

Access to Information Programme



CONCEPT ON AMENDMENTS TO THE ACCESS TO INFORMATION LEGISLATION

Sofia 2015



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Why is this Concept Necessary?

Sixteen years ago, an Access to Information Programme (AIP) team drafted a concept for legal regulation of the right of access to information in Bulgaria – *The Right of Access to Information – Concept on Legislation*.¹ At that time, the right to information had not yet received international recognition and was perceived as part of the right to freedom of opinion and expression, set forth by Art. 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. However, around 1998 only 22 states had their laws on access to/freedom of information.

There were only a few documents establishing standards in the area. A Recommendation of the Council of Europe on Access to Information from 1981; the Johannesburg's Principles, prepared by a group of experts of the international organization *Article 19*; and a decision of the Bulgarian Constitutional Court as of 1996, framing standards and approaches towards future access to information legislation.

Today, one hundred states have access to information laws and the development of the relevant implementation practices has been extremely intensive.

The Bulgarian Access to Public Information Act (APIA) was adopted in the summer of 2000 following almost two years of public debate.² The then APIA regulated the main elements of the right of access to information, namely: who has the right to information; who is obliged to provide information proactively and upon request; the restrictions to the right to information that is seen as a state and official secret at that time; the procedure for the provision of access to information; the obligations for active publication; the forms of access; the fees for the provision of information; the procedure for appealing a decision for the provision of information.

¹ The Right of Access to Information – Concept on Legislation, 1998: http://store.aip-bg.org/publications/reports_eng/concept.pdf

²The Access to Public Information Act – history of adoption: http://www.aip-bg.org/en/legislation/Access_to_Public_Information_Act/101969/.

In 2003, Bulgaria ratified the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the 1998 Aarhus Convention). The ratification was a new step in the process of regulation of the right of access to information, public participation, and access to justice in the environment.

The APIA was substantially amended in 2007 and 2008. The former amendments were dramatic. With the ostensible purpose to introduce the Directive of the EC on the Re-use of Public Sector Information (adopted in 2003), a draft law was proposed which would have prejudiced the access to information regime. The public reaction was remarkable and, as a result, not only were the proposed amendments that would have prejudiced the regime rejected, but also positive amendments were introduced:

1. Regulation of the re-use of public sector information by introducing the Directive 2003/98/EC;
2. Assigning of officials who are directly responsible for the provision of access to public information;
3. Assigning of an appropriate reading room for review of the provided information.

The APIA amendments as of December 5, 2008 brought the Bulgarian law into compliance with the standards set forth by the Council of Europe Convention on Access to Official Documents, adopted in 2008:

- The scope of the obliged bodies was extended by including the regional offices of the central authorities, natural persons and legal entities under the EU programs and funds, as well as public-law entities;
- The obligation for online publication of the categories of information under Art. 15 and other specific categories was introduced, including the establishment of the section "Access to Information," which greatly benefits information requestors;
- The overriding public interest principle (test) was introduced as regards the application of the restrictions related to the trade secret, the preparatory documents, and the negotiations;

- The obligation for provision of partial access to information was introduced.

Those amendments reflected the problems stemming from the practices and offered solutions.

Due to the active exercise of the rights under the APIA by citizens, journalists, and nongovernmental organizations, practices on the subject have been developing and the awareness about these rights has been rising.

The Access to Information Programme (AIP) has helped considerably for the enhanced exercise of the access to information right during the years and has contributed for the debate on necessary amendments to the legislation and its implementation by formulating problems and recommendations for their overcoming in its annual reports.³

A number of our recommendations have been realized either through the introduction of changes in the legislation or through the acquiring of good practices within the administration.

Some of these achievements are: the establishment of reading rooms; trainings for public officials; the overriding public interest in the application of the exemptions; mandatory partial access; adoption of internal APIA implementation rules; the obligation for online publications; provision of assistance to the requestors; review of the fees for access to information provision, etc.

By contrast, some of our recommendations were not taken into consideration. An example is the recommendation for regulation of the APIA implementation oversight, different from the judicial/ court control.

In the beginning of 2013, in the course of the preparation of the AIP annual report on the state of access to information and the discussions within the initiative Open Government Partnership it became clear that the lack of an oversight public body responsible for the APIA implementation is a serious obstacle to the development of an open government

³ AIP annual reports on the state of Access to Information in Bulgaria 2001 – 2014: <http://www.aip-bg.org/en/publications/annualreports/>.

and the establishment of its infrastructure. At that time, AIP launched public discussions with different groups participating in the process of seeking and providing of public information concerning the need for amendments to the relevant legislation.⁴

Meanwhile, discussions were going on at the EU level concerning potential revision of the Directive on the Re-use of Public Sector Information. The latter was revised in the summer of 2013 with a time frame to be introduced into the national legislation until the summer of 2015.

The second national Operation Plan within the initiative Open Government Partnership contained commitments for introducing the Directive, for amendments to the APIA with regard to the proactive publication of information, and for starting the process of signing and ratification of the Council of Europe Convention of Access to Official Documents.

In the summer of 2014, a working group was established at the Ministry of Transport, Information Technologies and the Communications with the purpose to draft amendments to the APIA that would introduce the Directive. In the autumn of 2014, the draft law was published for public consultation in the period of a month.

The purpose of our Concept is to present a broader range of problems stemming from the APIA implementation practices and the approaches to their overcoming (including problems related to the re-use of public sector information). Moreover, the practices related to that specific part of the law are not very well developed. We can find systematization of the APIA implementation in the annual reports of the Council of Ministers, but there are no data available about the re-use of public sector information. In the Concept, we also present the results from the five public discussions held by AIP in 2014, and the statements referred online within the consultation process.

The second Concept, which AIP presents 16 years after the first one, is based on more knowledge, developed international standards, extremely rich AIP experience in the

⁴ For details on the AIP run Advocacy Campaign for Necessary Amendments to the ATO Legislation, please see: http://www.aip-bg.org/en/publicdebate/Are_APIA_Amendments_Necessary/106099/.

provision of free legal aid to access to information requestors, case law, the experience of training officials from the administration, journalists, NGOs, and different campaigns.

We hope that the Concept would become a basis for further debates on whether further amendments to the APIA are necessary and help for the improvement of transparency practices of Bulgarian institutions, which would correspond to the world open government movement.

Gergana Jouleva

Executive Director of the Access to Information Programme

1. International Standards on Access to Public Information

The right of access to information is among the comparatively “young” rights. Although the first national law in the area was adopted in Sweden in 1766, international documents regulating this specific area, appeared as late as the last quarter of the XX century. During the last 15 years, the number of states which have adopted access to information laws has increased enormously, and in 2014 it reached one hundred.

1.1. Recognition of the right to receive information set forth by international documents related to the protection of human rights

The basis for the recognition of the right to information at international level was set after the Second World War. At its first session in 1946, the General Assembly of the United Nations adopted Resolution 59 (I), which proclaimed: “Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated.” Article 19 of the Universal Declaration on Human Rights sets forth the right of everyone to seek, receive, and impart information. With the same content, the right is set forth as a fundamental human right by Art. 19 of the International Covenant on Civil and Political Rights (ICCPR), which is a legally binding document.

Parallel to the regulation of the fundamental human rights within the work of the UN, the legal framework for their protection in democratic Europe was being established. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR) guarantees the right of everyone to receive and impart information. The provision of Art. 11 of the Charter of Fundamental Rights of the European Union, which is found in Title “Freedoms” of the Charter, provides for the protection of the same right. Further in the Charter, Art. 42 guarantees the right of every citizen of the Union, or every natural or legal person residing or having its registered office in a Member State, to access the documents of the institutions, bodies, offices, and agencies of the Union. Article 13 of the American Convention on Human Rights guarantees the right of freedom to seek, receive, and

impart information. The right of everyone to receive information is protected by Art. 9 of the African Charter on Human and People's Rights.

The difference in the wording of Art. 19 of the ICCPR on one hand, which includes the right of everyone to “seek information”, and Art. 10 of the ECHR on another, which does not contain this right, is one of the reasons why until 2009 the right of access to public information was perceived as falling outside the scope of the Convention.

In 2006, the Inter-American Court of Human Rights delivered a decision which recognized the right of access to information held by the state as a part of the right of everyone to seek, receive, and impart information, set forth by Art. 13 of the American Convention on Human Rights.⁵ With a decision as of 2009, the European Court of Human Rights assumed that the refusal to provide information, held by a public institution, is a form of a breach of the right of everyone to receive and impart information as guaranteed by Art. 10 of the ECHR.⁶ The monopoly of information by the state amounts to a form of censorship and interferes with the exercise of the functions of a social watchdog carried out by nongovernmental organizations and media.⁷ The right of access was recognized to researchers as well.⁸

1.2. Recognition of the right of access to information held by public authorities as a right

The first document within the Council of Europe which recognized the right of citizens to access information held by public authorities is Recommendation R (81) 19 as of November 25, 1981 of the Committee of Ministers of the Member States of the Council of Europe. The document stipulates that all persons within the jurisdiction of the member-states have a right of access to information held by public bodies and the latter cannot be denied on the ground that the requesting person does not have a specific

⁵ Claude Reyes et al vs. Chile, 2006.

⁶ *Társaság a Szabadságjogokért v. Hungary*, Judgment as of 14 April 2009, Final as of 14 July 2009, Application No. 37374/05.

⁷ Вж. още *Youth Initiative for Human Rights v. Serbia*, Judgment as of June 25, 2013; Final Judgment as of September 12, 2013, Application No. 48135/06; *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria*, решение от 28 ноември 2013 г., окончателно от 28 февруари 2014 г., жалба № 39534/07.

⁸ *Kenedi v. Hungary*, решение от 26 май 2009 г., окончателно от 26 август 2009 г., жалба № 31475/05.

interest in the matter. The restrictions to the access to information are permissible only if necessary in a democratic society for the protection of legitimate public interests, listed in the Recommendation. Almost twenty years later, Recommendation R (2002) 2 of the Committee of Ministers of the Member States (of the Council of Europe) that concerns the access to official documents was adopted. It contains definitions of the terms “official documents” and “public authorities” and provides for the regulation of the restrictions to the right of access to documents, of the procedure for the provision of access to information upon request, the forms of access, the fees, the review procedure, additional measures related to raising public awareness about the relevant individual rights, and the training of officials with regard to the fulfillment of their obligations. Due to the increasing significance of the right to information and the fast-lane adoption of national laws in the area, the idea that the Recommendation should become a legally-binding document, a Convention, grew for a short time.

The Convention on Access to Official Documents was adopted on November 27, 2008. On June 18, 2008 in Tromsø, Norway, the Convention was opened for signature. To date, it has been signed by Belgium, Bosnia and Herzegovina, Estonia, Finland, Georgia, Hungary, Lithuania, Macedonia, Montenegro, Norway, Serbia, Slovenia, and Sweden. It will enter into force when ten Member States ratify it. To date, this has been done by Bosnia and Herzegovina, Lithuania, Norway, Sweden, Hungary, and Montenegro. The Convention introduces a minimum standard for access to official documents by providing for national laws to recognize a wider right of access to official documents.⁹ The term “official documents” and the scope of obliged bodies are defined. It sets forth the necessary approaches towards the restrictions to the access to information, as well as a list of acceptable grounds for restrictions to the right. It introduces the obligation for proactive publication, the procedure for filing a request, and the review of the refusals.

⁹ See.

<http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=205&CM=8&DF=16/04/2014&CL=ENG> Art.1, Para.1 of the Convention.

1.3. Recognition of the right of access to official documents of the European Union bodies

In 2001, on the ground of Art. 255 of the Amsterdam Treaty, Regulation 1049/2001 of the European Parliament and the Council regarding the public access to official documents of the European Parliament, of the Council, and of the Commission was adopted. Refusals to provide information under this document could be appealed before the European Ombudsman or before the Court of the European Union. Pursuant to the Lisbon Treaty, a new Art. 10, Para. 3 is introduced in the Treaty on the European Union, providing that “Every citizen has the right to participate in the democratic life of the Union. The decisions are taken as open as possible, and as close as possible to the citizens.”

The Lisbon Treaty also introduced a new provision in the Treaty on the Functioning of the EU (TFEU) – Art. 15 which replaces Art. 255 of the Amsterdam Treaty. The new provision establishes an obligation for the institutions, bodies, offices, and agencies of the Union to work as openly as possible with the purpose of promoting good government and ensuring public participation. Article 15.3 of the TFEU guarantees the right of any citizen of the Union, or any natural or legal person residing or having their registered office in a Member State, to have a right of access to documents of the Union's institutions regardless of their medium.

At the same time, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was adopted with Regulation (EC)1367/2006 of the European Parliament and the Council. Directive 2003/4/EC regarding public access to information concerning the environment establishes the legal regime for such an access as a binding rule for all EU member states.

Although it deals with the legal regulation of different matter, the institute of the “re-use of public sector information” is also related to the access to official documents regime.

The effective mechanism in the area is Directive 2003/98/EC of the European Parliament and the Council regarding the re-use of public sector information adopted in 2003. The Directive was revised with Directive 2013/37/EU which is to be introduced in the national legislation of member states by July 18, 2015.

2. Proactive Publication of Information

The main principle of the access to information legislation is that all information generated and held by public institutions which is not subject to restrictions, i.e. access to it would not harm any common or personal interest, should be accessible. The accessibility of the information not subject to any restrictions includes its publication, and the latter is most effective when using new technologies, i.e. the Internet.

2.1. The principle of proactive publication

One of the main elements of the access to information legislation is the principle that public bodies shall pursue a policy of publishing information of common interest without the need for an individual request, the so called **policy of proactive publication**.

The Convention on Access to Official Documents of the Council of Europe (the Convention), adopted on November 28, 2008, establishes active transparency as one of the principles of the right of access. Article 10 of the Convention gives a broad formulation of the obligation for executive bodies, but, nevertheless, reflects the developing legislation in the member states, namely:

Article 10 – Documents¹⁰ made public at the initiative of the public authorities

¹⁰ The definition of “official documents” given by the Convention coincides with the term “public information” provided by the Bulgarian APIA, namely “Art.1...b: “official documents” means all information recorded in any form, drawn up or received and held by public authorities.”

On its own initiative and where appropriate, a public authority shall take the necessary measures to make public official documents which it holds in the interest of promoting the transparency and efficiency of public administration and to encourage informed participation by the public in matters of general interest.¹¹

The Explanatory Report to the Convention¹² clarifies which “official documents of general interest” shall be made public without the need for individual requests, namely: documents on structures, staff, budget, activities, rules, policies, decisions, delegation of authority, information about the right of access and how to request official documents, as well as any other information of public interest.

All these documents ensuring that citizens are able to form an opinion on the authorities that govern them and to become involved in the decision making process should be published on the initiative of the public authorities.

2.2. Legal regulation of the principle of proactive publication

The policies of proactive publication of information by public bodies are regulated to a large extent, although not entirely by the access to information laws.

The Explanatory Report to the Convention advises the member-states to establish national rules for proactive publication and thus encourage the policy of making public information accessible without the need for individual requests.

With the adoption of the Bulgarian Access to Public Information Act in 2000, the obligations for promulgation, announcement, and publication of specific categories of information were established, namely in the provisions of Art. 12, Para. 1 and Para. 2, Art.14, Art. 15, and Art. 16. The categories of information of common interest, subject to **promulgation by all bodies obliged under the law**, were listed: normative acts, other

¹¹ The Convention was open for signature on June 18, 2009. See: <http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=205&CM=8&DF=16/04/2014&CL=ENG>

¹² Ibid.

official public information provided by law or by a decision of the authority;¹³
announcement by all authorities – information which could prevent some threat to citizens' life, health, or security, or to their property; which disproves previously disseminated incorrect information that affects important social interests; which is of public interest; which must be prepared and released by virtue of law;

and **publication by the executive bodies:** description of powers and data on the organizational structure, the functions and the responsibilities of the body administration; list of acts issued within the powers; contact information; summary of data related to the APIA implementation.

2.3. Elements of the legal regulation of proactive publication

2.3.1. Equality of obliged bodies

Although all bodies of power maintain Internet sites and publish information about their powers, functions, structure, acts, strategies, and activities, the legal obligation for proactive publication of information under the APIA binds solely the executive bodies.

The Judiciary Act establishes the obligations for the courts and the Supreme Judicial Council to publish information related to their justice administering activities and the administration of the judicial power. The Judiciary Act provides in detail the time frames within which information shall be published on the Internet.

The Regulations for the Organization and Activities of the National Assembly¹⁴ establish the rules for the publication on the Internet of specific categories of information related to the legislative process.

¹³The definition of “official information” is provided by Art. 10 of the APIA: “information contained in the acts of the state or local self-government bodies in the course of exercise of their powers.”

¹⁴ Regulations for the Organization and Activities of the 43th National Assembly, promulgated in issue 97 as of November 25, 2014 of the State Gazette.

The obligation for proactive publication by the bodies under Art. 3, Para.2, item 1, i.e. “bodies, subject to the public law, other than those under sub-art. 1, including public law organizations ” is not yet regulated.¹⁵

The proactive publication practices show that different bodies of authority fulfill the requirements of Art. 15 and Art 15a of the APIA, regardless of the fact that the latter affect only the executive bodies.

The draft law on amendments to the APIA,¹⁶ presented in the autumn of 2014, would increase the obligations of the heads of administrative structures and the “public sector bodies”¹⁷ with regard to the publication of information resources and data bases in open formats on the Internet (Art.15b). However, the “public sector bodies” are not obliged under Art. 15 and 15a.

2.3.2. The Internet rule

The Explanatory Report to the Council of Europe Convention on Access to Official Documents, in its paragraph 72 related to Art. 10 of the Convention, encourages public authorities to use different forms of proactive publication, including the use of new information technologies and publicly accessible Internet sites, together with the traditional reading rooms and libraries of the institutions.

Before the Internet era, the approach embedded in the access to information legislation with regard to the information generated by public bodies that is important for society was that it shall be promulgated, announced, or published.

In the XXI century, the standard for publishing information of importance to society was complemented by publication on the Internet. Currently, the so called “Internet clause” is

¹⁵ A definition of “public law organization” is given by the Additional Provisions of the APIA, item 4: http://www.aip-bg.org/en/legislation/Text_of_the_APIA/200432/.

¹⁶ Available in Bulgarian at the Government Public Consultations Portal: <http://www.strategy.bg/PublicConsultations/View.aspx?lang=bg-BG&Id=1474>

¹⁷ A term used in the Directive 2013/37/EU of the European Parliament and the Council for revision of the Directive 2003/98/EC regarding the re-use of public sector information which encompasses all subjects under Art. 3, Para. 1 and Para. 2, item 1 of the APIA, i.e. state bodies, their regional offices, the local self-government bodies, and the public-law organizations together with their associations.

introduced in the access to information legislation. States with older legislation are amending it or are adopting new laws for electronic access to information, containing rules for publication on the Internet sites of public authorities.

The “Internet clause” was adopted in the Bulgarian Access to Public Information Act with the amendments as of 2008.¹⁸

2.3.3. Categories of information of common interest

The proactive publication of information is among the most important elements of the right of access to information. Its significance for the exercise of that right has been increasing and the standards in the area have gradually been set. In most access to information laws adopted during the past decade, obligations for online publication of specific categories of information have been established. A review of this legislation shows that some categories of information mandatory for online publication are common.¹⁹ For instance, information about the powers and the normative acts of the public authorities, about their structure and functions, their activities, signed contracts, and the transparency of the decision making process are mandatory for publication under most access to information laws.

During the past several years, within the global Open Government Partnership initiative, Open Government Standards were developed and widely discussed.²⁰ An important part of these standards are the “Standards for Proactive Publication of Information,” namely the online publication of:

- Institutional information – legal basis of the institution, internal regulations, functions and powers;

¹⁸ State Gazette, issue 104/2008.

¹⁹ Comparative review of the categories of information for proactive disclosure (standard-setting) of the Council of Europe, the Organization for Security and Cooperation in Europe, etc. can be found in Helen Darbshire’s working paper: http://siteresources.worldbank.org/WBI/Resources/213798-1259011531325/6598384-1268250334206/Darbshire_Proactive_Transparency.pdf, p. 39. The paper was presented in AIP information newsletter, October 2010 issue (10)82): <http://www.aip-bg.org/publications/Бюлетин/2010/>.

²⁰ <http://www.access-info.org/en/open-government-data>

- Organizational information – organizational structure, information on personnel, and the names and contact information of public officials;
- Operational information – strategies and plans, policies, activities, procedures, reports, and assessment of performance – including factual analysis and other documents and data on the basis of which policies are being formulated;
- Decisions and acts – including data and documents which prove the necessity of these decisions and acts;
- Public services information – description of the services provided by the authority, manuals and guidelines, forms and information about the fees and the time periods for their provision;
- Budget information – budget procedure, draft budget, budget, financial reports, including information about the salaries within the public institution, auditor’s reports;
- Open meetings information – the topic, the time, the agenda, information about public discussions and the conditions for participation in them;
- Decision-making and public participation – information about the decision-making procedures, including the mechanisms for public consultation and participation in the process;
- Subsidies information – about subsidized persons, about the purposes of the subsidies, the amounts paid and the process of execution;
- Public procurement information – about the tender procedure, the selection criteria, the results of the tender, the contracts signed, and the execution reports;
- Information volumes and resources – description of the information resources, indexes, lists of public registers, description of public registers, the access procedure, including online registers and databases;
- Information about the information generated and held by the information – register of the documents/information, generated and held;
- Information about the publications issued by the institution, including information about free and paid publications;
- Information about the right to information:

- Information concerning the right of access to information and how to request information, including contact information for the responsible person in each public body.²¹

A lot of the categories of information listed above as standards in the area are mandatory for online publication under the Bulgarian legislation as well, although not specified in such details. For instance, the institutional, organizational, and operational information, the administrative acts, information about the exercise of the right of access to information and about the information resources, registers, and data bases is mandatory for publication on the institutional Internet sites under Art. 15 and Art. 15a of the Access to Public Information Act (APIA) after its 2008 amendments.

The law, however, does not specify how often publications should be updated, nor does it stipulate what the content of some broadly formulated categories should be. Thus, the practices of proactive publication are extremely diverse.

The list of acts²² issued within the scope of powers of the administrative structures is subject to mandatory publication under Art. 15, Para. 1, Item 2 of the APIA since 2000. The online publication of that list is obligatory since the 2008 amendments to the Access to Public Information Act. The 2008 amendments have elucidated which acts of the authorities should be proactively published, namely “a structured aggregation of all normative, general, and individual administrative acts, issued by the respective administrative body.”²³

The issue concerning the availability of a unified portal of all administrative acts remains legally unsolved. The initial intention of the legislators as of 2000 for the establishment of a Register of Administrative Structures and Administrative Acts has not been fulfilled. In

²¹ <http://www.access-info.org/en/open-government-data>

²² According to the Bulgarian general administrative law, there are three categories of administrative acts (documents): individual acts are administrative decisions with application to certain individual/individuals; general administrative act is a decision with application to unspecified number of individuals; administrative normative act applies to unspecified number of individuals multiple times i.e. it has the legal character of "rules."

²³ APIA, Additional Provisions §1, item 3 (State Gazette, issue 104/2008): http://www.aip-bg.org/en/legislation/Text_of_the_APIA/200432/.

2002, the obligation for publication of administrative acts in that Register was repealed. Only the obligation for publication of acts which establish regulatory regimes remained. Currently, the data base is titled Administrative Register and does not contain administrative acts, except for these related to the regulatory regimes.²⁴

The decisions of the municipal councils should be announced “through the Internet site of the municipality and through other appropriate means” pursuant to Art. 22, Para 2 of the amended Local Self-government and Local Administration Act (SG, issue 69 as of 2006).

The proactive disclosure of the draft budget, the budget, the draft financial reports, and the financial reports is regulated by the Public Finance Law.²⁵

The Electronic Governance Act (EGA)²⁶ established the obligation for electronic service providers to announce on their Internet sites information about the services they provide (Art. 10 of the EGA). Besides, they have an obligation to provide unimpeded, direct, and constant access of their customers to information about the contacts, the control bodies, the possibilities for filing appeals, etc., the appealing procedure, the value of the service and the ways of payment, the technical description of the service, the way the issued act could be accessed, the technical means for finding and removing errors and the languages in which the service could be used (Art. 13 of the EGA).

The amendments to the Public Procurement Act as of 2014,²⁷ introduced in Chapter Three “Buyer's Profile” Art.22b, 22c and 22d, establish obligations for publication of the complete documentation related to a public procurement on the Internet site of the

²⁴ Regulations for the Conditions and the Procedure of the Maintaining and Using of the Administrative Register, adopted with a Decree of the Council of Ministers No. 132 as of May 12, 2011, promulgated in the State Gazette, issue 39/2011, <http://ar2.government.bg/ras/>

²⁵ Public Finance Law (SG issue 15/ February 15, 2013).

²⁶ Electronic Government Act, promulgated SG issue 46/June 12, 2007, effective June 13, 2008; amended SG issue 82/October 16, 2009, effective October 16, 2009; amended SG issue 20/February 28, 2013; amended SG issue 40/ May 13, 2014, effective as of July 1, 2014.

²⁷ Public Procurement Act, promulgated SG; amended SG issue 40/May 13, 2014, effective July 1, 2014.

contracting authority or on another Internet address, as well as the obligation for coherence of this information with the one published in the Public Procurements Register. This is a serious step towards transparency in the area and responds to the increased public interest in that type of information.

2.3.4. Flexible approach towards the categories of information to be published

It is evident that the list of categories of information subject to publication under the law cannot be exhaustive. Increased interest towards a specific type of information may emerge as a result of ongoing debates, crises, and other public issues.

The states where legislation has established the institution of the Information Commissioner have that independent, centralized, specialized body entitled to create model publication schemes and to approve the publication schemes of specific institutions. Thus, the possibility for consideration of the specifics of the generated and held information within the powers of the institution is increased. On the other hand, external control is exercised over the publication schemes.

A possible legislative solution for deciding which information should be additionally published is to consider the extent to which the information at issue is sought with requests. Such an approach is offered in the Council of Europe Convention (Art. 10, item 73). A similar approach is embedded in the laws of Mexico, Slovenia, USA,²⁸ etc.

2.3.5. Extension of the categories of information of general interest through special laws

Besides the obligation for maintaining an Internet site and providing access to the information which is uploaded on it, the law should require the publication of information about the public authority that is of general interest – how the citizen can contact the institution; what kind of services they can obtain; how the institution fulfills its powers and

²⁸ Assessment of access to/freedom of information laws of 100 states: Global Right to Information Rating: http://www.rti-rating.org/country_data.php

functions; information which helps the visitor to form an opinion about the activities of the institution; how the public funds are spent; how to obtain information from that authority.

The bill for amendments to the APIA²⁹ extends the categories of information listed in Art. 15 from 4 to 14, gives the possibility for a dynamic increase of these categories in its item 14: “other information designated by law,” and creates the obligation for the heads of administrative structures to review and update the lists of categories for publication annually (Art.15a, Para. 3).

The process of review and update of the lists of categories of information subject to publication should also follow specific approaches and should be subject to control. This condition has not been provided in the currently proposed bill.

In a number of states, which had access to information legislation before 1990, the obligations for proactive disclosure have been extended not only through the access to information laws, but also through specific laws introducing obligations for publication of specific categories of information – contracts, budget transparency, or developing the so called guided transparency. Recently, this process of enhancing transparency has been specifically studied and systematized.³⁰

The development and maintenance of public registers on the Internet is another precondition for the development of guided transparency.

A number of laws regulate the online maintenance of public registers. A review of these obligations was made by AIP in 2011 and the results served as a basis for the launching of the Public Registers portal.³¹

2.3.6. Determining the ways, channels, formats of publication, metadata of published information

²⁹ The text is published in Bulgarian in the government portal for public consultations:

<http://www.strategy.bg/PublicConsultations/View.aspx?lang=bg-BG&Id=1474>

³⁰ Full Disclosure. The Perils and Promise of Transparency, Archon Fung, Mary Graham, David Weil, Cambridge University Press, 2007.

³¹ www.publicregisters.info

The standards for the publication of specific categories of information which is of public interest require that there are rules concerning the update of the information and its free obtaining. For some categories of information, public bodies are obliged to seek other channels of dissemination when there is a risk to the life, health, and property of citizens. In such cases, an additional obligation is established for the administration to inform the citizens as fast as possible by all appropriate means.

There are such provisions in Art. 14 of the Bulgarian Access to Public Information Act and the Environmental Protection Act, but without details for time frames and specific obligations.

The interest towards the free use of whole data sets and data bases, generated by the public bodies increases with the development of information technologies.

In 2003, the European Community adopted Directive 2003/98/EC on the Re-use of Public Sector Information.

In 2013, the Directive was revised and will be introduced in the Access to Public Information Act, via which it was first transposed in 2007.

The purpose of the revisions of the Directive on the Re-use of Public Sector Information is to provide for a clear obligation of the Member States to permit the re-use of all available documents, unless the access is restricted or excluded pursuant to the national access to documents regulations and in compliance with the other exemptions provided by the Directive.

With the purpose of facilitating the re-use, the Directive provides that when possible and appropriate, public sector bodies should make documents available in open and machine-readable formats. The new Directive introduces a few important principles which are significant for the legislation on access to and free use of information.

The data sets maintained by public sector bodies should contain:

A. A description of the information contained in data sets and data bases, its thoroughness and coherence. The current text of the law establishes an obligation for a “description of data bases and data sets” and the “procedure for accessing” them. The Directive introduces the requirement for the provision of data, together with metadata.

B. Coherence of the published data and their relevance to other data.

C. Transparency of the criteria forming the charges for access to data sets, registers, etc.

2.3.7. Rules for updating the information and ensuring its availability

The legal regulation of the proactive publication of up-to-date information introduces rules and time frames for its publication.

The Bulgarian Access to Public Information Act establishes the obligation for regular update of published information.

We recommend that a specific obligation be introduced in the text of the law that would determine the time frames for publication of up-to-date information, the time frames for its accessibility on the Internet, and the procedure for archiving it. Furthermore, we recommend transparency with regard to the update of the information similar to the mandatory time frames for publication under the Judiciary Act.

In the course of discussions within the working group drafting the law on amendments to the APIA in 2014, AIP presented a draft list of categories of information subject to online publication which contained proposals for the time frames within which the information should be available on the Internet.³² The flexible approach attained by the working group with regard to the list was a good solution, although no rules for up-to-date publication of information were written down. The making of rules was left to the heads of administrative structures who would determine the lists of categories of information to be published online. We believe that the law should establish the time frames for

³² The Draft List is available on AIP web site (in Bulgarian): http://store.aip-bg.org/Obsujdane2014/Primeren_spisuk_za_publicuvane.pdf

publishing the categories of information under Art. 14, items 1-13. This would serve as a reference point for the heads of administrative structures within the executive power with regard to the specific categories of information to be included in the lists which would be approved annually.

The same is valid for the update of the information subject to publication in the sections “Access to Information.”

2.3.8. Accessibility of the content on the Internet sites

Public bodies, which are obliged to publish information on the Internet, should undertake measures to make that information accessible on their Internet sites by providing a unique address to it, automatic redirection to the new address if changed, and accessibility of the addresses of the published information to the search engines.

2.3.9. Equal opportunities for access to the Internet sites

Art. 26, Para 4 of the currently effective law stipulates that disabled persons may ask access in a form that corresponds to their ability to communicate. However, such obligations are not pertinent to the proactive publication of information. The most recent amendments to the Electronic Governance Act formulate as an aim “accessibility of the electronic administrative services, including for disabled persons.”³³ When we have such an aim set with regard to the e-services, i.e. a part of the work of the administration, this principle should be applied with regard to the publication of information about the activities of the public body on the Internet.

2.3.10. Assistance to people without technical skills

The access to information laws require equality of all requestors. It should be considered that the publication on the Internet does not replace the obligation of the public bodies to

³³ Bill for amendments to the Electronic Government Act (promulgated SG issue 46/2007; amended SG issue 82/2009; SG issue 20/2013; SG issue 40/2014).

provide access to information to people with no technical skills to work with a PC and the Internet. The required by the APIA reading rooms in the public institutions are a necessary condition, but should be complemented with rules for assisting the requestors.

2.4. Coordination and control over active transparency

The process of selection of information which should be published on the Internet should not be left only to the discretion of the administration. This issue could be resolved by regulation of the categories of information mandatory for publication by all obliged bodies and by harmonization of the publications. Besides the legal regulation, this requires the functioning of a centralized specialized body to oversee the implementation of the law, or the entitling of an existing body with the functions of coordination and control.

3. Seeking and providing information via the Internet

Internet has become a commonly used intermediary for seeking, receiving, and disseminating information. As a cheaper and faster means of exchange, of even large amounts of data, Internet should facilitate the use of the right of access to information. However, statistics for recent years show that the requests submitted electronically are approximately between 9% and 15% of the total number of applications for access to information – in 2013 they are 1431 out of 9447 requests received by the executive bodies³⁴. Access to Information Programme's annual surveys reveal even more clearly the problems concerning seeking and obtaining access to information via the Internet. Although the number of government bodies that refuse to provide information on

³⁴ See comparative data from the Reports on the State of the Administration in Gergana Jouleva – *Access to information – without common models, without coordination and without control*, Monthly FOI Newsletter, Issue 7 (127), 2014. (Сравнителни данни от Докладите за състоянието на администрацията – [Достъпът до информация – без общи модели, без координация и без контрол](http://bit.ly/124kcpa), Гергана Жулева, Информационен бюлетин на ПДИ, брой 7 (127), 2014 г.,) (in Bulgarian) <http://bit.ly/124kcpa>.

request submitted by e-mail is decreasing, it remains at 20% of the surveyed institutions (or 107 have not responded out of the 535 surveyed in 2014).³⁵ At the same time the administrative authorities that provided information only by e-mail as requested in the application are barely more than half³⁶ – 269 – of the 535 surveyed in 2014. Behind these figures lies a wide variety of practices associated with the handling of “electronic requests” and with providing information by electronic means, and this diversity reflects the different ways in which administration officials seek solutions to the problems flowing from vague legal provisions.

Seeking and providing information by electronic means are two procedures laid down in different provisions of the Access to Public Information Act and raising a few very specific issues that will be discussed hereafter. The aim is to find the most appropriate, direct and pragmatic solutions to problems encountered in practice.

3.1. Requesting access to information by electronic means

The Access to Public Information Act (APIA) in its Article 24, paragraph 2 provides: “The application is deemed written also in cases where it is sent electronically subject to conditions determined by the respective body.” The issues that most often arise when applying this provision can be divided into three groups – problems with the procedure for submission of applications, problems with requirements for clearer identification of the applicants, and problems with the confirmation of receipt of the application by the administrative body.

3.1.1. Procedure for submitting requests by electronic means

³⁵ Statistics on the received responses to the requests for access to information, AIP 2014 Audit on Institutional Web Sites, <http://bit.ly/1vSbx80>.

³⁶ Idem.

Article 24, par. 2 of the APIA leaves it within the discretion of every obliged body to determine the procedure for handling electronic applications. This text has remained unchanged since the adoption of the Act in 2000. At that time, access to the Internet was not as developed and probably this motivated the legislator to allow a certain level of discretion to the obliged bodies in finding solutions for receiving applications for access to public information through the Internet. Administrative practices provide many different solutions. Some of them, however, unduly restrict the avenues for filing an application by electronic means and sometimes lead to disguised, at times illegal, restrictions on the fundamental right of access to public information. For instance, the Sofia Municipality receives applications electronically only if submitted through its "Virtual office" service. There the requestor should fill a certain type of electronic "form" which gives the impression that it requires different and more data than the exhaustively listed three requirements of Article 25 of the APIA (three names, a description of the information and mailing address). It is not clear why citizens cannot use their own e-mail or letter form to file a request for access to information with the Sofia Municipality. Instead of facilitating citizens, such practices tend to increase the unnecessary formalities in the process of seeking public information.

Such impressions are shared by many regular users of the right of access to information. The discussion that AIP held with journalists produced the overall proposal that "the procedure for electronic submission of requests and provision of information by electronic means should be regulated in more detail in order to harmonize practices".³⁷ The draft Law on amendments to the APIA, submitted for public discussion by the Ministry of Transport, Information Technology and Communications³⁸ proposes modifying Art. 24, par. 2, by deleting the words "subject to conditions determined by the respective body" and replacing them with "to the electronic address under Art. 15, par. 1, item 4." This reform leads to two consequences. On the one hand, the heads of bodies'

³⁷ Proposals for amendments to the APIA from the public discussion with journalists around the topic "Are Amendments to the APIA Necessary?", held on 03 June 2014 in City Hotel, Sofia, within the project "Advocacy Campaign for Amendments to the Access to Information Legislation, (in Bulgarian) <http://bit.ly/1B4B12s>.

³⁸ Draft bill of amendments to the Access to Public Information Act, published on 23.10.2014 on the Public Consultations Portal, (in Bulgarian), <http://bit.ly/15DB0Wk>.

discretion to determine themselves the method of receiving applications electronically is revoked. On the other hand, the duty of every executive body to establish an "electronic address" where it would receive requests for access to public information is clearly set. In short, if under the term "electronic address" all understand "e-mail", this solution would lead to uniformity of practice to a large extent and to the clear result that everyone can send an application through their own e-mail, in free form, subject only to the requirements of Article 25 of the APIA.

Certain ambiguities arise in two directions. On one hand, the term "electronic address" is not defined in the proposed bill and it seems to cover both e-mail and website address. Here the risk is that different administrations can create new diverging practices or the currently existing ones may remain unchanged. Sofia Municipality, for example, will not be forced to change its procedure since the section "Virtual office" on its website is a form of "electronic address". A definition of "electronic address", which supports this interpretation, is enshrined in the draft Law on amendments to the Electronic Governance Act³⁹: "Electronic address" is an identifiable by a common standard information system for receiving electronic statements." In turn, the fact that "electronic statements" are not provided for in the APIA creates inconvenience. A more appropriate option would be that this term be replaced by the term "e-mail" in the text of the APIA.

On the other hand, Article 15 binds only the heads of administrative structures "in the system of executive power." The draft Law on amendments to the APIA omits to require that the other subjects under the law (public law organizations, persons financed by the state budget or EU funds, etc.) determine an "electronic address" for receiving requests for access to information electronically. This could be misused to restrict the receipt of applications by e-mail.

We are on opinion that all obliged subjects under the APIA should announce on their websites an e-mail address, through which they can receive requests for access to public information. If such an address is not announced, the requests are considered

³⁹ Draft bill of amendments to the Electronic Governance Act, submitted for public discussion by the Ministry of Transport, Information Technology and Communications, published on 20.10.2014 on the Public Consultations Portal, (in Bulgarian), <http://bit.ly/1tvPHz6>.

regularly received on the official e-mail address of the subject or, if such an address does not exist, on any e-mail address used by the subject.

When the obliged bodies set out the procedures for receiving requests electronically in their respective internal rules, they sometimes add requirements additional to those of Art. 25 of the APIA that sharply restrict the right of access. Such is the case with the requirement for clearer identification of the applicant which demands the application of an electronic signature.

3.1.2. Requirement for identification of the applicant by electronic signature

AIP's annual survey⁴⁰ indicates that the institutions requiring an electronic signature when submitting an access to information request through the internet are not many. For 2014 they are 12 out of the 535 researched institutions, but some of them have a crucial role in the administration – the National Revenue Agency, the Registry Agency, the State Agency "State Reserve and War – Time Stocks", Regional Administration - Gabrovo.

The main practical problem with this requirement is that not every citizen has an electronic signature. Its possession is not mandatory for everyone, in contrast to the possession of personal documents, and, moreover, such a signature must be purchased. The electronic signature is a way for attesting the identity of the applicant and amounts to a handwritten signature according to Article 13 of the Electronic Document and Electronic Signature Act. However, Article 25 of the APIA, which is also *lex specialis* and applies notwithstanding Article 29 of the Administrative Procedure Code, clearly defines the requisites of a request for access to public information, which exclude the affixing of a signature. This situation is also logically derived from the idea that the APIA does not differentiate between applicants and their objectives. Public information is available to every person in society.

⁴⁰ 2014 Audit on Institutional Web Sites, AIP, Results by Indicator, see B.7. "Is an electronic signature required to submit an access to information request electronically?", <http://bit.ly/1DlmyRp>.

The draft Law on amendments to the APIA provides for amending Article 24, par. 2, which regulates the submission of requests electronically, by adding a second sentence: “In these cases a signature under the Electronic Document and Electronic Signature Act is not required.”⁴¹

This proposal seems to solve the problem with the requirement of electronic signature, eliminating the need for interpretation of several legal provisions by expressly settling the matter in the APIA itself.

During the discussions held by AIP on the question "Are APIA Amendments Necessary?" on several occasions was raised the issue of the formal proof of receipt of requests or responses. The establishment of the actual time of receipt is crucial for the calculation of legal deadlines. In order to exhaust the issues concerning the request for access to public information, we will discuss only the receipt of the application, leaving the receipt of response or information for later.

3.1.3. Confirmation of receipt

With no proof of receipt or registration of their request no citizen may demand that the court upholds their right of access to information. The establishment of the time of receipt and registration of the request for access to public information is crucial for determining the day on which the 14-day period for consideration under Article 28 of the APIA starts running, as well as the subsequent time limits for a potential court appeal. When submitting requests on paper, the acknowledgment of receipt or the registration number issued by the obliged subject serves for attesting the abovementioned period's start date. The acknowledgment of receipt, however, has no equivalent with a similar level of credibility and reliability when exchanging letters through e-mail. Moreover, each administration is itself responsible for determining how to register applications received electronically and whether to inform applicants thereof.

⁴¹ Draft bill of amendments to the Access to Public Information Act, published on 23.10.2014 on the Public Consultations Portal, (in Bulgarian), <http://bit.ly/15DBOWk>.

Generally, questions concerning the registration of correspondence, and document circulation in the administrative bodies as a whole, find their common solutions in procedural legislation, outside of the specific acts that govern matters of substantive law, such as the APIA. However, during the public discussions organized by AIP, a number of users of the Act offered different solutions for settling the matter explicitly in the APIA. Some suggestions propose that the use of specific technical standards for e-mail exchange and confirmation of sending and receiving should be required⁴². These standards, however, do not provide a completely secure technical solution⁴³, would be difficult to implement in the practice of all obliged subjects, and do not represent official standards of the Republic of Bulgaria. Other proposals focused on a possible obligation that institutions receiving a request electronically should return a reply containing the reference number under which the application was registered⁴⁴. Such a solution is enshrined in Article 34 of the Electronic Governance Act: "(1) Upon registration of the incoming electronic document received in the administration of the administrative body, an acknowledgment of receipt is generated and sent to the applicant."

The possible solutions are many, but since the problem of acknowledging the receipt of an electronic request is primarily technical, it is best that its solution be also firstly technical. Such a solution could be to establish a common Internet platform for submitting requests and receiving answers on them, operating not by excluding other avenues for seeking and providing access to public information, but alongside them. This platform, as a kind of intermediary between the requestor and the different administrations, will provide a reliable and precise identification of the moments of sending and receiving of letters electronically. Such platforms operate successfully in

⁴² Proposal for the use of *Simple mail transfer protocol (SMTP)*, statement from Georgi Shumakov, received on AIP's official e-mail address on 19.08.2014

⁴³ According to Anton Stoychev, Obshtestvo.bg, <http://bit.ly/1vvmUeD>.

⁴⁴ Proposal from Alexander Dunchev, WWF, made during the public discussion with representatives of NGOs, active citizens and civil society groups around the topic "Are Amendments to the APIA Necessary?", held on 04 July 2014 in City Hotel, Sofia, within the project "Advocacy Campaign for Amendments to the Access to Information Legislation, (in Bulgarian), <http://bit.ly/1FHgyyM>.

Europe and around the world⁴⁵. Pitaigi.bg⁴⁶ is the project of the NGO Obshtestvo.bg, supported by AIP, for the creation of such a voluntary platform for Bulgaria.

Providing in the APIA an additional opportunity for requestors to use such a general Internet platform would also bring a normative solution to the problems with acknowledging receipt of electronic requests.

The solutions discussed so far would lead to a greater degree of uniformity in practices regarding the receipt of electronic requests for access to public information. In turn, this would increase public confidence in the reliability of this procedure and would thus increase its use at the expense of the more demanding procedure of correspondence on paper. In order to maximally facilitate the work of the administration, however, it is necessary to pay attention to the difficulties associated with providing public information electronically.

3.2. Providing public information by electronic means

Officials from the administrations and other obliged subjects that answer to requests for access to public information by electronic means, are encountering several problems in their work – sending electronically the decision of the body, arranging payment of the charges due, the form of access to information, and obtaining proof of receipt.

3.2.1. Sending electronically the decision to provide or refuse access

Having received a valid request for access to information, the head of the administrative structure or of the obliged subject must, within a certain time limit, issue a decision and notify thereof the requestor in writing, according to Article 28, par. 2 of the APIA. How could this be done only by electronic means? The problem does not seem particularly important or causing any serious consequences, but it still raises concerns. This is

⁴⁵ Two such examples are <https://www.whatdotheyknow.com/> for the United Kingdom and <http://www.asktheeu.org/> for the European Union.

⁴⁶ Foundation Obshtestvo.bg, <http://bit.ly/1zHyR4W>.

indicated in the heterogeneous practices on its addressing. For example, the decision is sent only by regular mail with acknowledgment of receipt, or both electronically and by regular mail with acknowledgment of receipt, or is not sent at all, etc.⁴⁷ The decision under Article 28, par. 2 of the APIA is an individual administrative act (i.e. official legal document), which by itself generates consequences in the legal order.

The draft Law on amendments to the APIA offers a partial solution to the question as in Article 34, par. 3 of the APIA, in addition to the possibilities for delivering the decision against the signature of the applicant or through registered mail, it includes the option that the decision be sent electronically in cases when the applicant has requested that access be provided electronically and has indicated an email address⁴⁸. This approach is partial, since it concerns only the decisions granting access to public information. The draft Law on amendments to the APIA does not propose to amend Article 39, which provides: " A decision refusing access to public information shall be handed over to the applicant against his/her signature or sent by registered mail." In this proposed situation the fate of the decisions granting partial access, which at the same time also issue a partial refusal, remains unclear. It seems that their delivery to the requestors will have to continue to be made on condition of applying a signature or by regular mail with acknowledgment of receipt. Thus, a stronger level of protection of the requestors' rights will be guaranteed in the event of a conflict between Article 34, par. 3 and Article 39. At the same time, nothing prevents the obligated subjects to send these decisions electronically as well. Ultimately, the proposed reform is practically without serious consequences, since the decisions of refusal or partial refusal, i.e. the more frequently contested acts, should continue to be served in the traditional way.

3.2.2. The form of providing access to public information through the Internet

⁴⁷ Concerning the contradictory practices, see the report "Access to Information in Bulgaria 2013", Access to Information Programme, Sofia, 2014, page 37, <http://bit.ly/1ubaFsw>.

⁴⁸ Draft bill of amendments to the Access to Public Information Act, published on 23.10.2014 on the Public Consultations Portal, (in Bulgarian), <http://bit.ly/15DBOWk>.

It seems that so far the biggest stumbling block in the provision of public information through the Internet has been the form of access under Article 26 of the APIA. Some obliged subjects have used the argument that since the law does not provide for “provision by electronic mail”, they could not provide information in this way. AIP has more than once criticized such unlawful interpretations⁴⁹, and the case law on the subject⁵⁰ clearly states that e-mail is included in the term "technical carrier" (“technical bearer/medium”) in Article 26, par. 1, item 4 of the APIA⁵¹. However, for the uninitiated citizen, who should also apply the law, the ambiguity in the text remains, especially since the term "technical carrier" is not defined in the Act itself. The current wording does not really make it easy to understand that the term "technical carrier" plays the dual role of the form in which the actual information is presented (digital, audio or other) and of the way of transmission, through which it reaches the requestor (sent by regular mail, handed personally or sent by e-mail).

The draft Law on amendments to the APIA⁵² offers a solution to this problem in two steps. Firstly, it obliterates the distinction between copies on paper and copies on technical carrier (from Art. 26, par. 1, item 3 and item 4) and replaces it with the general concept of "copies on a material carrier" in Article 26, par. 1, item 3. The definition proposed for "material carrier" in the Additional Provisions of the law is as broad as possible and clearly left inexhaustible in order to include any future types of media (“carriers”): "Material carrier" is any paper, technical, magnetic, electronic or other media, regardless of the type of the recorded content – text, plan, map, photograph, audio, visual or audio-visual image, file and the like." Thus is achieved the objective of

⁴⁹ Statement of Access to Information Programme from 2013, published in Bulgarian at <http://bit.ly/1uRIRUS>.

⁵⁰ Fany Davidova, *The refusal to provide information through e-mail is illegal*, *Monthly FOI Newsletter, Issue 2 (122), 2014*, (Фани Давидова, *Отказът да се предостави информация по електронна поща е незаконосъобразен*, *Информационен бюлетин на ПДИ, брой 2 (122), 2014 г.*), (in Bulgarian) <http://bit.ly/1zDLnCt>.

⁵¹ See for example, Decision 512/15.01.2014 of the Supreme Administrative Court, Seventh Division, on administrative case no. 6659/2013, judge-rapporteur Sonia Yankulova, (unofficial translation): “Email is a method of exchanging digital messages over the Internet (or other computer networks). It therefore, for the purposes of the Access to Public Information Act, as the court correctly held, is also a technical carrier, since it is a means of transmitting information electronically to the requester, i.e. means (form, in the words of the law) for obtaining it by the requester as a copy, other than paper.”

⁵² Bill of amendments to the Access to Public Information Act, published on 23.10.2014 on the Public Consultations Portal, (in Bulgarian), <http://bit.ly/15DBOWk>.

Article 2 par. 2 of the APIA that access to any public information, whatever its carrier, is made possible.

Secondly, in a new item 4 of Art. 26, par. 1 the bill adds "copies, provided electronically, or an Internet address where the data are stored." This part of the provision reflects the ways of transmission of information to the requestor over the Internet. The wording leaves beyond doubt that public information may lawfully be provided through e-mail or other Internet intermediary such as temporary storage services for large volume files.

The solution proposed by the draft Law on amendments to the APIA, on the one hand, with its express provisions removes the existing ambiguities in Article 26, par. 1, and on the other – logically separates the role of the carrier from the way of transmission. Consequently, the text of the act should eliminate the obstacles, seen in Article 26, to the provision of public information through the Internet.

Some other difficulties in the provision of information electronically occur in the concomitant payment of costs.

3.2.3. Payment

Public Information itself is free (Article 20, par. 1 of the APIA), because the right of access is a fundamental right, and anyway the collection and creation of public information is already paid for by the state budget, i.e. by the taxes of citizens. If necessary, only the transfer of the public information to a given carrier and the carrier itself is paid for without profit (Article 20, par. 2 of the APIA). This payment must be carried out before the requestor obtains the information sought (Article 35, par. 1 of the APIA). The currently effective order of the Minister of Finance⁵³, which sets the standards for costs, set aside the payment for 1 Mb of information which had been

⁵³ Order no. 1472 of 29 November 2011 of the Minister of Finance, promulgated in the State Gazette issue 98 of 13 December 2011 (Заповед № ЗМФ-1472 от 29 ноември 2011 г. на министъра на финансите, обн. ДВ, брой 98 от 13 декември 2011 г.).

introduced by the previous order⁵⁴. In other words, the provision of information through the Internet should be free. However, payment continues to be required in different cases⁵⁵. What are the potential costs of the provision of information electronically?

In the discussion with civil servants in charge under the APIA, organized by AIP⁵⁶, the need for payment for the provision of written reference (written abstract) electronically was brought forward as a major issue. This topic has also been considered in the discussion with journalists, where it was proposed that the law should indicate clear criteria for the drafting of written references (written abstracts) and standardize practices in the calculation of their cost⁵⁷. It was also proposed that the law expressly provide that value added tax should not be charged over the costs for providing public information⁵⁸. Another problem brought forward by many journalists was the lack of opportunity for direct payment of the determined costs from distance and without the (sometimes much more expensive) bank transfer fees. It was proposed that the costs for provision of public information could be paid through some internet payment intermediaries (those dealing with utility bills, for instance), whose respective fees are far lower than those for bank transfers.

There is an apparent need for clearly regulating the payment of costs for the electronic provision of public information. However, which normative instrument would be most suitable for this? The standards for costs, by reference to Article 20, par. 2 of the APIA, are set by the Minister of Finance. Participants in the abovementioned discussions preferred that these reforms be enshrined in the law, which would probably lead to a higher level of protection. However, as a specialized body the Minister of Finance seems better placed regarding the clarification of the methodology for determining the standards of costs. There seems to be a need for a more detailed and well-reasoned

⁵⁴ Order no. 10 of the Minister of Finance, promulgated in the State Gazette issue 7 of 23 January 2001 (repealed) (Заповед № 10 на министъра на финансите, обн., ДВ, бр. 7 от 23.01.2001 г. (отм.)).

⁵⁵ An example from AIP's practice – "Access to Information in Bulgaria 2013", Access to Information Programme, Sofia, 2014, page 40, <http://bit.ly/1ubaFsw>.

⁵⁶ Public discussion with public officials from central bodies of power and local self-government bodies responsible for the APIA implementation around the topic "Are Amendments to the APIA Necessary?", held on 14 October 2014 in City Hotel, Sofia, within the project "Advocacy Campaign for Amendments to the Access to Information Legislation, (in Bulgarian), <http://bit.ly/1v2OKi0>.

⁵⁷ Proposal by Iliya Valkov, Darik Radio, public discussion with journalists, op. cit.

⁵⁸ Proposal by Iliya Valkov, Darik Radio, public discussion with journalists, op. cit..

order for determining the standards for the costs of provision of access to information. It should provide for explicit and clear terms as regards payment for written reference (written abstract) provided electronically. This order must also provide opportunities for diversification and facilitation of the payment methods. In order to avoid high transfer fees, it should provide the possibility for payment through internet intermediaries and other similar solutions.

The chronologically last issue arising in the context of the provision of information by electronic means is that of proving when and how the body obliged under the APIA has provided the requested access.

3.2.4. Proof of receipt of the requested information

How should the administration prove that it has fulfilled its obligation under the APIA and has provided public information electronically? This problem was raised by civil servants in the discussion with them, organized by AIP⁵⁹. In practice, many solutions⁶⁰ that are not always satisfactory either for the requestor or the responding obliged subject (or for both) are observed. Currently the issue is regulated by Article 35, par. 2 of the APIA, which requires the preparation and signing by both the requestor and the relevant official of a protocol for the provision of information. Civil servants often require that the applicant sign the protocol before giving him the requested information, which leads to the situation that the applicant signs that he received something she/he has not yet seen. In cases when this procedure must be carried out via the Internet, further complications occur.

The draft Law on amendments to the APIA⁶¹ offers a partial solution to the problem in favour of the requestors. A new paragraph 3 of Article 35 is introduced, which should be

⁵⁹ Public discussion with public officials from central bodies of power and local self-government bodies responsible for the APIA implementation, op. cit.

⁶⁰ Several examples in the report "Access to Information in Bulgaria 2013", Access to Information Programme, Sofia, 2014, page 39, <http://bit.ly/1ubaFsw>.

⁶¹ Draft bill of amendments to the Access to Public Information Act, published on 23.10.2014 on the Public Consultations Portal, (in Bulgarian), <http://bit.ly/15DB0Wk>.

applied alternatively to the previous provision (Art. 35, par. 2). As a result, when providing public information through the Internet, the requirement to draw up a protocol is removed. The requestor, if she/he has expressly chosen it, will receive the requested information by e-mail or via an Internet service for temporary storage of large volume files, which will be the end of the statutory procedures. The only guarantee for the obliged subject is provided for in the new paragraph 4 of Article 35: "If the requestor has changed the e-mail address without informing the body or has indicated an incorrect or nonexistent address, the information is deemed to be received from the date of its sending." As far as having proof is concerned, the date of fulfillment of the obligation is considered the one on which the requestor receives the public information sought. When providing access personally and on-site, the drawn up and signed protocol certifies that date. Notably, certifying the date is important for determining the beginning of the period for demanding court review and other legal deadlines. In this proposed solution, only in the event when the applicant has indicated an incorrect or nonexistent address, the obliged body would have a proof of the precise date (proposed Article 35, par. 4). In all other cases, the administration will have no sure way for attesting the date. It is true that this problem does not seem like loaded with high risk. Such a lack of regulation is also encountered in Regulation (EC) № 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and the Commission documents; still, there is no evidence in the practice of specific disputes arising from this. However, the Bulgarian administrative culture strongly adheres to formalism and gives special attention to the detail of the form. The discussion of the matter is not without interest.

One possible solution is the inclusion in the APIA of an additional possibility for requestors and obliged bodies to use a common internet platform (see above, section 3.1.3 Confirmation of receipt).

4. Limitations on the right of access to information

4.1. Regulation of the limitations on the right of access to public information contained in international standards

The grounds on which it is permissible to limit the right of everyone to receive and impart information, including any information held by public bodies are listed in Article 19 of the Universal Declaration of Human Rights⁶², Article 19 of the International Covenant on Civil and Political Rights⁶³, Article 10 of the European Convention on Human Rights (ECHR)⁶⁴.

In the field of access to environmental information, the regulation of which historically preceded that of access to official documents, the relevant limitations and the approach to them are listed in the Convention on access to information, public participation in decision-making, and access to justice in environmental matters⁶⁵. The regulation in Directive 2003/4/EC is analogous.

A more detailed regulation of matters relating to limitations of access to information is contained in the Council of Europe Convention on access to official documents. Similarly, detailed regulation can be found in Regulation (EC) 1049/2001 which applies as regards the right of access to official documents held by institutions of the European Union.

Applicable to the limitation on access to information in view of the protection of personal data are Convention № 108 of the Council of Europe for the Protection of Individuals with regard to Automatic Processing of Personal Data, Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free

⁶² Adopted by the United Nations General Assembly on 10 December 1948.

⁶³ Adopted on 16 December 1966, in force since 23 May 1976, promulgated in the State Gazette, Issue 43 of 28 May 1976 (обнародван в ДВ, бр. 43 от 28 май 1976 г.).

⁶⁴ Concerning the European Convention on Human Rights this could be concluded on the basis of two decisions of the European Court on Human Rights from 2008.

⁶⁵ Adopted in 1998 in Aarhus, Denmark, also known as Aarhus Convention.

movement of such data, and Regulation (EC) № 45/2001 of the European Parliament and the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by institutions and bodies and on the free movement of such data. Protection of personal data is a fundamental right recognized by the Council of Europe and the European Union. The balance between the two rights is subject to the case law of the Court of Justice of the European Union, as well as to the European Court of Human Rights' case law.

4.2. Contents of the requirements regarding limitations on access to information, in accordance with international standards

According to Article 10, par. 2 of the European Convention on Human Rights, limitations on the right of everyone to receive and impart information may be applied only if three conditions are simultaneously present. Restrictions must be:

- expressly provided by law;
- proportionate to the aim of protecting one or more of these interests;
- necessary in a democratic society.

These conditions of applicability of the limitations are termed "three-part test", the application of which in the specific cases is detailed in the European Court of Human Rights' case law.

The regulation of limitations is developed regarding the right of access to official documents in the Convention on Access to Official Documents, which is the most extensive international document in this respect. According to Art. 3 para. 1 of the Convention:

Each Party may limit the right of access to official documents. Limitations shall be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting⁶⁶.

At the same time, in addition to the standard "three-part test", the Convention also contains further requirements that lead to more guarantees for the restrictive application of the grounds for refusal of information. The first one is known as the "harm test" (Article 3, par.2, item 2, first hypothesis of the Convention). The second is the "balance of interests". It builds on the "harm test" and even in cases of harm to the protected interests, the information (official documents) is subject to disclosure when there is an overriding public interest in the disclosure. The third requirement is for States to fix a maximum period of applicability of the restrictions⁶⁷.

4.2.1. Tests for harm and overriding public interest - means of introduction

The Explanatory Report to the Convention offers a detailed presentation regarding the various provisions, including the application of harm and overriding public interest tests. They may be applied for each individual case, or may be enshrined legislatively as presumptions. For example, par. 38 of the Explanatory Report reads:

... Legislation could for example set down varying requirements for carrying out harm tests. These requirements could take the form of a presumption for or against the release of the requested document...⁶⁸

Such an approach is understandable, since such presumptions relate to possible life situations. It is logical not to expect a presumption of openness regarding an action plan in wartime conditions, as opposed to a contract for consulting on a reform in a given

⁶⁶ The three- part test is enshrined in the 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, as well as in the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

⁶⁷ The harm and the balance of interest tests are both enshrined also in the Aarhus Convention, as well as in Regulation (EC) No 1049/2001

⁶⁸ Explanatory Report to the Council of Europe Convention on Access to Official Documents.

sector of government. The legislative introduction of a presumption against granting a requested document could be in the form of a legislative introduction of fixed periods of protection of the information. On this issue the Explanatory Report states:

The outcome of the “harm-test” is closely connected with the lapse of time. For some limitations, certain events inevitably lead to the cessation of that limitation. In other instances, the passage of time may reduce the damage of release of the information⁶⁹.

Therefore, determining the legal periods of applicability of the protection through limitations on access to information is based on the assumption that at the time of determining that a given piece of information should be restricted for access, the latter is most sensitive, while its sensitivity decreases with time, and with it the protection should also be removed.

4.3. Limitations on access to information under the Bulgarian legislation

To a certain extent, the abovementioned requirements contained in international standards regarding limitations have been introduced in the Bulgarian legislation on access to public information. By Decision № 7 of 4 June 1996 on constitutional case № 1/1996, the Constitutional Court has adopted the interpretation of Article 41, paragraph 1 of the Constitution, according to which "the right is the principle and its restriction is the exception to the principle" and exceptions are applied "strictly and only for the protection of a competing interest."

The requirement that a restriction of the right of access to public information may be introduced only by a law is a consequence of the abovementioned decision of the Constitutional Court and is expressly provided for by Article 7, paragraph 1 of the APIA.

The protected interests are listed both in Article 41, paragraph 1, phrase 2 of the Constitution and in Article 5 of the APIA. These provisions follow the enumeration in Article 19 of the ICCPR and are, therefore, worded in very general terms. A more

⁶⁹ Ibid, par. 39.

specific enumeration of the grounds for restricting the right of access to public information is listed in Article 37, paragraph 1 of the APIA. However, they are not specified in detail. For example, Article 37, paragraph 1, item 2 refers to the situation in which "access affects the interests of a third party" and Article 37, paragraph 1, item 1 - "classified or other secret protected by law". The hypothesis "protection of the interests of a third party" actually covers two separate grounds for limitation of the right of access to information – protection of the personal sphere and protection of trade secrets. This understanding has been adopted in the case law, but is not distinct and clear enough in the wording of the legal provision.

In the Convention on access to official documents, the Convention on access to information, public participation in decision-making, and access to justice in environmental matters, Regulation № 1049/2001, and Directive 2003/4/EC trade secret and the protection of the personal sphere are listed separately as restrictions on the right of access to information. The question arises whether it is not preferable that they also be listed separately in Article 37 of the APIA.

4.3.1. Applicability of the "balance of interests" to individual restrictions

The balance of interests test was introduced in the APIA through the legal form of the so-called "overriding public interest". It applies to various restrictions – "trade secret" – Article 17, paragraph 2 *in fine* of the APIA, "opinions, advice, and recommendations prepared by or for the body" – Article 13, Paragraph 2, Item 1 of the APIA, "ongoing negotiations" – Article 13, Paragraph 2, Item 1 of the APIA, "affecting the interests of physical persons (individuals)" – Article 31, paragraph 5 and 37, paragraph 1, item 2 of APIA.

A question arises – is the "overriding public interest" test applicable regarding restrictions that are not explicitly mentioned in the APIA, such as the so-called

"professional secret."⁷⁰ The latter is referred to in the phrase "other protected secret in cases prescribed by law" as used in Article 37, par. 1, item 1, second hypothesis of the APIA. If we accept that it was introduced in order to protect third parties concerned, then the test is applicable. A similar question is raised in the case of the so called "official secret." This is a type of classified information and is provided for as a restriction in Article 37, par. 1, item 1, first hypothesis. At the same time, as defined in Article 26, paragraph 1 of the Protection of Classified Information Act, this is information the unauthorized access to which would harm a state or other legally protected interest. Insofar as this may be the interest of a third party concerned, the issue of the applicability of the "overriding public interest" is present.

Concerning the "tax and social security secret", the case law interprets the law thus – the existence of special rules on "tax and social security secret" in the Tax and Social Security Procedure Code (TSSPC) does not exclude the application of the APIA and the need to assess the existence of an overriding public interest under Article 31, par. 5 of the APIA. This is because under Article 74, paragraph 2 of TSSPC, data constituting tax and social security information shall be provided with the written consent of the person, which is in agreement with the rule of Article 31, par. 1 and 2 of the APIA. The latter provides that when the requested information is affecting a third party, its consent is necessary for the provision of the information. In this situation, the issue is present for the cases where consent is not required, such as these covering the "overriding public interest" according to Article 31, paragraph 5 of APIA⁷¹.

In the interest of uniformity and predictability in the implementation of the Act, it is appropriate to address these questions through legislation or in case law.

⁷⁰ The issue arose in 2014 when the Bulgarian National Bank used the "professional secret" concept in order to argue that its protection is absolute and that the information sought could not be disclosed under any circumstances.

⁷¹ Decision № 2045/16.02.2010 on administrative case № 9995/2009 of the SAC, Fifth Division.

4.3.2. Applicability of the "balance of interests" test to the restrictions

The norm of §1 of the Additional Provisions (AP) of the APIA provides for two large groups of categories of cases in which there is an overriding public interest. One is regulated in § 6 of the AP of the APIA and these categories of cases are applicable to restrictions relating to the protection of opinions, statements and proposals⁷² on an issue, as well as to the protection of negotiations⁷³ and the interests of a third party, other than a trader⁷⁴. This provision establishes four types of cases where the overriding public interest test is applicable. On another hand the norm of § 5 of the AP of the APIA applies only to cases of commercial secret.

It turns out that the scope of the overriding public interest test applied on commercial secret cases is broader than that on other restrictions. This difference, however, is not due to legislative intent or the nature of the restrictions. For example, there is hardly a good reason for preparatory documents not to be disclosed under overriding public interest in the case of an ongoing discussion. The existence of such a discussion, however, is grounds for the application of the overriding public interest test as regards a commercial secret, but not as regards preparatory documents, since in § 6 of the AP of the APIA does not provide for it. At the same time, it is the statements and advice expressed in the course of an ongoing discussion on a bill, draft regulation or general administrative act that have to have the utmost publicity.

The legislation under which classified information is not subject to assessment for an overriding public interest is clearly incompatible with international standards. The provision in question is Article 37, par. 1, item 1 of the APIA. In the case of a state secret the protection covers an interest other than the interest of a third party, and therefore item 2 of the same provision, which provides for the assessment of an overriding public interest, is not applicable. The international standards, however, do not provide for any exemptions from the application of the overriding public interest test.

⁷² Article 13, par. 2, item 1 of the APIA

⁷³ Article 13, par. 2, item 2 of the APIA.

⁷⁴ Article 37, par. 1, item 2 of the APIA.

International standards and legislation in (most) democratic systems include an express provision, according to which information revealing violations of human rights, humanitarian law, and crimes⁷⁵ cannot be classified. Assessment of the balance of interests should also be provided for when the information is of importance to a public debate, increases the accountability on public spending, or is of significance for public health and safety⁷⁶.

When carrying out a balance of interests test involving the protection of the private sphere of citizens, a contradictory interpretation as to which is the most appropriate method occurs in practice. The issue is settled on the constitutional level by Decision № 4 of 26 March 2012 on constitutional case № 14/2011. The Constitutional Court held that persons holding public office or carrying out public activities enjoy much lower level of protection of personal privacy than other citizens. In the reasoning of this ruling the Constitutional Court refers to its Decision № 7 of 4 June 1996 on constitutional case № 1/1996, according to which *state authority as a whole, as well as political figures and public officials may be subject to public scrutiny at a higher level than other individuals*. This view has been adopted by the Supreme Administrative Court in decisions on disputes under the APIA.

Other legislations have adopted an approach where the Access to information act provides a list of the persons holding public positions. In Bulgaria such a listing is provided in at least three laws with a different scope of officials – the Prevention and Ascertainment of Conflict of Interest Act, the Access and Disclosure of Documents and Announcing Affiliation of Bulgarian Citizens to State Security and the Intelligence Services of the Bulgarian People’s Army Act, and the Public Disclosure of Property of Persons Occupying High State and Other Positions Act. In the APIA there is no express reference to the scope of these persons, which leaves to the courts the opportunities for development of case law according to the specifics of the cases.

⁷⁵ See Resolution 1954 (2013) of the Parliamentary Assembly of the Council of Europe, par. 9.6.

⁷⁶ Ibid, par. 9.5.

4.3.3. Applicability of the harm test and time limits for the different limitations

In the APIA there is no general provision on the applicability of the harm test or a provision detailing to which restrictions it applies. The analysis of the various rules governing certain restrictions shows that the test is applied to information classified as state or official secret⁷⁷, commercial secret, protection of opinions, statements and recommendations from or for the body, negotiations, as well as protection of the interests the third party. This practically means that the harm test is applicable to all restrictions.

The question of the when to apply the harm test is very important. According to some legislative solutions, it should be applied at the time of creation of the information / document, according to others – at the time of receipt of the request for access to information, and according to still others – at both times. In this respect, according to the APIA assessment must be made regarding all restrictions except those related to the protection of state or official secret, at the moment when a request is received. It is appropriate to discuss the issue of the need to introduce an obligation for carrying out a harm test at the time of consideration of the request for access.

There is also the question of introduction of time limits for the protection of the particular interest. Time limits for the application of the restriction are provided for state secrets, official secrets, the protection of opinions, statements and proposals from or to the body, as well as for negotiations. Duration for the protection of information under the restrictions relating to commercial secret and personal data has not been set. It is worth discussing whether and under what circumstances it is appropriate to provide for such a period in respect of them.

⁷⁷ The test is carried out at the moment of classifying the information according to Article 25 and Article 26 of the PCIA.

5. Sanctions under the APIA – problems and how they could be solved

The administrative sanctions in the APIA are provided for in Articles 42 and 43. The current legal framework covers four main administrative infringements for which an administrative sanction is imposed: a fine for individuals and a property sanction for legal persons.

Art. 42. (1) If not subject to a harsher penalty, a civil servant who failed to respond within the specified time limits to a request for access to public information without an exculpatory reason, shall be fined between 50 and 100 leva.

(2) If not subject to a harsher penalty, a civil servant who did not follow a court order to grant access to public information shall be fined between 200 and 2000 leva.

(3) Any failure to meet the obligations under art. 31, par. 3 shall be punished with a fine between 50 and 100 leva for physical persons or between 100 and 200 leva for legal entities.

(4) For failure to provide access to public information by the persons described in art. 3, par. 2, the punishment shall be a fine between 100 and 200 leva.

5.1. Problem with the imposition of the fine

Sanctions under the APIA are not being imposed over the years, indicating that the current model does not work. Such conclusion follows from both the observation of administrative practices of APIA implementation, which we constantly monitor, and the data published in the annual Reports on the state of the administration, prepared by the Council of Ministers on the basis of aggregated data obtained for the given year. A case of imposition of an administrative sanction for a breach of the APIA was indicated only

once in the 2013 Report on the state of the administration⁷⁸. One of the main reasons for this lack of sanctions is the definition of the sanctioning body. Under Article 43 of the APIA sanctions are imposed either by the respective administrative body, or by the Ministry of Justice in cases, where the breach of the APIA was carried out by an obliged body outside the system of state authority – such as the so-called public law subjects. At the same time, according to Article 28, par. 2 of the Act decisions on requests received in the institution are taken by the bodies or by officials expressly designated by them. In practice, in cases where the head of the institution has not designated another official, entitled to take such decisions, but does it herself/himself, it appears that in case of a breach she/he must punish herself/himself.

Problematic is the question concerning the ascertainment of infringements under the APIA – under the provision of Article 43 violations under this Act shall be established by the officials designated by the Minister of Justice in the cases set forth in Article 3, par. 2 or by the respective body in the other cases. This means that at this stage of the administrative sanction proceedings, the person having committed the violation and the person who must establish the existence of the violation may, once again, be the same person.

For comparison, in the domain of personal data protection the issue is resolved as follows: in the Personal Data Protection Act, both the establishment of violations and the imposition of sanctions are carried out by the Commission for Personal Data Protection. The ascertainment of the infringement is carried out by a member of the Commission, and the imposition of the sanction – by the Chairman of the CPDP. The monitoring of practices on sanctioning violations of personal data protection has indicated the

⁷⁸ During the reported year there has been 1 registered violation and 1 imposed sanction to officials responding under the APIA in Regional Directorate “Agriculture” – Kyustendil” – Report on the State of the Administration, 2013

effectiveness of this model – each year hundreds of fines are imposed for violations committed by personal data administrators⁷⁹.

So far, there is no evidence of sanctions imposed by the Ministry of Justice against an obliged body under Article 3, par. 2 of the APIA.

Monitoring of existing practice indicates that ministries' inspectorates are not very active in the exercise of control over the implementation of the APIA. The inspectorates have general functions of oversight over the implementation of the legislation, which includes the APIA, by the ministries' administration, but in fact these functions remain unrealized.

Based on the above, it can be argued that the system in which the respective public body is competent to impose administrative sanctions for violations of the APIA to its own administration is not appropriate. As a whole, the absence of a single authority monitoring the implementation of the APIA, and vested with the sanctioning functions, affects adversely the existing administrative practices on the imposition of sanctions.

5. 2. Amounts of fines

The amount of the statutory APIA fines is low, ranging between 50 and 200 levs. An exception is the amount of the fine imposed under Article 42, par. 2 of the Act, but this hypothesis concerns the cases of failure to implement a court instruction and the competent body to impose the fines is the respective court.

The comparison with the fines imposed under the laws governing restrictions on the right of access to information – the Protection of Classified Information Act and the Protection of Personal Data Act (respectively up to 20 000 and 100 000 levs), indicates a lack of proportionality. The right to access information is a fundamental human right, which is why its violations should be adequately sanctioned, which would have a positive effect on the practices of implementation of the APIA.

⁷⁹ According to the CPDP's 2013 Annual Report, in the reporting period, the Commission has established a total of 83 administrative violations of the Personal Data Protection Act, in relation to which were imposed property sanctions and fines in the amount of 503,300 levs.

5. 3. Expanding the cases where a fine is imposed

At present, the above-mentioned APIA sanctions cover only a few hypotheses of failure to fulfill obligations prescribed by the Act. They do not exhaust the violations detected in practice and, therefore, new proposals to expand the scope of the sanctions should be brought forward. In its current version the APIA does not provide for sanctions against failures to fulfill obligations for active disclosure of information under Article 15 et seq., as well as against failures to provide information electronically, which affects adversely the relevant administrative practices on publication / provision of information. The results of AIP's annual surveys on the information published on the institutions websites show a number of problems with the implementation of the law that can be removed to a large extent by introducing specific sanctioning provisions. A possible legislative solution of this issue could be the adoption of the punitive model, introduced in the administrative sanction provisions of the Public Finance Act. Its Article 173 reads: *“(a) responsible official who has failed to fulfill the obligation to publish information or documents on a website as prescribed by this Act, the state budget act for the respective year or its implementing ordinance shall be punishable with a fine of BGN 100 to BGN 500, whereas a repeated violation shall be punished with a fine in double amount.”*

The draft Law on amendments to the APIA of October 2014 has a single proposal for changes in the administrative sanction provisions. It is the introduction of a sanction for failure to provide information for re-use by adding a paragraph 5 with the following text: *“For failure to provide information for re-use shall be imposed a sanction of 50 to 200 levs.”*

What is further recommendable is solving the issues concerning the body which establishes the violations and respectively the sanctioning body – for example a Minister may be empowered – such as the Minister of Justice for all cases. Another way to meet the problems is the introduction of specific functions as regards the ministries' inspectorates.

The sanctioning mechanism will become more effective if the scope of control is broadened. It should also include fines for failure to fulfill obligations for active publication.

6. Oversight of the APIA implementation

6.1. Standards which precondition the introduction of a specialized public body to oversee the APIA implementation

The Convention on Access to Official Documents (the Convention) sets forth the right of the requestor, whose request for information has been denied expressly or impliedly, to appeal the denial before a court or another independent and impartial body.⁸⁰ In addition to the review procedure, the Convention sets forth a requirement for “an expeditious and inexpensive review procedure.”⁸¹

The requirement for a guarantee of the right to review is fulfilled by the Bulgarian law. Pursuant to Art. 40 of the Access to Public Information Act (APIA), the requestors have the right to appeal the denials and other decisions on their access to information requests before the administrative courts and the Supreme Administrative Court. The right to appeal the silence of the administration on access to information requests, or the so called silent refusals, is not explicitly provided by the APIA. However, it has been substantiated and deduced in the case law of the Supreme Administrative Court.⁸²

The requirements for a fast and inexpensive review procedure usually raise the question of the potential establishment of a public body which would exercise especially these functions, separately and independently of the courts. Parallel to these functions, the existence of a specialized public body with administration and expertise in the access to

⁸⁰ Art.8, Para.1 of the Convention:

<http://www.conventions.coe.int/Treaty/EN/Treaties/Html/205.htm>.

⁸¹ Ibid, Para.2.

⁸² See. Ruling No. 8645/ 16.11.2001 on adm. case No. 6393/2001 of the SAC, Five-member Panel, and many other court decisions.

public information area requires legislative decisions which would entitle it with wider powers. The latter are related to the monitoring of the implementation practices, the analysis of the monitoring results, the issuing of guidelines, handbooks, the holding of trainings for the administration, the running of campaigns in order to raise awareness about the right of access to information, and the imposition of sanctions. Within the European Union, the functions of this authority are also related to the ensuring of the right to good governance,⁸³ as well as to the monitoring and analysis of the provision of information for re-use.

The application of the provisions related to the re-use of public sector information also suggests that it would be beneficial to assign specific functions to such a public authority. Pursuant to Art. 4, Para. 4 of the Directive 2003/98/EC (the Directive) on the Re-use of Public Sector Information, revised by Directive 2013/37/EU, the Member States shall provide for means of redress in case the applicant wishes to appeal the decision on the provision of information for re-use, including the possibility of review by an impartial reviewing body. Pursuant to Art. 7, Para. 4 of the Directive, Member States shall ensure that applicants for re-use of documents are informed of the available means of redress relating to decisions or practices affecting them. This means that on national level, a system for monitoring, analysis, and unification of decisions and practices should be established. For that purpose, a competent public authority shall be entitled which would be enabled to use the respective financial, technical, human, etc. resources. The functions of the public authority may include overseeing the implementation of the obligation under Art. 9 of the Directive for making practical arrangements facilitating the search for documents, such as asset lists of documents with relevant metadata, online accessibility in proper formats, and portal sites that are linked to the asset lists. In the end, a specific public body is required to undertake the preparation of a report on the implementation of the Directive every 3 years, as stipulated by the revised Art. 13, Para.

⁸³ Pursuant to Art. 15 of the Treaty on the Functioning of the EU, the right of access to documents is part of the right to good governance. In the Charter of Fundamental Rights of the EU, these rights are connected, but are provided separately by Art. 41 and Art. 42 respectively.

2. A possible and reasonable approach would be that the listed functions are undertaken by a public body with assigned functions related to the control and implementation of the APIA. In the context of Bulgaria, this would also comply with the commitment for “enhanced coordination and control over the implementation of the law,” provided by the Second National Action Plan within the Open Government Partnership initiative.

6.2. Information Commissioner/ Ombudsman and the courts

In different national legislative models, the specialized public authority which reviews appeals under the access to information laws is the Information Commissioner, Ombudsman, Commission. A substantial issue regarding the establishment of such an oversight/enforcement mechanism is the comparison with the functions of the courts. An important aspect is that the introduction of a Commissioner/ Ombudsman does not exclude the court review. This means that this oversight mechanism appears as parallel and not as “competitive” to the judicial one. The issue that appealing before the courts is not a fast, accessible, and inexpensive procedure is raised. In a number of countries, it is even a hardly accessible and expensive initiative.⁸⁴ The need to use legal aid and counsel services, as well as the overburdening of the courts, is common obstacles in most of the systems. An example is given in one of the research papers on the topic explaining that a 2002 court case in South Africa against an access to information denial cost nearly 30,000 USD.⁸⁵

In Bulgaria, court review of denials and decisions for provision of public information has been introduced with the APIA as early as 2000.⁸⁶ Pursuant to the effective Tariff No. 1 to the Law on State Taxes, the taxes collected by the courts, the prosecution's office, the investigative services, and the Ministry of Justice for the review of appeals against administrative acts amount to 10 BGN (5 Euro) for natural persons or legal non-profit

⁸⁴ Laura Neuman, *Enforcement Models. Content and Context*, published by the International Bank for Reconstruction and Development/The World Bank, Washington DC 2009, pages 8-9.

⁸⁵ *Ibid*, p.9.

⁸⁶ This circumstance deserves consideration since there are legislations with a different history. For instance, in the USA, the Freedom of Information Act adopted in 1966 did not provide for a court review. The latter was introduced with 1974 amendments to the law.

persons, and 50 BGN (25 Euro) for legal commercial persons.⁸⁷ At the submission of a second instance court appeal, half of the amount of the tax is due, i.e. 5 BGN or 25 BGN respectively.⁸⁸ These taxes are applicable for the appeals against denials and decisions under the APIA. The duration of litigation under APIA is around an year, year and a half encompassing the hearing at two instances. In comparison to a number of other types of cases, these cases are processed and heard relatively fast. The comparison is not only with types of cases in Bulgaria, but also with types of cases from other systems.

In view of that exposition, the possible advantages of the introduction of the Information Commissioner/ Ombudsman should be sought in the exercise of other functions rather than the review of appeals.

6.3. Review of the approaches adopted in national access to information laws

In different national access to information laws, the functions regarding the review of appeals against denials and decisions of access to information are assigned to different bodies. In some cases, the appeals are reviewed by the courts – administrative or civil. In other cases, the appeals are reviewed by a separate public body. The establishment of such an independent body has been observed during the past ten – fifteen years at European level and worldwide. In Europe, it exists at the EU level, in the UK, Scotland, Ireland, Germany – at a federal level, and in the states - in Hungary, Slovenia, Serbia, Croatia, Montenegro, etc.

The issue of independence has substantial significance for the efficient functioning of the Information Commissioner/Ombudsman. In some laws, it is adopted that the body is elected by the parliament, in other – it is appointed by the executive. Certainly, the independence of this body is of key significance for the promotion for the review of appeals. Within Europe, an approach different from that one would be extremely problematic as far as the effective protection of human rights is essential in view of the provisions of Art. 13 and Art. 6 of the European Convention on Human Rights.

⁸⁷ Pursuant to the provision of item 2a, letters “a” and “b” of the Tariff.

⁸⁸ Pursuant to item 2a, letter “c” of the Tariff.

In some systems, the decisions of the Information Commissioners are of a recommending character (Hungary, European Union), and in others they are binding (UK, Slovenia, etc). A 2013 survey of the Center for Freedom of Information finds that the binding character of the decisions on appeals or complaints is a substantial factor for effective consecutive compliance.⁸⁹ Out of the participating Commissioners/Ombudsmen in the survey, 62.3% (33) pointed that their decisions are binding, and 37.7% (20) that they issue recommendations.⁹⁰ Regarding the extent of compliance with their decisions, 55% of the former category responded that their decisions are always implemented, while none of the second category gave a confirmatory response.⁹¹ Consequently, issuing recommendations to public bodies turns out to be a less effective enforcement tool compared to the pronouncement of binding decisions.

As it has been already pointed out, the functions of the Information Commissioner/Ombudsman beyond the review of appeals vary in different national legislations, encompassing preventive as well as repressive aspects. The former encompasses activities related to raising awareness about the right to information and how to exercise it, monitoring of practices, holding of trainings, issuing of guidelines, instructions, prescriptions for the effective application of the law and the unification of the implementation practices, review and reporting before the parliament (or another body depending on the way of appointment of the Commissioner), recommendations for amendments to the legal framework etc. The latter aspect encompasses the powers related to investigation/ inspection of cases/, review of appeals and complaints, establishing violations, and imposition of sanctions.

The issue concerning the powers which the Commissioner/ Ombudsman possesses with regard to investigation, i.e. collecting evidence, is interesting. It is important to know which powers are applied more often and which less often. The conclusion of the quoted

⁸⁹ The Information Commissioners' International Exchange Network Survey 2013: www.centrefoi.org.uk/edocs/pdfs/experience_of_information_comms.pdf.

⁹⁰ Ibid, page 6.

⁹¹ Ibid, page 7.

survey is that strong powers are comparatively rarely used. Only one out of 34 Commissioners who have such powers responded that they often use the power to require an affidavit from a person, and only three out of 25 Commissioners who have the powers to search premises responded that they use their powers often.⁹²

Similar tendencies are observed with regard to typically repressive powers related to the imposition of sanctions or even recommendations for disciplinary actions. A total of 37 commissioners responded that they have powers to impose a fee or another penalty, but only 2 pointed out that they use these powers often. Out of 21 Commissioners who have the powers to recommend disciplinary penalties, only 5 responded that they have done it frequently.⁹³

At the same time both categories of Commissioners/ Ombudsmen apply frequently the methods of negotiation or mediation, and in around 40% of cases the proceedings end with these methods, rather than by a decision of the Commissioner.

The question of whether this independent public body should combine the oversight of personal data protection and access to information is very specific. If the approach is that it does, it is possible that the functions related to the monitoring, coordination, and control over the implementation of the APIA be assigned to the Personal Data Protection Committee. Some states have adopted such a model – Canada, Hungary, UK, Serbia, Croatia, and Slovenia. This model would suppose the division of the administration of the institution into two, each division taking the responsibilities for protection of one of the two rights. Usually, each of the two structures is headed by a deputy commissioner – the UK, Slovenia.

In other national models, the institutions responsible for the oversight of the access to information are different from those entitled to protect personal data. In France and Belgium, there exist collective bodies (commissions) on access to administrative documents, while Information Commissioners are established in Ireland,⁹⁴ Scotland,

⁹² Ibid, page 8.

⁹³ Ibid.

⁹⁴ See. <http://www.oic.gov.ie/en/>

Chili, Australia. There is a third category of national models, where the review of appeals is performed by the parliamentary ombudsman – Sweden, Denmark, Norway, Finland, New Zealand.

6.4. Institutional environment, effective in the access to public information area

6.4.1. Monitoring, coordination, reporting, recommendations

In 2009, the Ministry of State Administration and Administrative Reform was closed. The functions of organization, support, development of state administration, and state service have not been undertaken by another executive body. Currently, a department within the administration of the Council of Ministers is responsible for the collection of data on the implementation of the APIA and prepares an annual report on the state of the administration, a chapter of which contains a summary of the APIA implementation.⁹⁵ Consequently, there are activities performed with regard to the monitoring and preparation of a report, but not with regard to coordination and recommendations for improvements due to the lack of responsible government authority.

6.4.2. Investigations and inspection upon signals

The inspectorates to the ministries, established and functioning pursuant to Art. 46 of the Administration Act (AA), are entrusted with the powers to perform administrative investigations of alleged violations of the law and to recommend disciplinary actions. Within their powers, they perform planned and unplanned inspections,⁹⁶ inspections upon submitted signals for illegal or wrongful actions or omissions of civil servants,⁹⁷ including for conflict of interests,⁹⁸ corruption, and inefficient work of the administration,⁹⁹ propose disciplinary actions,¹⁰⁰ etc. The powers are broad, although there are no data about their efficiency in the access to information area. A serious problem is the

⁹⁵ Department “Administrative and Regional Coordination” at the Chief Secretary of the Council of Ministers, pursuant to Art. 59, Para. 2 of the Regulations for the Functioning of the Council of Ministers and its Administration.

⁹⁶ Pursuant to Art. 46, Para.4, item 1 of the Administration Act.

⁹⁷ Pursuant to Art.46, Para.4, item 6 of the Administration Act.

⁹⁸ Pursuant to Art.46, Para.4, item 7 of the Administration Act.

⁹⁹ Pursuant to Art.46, Para.4, item 3 of the Administration Act.

¹⁰⁰ Pursuant to Art.46, Para.4, item 5 of the Administration Act.

subordination of the inspectorates to the respective ministry and the lack of any guarantee for a complete or partial independence from it. This explains the lack of efficiency.

6.4.3. Sanctions

Pursuant to the APIA, administrative offence under the law should be found by an assigned official within the respective body, while the sanctions should be imposed by the respective body of power or by an official assigned by this body (Art. 43, Para.2, item 1 of APIA). In the rest of the cases, this is carried out by the Minister of Justice, pursuant to Art. 43, Para. 2, item 3 of the APIA. To date, one case of sanctioning of a public official is reported in the annual report on the state of the administration in 2013.

6.4.4. Unification of practices

Pursuant to the powers entrusted by law (Art. 20, Para. 2 of the APIA), the Minister of Finance should issue an order by which the fees for provision of access to information are determined. Such orders were issued in 2001 and in 2011. The provision of Art. 20 of the APIA is, however, the only ground given by the APIA for unification of practices. Thus, there is no unification with regard to the other elements of the procedure for access to information disclosure such as the work with electronic requests, the provision of information by email, and the proactive publication of information.

6.4.5. Review of appeals against denials

The administrative courts are competent to review complaints and appeals against denials and decisions for provision of access to information. They have the powers to repeal a denial and to obligate the public authority to provide the requested information within a specific time frame; to alter the decision of the public body, to repeal the denial and return the request for a new decision or to declare the denial void and return the request for reconsideration. The court could require the respective public body, to present for a review even classified information.

Pursuant to the legally prescribed powers, the National Ombudsman could review complaints against violations of the APIA, although he could only give recommendations.¹⁰¹ The Personal Data Protection Committee reviews appeals requiring a decision on the balancing between the access to information and the personal data protection (for instance, in cases when access is requested for information about the bonuses of public officials).¹⁰² The appeals, however, are filed by persons, whose personal data protection rights are affected, and not their right of access to information.

6.4.6. Proactive publication

Different public bodies are responsible for the implementation of the obligation for publication of different types of information stemming from different special laws. The Public Finances Act, adopted in 2013, provided for fines for non-publication of information within the legally prescribed time frames. The offences are established by officials assigned by the Minister of Finance. The sanctions are imposed by the Minister of Finance or by an assigned official. No sanctions are provided with regard to the obligations for proactive publication of information under the APIA.

6.4.7. Trainings for the administration

The state administration officials are subject to trainings on specific topics carried out by the Public Administration Institute.

6.4.8. Summary of the findings

The main problem with the variety of institutions which are responsible for different aspects of the APIA implementation is the absence of a coordination unit which would

¹⁰¹ See: Art. 19, Para. 1, item 1 of the Act on the Ombudsman.

¹⁰² See for example, a Statement of the Personal Data Protection Commission No. 7488/2013 as of 14.12.2013, Statement No. № П-5864/2012 as of 06.12.2012, etc. Regarding the access to information about the bonuses of officials see Statement No. 753/2012 as of 17.02.2012, Statement No. 1094/2012 as of 12.03.2012, including information about the salary of the Chairperson of the Commission for the Regulation of Communications – Statement No. П-5812/2012 as of 14.11.2012, etc.

accumulate expertise and information. Besides, with regard to part of the activities which are usually performed by an Information Commissioner or an Ombudsman, such as the issuing of handbooks, guidelines and instructions, the coordination of the implementation practices, etc, in Bulgaria there is no institution to perform them.

6.5. Institutions with functions in the right to information area

Currently, different institutions have powers as regards the rights and legal interests related to the collection and holding of information by public bodies. The Personal Data Protection Commission (PDPC) has powers in the area of protecting personal data during their processing. Its establishment as an institution stems from the obligations arising from EU legislation. The Commission is appointed by the National Assembly as an independent body. Along with other powers, the PDPC reviews complaints against the acts and actions of personal data administrators,¹⁰³ issues statements,¹⁰⁴ performs inspections on personal data administrators,¹⁰⁵ issues binding prescriptions,¹⁰⁶ could impose a temporary ban for personal data processing, and¹⁰⁷ issues legal regulations in the personal data protection area.¹⁰⁸

Functions related to provision of information, disclosure, and announcement of affiliation to the former secret services are entrusted to the Committee for Disclosing the Documents and Announcing Affiliation of Bulgarian Citizens to the State Security and Intelligence Services of the Bulgarian National Army. Its members are elected by the National Assembly for a term of five years at the nomination of the parliamentary groups. In view of its specific activity, its powers are strictly and narrowly determined and could not serve as an analogue of the functions of an independent body under the APIA.

The Committee for Oversight of the Security Services, the Deployment of Special Surveillance Techniques and the Access of Data under the Electronic Communications Act in the 43rd National Assembly is a typical parliamentary committee. Its functions

¹⁰³ Pursuant to Art. 10, Para.1, item 7 of the Personal Data Protection Act.

¹⁰⁴ Pursuant to Art.10, Para.1, item 4 of the Personal Data Protection Act.

¹⁰⁵ Pursuant to Art.10, Para.1, item 3 of the Personal Data Protection Act.

¹⁰⁶ Pursuant to Art.10, Para.1, item 5 of the Personal Data Protection Act.

¹⁰⁷ Pursuant to Art.10, Para.1, item 6 of the Personal Data Protection Act.

¹⁰⁸ Pursuant to Art.10, Para.1, item 9 of the Personal Data Protection Act.

encompass the control over the indicated intrusions in privacy through the collection of information. It does not review complaints and has scarce administration. A substantial weakness in its functioning is that it ceases its activity during the National Assembly recess.

6.6. The National Ombudsman

The National Ombudsman is elected by the National Assembly. Its powers encompass the review of complaints against violations of rights and freedoms,¹⁰⁹ investigations related to the complaints,¹¹⁰ mediation between the affected parties and the respective public bodies,¹¹¹ bringing of cases to the Constitutional Court,¹¹² issuing of legal statements, proposals, and recommendations to the National Assembly and the Council of Ministers, etc. Amendments to the Law on the Ombudsman have entrusted him with powers of prevention aiming at the protection of arrested or imprisoned persons from torture and other forms of violent, inhuman or humiliating treatment or penalty.¹¹³

Regarding the complaints, the Ombudsman issues recommendations and has the right to impose administrative sanctions in specific cases, for instance for not presenting evidence within the prescribed time frame.

6.7. Conclusions

In Bulgaria, the administrative justice system turns out to be adequate and efficient in view of the protection of citizens' rights under the Access to Public Information Act. The legal proceedings are relatively fast and inexpensive for the complainants. The courts have considerable power to collect and inspect evidence, including at their own initiative.

The executive power system needs a public body that would be responsible for exercising the necessary coordination and for making recommendations for the improvement of the implementation practices on the basis of monitoring and analysis. In

¹⁰⁹ Pursuant to Art. 19, Para.1, item 1 of the Law on the Ombudsman.

¹¹⁰ Pursuant to Art.19, Para.1, item 2 of the Law on the Ombudsman.

¹¹¹Pursuant to Art.19, Para.1, item 1 of the Law on the Ombudsman.

¹¹²Pursuant to Art.150, Para.3 of the Constitution.

¹¹³ See Art.28a of the Law on the Ombudsman.

the judicial system, this function could be and should be performed by the Supreme Judicial Council.

The activities related to the review of complaints and issuing of statements and recommendations for changes in the public bodies' practices could be improved by the establishment of a public authority on the model of the Information Commissioner or Ombudsman. This institution should be independent and should be elected by the parliament. It is recommendable that its decisions be binding and subject to court review. Otherwise, a risk would emerge of disbalance with the strong powers of the Personal Data Protection Commission. In the cases of conflict and balancing between the right of access to information and the right of personal data protection, a mechanism for review should be established that is in line with international standards.

In view of the financial and administrative support that is necessary, a possible option would be the broadening of the National Ombudsman's functions. The undertaking of the review of complaints and the issuing of statements, recommendations, and prescriptions could relieve the work of the courts on more ordinary and repetitive cases such as the ones related to silent refusals, the proactive publication of information, the requirements to the requests, and the forms of access.

In addition to the review of complaints function, the Ombudsman could be entrusted with the issuing of instructions or statements, and the training of officials.

Sofia, 2014