

# SANCTIONING THE VIOLATION OF THE RIGHT TO FREE ACCESS TO PUBLIC INFORMATION AND ITS CHARACTER IN A TOOL IN THE FIGHT AGAINST CORRUPTION

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## ABSTRACT

Free access to public information is an important tool on the way to achieving full transparency and openness of institutions towards citizens, that is, it is a strong tool in the fight against corruption.

This right allows citizens to become more familiar with the work of the institutions and, on this basis, without intermediaries, to participate in the public affairs and decision-making process in a real and responsible manner.

The right to free access to information held by the institutions strengthens the principle of responsibility in the work of all holders of power and creates conditions for quality construction and stability of the system of a democratic society.

This right has contributed to the effective fight against corruption. Namely, corruption is based on secrecy, the institutions become corrupt when the public has no insight into their work. In this sense, the more the work of public institutions is offered to the public, the chance that they are corrupt will be less.

The protection and practical realization of the right to free access to public information impose the need for effective legal instruments to sanction the violation of the law.

**Key words:** access to information, legal protection, sanctioning, fight against corruption,



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## **1. OCCURRENCE AND DEVELOPMENT OF THE RIGHT TO FREE ACCESS TO INFORMATION**

The right of access to public information was first promoted in Sweden with the adoption of the Freedom of the Press Act in 1776 ([www.britannica.com](http://www.britannica.com)). According to this act, all “information and documents created or received by the government must be accessible to the public.” And not only that, this act requires “state institutions to do everything in their power to deliver the requested information as quickly as possible to the applicant.”

We can talk about the true development of this right from the middle of the last century. Namely, Article 19 of the Universal Declaration of Human Rights ([www.ichrp.org](http://www.ichrp.org)) UN, 1948, states that “freedom of information is a fundamental human right and a cornerstone of all freedoms to which the UN is committed.” In fact, the right to freedom of information and the right to access information are closely related to freedom of expression.

Following the Universal Declaration of 1948, one of the most important documents in the field of human rights for the countries of Europe is the European Convention on Human Rights of the Council of Europe since 1950 ([www.echr.coe.int](http://www.echr.coe.int)). Article 10 of the Convention states: “Everyone has the right to freedom of expression. This right covers the freedom of thought and the freedom to receive and impart information or ideas without interference by the public authority and regardless of the boundaries. The exercise of these freedoms, which includes obligations and responsibilities, may be subject to certain formalities, conditions, restrictions and sanctions provided by law, which in a democratic society constitute the necessary measures for state security, order protection and the prevention of riots and crimes, For the protection of health or morals, for the reputation or rights of the other, for the prevention of the dissemination of confidential information or the preservation of authority or impartiality in the making of judicial decisions. “

Among the first countries that include in their legislation the Law on Free Access to Information are the Scandinavian countries: Sweden 1949, Finland 1951, Norway and Denmark in 1970. During the 1990s, this process started in the countries of Central and Eastern Europe: Hungary 1992, Lithuania 1996, Latvia 1998, Czech Republic 1999, Estonia 2000, Slovenia 2003, Croatia and Serbia in 2004.

Another important international document for development of the right to free access to information is the Convention on Access to Official Documents of the Council of Europe since 2009 ([www.rm.coe.int](http://www.rm.coe.int)). It contains minimum standards in terms of access to public documents that each country has to respect and implement in its own legislation. The

Convention places great emphasis on proactivity, which signifies the self-initiative disclosure of information of public character by the holders, that is, without having specifically asked them. Also, it foresees several actions that will enable greater transparency and openness of the information holders - the institutions.

## **2. THE ESSENCE OF THE RIGHT TO FREE ACCESS TO INFORMATION**

Publicity in the work of state bodies and other public authorities, as well as the free access to public information are essential features of the modern legal state. One of the basic conditions for the democratization of society is creating the conditions for citizens to independently decide on their rights and obligations, and to have the right to access information available to state authorities at central and local level, as well as other entities that perform public authorizations.

The right to free access to information affirms the role of the citizen in the exercise of public authority. In fact, this right provides broad access to the work of holders of public authorizations, whether in legislative, executive or judicial power. Through this right the citizen exercises control of the state bodies and all entities that have public authorizations.

This right is synonymous with transparency, which in the process of decision making strengthens the democratic nature of the institutions and public confidence in the administration.

The right to free access to information is a general right that belongs to all citizens, and is not the privilege of certain structures or individuals. It extends the freedom of information and allows citizens to get information that is essential for creating their views on various issues. In the basis of this right is proactivity, namely, it means an active attitude of the institutions, that is, to publish information from its domain of work on its own initiative, so that the citizens without asking for that information will have them at their disposal.

The purpose of the right to free access to information is to obtain the information requested by the citizen or at the disposal of the state authorities or other entities that have public authority. However, it does not have an absolute character, that is, there is a rule according to which the use of one's own right should not cause harm or restriction to the other in the exercise of his rights. In a specific case, the exclusion of the right to free access to information requires the interest that is protected to be more significant than the public's interest.

Essentially speaking, the right to free access to information is understood as the right of everyone from the state bodies and other entities, holders of public authorizations, to request and obtain relevant information of public interest in order to enable in an appropriate manner an insight into the work of all the bodies that decide on behalf of the citizens. This right allows citizens without intermediaries to participate in the performance of public affairs and in the decision-making process, as well as to influence their content and implementation.

### **2.1 Anti-Corruption characteristics of the right to free access to information**

One of the greater values of the right to free access to information is that it offers a real opportunity for citizens, the media, and the general public to establish an important mechanism for democratic control of the government and an effective means of combating corruption. Namely, corruption with its detrimental effect threatens democracy and its values, causes instability and mistrust in the institutions, endangers human rights and civil liberties, its characteristic is the closeness and absence of relevant information.

The right to free access to information is a counterweight to corruption, with it enhancing transparency and accountability in society. With this right, citizens are guaranteed access to the requested information without discrimination on any grounds.

Namely, the right to free access to information plays an important role in the fight against corruption. Thus, apart from prescribing the offenses of corrupt behavior, the creation of specific legislation (Law on Prevention of Corruption, Law on Prevention of Conflict of Interest), introducing the obligation to report assets by public officials and this right has its place because it guarantees transparency in the performance of public affairs, i.e. it monitors the work of state bodies and other entities that perform public authorizations, as well as access to documents in their possession.

Starting from the fact that corruption and human freedoms and rights are two opposing phenomena, the right to free access to information is actually a protector of human freedoms and rights, and therefore a significant factor in the fight against corruption.

### 3. THE RIGHT TO FREE ACCESS TO PUBLIC INFORMATION IN THE REPUBLIC OF MACEDONIA

The right to free access to information in our country is grounded and guaranteed by the Constitution of the Republic of Macedonia. Namely, article 16, paragraph 3 states: “The free access to information, freedom of reception and transmission of information is guaranteed.” The legal framework was created in 2006 with the adoption of the Law on Free Access to Public Information, which enabled the citizens to seek and receive information on the work of all institutions, which is essential for the transparency and accountability that are necessary in an open and democratic society.

With this concept, citizens were able to request and receive information from state institutions at central and local level, exercising control over their work, especially in the area of spending of budget funds.

The Law on Free Access to Public Information of the Republic of Macedonia is modern and in line with the democratic standards of the EU Member States. Namely, in 2017, by - Institute “Center for Law and Democracy” from Canada and “Access Info Europe” from Spain, the Law of the Republic of Macedonia is ranked on the high 16th place on the world ranking list - Global Right to Information Rating ([www.rti-rating.org](http://www.rti-rating.org)) of countries. The Republic of Macedonia has 113 of the maximum 150 points, which are obtained according to different criteria, among which the most important are those related to the number of exceptions from free access, oversight mechanisms and awareness-raising, i.e. the promotion of the right to free access to public information.

The law created legal bases for creating specialized body for protection and realization of the right to free access to public information, i.e. the Commission for protection of the right to free access to public information. In that sense, the first composition of the Commission was appointed by the Parliament of the Republic of Macedonia in April 2006.

The Commission is an independent state body that works and makes decisions in accordance with the competencies determined by law. The funds for its operation are provided from the budget of the Republic of Macedonia, and for its work the Commission submits to the Parliament of the Republic of Macedonia an annual report.

With its mission, the Commission aims to protect and implement the constitutionally guaranteed right to free access to information through effective and independent implementation of the complaint procedure, informing the public, continuous education of information holders, as well as undertaking measures for improvement of the legal framework, especially in the part for promotion and incentives for transparency, readiness of the information holders for comprehensive information, as

well as for acquainting as many citizens as possible with the right deriving from them from the Law.

In the past 10 years, about 37,000 requests for free access to public information have been submitted by the applicants, which points to the significant practical use of the Law on Free Access to Public Information. On the other hand, in the mentioned period, the Commission acted upon about 6,700 appeals lodged, and for the majority of the appeals lodged, i.e. about  $\frac{3}{4}$  of them, the Commission made a positive decision for the applicants.

According to the Law on Free Access to Public Information (Official Gazette of the Republic of Macedonia No. 13/06, 86/08, 6/10, 42/14, 148/15 and 55/16), this right seeks to achieve publicity and openness in the work of the information holders, and to allow natural and legal persons access to the requested information of public character.

Public information is information in any form created or held by the information holder in accordance with its competencies. While holders of information are the state authorities and other bodies and organizations determined by law, the bodies of the municipalities, the City of Skopje and the municipalities in the City of Skopje, the institutions and public services, the public enterprises, legal entities and natural persons performing public authorizations, determined by law.

The law covers the whole procedure for exercising the right to access public information, that is, from the moment of submitting the request to the holder of information, through the procedure of the second instance body, until the filing of a complaint with the Administrative Court and initiating a dispute. It provides access to all information except to those provided for as an exception, in accordance with article 6 paragraph 1 of the Law, in addition through mandatory implementation of the harm test.

#### **4. SANCTIONING THE VIOLATION OF THE RIGHT TO FREE ACCESS TO PUBLIC INFORMATION AND DESIGN SOLUTIONS FOR IMPROVING THE SITUATION**

However, the best law can be only one declaration if there are no mechanisms for protection and application of its provisions. In that direction, we should analyze the sanctioning provisions in the Law on Free Access to Public Information and their potentials.

Namely, the law provides for sanctions - fines, for the responsible person of the institution and for the official person for mediation with information of public character. These are fines in the range of 300 to 2000

euros. When comparing with the average net salary in the Republic of Macedonia, it follows that these are serious sanctions.

Here, another issue is opened, that is, the possibility of creating a penal instrumentarium of various sanctions for punishment due to non-fulfillment of legal obligations. Namely, the experience of EU member states, such as Scotland, Germany, Spain, shows that they have more possibilities for sanctioning, starting with reprimand, through other milder forms, in the end if there is no effect from them to apply some more sensitive sanction - punishment. Their experience shows that the purpose of the law is generally achieved with the first measure, that is, the reprimand. Namely, the goal is not and should not be punishment, but fulfillment of the legal norms. Therefore, in the coming period, we need to think in this direction, that is, to create practical solutions in the sanctioning of non-fulfillment of the obligations stipulated by law.

In the criminal law one of the basic principles is the principle of legality or “*nullum crimen, nulla poena sine lege*”. There are five legal consequences in its content, one of which refers to the precision and clarity of the punishable behavior, that is, the norm for which it is punished to be clear and unequivocal. Thus, article 39 of the Law on Free Access to Public Information provides for a fine in the amount of 1,000 to 2,000 euros for the responsible person in the information holder if he fails to act in accordance with article 2, paragraph 2 of the Law. Article 2, paragraph 2 states that “the information holders for their work are obliged to provide information to the public”. It is a norm that is completely general, generalized, which does not show any concreteness, which leaves room for different interpretation, that is, the obligation is fulfilled, but also that it is not fulfilled, and it is followed by a serious sanction. This is a norm where appropriate intervention, that is, precision is needed in order to achieve legal certainty.

One of the measures for the level of publicity and openness in the work of information holders, and therefore the access to public information, is the number of exceptions to free access to information. It denotes the situations in which access can be refused and the required information not given, which means that the interest being protected is greater than the public interest that would be achieved by publishing the information. Although these are not absolute exceptions, our lawmaker has prescribed a sanction for the responsible person and the official person for mediation with information of public character in the information holder who will provide data in cases covered by an exception and therefore there was damage to the applicant, the public or the interest protected by that information.

Regarding the above, it should be pointed out that in our Law there are eight exceptions from the free access contained in Article 6

paragraph 1 of the Law (Classified information with an appropriate degree of secrecy; Personal data; Information about archiving; Information whose giving would violate the confidentiality of the tax procedure; Information acquired or compiled for a particular procedure; Information concerning commercial and other economic interests; Information from a document under preparation and information that endangers the rights of industrial or intellectual property). Unlike our law, many more exceptions are provided in the laws of several EU member states: Slovenia -11, Estonia -19, Spain -12, Croatia -15, Germany -23, Czech Republic -26.

The significance of the law is access to the requested information, which means that in the whole process the essential point is the mediation or submission of the requested information from the information holder. Therefore, the legislator has prescribed a sanction in the amount of 300 to 500 euros in denar equivalent that will be imposed to the official person for mediation with information of public character in the information holder if within the deadline (no later than 30 days from the day of receipt of the request) ungroundedly does not mediate the information. However, remarks may also be made to this provision. Thus, for the information holders, the decision to provide the requested information depends on the responsible person, and it is precisely this that has not been entered in the sanctioning provision. It is therefore necessary to expand it in order to overcome this deficiency.

Starting from the fact that the Commission for Protection of the Right to Free Access to Public Information is in charge of law enforcement, and therefore for the implementation of the right to access information, the legislator obliges all information holders to submit them by January 31st at the latest to the Commission Annual Report on the implementation of the law on their behalf, for the previous year. For the non-fulfillment of the obligation, the legislator has envisaged a fine in the amount of 500 to 800 euros in denar equivalent for the responsible person in the information holder. And here it should be emphasized that the goal should not be in the punishment, but in the development of awareness among the responsible persons that they all contribute to the preparation of a single Commission Report where the problems in the implementation of the law will be accurately identified.

## 5. CONCLUSION

The free access to public information is an important tool on the way to achieving full transparency and openness of institutions towards citizens, i.e. it is a powerful tool for fight against corruption.

Through this right the doors of the citizens are opened up to become familiar with the work of the authorities and on this basis without intermediaries, participate in the public affairs and the decision-making process, as well as to influence their contents and effectively implementation.

Free access to information held by the authorities is a condition for the quality and effective enjoyment of other rights and freedoms (freedom of opinion). The exercise of citizens' right to information and expression is not possible without the right to freedom of reception and dissemination of information, that is, without free access to information.

This right also strengthens the principle of responsibility in the work of all holders of power and creates conditions for quality construction and stability of the institutions of a democratic society.

However, the right to free access to public information will be only a declaration if no sanctions provisions are foreseen in case of violation of the legal provisions. Therefore, the paper emphasizes several provisions from a positive aspect, but also conceptual solutions to amend the sanctions provisions.

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