General recommendations for strengthening the enforceability of the right to information

In modern society, the elementary right to information also includes the right to a certain comfort in the access to information, including promptness, price not exceeding the costs of providing the information (or providing information free of charge), assistance with the process, remote access, selection of format and a generally positive approach to those who are requesting the information. Applicants must always have quick and cheap access to information and to appellate proceedings[1].

1) Information order

In order to speed up the process of providing information and prevent obstructions, we recommend giving the appellate body the option to decide on providing the information by issuing an **information order** that is binding for obligated bodies. The same mechanism can also prevent obstructions from the side of obligated bodies. The information order allows bodies standing hierarchically above the obligated body to issue a direct order to provide the sought information after remedy proceedings are concluded. If the appellate body is unable to give such an order, the case returns to the obligated body at the end of the investigation, after which the obligated body may once again refuse to provide the information and force the appellate body to reopen the case. Such situations also waste money of the requesting party, the obligated body, the appellate body as well as the court.

The Estonian model can serve as an inspiring example that could be adapted to the specific situations and institutional frameworks of the individual countries in the form of a system of optional remedies, such as turning to the Information Commissioner or an administrative court who may order the body in question to provide the information. Such solution of course does not mean that it would be the only possible way of enforcing the right to information[2].

Rationale: Three of the five analysed countries (Slovakia, the Czech Republic and Poland) share similar problems – inconsistent approach to providing information and the remedy process (see e.g. the Czech "administrative table tennis" in which a rejected application keeps returning from the supervisory to the obligated bodies to be reopened, or the fact that the decisions of Polish courts only serve as recommendations) which at the very least introduce unnecessary delays in the whole process and thus discriminate against the requesting party. The process becomes very lengthy and the information is therefore not being provided for unjustified reasons. With the exception of Estonia and Hungary, the supervisory bodies in the individual countries do not have the option of issuing an order to provide the information, even though Estonian (as well as for example Slovak or British) experience shows that this instrument is effective.

2) Institution for methodology and enforcement

A good instrument is the establishment of an **institution for methodology and enforcement** with full appellate, intermediary and methodological powers that systematically carries out activities enforcing the right to information on the state level.

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[1] C.f. Council of Europe Convention on Access to Official Documents, http://www.conventions.coe.int/Treaty/EN/Treaties/Html/205.htm

[2] Other options include e.g. sanction mechanisms or extension of the scope of actively published data.

The powers of such an institution should apply both to the publishing of information and to the process of handling information requests, partially in terms of methodology, education, intermediary communication and possibly acceptance of the role of the supervisory body.

First and foremost, the aim is to create a more flexible and faster option for accessing information, as the body would have the option to resolve appeals with a binding final decision on the application in the form of an order to provide specific information. In terms of intermediary competence, the body should be monitoring and supporting the implementation of legislative measures, monitoring active publishing of information, providing education and methodological guidance, supporting public awareness and formulating recommendations to currently applicable and draft legislation.

This recommendation is in line with the current European trend; example models include Germany or the United Kingdom as well as new democracies such as Serbia and Slovenia. For example Estonia, Germany and Switzerland have combined the protection of personal data with the function of an Information Commissioner. The obvious risk lies in the conflict of the insitution's roles, where the access to public information is sacrificed to the protection of personal data. Personal data protection is becoming ever stricter and may become a serious threat to dissemination and accessing public information. At the same time, the Estonian Data Protection Inspectorate obligates the institutions to publish as much data as possible by crossing over the sensitive areas of the document. Also, the opposing roles may actually increase the institution's competences and more balanced decision-making. Similarly in the USA, the corresponding office is responsible for monitoring compliance with the Freedom of Information Act as well as personal data protection. Combining these individual areas does not necessarily lead to positive results; the situation largely depends on the conditions under which the body operates in terms of its independence and capacity (including management). For example in Hungary the New Information Act introduced a new organizational model replacing the Data Protection Commissioner with the National Authority for Data Protection and Freedom of Information, which is defined as an independent agency. In contrast with the status of the Data Protection Commissioner who was responsible only to the Parliament, the Authority, as an administrative body is part of the executive branch. This model is absolutely alien from the ethos of protecting fundamental rights, so the change in the institutional system of protecting information rights in Hungary can be identified as a very relevant risk factor because of the lack of true independence.

An independent institution providing methodology and enforcement must have the powers, authorisation and capacity to carry out all of these functions. It should be established as an independent central public authority with its own chapter in the budget. This position meets the minimum necessary requirements for functional and financial independence, because allocated funds are not dependent on ad hoc political decisions.
The basic condition for the functioning of the monitoring body is its political independence.
For this reason, qualification requirements for the heads of the body, their selection and appointment are necessary conditions for preventing potential political influence. The selection should be primarily motivated by qualifications of the candidates and by high requirements for their personal qualities and moral integrity.

In addition, it is also necessary to identify the body responsible for the right to information (for example, the Czech Competency Act does not explicitly assign the issues of the right to information to any of the state bodies, even though in practice, it is partially handled by the Ministry of Interior).

Rationale: All countries except for Estonia and partially Hungary lack a body that would systematically deal with the current needs of access to information, meaning monitoring transparency, providing intermediary and methodological support in information disputes, education and methodological assistance or raising public awareness about rights and obligations. Crucial elements of the operation of such bodies are independence and sufficient capacity, as for example Hungary struggles with a lack of funding for its institution and in Estonia there is a certain degree of subordination to the Ministry of Justice that monitors the body's activities. What seems to be a bit more problematic is the possible role conflict of the inspectorate (protection of personal data and the right of access to public information).

3) Consulting, methodological support and public involvement

A key tool in enforceability is providing methodological support to obligated bodies and consultations to those who request information. This recommendation is also based on the Council of Europe Convention on Access to Official Documents[3] which among others mandates taking appropriate measures to educate the public about its rights, such as publishing documents electronically or establishing documentation centres.

Public administration bodies may among other things establish points of contact for individual administration departments that could provide information to the general public, providing access to documents that these departments are responsible for[4]. Countries should also establish a suitable mechanism for providing consultations and trainings to representatives of public administration focusing on their duties and responsibilities.

Informing the public about its rights and supporting the culture of openness are necessary components of enforcement of the right to information; adopted measures should also be complemented by public education campaigns implemented in collaboration with the media.

Public administration is in a period of transition from discretion to publicity. This means a change in public access to information, as now essentially everyone has the legal right to access all information except that which is by necessity not shared with the general public. In the past, citizens were only entitled to information if the law or an administrative body said so.

This situation has created new roles for both parties, requiring an individual approach in specific situations. Enforceability of the right to information and its success depend on this change of culture, as it is virtually impossible to ensure openness only through laws, no matter how good.

It is also necessary to keep monitoring the efficiency of introduced measures and carry out regular evaluations.

A good solution is the establishment of an institution (see recommendation number 2) that would be doing these activities.

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[3] Available at: http://bit.ly/17Se0oc

[4] The Convention was ratified by only seven Member States so far, and from the analysed countries only by Hungary: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=205&CM=1&DF=&CL=ENG

Rationale: All countries except Estonia report that members of the public often fail to understand the law and are not aware of their rights. This was in fact the most commonly mentioned issue in all participating countries. Estonia compensates for its rather fragmented legal framework with the activities of its Inspectorate that provides consultations, publishes guidelines on its website and offers training and monitoring services to public institutions. Sufficiently extensive, simple and quick public access to information has a positive impact on public trust in democratic institutions and the willingness of citizens to take part in public life, which is an often discussed issue today (the "democratic deficit" and related loss of legitimacy of elected representatives).

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

4) Proactive publishing

To enforce the right to quick and remote access to information at acceptable costs, it would also be advisable to ensure that there is a corresponding attitude from obligated bodies, encompassing individual support of those who request information as well as raising awareness about issues of public interest.

Obligated bodies should, on their own initiative and where appropriate, adopt necessary measures to support transparency and efficiency of public administration in the publishing of official documents held by these bodies, and measures supporting awareness of the general public about issues of public interest.

The amount of published information should keep gradually increasing, in part due to the existence of new technologies that make publishing and disseminating information easier. The scope of proactive publishing to a certain extent depends on the available resources of the obligated body, but should undoubtedly be expanding over time. Furthermore, standardized formats for publishing of information should be introduced and applied by obliged bodies.

Rationale: The lack of a proactive information publishing policy may be considered a key issue in the entire topic. In Hungary and the Czech Republic, many obligated bodies still fail to publish[5] even information that is required by law. In Poland, the active publishing system is fragmented, as each institution works on its own website separately. There is no monitoring and no tool that would force the individual bodies to publish all mandatory information. There is a good practice of mandatory publishing of contracts, invoices and court decisions in Slovakia since 2011. However, there are great differences between individual institutions in what is being published and in what format. On the contrary in Estonia, there is a single central database, but publishing information in this database is not as yet mandatory.
Informed citizens are a source of feedback, an important qualitative factor as well as a safeguard against misuse. A situation in which essentially anyone can easily obtain information about the activities of public administration bodies leads to an increase in their responsibility for using their administrative powers and improved transparency, acting as a tool preventing violations of the law. The same mechanism can also ultimately reduce the administrative burden of handling individual applications.

[5] Inspections of the Department of Public Administration, Monitoring and Oversight of the Ministry of Interior of the Czech Republic in 2014, p. 4: http://bit.ly/1LakoTM

5) Sanctions

While sanctions are a necessary part of any legal regulation, state bodies are generally reluctant to apply them. There should be a system of sanctions for significant illegal violations of the right to information in handling individual cases as well as for violations of the duties of obligated bodies to publish information in the scope, manner and time frame required by law. Failure to publish information that is not justified by law represents the same violation of the public subjective rights of those who request the information as an illegal refusal to provide information after a valid request. Sanctions should apply not only to obligated bodies as such, but also to specific persons[6]. Sanctions should very specifically target the responsible person and apply to:

a. not processing a request within a set time limit;
b. issuing a decision that is against the law;
c. deliberately providing false information;
d. destroying the information without justification in order to make it impossible to be published.

Rationale: The Czech Republic is the only one from the analysed countries that quite unusually does not define any sanctions for violations of the Freedom of Information Act. Violations of the right to information do not have any consequences besides the activities of the requesting party in appealing against the decision of the obligated body. Even though the laws of the remaining countries do define sanctions, there are some issues with their scope and application. For example in Poland, there is no penalty for providing incorrect information (even though not providing the information can lead to imprisonment); in Hungary, the sanctions for not publishing information are very weak. The Polish system also often fails in identifying responsible persons and internal sanctions are used only rarely. This means that the introduction of sanctions itself is not enough; an effective sanction mechanism is required.
In Slovakia, the enforcement of the access to information right primarily fails because of the difference in the interpretation of the Fredom of Information Act. The gaps in law, unclear definition of the obliged bodies and their obligations, as well as the lack of independent supervisory institution, result sometimes in the denial of requests to access information. In Slovakia, sanctions are resolved according to the Civil Procedure Code and the general Act on Offences and it can take years for administrative court to issue a decision. Therefore, the introduction of effective sanction mechanism as well as the establishment of independent supervisory institution, information commissioner, is necessary.

[6] For example Polish law introduces as sanctions fines as well as potential imprisonment for up to one year.