At this point, the following remark has to be made: there are controversial and unclear aspects of Law No. 544/2001 on Access to Public Interest Information and of the Government Decision No. 123/2002 which regulates the application of the law[16]. There are unacceptable

[16] For instance, Law no. 544/2001 states that requests must be processed within 10 days, representing calendaristic days. The Norms regulating the application of the Law are logically incompatible with the interpretation above as they refer to 'working days'.

limits of the access to information within Law 544/2001 regarding the free access to the public interest information introduced in the Methodological Norms for the application of the law hereto. These norms cannot add to the law, neither restrict the access to information.

Moreover, the requirements imposed by the latest legislation regarding personal data and classified information are often in contraction with the FOIA stipulations. Within the context of this reality, the lack of communication between the various state institutions responsible with the elaboration of the two aforementioned laws had as a first effect **the absence of a unitary framework to settle the relation between the public interest information, personal data and classified information.** Such a problem subsequently leads to legal issues (unclear interpretation of the relation between the data types articulated by cooperation and consultation between the state institutions).

IV.a.2. Status at the institutional level

The adoption of the Freedom of Information Act in 2001 was an important step forward in Romania toward establishing good governance and accountability of public institutions. As a very important element, it must be highlighted that in Romania the access to public information has two constants:

- On one hand, the lack of communication between the state institutions responsible with the drafting, implementation and improvement of the laws concerning this aspect;

- On the other hand, the excessive lack of transparency of public institutions in providing public interest information.

The real and constant access to the public interest information is a key element in the democratization process. The access to information allows the public to have an adequate image and to form a critical opinion regarding the society it lives in and the authorities governing it; it encourages the informed participation of persons/groups/communities to public interest matters; it helps improve the efficiency of the administration, the legislative and justice and to maintain their integrity by reducing corruption risk; it contributes to the legitimacy of the administration as a public service and the increase of the confidence in the public institutions and authorities. The access to information is able to lead to institutional transparency, transparency in the management of the public funds, responsibility of the public clerks, exposure of corruption and, last but not least, the satisfaction of the individual interests of the persons desiring public interest information. Practically, the real access of persons and press to the public interest information essentially determines the evolution toward a stable democracy.

IV.a.3. Restrictions

The enactment of Law no. 544/2001 regarding the free access to the public interest information - even if it comes 11 years after the change of the political regime - is undoubtedly the first important intercession in ensuring the access to information. Unfortunately, this intercession is incomplete from the legislative point of view. Besides the limits of the law itself (especially concerning the exceptions to the access to information), there is a large number of other laws that, in various fields, restrict or forbid the access to the public interest information. The diversity and contradictory character of some interpretations of the legal norms in force at present create at least a state of ambiguity for the information

applicants, for the public institutions and authorities and judges and, they certainly reduce the benefits such a law should bring to the Romanian society.

A legislative correlation is essential to allow the operation of the information access mechanism as well as to prove the political will to provide a real and constant access - not superficial, illusory and occasional - to the public interest information.
Access to information regarding public institutions should be granted to anyone. Unfortunately, article 12 of the law entails **on the right to access public interest information the most drastic limitations, partially unconstitutional and that violate the principle of proportionality.**

First and foremost, article 12, that settles the exceptions of the free access to the public interest information, **exceeds, due to the listed reasons, the constitutional limits.** Thus, article 31 of the Constitution that guarantees the right to information, provides in paragraph 3 that the access to information *must not prejudice the protection measures of the young or of the national security*. Thenceforth, article 49 of the Constitution, that settles the possibility and conditions under which may take place *the restriction of the exercise of some rights or liberties*, restrictively lists the reasons for which the exercise of a right may be limited: *defence of the national security, order, health of public morals, of the rights and liberties of citizens, the progress of the penal instruction, prevention of the consequences of a natural calamity of especially grave catastrophe*.

Comparing the possible limitations established by the two articles of the Constitution with those listed in article 12 of Law 544/2001, it results that the latter contains limitations inexistent in the Constitution, therefore not allowed by the fundamental law. They are those from paragraphs (b) *information regarding the deliberations of the authorities, as well as those concerning the economic and political interests of Romania, provided they are part of the classified information category, under the law* and (c) "*information regarding commercial or financial activities, provided their publication would infringe upon the principle of loyal competition, under the law.* Concerning the limitation entailed by paragraph (b), it must be mentioned that the text reference to the category of the classified information does not bring this limitation into the sphere of the national security - which, according to the Constitution, would be a legitimate reason to restrict the access to information - as this reason, of the national security is clearly provided in paragraph (a) of article 12.

Consequently, the limitation reasons from paragraph (b) are clearly beyond the constitutional limits. Albeit, the limitation reasons regarding the "economic and political interests of Romania" or the "deliberations of the authorities" - without this information being included in the national security category - must, by all means, not constitute secrets as they affect the life of each person of this country; while as far as the authorities are concerned, they operate on public funds and must be responsible toward tax payers, so as their deliberations must not be kept secret. In its turn, the limitation from paragraph (c) - without discussing on this occasion its opportunity - is obviously unconstitutional too, as it is not found in any of the constitutionally allowed restriction categories

Second of all, the exceptions provided by article 12 stipulate **interdictions on this right, not only on its exercise or, contrary to article 49 of the Constitution**, which provides in paragraph (1), that ***the exercise*** *of certain rights or liberties* ***may*** *be restricted only by law and* ***provided it should be required, as the case stands,*** *for…* and in paragraph (2): *The restriction must be* ***proportional*** *to the circumstance causing it and* ***may not infringe upon the existence***

***of the right or liberty***. Article 12 entails, as an example, restrictions on the content of the right to information in the following paragraphs:

(a) *information in the field of national defence, security and public order if, in compliance with the law, it belongs to the category of classified information;* (b) *information regarding deliberations of the authorities, as well as those concerning the economic and political interests of Romania if they are part of the category of classified information, under the law.*

Practically, the two paragraphs tell us that everything going into the category of "classified information", is *a priori* exempt, and shall not be disclosed, automatically leading to the rejection of any request that would envisage an information of the "classified" category, according to a different law from the hereto[17].

Such general exceptions (**all** classified information is exempt), reduce the content of the right of access to information; maintain the institutional opacity of certain major interest public institutions and authorities, being typical exceptions of the legislation of the totalitarian systems.

The text must be amended in order to introduce the **proportionality criterion** for each circumstance where the disclosure of information is refused/ approved, such as provided by article 49 of the Constitution. The information requests, even when they have as object the national security field, must be **weighed** against the reason due to which the requested information should not be disclosed. In this assessment process, **the authority or institution refusing the disclosure of information should prove the existence of an imminent, real and measurable danger** for the national security, for instance, that would follow the disclosure of that information.

Furthermore, within this pondering system, we must first take into consideration the public interest in finding that information. When the **public interest in finding out information is prior** to the interest in maintaining the secrecy of that information and in avoiding the possible negative effects on the public authorities or institutions, **the information must be disclosed**.

Within the context of the restrictions on the content of the right of access to information, the reference issue arises, in paragraphs (a) and (b) of article 12, to other laws establishing the categories of classified information. It is unjust that the law of the access to information refers to other laws (without even mentioning them) in order to define the exceptions from the right guaranteed by this law. This legislative tactics has left unsettled the essential issue, that of establishing the "exception" character from the free access for each request of certain information.

One must also envisage the circumstance that the laws being referred by the law of the access to information, may change in the future, affecting - positively or negatively - yet certainly in an unpredictable manner the norms regarding the access to the public interest information. Similar references - to other laws - are also found in the other paragraphs of

[17] Law no. 182 of 12 April 2002 on the protection of classified information. Published in the Official Gazette, Part 1 no. 248 of 12 April 2002.

article 12, but those texts also introduce criteria for the comparative assessment of the interest to obtain information and that of refusing the disclosure of the information; such criteria are absent in the first two paragraphs, which renders those exceptions absolute, to limit the content of the right of access to information and to lay beyond the possibility to comparatively assess the conflicting interests.

The issue of the existence of a public register that all institutions should use in order to make public the documents it produced and can be of interest for citizens. The issue of the proactive publication of information of public interest.

Article 5 of Law no. 544/2001 entails the public authorities and institutions the obligation to communicate, *ex officio*, by publishing in an informative annual bulletin, a series of public interest information, listed restrictively. Among them, there is the ***list comprising public interest documents***. This obviously determines a selection, prior the publication, by the public authorities and institutions of the information they hold, allowing them to decide based on discretionary and subjective criteria, that certain information categories should not be of public interest, **the potential applicants for information being unaware of the information categories to which, according to the will of the public authority or institution, they don't have access.**

The text under consideration must be **modified in the sense of binding** the public institutions and authorities to **publish the list of all categories of documents/ information being in their possession,** and where considered necessary, what **documents information are not considered as being of public interest.** The same would not lead to the disclosure of the information that the institutions and authorities do not consider as being of public interest, as our proposal envisages only an indication of the category of field where the information would not be of public interest. Such a modification is not required as some information may be of public interest but a certain public institution or authority still may **not** consider as such. The absence of such a modification would deprive the potential information applicants of complete information regarding the activity of the public institutions and authorities, which is necessary to formulate their requests under Law 544/2001, also with regard to the information that is not considered as being of public interest by the ones holding that information.

Considering that the law provides the possibility to contest in court the refusal to provide information, the information applicants should know all the categories of information/ documents held by the public institutions and authorities in order to realistically and fully be able to exert the right to demand information. Because of such actions, the awareness of the law was improved and most institutions appointed officials, adopted internal rules and created registers of public information. We think that, in order to improve authorities' activity in this matter, each institution should have annual reports regarding its requests based on the FOIA law.

IV.a.4. Sanctions for the wrongful application of the FOI law

The Freedom of Information Law includes provisions for imposing sanctions on public authorities and employees in cases where information is unlawfully withheld. Typically, the cases involve the body or the employee unreasonably refusing to release information or altering or destroying documents. The sanctions can be imposed against the body itself or as administrative sanctions against specific employees.

Most laws provide fines for egregious violations. The Romanian Law on Access to Public Information states that “the explicit or silent refusal of the designated employee within a public authority or organization to enforce the provisions of this law shall be considered as infringement and the employee shall be deemed disciplinary responsible.”

An important issue to be taken into consideration would be sanctioning the verbal refuse. Law no. 544/2001 states that requests can be verbal or written, but a verbal refuse is almost impossible to prove in a court of law. Sanctions of the institutions and of the personnel responsible for making the information public are a necessary part of every law so as to show the seriousness of failure to comply. However, there is a general reluctance by government bodies to sanction their own employees for following their general policies.

IV.a.5. Conclusions

The right of accessing public information is an important human right, necessary for the enjoyment of other human rights but it can only be effectively exercised and implemented on the basis of laws, regulating this right in accordance with international standards. The Freedom of Information Act (FOIA) in Romania is an important step towards democracy, essential for transparent and accountable government as it entitles anybody to ask a public authority for any recorded information that they keep. This Act gives Romanians greater access to information about how decisions are taken in government and how public services are developed and delivered. The right of access to information makes possible the public involvement in formulating public policies and in the decision-making processes of governance.

However, the enjoyment of the right to public information, even though encompassed in the provisions of a 7-year old law, is sometimes impeded by a series of other legal provisions stipulated in two other laws: Law 677/2001 regarding the protection of personal data and Law 182/2002 regarding the register of classified documents. These two laws provide the basis for interpretations by the institutions and, unfortunately, sometimes by the courts as well, which are contrary to the right of public information provided for in Law 544/2001 (Romanian FOIA). The second part of the present research comprises a case study that shows the problems brought by the different interpretations of FOIA requests by various institutions and by the lack of a unitary practice.

**IV.b. Quantitative Research**

In order to test the level of implementation of the Romanian FOIA (Law 544/2001) within the framework of the trilateral PASOS project, Institute for Public Policy (IPP) Bucharest addressed a series of FOIA inquiries to the central administration. The 15 ministries that formed the Government in February 2008 were targeted. All of them received one single letter containing 9 distinct requests of information (some ministries received only 8 requests). The requests were sent by regular post in mid-January 2008. As mentioned above, the legal timeframe for the ministries to provide the answers is 10 days. However, practice shows that in most cases the institutions request an extension of that timeframe to 30 days, extension specified in the law for answers that require additional preparation. In this particular case, only one ministry provided the answer in less than 10 days, that is the Ministry of Justice. It is followed in terms of quickness by the Ministry of Agriculture and Rural Development (14 days). However, despite their rapidness, the answers were not completely satisfactory. Moreover, a number of 5 ministries responded after the legal deadline of 30 days (after having requested the legal extension) and only after IPP representatives insisted to receive the answers arguing that otherwise they will have to sue the ministry. These are the Ministry of Economy and Finance, Ministry of Interior and Administrative Reform, Ministry of Education, Ministry of Culture and Ministry of Communication and Information Technology.

*Abreviations*

| | |
|---|---|
| **MAE** | Ministry of Foreign Affairs |
| **MEF** | Ministry of Economy and Finance |
| **MJ** | Ministry of Justice |
| **MIRA** | Ministry of Interior and Administrative Reform |
| **Map** | Ministry of Defense |
| **MT** | Ministry of Transportation |
| **MEdu** | Ministry of Education, Research and Youth |
| **MMF** | Ministry of Labor, Family and Equal Chances |
| **MM-IMM** | Ministry of Small and Medium-Sized Enterprises, Commerce and Tourism |
| **MADR** | Ministry of Agriculture and Rural Development |
| **MSP** | Ministry of Public Health |
| **MDLPL** | Ministry of Development, Public Works and Housing |
| **MMDD** | Ministry of Environment and Sustainable Development |
| **MCC** | Ministry of Culture and Cults |
| **MCTI** | Ministry of Communication and Information Technology |

*Requests of public information to Romanian ministries*

| Institution | Request sent (by IPP) | Request received (by ministry) | Answer received (by IPP) | Requests received by IPP via | Answer's overall quality |
|---|---|---|---|---|---|
| MAE | 14.01.2008 | 18.01.2008 | 11.02.2008 | Mail | Satisfactory |
| MEF | 14.01.2008 | 21.01.2008 | 28.02.2008 | Mail | Satisfactory |
| MJ | 14.01.2008 | 16.01.2008 | 25.01.2008 | Mail | Satisfactory |
| MIRA | 14.01.2008 | 18.01.2008 | 22.02.2008 | E-mail | Satisfactory |
| MAp | 14.01.2008 | 21.01.2008 | 14.02.2008 | E-mail | Satisfactory |
| MT | 14.01.2008 | 17.01.2008 | 30.01.2008 | Mail | Satisfactory |
| MEdu | 14.01.2008 | 17.01.2008 | 21.02.2008 | E-mail | Partial |
| MMF | 14.01.2008 | 18.01.2008 | 04.02.2008 | E-mail | Satisfactory |
| MM-IMM | 14.01.2008 | 18.01.2008 | 14.02.2008 | Mail | Satisfactory |
| MADR | 14.01.2008 | 17.01.2008 | 28.01.2008 | Mail | Satisfactory |
| MSP | 14.01.2008 | 18.01.2008 | 31.01.2008 | Mail | Satisfactory |
| MDLPL | 14.01.2008 | 17.01.2008 | 01.02.2008 | Mail | Satisfactory |
| MMDD | 14.01.2008 | 17.01.2008 | 17.02.2008 | Mail | Partial |
| MCC | 14.01.2008 | 17.01.2008 | 27.02.2008 | E-mail | Satisfactory |
| MCTI | 14.01.2008 | 17.01.2008 | 26.02.2008 | E-mail | Partial |

As one can see from the table above, there are 3 ministries whose answer was far from complete: Ministry of Education, Ministry of Environment and Sustainable Development and Ministry of Communication and Information Technology. There is also a fourth ministry whose answer was not complete, Ministry for Small and Medium-Sized Enterprises, but this is a particular case since it existed only since mid-2007 and therefore had little information to provide. In the tables below the answers are grouped by question and by ministry (requests 1 to 9):

1. Requests the annual reports for 2006 and 2007 of the implementation of FOIA , reports that each ministry is legally bound to draft in a standard format, as requested by the Agency for Governmental Strategies;

2. Aims at revealing whether the ministry has drafted the list of classified information that it works with, as the law requires;

3. “What are the annual costs related to the website?” - An essential tool for keeping people informed.

4. “What are the rules that regulate the categories of classified documents in your institution?”

5. “Within your institution, is the person in charge of applying the FOIA also in charge of other duties?” - By this request we aimed at monitoring to what extent the ministries consider a priority providing citizens with information;

6. “Please provide us with the number of cases in which civil servants in your institution were sanctioned for not properly implementing FOIA”?

7. “Please provide us with the number of law suits intended to your institution by individuals or juridical entities”;

8. “Please provide us with the paying roll (of a specific department within the ministry)” - as expected, this was the most controversial issue; for the sake of simplification and exemplification, IPP requested the paying roll of only one department in each ministry, usually the one related to European affairs;

9. “Please provide us with a copy of the document of attendance register of the employees (of the above-indicated department)”.

| **Request 1 : copies of the 2006 and 2007 report on implementation of Law 544/2001 (FOIA) in the respective ministry** | |
|---|---|
| MAE | The Ministry invited IPP to read the 2006 annual reports on the application of law 544/2001 on the official webpage of the institution, saying that the 2007 annual report is still pending for approval from the Agency for Governmental Strategies. Yet, in the end, they sent both reports to IPP. |
| MEF | The Ministry sent the copies of reports for both years. |
| MJ | The Ministry indicates that the 2006 Annual report can be found on the webpage of the institution, while the 2007 report is not finished yet. |
| MIRA | The Ministry sent the copies of reports for both years. |
| MAp | The Ministry sent the 2006 report for law 544/2001, saying that the one for 2007 is not finalised. In the second answer the Ministry sent this report too. |
| MT | The answer presents the copy of the annual report for the year 2006, while mentioning that the annual report for 2007 is not finished. |
| MEdu | The Ministry only sent the report for 2006. |
| MMF | It sent the copy of the 2006 report, while indicating that the 2007 report is still in work. |
| MM-IMM | The Ministry indicates that it was constituted as an institution only in April 2007, so that it does not have an annual report for the implementation of law no. 544/2001. The 2007 annual report is pending for the approval of the Agency for Governmental Strategies. |
| MADR | The ministry sent the copies of the two required annual reports for 2006 and 2007. |
| MSP | The answer is not satisfactory as it does not address the issue of annual reports drafted on the implementation of law no. 544/2001, the Ministry did not send the reports. |
| MDLPL | The ministry sends the copy of the annual report just for 2007. |
| MMDD | The Ministry sent copies of reports for 2006 and 2007. |
| MCC | The Ministry sent the annual report for year 2006, saying that the one for 2007 is still in work. |
| MCTI | The ministry sent the copies annual reports for 2006, 2007. |

Request number 1 was generally fulfilled by ministries, all of them sending at least the report for 2006 or indicating the web location where it can be accessed. The report for 2007 was only sent by some of the institutions, as the others argued that they haven't finished yet. A particularity is met at the Ministry of Public Health, who instead of sending the reports provided a set of information, but not in the format requested by the Agency for Governmental Strategies.

| Request 2: is there an official classification of the lists of public and confidential documents in your institution? | |
|---|---|
| MAE | The ministry asserts that it uses an impressive number of documents that are tackled according to the internal rules of the ministry and of the international organizations Romania is member of. The answer underlines the fact that the principles of secrete information of these organizations are being obeyed. |
| MEF | The Ministry indicates the link on its website where the list can be found. |
| MJ | The answer indicated the webpage where one can find information of public interest. |
| MIRA | The Ministry indicates that the list can be found on its website without indicating the precise section. |
| MAp | The Ministry says that the list with documents of public interest can be found in the special information newsletter of the Ministry that can be accessed either on the webpage of the Ministry or in the Information spot of the Ministry. The list with classified information is not available to the public. |
| MT | The ministry indicates that due to the latest reorganization process of the Ministry the list with all documents issued or managed by its structures will be available online after it is finalized. |
| MEdu | No information provided. |
| MMF | The Ministry presents a list of categories of documents of public interest, produced and managed by the Ministry, while mentioning that this list is also made public within the Ministry's information point. |
| MM-IMM | The answer presents in attachment the list of documents that are considered as being of public interest and are made public. |
| MADR | The Ministry has a list with all documented produced or managed within its structures, as well as a list with the documents that are secrete. Yet, the ministry does not send the copy of this first list. |
| MSP | Elusive answer: the answer indicates that the documents produced and managed by the Ministry are registered and archived through the e- Doc software application, existing since 2003. |
| MDLPL | The Ministry indicates that the list containing information about the categories of information produced or managed within the Ministry can be found on the web page of the institution. |
| MMDD | The Ministry has provided the list of classified documents for each department within the institution |
| MCC | The answer specifies that there is no document containing such a list. |
| MCTI | The Ministry answers that the list of classified information is...classified in itself |

The request for the official list of classified documents was met differently by ministries. While most of them acknowledged the existence of such a list and provided information concerning it, some of the ministries avoided providing a direct answer. Ministry of Education provided no answer whatsoever, while Ministry of Communication and information Technology wrote back saying that the list of classified information is classified in itself.

Moreover, Ministry of Culture answered that there is no such list, in spite of the contrary legal provisions.

| **Request 3: what was the yearly cost for the maintenance of the web page of the institution (in RON)?** | |
|---|---|
| MAE | 69.462 |
| MEF | The Ministry indicates that the creation and maintenance of the website is done out of own resources, by its employees. |
| MJ | The web page was maintained in 2007 with the help of internal personnel so that it did not entail any costs. |
| MIRA | 18.600 |
| MAp | Cost for the maintenance of the web page: "it cannot be calculated as a distinct spending within the overall budget of the Ministry". |
| MT | 45.371 |
| MEdu | No information provided. |
| MMF | The Ministry indicates that the maintenance of the website is done out of own resources, by its employees. |
| MM-IMM | 83.219 |
| MADR | 1.698 |
| MSP | 1.895 |
| MDLPL | The Ministry indicates that the maintenance of the website is done out of own resources, by its employees. |
| MMDD | The Ministry indicates that the maintenance of the website is done out of own resources, by its employees. |
| MCC | 150.000 (for 10 months) |
| MCTI | 8.441 |

Request number 3 did not create big disputes, except for the Ministry of Education all the other institutions providing the required information. Six of the ministries explained that the web page is maintained by its staff; therefore the exact cost for maintenance couldn't be estimated. However, for those who made public the costs, one is struck by the huge difference between the costs supported by the Ministry of Agriculture and Rural Development and ministry of Health on the one hand (less than 2.000 RON), and Ministry of Culture and Cults on the other (150.000 RON). Even taking into account the obvious difference of quality between the web pages, one cannot wonder how come such a gap can persist between to public institutions equally interested in minimizing costs and maximizing the amount of information provided to citizens. It should be underlined the fact that these on line tools are very useful, as the citizens can save a lot of time by accessing the information they need on line instead of requesting it to the institution and waiting for the answer within the legal deadline.

| **Request 4: what are the rules that regulate the categories of classified documents in your institution?** | |
|---|---|
| MAE | The documents setting the classification criteria: Government Decision (G.D.) no. 0825/2003 - for regulating "state secretes" and internal document of the Ministry containing the list of "secret service information". |
| MEF | This request was not addressed to this Ministry. |
| MJ | When referring to the rules according to which documents and information are being classified, the Ministry mentions article 12, letter a) from Law no. 544/2001. |
| MIRA | The Ministry enumerates a series of Governmental Decisions and internal regulations: Law 182/2002 concerning protection of classified information, G.D.s no. 585/2002, 1365/2002, 781/2002 and a number of unspecified internal regulations. |
| MAp | Rules for classifying documents: Law 182/2002, G.D. no. 585/2002, G.D. no. 781/2002, orders and dispositions of the Ministry. |
| MT | The laws regulating the classification of documents process within this Ministry are: Law no. 182/2002 on the protection of classified information, H.G no. 781/2002 on the protection of secret service information, G.D. no. 585/2002 on the approval of National Standards of classified Information in Romania. |
| MEdu | No information provided. |
| MMF | No information provided. |
| MM-IMM | No information provided. |
| MADR | No information provided. |
| MSP | This request was not addressed to this Ministry. |
| MDLPL | The answer provides a detailed list indicating the categories of documents that have been produced or managed according to Law no. 544/2001, for each considered direction and department within the ministry. |
| MMDD | The Ministry has provided the list of a series of laws and governmental decisions regulating the classified documents for each department within the Ministry. |
| MCC | This request was not addressed to this Ministry. |
| MCTI | The Ministry answers that the list with classified information is established by Governmental Decision that is, in its turn, classified in itself. |

Most ministries replied to this request specifying the rules that regulate the categories of classified documents. Four of the ministries did not reply, while two of them were not addressed this question. As in the case of request no. 3, the Ministry of Communication and Information Technology replied that the rule regulating the list is in itself classified.

| **Request 5: within your institution, is the person responsible for applying the FOIA also in charge of other duties?** | |
|---|---|
| MAE | The ministry does not mention explicitly the other duties that the responsible with the application of law no. 544/2001 has. It just names the person in charged with this law. |
| MEF | The Ministry answers that there are 3 civil servants in charge of applying the FOIA, all of them having other responsibilities as well. |
| MJ | The answer mentions that the civil servant in charge with the implementation of Law no. 544/2001 has other duties as well, but without mentioning them. |
| MIRA | The respective persons have primarily responsibilities concerning the implementation of Law. No. 544/2001. |
| MAp | Elusive answer. It mentions that within the Ministry there is a Compartment for Public Direct Information there is a public servant in charge exclusively with public information. |
| MT | The answer mentions the name of the two people in charge with the implementation of law no. 544/2001, while mentioning that they have other responsibilities than the application of this law. |
| MEdu | The answer mentions that the civil servant in charge with the application of Law no. 544/2001 has other duties as well, but without mentioning them. |
| MMF | The answer presents a detailed list of the responsibilities of the civil servant in charge with the implementation of law no. 544/2001. |
| MM-IMM | The Ministry indicates that the person in charge with the application of the provisions of law no. 544/2001 has also other responsibilities such as communication and public relations, the relation with Parliament and solving petitions. |
| MADR | The answer mentions the name of the civil servant responsible with law no. 544/2001, saying that this person has other duties to fulfil. Yet it does not mention them explicitly. |
| MSP | The answer indicates that there are 2 people responsible for the application of law no. 544/2001 and that they have other responsibilities besides the implementation of this law. |
| MDLPL | The ministry indicates that the person in charge with the application of law no. 544/2001 is part of the Communication Service and bears no other responsibility than the application of this law. |
| MMDD | The person is also in charge of other tasks; however the Ministry does not specify them. |
| MCC | The person in charge of FOIA requests deals also with petitions. |
| MCTI | The person is also in charge of the PR department. |

All institutions have answered to this question. The general conclusion is that the persons in charge of solving the FOIA requests have also other tasks as well within the ministry.

Therefore this may be considered as one of the reasons for which usually FOIA requests are not dealt with in a shorter time.

| **Request 6: please provide us with the number of cases in which civil servants in your institution were sanctioned for not properly implementing FOIA** | |
|---|---|
| MAE | No public servants were sanctioned for not applying the law no. 544/2001. |
| MEF | No public servants were sanctioned for not applying the law no. 544/2001. |
| MJ | No public servants were sanctioned for not applying the law no. 544/2001. |
| MIRA | No public servants were sanctioned for not applying the law no. 544/2001. |
| MAp | No public servants were sanctioned for not applying the law no. 544/2001. |
| MT | No public servants were sanctioned for not applying the law no. 544/2001. |
| MEdu | No information provided. |
| MMF | No public servants were sanctioned for not applying the law no. 544/2001. |
| MM-IMM | No public servants were sanctioned for not applying the law no. 544/2001. |
| MADR | No public servants were sanctioned for not applying the law no. 544/2001. |
| MSP | No public servants were sanctioned for not applying the law no. 544/2001. |
| MDLPL | No public servants were sanctioned for not applying the law no. 544/2001. |
| MMDD | No public servants were sanctioned for not applying the law no. 544/2001. |
| MCC | No public servants were sanctioned for not applying the law no. 544/2001. |
| MCTI | No public servants were sanctioned for not applying the law no. 544/2001. |

The answers to request no. 6 show that, apart from the Ministry of Education who did not provide any information, in none of the other ministries disciplinary sanctions were applied to public servants, in spite of the fact that the ministries were involved in a number of law suits for improper implementation of FOIA, as follows:

| **Request 7: please provide us with the number of law suits against the institutions by individuals or juridical entities** | |
|---|---|
| MAE | 2004: 2 individual law suits<br>2005: 3 individual law suits,<br>2006 : 6 law suits (4 individuals, 2 juridical entities)<br>2007: 4 law suits (1 individual, 3 juridical) |
| MEF | No law suits were intended at central level. However, the Ministry underlines that a number of law suits were filed at local level:<br>2004: 4<br>2005: 0<br>2006: 16<br>2007: 18 |
| MJ | "The number of lawsuits for the requested time span can be found on the official website of the Ministry". |
| MIRA | 2004: 1 individual law suit<br>2005: 1 individual and 1 juridical<br>2006: 4 individual and 4 juridical<br>2007: 4 individual law suits. |
| MAp | 2004: 0 lawsuits<br>2005: 2 lawsuits<br>2006: 1 lawsuit<br>2007: 1 lawsuit. |
| MT | 2004: 2 lawsuits, 2 individuals<br>2005: 1 law suit, 1 juridical person<br>2006: 3 lawsuits, 3 juridical persons<br>2007: 1 individual. |
| MEdu | 6 law suits in 2006; No other information provided. |
| MMF | 2004: 4 lawsuits, 4 individuals<br>2005: 0 lawsuits<br>2006: 2 lawsuits, 1 individual, 1 juridical person<br>2007: 1 lawsuit, 1 individual. |
| MM-IMM | No law suits. |
| MADR | 2005: 2 lawsuits, 1 individual, 1 juridical person<br>2006 - 2 lawsuits, 2 juridical persons<br>2007 - 3 lawsuits. 3 juridical persons<br>2008 - 1 lawsuit, 1 individual. |
| MSP | 2005: 2 lawsuits, 2 juridical persons,<br>2006 : 1 lawsuit, 1 juridical person. |
| MDLPL | Answer provided only the year 2007: 1 lawsuit. |
| MMDD | 2005: 1 individual<br>2006: 1 individual and 1 juridical<br>2007: 1 juridical. |
| MCC | 2004: 1 individual<br>2005: 7 juridical |

| | |
|---|---|
| | 2006: 3 individuals, 9 juridical<br>2007: 1 juridical. |
| MCTI | 2004-2007 the Ministry was involved in no law suits. |

The number of law suits is relatively low, proof of lack of information of the citizens regarding their rights, rather than of a good compliance by the institutions, as our research shows. The Ministry of Economy and Finance was the one confronted with the most of such law suits over the monitored period of the last 4 years.

| **Request 8: please provide us with the paying roll (of a specific department within the ministry[18])** | |
|---|---|
| MAE | The salaries of the employees of the particular inquired department are confidential. |
| MEF | The Ministry argues that this information is classified as personal data. |
| MJ | The answer indicates the number of each category of employees and the correspondent total sum of money for their payment. No name is mentioned whatsoever. |
| MIRA | The Ministry argues that this information is classified as personal data. |
| MAp | The answer invokes the decision of the Constitutional Court asserting that the salaries of individuals even if they are public servants are not of public interest, but rather enters the sphere of personal data. |
| MT | The answer invokes the decision of the Constitutional Court asserting that the salaries of individuals even if they are public servants are not of public interest, but rather enters the sphere of personal data. |
| MEdu | No information provided. |
| MMF | Answer does not indicate the name of employees and their correspondent salaries. Instead it presents the total number of employees of the Direction, the total amount of money directed for salaries and the total amount of money directed for extra benefits. |
| MM-IMM | No information provided |
| MADR | The ministry does not provide a list with the salaries of all employees form the required department, but mentions only the way in which these salaries were calculated. It just gives a list with the employees and their position within the department. |
| MSP | The incomes of employees of the inquired Direction are presented in attachment, in a table. However, the table mentions but the month and the "number of total rights". This table has no title so one cannot actually figure out what information is provided within this table. |
| MDLPL | The answer invokes the decision of the Constitutional Court asserting that the salaries of individuals even if they are public servants are not of public interest, but rather enters the sphere of personal data. However, the Ministry indicates the total income of the employees (salaries and bonuses together) for the April - August 2007 time span. Yet, we asked for the January- August time span. |
| MMDD | The Ministry claims that this data is confidential in accordance with the Employment Bill (art. 155 and 158). The Ministry provides the total income of the employees in the respective department. |
| MCC | The Ministry only provides the total amount of income of the employees in the respective department. |
| MCTI | The Ministry provided a detailed list with the income of the employees in the respective department |

[18] IPP selected one department (usually "Department for European Affairs") in each ministry in order to test the level of transparency regarding the wages of civil servants.

Undoubtedly, request no. 8 referring to the paying roll of the employees in a respective department was the one met with the most reluctance by the ministries. Out of the 15 institutions, only the Ministry of Communication and Information Technology (MCTI) has provided detailed information of the salaries of its employees also mentioning their names. This is somewhat curios, since so far the MCTI had proved to be one of the least transparent institutions, arguing for instance that the list of classified documents and the governmental decision regulating this list were classified themselves. Two ministries provided a list of the salaries of employees by category, but without mentioning their names. Another two ministries specify only the total amount of money for the salaries of all employees in the respective department, without splitting it into categories. However, seven of the ministries provided no data, six of them arguing that this is classified information, most of them invoking a previous decision of the Constitutional Court. This is one of the best examples of the lack of a unitary practice in the central administration.

| **Request 9: please provide us with a copy of the document of attendance registering of the employees (of the department indicated at request no. 8)** | |
|---|---|
| MAE | The document attesting daily presence at work of public servants from the particular inquired department is under the provisions of law no. 677/2001 regarding personal data protection. |
| MEF | The Ministry invited IPP to check these documents at Ministry's headquarter, as it argued that it would take too much time for its employees to centralize and send these documents to IPP. |
| MJ | No list with the daily attendance of civil servants provided. Just an elusive answer referring to the fact that "the salaries of the employees of the European Affairs Direction" have been paid accordingly to the numbers of hours actually worked during each month". |
| MIRA | The Ministry argues that this information is classified as personal data. |
| MAp | Daily attendance sheet is considered by the Ministry as being classified as "service secrete", according to the Guide for classifying information of the Romanian Army, art. 2.1/17. |
| MT | The answer provides in attachment copies of the document presenting the list with the daily attendance of the employees from the inquired Directorate of the Ministry. |
| MEdu | The Ministry provided a copy of the attendance sheets of the employees in the respective department |
| MMF | The Direction for which IPP asked for the list of daily attendance has been established in august 2007. The IPP request asked for information for the January/ August time span. |
| MM-IMM | No information provided |
| MADR | Not a word about this point and about the attendance list for the public servants from the required department. |
| MSP | The daily attendance list attesting the presence at work of the employees of the respective department is presented in an attachment, for each month from the January -August 2007 time span. However, there are several problems:<br>No names are mentioned within this table.<br>The quality of the photocopy is extremely bad so that one can hardly understand what is written in this table.<br>The manner in which this table is written is extremely poor as a common citizen could barely understand something about the activity of public servants from this Ministry. |
| MDLPL | The answer argues that the list providing information about the daily attendance of employees can be accessed at the institution building, as "the process of searching for it and photocopying it would imply extra efforts and a reallocation of the time of employees from several directions". |
| MMDD | The Ministry provided a copy of the attendance sheets of the employees in the respective department |
| MCC | The Ministry provided a copy of the attendance sheets of the employees in the |

| | |
|---|---|
| | respective department |
| MCTI | The Ministry provided a copy of the attendance sheets of the employees in the respective department |

Request no. 9 is tightly connected to no. 8. The topic of this request is also very sensitive in Romania, the purpose for asking it being directly linked with the general objective of this study, so as to assess the level of transparency in Romania. The ministries responded quite differently to this request: five of them provided detailed information, as requested. Other two invited IPP to consult this document at the ministry's headquarter, since it involves a lot of effort to make copies of it. Three of the ministries clearly stated that this information is classified data, considering the nature of the activities of their employees that should remain secret: Ministry of Foreign Affairs, Ministry of Defence and Ministry of Interior. Ministry of Justice in its turn provided only an elusive answer, without effectively answering the question. We can also single out the case of the Ministry of Health, who, despite sending the required information, it sent in such of form that it cannot technically be understood and used, a common practice for institutions that know the provisions of the law.

With regards to obstacles in enforcing FOIA, the experience that the Institute for Public Policy (IPP) Bucharest has gathered over the years in the field of monitoring the application of the FOIA in Romania has shown that the situation is even worse at the level of the local administration, which has been even less often confronted with requests of public information from the citizens and law suits for improper law-enforcing. If at central level the public institutions have become aware of the fact that not-proving an answer to FOIA-based requests can at any moment result in a law-suit and therefore react promptly to such threats made by the civil society, at local level there are only a few places where public authorities are aware of the consequences of not responding to citizens requests and therefore grant little attention to such requests.

One of the things that strikes you the most when looking at the answers from the ministries is that over the four years (2004-2007) there were 0 disciplinary actions against employees for improper enforce of the FOIA. Disciplinary action against employees on this ground is clearly mentioned in Chapter III, art. 21 (1) of the Law 544/2001:"Explicit or implicit refusal of the designated employee within a public institution or authority for the enforcement of the provisions of present law is considered contravention and brings disciplinary action against the guilty person". Coupled with the way in which public servants understand to answer requests of public information, this proves that the general attitude of the public servants of always trying to reduce the amount of information provided (using all sorts of legitimate but mostly illegitimate arguments) is shared by the management of the institution as well.

Law no. 544/2001 is undoubtedly not an ordinary law. It has educational role in the sense that its proper implementation leads to the modernization of the public institutions. It is meant at facilitating the interaction between citizens and institutions, a prerequisite for the public trust in states authorities in any democracy. In the context of the very low level of trust of the Romanians in public institutions it is imperative that such law is enforced adequately. Unfortunately, there is still a long way to go, as there are a series of legal obstacles added to

the institutional ones. As such, there is no unitary practice in interpreting the provisions of this law neither by the institutions themselves nor by the courts, particularly when it comes in conflict with the provisions of two other laws: Law no. 677/2001 regarding the protection of personal data and Law no. 182/2002 regarding the classified documents.

Having said that, it becomes clear that the public institutions and the civil society in Romania must work together to promote the proper enforcement of the FOIA. On the one hand, the public institutions need to incorporate the know how and experience that the civil society gathered over the years and put it to use when training the persons in charge of dealing with FOIA requests, but also the management of the each of the public institutions. On the other hand, the civil society needs to remain open to dialogue, but go beyond sterile criticism and come up with a constructive discourse and proposals for the public institutions. Practice has shown that direct contact between NGO representatives and the persons in charge of applying the FOIA in the ministries is important for mutual understanding and trust.

**IV.c. Conclusions and recommendations**

1. It takes a very long time for a FOIA based request to reach the appropriate department of a Ministry after being officially registered by the registering office of the Ministry. Up to 7 days were necessary for the Ministry of Economy and Finances to bring the IPP FOIA based request to the civil servant in charge with dealing with it.

2. Most of the Ministries asked for an extension period and did not respect the 10 days time frame in which they could ask for this extension. We consider this as an indicator of an inefficient bureaucracy that does not comply with the legal provisions regarding the principle of institutional transparency and public access to information.

3. Most ministries considered that salaries are a matter of personal data although we referred to the salaries of civil servants. Ministries providing this answer invoked the provisions of the Constitutional Court's decision of September 21st, 2006 that mentions that the salaries of public servants are not public, but rather enter the sphere of personal data. However, one ministry provided a detailed list with the names of its employees and the salaries of each, while two others provided the paying roll, but without the names. This shows that there is no consistency with regards to the implementation of FOIA in Romania.

4. Most ministries declared that the documents attesting the daily work presence of public servants are not a matter of public information so that they tried by all means to avoid answering directly to this point of the request addressed by IPP. However, five ministries provided a list with the full names of the public servants and their daily attendance in an acceptable manner.

5. Almost all of the ministries presented the annual reports on the implementation of law 544/2001 in hard copies or made reference to the exact webpage of the Ministry where one can find them. The reports are written in the standard format required by the Agency for Governmental Strategies.

6. Most Ministries indicated the fact that usually there is one or two public servants in charge with the implementation of law no. 544/2001 and that they have other responsibilities besides the implementation of this law. This might explain why ministries do not answer in due time to FOIA based requests.

7. In some cases, one could notice that the answer to the FOIA-based request was provided by different Departments of the same Ministry. Judging this aspect from the perspective of the delay of answers, IPP draws the attention on the poor coordination existing between the different departments of these Ministries.

8. In roughly a third of the cases it was needed for the IPP research team to call the Ministries and asked them what happened with the FOIA based request addressed by IPP. IPP team could notice a general sense of confusion within different departments of the Ministries and a lack of communication between them.

9. A number of 5 ministries did not respect the legal deadline for providing the information required. However, after IPP repeatedly called them and faced them with the perspective of a law suit, they all sent the answers to requests, even though not all of them were complete. In other times, IPP would have brought them to Court.

All in all, it can be noticed that 7 years after the issuing of the Romanian FOIA (Law 544/2001) there are still many flaws in applying it. This project targeted the institutions of the central administration only and revealed an important series of problems. First of all, it is still striking that there are persisting differences between the way different ministries interpret the same request. The answers provided differ from one ministry to another, fact which emphasizes the lack of a common authority that could train the persons in charge of applying the FOIA in each of the ministries. Even though the Agency for Governmental Strategies (ASG) decided to get involved and made a first step issuing a standard format for the yearly reports that the ministries have to present to it, this is far from sufficient.

The ministries have respected the standard format proposed by the ASG and this is significant step forward for efficiently centralizing information concerning the way ministries deal with FOIA requests over the year. However, this step is rendered useless if it is not doubled by other adequate measures such as assigning the right people as responsible for applying the FOIA in each of the ministries, providing them with appropriate training and preventing them from having multiple tasks so that they can focus on effectively applying the FOIA. Moreover, the results of the study show that the bureaucracy is still high within the ministries, since it takes sometimes more than a couple of days for the request to reach the right person. Consequently, the legal 10 day-limit for coming up with an answer is rarely respected, most of the institutions requesting for the legal extension of 30 days, but usually only after the 10-day limit has expired.

# V. EU Legislation and Practices on Freedom of Information

## V.a. Introduction

Freedom of Information legislation aims to ensure community access to contemporary government information (in contrast to archival documentation). FOI is now becoming widely recognized in international law. Numerous treaties, agreements and statements by international and regional bodies oblige or encourage governments to adopt laws. Cases are starting to emerge in international forums.

FOI is essential for public participation. Democracy is based on the consent of the citizens and that consent turns on the government informing citizens about their activities and recognizing their right to participate. The public is only truly able to participate in the democratic process when it has information about the activities and policies of the government. Freedom of information legislation, also described as open records or (especially in the United States) 'sunshine laws', are laws which set rules on access to information or records held by government bodies. In general, such laws define a legal process by which government information is required to be available to the public. In many countries there are constitutional guarantees for the right of access to information, but usually these are unused if specific legislation to support them does not exist.

Over 70 countries around the world have implemented some form of such legislation. Each country organizes its FOI Acts according to its own administrative regulation and practice. All states of the EU have traditionally had some form of administrative secrecy for many centuries. After important struggles for increased openness, Member States have increasingly adopted Freedom of Information Acts introducing laws and regulations concerning the right of access to the information held by public bodies. All these Acts also contain some exemptions to the guaranteed right of access.

**V.b. Main International Sources of FOI**

There is a growing body of treaties, agreements, work plans and other statements to require or encourage nations to adopt freedom of information laws. The growth is especially strong in the area of anti-corruption, where most new treaties now require that signatories adopt laws to facilitate public access to information. Most treaties on environmental protection and participation also include public access rights and have been particularly important in encouraging many countries to adopt national laws on access to environmental information and general FOI laws. There is also a growing recognition of FOI as a human right in both the international human rights treaties and regional conventions:

1. European Parliament Decision of 10 July 1997 on public access to European Parliament documents (97/632/ECSC, EC, Euratom)

2. Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information

3. Code of conduct concerning public access to Council and Commission documents (93/730/EC)

4. Commission Decision of 8 February 1994 on public access to Commission documents (94/90/ECSC, EC, Euratom)

5. Council Decision of 20 December 1993 on public access to Council documents (93/731/EC)

6. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents

7. Green Paper - Public Access to Documents held by institutions of the European Community.

**V.c. Transparency in the European Union**

Policy-makers in the EU have long had a narrow view of "openness", based on an equally narrow view of transparency. Nowadays, the EU believes that the more information it provides to the public, the more the public will get involved, and the more open - and hence legitimate - the EU will become.[19]

There is no general obligation by the European Union that member states adopt freedom of information laws. However, the EU has adopted directives that require member states to adopt laws to provide access to information in specific areas including environmental protection[20], consumer protection, public procurement, and most recently, a law on the re-use of public information.[21] Nearly all EU countries adopted national laws on access to information following a 1990 directive on access to environmental information. Today, the EU treaties require the bodies of the EU to follow rules on freedom of information and data protection that give citizens a right to demand information from the EU bodies. Still, the scope of the Regulation 1049/2001 is limited. Article 255 of the Treaty of the European Union states:

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission's documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.

3. Each institution referred to above shall elaborate in its own rules of procedure specific provisions regarding access to its documents.[22]

The institutions required by the Regulation have adopted rules on access to information which creates rules similar to a national FOI law.[23] The European Ombudsman provides oversight and cases can also be appealed to the European Court of Justice.[24]
The Council's public register of EU documents represents the most significant step in terms of transparency and is certainly a very useful source of information.

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[19] *The right to know or the right to try and find out? The need for an EU freedom of information law* - Ben Hayes
[20] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC
[21] Directive 2003/98/EC of the European Parliament and of the Council on the re-use of public sector information http://europa.eu.int/information_society/policy/psi/docs/pdfs/directive/psi_directive_en.pdf
[22] Consolidated Version of the Treaty Establishing the European Community, Official Journal C 325, 24 December 2002. http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/htm/12002E.html
[23] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents
[24] Homepage: http://www.ombudsman.europa.eu/home/en/default.htm

**V.d. Regulation 1049/2001/EC**

An important success in the work towards a more transparent Union is the Regulation 1049/2001. Regulation 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents grants a right of access to documents of the three institutions to any Union citizen and to any natural or legal person residing, or having its registered office, in a Member State. "Document" is defined broadly and it is assumed that all documents, even if classified, may be subject to right of access unless it falls under one of the exceptions. If access is refused, the applicant is allowed a confirmatory request. A complaint against a refusal can be made with the European Ombudsman or an appeal can be brought before the Court of First Instance.

Since the adoption of the Regulation the European Parliament has worked actively within the Council and in the Courts to affect the application of the Regulation in a transparency-friendly direction. As a result, the EU has become more transparent indeed and we should mention a few examples:

- Incoming documents fall within the scope of the Regulation. Before, the public did not have the right of access to documents originating from a Third Party.

- The public has a right of partial access to documents. Access can only be denied to the specific parts of a document that are secret.

- The exceptions to the right of access are exhaustive which means that the Institutions cannot refuse access to a document on any other grounds than those stated the Regulation.

- The time for handling applications for access to documents are much shorter and the Institutions have a duty to set up registers of documents that include references about the time the documents were submitted, the name/the title of the person/juridical person submitting it as well as the general scope of the request.

In order to state the importance of the Regulation, few statistics and official documents/evaluations' conclusions may be important to be mentioned.

In its first *Report on Public Access to the Parliament, the Council and the Commission documents'* issued one year after adopting the Regulation no. 1049, the Committee on Citizens Freedoms and Rights, Justice and Home Affairs stated that real progress was achieved by the European institutions increasing the number of documents that are made available to the public, setting up the registers while the citizens became increasingly aware of their right of access to documents. Still, the same Committee of the European Parliament that was in charge of drafting the report mentions in the same document that "the Council and the Commission should more often give direct access to documents".

The Committee's evaluation main conclusions were the following:

1. "The European Council does not give full access to the documents under discussion if they have not previously been subject to discussion in the Council of Ministers;

2. The Council and the Commission do not give direct access to preparatory acts of the delegated legislation (eg. Proposals submitted by the Committees assisting the Commission)

3. The Council does not permit the identification of the positions of the various national delegations in the decision making process

4. The Council seems to systematically refuse applications for documents concerning public security on the basis of Art. 4 of the Regulation. All requests for documents must be considered on a case - by - case basis.

5. The Council stopped recording certain meetings to avoid having to provide the tapes on request.

6. The Commission does not set one single electronic register but has several.

7. The annual reports should in the future follow a common methodology between institutions".

Same document also recalls that "a further important step in guaranteeing transparency and citizens' access to documents is by:

- Making audio video resources related to the major events available on the internet

- Further publishing the preparatory acts in the Official Journal. Its electronic version should be developed as soon as possible.

- The Register Services of the Institutions have to inform the citizens after access to a document is partially or completely refused about their right to complain to the European Ombudsman.

From the analysis of the refusing acts, the Committee draw the conclusion that most of the denying answers were not providing a clear explanation to the applicant. The Commission evoked *unspecified exceptions* in a number of 38 cases while the Parliament in 109. The Council used the reason *protection of Court proceedings and legal advise* in 12, 2% of cases. At the level of the Commission such reason was evoked in 3,7% of the cases while in 5% of the cases in the Parliament, the answers touched this explanation.

A new category of explanations was related to the *protection of national delegations* or were concerning the *partially accessible documents of the Council*. It finally evoked *the exception of privacy and integrity of the individual*.

The evaluation underlined the importance of the registers, stating that "all institutions have set up their electronic registers on time; still the Commission has in fact several". These registers have to be constantly updated.

In the end, the Committee of the Parliament recommended a further assessment of the enforcement of Article 4 in order to avoid abuses and guarantee the non discriminatory application of the right of citizens of accessing public documents.

In the *Third Annual Report of the Council on the implementation of the Regulation no. 1049 of the European Parliament and of the Council from 2005*, it has been stated that even in case of sensitive documents of the Council, the access is granted once the author specifies the references that are permitted to appear in the register of documents (at the level of the Council, public register was introduced in 1999). The importance of the public register became more and more evident, as it proved to be an efficient search tool for anyone interested.

Even in the case of classified documents, access is allowed to the conclusions of these papers, after a complex examination of the impact. A document that is still under debate could be accessible to, at least to the content of the document if not to its final conclusions. After February 2004, citizens can consult the on - line all new documents partly released by the Council. While providing full access to these documents, the number of inquiries decreased which shows the impact of electronic means of communication on the transparency of the decision making process. The new requests referred to documents that are listed but not automatically accessible via the register. Many requested registered in 2004 concerned a number of classified documents, the access to which raised a lot of examination work for the staff. In the same year, the average time for processing a request if of 9 working days.

Here are some statistics related to the implementation of the Regulation in the context improving the organisation of the system.

*Number of applications based on the Regulation 1049*

2002 - 2.391
2003 - 2.830
2004 - 2.160

*Number of documents concerned by initial application*

2002 - 9.349
2003 - 12.565
2004 - 12.907

*Professional profile of the applicant at the level of 2004 (main categories of solicitants)*

Academics - 27,6%
Civil society - 21,9%
Lawyers - 10,7%

*Geographical spread of the applicants at the level of 2004 (main categories)*

*Most of the applicants:*
Belgium - 26%
Germany - 14,2%

*The fewest applications*
Estonia - 0,1%
Latvia - 0,1%

*The sector (field) that the applications concerned*

Justice and Home Affairs - 20,1%
External Relations - 14,6%

Internal Market - 14,2%
While 17,9% concerned the applications referring to more than 1 sector.

*Reasons for refusal of access (replies provided by the General Secretariat of the Council at the initial stage) in 2004*

1. Protection of the institutions Decision Making Process -33%
2. Protection of public interest as regards public security - 21,1%
3. Protection of public interest as regards international relations - 16,3%

The average timing for preparing the reply is of 9 working days.

*Reasons for refusal of access (replies provided by the General Secretariat of the Council following confirmatory applications) in 2004.* Confirmatory applications/complaints to the European Ombudsman are examined by the Council Working Party on Information and by the Permanent Representatives Committee. Replies to the applicants and to the European Ombudsman are adopted by the Council.

1. Protection of Public Interest as regards Public Security - 27%

2. Protection of Public Interest as regards Defence and Military Matters - 25,9%

3. Protection of Public Interest as regards International Relations - 21,1%

The average timing for preparing the reply is of 24 working days.

*Number of applications with prolonged deadline according to the Art. 7 (3) and Art. 8 (2) of the Regulation*

*Initial application*

2002 - 2.395
2003 - 2.835
2004 - 2.204

*Confirmatory applications*

2002 - 43
2003 - 45
2004

This active work, regarding openness and transparency continues with the review of the Regulation. "The overriding goal for all friends of transparency in upcoming negotiations must be that the review shall not lead to any steps back for transparency and public access. On the contrary, we must move forward"[25]. In this context, it is important to underline that the

[25] Cecilia Malmström, Minister for EU Affairs, public speech at the European Parliament on March 5th 2008

definition of a document under the Regulation is very important for the debate. Article 6 of the Regulation states that "Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent".

In a more recent report of the European Commission drafted in 2006 which concerns the enforcement of the Regulation at the levels of the Parliament, Council and the Commission, the authors state that the situation improved compared with the previous years. At the end of 2006, the register of documents included 73 708 inquiries. A special attention was brought to the so called "sensitive" documents where access should be granted based on the issuing authority' approval. No such document was included in the registry in 2006.

The statistics included in the report speaks for itself. The main conclusions were that:

- The number of initial request increased with 445 in 2006 compared with 2005. The total number in 2006 was of 3,841.

- The number of confirmation inquiries decreased, 140 in 2006 compared with 223 in 2005

- In terms of the field that the inquiries are targeting, those concerning the field of judiciary cooperation almost doubled.

- 30% more academics were interested in the Commission's documents, in 2006 compared with the previous year. Most of the solicitants still come from Belgium.

- The percentage of the affirmative answers granted in the initial stage increased (73% answers were fully offered and 2,94% answers were partly answered). After deliberations, the percentage of affirmative answers issued after initial deny increased a little (8,57% compared with 7,30% in 2005)

- With regards to the evoked reasons for deny access to documents, the most frequent ones concerned: protection of the inspections/audits' results; protection of the deliberative process of the Commission.

- A special chapter was dedicated to complaints addressed to the Ombudsman. In 2006, 7 files were closed by this institution, 5 of them containing critics with regards to the Commission' conduct in enforcing the Regulation.

In another recent report issued by the Ombudsman, with regards to 2007 evaluation of the enforcement of the Regulation 1049, the author (Nikiforos Diamandiuros) states that the activity of the institution is very important in stimulating the European institutions to further act towards fully enforcing the legislation regarding to citizens' access to public European documents. His report is very important as it includes commentaries and statistics that are very relevant for the sake of the current paper. Thus, the report shows what was the Ombudsman's performance with regards to handling complaints and conducting inquiries:

- The total number of cases dealt in 2007 was of 3,760 out of which 3,211 were new complaints were issued in 2007, 332 were awaiting for resolution from 2006, 211 were awaiting for decision of admissibility from 2006, and 6 were initiated on the own initiative of the Ombudsman. For comparison, 3830 were issued in 2006.

- In 2007, the Ombudsman dealt with 641 inquiries, 309 initiated in 2007 and 332 not closed from 2006. 58% of this new inquiries were sent electronically (email or by filling the Ombudsman website form)

- ¾ of the complaints were outside the mandate of the institution which made the Ombudsman decide to send it to other bodies at the EU or national level
- From the overall percentage of the inadmissible complaints, in 2007, 65,8% were rejected mainly because of prior administrative approach that was not made.

- Most of the complaints were sent directly by the individuals, 3,056 cases and 155 by associations and companies. In 70% of the cases, the Ombudsman helped the complainant by opening and inquiry. In fact, 303 inquiries were opened in 2007 on the basis of complaints received by third parties. Also 6 inquiries were initiated on the Ombudsman's initiative. The Ombudsman may investigate a possible case of maladministration. He may also use his own initiative power to tackle what appears to be a systematic problem in the institutions. One example could be the measures adopted by the Commission to ensure that people with disabilities are not discriminated against their relations with the institutions.

- Most of the inquiries received by the Ombudsman concerned the European Commission; in these complaints, the main type of critics concerned the maladministration alleged were lack of transparency refusal of the information, abuse of power, unsatisfactory procedures, avoidable delay and discrimination acts. In a quarter of the complaints accusing maladministration, for example, the Ombudsman considered that no maladministration could be proven.

- Geographically speaking, most of the complaints come from Luxembourg, Malta or Cyprus.

With regards to the results of the Ombudsman's inquiries, the report also noted that in 2007, the Ombudsman closed 348 inquiries (which shows a 40% decrease compared with 2006). In 55 of the cases, the reports were closed with critical remarks and 8 with draft recommendations. One of these draft recommendations concerned the public access to details on payment of the MEPs. This followed a complaint from a Maltese journalist whose request for details of certain MEPs allowances was rejected by the Parliament on the grounds of data protection.

Finally, the report emphasizes that the year of 2007 was very important as in December of the last year, the EU Chart of Fundamental Rights was signed by the Presidents of the EU Parliament, Commission and the Council which gives a certain force to the document.

Apart from the review of the regulations regarding public access to documents in the institutions the question of openness is also brought forward in other documents.

Lisbon treaty includes additional progress regarding openness. It is made clear that the Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents refers to all activities of the European Union. Regulation 1049/2001/EC on public access to documents was supposed to "enshrine" the public's right of access to EU documents. This it did only in the sense that it broadly incorporated the previous EU code of public access to documents as amended by the case-law of the European courts and the administrative rulings of the European ombudsman. In doing so the regulation incorporated the deficiencies of the existing system and enshrined only a limited public right of access to EU documents. Considering the importance of openness and transparency in the institutions, a review of the Regulation is imperative.

There are a number of readily identifiable problems with the existing regulation and its implementation. Primarily, these concern the exceptions under Article 4 of the Regulation which should, as "exceptions", be interpreted very narrowly by the institutions. Generally they are not. Some are being interpreted very broadly indeed.

This is certainly the case with Article 4 (1) a) of the Regulation which allows the EU institutions to refuse access to documents concerning security, defence, the military, international relations and economic policy if their release would "undermine the protection of the public interest" - the so-called "harm test" (or "public interest" exception). Fifty per cent of the requests for documents that are refused by the Council are refused on the various grounds in this article. This means whole categories of documents are excluded from public scrutiny. The concept of "national security", for example, is invoked to withhold many justice and home affairs documents concerning "terrorism" even though many of these concern policy issues (which should be public) rather than operational matters (which might legitimately be withheld).

The international relations "exception" in article 4 (1) is regularly used to withhold swathes of documents on EU-US cooperation. "When we apply for the actual documents concerning EU-US cooperation, we are routinely told that the release of the documents would "prejudice the relations between the EU and the United States". This is what we were told with the EU-US extradition and mutual legal assistance treaties, treaties which have significant constitutional and human rights implications for the member states (not least here in Germany where the constitutional court as just ruled the European Arrest Warrant (an extradition system) unlawful)."[26]

Article 4 (1) b) of the Regulation, allowing documents to be withheld on data protection grounds, is also problematic. The European Commission has used this provision to refuse to disclose the names of all commercial lobbyists meeting secretly with Commission officials. This contradicts the new European Data Protection Supervisor's recent interpretation of the relationship between FOI and data protection, which makes it clear that the latter should not be invoked as a justification to undermine the former, and certainly not in cases like this.

Article 4 (2) of the Regulation similarly allows the refusal of documents that would prejudice commercial interests. The Commission has stated that this exception is interpreted in a "wide sense". This plainly breaches the regulation. The whole point about an "exception" is that it

[26] The *Statewatch* Report on FOI laws, 2006. See: http://www.statewatch.org/.

must be interpreted narrowly. *The wider we interpret exceptions, the more the exceptions become the rule.*

This is precisely what has happened with documents authored by the EU legal services - also covered by article 4 (2). These documents are withheld as a matter of course, even after the decisions to which the legal advice relates have been taken. Therefore, we cannot know for sure whether the EU is following its own legal advice and act in accordance with the treaties or not.

Next, article 4 (3) allows the institutions to withhold documents relating to draft decisions "if disclosure would undermine the decision-making process". The principle is that efficient decision-making is more important than freedom of information. It is hard to think of a more undemocratic argument. Yet, according to Council reports, this is the (single) "exception" it invokes the most when refusing access to documents. One third of its refusals have this justification.

Article 4 (3) also covers "non-legislative" and "internal" documents meaning that documents like feasibility studies, internal reviews and informal decisions are also routinely withheld unless there is an "overriding public interest in their disclosure" - something which under current practice might never going to happen. This means that the "preparatory documents" mentioned earlier - the documents that might explain where policy came from and why - could be also arbitrarily withheld.

Given these facts, The EU has taken action in trying to move forward in these difficult problems and taking responsibility. In May 2007 the Green Paper "The European Research Area: New Perspectives" was presented. The Commission re-launched a broad institutional and public debate on what should be done to create a unified and attractive European Research Area that would fulfil the needs and expectations of every citizen of the EU in order to reconnect Europe with its citizens and close both the physical and mental gap that makes it difficult for people to understand what Europe does and why it matters.

**V.e. E-FOI**

The new trend on access to information is the increasing use of electronic systems for filing requests and disclosure. Unfortunately, not all Member States foresee fully open access to documents in electronic format: several countries are modifying their legislation to require access to documents in this new format, while others still have mainly paper-based access regimes.

The appropriate use of information and communications technology has the potential to deliver massive benefits in terms of human development and to be a fast-track to knowledge-based growth. Many national FOI laws now impose a duty on government agencies to routinely release certain categories of information on their websites. Under the Romanian Law on Access to Public Information, public bodies are required to publish detailed information about their policies, legal organization, principles of operations, contents of administrative acts and decisions, and public assets in a Public Information Bulletin on their web sites. National and local government departments and other holders of public information have the duty to maintain websites and post an extensive list of information on the Web including statistics on crime and economics; enabling statutes and structural units of agencies; job descriptions of officials, their addresses, qualifications and salary rates;

information relating to health or safety; budgets and draft budgets; information on the state of the environment; and draft acts, regulations and plans including explanatory memoranda. They are also required to ensure that the information is not “outdated, inaccurate or misleading”. The Council of the European Union automatically makes available most of the documents it creates, including any document released under its access regulations, in its electronic register.

## V.f Case study IPP Romania: Testing the Transparency of EU Institutions

In order to have a term of comparison in what regards access to public information, it was decided that within the project the EU institutions would also be targeted with inquires in accordance with regulation 1049/01 establishing the right of public access to documents of the EU institutions. More precisely, IPP targeted the European Commission and the European Parliament, considering that it is very important for citizens in a new EU member state to test the European mechanisms and best practices regarding access to public information.

**Time and form of reply**

Even though Romanian language became official language of the EU after Romania's accession in 2007, IPP addressed the inquires in English in order to test the reply of the EU civil servants in general, trying to avoid particularizing the situation only to the case of the Romanian civil servants in the EU institutions who would have normally dealt with inquires addressed in Romanian. The inquiries were addressed on line, via the Europe Direct service.

*EU Commission*

IPP addressed two questions to the European Commission (EC), Directorate General Regional Development (DG REGIO):

1. Which were the Romanian organizations applying for the calls for tenders issued by Directorate-General REGIO in 2007?

2. Which are the Romanian organizations that have been selected following these calls for tenders in 2007?

The purpose was to evaluate to what extent Romanian organizations have become aware of the new opportunities that the EU membership brings, in terms of being able to apply within the calls for tenders of the various DG of the EC. The answer from the EC came only 3 days later, indicating that the managing authority in Romania for the program of social cohesion is the Ministry of Economy and Finance - Authority for the Coordination of Structural Instruments. Moreover, the answer provides the link to a web page of the DG containing information about eligible areas in Romania for Cohesion Policy 2007-2013. However, the answer does not provide any information regarding the Romanian organizations that have applied within the calls for tenders and no such information could be found at the indicated web page. The electronic means of communication between citizens and EU institutions might affect the content of the information that was expected. Clarifications or additional questions based on the answer provided in the first instance could be assimilated to a second, new inquiry which may add additional time in the documentation process.

*EU Parliament*

In what regards the European Parliament (EP), IPP addressed a series of five questions aiming at finding information about two issues. Firstly, just as in the case of the EC, IPP wanted to see whether there were any Romanian organizations that have shown interest in the calls for tenders of the EP and if yes, to what extent they were successful. Secondly, in the context of the IPP' s ongoing projects of monitoring the activity of the elected officials, IPP requested information about the activities of the members of the European Parliament. The following questions were issued in the context of the current comparative study:

1. Which were the Romanian organizations that applied for the calls for tenders organized by the European Parliament in 2007?

2. Which were the Romanian organizations that were selected following these calls for tenders procedures?

3. Were there any periodical activity reports that the members of the European Parliament were using for evaluating and making known their activities within the European Parliament as well as in their country of origin as EU officials? If so, where can these reports be accessed?

4. Where can be found the minutes of the meetings of the Committees of the European Parliament?

5. Where can one found data on the attendance of national representatives to the working assemblies of the European parliament as well as on their participation within the Committees of the European parliament?

The answer from the EP came the next day, all the questions being replied by indicating the links to the web pages that contain such information. The exact link indicated for the first two questions was indeed a good starting point for searching the organizations which have received grants from the European Parliament in the previous year. No Romanian organization or company was among them.

In what regards the second part of the inquiry referring to the activities of the MEPs, the EP answered that the Members of the European Parliament are not required to draft any periodical reports of their activity. However, EP indicated the links to its web pages where some information can be found, as well as the web pages of the political groups. The answer also comprised the links to the web pages containing the minutes of the meetings of the parliamentary committees and the minutes from the plenary sessions. Nevertheless, by following those links one cannot find centralized information regarding the attendance record of a certain MEP.

*Key challenges*

1. The electronic means of communication are the most frequently used when addressing a public inquiry to EU institutions. This could speed the process but at the same time could harm the content of the information. The EU institutions tend to send the solicitant to the already existing set of information (documents) instead of preparing a particular answer depending on the content of the initial question.

2. Electronic means of communication, at the level of the new member States, may exclude a large category of citizens who still have no access to internet. Romania case is relevant form this perspective.

3. From all above mentioned arguments, it shall be underlined that a public inquiry on FOI legislation at the EU level should be very precise, ideally quoting from the responsibilities of the institutions/members whose activity is under observation.

One could notice that the attitude of the civil servants in the EU institutions in charge of providing answers to public information requests was different from that of the national civil servants. Firstly, the time of reply was remarkably shorter and no extension period was requested, as it is legally possible. It is true that one should take into account the fact the requests to EU institutions were more punctual than those addressed to the national institutions. Nonetheless, the quickness with which these punctual matters were addressed is also caused by the experience that the EU civil servants have acquired in dealing with such requests. Secondly, the requested were mostly answered under the form of links to web pages of the European institutions, which proves that usually the information one is looking for is already available on line. In spite of the well known difficulties that citizens meet when having to surf the web pages of the EU institutions in their quest for specific information, the presence of such information on line puts the EU institutions one step ahead of the national institutions.

There is also one negative point that our experience with the EU institutions in terms of access to information emphasized: as opposed to the situation with the national institutions, the interaction with the European civil servants is a lot more impersonal. For instance, in relation with the EU institutions one has usually to clearly specify what document is needed, while not always this information is available itself. At national level this problem may be solved by calling the specific division and first clarify what type of documents they hold and then address the inquiry to target those specific documents. At European level the problem can usually be solved by addressing a series of requests gradually narrowing the area of research, which takes more time. EU civil servants are very effective at answering inquiries when these concern very concrete matters, provided that the inquirer is able to formulate the request in a punctual manner.

**General Conclusions**

The enactment of a FOI law is only the beginning. For it to be of any use, it must be implemented. National governments must change their internal cultures. Civil society must test it and demand information. However, governments resist releasing information, causing long delays, courts undercut legal requirements and users give up hope and stop making requests. Developing a culture of openness can be difficult. Officials must learn to change their mindset to recognize that the information that they hold is owned by the public and that citizens have a right to obtain information. This mindset is not unique to any region or legal system and can take many years to resolve.

Developing an openness mindset can also be hampered by a lack of public awareness or apathy. If the public does not demand information, government bodies do not necessarily get used to the idea and develop adequate experience and procedures to be able to respond correctly.

Transparency is the basic condition for citizens to participate effectively in the political process and to call public authorities to account. It is an essential aspect of pluralist democracy and it is now more important than ever. We need to find more ways to ensure that openness and impartial information is well-balanced. Both politicians and civil society should continue to debate, discuss and try different methods to achieve this goal. This process must be an constantly, on-going process. The work has been started, is developing through institutions, civil societies and political action and this must go on to make further improvements. Ensuring transparency in the EU is essential to a pluralist democracy and helps to overcome the Union's "democratic deficit"[27]. The EU's institutions have made real progress on this issue since the early 1990s, but there is still room for improvement. Greater attention should also be paid to the issue of transparency on EU-related matters at the Member State level. Most FOI Acts are adopted at national (or even regional) level, which brings severe divergences between the Member States. A particularity regarding access to public sector information in the EU is that there exists no harmonized regime at the EU level for this. Problematic issues in this regard are, for instance, the differences concerning exceptions existing in those regulations such as allowances for public authorities to refuse access to certain public documents (e.g. in case of conflict with data protection rules or national security confidentiality needs). The way those exceptions should be interpreted still need to be clarified at the European level. Yet, the only European harmonization that has taken place to date - justified by the principle of subsidiarity - deals with transparency for public procurement[28]. "Despite EU members' potential to promote accountability of public institutions and improve government efficiency in the provision of public services, transparency reforms have been insufficiently appreciated and integrated into institutional reform programs."[29] Proper implementation of the Freedom of Information Act is highly dependent upon all members of a public authority being aware of the obligations of the

[27] European Ombudsman P. Nikiforos Diamandouros

[28] Regarding Public procurement matters, the European legislative package consists in the Directive 2004/17 of the European Parliament and of the Council of 31 March 2004, coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of contracts for public works, public supply and public service.

[29] Ana Bellver, Daniel Kaufmann: "Transparenting Transparency", World Bank paper on FOI laws, September 2005

organization under the Act. They must be able to recognize and react properly to a request, and where necessary, provide advice and guidance to requesters. This is a statutory obligation.

Given the above, we appreciate that The Freedom of Information Act is a dialogue between people and their government about what's reasonable for the government to be able to release to them, with some exceptions, and what's reasonable for a requester to be able to get. Openness must govern government.

As we stated that FOI law implementation at the EU level is at the beginning, it is important that the members States, especially the new ones, learn as much as possible for the practical experience that could be drawn if soliciting various types of data and information. The following examples might inspire any citizen/non governmental organization to fully use this important right of having access to information at the level of European institutions.

**V.g. Case study Providus Latvia: Testing the Transparency of EU Institutions**

*The nature and content of requests*

Similar to the requests addressed to the national institutions, the requests in accordance with regulation 1049/01 establishing the right of public access to documents of the EU institutions were filed to receive information necessary for the ongoing research projects of PROVIDUS, or, in some instances, information, which had proved onerous to receive form national institutions. The questions/requested information addressed elaboration of EU policies, internal administrative dealings of EU institutions and implementation of supranational policies in the EU member states. Particular attention was paid to the measures on avoiding conflict of interest both within European Commission and Parliament. Most of the requests were complex and normally included several extensive questions pertinent to shared competences of several EU institutions.

*Timing of reply*

The average time of reply by institutions subject to the Regulation is 16 days from the day of the notification of receipt of a particular application. The Regulation provides the information must be received within 30 days of the notification of receipt. There is no statutory deadline for the notification of receipt to be issued.

Table 2 Timing of replies in working days

| Timing of reply/ days | Notification of receipt | Reply |
|---|---|---|
| Up to 15 | 4 | 2 |
| 16 to 30* | 1 | 1 |
| 30 and longer | - | 2 |
| None | 2 | 3 |

** The requirement of the Regulation in case of the reply to the application after the notification of receipt*

The data in Table 2 does not provide a representative set of information on general practices of institutions in with regard to the FOI requests. Primarily due to the small number of applications and the fact that majority of seven requests are still pending and there has been no notification of receipt. The little information there is, reveals that institutions are in average efficient in responding to the requests.

As opposed to national institutions, supranational institutions are more proactive in using email as a tool both for communication with the applicant (the notification of receipt is sent only via email), and the channel of discharging information (shorter reply that did not contain documents that need to be scanned in order to be sent, was provided only via email) that, just at in the case discussed with regard to practices of national institutions, allow for a significantly shorter time for reply.

*Communication with institutions*

Both in case of requests addressed to the national institutions and EU institutions indicated precisely the title or the topic of the documents desired by the researchers. As opposed to the experience of FOI requests at the national level, a direct communication with the applicant is not characteristic in EU institutions. Only in one case did the official preparing the reply called PROVIDUS to clarify the content of the letter. In some cases (missing notification receipts as well as missing answers) PROVIDUS has attempted to communicate the institution responsible via email, to ascertain the status of the application. At the time of preparation of this report, however, no reply has been obtained.

While the experience on the national level shows that institutions are more eager to issue notification of the possible location/ holder of the desired data (while the FOIL requests the institution to forward the request to the competent institution, if the matter addressed falls outside the realm of its competence), the system established within EU guarantees more efficient system. The requests can be sent directly to the institution expected to reply or to a body dealing with the requests from citizens, including FOIL requests. The latter have proven more speedy and effective.

In the only case where information that matches the description in the application could not be identified (no documents with the content that answers the question in the FOI request), the institution provided a brief narrative explanation of the process.

*Research value of the information received*

The primary value of the information held by EU institutions is that it serves as a valuable source of raw data from national institutions, obtained by EU in order to analyze the situation in the MS with regard to various goals of EU policy. Such information is often hard to obtain on a national level due to its political sensitivity (those may reveal tasks accomplished on paper, non existing consultations or policies).

The documents received from the EU institutions have proven to be of a very high value and a significant contribution to the ongoing research. In many cases the age of the document suggests that it is no longer in an active circulation of the particular institution, but most likely a part of its archives. Regardless of that, and quite different from national practices and regulation, such information has been sent as valuable addition relatively new documents mostly available on line.

*Key challenges*

1. EU law provides for the right to access registered documents of EU as opposed to information - a more encompassing term. The experience suggests that the requests for information in this case, especially information for research, must be formulated very precise (knowing almost exactly what document is necessary). It limits the possibility to explore themes.

2. The point of reference to calculate the deadlines for reply is the notification of receipt of the request in the institution. However, the experience shows that, if the request is directed to the responsible agency itself and not to the unit of the Secretariat General

responsible for openness, access to documents, relations with civil society, it is problematic to plan for the time of the notification and therefore reply.

| | | | | |
|---|---|---|---|---|
| Secretariat-General of the European Commission Unit SG/B/2 - Openness, access to documents, relations with civil society | Documents that describe anti corruption policies that are binding to both political and administrative officials of the European Commission. | The reply of the institution indicates the web address of the source where the main documents of interest can be accessed. The OLAF also suggests to contact the DG for Personnel and Administration for further details on rules of ethics | 11.01.2008<br><br>Notification of receipt 16.01.2008 by OLAF | 07.02.2008 |
| European Parliament | Documents that describe the anti corruption policies that are binding to the officials, including the members, of the European Parliament. | - | 11.01.2008 | - |
| Secretariat-General of the European Commission Unit SG/B/2 - Openness, access to documents, relations with civil society | Documents that describe the criteria, which is used to evaluate the quality of transposition of the measures of EU legislation to the national law. | "Given the different areas of policy and the great variety of EU directives to be transposed there are no documents containing general criteria for assessing the conformity of the national law with the EU directives. In fact the quality is evaluated case by case. The EC assesses whether all provisions of the directive have been transposed and whether the objectives of the directive will be attained through the measures taken by the member state" | 11.01.2008 | 25.01.2008 |
| Secretariat-General of the | The questionnaires submitted by the Republic of Latvia in response to the | There has been an individual communication with the official responsible for implementation of the | 11.01.2008 | Pending |

| | | | | |
|---|---|---|---|---|
| European Commission Unit SG/B/2 - Openness, access to documents, relations with civil society | requests of the European Commission regarding the progress and activities planned in preparation for appropriation of Structural and Cohesion funds in Latvia. | Cohesion Fund in the Baltic states, specifying the nature of the requested information.<br><br>Answer will be provided. | Notification of receipt 16.01.2008 | |
| Secretariat-General of the European Commission Unit SG/B/2 - Openness, access to documents, relations with civil society | Answers to the questionnaires on migration and integration of migrants in Latvia that were submitted by the Republic of Latvia in response to the request of the European Commission and used to prepare the first, second and third *Annual Reports on Migration and Integration* released in the year 2004, 2006 and 2007 respectively. | The reply of the Commission official stated that the institution has no power to release the documents as "these replies come from the Republic of Latvia and are not European Commission's documents, we cannot provide you the information", urging requestors to refer to the national offices of the Republic of Latvia. | 11.01.2008<br><br>Notification of receipt 16.01.2008 | 25.03.2008 |
| (E4) of Directorate General Information Society European Commission Directorate General Information Society Unit E4, | Documents that describe the implementation of the Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 *on the re-use of public sector information* by the Republic of Latvia.<br><br>Any reports, including answers to unified questionnaires, prepared by Latvian authorities in response to submissions or requests of institutions responsible for the | The authority has provided a comprehensive descriptive answer to the question in the request for information as well as valuable information on the discussions and rationale of the discussions preceding the preparation of the guidelines.<br><br>The information also includes the Minutes of discussions and official reports (the so called "PUBLAW" reports) preceding the Directive of re-use. | 11.01.2008<br><br>Notification of receipt 07.02.2008 | 19.02.2008 |

| | | | | |
|---|---|---|---|---|
| Information market | implementation of the Directive at the level of the European Commission.<br><br>Documents that describe the debates preceding adoption of the *Guidelines for improving the synergy between the public and private sectors in the information market* (1989) [..] | | | |
| European Commission | Documents that describe the selection of projects that received funding from "Europe for Citizens Programme 2007-2013 - Action 2-Measure 3 "Support for projects initiated by civil society organisations"" after the call for proposals of 2007.<br><br>We are especially interested to receive the documents that describe the following:<br>- the criteria that were used to select the winning project,<br>- the selection procedure - institutions involved in the process and the rules of procedure applied in the selection process, and<br>- a full list of organizations, that had submitted their proposals to the tender. | - | 11.01.2008 | - |

## VI. General findings and recommendations

The enactment of a FOI law is only the beginning. For it to be of any use, it must be implemented. National governments must change their internal cultures. Civil society must test it and demand information. However, governments resist releasing information, causing long delays, courts undercut legal requirements and users give up hope and stop making requests. Developing a culture of openness can be difficult. Officials must learn to change their mindset to recognize that the information that they hold is owned by the public and that citizens have a right to obtain information. This mindset is not unique to any region or legal system and can take many years to resolve.

Developing an openness mindset can also be hampered by a lack of public awareness or apathy. If the public does not demand information, government bodies do not necessarily get used to the idea and develop adequate experience and procedures to be able to respond correctly.

Transparency is the basic condition for citizens to participate effectively in the political process and to call public authorities to account. It is an essential aspect of pluralist democracy and it is now more important than ever. We need to find more ways to ensure that openness and impartial information is well-balanced. Both politicians and civil society should continue to debate, discuss and try different methods to achieve this goal. This process must be an constantly, on-going process. The work has been started, is developing through institutions, civil societies and political action and this must go on to make further improvements. Ensuring transparency in the EU is essential to a pluralist democracy and helps to overcome the Union's "democratic deficit"[30]. The EU's institutions have made real progress on this issue since the early 1990s, but there is still room for improvement. Greater attention should also be paid to the issue of transparency on EU-related matters at the Member State level. Most FOI Acts are adopted at national (or even regional) level, which brings severe divergences between the Member States. A particularity regarding access to public sector information in the EU is that there exists no harmonized regime at the EU level for this. Problematic issues in this regard are, for instance, the differences concerning exceptions existing in those regulations such as allowances for public authorities to refuse access to certain public documents (e.g. in case of conflict with data protection rules or national security confidentiality needs). The way those exceptions should be interpreted still need to be clarified at the European level. Yet, the only European harmonization that has taken place to date - justified by the principle of subsidiarity - deals with transparency for public procurement[31]. "Despite EU members' potential to promote accountability of public institutions and improve government efficiency in the provision of public services, transparency reforms have been insufficiently appreciated and integrated into institutional reform programs."[32] Proper implementation of the Freedom of Information Act is highly dependent upon all members of a public authority being aware of the obligations of the

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[31] Regarding Public procurement matters, the European legislative package consists in the Directive 2004/17 of the European Parliament and of the Council of 31 March 2004, coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of contracts for public works, public supply and public service.

[32] Ana Bellver, Daniel Kaufmann: "Transparenting Transparency", World Bank paper on FOI laws, September 2005

organization under the Act. They must be able to recognize and react properly to a request, and where necessary, provide advice and guidance to requesters. This is a statutory obligation.

Given the above, we appreciate that The Freedom of Information Act is a dialogue between people and their government about what's reasonable for the government to be able to release to them, with some exceptions, and what's reasonable for a requester to be able to get. Openness must govern government.

As we stated that FOI law implementation at the EU level is at the beginning, it is important that the members States, especially the new ones, learn as much as possible for the practical experience that could be drawn if soliciting various types of data and information. The following examples might inspire any citizen/non governmental organization to fully use this important right of having access to information at the level of European institutions.The present study emphasized the status of implementation of the FOIA in the Czech Republic, Latvia and Romania by combining reviews of the national legislations with case studies based on research conducted by the three partner policy institutes. A series of conclusions have surfaced when placing the data together:

1. The FOIA regulations prove to be extremely important in each of the countries due to their multiple potential to:

    a. modernize the public administration

    b. inoculating the civic spirit among the civil society organizations which have to become aware of their right to access information resulted from the activity of public institutions; undoubtedly, the work of the NGOs is based in a large proportion to access to such information and consequently the right to full and proper access to public information has to be fiercely affirmed.

2. In none of the three countries the problems related to the implementation of the FOIA legislation have been surpassed. The data available for this report shows that the public institutions in the three countries are not capable of meeting the efficiency standards in implementing the norms regulating transparency of public institutions.

3. The findings of this research should be interpreted from the following point of view: the requests within this project have been formulated by three NGOs with experience in dealing with the public administration and with a good internal reputation. Consequently, the requests were met by the public authorities with more attention. The situation is usually a lot different when such requests are addressed by local NGOs (provided that they are aware of their rights to information), in the sense that the chances that they receive the same amount of information are significantly lower.

4. Having said that, the necessity of continuing this type of comparative analysis and sharing experiences on implementation of FOIA becomes obvious, particularly those targeting new EU member states.

5. The possibility of accessing public information at the level of European institutions is still to be discovered by the national organizations. Accessing information from EU sources brings a number of differences, such as the need to clearly specify the type of document that one requires. However, the level of efficiency in this case is higher, as proven by the quicker replies, efficiency which is also due to the massive use of information technology.

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