

Analysis of amendments to the Law on Freedom of Access to Information of Bosnia and Herzegovina¹

1. Overview: International Standards and the need for amendments

The series of amendments proposed to Bosnia and Herzegovina's Law on Freedom of Access to Information (hereinafter LFAI) raise concern because a number of the proposed provisions are out of line with international standards and/or would be unworkable in practice.

In particular, the attempts to define in the law a list of classes of information which should and should not be published is worrisome because it risks limiting access to large volumes of information of great public importance, including for participation in decision making, for reducing risks of and exposing corruption and conflict of interest, and for ensuring that there is public scrutiny of the judicial process.

The Rationale Note to the proposed amendments sets out a series of reasons for the proposed amendments which include:

- "Consolidation with the Council of Europe's Convention on Access to Official Documents (CETS No. 205), ratified by Bosnia and Herzegovina in 2011."²
- And the "fact the Personal Data Protection Agency of Bosnia and Herzegovina stated in its Report that the current solution to personal data protection was outdated and that it impacted the concept of personal data protection as the right deriving from the right to privacy"
- Harmonization with "the EU *acquis communautaire*, and the international standards and recommendations of the Council of Europe in this area [freedom of information]"

These are, in principle, acceptable reasons for reviewing the LFAI. The Council of Europe Convention on Access to Official Documents was developed after the adoption of the Bosnia and Herzegovina LFAI and any modifications should aim to bring the law into conformity with that treaty. Ensuring that Bosnia and Herzegovina law is in line with EU and regional standards on the right of access to information is also welcome.

¹ Analysis prepared by Helen Darbishire, Executive Director of Access Info Europe. Ms Darbishire was a member of the drafting committee of the first Bosnia and Herzegovina Law on Freedom of Access to Information, convened from 1999-2000.

² The text of the Convention is available from the Council of Europe Treaty Office here: <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=205&CM=1&CL=ENG>. It is noted that, according to the Treaty Office, Bosnia and Herzegovina signed the Council of Europe Convention on Access to Official Documents on 1 September 2010 and ratified it on 31 January 2012.

We note however, that such vague references to “*acquis communautaire*” and the generally rather unspecific tone of the Rationale Note which accompanies the proposed amendments, is not a sufficient reason in itself: the text should be made much more specific and should justify clearly why particular changes are being made, and how precisely they bring the legal framework in Bosnia and Herzegovina into line with the international standards.

The focus of this analysis will be what these standards require and whether the proposed amendments are indeed in line with them. A series of recommendations is included in the text as to which amendments should not be adopted and which should be reviewed carefully before proceeding. In particular, and of most concern, the proposed Article 8.2 should not be adopted as it runs directly counter to international standards in multiple ways.

It is noted that there are a number of steps which could be taken to strengthen the access to information law in line with the provisions of the Council of Europe Convention on Access to Official Documents, and the recognition of the right of access to information by international human rights bodies, as well as in line with the recommendations of the Representative on Freedom of the Media of the Organization for Security and Cooperation in Europe (OSCE) and the comparative standards set by the many countries in Europe and beyond which adopted access to information laws after Bosnia and Herzegovina.

The most pressing matter in the context of the debate on the current reforms is to ensure that in separating out the Law on Freedom of Access to Information and the Law on Personal Data Protection, no provisions are introduced which would seriously curtail the right of access to information. The recommendations in this document are aimed at ensuring that and we urge the Council of Ministers and the Parliamentary Assembly of Bosnia and Herzegovina to pay careful attention to them.

2. Constitutional basis for the amendments

As the Rationale Note states, the constitutional powers for the amendments derive from the mandate of the Parliamentary Assembly to enact legislation (Article IV 4. a) of the Constitution of Bosnia and Herzegovina). Such powers must, however, be exercised in line with the other provisions of the Constitution and must ensure that all future legislations is in line with the Constitution, which contains a specific commitment to uphold the rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms which “shall have priority over all other law” (Article II.2), as well as in other treaties including the 1966 International Covenant on Civil and Political Rights (Annex I).

The reference to these Conventions is important when considering the Parliamentary Assembly’s obligations with respect to the right of access to information because a fundamental right of access to information has been developed under these treaties and should be respected in law and practice in Bosnia and Herzegovina.

Specifically the European Court of Human Rights ruled in 2009 that the right of access to information held by public bodies is protected by Article 10 of the European Convention on Human Rights which protects the right of freedom of expression. In the key ruling of

*Társaság a Szabadságjogokért v. Hungary*³, the Strasbourg Court argued that the right is particularly strong when public bodies are the unique holders of information (an “information monopoly”) and hence the information may not be obtained from another source. Furthermore, when a public body holds information which is essential either for the media to play their role as “public watchdogs” or for civil society to play a “social watchdog” function, then to withhold that information is an interference with freedom of expression right as protected by Article 10 of the European Convention on Human Rights.

It is worthwhile noting in the context of the debate in Bosnia and Herzegovina, that the European Court of Human Rights has rejected the idea that protection of personal data about public officials could be used to impose blanket limitations on the right of access to information. The Court has stated that it would be “*fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights*”⁴ and that such arguments could not be called upon to justify the restriction on access to information and consequent interference with freedom of expression as protected by Article 10 of the European Convention on Human Rights. Any proposed amendments to the LFAI in Bosnia and Herzegovina should take this into account and ensure that personal data protection does not become the pretext for unduly limiting freedom of expression and media freedom in Bosnia and Herzegovina.

The existence of a right of access to information as an inherent part of freedom of expression was confirmed in July 2011 by the United Nation Human Rights Committee, in its General Comment No. 34, which states that:

18. Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production. Public bodies are as indicated in paragraph 7 of this general comment [All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party]. The designation of such bodies may also include other entities when such entities are carrying out public functions.

In the light of these significant developments in the right of access to information, which occurred after the adoption of the first Bosnia and Herzegovina LFAI, any amendments to the Law on Freedom of Access to Information must ensure that the right of access to information is treated as a human right, and must ensure that the legal framework strikes a proper balance between access to information and other European Convention rights (including the right to privacy). The legislature must also ensure that the LFAI is only amended in ways which are consistent with the current interpretation of rights under those

³ European Court of Human Rights Case of *Társaság a Szabadságjogokért v. Hungary* (App no 37374/05), of 14 April 2009, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92171>, paragraph 38.

⁴ Ibid, at Paragraph 37.

conventions, and may impose no greater restrictions on the right than permitted by those standards.

Other international treaties, including the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 (CETS No. 108) and the Convention on Access to Official Documents of 18 June 2009 (CETS No. 205) must be interpreted in line with these international human rights treaty commitments and the interpretation of these by relevant bodies, in particular the European Court of Human Rights.

As elaborated in this analysis, sufficient measures have not been taken in ensuring that the proposed amendments meet the requirements of these international treaty law commitments in two main ways. First, they do not ensure a sufficiently broad scope of the right of access to information by imposing additional limitations and second they do not establish a correct balancing with the right to privacy. Indeed, the amendments should rather be of a different nature, ensuring that the right of access to information is fully in line with international standards on the right of access to information.

3. Evaluation of the Proposed Amendments.

3.1 Separation of Personal Data Protection Provisions

Given that Bosnia and Herzegovina now has a law on Personal Data Protection (which is not per se the subject of this analysis), it appears to be acceptable to remove from the LFAI the provisions which refer to mechanisms now established under that other legal regulation. This includes the deletion of Article 1, Paragraph 1, item c) which referred to the right of every natural person to request the amendment of, and to comment on, his or her personal information in the control of a public authority. Such a provision is no longer needed in the LFAI.

Recommendation: It is acceptable to make this amendment, provided that the Personal Data Protection Law enables data subject to access and/or comment on their personal data and that it does so in a way which is fully in line with Council of Europe and European Union standards.

3.2 Interpretation

The proposed amendments would replace the current Article 2 as follows:

Current	Proposed
Article 2 Interpretation This law is interpreted in order to facilitate and promote the maximum and prompt disclosure of information under control of public authorities at the lowest reasonable cost.	Article 2 Interpretation 1. Access to information kept by a public authority is based on the following principles: a) Freedom of information, b) Equal requirements to exercise right to access to information, c) Transparent and open operations of a public authority,

	d) Urgency of the proceedings. 2. Access to information kept by a public authority is in public interest."
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The necessity of the proposed changes is not entirely clear and is rather vaguely explained in the Rationale Note as "having regard to international standards in this area and democratic values of modern societies."

It is noted that the current Article 2 is very much in line with the Council of Europe Convention on Access to Official Documents whose preamble establishes a principle of publicity ("all official documents are in principle public and can be withheld subject only to the protection of other rights and legitimate interests") and contains specific provisions requiring maximal and prompt disclosure at low or no cost to the requestor.

On the other hand, introducing a concept of "freedom of information" (Proposed Article 2.1.a does not reflect the language of either the Convention on Access to Official Documents or of the UN Human Rights Committee, which made clear that the broader right to freedom of expression and information includes a very specific right of access to information, something which is distinguished from the free flow of information.

The remaining wording changes do not appear in the English translation to be problematic, and do have the benefit of adding equality of access.

The proposed new provision 2.2 stating that "Access to information kept by a public authority is in public interest" seems to confirm the principle of publicity but, in the English translation at least, is rather more elegantly phrased in the original law. Indeed, there is a mild concern here that the new language could be misread to limit the principle that all information held by public bodies is presumed to be public, with only limited exceptions.

Recommendations:

- » Reconsider the necessity of these changes, particularly as the remainder of the law may not need changing.
- » Refrain from changing the terminology from access to information to freedom of information.
- » Ensure that any new language carefully follows the wording of the Convention on Access to Official Documents and the General Comment 34 of the UN Human Rights Committee.

3.3 Definitions

The proposed amendments to Article 3 are stated to have the objective of defining terms in order to "provide a detailed explanation of the provisions therein, with the aim of ensuring a realistic and practical concept of exercising the right to access information possessed by public authorities, in line with the international standards regulating this area."

The proposed revision is extensive, as set out in the chart below:

Current	Proposed
<p>Definitions For the purpose of this Act: NB: this is not current version</p> <p>(1) "information" means any material which communicates facts, opinions, data or any other matter, including any copy or portion thereof, regardless of physical form, characteristics, when it was created, or how it is classified.</p> <p>(2) "public authority" means any of the following in Bosnia and Herzegovina:</p> <ul style="list-style-type: none"> (a) an executive authority; (b) a legislative authority; (c) a judicial authority; (d) a body appointed or established by law to carry out a public function; (e) any other administrative authority; (f) a body that is either owned or controlled by a public authority. <p>(3) "control" means either possession of, or access to, information.</p> <p>(4) "personal information" means any information relating to a natural person who can be directly or indirectly identified by reference to factors such as but not limited to, an identification number or that person's physical, mental, economic, ethnic, religious, cultural, or social identity.</p> <p>(5) "competent authority" means a public authority that has control of the requested information and is the authority by whom or for whom the information was brought into existence. If the latter cannot be determined the competent authority shall be the public authority whose function most closely relates to the requested information.</p>	<p>Article 3 shall be amended as follows:</p> <p>"Article 3 – Definitions"</p> <p>For the purpose of this Law:</p> <ul style="list-style-type: none"> a) Right to access to information encompasses the right to request and receive information kept by a public authority; b) Information means any material in written, printed, video, audio, electronic or other format, which communicates facts, opinions, data or any other content, including any copy or portion thereof, regardless of its form or characteristics, source (author), date of creation or manner of classification; c) Public authority means government institution, state body (legislative, executive, judiciary), public institution or institution assigned to perform public office established by the state or funded from public sources, keeping the information in its possession; d) Information in possession of the public authority refers to the actual possession of the information by the public authority (personal information, information provided by other public bodies or third persons), regardless of the ground for possession or the manner in which the information was acquired; e) Applicant means legal entity or individual requesting access to information; f) To reveal the content of information means to make the information available to the applicant or to third persons, regardless of purpose of its use; g) To disclose information means to enable revealing the content of information; h) Responsible person is a person authorised to act on the request for access to information, a person authorised to act on the appeal and a person responsible for legality of operation of a public authority; i) Date of submission is a day of submission of the request or other document to the public authority j) Date of delivery is the date of delivery of a decision or other act to the attention of the applicant; k) Control means either possession of, or control of freedom of access to information.

The proposal to further amend Article 3 of the Act, on Definitions, which has been amended in the past, is a very mixed bag of some acceptable and some problematic proposals. These are assessed here one by one.

Proposal: 3.a *Right to access to information encompasses the right to request and receive information kept by a public authority;*

Analysis: International standards make clear that a right of access to information is part of a freedom of expression rights, and therefore also encompasses a right to use and to disseminate the information received.

Recommendation: Revise the proposed language to bring it into line with international standards.

Proposal 3.b: *Information means any material in written, printed, video, audio, electronic or other format, which communicates facts, opinions, data or any other content, including any copy or portion thereof, regardless of its form or characteristics, source (author), date of creation or manner of classification;*

Analysis: Of particular concern with this provision is the phrasing “communicates facts, opinions, data or any other content” which seems at best redundant and at worst could be used to deny access (on the ground that it does not “communicate” something). This should be deleted. Overall, this is unnecessary detailed language and the clarity of the Convention on Access to Official Documents is recommended: Information is “all information recorded in any form, drawn up or received and held by public authorities.”

Recommendation: Revise the proposed text, in particular to take out the redundant terminology; use the provision in the Convention on Access to Official Documents.

Proposal 3.c: *Public authority means government institution, state body (legislative, executive, judiciary), public institution or institution assigned to perform public office established by the state or funded from public sources, keeping the information in its possession;*

Analysis: The amendment appears to be in conformity the Convention on Access to Official Documents.⁵ We note that the last clause “keeping the information in its possession” is not needed as this falls within the definition of information.

⁵ It is noted that, according to information obtained from the Council of Europe, Bosnia and Herzegovina did not make any declaration upon depositing the ratification with the Council of Europe Treaty Office. If this is the case, then Bosnia and Herzegovina failed to take the opportunity to signal that its law applies to the optional provisions of the Convention in matters of scope, as did Hungary and Latvia for example. Bosnia and Herzegovina should take steps to rectify this in communication with the Council of Europe Treaty Office. See : <http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=205&CM=8&DF=29/05/2013&CL=ENG&VL=1>

Recommendation: Delete the last clause.

Proposal 3.d: Information in possession of the public authority refers to the actual possession of the information by the public authority (personal information, information provided by other public bodies or third persons), regardless of the ground for possession or the manner in which the information was acquired;

Analysis: This is helpful language and positive. We recommend that the right extends to information held by others (third parties) on behalf of a public authority.

Recommendation: Make clear that the right of access extends information held by third parties on behalf of public authorities.

Proposal 3.e: *Applicant means legal entity or individual requesting access to information;*

Analysis: This amendment is acceptable as international standards make clear that any natural or legal person may make a request for access to information. Indeed the Convention on Access to Official Documents encourages States Parties to go further than this, stating in Article 4.2 that "Parties may give applicants the right to remain anonymous except when disclosure of identity is essential in order to process the request." Being a universal right, it does not matter who the applicant is, and it is not essential for the public body to know to whom they are releasing information: if information is public, then it is public to all. International standards also make clear that, consistent with access to information being a human right, any person, including non-citizens and non-residents, has the right to request information. It is noted, however, that reports from civil society organisations indicated that the practice of many public bodies in Bosnia and Herzegovina has been to require applicants to identify themselves, in some cases requiring, for example, copies of identity documents or legal statutes, etc. The current reform of the LFAI is an opportunity for the legislator to put an end to such practices and to signal that, apart from some basic contact information (which could be an email or physical address), no more data is needed to process a request.

Recommendation: Consider adding language which makes clear that applicants only need to provide a contact address which may be an electronic or physical address for receipt of the information.

Proposal 3.f: *To reveal the content of information means to make the information available to the applicant or to third persons, regardless of purpose of its use;*

Analysis: The necessity or meaning of this amendment is not clear and not sufficiently explained in the Rationale Note which comes with the amendments, which states in general that the Article 3 amendments have "the aim of ensuring a realistic and practical concept of exercising the right to access information possessed by public authorities, in line with the international standards regulating this area." In particular it is not clear what is meant by "third persons" in this definition. The phrasing "regardless of purpose of its use" is also of concern as it potentially opens the door to questions about purpose. We question whether there is any added value in this language and recommend that it be removed from the amendments. If necessary, language which expressly prohibits public officials from enquiring

about the reasons for the request or the planned use of the information could be strengthened; this is currently contained in Article 11.4.

Recommendation: Remove this provision from the proposals.

Proposal 3.g: *To disclose information means to enable revealing the content of information;*

Analysis: It is not normally necessary in access to information laws to specify the meaning of releasing information to an applicant. We question if this is necessary (and in English language there is relatively little difference from 3.f).

Recommendation: Reconsider necessity of this provision.

Proposal 3.h: *Responsible person is a person authorised to act on the request for access to information, a person authorised to act on the appeal and a person responsible for legality of operation of a public authority;*

Analysis: It is acceptable and important that such a figure is established. There is a need to clarify if this is the same figure as in Article 19.

Recommendation: Review law for coherence and ensure that there is a strong definition of an information officer and their roles and responsibilities.

Proposals 3.i: *Date of submission is a day of submission of the request or other document to the public authority;*

Analysis: It is not clear here what is meant by "other document" unless it means part of the correspondence with the requester, which could be more clearly stated.

Recommendation: Clarify or remove "other document".

Proposals 3.j: *Date of delivery is the date of delivery of a decision or other act to the attention of the applicant;*

Analysis: Strictly the date of delivery should be the date of receipt by applicant given that that is the legal obligation. It is no good having a decision with one date which is not delivered for another 15 days. Recommend clarifying this provision.

Recommendation: Review and clarify the proposal.

Proposal 3.k: *Control means either possession of, or control of freedom of access to information.*

Analysis: It is not clear what is meant by "control of freedom of access to information" and in any case this provision does not seem necessary given that it appears to duplicate earlier definitions and be redundant.

Recommendation: Review and clarify the proposal.

3.4 Privacy rights

The Rationale Note sets out a series of reasons for amending the LFAI with respect to its provisions on privacy and personal data protection. These changes primarily aim to achieve clarity between the LFAI and the Personal data protection law, and to remove overlap, as well as to ensure consistency of interpretation. In addition, however, the amendments place unacceptable limitations on the right of access to information, and should not be adopted as they run directly counter to the international standards on the right of access to information which Bosnia and Herzegovina is committed to upholding.

I) Removing Overlap with Personal Data Protection Law: The provisions which are merely designed to remove the overlap in terms of legal mechanisms between the LFAI and the personal data protection law are Article 6 of the Amendments (removing Article 11.3 on the mechanisms for accessing personal data by the data subject) and Article 8 of the Amendments (Article 17 mechanisms for deletion or comment on personal data).

Recommendation: These changes are acceptable and no further comment is needed.

ii) Clarity in Balancing Access and Data Protection: A second reason given in the Rationale Note is that the Data Protection Agency has encountered problems of interpretation of the personal data protection area, both with limitations on access and, it is asserted, release of information containing personal data; no specific examples are given. A further and more detailed argumentation is given with respect to court cases although the necessity of denying access to any court cases is not justified. What is stated is that the proposed solution of only publishing some court cases has been determined by the Court of Bosnia and Herzegovina (not stated where specifically) not to be in contravention of the existing provisions of the Bosnia and Herzegovina Law on Protection of Personal Data. This may be the case, but the proposals are, regrettably and seriously, in contravention of the right of access to information. The proposed changes are as follows:

Current	Proposed
<p>Article 8 Exemption for the Protection of Personal Privacy A competent authority shall claim an exemption where it reasonably determines that the requested information involves the personal privacy interests of a third person.</p>	<p>“Article 8 – Restrictions for the Purpose of Protection of Right to Privacy and other Legitimate Private Interests</p> <ol style="list-style-type: none">1. Acting in accordance with the provisions of this Law and special regulations pertaining to protection of personal data, the relevant public authority shall restrict access to information or part of information if disclosure of such information violates the right to privacy and other legitimate private interests.2. As an exception from the provisions of Paragraph 1 above, the public authority shall not restrict access to

	<p>information or part of information pertaining to:</p> <ol style="list-style-type: none"> a. Use of public funds, with the exception of funds disbursed as social welfare, healthcare and unemployment benefits; b. Performance of public office, including income, property and conflict of interest of public office holders and their relatives, as detailed under the law which deals with prevention of conflict of interest; c. Court decisions in cases of public interest, such as war crimes, organised crime, corruption, terrorism, tax evasion and other cases, which represent cases of public interest, in line with the assessment of the public authority conducting the proceedings; d. First name, last name and title of employees of public authorities. <p>3. Restriction of access to information or part of information for the purpose of protection of privacy shall be in effect for 70 years of the date the information was created or 20 years after the death of the person the information pertains to, unless the person the information pertains to, his/her spouse or partner, children or parents, provide explicit written approval for disclosure of the information after his/her death, prior to expiry of the period of restriction."</p>
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The proposed Article 8.1 introduces an exception to the right of access to information based on the Council of Europe Convention on Access to Official Documents which admits an exception for the protection of "privacy and other legitimate private interests" (Article 3.1.f). This is an acceptable minor rephrasing of the current LFAI.

The proposed new Article 8.2, however, has a convoluted structure by which it exempts some information from the restriction on grounds of privacy but then sets up exceptions to this, which in effect mandatorily removes significant quantities of information from the public domain. In effect, the mandatory exceptions include:

- Use of public funds for social welfare, healthcare and unemployment benefits;

- Any information about performance of public office holders which does not fall under a narrow list (income, property and conflict of interest of public office holders and their relatives, as detailed under the law which deals with prevention of conflict of interest);
- All court decisions which are not included in a limited list of "cases of public interest" ("war crimes, organised crime, corruption, terrorism, tax evasion and other cases which represent cases of public interest") as well as potentially other information about court cases while proceedings are on-going or after decisions have been reached;
- Possibly, any data about public employees which is not simply their first name, last name and title.

The information potentially excluded under this provision on the grounds that it contains personal data is all information of great public importance. Particularly broad is the exclusion of information about spending of public funds on social welfare and healthcare: this definition covers much information which is not personal data and in which there is a clear public interest.

The area of protection of privacy and personal data protection is a complex one, and for that reason it needs very careful legal drafting. In particular, the law needs to capture clear principles which can be applied on a case by case base, and reviewed by oversight bodies and the courts where necessary. These principles must take into consideration that both the right of access to information and the right to protection of privacy are fundamental rights protected by the European Convention on Human Rights. The Rationale Note fails to take this into account, referring to a right to privacy but not to access to information.

In addition, the proposed new Article 8.2 fails to take into account other requirements of the Convention on Access to Official Documents and international law more generally, namely that the harm to the protected interest (privacy and other legitimate private interests) has to be demonstrated on a case by case basis, in a decision which has to be drawn up and well-reasoned and motivated by the public authority, and furthermore, that the public interest test has to apply.

In another twist, and in some very unclear legal drafting, an amendment to Article 9 is proposed which states that "Access to information mandated under the provisions of Article 8, Paragraph 2, shall not be subject to verification of public interest arguments". It is not totally clear here whether this language applies to the mandatory exceptions to the exceptions, or to the exceptions to these mandatory exceptions. In other words, it is not clear if, for example, no public interest test shall apply to access to spending of public funds or to spending of public funds on healthcare. Similarly, does the public interest not apply to court decisions where the legislator has deemed them to be in the public interest or does it not apply to other court decisions?

The correct reading of this text (based on the available translation) seems to be that the public interest test should not apply to the exceptions to the exceptions. Hence, personal data contained in information relating to spending on public funds should never be subject to a public interest test because the legislator has deemed that information on spending on

public funds must be public. Similarly, there would never be any need to apply the public interest test to court decisions in war crimes trials, nor to information on performance of public office, including income, property and conflict of interest of public office holders, nor to the first name, last name and title of employees of public authorities. If this is the correct reading of the provision, then the amendment is entirely unnecessary: it would be sufficient for the legislator to list which information shall always be available.

Even if, however, the legislator were to wish to list classes of information which should always be made available, that does not permit it to disregard the right of protection of privacy and other legitimate private interests. To take one hypothetical but not improbable example: a document relating to a conflict of interest investigation might contain the name of an individual (a whistle-blower for example) which should not be made public at that point in time. And there may well be information on the spending of public funds in fields other than social welfare, healthcare and unemployment benefits where personal data should be withheld (data which could include not only names, but ID information or even bank accounts!).

It is clear that these proposed provisions have not been considered with sufficient care and thoroughness. The proposals fail to anticipate the panoply of specific issues which could arrive when documents in any field of government activity are requested. It is precisely for that reason that international and comparative standards, including but not limited to the Convention on Access to Official Documents, require that exceptions to the right of access to information be applied on a case by case basis, taking into account both the harm and the public interest. A failure to do that in the context of protection of privacy is dangerous because it opens the door to almost inevitable mistakes: the very concern alleged by the Data Protection agency that information is being both unduly limited and personal data wrongly released is likely to be magnified with the proposed language.

A particular area of concern is that of court cases. It is a standard principle of democratic societies that the functioning of the judiciary takes place in public: hearings of the courts are public and any journalist should be able to attend and write a report of proceedings. Court decisions and other related records must be publicly accessible in order to protect the public interest in ensuring that justice is done. Any permissible limitations on access to court documents (and the Convention on Access to Official Documents does have an exception for "the equality of parties in court proceedings and the effective administration of justice" cannot apply to the outcome of the judicial process. The Convention on Access to Official Documents makes clear that any limitations must be set down by law and must be "necessary in a democratic society and be proportionate to the aim of protecting [the specified interest]." In most democratic societies that principle argues for almost total access to court decisions (very limited redaction of names to protect minors, for example, in cases of child abuse, incest, or domestic violence are occasionally permitted). The importance in Bosnia and Herzegovina of protecting and monitoring the independence and impartiality of the judiciary, as well as the broader societal interest in knowing the outcomes of court processes, argues strongly in favour of publication of all court decisions. It is recommended that the language be modified to require the default position to be publication of all court decisions in their entirety unless in exceptionally cases a compelling argument to redact some limited information.

Recommendations:

- » Integrate the protection of privacy and other legitimate private interests into the general list of exceptions, which should be in line with the Convention on Access to Official Documents.
- » Withdraw in its entirety the proposal for Article 8.2.
- » Put in place a plan to train information officers and other public officials on how to balance access to information with personal data protection and establish strong support and oversight mechanisms to improve practice. This is not a matter which can be solved through legislation alone, nor even primarily through legislation.

iii. Time Limits for Restrictions on Access to Personal Data

The proposed Article 8.3 introduces a requirement that a restriction on access to information for the purpose of protection of privacy shall be in effect for 70 years of the date the information was created or 20 years after the death of the person to which the information pertains (absent the consent of the individual or a family member should they have passed away).

This is also a highly problematic provision. First it runs counter to the provisions of the Convention on Access to Official Documents which require decisions to be taken on a case-by-case basis. In other words, a request for information which is denied today may be granted tomorrow if circumstances change. Such a change could include that the assessment of harm is that it is not so great, or that the public interest has increased to a level which justifies publication.

The second problem with this provision is that it fails to understand the meaning of the provision in the Convention on Access to Official Documents (Article 3.3) which gives States the option of "setting time limits beyond which the limitations ... would no longer apply." The purpose of the drafters of the Convention was to give an option to place a time limit in order to indicate to a requester when a document would become available. For instance, a document relating to a decision-making process is not available at the time when a request is submitted, but will be available immediately the decision has been taken. An example might be a public procurement process where documents become available after the contract has been awarded. The drafters of the Convention on Access to Official Documents did not have in mind exceptionally long time periods such as seventy years.

A third problem is that this provision introduces a potential overlap with other legislation regulating privacy just as the proposed amendments removed other overlaps. Any general language about the length of time for which personal data is considered to be personal data (during the lifetime of the individual) should be contained in other legislation, if it is necessary at all, which is questionable. For that reason such a provision is not contained in the Convention on Access to Official Documents and should not be introduced into the Bosnia and Herzegovina LFAI.

Recommendations:

- » Withdraw in its entirety the proposal for Article 8.3.
- » Introduce a provision which requires public bodies applying an exception to notify a requester when the information should become available.

- » Ensure that public officials are trained on the fact that information which is denied on grounds of a protected interest may be requested again and may well become available at a later stage.

3.5 Appeals

The appeals process has long been an issue with respect to the Bosnia and Herzegovina LFAI. According to the Rationale Note, the proposed amendments to Articles 23 and 26 are designed to rectify changes made in 2011 with respect to the appeals process. The administrative and court appeal process is clarified with the new provisions:

Article 23 – Right to Appeal

- 1. Decision on request to access to information issued by the public authority in the first instance may be subject to appeal before the relevant public authority assigned under the law to act in the second instance. In the event such second instance body is not in place, administrative proceedings may be initiated to challenge the subject decision.*
- 2. The public authority assigned to act on the appeals is required to make its decision and send it to the appellant within 30 days of submission of the appeal.*
- 3. Appeal against the decision which approves the request for access to information does not delay implementation of such decision*

It is essential that there be an effective internal appeals process. A first point of note is that Article 23.2 would give public bodies 30 days to decide on the appeal. This is a long time frame (assuming 30 working days; but even 30 calendar days is somewhat long). The European Union which has a standard 15 working days to answer requests, provides public bodies with 15 working days for appeals to be processed and a final decision issued to the applicant. It is recommended that Bosnia and Herzegovina reduce the appeal time, especially given that, as the European Court of Human Rights has stated “news [information] is a perishable commodity”.

The proposed Article 23.3 is not clear. It appears to provide a right to challenge decisions to release information but that such an appeal “does not delay implementation of such decision.” Given that the timeframes for appeals are longer than the timeframes for delivering information, this would be a totally meaningless decision as by the time the appeal was resolved, the information would be in the public domain.

Article 10 of the amendments revises the current Article 26, Paragraph 1 so as to ensure that the administrative procedure applies. The language of this provision (in translation at least) is not entirely clear and should be reviewed to ensure that the proposal functions in practice consistent with the current legal framework in Bosnia and Herzegovina.

Recommendations:

- » Reconsider the timeframes in future Article 23.2 and reduce them to a reasonable length (maximum 15 working days) in line with EU standards.
- » Revise for clarity the proposed changes to Article 23.3 and 26.

3.6 Other Amendments.

The amendments proposed by Article 7 are a technical change to the wording (correcting the word "include" to "submit" – which possibly should be "deliver"), which does not seem problematic and no comment is necessary.