

AIG/Inf(2022)07

Council of Europe Group on Access to Information (AIG)

**Report submitted by Bosnia and Herzegovina
pursuant to Article 14, paragraph 1
of the Council of Europe Convention
on Access to Official Documents (CETS No.205)**

Received by the Secretariat on 29 March 2022

1. INTRODUCTION

The Council of Europe Convention on Access to Official Documents (CETS 205) was ratified by the Presidency of Bosnia and Herzegovina at its 13th regular session, held on 10 October 2011. Decision on ratification was published in the Official Gazette of BiH – International Agreements, 10/11.

Article 14 of the Council of Europe Convention on Access to Official Documents prescribes the following:

1. *Within a period of one year following the entry into force of this Convention in respect of a Contracting Party, the latter shall transmit to the Group of Specialists a report containing full information on the legislative and other measures taken to give effect to the provisions of this Convention.*
2. *Thereafter, each Party shall transmit to the Group of Specialists before each meeting of the Consultation of the Parties an update of the information mentioned in paragraph 1.*
3. *Each Party shall also transmit to the Group of Specialists any information that it requests to fulfil its tasks.*

The right of access to information in Bosnia and Herzegovina is governed by laws adopted at the state and entity levels. The Law on Free Access to Information in Bosnia and Herzegovina was adopted in 2000, while the Law on Free Access to Information of the Federation of Bosnia and Herzegovina and the Law on Free Access to Information of the Republika Srpska were adopted in 2001. In Brčko District of Bosnia and Herzegovina, in force is the Instruction on Application of the Law on Free Access to Information in Bosnia and Herzegovina, which governs the issues that should contribute to more effective implementation of the Law on Free Access to Information in Bosnia and Herzegovina in the Brčko District of Bosnia and Herzegovina, and address the issues that contribute to the proper implementation of that Law, and to determining the costs of copying the information.

Bosnia and Herzegovina was the first country in the region to adopt these laws, which contained very advanced solutions at that time. With the passage of time and the development of the Internet and electronic media, the content of the right of access to information has developed significantly, which created the need to upgrade existing legislation.

The Law on Free Access to Information in Bosnia and Herzegovina partially followed this need, and was amended several times. The most significant amendments to the Law related to prescribing the obligation to issue a decision on a request for access to information, penal provisions, and prescribing the competence of the Administrative Inspectorate in cases of non-compliance with the provisions of the Law.

The Law on Free Access to Information of the Federation of Bosnia and Herzegovina was amended only once in the part related to the obligation to issue a decision on a request for access to information and in part related to a second-instance body that makes decisions on appeals from the decisions.

The Law on Freed Access to Information of the Republika Srpska has not been amended so far.

2. IMPLEMENTATION OF THE EXISTING LEGISLATIVE FRAMEWORK

Provisions of Articles 20 to 22 of the Law on Free Access to Information in Bosnia and Herzegovina (Official Gazette of BiH, 28/00, 45/06, 102/09, 62/11 and 100/13) prescribe the following:

- a) statistics on the number of requests for access to information, type of requested information, determined exemptions, issued decisions and final decisions are submitted to the Parliamentary Assembly of Bosnia and Herzegovina and the Ombudsman;
- b) the annual report referred to in Article 20 d) is submitted to the Parliamentary Assembly of Bosnia and Herzegovina;
- c) Ombudsman for Human Rights of Bosnia and Herzegovina performs its functions in accordance with this Law and in accordance with its mandate and responsibilities as stipulated by Article II 1 of the Constitution of Bosnia and Herzegovina and Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina, and in accordance with any subsequent legislation regulating its competence and responsibilities;
- d) in performing its functions, the Ombudsman for Human Rights of Bosnia and Herzegovina may *inter alia* consider:
 - i. drawing up and disseminating information such as guidebooks and general recommendations concerning the implementation and application of this law;
 - ii. including in the annual report a special part regarding its activities in accordance with this law; and
 - iii. proposing directions on the application of this law to all competent ministries within Bosnia and Herzegovina.

Accordingly, the administrative bodies at the level of Bosnia and Herzegovina submit their reports on the implementation of the Law on Free Access to Information to the Ombudsman for Human Rights of Bosnia and Herzegovina, which includes them in its annual report.

In 2019, the Ombudsman for Human Rights of Bosnia and Herzegovina prepared a Special report on experiences in the implementation of the Law on Free Access to Information in Bosnia and Herzegovina, which are attached to this report.

3. LEGISLATIVE INITIATIVES

The Personal Data Protection Agency of Bosnia and Herzegovina, in its 2011 Annual Report addressed to the Parliamentary Assembly of Bosnia and Herzegovina, initiated amendments to the Law on Free Access to Information of Bosnia and Herzegovina. The Council of Ministers of Bosnia and Herzegovina, acting upon the conclusion of the Parliamentary Assembly of Bosnia and Herzegovina, which adopted the Annual Report of the said Agency, decided to initiate the procedure for amending the Law on Free Access to Information of Bosnia and Herzegovina, in order to comply with the Council of Europe Convention on Access to Official Documents (CETS 205).

Following the establishment of the Working Group, the Ministry of Justice of Bosnia and Herzegovina drafted the Law on Amendments to the Law on Free Access to Information of Bosnia and Herzegovina, to which more than 200 comments of non-governmental organisation and international institutions operating in Bosnia and Herzegovina were submitted.

The Ombudsman for Human Rights of Bosnia and Herzegovina also submitted comments to the mentioned Draft. Discussion about the comments never took place, and the Working Group never resumed its work thereafter, so the amendment process was suspended.

After that, in 2016, the Ministry of Justice of Bosnia and Herzegovina opened a new public consultation process on the pre-draft Law on Free Access to Information in Bosnia and Herzegovina. Ombudsmen of Bosnia and Herzegovina also took part in these consultations, providing their comments on the text of the pre-draft Law. The proposed text of the Law provides for the current Law on Free Access to Information of Bosnia and Herzegovina to be repealed, and the public interest test would be expelled, which would pose a potential risk of possible misuse and denial of disclosure of information in the public interest. Furthermore, the text of the proposal of the Law was also deficient because it failed to proclaim the right of access to information as a guaranteed human right, protected by a number of international documents, starting from the European Convention on Human Rights, which, under the Constitution of Bosnia and Herzegovina, has direct application, while the part related to the Ombudsman's competence was omitted.

The mentioned initiatives were the reason for holding TAIEX - IPA, ENI -TAIEX expert mission on *Improving the right of access to information in Bosnia and Herzegovina*, in the period from 7 to 9 February 2018. The TAIEX mission included three experts in the relevant field, who submitted an Expert Report to the Ministry of Justice of Bosnia and Herzegovina having completed their mission. The experts presented their suggestions and recommendations in order to meet the stated objective.

In the report, the experts pointed out, inter alia, to the following:

We would like to note that although the experts could speak to the government officials and the civil society representatives during this mission, we did not have good information on the Law implementation. Indeed, this lack of information is something we have raised as a concern with the government officials we have met, because knowing how the implementation of the Law is going on is absolutely necessary for drafting well-tailored recommendations. In other words, the information we have received indicate to a number of practical obstacles in implementation, many of which can be addressed by improving the specifics and details of the legal framework. We have concluded that there is a clear need to improve the current Law in order to comply with international standards, especially those in the European Union, as well as those in the Western Balkans, since it is the first law adopted in this field. Subsequent amendments are not sufficient to meet this aim.

We have noticed that the draft amendments are well-intentioned and would generally improve the Law, but they are not sufficiently comprehensive and do not provide necessary clarifications, and have failures in terms of introducing the sufficient or appropriate instruments for the protection of the right of access to information. The revised legal framework should have a sound legal basis, administrative procedures, monitoring mechanisms and the promotion of the right.

Recommendations of TAIEX experts are as follows:

1. It is recommended to adopt a new Law on the Right of Free Access to Information with clear and well-structured text, which should include the provisions of Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information;
2. Definition of principles is recommended;
3. It is recommended to remove from the current law all provisions on requests related to personal information, as the Law on Protection of Personal Data is in force;
4. It is recommended to ensure that proactive disclosure of information on the official website of public authorities is the main manner of distributing information, as it is an international standard and it is in line with EU legislation, while it was especially emphasized that proactive approach of publishing information implemented by public authorities affects saving of human resources and time, as well as additional material costs, and treats

citizens in an equal and non-discriminatory manner. It was also suggested that the provisions of the law should define short deadlines for proactive disclosure of information, for their effectiveness, as well as the adoption of key international standards, which should be monitored through proactive disclosure, i.e. the information should be: relevant, understandable, available, cost-free, timely, updated and published in an accessible way;

5. It is recommended to define information in accordance with international standards;
6. It is recommended to draw up a list of exemptions and to establish tests of public interest and harm in accordance with international standards;
7. It is recommended to include the mechanisms for improving the efficiency of the application procedure in order to provide that the decision on the right of access to information is enforced without delay, as well as to provide that the right of access to information is effective and efficient;
8. It is recommended to regulate in detail the issues related to costs, and to ensure by the provision that this issue will be precisely defined through a by-law act;
9. It is recommended to strengthen through the provisions the role of an Information Officer;
10. It is recommended to provide in the provisions of the Law the protection of the right of access to information through a second-instance procedure, which should be vested exclusively to an independent body;
11. It is recommended to establish a supervisory body in accordance with international standards.

It is also important to mention the joint activities of the Organization for Economic Co-operation and Development and the European Union implemented through the SIGMA project - Support for Improvement in Governance and Management. Its key objective is to strengthen the foundations for improved public governance, and hence support socio-economic development through building the capacities of the public sector, enhancing horizontal governance and improving the design and implementation of public administration reforms, including proper prioritisation, sequencing and budgeting.

In January 2019, SIGMA published a document entitled *Improving the Legislative Framework for Access to Public Information in Bosnia and Herzegovina* containing a comprehensive analysis of the legislation on access to public information in Bosnia and Herzegovina at the level of Bosnia and Herzegovina, in the Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District of BiH.

The analysis focused on the compliance of relevant laws with international standards and international best practices in this area, followed by recommendations on possible amendments to increase transparency of public authorities and harmonize standards of access to information across the country. The recommendations issued relate to the lack of provisions governing the proactive publication of information, the weak institutional framework for monitoring the application of legislation on access to public information, and the shortcomings in the process of accessing information on request.

On 31 January 2022, the Ministry of Justice of Bosnia and Herzegovina, as the authorized processor and proponent of the Law on Free Access to Information at the Level of Institutions of Bosnia and Herzegovina, after extensive inter-institutional consultations and public consultations, drafted and submitted to the Council of Ministers the draft Law on Free Access to Information at the Level of Institutions of Bosnia and Herzegovina. This is a new text of the Law, which transposes the provisions of Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information.

The aim of enacting the Law is to regulate this matter systematically at the level of the institutions of Bosnia and Herzegovina, in order to ensure proper implementation of the Law and compliance with international standards, as well as promotion and protection of the right of access to information. At the same time, the aim of enacting this Law is to establish a solid legal structure with clear administrative procedures and clear provisions related to supervisory mechanisms, providing quality promotion of rights in the field of freedom of access to information.

The basic principles of the Law are transparency and openness, free access to information, open government, timeliness, completeness and accuracy of information, equality of users, disposition of information, mutual respect and cooperation, and free provision of information.

Relevant international norms were taken into account, as well as the ambiguities of the current law related to the appellate procedure, lack of provisions related to the functions of supervisory bodies and lack of quality information on the implementation. In this regard, it was suggested that the revised legal framework should have a solid legal basis, clear administrative procedures, clear provisions concerning the supervisory mechanisms, which would contribute to the quality promotion of rights in this area.

All of the above mentioned, and in particular the recommendations of TAIEX experts, was taken into account and incorporated into the new text of the Law.

In the normative-legal sense, the text of the new Law is harmonized with the Uniform Rules for Legislative Drafting in the Institutions of Bosnia and Herzegovina (Official Gazette of BiH, 11/05, 58/14, 60/14 and 50/17), regulating the formal criteria for legislative drafting in accordance with the relevant practice of the European Union. This Law prescribes the freedom of access to information in a comprehensive manner, using the terminology clearly, consistently and precisely.

Adoption of this Law seeks to overcome the perceived shortcomings arising from the practical application of the Law on Free Access to Information at the Level of Institutions of Bosnia and Herzegovina.

Reason for enacting the new Law is reflected in the importance of the matter defined by this Law, since the freedom of access to information is a precondition for responsible and transparent work of the public authorities.

One of the main characteristics of this Law is the regulation of a special institute of *proactive access to information*, for the purpose of stronger democratization in terms of insight into the data of public importance available to the institutions of Bosnia and Herzegovina and contribution to strengthening the trust in public authorities. Proactive access to information is a process on which the publicity of the work of a public body depends, and at the same time, it provides the public with the relevant information that is crucial for understanding the work of public bodies.

Introductory part of this report states that in Bosnia and Herzegovina, in addition to the Law on Free Access to Information at the Level of Institutions of Bosnia and Herzegovina, there are entity laws that apply to the area of freedom of access to information. According to the available information, the entities have not drafted new laws, so the only legislative activity in regulating this area in accordance with the European Union Directive, provisions of the Council of Europe Convention on Access to Official Documents (CETS 205) and other international standards in the area of free access to information, was made by the Ministry of Justice of Bosnia and Herzegovina.

Following the establishment of the proposal of the Law on Free Access to Information at the Level of Institutions of Bosnia and Herzegovina by the Council of Ministers of Bosnia and Herzegovina, the established proposal of the Law will be forwarded to the Parliamentary Assembly of Bosnia and Herzegovina for adoption in the basic legislative procedure.