



## **Access to information in Croatia:**

### Exercise of a Constitutional Right in an Institutional Culture of Secrecy

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## **INTRODUCTION**

In Croatia, access to public information has become a constitutional right, as a part of the 2010 constitutional changes. According to the Constitution, restrictions to access to information should be relative to the nature of the need to restrict access in each individual case, and as such, regulated by the Law. Access to information is regulated by the Freedom of Information Act (FoIA), first enacted in 2003, and amended in 2010. Apart from FoIA, access to information is regulated by the Data Secrecy Act (DSA), and the valid provisions on business (and professional) secrets of the otherwise void Law on the Protection of Secret Data. Finally, access to information is also regulated by the Personal Data Protection Act and the Act on Information Security.

The enactment of the DSA in 2007, including the proportionality/public interest test<sup>1</sup>, was part of harmonization efforts in the processes of Croatia's Euro-Atlantic integration. Similarly, **FoIA amendments enacted in 2010 (proscribing the proportionality/public interest test) had the goal to strengthen efforts in fighting and preventing corruption in the public sector, and as such were part of the closing benchmarks in Chapter 23 – The Rule of Law and Fundamental Rights in Croatia's accession negotiations with the European Union.**

Currently, GONG is a member of the Government's working group in charge of preparing FoIA amendments related to its harmonization with the EU Directive on the re-use of public sector information<sup>2</sup>. This has created a window of opportunity for GONG to tackle numerous implementation problems and legal incoherencies which have led to the inability and/or difficulty for individual citizens in exercising their constitutionally granted right of access to public information. If these problems remain untackled, it might have dire consequences in terms of further deepening of the distrust of Croatian citizens towards state and public institutions and actors.

Based on long-term monitoring of the implementation of the FoIA, **GONG has identified that, beyond the declarative level, the lack of understanding of FoIA as a corruption prevention mechanism among officials and civil servants is the underlying problem, affecting its implementation. This underlying problem resulted in:**

- (1) the inadequate definition of key terms in the current legislation;
- (2) the weak authority of the mandated monitoring body – The Agency for Personal Data Protection (hereafter: the Agency);
- (3) the inadequate allocation of resources for implementation;
- (4) incoherencies between FoIA and other relevant legislation (Constitution, DSA, the Law on the Protection of Secret Data).

This analysis focuses on the review of the identified problems and proposes recommendations necessary to improve the legal, institutional and implementation frameworks relevant to free access to public sector information. Recommendations supported by this analysis are to be used in the FoIA working group, but also to provide a basis for evidence-based advocacy actions (if deemed necessary). The recommendations are based on the analysis of the existing legal framework, the analysis of judicial practice, research and official reports on FoIA and DSA implementation, as well as personal experiences and official correspondence in the interaction between the researchers and public sector stakeholders.

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<sup>1</sup> The proportionality and public interest test constitutes an assessment of proportionality between access to information and the reason for denying access, allowing access to information if public interest prevails. (Art. 15 of the draft of the Freedom of Access to Information Act, available at: <http://www.uprava.hr/default.aspx?id=13576>)

<sup>2</sup> Directive on the re-use of public sector information, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0098:EN:NOT>

## 1. INADEQUATE DEFINITION OF KEY TERMS

This part of the analysis refers to inadequacies related to the definitions of key terms in FoIA, i.e. “information”, “public body”, and “information catalogue”.

According to contemporary definitions, the difference between the terms “information” and “data”<sup>3</sup> is in the fact that information is contextualized data, thus providing the recipient with new knowledge or insight. In Croatia, there are incoherencies in definitions in the relevant legislation. Namely, in FoIA, “information” is considered to be data (on any medium), whereas in DSA, data can also be information (on something). However, both definitions include a mention of the so called “content wise whole” implying therefore that “information” is a self-contained unit of contextualized content.

According to the Report of the Agency, **civil servants have problems differentiating between FoIA requests and other queries or solicited opinions**<sup>4</sup>. The Agency holds that the right of access to information regards “information, i.e. documents, data present on any medium, existing at the time when the request was filed, but that it does not mean that public bodies have an obligation to create new information”<sup>5</sup> in order to respond to the FoIA request. On the other hand, simply conveying already existent data, without their contextualization does not fulfill the “content-wise whole” obligation. **This is probably one of the ambiguities that add to the insecurities of public servants in charge of implementing FOIA and DSA in practice.**

Since the 2010 amendments to FoIA, **the Government no longer produces a yearly list of public bodies, which acted as a guideline for determining which public bodies fall under FoIA.** At the same time, FoIA amendments have broadened the circle to include legal entities financed in part or in full from national or local level budgets. According to the Agency’s report, some bodies have refused FoIA requests, since they do not think or did not know that the Law applies to them. In cases of legal entities that have been given some public authority (e.g. communal companies, recycling yards, etc.) the situation is even more complicated, as public authorities are delegated on an *ad hoc* basis, while a single register does not exist.<sup>6</sup> **A more precise and broader definition of the term public body** would enable the fulfillment of the purpose of the Act – the prevention of corruption in the public sector through the control of such bodies. Additionally, it would annul the need for the appellate body to decide in each individual case whether an entity is indeed a “public body” in the sense of FoIA, but based on some other legal norm.

**Information catalogues, as documents listing all information that a public body has, have proved to be ineffective**, since they are not updated regularly and most do not fulfill the legal requirements regarding their content. Additionally, there are no minimal standards proscribing the content of information catalogues<sup>7</sup>. Having in mind the final goal of information catalogues, **more effect could be achieved through providing specific provisions regarding proactive publishing of data within FoIA and corresponding by-laws.**

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<sup>3</sup> Clegg, Stewart R. and James Bailey (Eds.). 2007. *International Encyclopedia of Organization Studies*. "Information". SAGE Publications.

<sup>4</sup> AZOP. (2012.) - Izvješće o provedbi Zakona o pravu na pristup informacijama 2011. [Report on the Implementation of FoIA in 2011], p. 80, available at: [http://www.azop.hr/download.aspx?f=dokumenti/Clanci/IZVJESCE\\_ZPPI-2011.pdf](http://www.azop.hr/download.aspx?f=dokumenti/Clanci/IZVJESCE_ZPPI-2011.pdf)  
5 Ibid. p. 81

<sup>6</sup> In its Report for 2011, the Agency has concluded that at least 5432 legal entities are obliged to submit their reports on FoIA, while the number is not exhaustive. See AZOP. (2012.) - Izvješće o provedbi Zakona o pravu na pristup informacijama 2011. [Report on the Implementation of FoIA in 2011], pp. 5-6, available at: [http://www.azop.hr/download.aspx?f=dokumenti/Clanci/IZVJESCE\\_ZPPI-2011.pdf](http://www.azop.hr/download.aspx?f=dokumenti/Clanci/IZVJESCE_ZPPI-2011.pdf)

<sup>7</sup> Ibid. p. 83

## **2. INADEQUATE POSITION AND MANDATE OF THE MONITORING BODY IN THE INSTITUTIONAL SETUP**

Most of the analysis and recommendations in this section are aimed at the Agency as the monitoring body for FoIA implementation. However, they are applicable to any other type of monitoring body which could be established through current revisions of FoIA (such as, for example, an independent Information Commissioner).

The inadequate position and unclear mandate of the Agency in the institutional setup are evident in: (1) the restricted mandate of the Agency to perform proportionality/public interest tests; (2) inadequate sanctions or lack of sanctions for breaches of FoIA; (3) only an implicit mandate to provide education activities and information campaigns as well as the lack of a mandate to create relevant by-laws. Additionally, the head and deputy head of the public body in charge of two constitutional rights (access to information and personal data protection) are appointed by a simple majority in the Parliament, making the position susceptible to current political constellations and power relations.

### **2.1. Limited mandate to perform public interest tests in cases of exceptions to free access to information**

The proportionality/public interest test (hereafter: public interest test) has been introduced in the FoIA amendments of 2010, and mandated to the Agency for Personal Data Protection. However, the Act proscribes that **the Agency is not allowed to perform public interest tests in cases of refusal of access to classified data, nor in cases when access to information has been refused by the highest state institutions** (Government, Parliament, President, Supreme Court, Constitutional Court, Attorney General, Army Chief of Staff). In all these cases, an appeal can only be filed directly with the Administrative Court, which is bound by FoIA to perform the public interest test. The Court's practice, however, has shown that **the Court, instead of performing the public interest test, simply rules that refusal of access to information was legal, since information was classified** in accordance with the provisions of DSA<sup>8</sup>.

**Business secrets represent a separate problem**, as access to documents labeled as business secrets is governed by the otherwise void Act on the Protection of Secret Data<sup>9</sup>. **Here too, the Administrative Court's practice has shown that the public interest tests are not performed**, and that the provision of FoIA stating that unclassified parts of classified information are to be made available to the public.<sup>10</sup> In one of its rulings, the Court found that the defendant – the City of Zadar Water Management Company – labeled the refused data in question (their annual report) as a business secret in accordance with the Law since it is in line with their internal by-law, and that therefore refusal of access was justified. At the same time, **the Court completely ignored the provision in the Law stating that a by-law “cannot state that all data pertaining to business operations of a legal entity are deemed to be a business secret”**<sup>11</sup>.

Finally, **the changes to the Administrative Court's institutional setup within the process of judiciary reform have actually increased the number of appellate proceedings for refusals of access to information**, as the former single Administrative Court became the High Administrative Court, with four lower instance courts operating in four regions. Therefore, currently, if a person is dissatisfied with the ruling of the Agency or the refusal of information from highest state institutions (mentioned above), they first appeal to the

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<sup>8</sup> Explanation of the ruling of the Administrative Court of the Republic of Croatia No. Us-72531201 1-5, dated August 17, 2011.

<sup>9</sup> Official Gazette 108/96

<sup>10</sup> Ruling of the Administrative Court of the Republic of Croatia, No. Us-8284/2011-4, dated September 14, 2011.

<sup>11</sup> Art. 19, § 2 of the Act on the Protection of Secret Data

lower instance administrative court, and after that to the High Administrative Court. This prolongs the procedure and thus the exercise of a constitutional right unnecessarily.<sup>12</sup>

## **2.2. Inadequate sanctions for breaches of FoIA**

In the current normative solution, sanctions for breaches of FoIA are mentioned in two articles (Art. 26 and Art. 26a), but given their wording, they do not encompass all public bodies and do not proscribe sanctions for all so far identified breaches of the Act. Besides, the Act is unclear on whether, when or which body is mandated to file a misdemeanor proceeding.

The mandated Agency has no authority to impose sanctions in cases when public bodies refuse to act upon their ruling or do not adhere to the deadlines proscribed by the Agency to deal with FoIA requests, and can only initiate indictment proceedings against public bodies, as was the case in a few instances<sup>13</sup>, thus additionally burdening the Courts.

Finally, FoIA proscribes much higher financial sanctions for legal than for natural persons found guilty for breaching FoIA. Higher sanctions for legal persons (3.000 – 13.000 EUR) actually only mean transfers of funds from one budget line to the other, and draining of resources for providing public services. The low levels of financial sanctions for natural persons (750 – 1300 EUR), in contrast, are not a strong enough incentive for natural persons to change their behaviour and thus change the overall institutional culture of secrecy.

## **2.3. Only implicit mandate to hold education activities and promotional campaigns; no mandate to create relevant by-laws**

The Agency holds education seminars on the implementation of FoIA, but this competence is not explicitly stated in the Act. Additionally, currently no legal grounds exist for the Agency to hold promotional campaigns related to the freedom of access to information deemed necessary in the current political context that is characterized by a low knowledge of this constitutional right by citizens, a long period of a malfunctioning system of access to information, low recognition of access to information and proactive publishing of data as an efficient anti-corruption tool, etc. Finally, the Agency does not have a mandate to create relevant by-laws, adding to problems arising from implementation difficulties and legal inconsistencies and incoherencies.

## **3. INADEQUATE ALLOCATION OF RESOURCES TO IMPLEMENT AND MONITOR IMPLEMENTATION**

In the process of proposing FoIA amendments in 2010, the Government stated that the implementation of the amendments does not require additional resources from the state budget<sup>14</sup>, despite significant changes, including the introduction of the public interest test, mandating the Agency for Personal Data Protection to monitor implementation and act as the appellate body, and widening the scope of public bodies (to include all legal entities whose programs or operations are in part or in full determined to be of public interest and which are financed, in part or in full, from state or local (regional) level budgets). Additionally, the scope was widened to include companies where the state or local or regional authorities have partial or full ownership.<sup>15</sup> To

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<sup>12</sup> AZOP. (2012.) *Smjernice za pristupanje informacijama*. [Guidelines on Access to Information] p. 6, available at: <http://www.azop.hr/download.aspx?f=dokumenti/Clanci/Smjernicezapristupinformacijama.pdf>

<sup>13</sup> AZOP. (2012.) - *Izvješće o provedbi Zakona o pravu na pristup informacijama 2011*. [Report on the Implementation of FoIA in 2011] – Executive summary – pp. 16-17, available at:

[http://www.azop.hr/download.aspx?f=dokumenti/Clanci/IZVJESCE\\_ZPPI-2011-SAZETAK.pdf](http://www.azop.hr/download.aspx?f=dokumenti/Clanci/IZVJESCE_ZPPI-2011-SAZETAK.pdf)

<sup>14</sup> Prijedlog zakona o izmjenama i dopunama Zakona o pravu na pristup informacijama, s konačnim prijedlogom zakona, [Proposal of the Law on the Amendments to the Freedom of Information Act, with the Final Proposal ], p. 3, available at: : [https://infodok.sabor.hr/GetAlternativeDocument.aspx?ent\\_id=9210](https://infodok.sabor.hr/GetAlternativeDocument.aspx?ent_id=9210)

<sup>15</sup> *Ibid.* pp. 2-3

**determine that such significant changes do not require additional resources is highly irresponsible, even more so, since it is matter of constitutional rights.**

The Agency's report for 2011 states that public bodies expressed the need for education<sup>16</sup>, while citizens are not informed to a satisfactory level about the Act. The Agency therefore called for additional resources to be allocated for educating information officers and raising awareness of the Act among citizens in the upcoming period. Namely, no resources for the campaign were allocated in 2011<sup>17</sup>, and very limited ones for education of information officers – only 100 of them, through a project financed by a British bilateral assistance program to the Ministry of Justice.<sup>18</sup> Given that this is less than 2% of information officers (in relation to the minimal number of public bodies identified by the agency), **it is not surprising that public bodies breach FoIA quite often, most likely unwillingly, but out of ignorance.**<sup>19</sup>

Examples of breaches of the FoIA are well documented in GONG's yearly monitoring reports since 2005<sup>20</sup>, and include illegal queries on the purpose of FoIA requests, illegal insistence on the use of forms signed in hand (even though the Law allows for oral as well as electronic submission of requests), attempts to charge costs for providing information exceeding the actual costs accrued, not forwarding the requests to recognized mandate bodies, and the omnipresent "silence of the administration". The Agency has also recognized that public bodies sometimes illegally refuse a FoIA request (e.g. because the requested information is not part of the body's information catalogue) or refuse access to information without stating the proper appellate procedure, according to the General Administrative Act.<sup>21</sup>

Finally, **the unequal treatment of the right of access to information in relation to the right to personal data protection** is evident in the disproportion in the number of civil servants working in the Agency on these two issues. **Namely, out of 18 civil servants, 15 (83%) work on personal data protection and only three on access to information.**<sup>22</sup> In terms of financial resources, the Agency's budget for 2012 is around 1 million EUR, of which 63% is allocated to employee costs, and only 14% for capacity building of the Agency. Additionally, the 14% are all part of pre-accession IPA funding<sup>23</sup>. It is not surprising therefore that the Agency's strategic plan 2013-2015 envisages only two, four, and six annual seminars for public bodies on FoIA implementation in the respective years. At the same time, no awareness raising campaigns are envisaged.<sup>24</sup>

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<sup>16</sup> AZOP. (2012.) - Izvješće o provedbi Zakona o pravu na pristup informacijama 2011. [Report on the Implementation of FoIA in 2011], p. 112, available at: [http://www.azop.hr/download.aspx?f=dokumenti/Clanci/IZVJESCE\\_ZPPI-2011.pdf](http://www.azop.hr/download.aspx?f=dokumenti/Clanci/IZVJESCE_ZPPI-2011.pdf)

<sup>17</sup> Ibid. pp. 112-113

<sup>18</sup> Ibid. p. 107

<sup>19</sup> Data on the total number of information officers who have been educated on the implementation of FoIA since its enactment does not exist.

<sup>20</sup> All yearly reports are available at <http://www.gong.hr/page.aspx?PageID=219>, as well as in the part on FoIA implementation in the research of transparency and openness of local and regional level authorities 2011/12 (pp. 33-28), available at: <http://www.gong.hr/download.aspx?f=dokumenti/LOTUS2011-ISTRAZIVACKIIZVJESTAJ.pdf>

<sup>21</sup> AZOP. (2012.) - Izvješće o provedbi Zakona o pravu na pristup informacijama 2011. [Report on the Implementation of FoIA in 2011] – Executive Summary – p. 17, available at: [http://www.azop.hr/download.aspx?f=dokumenti/Clanci/IZVJESCE\\_ZPPI-2011-SAZETAK.pdf](http://www.azop.hr/download.aspx?f=dokumenti/Clanci/IZVJESCE_ZPPI-2011-SAZETAK.pdf)

<sup>22</sup> Agency's response to GONG's query, dated MAY 22, 2012 (No.: 008-02/12-01/04 - 567-06/01-12/02)

<sup>23</sup> State Budget for 2012, available at: <http://www.mfin.hr/adminmax/docs/POFFICIAL>

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<sup>24</sup> Strategic Plan of the Agency for Personal Data Protection for the Period 2013 – 2015, available at: [http://www.google.hr/url?sa=t&rct=j&q=ppate%C5%A1ki%20pla%20azop&source=web&cd=1&ved=0CFMQFjAA&url=http%3A%2F%2Fwww.azop.hr%2Fdownload.aspx%3Ff%3Ddokumenti%2FClanci%2FStrateski\\_plan\\_AZOP\\_2013\\_2015.pdf&ei=X-i8T9CPHcSr-QbIhLQn&usg=AFQjCNEchHVVQpaQIUeC-xdj8KHPgYAYWA](http://www.google.hr/url?sa=t&rct=j&q=ppate%C5%A1ki%20pla%20azop&source=web&cd=1&ved=0CFMQFjAA&url=http%3A%2F%2Fwww.azop.hr%2Fdownload.aspx%3Ff%3Ddokumenti%2FClanci%2FStrateski_plan_AZOP_2013_2015.pdf&ei=X-i8T9CPHcSr-QbIhLQn&usg=AFQjCNEchHVVQpaQIUeC-xdj8KHPgYAYWA)

#### **4. INCOHERENCE OF FoIA WITH LEGISLATION PERTAINING TO DATA SECRECY**

This section focuses on the incoherencies between FoIA and legislation which deals with classified information: the Constitution, the DSA, the Law on the Protection of Secret Data. It has been recognized that problems stem from the fact that data can be classified or declared secret by a large number of persons (heads of all state bodies) while the system lacks any kind of mechanism able to detect an abuse of the classification procedure. Additionally, a lack of understanding of DSA by civil servants combined with absurd administrative court rulings have petrified a system in which access to classified information (or business secrets) is *de facto* impossible.

Amendments to the Constitution instigating the right of access to information as a constitutional right clearly state that “restrictions on the right of access to information must be proportionate to the nature of the need for such restriction in each individual case and necessary in a free and democratic society, **as stipulated by law.**”<sup>25</sup> Therefore, Art. 8 § 1 of FoIA needs to be changed to preclude the existing possibility to classify information on the basis of a by-law.

The actual possibility to exercise any right that is recognized in principle, including access to information, depends on its limitations. Therefore, the issue of data classification is key to the actual possibility to exercise the right of access to information.<sup>26</sup>

**In Croatian practice, the DSA and the valid provisions of the Act on the Protection of Secret Data represent a significant impediment to the exercise of the right of access to public information.** The current DSA<sup>27</sup> has been enacted in July 2007 in the process of Croatian harmonization with the *EU acquis* and NATO classification standards prior to joining NATO. Its enactment made the Act on the Protection of Secret Data<sup>28</sup> void, except provisions regarding business and professional secrets.

Art. 4 of the DSA proscribes the levels of secrecy – very secret, secret, confidential and restricted, while Art. 13 names functions with the right to classify data. The two highest levels of classification are the right of highest state officials. However, according to Art. 13 § 3 of DSA, **restrictions in the forms *confidential* and *restricted* can be placed by all heads of other state bodies. This provision bears a very strong risk to the exercise of the constitutional right to public information**, since it is unclear whether “heads of state bodies” actually means only ministers and possibly heads of government’s offices, or if the authority extends to heads of state offices operating at the regional levels, as well as heads of agencies (only regulatory ones or both regulatory and executive agencies?) and all other heads of public bodies at the national, regional and local levels. Besides, the valid provisions on business secrets of the Act on the Protection of Secret Data allow all heads of legal entities as well as heads of other public bodies to label any document as a business secret. **In practice, it means that currently more than 5.000 people in Croatia have the right to classify data, but without a control mechanism over the classification process itself.** Namely, according to DSA, the procedure and criteria for classification should be proscribed in Ordinances of each public body, while according to the Office of the Council for National Security, **the system lacks mechanisms that would recognize abuse of**

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<sup>25</sup> Art. 38 of the Constitution of the Republic of Croatia, available at: <http://www.usud.hr/uploads/Redakcijski%20prociscen%20tekst%20Ustava%20Republike%20Hrvatske,%20Ustavni%20sud%20Republike%20Hrvatske,%2023.%20ozujka%202011.pdf>

<sup>26</sup> Rajko, Alen. (2011.). „Antinomije u hrvatskom zakonodavstvu na području informacijskoga upravnog prava“. [Antinomies in Croatian legislation in the area of information administrative law]. Foundation Public Law Center, p. 17. available at:

[http://www.access-info.org/documents/Access\\_Docs/About/Access\\_in\\_the\\_news/AIE\\_in\\_the\\_news\\_2011/Alen\\_Rajko1.pdf](http://www.access-info.org/documents/Access_Docs/About/Access_in_the_news/AIE_in_the_news_2011/Alen_Rajko1.pdf)

<sup>27</sup> Official Gazette79/07

<sup>28</sup> Official Gazette108/96

**classification procedure**<sup>29</sup>, i.e. that classified data does not fall into the category of national security in the areas proscribed in Art. 5 of DSA.

For the purpose of this analysis, GONG sent FoIA requests to all Croatian ministries, the Government, the Parliament and the President, to obtain information on the implementation of those DSA provisions which are connected to the exercise of the constitutional right of access to public information<sup>30</sup>. Answers to all 23 requests have been received, but six of them outside of the proscribed responding period.

Each institution that classifies documents is obligated through DSA provisions to perform periodic reviews of classifications. Only five ministries have ever performed periodic reviews, while three that have classified documents confirmed that they have not performed obligatory reviews. Additionally, two ministries did not provide an answer to this question at all. The Office of the President and eleven ministries have not classified documents in the designated period. Neither the Government nor the Parliament have performed obligatory periodic reviews, **reaffirming the finding that this not fully functional system has sustained recognized risks for abuse of classification procedures rather than mitigated them**. It is of no surprise that the data obtained show a poor general outcome of the periodic reviews. Namely, out of 105.756 classified documents, the classification level was changed for less than 2.000, or only 1,8%.

At the same time, of the 51.276 civil servants, at least 7.000<sup>31</sup> (13%) have access to some type of classified documents, of whom 54% have access to documents classified by the highest classification degree. The reasons for such a high percentage of civil servants with access to classified documents should be looked for in the high number of classified documents and persons authorized to classify documents, increasing the possibility of public servants of coming into contact with such documents in their day-to-day work.

Art. 16 § 1 of the DSA proscribes the performance of the proportionality test between the right of access to information and data protection in all cases when there is public interest to access classified data. This test is to be performed by the body that classified the data. Paragraph 2 of the same article proscribes that before making the decision, the body in question has to seek an opinion of the Office of the Council for National Security on whether to keep or change the classification level. In practice, however, this provision is not implemented as evidenced by the Office's response to GONG's question on whether the Government of Croatia respected this procedure when they refused us access to information on classified agendas of closed Government sessions. The Government did not seek the opinion of the Office, although it was legally bound to do so.<sup>32</sup> Our research has also shown that 34 requests for information submitted by GONG have been denied on the grounds of their being classified, whereas in none of those cases was the opinion of the Office solicited.

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<sup>29</sup> Meeting with representatives of the Office of the Council for National Security, March 29, 2012

<sup>30</sup> We requested access to information on the number of classified documents that each of these bodies has produced since the enactment of DSA in 2007 up until April 30, 2012. We also requested information on the number of periodic reviews undertaken, as proscribed by DSA, and the resulting lowering of the classification level or declassification. Furthermore, we requested information on the number of FoIA requests denied on the basis of DSA or "business secret" provision, as well as the number of officials and civil servants in each body who have security clearances and can access differently classified data.

<sup>31</sup> Not all ministries provided an answer to this question.

<sup>32</sup> Office of the Council for National Security response to GONG's question dated May 04, 2012 (No. 008-01/12-01/02, Urbroj: 50439-05-12-02)

## **5. CONCLUSION AND RECOMMENDATIONS**

This analysis showed that access to public information is yet to be recognized both as a constitutional right and as a tool against corruption. The identified problems start with the very definition of terms, to be followed by inadequate and imprecise regulation of specific issues, all the way to the incoherence of the Freedom of Information Act with the Constitution and the Data Secrecy Act; the latter as a basis for restricting access to information.

At the level of implementation, the problems are reflected in the serious lack of capacities and resources of the Agency for Personal Data Protection, as well as the restrictions imposed by the legislation itself, regarding appellate procedures for classified data, and in the lack of control mechanisms over classification procedures or restrictions of access to information solicited from the highest and most powerful state institutions. The latter is also reflected in the weak position of the Agency mandated to monitor implementation, while judicial practice reveals a lack of understanding of the very quintessence of FoIA and an evasion from performing public interest tests, as the first instance appellate body.

**In order for FoIA to become a strong tool for fighting and preventing corruption as well as a “change agent” of the institutional culture of secrecy we recommend the following:**

### **1. Address the shortcomings of the norms and definitions within FoIA**

- Redefine the term “information” to ensure that the “content wise whole” is transferred;
- Define more precisely the term “public body” to include all bodies that use public resources and/or have a public function and/or have been given public authority;
- Proscribe that the Internet is the primary source of public information;
- Proscribe the format in which information is released in electronic form to enable easy re-use of information (XML) all in line with the open data principle; proscribe specific criteria by means of by-laws;
- Define precisely which information should be proactively publicized (Art. 20);
- Regulate access to non-classified information.

### **2. Increase the authority and strengthen the position of the independent body**

- Introduce a monitoring body with full authority over access to information as well as full authority to perform public interest test in all cases of refusal;
- Change the appointment procedure for the head and deputy head of the monitoring body to a two-thirds parliamentary majority, given that two constitutional rights are in question;
- Make obligatory the initiation of the misdemeanor procedure against the person legally representing a public body which illegally denied access to public information or failed to follow through the monitoring body’s ruling;
- Proscribe the authority of the monitoring body to produce relevant by-laws thus ensuring a more effective implementation of FoIA;
- Proscribe the authority of the monitoring body to organize and hold education events (for information officers in public bodies at all levels of governance) and have informational/promotional campaigns.
- Introduce high financial penalties for natural persons found guilty of breaching FoIA and reduce penalties for legal persons.

### **3. Ensure an adequate level of resources for effective FoIA implementation**

- Allocate adequate human, material and financial resources to the monitoring body to effectively monitor implementation;
- Allocate adequate financial resources for implementation of education activities;
- Allocate adequate financial resources for awareness-raising campaigns targeting citizens.

### **4. Ensure coherence between FoIA, the Constitution and the DSA**

- Change the provision enabling classification of information on the basis of a by-law;
- Regulate access to classified information and information labeled as “business secrets”;
- Within DSA:
  - Proscribe the procedure for performing the proportionality of interest test;
  - Proscribe mechanisms of control over classification procedures;
  - Proscribe sanctions for classifying data which are not of national security, as specified by Art. 5;
  - Define more precisely which “state bodies” heads can place restrictions on the form of “confidential”;
  - Proscribe the authority of the Office of the Council for National Security to approve the content of the Ordinances on Criteria and Classification Procedures, as well as on individual data classification decisions;
  - Proscribe who has authority over data classified as “business secrets” to prevent abuse in legal entities in the public sector;
  - Proscribe authority and ensure adequate human, material and financial resources to train public bodies in proper implementation of the DSA;
  - Proscribe sanctions for not obtaining the opinion of the Office of the Council for National Security in deciding on whether or not to disclose classified information (Art. 16);
  - Define precisely whether and in which case the abovementioned opinion is binding;
  - Define the procedure and deadline to perform the proportionality of interest test, ensuring that the deadlines are in line with those proscribed within FoIA.