

Analysis of the Legal Framework, Practice and Implementation of ECHR Case Law and Other International Standards with Recommendations for Improvement

Introduction

The aim of this analysis is to provide specific suggestions and recommendations for Montenegrin institutions performing oversight on the Law on Free Access to Information (public authorities and institutions in charge of disclosure of information, newly created Agency For the Protection of Personal Data and Free Access to Information as well as the Administrative and Supreme Court) and thereby develop the protection mechanisms for freedom of information as a basic precondition of a democratic state.

The right of access to information is well established in European as well as international law. Access to government information is an integral element of freedom of expression and is a prerequisite for the meaningful exercise of other political rights.¹ It is now widely recognized that the right to information is protected by the main human rights treaties and has developed into a norm of customary international law.² Developing a comprehensive strategy for the implementation of freedom of information laws jointly with NGO representatives is essential for transparent policy making.³

Recent developments have shown a clear recognition of the right to the access of information held by public bodies as being a human right.⁴ For every country's legal

order it is necessary to adopt comprehensive laws on free access to information based on international standards and internationally binding legal norms. Montenegro has a new Law on Free Access to Information, which entered into force in February 2013. The new law in general provides a better standard of protection for freedom of information than the previous legal act regulating the same issue. However, there are problematic areas in the new law. For example, the deadline for administrative organs for responding request increased and doubled.⁵ Limitations for access to information also represents unnecessarily long list.⁶ Furthermore, application and enforcement of the law by administrative organs still needs significant improvements.

This analysis provides an overview of important case law of the European Court of Human Rights on freedom of information issues, as well as of authoritative recommendations of the Council of Europe and instruments of the United Nations. It further outlines good practices of other countries in the region and discusses what can motivate refusals from administrative organs to issue information. It lastly provides ideas of experts working on freedom of information in Montenegro and suggestions on how the situation can improve and what are the principles that should primarily be taken into consideration by public authorities, courts and agency in Montenegro.

¹GERAGUYN KHORHURD PATGAMAVORAKAN AKUMB V. ARMENIA, ECHR, Application no.11721/04, 14 April, 2009

http://www.right2info.org/cases/plomino_documents/r2i-geraguyn-khorhurd-patgamavorakan-akumb-v.-armenia (accessed at 4 April, 2013)

²Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, UNESCO 2nd edition, 2008; Jonathan Fox, *The Uncertain Relationship Between Transparency and Accountability, Development in Practice*, volume 17, Routledge Pubs, August 2007, p. 1

³United Nations Rule of Law, Non-Governmental Organizations, http://www.unrol.org/article.aspx?article_id=23 (accessed at 26 March, 2013)

⁴Centre for Law and Democracy, Canada, *Response to the OIC Call for Dialogue: Recommendations for Improving the Right to Information in Canada*, January 2013 [http://www.law-democracy.org/live/wp-](http://www.law-democracy.org/live/wp-content/uploads/2013/01/Canada.RTI_Jan13.pdf)

[content/uploads/2013/01/Canada.RTI_Jan13.pdf](http://www.law-democracy.org/live/wp-content/uploads/2013/01/Canada.RTI_Jan13.pdf) (accessed at 1 April, 2013)

⁵Article 31, The Law on Free Access to Information, Montenegro - "15 working days"

⁶Article 14, The Law on Free Access to Information, Montenegro

Table of contents

1.	Executive Summary.....	3
2.	Main Finding.....	4
2.1.	Overview of Freedom of Information Law and Practice in Montenegro.....	4
2.2.	Types and Motives for Refusals.....	6
3.	Cases of European Court of Human Rights on Freedom of Information.....	7
3.1.	Principles set by ECHR on Freedom of Information.....	7
3.2.	Overview of the Court’s Practice on Freedom of Information.....	8
3.3.	“Three-Prong Test” Applied by the European Court of Human Rights.....	10
3.4.	Case of Sdruženi Jihoceska Matky v. Czech Republic	11
3.5.	Case of Guja v. Moldova.....	12
4.	Other Important International Documents and Country Practices.....	13
4.1.	Instruments of the United Nation.....	13
4.2.	Convention on Access to Official Documents.....	13
4.3.	Recommendations of the Council of Europe.....	14
4.4.	Practice of Neighboring Countries (Croatia, Serbia).....	15
5.	Opinions of Experts Working in the Field	17
6.	Conclusions and Recommendations.....	19
	<i>Bibliography</i>	21

1. Executive Summary

Generally in Montenegro there is negative official attitudes towards disclosure as well as an adversarial approach on the part of many civil society groups and actors. Problems with finding the correct balance between the implementation of the Law on Free Access to Information on the one hand and state secrets legislation on the other hand creates a good environment for arbitrary refusals to release information, manipulation of information, and, in some cases, even release of false information by public officials.

The courts and the judiciary in general together with public institutions should be the one of the leading organs to advocate of this fundamental right of citizens. However, as a rule, the freedom of information cases should be taken to a court only in exceptional cases. Public institutions should be the primary and most important organs that should deal with requests to free access to information and should try to provide requested information so that the citizen gets requested information on time and would not need to address the court/information agency in order to obtain information.

It is important to look specifically at standards set by international courts that have been established on certain classes of information. And it is even more important that on a domestic level courts and supervisory bodies follow these rules and principles and implement these international standards so as to make them a national reality.

An advanced freedom of information regime, with a comprehensive freedom of information law at its core, provides a number of benefits for society as well as government by:

- supporting people-centric policy-making and its effective implementation;
- forming public trust towards government;
- fighting against corruption;
- giving meaning to electoral democracy;
- creating a transparent and competitive economic environment.⁷

Despite certain positive developments in Montenegro (e.g. the adoption of the new Law on Free Access to Information), the country has had problems with the implementation of the previous laws, which has been further complicated by broad state secrets acts.

It will be a challenge to change official practices and to generate the political will to improve the freedom of information situation in Montenegro. However, it is manageable and it is the way towards democratic, transparent governance. In addition to that, free access to information is the best way to fight against corruption and misconducts by public authorities which are not rare in today's reality in Montenegro. Since one of the aims of MANS is to fight against corruption in the country, it is essential to be active in terms of disclosure of information, since these two interact and overlap each other.

In summary, the new Law on Free Access to Information in Montenegro provides better protection and is closer to the international standards. Nevertheless, there are reasons for concern - as already mentioned above the deadline for responding freedom of information requests doubled and now amounts 15 working days. Additionally, the reasons for restricting information are too many. Now it is up the administrative and supervisory organs as well as courts in Montenegro how they apply this law and what kind of practice they develop. Aside from the necessity of being in compliance with international legal standards, making public information transparent and available for citizens will be a clear step forward toward Montenegrin integration in the European Union.

⁷ The Public's Right to Know, Principles on Freedom of Information Legislation, Article 19, Global Campaign for Free Expression, International Standards Series, <http://www.article19.org/data/files/pdfs/standards/righttoknow.pdf> (accessed at 19 March, 2013)

2. Main Findings

2.1. Overview of Freedom of Information Law and Practice in Montenegro

Freedom of information law varies between countries and legal systems. It is set out in a number of countries' constitutional documents as well as in special laws that stipulate rules and procedures regarding timeframe and other important formalities in terms of issuing a needed document.⁸ Governments must report in prescribed ways on prescribed topics, and submit specified information; government and public bodies should also be open to scrutiny and freedom of information requests and must not be partial.⁹

The Constitution of Montenegro underlines this right in a separate article since the year of 2007. Article 51 of the Constitution of Montenegro stipulates: "Everyone shall have the right to access information held by the state authorities and organizations exercising public authority."¹⁰ Additionally, there are several provisions that indirectly address to freedom of information. Article 49 provides for "freedom of press." Article 23 gives everyone a right to "timely and complete information" about the environment.¹¹

Further, the new Law on Free Access to Information in Montenegro gives a precise procedure for obtaining public information. The law allows any natural or legal person the right to access information held in any form by state and local authorities, public companies, and other entities that exercise public powers. Requests must be in writing, including via email.¹² Bodies must decide on issuing the information within 15 working days. It means that this period of time includes at least 2 weekends and on average makes 19-22 days for receiving information. This can be considered as a shortcoming of the current law - the time for issuing requested information has doubled (almost tripled). According to the previous law adopted in 2005, public information should have been issued within 8 days (not working days).

Moreover, the law includes unnecessary exceptions for disclosing information. As it becomes clear from Article 14 of Law on Free Access to Information, there are a lot of restrictions to freedom of information. For example, Article 14 refers to effectiveness of criminal procedure as a reason to restrict access to information.¹³ We believe that this restriction is too vague and too general. It gives room for public institution to interpret it in a way that will eventually restrict free access to information. As demonstrated below, the current practice shows that Article 14 of the Law on Free Access to Information is indeed interpreted in a wrong way by administrative organs: they merely quote the article and do not give further reasoning, which is absolutely not justified (please also see pages 22-23 of this document).

In addition to that, part 2 of Article 14 is again too general: "The public authority may restrict access to information [...] if it is in the interest of security defense, monetary and economic policy of Montenegro."¹⁴ Economic interest is also further mentioned in the part 5 of Article 14 where it is noted that "protection of trade and other economic interests of the publication of data, which relate to the protection of the competition and business secret in connection with business property rights."¹⁵ We assume that this part of the article is enough restriction for business and economic secret information and it should not be further mentioned in different parts of the article since it might give chance to public authorities to misuse their

⁸Written Analysis of Two Alternative Azerbaijani Draft Law on Freedom of Information, Council of Europe, Organization for Security and Cooperation in Europe, The Representative on Freedom of Media, by Jan van Schagen, 6 September, 2004, Strasbourg, <http://www.osce.org/fom/37291> (accessed at 25 March, 2013)

²The Rights of Journalism and the Needs of Audiences, Onora O'Neill, 18 March 2013 <http://kingsreview.co.uk/magazine/blog/2013/03/18/the-rights-of-journalism-and-the-needs-of-audiences/> (accessed at 26 March, 2013)

¹⁰Article 51, The Constitution of Montenegro

¹¹ Constitution of Montenegro, Adopted 19th of October 2007

¹² Article 18, The Law on Free Access to Information, Montenegro

¹³ Article 14, The Law on Free Access to Information, Montenegro

¹⁴ Article 14, part 2, The Law on Free Access to Information, Montenegro

¹⁵ Article 14, part 5, The Law on Free Access to Information, Montenegro

power and hide important information. Also there is no direct mention of private companies, which might perform public capacities in a number of situations (e.g. when private company wins a tender and performs action that might be in the focus of public interest).

The new Law on Free Access to Information also introduces a new supervisory body called Agency For the Protection of Personal Data and Free Access to Information.¹⁶ Agency for the Protection of Personal Data and Free Access to Information works on the appeal process of freedom of information requests. This institution consists of three members, so called Council of the Agency as well as administrative staff. However, in other countries' practice¹⁷ it appears to be merely one person - so called commissioner (rather than council of three people) who deals with denied or non-responded requests of information. Thereby, it is controversial if agency will be as effective in its work as commissioner and how will the responsibility be divided among three members of agency. Nevertheless, since Agency For the Protection of Personal Data and Free Access to Information is a newly created body it is still early to discuss how effective it is or if it has any shortcomings. The Agency started working from February 18th 2013 and it decided on 150 cases till now.¹⁸

In addition to this, it becomes clear from previous publications of MANS and our statistical data that the enforcement of freedom of information law in Montenegro is not very effective and there is significant room for improvement. As statistics show, in 2012 MANS has submitted over 7.000 freedom of information requests on behalf of citizens and received 48% of requested documents.¹⁹ This means that more than half of the requests remained without an answer. MANS has a practice of helping individuals to submit their requests on freedom of information since due to a number of reasons they find it difficult to submit these requests themselves. The fact that these requests went unfulfilled means that Montenegrin government ignored individual citizens.

This tendency is clearly not positive. In the area of access to information, the dominant approach in Montenegro is to deny requests if there is even a small risk that disclosure of the information may cause even minor harm to a protected interest.

It is a fact that in general Montenegrin courts do not use and quote the judgments of European Court of Human Rights in its decisions. Nor Montenegrin public institutions follow the practice of evaluating and balancing the competing interests (so called three prong test, which will be discussed below). Even though current Montenegrin law gives sufficient means to take into consideration public interest in issuing the information. With this regard, Article 17 of Law on Free Access to Information is a very positive development and it stipulates that prevailing public interest for disclosure of information exists when the requested information contains data that evidently refer to corruption, illegal use of public funds, abuse of authority, illegal spending of funds from public revenues, threat to public security, threats to the environment, etc.²⁰ However, this article has never been applied in practice either by public authorities or courts in Montenegro.

Another positive development in new Law on Free Access to Information is included in Chapter V of the Law, which imposes fines imposed upon public authorities if they fail to provide an applicant with access to information. The fines range from 500 Euros to 20 000 Euros.²¹ This might serve as a good implementation mechanism for the new law. However, again it is early to say how this provision will work in practice.

Hence, it is necessary to look beyond the formal rules and to point out that there is a need for a change in attitudes towards openness and disclosure of information in Montenegro. It is essential to recognize that in addition to specific legal reforms, there is a wider need for a shift in Montenegrin bureaucratic attitude towards a "culture of secrecy" and further promote freedom of information.

¹⁶ Articles 39- 41, The Law on Free Access to Information, Montenegro

¹⁷ Serbia, Croatia - refer to practice of these countries in Chapter 4, part 4 of the analysis.

¹⁸ Aleksa Ivanovic, a Council member of Agency for the Protection of Personal Data and Free Access to Information

¹⁹ Annual Report of MANS, Free Access to Information, 2012

²⁰ Article 17, The Law on Free Access to Information, Montenegro

²¹ Articles 47-48, The Law on Free Access to Information, Montenegro

2.2. Types and Motives for Refusal

Before proceeding with clarification of the case law of the European Court of Human Rights, firstly it is necessary to mention the practice of other NGOs regarding freedom of information. There are many organizations fighting for freedom of information in several different parts of globe.²² Well-known London based NGO “Article 19” is working on freedom of information (as well as freedom of expression) cases, and according to the analysis of this NGO, there can be several types of refusals for issuing information. These include:

- refusals because officials believe that such information should not be made public;
 - tacit denials (e.g. when no answer is given, or when just a very general part of the information is given);
 - refusals when public bodies arbitrarily declare information that should be open to be instead a state secret;
 - delays in responding to requests, thus diminishing the value of requested information;
 - issuing only partial information which may affect the understanding of the whole picture and still hide the most important bits of information.²³

As it becomes obvious from the practice of administrative organs in Montenegro, it is common that the information is denied based on all the grounds mentioned above.²⁴

Furthermore, “Article 19” emphasizes some of the main motives that can serve as grounds for refusals. These are:

- a common belief that information merely belongs to government bodies;
- attempts to prevent access to information that might show a particular governmental agency in a negative context.²⁵

These motives can lead to a significant detrimental impact on participation in democratic processes in a country. They further and increase the possibility that a government is not acting in compliance with the law - for example, it may be attempting to conceal criminal activity. It is essential that Montenegrin public institutions, courts and agency are aware of these possible underlying motives, and analyze the reasons behind any particular refusal to issue information. The Montenegrin administrative organs in charge of issuing information should read the new law in favor of a more transparent and open decision-making policy.

²² NGOs, Information Commission(ers) and other recourses, <http://www.right2info.org/resources/ngos-information-commission-ers-and-other> (accessed at 23 March, 2013)

²³Under Lock and Key, Freedom of Information and the Media in Armenia, Azerbaijan, Georgia, Article 19, April 2005

²⁴Do you know that you have the right to know?, Free access to information Serving Citizens, MANS, Swedish Helsinki Committee for Human Rights, 2008; Do I have the Right to Know? Enforcement of the Law on Free Access to Information in Montenegro, MANS, Open Society Institute, 2007.

²⁵Under Lock and Key, Freedom of Information and the Media in Armenia, Azerbaijan, Georgia, Article 19, April 2005

3. Cases of European Court of Human Rights on Freedom of Information

3.1. Principles set by European Court of Human Rights on Freedom of Information

Before going through the practice of the European Court of Human Rights into more details it is essential to underline principles regarding freedom of information that were clearly underlined in different judgments and decisions of the Court. This analysis draws readers' attention on the 13 main findings of the ECHR, which can also be considered as important principles on free access to information, stressed by the European Court of Human Rights:

1. It is crucial that the public is enabled to obtain access to information from the authorities.
2. Freedom of Information (as a part of larger right of freedom of expression) constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment.
3. The public has a right to receive information, which is on matters of public interest and the public interest in receiving information can sometimes be so strong as to override even a legally imposed duty of confidence.
4. Social "watchdogs" have a right to access state-held information on a matter of public importance in order to enable free public debate on such matters.
5. The activities of social "watchdogs" warrant similar protections afforded to the press, since they are essential contributors to an informed public debate.
6. The restriction of freedom of information should be "a. prescribed by law, b. have a legitimate aim and c. must be necessary in a democratic society." And domestic courts are also encouraged to use this test while discussing on disclosure of information.
7. The freedom to receive information aims largely at forbidding a state to prevent a person from receiving information which others would like to have or can consent to provide.
8. The information about political figures (e.g. Speaker of Parliament, Public Prosecutor's, etc.) is a very important matter in a democratic society, on which the public has a legitimate interest in being informed and it falls within the scope of political debate.
9. In a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also public opinion.
10. The public interest in having information about undue pressure and wrongdoings by political figures is so important in a democratic society that it outweighs the interest in maintaining public confidence in governmental bodies.
11. Open discussion of topics of public concern is essential to democracy and regard must be made to the great importance of encouraging members of the public from voicing their opinions on such matters.
12. Governments should be mindful of the importance of the right to freedom of information on matters of general interest, and of the right of civil servants and other employees to report illegal conduct and wrongdoing at their place of work.
13. The privacy rights of public figures cannot prevail over the right of access to information.

3.2. Overview of the Court's Practice on Freedom of Information

While discussing improved protection of freedom of information, it is essential to look at the practice and case law of an authoritative supra-national court - the European Court of Human Rights. The European Convention of Human Rights (which represents the legal basis for the establishment of the European Court of Human Rights) was adopted within the context of the Council of Europe, and all of its 47 member states are contracting parties to the Convention.²⁶ Montenegro became the 47th member state of the Council of Europe on 11 May 2007.²⁷

Furthermore, Montenegro ratified European Convention on Human Rights in 2006²⁸ and thereby it recognized the jurisdiction of European Court of Human Right. Also Article 9 of the Constitution of Montenegro stipulates that:

*“The ratified and published international agreements and generally accepted rules of international law shall make an integral part of the internal legal order, shall have the supremacy over the national legislation and shall be directly applicable when they regulate the relations differently from the internal legislation.”*²⁹

This means that Montenegro is bound under international law by the decisions made by the Court and the government should enforce these decisions. Where judgments are made against Montenegro, appropriate remedies could include changes in current practice by the Montenegrin Government in order to reflect the Court's judgments (which may mean in certain circumstances that it may be necessary to enact new legislation). An appropriate remedy may include a declaration that a law or practice is not in compliance with the ECHR and/or compensation for the victims of violations.

It is also important to distinguish between steps the government and the judiciary may take to comply with international standards. The government can contribute in complying ECHR standard by adopting certain policies, amending laws accordingly and in case of violation providing appropriate remedy and actually enforcing judgment of the Court. On the other hand, judiciary should apply the law in a reasonable way, interpret law *prima facie* that information is public and follow case law of European Court of Human Rights.

Generally speaking, the case law of the ECHR is very important precedent for all the member states of the Council of Europe. In practice there is a high rate of compliance with decisions and opinions of the Court, and there is international recognition that the Court has a significant influence towards the proper protection of fundamental human rights and freedoms in a European context.

The European Court of Human Rights has examined the boundaries of the protection afforded by Article 10 of the ECHR³⁰ in a number of cases. Article 10 is the most important article in the Convention for the context of freedom of information. Article 10, paragraph 1 of the Convention reads as follows:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”

²⁶The ECHR in 50 Question, The European Court of Human Rights, July 2012, http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ_ENG_A4.pdf (accessed at 23 March, 2013)

²⁷<http://hub.coe.int/country/montenegro> (accessed at 23 March, 2013)

²⁸Country Profile- Montenegro, January 2013, http://www.echr.coe.int/NR/rdonlyres/3A00C9D6-EF7C-409E-88A8-E472CA4434F8/0/PCP_Montenegro_en.pdf (accessed at 15 March, 2013)

²⁹ Article 9, Legal Order, Constitution of Montenegro

³⁰ Article 10, para 1, Freedom of Expression, The European Convention on Human Rights, please note: including freedom of information, exact wording “right to receive and impart information”

The Court has distinguished between public and media access to information on the one hand and individual access to information on the other, including the right of access to documents by individuals with a particular interest in obtaining the information.³¹ The Court has stated that it is important that the public is enabled to obtain access to information from the authorities. The protection afforded by Article 10 has not been interpreted as to include a general right of access to information from the authorities, but it has indicated that the public has a right to receive information of public interest and significance.³²

According to the Court's most recent case law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment.³³ Freedom of expression in itself includes freedom of information, which clearly derived from the text of the European Convention of Human Rights Article 10: "[...] right to receive and impart information."³⁴ In the case *Sîrbu v. Moldova*³⁵ the Court has recognized "that the public has a right to receive information, which is [...] on matters of public interest."³⁶ The Court has emphasized that "the public interest in receiving information can sometimes be so strong as to override even a legally imposed duty of confidence."³⁷ Furthermore, the Court has emphasized that the protection of Article 10 extends to the workplace in general and to public servants in particular.³⁸

*Leander v. Sweden*³⁹ was the first case in which the Grand Chamber of the European Court of Human Rights (Grand Chamber of the Court decided cases that raises a serious question affecting the interpretation and application of the Convention⁴⁰) recognized a self-standing right of access to information held by public authorities. Later on, in *Társaság A Szabadságjogokért (Hungarian Civil Liberties Union) v. Hungary* the Court again ruled that a civil rights group, acting in the public interest, was entitled to access government records.⁴¹

The judgment of the ECHR in *Társaság A Szabadságjogokért v. Hungary* provides a new development in this area and it has been described as one of the landmark decisions on the relation between freedom of information and the ECHR. These cases are authority for the proposition that the Court has created a presumption under Article 10 of the Convention that state-held information of clear public interest must be disclosed.

The Court noted⁴² that social watchdogs have a right to access state-held information on a matter of public importance in order to enable free public debate on such matters. The privacy rights of public figures cannot prevail over the right of access to information in such circumstances.⁴³

³¹European standards for public access to official information, Helena Jäderblom; Commentary on The Ukrainian Law on Information, CoE, OSCE, 2001

³²OBSERVER AND GUARDIAN v. THE UNITED KINGDOM, ECHR, Application no. 13585/88, 1991, Series A, no. 216, para. 59

³³CASE OF KAPERZYNSKI v. POLAND, ECHR, Application no. 43206/07, 2012; Freedom of Expression, Council of Europe, A Guide to the Implementation of Article 10 of European Court of Human Rights, Monica Makovei, Human Rights Handbook no. 2, 2nd edition, <http://echr.coe.int/NR/rdonlyres/C3804E16-817B-46D5-A51F-0AC1A8E0FB8D/0/DG2ENHRHANDO22004.pdf> (accessed at 23 March, 2013)

³⁴ ECHR, Article 10, para 1.

³⁵SIRBU v. MOLDOVA, ECHR, Application no. 73562/01, 2004

³⁶ LEANDER v. SWEDEN, ECHR, Application No. 9248/8, 1987; GASKIN v. UNITED KINGDOM, ECHR, Application no. 10454/83, 1989; SIRBU v. MOLDOVA, ECHR, Application no. 73562/01, 2004

³⁷ FRESSOR AND ROIRE v. FRANCE, ECHR, Grand Chamber, Application no. 29183/95, 1999; RADIO TWIST, A.S. v. SLOVAKIA, ECHR, Application no. 62202/00, 2006

³⁸VOGT v. GERMANY, ECHR Application no. 323, § 53, 1995; WILLE v. LIECHTENSTEIN, ECHR, Grand Chamber, Application no. 28396/95, § 41, 1999; AHMED AND OTHERS v. UNITED KINGDOM Ahmed and Others v. the United Kingdom, ECHR, Reports of Judgments and Decisions, 1998; FUENTES BOBO v. SPAIN, ECHR, Application no. 39293/98, § 38, 2000.

³⁹LEANDER v. SWEDEN, ECHR, Application No. 9248/8, 1987

⁴⁰ECHR, Article 43, Referral to the Grand Chamber

⁴¹TARSASAG A SZABADSAGJOGOKERT (HUNGARIAN CIVIL LIBERTIES UNION v. HUNGARY, ECHR, Application no. 37374/05, 14 April 2009

⁴² Ibid

⁴³ Ibid, A Member of the Hungarian Parliament and other individuals lodged a complaint with the Constitutional Court for an abstract review of amendments to national drug legislation. The Hungarian Civil Liberties Union (HCLU), a non-governmental organization active in the field of drug policy, requested a copy of the complaint from the Constitutional Court (paras. 7-9). The Constitutional Court denied the request on the ground that the complaint contained 'personal data' that could only be disclosed with the authors' permission. After litigating the denial without success in national courts, the HCLU filed an application with the European Court of Human Rights. http://www.right2info.org/cases/plomino_documents/r2i-tarsasag-a-szabadsagjogokert-hungarian-civil-liberties-union-v-hungary (accessed at 4 April, 2013)

It is essential to strongly emphasize the wording of the Court in *Társaság A Szabadságjogokért v. Hungary* decision where it stated that “the activities of social ‘watchdogs’ [...] warrant similar protection to that afforded to the press, as they are essential contributors to an informed public debate.”⁴⁴ The Court declared that by creating obstacles to the legitimate gathering of information ‘on a matter of public importance’, the Hungarian authorities interfered with the applicant’s ‘right of access to information’ grounded in Article 10 of the Convention.⁴⁵

3.3. “Three-Prong Test” Applied by the European Court of Human Rights

Three-prong test is the special name for the standard applied by ECHR in order to define if the restriction of the right is justified or not. Within the context of Article 10, the restriction should be “(1) prescribed by law, (2) have a legitimate aim and (3) must be necessary in a democratic society.”⁴⁶

The decision-making of the ECHR it is a balancing process. The Court will first decide whether there was interference (by looking at factual circumstances and the wording of the Convention as well as previous case law), then this interference may be justified, which will mean that there has not been a human rights violation. The Court has a very specific reasoning process which it follows in order to decide whether a violation has been justified - e.g. identifying the legitimate aim and whether it is necessary in a democratic society (and the proportionality test, which generally amounts to weighing the degree to which the individual’s rights have been violated against the Government’s arguments). Emphasis should be made on the importance of this reasoning process - it is used by many different judicial systems around the world and is very useful. It would be positive step if the Montenegrin judiciary followed it too.

Three-prong test a widely used standard used by the administrative bodies of governments, which is also contained in the legislation of many countries, and employed by many domestic constitutional courts around the world, as well as by supra-national courts including the European Court of Human Rights.

And there are good reasons for applying this test:

- it provides transparency as people know what reasoning process judges or officials will use;
- it makes sure that decisions have a rational basis (e.g. an official cannot refuse to give someone information because it might reveal information that will affect their election campaign in a negative way, as this will fail the test of legitimate aim);
- If judges or officials use this test it means that the European Court of Human Rights will give their arguments more weight.

The Court has explicitly stated this in its recent case of *Von Hannover v. Germany*.⁴⁷ This is a significant point since it shows it is in the country’s self-interest to use this reasoning process. The Court encourages judges and government officials as well as legislators in member states to use this test.

The importance of such a principle is clear in the Montenegrin context. Given the troubling statistics showing that the Montenegrin Government does not comply with the majority of access to information requests, it may be easily inferred that they are erecting barriers that violate this principle.

⁴⁴Ibid, Court Assessment, para 27.

⁴⁵Ibid, Court Assessment, paras 27-28

⁴⁶ ECHR, Article 10, para 2.

⁴⁷CASE OF VON HANNOVER v. GERMANY (no. 2), ECHR, Applications nos. 40660/08 and 60641/08)7 February 2012, The Court’s Assessment

3.4. Case of *Sdruženi Jihočesk é Matky v. Czech Republic*

After reviewing the case law and reasoning process of the European Court of Human Rights generally in the previous chapters, this chapter will concentrate on a specific case, which is very important in terms of interpreting and analyzing freedom of information. The decision of 10 July 2006 in the case of *Sdruženi Jihočesk é Matky v. Czech Republic*⁴⁸ is essential as it contains an explicit and undeniable recognition of the application of Article 10 in cases of a refusal of a request to have access to public or administrative documents.

In the case of *Sdruženi Jihočesk é Matky v. Czech Republic* the Court held that Article 10 of the Convention did grant the applicant, a Czech environmental group, a right of access to documents regarding the design and construction of a nuclear reactor. More precisely, the case concerned an NGO that initiated administrative proceedings, but was not allowed to access to documents and plans regarding a nuclear power station.⁴⁹

The Court proceeded to hold that the rejection of the applicant's request for information amounted to an interference with "its right to receive information" under Article 10. The decision of *Sdruženi Jihočesk é Matky v. Czech Republic* is important as it contains an explicit and undeniable recognition of the application of Article 10 in cases of a refusal of a request to have access to public or administrative documents.⁵⁰ The right of access to administrative documents is not an absolute one and can indeed be restricted under the conditions of Article 10 & 2 of the Convention, which implies using the above mentioned three-prong test (a refusal must be prescribed by law, have a legitimate aim and must be necessary in a democratic society).⁵¹

The Court noted that the Czech government applied this test; it has reasoned in a pertinent and sufficient manner and then refused to grant access to the requested documents. The refusal was justified in the interest of protecting the rights of others (industrial secrets), national security (risk of terrorist attacks) and public health.⁵²

The admissibility decision of the Court in *Sdruženi Jihočesk é Matky v. Czech Republic* gives additional support and opens new perspectives for citizens, journalists and NGO's for having access to administrative documents in matters of public interest.⁵³ The important thing here is that, although the Court decided that there had not been a breach of Article 10, it explicitly recognized that the refusal by the Czech authorities was an interference with the right to receive information. After deciding that there was interference the Court started to discuss if the interference was justified and therefore applied a three-prong test. After application of the three-prong test the Court held that the interference was justified due to the reasons mentioned in the previous paragraph.

In the case of *Sdruženi Jihočesk é Matky v. Czech Republic*, the Court emphasized that the freedom to receive information "aims largely at forbidding a State to prevent a person from receiving information which others would like to have or can consent to provide."⁵⁴ In the admissibility decision of *Sdruženi Jihočesk é Matky v. Czech Republic* the ECHR for the first time has applied Article 10 of the Convention in a case where the authorities refused a request of access to administrative documents.

⁴⁸SDRUZENI JIHOČESKE MATKY v. CZECH REPUBLIC, ECHR, Application No. 19101/03, 2006

⁴⁹Ibid.

⁵⁰ Ibid; Dirk Voorhoof, Ghent University and Copenhagen University (Denmark) and Member of the Flemish Regulator for the Media, <http://merlin.obs.coe.int/iris/2006/9/article1> (accessed at 27 March, 2013)

⁵¹ Ibid; Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights, Wouter Hins, Dirk Voorhoof, http://www-ircm.u-strasbg.fr/seminaire_oct2008/docs/Hins_Voorhoof_Access_to_State_Held_Information.pdf (accessed at 27 March, 2013)

⁵² Dirk Voorhoof, Ghent University and Copenhagen University (Denmark) and Member of the Flemish Regulator for the Media, <http://merlin.obs.coe.int/iris/2006/9/article1> (accessed at 27 March, 2013)

⁵³ Ibid; Freedom of Expression and Article 10 ECHR Summaries of 20 recent judgments (and decisions) of the European Court of Human Rights (ECtHR), published in Iris, Legal Observations of the European Audiovisual Observatory, Dirk Voorhoof, September 2008, http://www-ircm.u-strasbg.fr/seminaire_oct2008/docs/Summariesrecentcases.Voorhoof.pdf (accessed at 27 March, 2013)

⁵⁴ Ibid

In another regional system, following a similar rationale as *Sdruženi Jihoceska Matky v. Czech Republic*, recognition of the freedom of information was affirmed by a decision of the Inter-American Court of Human Rights in *Claude Reyes and Others v. Chile*.⁵⁵ Here the Inter-American Court also explicitly held that the right to freedom of expression, as enshrined in Article 13 of the American Convention on Human Rights, included the right to receive information. In *Claude Reyes and Others v. Chile* failure of a state body to disclose information on environmental matters, which was requested by an NGO, violated the right of access to state-held information as an element of the right to freedom of expression.⁵⁶

3.5. Case of Guja v. Moldova

This case is of particular significance for the protection of the right to freedom of information. Here the Court held once again that Article 10 of the Convention, which guarantees the right to freedom of expression, including the right to receive and impart information and ideas, includes providing the internal documents to the press. The internal documents were revealing that the Deputy Speaker of Parliament had exercised undue pressure on the Public Prosecutor's Office.⁵⁷

The European Court of Human Rights ruled that, given the particular circumstances of the case, external reporting could be justified, as the case concerned the pressure by a high-ranking politician on pending criminal cases. The person who gave out the information was acting in line with the President's anti-corruption drive.⁵⁸

There is no doubt that Deputy Speaker of Parliament exercising pressure on the Public Prosecutor's Office is a very important matter in a democratic society, about which the public has a legitimate interest in being informed and which falls within the scope of political debate. In the case of *Guja v. Moldova* the Court made it clear that in a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also [...] public opinion.⁵⁹

The Court considered here that the public interest in having information about undue pressure and wrongdoing within the Prosecutor's Office revealed was so important in a democratic society that it outweighed the interest in maintaining public confidence in the Prosecutor General's Office. The Court ruled that open discussion of topics of public concern is essential to democracy and regard must be made to the great importance of not discouraging members of the public from voicing their opinions on such matters.⁶⁰ The Court came to the conclusion that governments should be mindful of the importance of the right to freedom of expression on matters of general interest, and of the right of civil servants and other employees to report illegal conduct and wrongdoing at their place of work. The Court held that there had been a violation of Article 10 of the Convention.⁶¹

The Court also referred to the reports of international NGOs (the International Commission of Jurists, Freedom House, and the Open Justice Initiative), which had expressed concern about the lack of judicial independence in Moldova. It would be a positive development if Montenegrin judiciary would also refer to such reports. The fact that the European Court of Human Rights relies on such reports shows that reporting process can be useful, and is

⁵⁵CLAUDE REYES AND OTHERS V CHILE, Inter-American Court of Human Rights, Series C. Application no. 151, 19 September, 2006

⁵⁶ Ibid.

⁵⁷GUJA v. MOLDOVA, ECHR, Application no. 14277/04, 2008 The applicant, Mr. Guja, was Head of the Press Department of the Moldovan Prosecutor General's Office, before he was dismissed, on the grounds that he had handed over two secret letters to a newspaper and that, before doing so, he had failed to consult the heads of other departments of the Prosecutor General's Office, a behavior which constituted a breach of the press department's internal regulations. Guja was of the opinion that the letters were not confidential and that, as they revealed that the Deputy Speaker of Parliament, Vadim Misin, had exercised undue pressure on the Public Prosecutor's Office, he had acted in line with the President's anti-corruption drive and with the intention of creating a positive image of the Office.

⁵⁸ Ibid.

⁵⁹Ibid; The Neo Case - Crime Committed or Well Organized Politically Motivated Punishment?, Case Analysis, Martins Birks, p.

46

⁶⁰ Ibid, para 91; also BARFOD v. DENMARK, ECHR, Series Application no. 149, § 29 1989

⁶¹Ibid, para 93.

recommended in Montenegro context.

4. Other Important International Documents and Country Practices

4.1. Instruments of the United Nations

As well as the case law of ECHR, there are other international instruments that highlight the importance of freedom of information. The United Nations human rights protection system also draws special attention to the importance of freedom of information.

The UN Human Rights Committee explicitly recognized the right to information in its 2011 General Comment on Article 19 of the International Covenant on Civil and Political Rights (Montenegro ratified the ICCPR in 23 October 2006⁶²), which guarantees freedom of expression. The General Comment 34 of ICCPR states:

*“To give effect to the right of access to information, States parties should proactively put in the public domain government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. [...] Authorities should provide reasons for any refusal to provide access to information.”*⁶³

Furthermore, the views of the Human Rights Committee are also essential in this regard. In the communication *Toktakunov v. Kyrgyzstan*⁶⁴ it was noted that the right to information held by public bodies is grounded within the right to freedom of expression; and Kyrgyzstan violated this right by not disclosing information concerning death sentences pursuant to secret bylaws.⁶⁵ The Human Rights Committee recognized a “right of access to state-held information” - including a duty of the government to disclose such information or to justify non-disclosure - which was grounded in ICCPR Article 19 regarding freedom of expression.⁶⁶

4.2. Convention on Access to Official Documents

Another essential development in this area concerns events occurred in 2009 when a certain number of member-states of the Council of Europe signed the Convention on Access to Official Documents. It made history as the first internationally binding legal instrument that recognizes a general right of access to official documents held by public authorities. Twelve member-states of the Council of Europe signed the Convention, including Montenegro.⁶⁷

As reasoned in the explanatory note of the Convention, transparency of public authorities and their work is a core feature of good governance; it serves as an indicator of whether or not a society is genuinely democratic and pluralist. Free access to information is an important tool to fight against all forms of corruption, to criticize those who govern it, and be open to participation of citizens in matters of public interest. The right of access to official documents is also essential to the self-development of people and to the exercise of fundamental human rights. It also strengthens public authorities' legitimacy in the eyes of the public, and its confidence in them. Considering this, national legal systems should recognize and properly enforce a right of access to everyone to official documents produced or held by public authorities.⁶⁸

⁶² United Nations Treaty Collection

http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-4&chapter=4&lang=en (accessed at 3 April, 2013)

⁶³ General Comment No. 34, Human Rights Committee, 102nd Session, Article 19, Freedom of Information and Expression, International Covenant on Civil and Political Right, United Nations, Geneva, 11-29 July 2011, para. 19

⁶⁴ TOKTAKUNOV V. KYRGYZSTAN, Human Rights Committee, Communication No. 1470/2006, 28 March 2011 http://www.right2info.org/cases/plomino_documents/r2i-toktakunov-v.-kyrgyzstan/ (accessed at 2 April, 2013);

⁶⁵ *Ibid* also http://www.worldcourts.com/hrc/eng/decisions/2011.03.28_Toktakunov_v_Kyrgyzstan.pdf (accessed at 2 April, 2013);

⁶⁶ *Ibid*, para 7.4

⁶⁷ 12 European Countries Sign First International Convention on Access to Official Documents, 19 June, 2009, <http://www.freedominfo.org/2009/06/12-european-countries-sign-first-international-convention-on-access-to-official-documents/> (accessed at 27 March, 2013); Council of Europe, Convention on Access to Official Documents, Explanatory Note, (CETS No. 205).

⁶⁸ Convention on Access to Official Documents, Council of Europe, Explanatory Note, (CETS No. 205) <http://conventions.coe.int/Treaty/EN/Reports/Html/205.htm> (accessed at 27 March, 2013)

4.3. Recommendations of Council of Europe

While talking about the practice and importance of freedom of information, it is also essential to look at the recommendations drafted by Council of Europe regarding this matter. The first step taken within the Council of Europe in the field of freedom of information was the Recommendation on the Right of Access to Information held by Public Authorities.⁶⁹ Additionally, in 2002 the Committee of Ministers adopted a new recommendation - the Recommendation On Access to Official Documents. In the preamble of this recommendation it is stipulated that:

“...wide access to official documents, on the basis of and in accordance with equality rules [...]allows the public to have an adequate view of, and to form a critical opinion on, the state of the society in which they live and on the authorities that govern them, whilst encouraging informed participation by the public in matters of common interest; fosters the efficiency and effectiveness of administrations and helps maintain their integrity by avoiding the risk of corruption; tributes to affirming the legitimacy of administrations as public services and to strengthening the public’s confidence in public authorities.”

This document guarantees a right to access to official documents for any person. Additionally, article XI of the Recommendation considers it as a duty of a public authority to:

*“... take the necessary measures to make public information which it holds when the provision of such information is in the interest of promoting the transparency of public administration and efficiency within administrations or will encourage informed participation by the public in matters of public interest.”*⁷⁰

The Explanatory Memorandum of the Recommendation further develops this topic and contains a provision stating: “in order to allow easy access to official documents, public authorities should provide the necessary consultation facilities, such as appropriate technical equipment, including making use of new information and communication technology.”⁷¹ In addition to this, the same idea is affirmed by the General Comment of the International Covenant on Civil and Political Rights, which stipulates that “State parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world.”⁷²

It should be emphasized that this is very important in the Montenegrin context since administrative organs due to the ground of insufficient technical equipment reject a lot of freedom of information request. The reasons given by the administrative organs themselves are that the document was too long and it is claimed that their technical resources were not enough (lack of a photocopier) in order to print out and provide documents for public interest and awareness.⁷³ Therefore, Montenegrin practice should be in conformity with international standards regarding proper technical base for issuing requested information without obstacles. However, it is under question if the reason for refusals by Montenegrin

⁶⁹Recommendation No..R (81) 19 of the Committee of Ministers to Member States on the Access to Information Held by Public Authorities. Adopted by the Committee of Ministers on 25 November 1981, at the 340th meeting of the Ministers’ Deputies, Council of Europe [http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec\(1981\)019_EN.asp](http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec(1981)019_EN.asp)(accessed at 27 March, 2013)

⁷⁰Recommendation Rec (2002)2 of the Committee of Ministers to member states on access to official documents, Council of Europe, Adopted by the Committee of Ministers on 21 February 2002 <https://wcd.coe.int/ViewDoc.jsp?id=262135>(accessed at 20 March, 2013)

⁷¹Art. X, Complementary measures http://www.coe.int/t/e/human_rights/media/1_Intergovernmental_Co-operation/MC-S-IS/IGFBlogSubmission_en.pdf (accessed at 15 March, 2013)

⁷²General Comment No. 34, Human Rights Committee, 102nd Session, Article 19, Freedom of Information and Expression, International Covenant on Civil and Political Right, United Nations, Geneva, 11-29 July 2011, para. 15

⁷³ Do you know that you have the right to know? Free access to information Serving Citizens, MANS, Swedish Helsinki Committee for Human Rights, 2008, p. 75, 77, 78

administrative bodies is actual technical problems or it is just a false argument provided by institution that simply are not willing to give out information since the political will is not in place.

Another important normative base of freedom of information in Europe is the Recommendation of the Committee of Ministers to Member States on Measures to Promote the Respect for Freedom of Expression and Information with Regards to Internal Filters. This document underlines the importance of the “protection of the right of everyone, regardless of frontiers, [...] to seek and receive information and ideas, [...] as well as to impart them under the conditions set out in Article 10 of the European Convention on Human Rights.”⁷⁴

4.4. Practice of Neighboring Countries (Croatia, Serbia)

It is noteworthy that very recently (February 15, 2013) Croatia adopted a new law on freedom of information. This is a positive step and needs to be taken into consideration given Croatia’s geographical proximity. A leading advocate has described this new freedom of information law as protecting the “highest standards of transparency and oversight.”⁷⁵ The new law is seen as a significant step towards, and even a precondition for, Croatia’s integration into the European Union for summer 2013.

Furthermore, the new freedom of information law in Croatia (like new Law on Free Access to Information in Montenegro) creates a new entity to protect freedom of information, an Information Commissioner, who will be elected by the Parliament, and who possesses oversight mechanisms including the right to inspect documents and apply administrative sanctions. Creation of this position was already offered to the Government of Montenegro by a guidebook drafted by MANS.⁷⁶ It is a positive development that new Law on Free Access to Information in Montenegro also includes similar position.

Moreover, the new law in Montenegro establishes a special Agency For the Protection of Personal Data and Free Access to Information, which “performs supervision over the legality of administrative decisions deciding upon requests for access to information and take the measures set forth by the law.”⁷⁷ Agency For the Protection of Personal Data and Free Access to Information is a unique supervisory institution for freedom of information in Montenegro. However, as already mentioned above having an Agency instead of Commissioner can be downside of this institution.

In addition to the new freedom of information law, there are specific measures such as activity plans and pilot-projects for open data initiatives happening in Croatia. Freedom of information educations have started in State School for Public Officials [...]and it is to be hoped that, the new Information Commissioner will use the full possibilities now ensured by legal and institutional framework.⁷⁸

As regards to Serbia, the Commission of Freedom of Information exists there as well and is an autonomous and independent public body. The Commissioner can hear cases relating to denial of access to information, delays, excessive fees, and refusal to provide information in the form or language request by the applicant. His decisions are binding on public authorities. If a body fails to release the information, the Commissioner can ask the Government to enforce the decision.⁷⁹ These powers given to the Commissioner are a

⁷⁴Recommendation CM/Rec (2008) 6 of the Committee of Ministers to Member States on Measures to Promote the Respect for Freedom of Expression and Information with Regards to Internal Filters, (Adopted by the Committee of Ministers on 29 April 1982, at its 70th Session

⁷⁵Vanja Škorić, Senior Legal Advisor with the group GONG, a non-partisan citizens’ organization founded in 1997 to encourage citizens to actively participate in political processes; Croatian New FOIA Was Approved Today, 15 February, 2013 <http://www.globalbtap.org/croatias-new-foia-was-approved-today/> (accessed at 28 March, 2013); Croatia Adopts New Freedom of Information Law, 15 February, 2013 <http://www.freedominfo.org/2013/02/croatia-adopts-new-freedom-of-information-law/> (accessed at 28 March, 2013)

⁷⁶Free Access to Information and Secrecy Data in Montenegro, Law comments with recommendations, Helen Darbishire, Access info Europe, Swedish Helsinki Committee for Human Rights, 2007, p. 22, para. 1.14

⁷⁷ The Law on Free Access to Information, Montenegro, Article 39

⁷⁸Croatia Adopts New Freedom of Information Law, 15 February, 2013 <http://www.freedominfo.org/2013/02/croatia-adopts-new-freedom-of-information-law/> (accessed at 28 March, 2013)

⁷⁹ Freedom of Information and Access to Government Records Around the World, by David Banisar, updated July 2006,

precondition for a successful and efficient functioning of the institution in Serbia.

The substantial powers of the Commissioner in Serbia could be one of the reasons why Serbia retains a top position in the updated rating of Right to Information (RTI) index.⁸⁰ Serbia is the very first country in the list, with a score of 135 out of a possible 150 is Serbia. To illustrate the significance of this, Germany, with a mere 37 was the least positive performer and held last position in the survey.

In addition to this, occasionally in some countries' practice "the requirement of harm to a protected interest is not interpreted rigorously, as it should be to override a fundamental human right. And the public interest override is applied only where there is a clearly dominant interest in the information in question, and not at all for many exceptions, including privacy."⁸¹ These countries are strongly criticized for their negative record in protection of freedom of information. Montenegrin governments should also try to avoid this practice.

http://www.freedominfo.org/wp-content/uploads/documents/global_survey2006.pdf(accessed at 21 March, 2013)

⁸⁰<http://www.rti-rating.org/results.html>(accessed at 23 March, 2013) This index deals with the legal framework for information rights in 89 countries throughout the world, using 61 different indicators drawn from international standards and data on law and regulation in the various countries.

Canada, Centre for Law and Democracy, Canada, Response to the OIC Call for Dialogue: Recommendations for Improving the Right to Information in Canada, January 2013

5. Opinions of Experts Working in the Field

It is also important to put emphasis on the ideas provided by the experts and professionals working in the field of freedom of information in Montenegro. The Human Resources Management Authority (HRMA), as an organ of public administration in Montenegro, is responsible for the implementation of laws regarding civil servants and state employees, and also carries out human resources development policies and sets the guidelines for the standard practice of human resources management through the entire public administration. In accordance with this, the HRMA has a leading role in defining and delivering civil servant needs for training, professional education and staff development.

As Blaženka Dabanović, Head of Department for Planning and Development of Training Programs, explained when interviewed, the HRMA conducted seminars about free access to information in 2013. All these seminars were professionally and financially supported by the OSCE. This year the HRMA conducted 15 seminars on an introduction of the new Law on Free Access of Information within the timeframe of May-July 2013. Most of the seminars were aimed at public servants from municipalities, as well as from ministries. These seminars were a part of the OSCE project “Supporting implementation of Law on Free Access to Information”. The seminars gathered public servant plus representatives from different NGOs in every meeting. This format aimed to put NGO representatives and public servants together and exchange ideas and experience.

These trainings were held in this format for the first time in Montenegro. It is important to note that the trainings were interactive and attended by 300 authorized public servants in total (20 public servants for each seminar). The seminars introduced the new Law on Free Access to Information, data security, the laws on personal data protection and the balance between freedom of information and confidential data. The participants of the training were given guidelines on the proper application of the new Law on Free Access to Information. The guidelines also consist of special forms and patterns that public institutions are recommended to use while responding to freedom of information requests. After September 2013 the HRMA plans to provide 6 more trainings for the newly created Agency For the Protection of Personal Data and Free Access to Information. It is expected that this may have a significant beneficial impact since the Agency is a supervisory body for almost 1000 different public institutions and are likely to get large amounts of requests which must be decided. Apart from the trainings mentioned above, the HRMA has planned to organize one more seminar for the NGO sector and media representatives.⁸²

“It is important to note that the new Law on Free Access to Information already imposes penalties in case information is not issued rightfully. The amount of the penalty varies from 500 Euros to 20 000 Euro depending on the wrongdoing of a public servant.” - states Blaženka Dabanović, Head of Department for Planning and Development of Training Programs, HRMA. Regarding Article 14 of the Law on Free Access to Information, she stated that public servants should explain their refusal with valid reasons, not with mere quotation of articles from the law.

Blaženka Dabanović further believes that the 2 best things about the new law are:

1. The imposed penalties, which are aimed at successful implementation of the law and the creation of a more proactive approach towards making information available;
2. The newly created Agency For the Protection of Personal Data and Free Access to Information.

However, she added that it is early to talk about the practices developed by the Agency so far and she is not even sure if they have enough experienced staff members in the Agency who will deal with requests effectively.

⁸²Blaženka Dabanovic, Head of Department for Planning and Development of Training Programs, HRMA. The Sector for Training and Development of Human Resources - independent body (legal supervision done by Ministry of Interior), interview (15 May, 2013).

It is also essential to underline the views and opinions of Aleksa Ivanović who is a Council member of the Agency for the Protection of Personal Data and Free Access to Information; and who was also part of the working group on drafting the new Law on Free Access to Information. While interviewing him, he declared that “the best thing about the new law is the taking of a proactive approach, which means that certain information should be on the web pages of administrative organs, without even a request being made by individual citizens (Article 12 of the Law on Free Access to Information).” Nevertheless, it should be noted that this requirement is not fulfilled by most of the administrative organs of Montenegro. He also believes that a deadline of 15 working days from the making of a request for issuing information/refusing to issue is not an unreasonably long period of time.

Regarding the structure of the Agency, Aleksa Ivanović thinks that having one Commissioner for Information and Data Protection could have been a more effective control mechanism than adding new functions to the already existing Agency for the Protection of Personal Data (now called Agency for the Protection of Personal Data and Free Access to Information). He also believes that the powers of Directorate of the Agency and the Council of the Agency are not clearly articulated and divided. In order to change the structure of the Agency, the law of data protection would need to be changed since this law regulates the consistency of the Agency.⁸³

Aleksa Ivanović usually underlines the importance of ECHR case law and practice while meeting with public authorities since he believes it to be important to spread the knowledge and improve the legal culture of Montenegrin public authorities, and he feels that ECHR case law and practice can help do this. He also noted that “disclosing public information is key but the balance between transparency and data protection is also very important.”⁸⁴

As Aleksa Ivanović stated, the biggest problem so far still remains silence from administrative organs. The second comes from the practice of refusing requests without providing any reason for the refusal. For example, Article 14, paragraph 5, of the Law on Free Access to Information stipulates: “The public authority may restrict access to information [...] if it is in the interest of protection of trade and other economic interests, or if it concerns the publication of data which relates to the protection of competition and business secrets in connection with commercial property rights”. Often requests are refused, and as justification the text of this Article is quoted. However, as he noted, this article is very general. He ventured the opinion that this Article needs to be interpreted on a case by case basis and that mere quotation of the article without stating specific reasoning is absolutely unjustified.⁸⁵

One challenge is that occasionally administrative organs do not provide the Agency with documents that is needed to make a decision on appeal - e.g. the request for information, the appealed documents and the document that an individual is seeking to obtain. Ivanović also emphasizes that lack of finances is another problem the Agency faces; therefore, they cannot recruit sufficient staff that will deal with appeals faster and in a more effective manner. Finding experienced professionals can be a problem as well.

Finally, Aleksa Ivanović underlined that “the fact that the new law on Free Access to Information provides for penalties is in itself a good development. However, the procedure itself is lengthy, and only a court has the capacity to penalize a public official. The Agency does not have enough staff to initiate court proceedings for every wrongdoing.”

⁸³Aleksa Ivanovic, a Council member of Agency for the Protection of Personal Data and Free Access to Information, interview (29 May, 2013)

⁸⁴ibid

⁸⁵ ibid

6. Conclusions and Recommendations

From a consideration of the above, it is clear that there is strong protection in international law for freedom of information. A consideration of the Croatian and Serbian contexts shows a similar trend. And lastly, the recent enactment of legislation in Montenegro, which provides significantly more protection to freedom of information, provides democratic justification for the proposition that current practices must change in favor of increased protection in practice for the freedom of information for individuals and for the public. However, the wording of the law is one thing and correct application of the law and forming good practice on freedom of information is another.

We believe that legislative changes could be successful only if accompanied by a significant change in attitude towards the right to information, in particular through its recognition as a human right. Reforms of the legal regime, changes in attitude towards freedom of information at all levels of Montenegrin society and political will would result in major changes and improvement of freedom of information practice in Montenegro. It is time for Montenegrins and their government to recognize that the right to access information held by public bodies is a human right.

Taking all the above into consideration, MANS has developed several rules and recommendations in order to make the protection of freedom of information in Montenegro efficient and more enforceable:

1. Freedom of information law should be read *prima facie* in favor of issuing requested information by Montenegrin public authorities;
2. Trainings and seminars for public servants should continue in order to increase the knowledge and awareness of free access to information among public authorities;
3. The newly created Agency For the Protection of Personal Data and Free Access to Information in Montenegro should use the full possibilities made available by the legal framework;
4. Montenegrin Courts and Agency should draw attention to the case law of European Court of Human Rights mentioned above and try to implement the principles in those cases in a national context;
5. Agency For the Protection of Personal Data and Free Access to Information in Montenegro must establish and maintain autonomy, independence and impartiality;
6. Public institutions in Montenegro should try to overcome technical difficulties in order to make information as transparent as possible;
7. Public authorities should take the necessary measures at their own initiative to make information public in the interest of promoting the transparency of public administration;
8. The standard that every restriction of freedom of information should be “be prescribed by law, have a legitimate aim and must be necessary in a democratic society” should be applied by the authorities before a decision is made to restrict information;
9. Importantly, the general practice of governmental institutions needs to be changed towards disclosure, in order to properly recognize freedom of information as a human rights concern;
10. It is recommended that the newly created Agency For the Protection of Personal Data and Free Access to Information should launch worthy initiatives and use its full potential. Only afterwards freedom of information law can become effective mechanism of government accountability;

11. Montenegrin Public Authorities, Courts and Agency are suggested that they should take into consideration reports and analysis of different NGOs regarding the matters of freedom of information as well as while solving other important legal issues;
12. Generally speaking, it is important that Montenegrin institutions take up human rights based approach regarding freedom of information;
13. It is recommended that 15 working days for disclosing information can be an unnecessarily long period of time for responding most of freedom of information requests. Therefore, public authorities in Montenegro are suggested to issue the information in the earliest possible;
14. Proactive approach towards free access to information, enshrined in new law should be applied accordingly and administrative organs should provide information prescribed by law as well as requested information on their web-pages;
15. The Law on Free Access to Information in Montenegro should override secrecy provisions in other laws. We believe that state secrecy law is important part of domestic legal order in Montenegro and should be taken into consideration but it should not override freedom of information law;
16. Law on Free Access to Information is *lex specialis* and should be given preference to other legal acts of Montenegro in interpreting freedom of information;
17. Agency For the Protection of Personal Data and Free Access to Information should use its potential in order to initiate penalty procedures against public officials who misuse the law;
18. Agency For the Protection of Personal Data and Free Access to Information should interpret an existing restricted list of responsible administrative organs widely and in accordance with Convention on Access to Official Documents and include all public bodies that perform public functions, operate with public funds, and have government owned shares.

Bibliography

Legal Acts:

American Convention on Human Rights, Adopted 22 November 1969

Constitution of Montenegro, Adopted 19 October 2007

Convention on Access to Official Documents, Council of Europe, Adopted 27 November 2008

European Convention on Human Rights, Council of Europe, Adopted 4 November 1950

International Covenant on Civil and Political Rights, Adopted 16 December 1966

The Law on Free Access to Information, Montenegro, Amended February 2013

Case Law:

AHMED AND OTHERS v. UNITED KINGDOM Ahmed and Others v. the United Kingdom, ECHR, Reports of Judgments and Decisions, 1998;

BARFOD v. DENMARK, ECHR, Series Application no. 149, 1989

CLAUDE REYES ET AL. V CHILE, Inter-American Court of Human Rights, Series C. Application no. 151, 19 September, 2006

FRESSOR AND ROIRE v. FRANCE, ECHR, Grand Chamber, Application no. 29183/95, 1999;

FUENTES BOBO v. SPAIN, ECHR, Application no. 39293/98, 2000.

GASKIN v. UNITED KINGDOM, ECHR, Application no. 10454/83, 1989;

GERAGUYN KHORHURD PATGAMAVORAKAN AKUMB V. ARMENIA, ECHR, Application no. 11721/04, 14 April, 2009

GUJA v. MOLDOVA, ECHR, Application no. 14277/04, 2008

KAPERZYNSKI v. POLAND, ECHR, Application no. 43206/07, 2012;

LEANDER v. SWEDEN, ECHR, Application No. 9248/8, 1987;

LEANDER v. SWEDEN, ECHR, Application no. 9248/81, 26 March 1987

OBSERVER AND GUARDIAN v. THE UNITED KINGDOM, ECHR, Application no. 13585/88, 1991, Series A, no. 216

RADIO TWIST, A.S. v. SLOVAKIA, ECHR, Application no. 62202/00, 2006

SDRUZENI JIHOESKE MATKY v. CZECH REPUBLIC, ECHR, Application No. 19101/03, 2006

SIRBU v. MOLDOVA, ECHR, Application no. 73562/01, 2004

TARSASAG A SZABADSAGJOGOKERT (HUNGARIAN CIVIL LIBERTIES UNION v. HUNGARY, ECHR, Application no. 37374/05, 14 April 2009

TOKTAKUNOV V. KYRGYZSTAN, Human Rights Committee, Communication No. 1470/2006, 28 March 2011

VOGT v. GERMANY, ECHR Application no. 323, 1995;

VON HANNOVER v. GERMANY (no. 2), ECHR, Applications nos. 40660/08 and 60641/08)7 February 2012

WILLE v. LIECHTENSTEIN, ECHR, Grand Chamber, Application no. 28396/95,1999;

Recommendations, General Comments, Reports:

Annual Report of MANS, Free Access to Information, 2012

General Comment No. 34, Human Rights Committee, 102nd Session, Article 19, Freedom of Information and Expression, International Covenant on Civil and Political Right, United Nations, Geneva, 11-29 July 2011

Recommendation CM/Rec (2008) 6 of the Committee of Ministers to Member States on Measures to Promote the Respect for Freedom of Expression and Information with Regards to Internal Filters, (Adopted by the Committee of Ministers on 29 April 1982, at its 70th Session

Recommendation No..R (81) 19 of the Committee of Ministers to Member States on the Access to Information Held by Public Authorities. Adopted by the Committee of Ministers on 25 November 1981, at the 340th meeting of the Ministers' Deputies, Council of Europe

Recommendation Rec (2002)2 of the Committee of Ministers to member states on access to official documents, Council of Europe, Adopted by the Committee of Ministers on 21 February 2002

Report Article 19 on Freedom of Information in Armenia, Azerbaijan, Georgia, 9 MAY 2005

Interviews:

Blaženka Dabanović, Head of Department for Planning and Development of Training Programs, Human Resources Management Authority.

Aleksa Ivanović, a Council member of Agency for the Protection of Personal Data and Free Access to Information

Online Sources

12 European Countries Sign First International Convention on Access to Official Documents, 19 June, 2009, <http://www.freedominfo.org/2009/06/12-european-countries-sign-first-international-convention-on-access-to-official-documents/>

Case Law of International Judicial and Quasi-Judicial Bodies

Croatia Adopts New Freedom of Information Law, 15 February, 2013 <http://www.freedominfo.org/2013/02/croatia-adopts-new-freedom-of-information-law/>

Croatia Adopts New Freedom of Information Law, 15 February, 2013 <http://www.freedominfo.org/2013/02/croatia-adopts-new-freedom-of-information-law/>

Dirk Voorhoof, Ghent University and Copenhagen University (Denmark) and Member of the Flemish Regulator for the Media, <http://merlin.obs.coe.int/iris/2006/9/article1>

http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-4&chapter=4&lang=en

http://www.right2info.org/cases/plomino_documents/r2i-tarsasag-a-szabadsagjogokert-hungarian-civil-liberties-union-v-hungary

<http://www.rti-rating.org/results.html>

<http://www.worldcourts.com>

Right to Information Case Law

United Nations Rule of Law, Non-Governmental Organizations, http://www.unrol.org/article.aspx?article_id=23

United Nations Treaty Collection

Vanja Škorić, Senior Legal Advisor with the group GONG, a non-partisan citizens' organization founded in 1997 to encourage citizens to actively participate in political processes; Croatian New FOIA Was Approved Today, 15 February, 2013 <http://www.globalbtap.org/croatias-new-foia-was-approved-today/>

Other Sources:

Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights, WouterHins, DirkVoorhoof

Centre for Law and Democracy, Canada, Response to the OIC Call for Dialogue: Recommendations for Improving the Right to Information in Canada, January 2013

Council of Europe, Convention on Access to Official Documents, Explanatory Note, (CETS No. 205).

Do I have the Right to Know? Enforcement of the Law on Free Access to Information in Montenegro, MANS, Open Society Institute, 2007.

Do you know that you have the right to know?, Free access to information Serving Citizens, MANS, Swedish Helsinki Committee for Human Rights, 2008

European standards for public access to official information, Helena Jäderblom; Commentary on The

Ukrainian Law on Information, CoE, OSCE, 2001

Free Access to Information and Secrecy Data in Montenegro, Law comments with recommendations, Helen Darbishire, Access info Europe, Swedish Helsinki Committee for Human Rights, 2007

Freedom of Expression and Article 10 ECHR Summaries of 20 recent judgments (and decisions) of the European Court of Human Rights (ECtHR), published in Iris, Legal Observations of the European Audiovisual Observatory, Dirk Voorhoof, September 2008

Freedom of Expression, Council of Europe, A Guide to the Implementation of Article 10 of European Court of Human Rights, Monica Makovei, Human Rights Handbook no. 2, 2nd edition

Freedom of Information and Access to Government Records Around the World, by David Banisar, updated July 2006,

Jonathan Fox, The Uncertain Relationship Between Transparency and Accountability, Development in Practice, volume 17, Routledge Pubs, August 2007

NGOs, Information Commission(ers) and other recourses, Right2info

The ECHR in 50 Question, The European Court of Human Rights, July 2012,

The Neo Case - Crime Committed or Well Organized Politically Motivated Punishment?, Case Analysis, Martins Birks

The Rights of Journalism and the Needs of Audiences, Onora O'Neill, 18 March 2013

Toby Mendel, Freedom of Information: A Comparative Legal Survey, UNESCO 2nd edition, 2008

Under Lock and Key, Freedom of Information and the Media in Armenia, Azerbaijan, Georgia, Article 19, April 2005

Under Lock and Key, Freedom of Information and the Media in Armenia, Azerbaijan, Georgia, Article 19, April 2005

Written Analysis of Two Alternative Azerbaijani Draft Law on Freedom of Information, Council of Europe, Organization for Security and Cooperation in Europe, The Representative on Freedom of Media, by Jan van Schagen, 6 September, 2004, Strasbourg



This analysis was developed by Ms Mariam Asanishvili which conducted research and analysis within MANS' Legal Department with the support of the Open Society Foundation, Human Rights and Governance Grants Program - Internship Program. Opinions expressed in the Analysis do not necessarily reflect views of the donor which supported the analysis.