

**PROACTIVE  
DISCLOSURE OF  
INFORMATION:**  
*Guidelines and Practices*



# PROACTIVE DISCLOSURE OF INFORMATION: GUIDELINES AND PRACTICES

Bojan Spaic, professor at the Faculty of Law, University of Belgrade

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## PROACTIVE OR REACTIVE?

The state is a public matter. It is a general belief that democratic political orders can function optimally only when the public is informed about the work of state authorities and public officials. To achieve this goal, the constitutions of modern states lay down special guarantees, so the citizens in such modern democracies have a fundamental right to be informed about the actions of the state authorities.

Citizens can exercise this right regardless of whether the information concerns them and the purpose for which they intend to use it. The right to free access to information is a basic right guaranteed by constitutions, international conventions and national legislation. In contrast, certain basic principles have been established thanks to the efforts of international civil society organisations.

*The right to free access to information is a basic human right guaranteed by constitutions, international agreements and laws of democratic countries.*

The right to access information belongs to the category of positive rights, which means that public authorities are obliged to take certain actions so that citizens can exercise the right. More precisely, that right puts two obligations on public authorities: 1. the obligation to proactively or previously make basic information about the activities of public authorities available to the public, and 2. the obligation to make information available to citizens upon request, reactively or subsequently. With such proactive and reactive actions, state officials ensure the constitutional and legal right to free access to information and increase citizens' trust in public administration.

Reactive disclosure of information is often considered an additional burden for public administration officials, given that responding to requests for free access to information is an addition to one's core line of work. This is one of the reasons for adopting a proactive approach to publishing information and for embracing this way of publishing as widely as possible. Certainly, that is not the main reason. Proactive disclosure of information promotes the rule of law and accountability of public authorities. It also increases citizens' participation in public affairs, reduces the possibility of corruption, and accelerates the digitisation of public administration.

In any case, the *proactive disclosure of information is the disclosure of information ex officio, without a special request for access to information*. Considering the availability of broadband Internet and plans or obligations to digitise the operation of most state authorities and companies, the obligation to proactively disclose information became a more prominent practice in the previous decade compared to the obligation to reactively provide insight into the information that is requested from the state authority. Today, the proactive approach primarily 1. increases the availability of information and citizens' trust in public administration, 2. reduces the need for reactive action and unnecessary consideration of individual requests for the realisation of rights.

*Proactive disclosure of information significantly facilitates the exercise of rights and reduces the workload of officials in charge of free access to information.*

## **PROACTIVITY IN INTERNATIONAL DOCUMENTS**

A large number of international legal documents guarantee the right to access information. The right to free access to information is an integral part of the right to freedom of expression established by Article 19 of the United Nations Universal Declaration of Human Rights. However, considering a large number of requests for information, technological progress and the trend towards digitisation of public authorities, only recent international documents fully recognise the importance of proactive disclosure of information. The Aarhus *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in*

*Environmental Matters* was signed on 25 June 1998 and entered into force on 20 October 2001. The Convention contains the most detailed provisions on proactive access to information, while its Annex B provides for the definition of information that must be proactively published, contains the requirement to publish information registers so that information can be searched, a list of basic categories of information that must be proactively published, and obliges signatory states to make available databases on the environment.<sup>1</sup>

*Technological progress brings the possibility of timely disclosure of an increasing number of information that the public is interested in and reduces the need to make decisions based on individual public requests.*

The fundamental regional document regulating the right to free access to information at the level of the Council of Europe is *the 1982 Declaration on the Freedom of Expression and Information*. The Recommendation of the Council of Europe (2002)<sup>2</sup> provides some important guidelines that include proactive disclosure of information. It also includes an instruction that recommends public authorities take care of documents in such a way that they are easily and without obstacles accessible and establishes a standard by which, regardless of express legal provisions, public authorities are always expected to use all measures to ensure to make the information available in order to make public authorities as transparent as possible.<sup>2</sup> Nevertheless, Article 10 of the Tromsø Convention on Access to Public Documents, which entered into force on 1 December 2020,<sup>3</sup> encourages the adoption of national rules obliging state authorities to proactively disclose information in their possession. In the explanation of said Declaration, it is explicitly stated that the frequency of requests should serve as one of the criteria

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<sup>1</sup> Information on the Aarhus Convention is available at: <https://unece.org/environment-policy/public-participation/aarhus-convention/introduction>

<sup>2</sup> The Recommendation is available at: <https://rm.coe.int/16804c6fcc>

<sup>3</sup> Information on the entry into force of the Declaration: <https://agenceeurope.eu/en/bulletin/article/12613/45>  
Accession to the Convention can be tracked at: <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=205> Montenegro and Bosnia and Herzegovina have ratified the Convention, while Serbia and North Macedonia have not.

for the decision that information that is often requested should be disclosed even without a special request. At the same time, the term proactive disclosure was not adopted in the declaration itself. As such, it is used in the reports explaining the declaration.<sup>4</sup> The Tromsø Convention also establishes special bodies that will, in the future, take care of free access to information for all signatories. The Access Info Group is a body of experts in the information of public importance who will report on the measures taken by states to implement the Convention and provide opinions.<sup>5</sup> It can be expected that over time, guidelines will be formulated through the work of the group, to be used during the proactive disclosure of information.

*International legal acts that become an integral part of national legal systems put particular emphasis on the obligation of proactive disclosure of information by state authorities. New conventions and the bodies established by them will formulate precise standards for the proactive disclosure of information in the future.*

The documents of certain international non-governmental organisations that deal with this matter are also of particular importance for access to information. In its document titled "The Public's Right to Know: Principles on Right to Information Legislation" from June 1999, the organisation *ARTICLE 19* formulated the basic principles on which the regulation of the right to free access to information should be based:

1. *Maximum disclosure* means that all information that is in possession of state bodies should be accessible to the public, except in rare cases provided for by law;

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<sup>4</sup> Explanatory report is available at: <http://www.worldlii.org/int/other/COETSER/2009/2.html>

<sup>5</sup> The first meeting of the group was held on 16 and 17 November 2022. Information and reports are available at: <https://www.coe.int/en/web/access-to-official-documents/group-of-specialists#{%22135175687%22:0}>

2. Obligation *to have a list of proactively published information* except in rare exceptions when this is not possible;
3. *The promotion of open government* implies the obligation of the authorities to foster a culture of openness in the sense of the Open Government Declaration;<sup>6</sup>
4. *Exceptions to the rules of public availability of information* should be narrowly drawn and justified only in the case when it is shown that the disclosure of information causes substantial harm in achieving legitimate aims;
5. *Information access procedures* should be simple and accessible;
6. *Information access costs* should be non-existent or low;
7. Laws on free access to information should introduce the *assumption of openness of all authorities*, except in the cases where there are reasons to limit public access;
8. Persons who release information on the government's wrongdoing (whistle-blowers) should be specially protected.<sup>7</sup>

*International organisations point out that the availability of information is the rule and that restrictions on availability are an exception in modern democracies that strive for government openness and accountability.*

Proactive availability of information is the standard that has been insisted on in the last decade. Nevertheless, the availability of information remains problematic even among the countries of the European Union. *Access Info Europe* data show that in the countries of the European Union, only 20% of information regarding documents

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<sup>6</sup> Information about the Declaration can be found at: [https://en.wikipedia.org/wiki/Open\\_Government\\_Partnership](https://en.wikipedia.org/wiki/Open_Government_Partnership)

<sup>7</sup> The document is available at: [https://www.article19.org/data/files/RTIPinciplesUpdated\\_EN.pdf](https://www.article19.org/data/files/RTIPinciplesUpdated_EN.pdf)



that researchers were interested in is proactively available to the public.<sup>8</sup> The fact that the wording of the requirement to proactively publish information in national legislation and international documents is very general and does not include lists of information that public authorities should publish, does not help.<sup>9</sup> The terms and wording give wide discretionary rights to government authorities in deciding what information to make available proactively.

## PROACTIVITY IN NATIONAL LEGISLATION

One of the first documents on European soil to regulate some kind of right to access information was adopted in Sweden back in the year 1766. Today, the laws on access to information, as a rule, stipulate the assumption of maximum openness in favour of the disclosure of information and narrowly define exceptions to this rule, lay down the manner of submitting a request for free access to information, and, finally, establish a list of information that must be made available proactively, without a special request from the members of public. Some national legislatures of the countries of the region have nevertheless opted for a different approach, adopting the 2007 OSCE recommendations that advise that laws on free access to information include the obligation of public authorities to proactively publish information on: the structure of the state authority, its composition, officials, rules, instructions, decisions, procurements and other information of public interest.<sup>10</sup>

Despite the early onset, national legislations have been slow to accept the idea that there is an obligation to make information about the work of state authorities available to the public.<sup>11</sup> Today, international organisations and researchers monitor the state of the right to free access to information and record changes in

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<sup>8</sup> The research is available at: <https://www.access-info.org/open-decision-making/proactive-publication/>

<sup>9</sup> The situation has not changed much compared to the first contemporary laws that regulate this area. The Dutch Act on Public Access to Information of 1978 features a provision similar to Article 10 of the Tromsø Convention: "The public authority shall provide, based on its own assessment, information about public policies and their implementation, whenever the provision of such information is in the interest of effective democratic government."

<sup>10</sup> The OSCE recommendations are available at: <https://www.osce.org/files/f/documents/7/3/24892.pdf>

<sup>11</sup> Dunja Mijatovic, Access to official documents is crucial – let's make it a reality, available at: <https://www.coe.int/en/web/commissioner/-/access-to-official-documents-is-crucial-let-s-make-it-a-reality>.

the legislation that regulates this matter. The ranking of legislative frameworks in this area, which is published by the international civil society organisation *Centre for Law and Democracy*, is highly referential in this regard. On that list, Serbia is ranked third with a score of 135, Bosnia and Herzegovina has a score of 102, North Macedonia 110, and Montenegro 89. These are general evaluations of the legislative framework, based on which one cannot make reliable conclusions about the extent to which the right to free access to information is achieved in practice.

*The legal framework regulating free access to information of public importance in the countries of the region is often solid. Although there is room for improvement in the legal framework, problems related to free access to information should mainly be sought in the illegal actions of state authorities and the lack of promotion of the value of open administration.*

In Serbia, the right to free access to information of public importance is guaranteed by Article 51, paragraph 2 of the Constitution, which guarantees the right to access data kept by state bodies and organisations with delegated public powers, in accordance with the law. Access to information is regulated by the Law on Free Access to Information, which was adopted in 2003. The amendments from 2007, 2009 and 2022, expanded the scope of the law and the legislative framework itself was improved. The fact that the Serbian normative framework for free access to information was rated as one of the best did not result in solving numerous practical problems that have emerged in the years following the adoption of the law.<sup>12</sup> The latest amendments to the Law include some good solutions, such as the introduction of new obliged entities, and the expansion of the powers of the Commissioner in situations when institutions do not act on requests for the disclosure of information of public importance (the so-called silence of the administration).

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<sup>12</sup> See: <https://www.balcanicaucaso.org/eng/Areas/Serbia/Serbia-the-hard-fight-for-information-177372>

However, the new Law does not contain solutions for long-term problems in the area of exercising the right to access information. The problems of ineffective supervision, mild penal policy, failure to implement the Commissioner's decisions, as well as ignoring the requests for access to information by the Government of the Republic of Serbia, have not been adequately resolved.

Certain cases in which Serbia was sued before the European Court of Human Rights led to key positions of the Court regarding free access to information kept by security agencies.<sup>13</sup> A serious oversight of the Serbian law on free access to information of public importance is the fact that it does not explicitly stipulate which information is proactively disclosed, nor does it oblige state authorities to proactively disclose certain information. This leads to an irrationally large number of requests for free access to information.<sup>14</sup> Nevertheless, Serbia's relatively advanced national legislation could serve as a model for countries in the region and beyond, given that the trend of increasing positive perception of the exercise of rights by citizens in Serbia continues to yield excellent evaluations of the right to free access to information by international bodies.<sup>15</sup>

Bosnia and Herzegovina was the first country in the region to adopt the Law on Freedom of Access to Information on 23 October 2000. Due to the specificity of the legal framework, an explicit constitutional basis for the right to free access to information does not exist. The current legislative framework meets the bare minimum of international standards and there is considerable room for improvement. When it comes to the proactive disclosure of information, a particular problem is that the law does not regulate proactive access to information, nor does

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<sup>13</sup> The case of Youth Initiative for Human Rights v. Serbia (Application no. 48135/06), decided in 2013, establishes a precedent that determines the obligation of security agencies to provide information of public importance if there are no reasons to restrict access to information: <https://strasbourgobservers.com/2013/07/08/article-10-of-the-convention-includes-the-right-of-access-to-data-held-by-intelligence-agency/#more-2125>; <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-120955%22%5D%7D>.

<sup>14</sup> The report is available at: <https://bezbednost.org/publikacija/pravo-na-slobodan-pristup-informacijama-od-javnog-znacaja/>

<sup>15</sup> The report (page 96) is available at: <https://www.sigmaweb.org/publications/monitoring-reports.htm>

it oblige state authorities to proactively disclose information. International reports indicate that a proactive approach is not promoted by the public authorities at all levels in practice, and that the Ombudsperson's recommendations are not adopted except at the state level. The effectiveness of courts in resolving disputes related to free access to information of public importance is low.<sup>16</sup>

*The Law on Free Access to Information in Serbia is still evaluated as very good, but it does not contain an explicit obligation to proactively disclose information. The same applies to Bosnia and Herzegovina.*

In Montenegro, the right to free access to information is guaranteed by the Constitution, and the exercise of this right is regulated by the Law on Free Access to Information. International reports assess that the Law provides a proper legal framework. However, such assessments are insufficiently grounded in the Montenegrin reality – the amendments to the law have been announced, but they have not been undertaken so far. The number of requests for free access to information is very high, as well as the number of successful complaints, mainly due to the administration's silence. All this supports the claim that there are problems in the proactive disclosure of information, and that information is disclosed unevenly.<sup>17</sup> Proactive access is also regulated by Article 12 of the Law on Free Access to Information. The public authority is obliged to publish the following information on its website: 1) access to information guide; 2) public registers and public records; 3) programmes and work plans; 4) reports and other documents on the work and state of play in the areas within their competence; 5) drafts, proposals and final texts of strategic documents and plans and programmes for their implementation; 6) drafts and proposals of laws and other regulations, as well as expert opinions delivered in relation to drafts and proposals for legislation; 7) individual acts and contracts on the use of financial resources from public revenues and state-owned property; 8) list of civil servants and employees, with their official

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<sup>16</sup> The report is available at: <https://www.sigmaweb.org/publications/monitoring-reports.htm>

<sup>17</sup> The report is available at: <https://www.sigmaweb.org/publications/monitoring-reports.htm>

titles; 9) list of public officials and lists of their salaries and other incomes and benefits related to the exercise of public functions; 10) decisions and other individual important for the rights, obligations and interests of third parties; 11) information to which access was granted upon request. The Montenegrin law provides a very short deadline for proactive disclosure of information in only 15 days.

Under Article 16 of the Constitution, which guarantees access to information, North Macedonia adopted the Law on Free Access to Public Information in January 2006. Proactive disclosure of information is regulated by Article 10 of the Law, which lays down the obligation of the state authority in possession of the information to provide: 1) basic data for contact with the holder of information, as follows: name, address, telephone number, fax number, e-mail and website; 2) the manner of submission of an application for access to information; 3) regulations related to the jurisdiction of the holder of information, which refer to the register of regulations published in the "Official Gazette"; 4) draft programmes, programs, strategies, positions, opinions, studies and other similar documents pertaining to the acts under the competence of the holder of information; 5) all calls within the public procurement procedures and bidding documents established by law; 6) data on its competences established by law; 7) organisation and business expenditures, as well as for providing services to citizens in administrative proceedings and for their activities; 8) publishing of information sheets and other forms of information; 9) a web-page for the publication of decisions, acts and measures that affect the life and work of citizens, and 10) other data arising from the competence and work of the holder of information.

It is assessed that North Macedonia has a good system of free access to information, but that proactive access to information of public importance is at a very low level in this country as well.<sup>18</sup>

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<sup>18</sup> The report is available at: <https://www.sigmaxweb.org/publications/monitoring-reports.htm>

*In Montenegro and North Macedonia, the laws explicitly provide a list of information that public authorities are obliged to disclose proactively, but the application of these provisions has not sufficiently taken off in practice.*

## **GUIDELINES AND GOOD PRACTICES RELATED TO THE PROACTIVE DISCLOSURE OF INFORMATION**

Public authorities have three conceivable reasons for failing to disclose information of public importance: 1. there are some reasons for concealing information, which have been explicitly regulated by law, 2. public officials cover up illegal work, 3. heads of public authorities are not capable of organising the work of public officials. The first group of reasons is based on law and is justified. The second group of reasons is illegal and officials are subject to criminal and misdemeanour prosecution. The third group of reasons is a clear indication that the head of the public authority should be dismissed, and that the person responsible for free access to information of public importance should also be dismissed.

*The lay public often understands the absence of disclosed information as an indication that the public authority and its officials have something to hide.*

There are three groups of reasons why proactive disclosure of information is necessary and beneficial: 1. There is a legal obligation to proactively disclose information in accordance with the technical capabilities of public authorities. 2. Proactive disclosure of information reduces the number of requests for free access to information and the need for reactive action, 3. The availability of information on websites and social networks and the proactive promotion of free access to information on social networks increases trust in the work of state administration.

*Proactive disclosure is a legal obligation; it increases the efficiency and trust of citizens in the work of the public authority.*

Based on everything that has been discussed so far, it is possible to formulate some guidelines regarding proactive access to information. Most of the guidelines can be applied in the work of public authorities and officials for free access to information with relative ease, while some require changes to the law. The general guidelines for disclosing information are as follows:

*The basic assumption established by the right to free access to information is that the public should have access to all information that is in possession of entities that are obligated under the law on free access to information. This means that availability of information is the rule, and unavailability thereof is an exception, and that access to information can be challenged only in cases provided for by law. This assumption should also be used when proactively disclosing information.*

*Proactive access to information of public importance must be legally established in the countries where this has not been done.*

*In countries where proactive access is not regulated, authorities in charge of access to information of public importance should develop proactive strategies for access to information that would be available to all obligated entities.*

*In the laws that do not provide for the individual property responsibility of the information officer of public importance or the head of the state body, it is necessary to establish this responsibility.*

*It is necessary to appoint an information officer responsible for the proactive disclosure of information who will be under internal supervision by the head of the public authority and external supervision by the Commissioner and other authorities, regardless of the (non)existence of a legal obligation.*

*In cooperation with commissioners and relevant authorities, officers for information of public importance should develop plans for the disclosure of information on the websites of public authorities or by competent public authorities.*

*Work in the public authority should be internally organised so that documents are made available to the public on the public authority's website as soon as possible upon their adoption.*

*Mere disclosure of information is not enough. It is necessary to make information effectively available so that the average citizen can access it.*

*If the public authority does not have a website and social media accounts, the information should be published by the closest hierarchically superior authority that has an official website.*

*Special attention should be paid to the transparency of decision-making, i.e., the public's ability to observe public authorities meetings that are not marked as secret or confidential. Whenever possible, one should make the most of the technical advantages provided by social networks (live broadcast does not require special equipment any more since it is enough to have a modern phone and an account).*

*The public should also be proactively informed about the proactive disclosure of information, so it is very useful to publish all new information and progress regarding disclosure on existing or new accounts on social networks.*

In line with the best international examples, recommendations can be formulated for the standardisation of information that is proactively disclosed in the countries of the region. This information must be made available regardless of the lack of a proactive disclosure obligation. Even when the laws do not specifically regulate proactive publication, there is a general provision establishing the obligation of state authorities to disclose all information of public importance.<sup>19</sup>

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<sup>19</sup> The guidelines, based on the practice of individual countries, were formulated in the scientific literature as early as 2007 in a document that is available at the following address: <https://openknowledge.worldbank.org/bitstream/handle/10986/25031/565980WPOBox351roactiveTransparency.pdf?sequence=1&isAllowed=y>. The recommendations represent an elaboration of the ideas contained in that document, with their adaptation to the specific circumstances of the region. The author would like to thank Milena Gvozdenovic for her useful input on relevant studies.



Guidelines of this kind can help to standardise the information that government bodies proactively disclose, especially when there are no explicit legal provisions, but also to reduce the (huge) volume of reactive action by public authorities regarding requests for information:

*Heads of public authorities should establish transparent and clear catalogues of information published in the form of an index or register. An index, as a register of information kept by a public authority, regardless of whether that information is made publicly available or not, makes it possible to clearly see what information is available and to access the available information effortlessly. Technological advantages make it possible to organise the index in a way that corresponds to the capabilities of the average Internet user.*

*Information regarding the right to free access to information and the procedures by which it can be exercised, including information about the officer in charge of free access to information. A unique website with this information can be created in cooperation with the authorities in charge of free access to information, and it can be used, with minor changes, on a large number of websites of public authorities.*

*Information about the public authority: a) the legal framework establishing the authority and its jurisdiction should be easily accessible. If the legal framework is written in technical language, the parties should also include summaries that make the legal framework understandable for average citizens. b) Statutes, regulations and other acts that regulate the internal work of the public authority and the civil servants working in it.*

*Organisational information: a) The internal structure of the public authority and its relationship with other public authorities should be available. b) Information about managers and officials, including information for telephone, mail and postal contact, together with information on the location of the public authority.*

*Operational information: Strategies and plans, activities, procedures and evaluations, including acts used to formulate these documents.*

*Decisions and legal acts: Decisions and legal acts that are not excluded based on the provisions of the Law on free access to information, which stipulates exemptions from the free access to information.*

*Budget information: Information on planned budget, income and expenditure, including information on wages, as well as other financial information, including audit reports.*

*Information about meetings: including minutes which contain the names of people who participated in the meetings.*

*Information on the possibility of public participation in decision-making and explanations of the procedures that enable such participation.*

*Information on public procurements: Detailed information on bidding procedures, bidding documents, contracts and reports.*

*Databases include information on how to access databases kept by a public authority.*

*Information on publications issued by a public authority or publication in whose issuance it participated.*

*Information obtained based on a request for free access to information. If free access to information is reactively approved in a large number of similar cases, that type of act should be proactively disclosed on the website of the public authority.*

Acting within these guidelines will enable not only observance of international standards, but also the establishment of standards that, through the work of the bodies established by the Tromsø Convention and the use of existing resources, can serve as an example for national and supranational legislators.

