WE HAVE THE RIGHT TO KNOW:

Challenges in the Right of Access to Information

IMPRESSUM

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The right to access information is of key importance for the fight against corruption and promoting the transparency of the work of public authorities, therefore it is necessary to strengthen knowledge about it. Although guaranteed by the Constitution of the Republic of Croatia and elaborated by the Act on the Right of Access to Information (ZPPI), many citizens are unaware of this right or do not know how to exercise it, and often have difficulties realizing it.

When citizens know what they are doing and how they do it, we increase the responsibility of these bodies and strengthen trust in public administration. For this reason, based on the analysis of several cases, Gong presents an overview of the biggest challenges in realizing the right to access information and recommendations for its better realization.

NECESSARY ESTABLISHMENT OF SUBSTANTIAL CONTROL OVER DATA CLASSIFICATION

Only the owner of classified data can decide whether to declassify or make information available to the public. The Information Commissioner has no power to order a public authority to declassify information, thereby lacking control over whether there is still a need to keep such information secret.

In March 2023, the Ministry of the Interior rejected Gong's request for information on the level of threat to the seat of the Government, the Parliament, and other institutions on St. Mark's Square, because of which the area has been closed off since October 2020, i.e. immediately after the armed attack on the building of the Government of the Republic of Croatia. They explained that such information "could potentially impair or make it much more difficult to carry out the necessary actions within the framework of the application of security measures and the protection of protected buildings and spaces". Gong did not appeal to the Information Commissioner at the time, because in the case of the Government's concealment of the defense contracts of generals Ante Gotovina and Mladen Markač, we discovered that there is no legal protection when it comes to classified data.

In 2011, the Ministry of Justice of the Republic of Croatia concluded an agreement with the American law firm Patton Boggs on the representation services for Croatia before the Hague Court in the appeal procedure for Generals Gotovina and Markač. The Agreement, costing Croatian citizens around HRK 10 million (approx. EUR 1.3 million), was not publicly available or published in Croatia. The Croatian public found out about it through the announcement on the website of the US Department of Justice, which published the Ageement as per the Foreign Agents Registration Act.

At the beginning of May 2012, Gong requested the delivery of a copy of the Agreement on the provision of legal consulting services concluded with Patton Boggs and copies of the addendums to the Agreement. At that time, the body responsible for the protection of the right to access information was still the Agency for the Protection of Personal Data. Meanwhile, under the provisions of the Data Secrecy Act (ZTP), the Agreement has been classified as "confidential". The Government, first headed by Jadranka Kosor, and then by Zoran Milanović, believed that too much damage would be caused to the Republic of Croatia if the Agreement were made available to the public, so it denied access to the data. It did so after conducting a test of proportionality and public interest and according to the previously obtained opinion of the Office of the National Security Council, as prescribed by the ZPPI and the ZTP. At the same time, the Government did not give a detailed explanation of its decision but rather referred to the reasons for the classification of data prescribed by law. In addition, the explanation also stated that it would endanger the conduct of the court proceedings because the deadline for submitting an extraordinary legal remedy has not yet passed.

The Information Commissioner of the time, Anamarija Musa, ordered the delivery of the requested data in April 2014, following Gong's appeal. In the decision, she pointed out that the issue of spending public money is important for the transparency of public authorities and the creation of citizens' trust in the work of that body, especially in the handling of public money. Furthermore, she reminded the ruling party not only of the constitutionally guaranteed right to access information but also of the fact that the Government did not explain the underlying values which would still pose the reasons for classifying the Agreement as "confidential" especially considering that the appeal procedure in The Hague has finished. Nevertheless, the Government filed a complaint against the decision of the Information Commissioner to the High Administrative Court.

The High Administrative Court, in a panel consisting of judges Sanja Štefan, Boris Marković and Blanša Turić, concluded that the Commissioner exceeded her authority by wrongly applying the ZPPI instead of the ZTP. In the explanation they stated that the Commissioner does not have the authority to assess whether the owner of the information - in this particular case, the Government - justifiably or unjustifiably classified some information, but only to examine whether the public authority properly carried out the test of proportionality and public interest. The majority in the Constitutional Court, which confirmed the decision of the High Administrative Court, was of the same opinion. Separate opinions of constitutional judges Mate Arlović, Andrej Abramović, Lovorka Kušan and Goran Selanac gave a different view of the situation. At that time, they clearly stated that they cannot accept a system in which executive authorities alone, without real substantial control by independent bodies or judicial authorities, evaluate whether to classify some information as confidential, and then use the same reason to justify their decisions on denying access to information, acceptable

from the aspect of effective protection. According to the ZTP, only the owner of classified data can decide on its declassification.

Gong then, as a last resort, turned to the European Court of Human Rights (ECHR). In its verdict from 2023, the court pointed out that the information that the government had concluded an agreement with a private law firm based in the USA for legal assistance in the appeal proceedings against two generals of the Croatian army before the Hague Court was clearly of interest to Croatian society as a whole, not only because the outcome of that procedure was a matter of great importance for Croatia and its circumstances. By publishing the fees that Croatia undertook to pay to the law firm in exchange for legal services, the transparency of the conduct of public affairs and the spending of public funds was undoubtedly ensured, according to the verdict.

However, the ECHR points out that the information requested by Gong - the law firm's offer signed by the Croatian Minister of Justice, which states the requested service, as well as the conditions under which it will be provided and the monthly fees, were published on the website of the US Department of Justice and therefore were in the public domain. There is nothing to indicate that a public hearing was prevented, according to the ECHR, because the information was already publicly available, without revealing the actual agreement. "It was not sufficiently explained to the court how exactly, given the already publicly available information, the non-disclosure of the agreement hindered the public discussion," the decision states.

The judgment of the ECHR did not touch the core of the issue. The fact that part of the requested documentation was published on American websites does not mean that the Government should not have provided complete documentation in Croatia as well, especially since it is not an identical document. Namely, Gong asked for the entire Agreement that was concluded and additional documents, while only the offer was published on the American website. Different numbers appeared in the media about the value of the contract with the company Patton Boggs, which is why Gong asked for insight into the complete data because based on what was published, it was not possible to find out the actual defense costs in case the Agreement was changed. The court did not go into the issue of lack of supervision over classified data at all.

Without control by the courts, the right guaranteed by Article 29 to everyone's right and obligations to be decided fairly and within a reasonable time by an independent and impartial court established by law is also violated.

As four judges of the Constitutional Court warned in their separate opinions, it is necessary to establish substantial control over the (de)classification of data by independent bodies and

courts, that is, control of the justification of confidentiality of such information. The Information Commissioner must have the authority to assess whether the withholding of classified data is justified, or whether it is more important for the public to know about information that is classified by some level of secrecy and encourage the High Administrative Court to exercise control over it. Otherwise, the discretionary possibility is left to the public authorities to, without giving a special justification, keep some information classified even when the objective reasons for it cease.

OBLIGATION TO APPOINT AN EXPERT WORKING GROUP FOR DRAFTING LAWS

Public authorities must publish information about the members of the expert working group that participated in drafting laws or other acts in case the expert group has been appointed. Since there is no obligation of the public authority to appoint an expert working group for drafting laws, the public may be deprived of the names of the persons responsible for drafting the most important laws of this country.

According to the ZPPI, public authorities are obliged, in addition to all the prescribed documentation that is attached to the public consultation process, to publish information on the expert working group for drafting laws, if appointed by the decision of the head of the body. The expert working group is appointed based on a public call by the responsible public authority and consists of experts in the field governed by the law in question, ranging from state administration bodies to the representatives of civil society.

There is no legal obligation to appoint an expert working group, regardless of the legal force of the regulations. Nevertheless, the Code of Consultation with the Interested Public in Procedures for Enacting Laws, Other Regulations and Acts emphasizes that the participation of citizens, i.e. the interested public, is one of the fundamental principles of European management of public affairs. In modern democracies, citizens, i.e. the interested public, play an active role and, through their participation, influence the improvement of the quality of programs, laws, other regulations and acts, and generally the quality of public administration services, as clearly stated in the Code. Although the appointment of an expert working group does not guarantee that it will indeed include experts and representatives of civil society for a certain area, it ensures at least a minimum of transparency when drafting laws.

Gong has tried for months to get the names of the people who drafted the new Act on Constituences for the election of representatives to the Croatian Parliament. The Act on Constituencies belongs to the subject of organic laws, which are voted by the majority of all

representatives in the Croatian Parliament and, as their name suggests, are crucial for the proper functioning of the state.

The Constitutional Court annulled the previous law because it violated the constitutional right to equal voting rights. For this reason, it was necessary to reform the system of constituences, which would finally take into account the administrative and geographical division of the state, i.e. reduce the political redrawing of borders (*gerrymandering*). Although the Constitutional Court repealed the previous law in February 2023 and there was a public debate about the best model of constituencies, the Government of the Republic of Croatia did not participate in it but only announced the proposal of the new law on May 25. During the public consultation period, information on the composition of the expert working group was not published, nor was a public discussion held at any time with representatives of the opposition, civil society, and election process experts who could present their proposals. During that time, Prime Minister Plenković and Minister Malenica only talked about unnamed Ministry experts in the media. In addition, out of a total of 39 comments on the draft law, only one was accepted, namely the one that warned about a spelling mistake in the name of one of the constituencies.

The non-transparency of the drafting of the law at the round table in Parliament on May 12 was condemned not only by Gong, but also by leading constitutional law experts and political scientists. On the same day, 11 professors of constitutional law from the Faculties of Law in Zagreb, Split, Rijeka and Osijek expressed in an open letter their concern with the process of drafting the new Act on Constituencies and warned of the necessity of respecting the basic principles and procedures of constitutional democracy.

For three months, the Ministry has ignored Gong's inquiry about the composition of the expert working group and the names of the authors of the new model of constituances, and in June 2023 we also warned the Venice Commission about the lack of transparency in the drafting of the law. After the Commissioner ordered the Ministry to resolve Gong's inquiry in August 2023, the answer only came to the question about the expert working group, which stated that it had not been appointed. After Gong asked to supplement the answer, the Ministry finally answered the question about the authors of the model:

"The Directorate for Political System and General Administration of the Ministry of Justice and Administration is managed by director Anita Markić, the head of the Sector for Political System and State Administration is Krešimir Orešković, while the work of the Directorate for Political System and General Administration of the Ministry of Justice and Administration, as well as the Sector for Political System and state administration, coordinated by state secretary Sanjin Rukavina".

After Gong objected that the systematization of the Administration was not an answer to the question, the Ministry still insisted that it had given an answer. However, following Gong's appeal, the Information Commissioner ordered the Ministry to respond.

The response received was as follows:

"(...) we inform you that Sanjin Rukavina, State Secretary in the Ministry of Justice and Administration, Anita Markić, Director of the Directorate for Political System and General Administration of the Ministry of Justice and Administration, and Krešimir Orešković, Head of the Sector for Political System and State Administration are persons who have prepared a proposal for a new model of constituencies".

From the above answer, it is clear that the Ministry, and therefore the Government, faked the authors of the constituencies and drafted one of the basic laws of this country without consulting the professional public and without the names of the "experts" who actually drafted it. The alleged authors have never publicly spoken about one of the most important laws of this country, and there are no official records of their work on it.

Gong proposes that the ZPPI includes a provision on the mandatory inclusion of representatives of civil society and experts from the ranks of representatives of the interested public in the drafting process of all laws of the Republic of Croatia. In this way, the representation of interest groups and natural and legal persons that may be directly affected by the law or other acts and regulations that are passed, or that will be involved in their implementation, as required by the Code of Consultation with the Interested Public, would be ensured.

SANCTIONING OF THE MISUSE OF THE TEST OF PROPORTIONALITY AND PUBLIC INTEREST

The test of proportionality and public interest assesses the relationship between two protected interests - the interest in protecting certain information and the interest in providing information. While there is a legal obligation to proactively publish certain types of information, there is a possibility of restricting access to others. The test is not being carried out when it comes to the consumption of public funds; rather public authorities often wrongly reject requests for access to information citing business secrecy or professional confidentiality and the protection of personal data.

According to Article 16 of the ZPPI, information on the disposal of public funds related to a personal name, amount and purpose of the funds is available to the public without conducting a test of proportionality and public interest, unless the information is classified. Furthermore, the test of proportionality and public interest is not carried out when it comes to information for which publication is prescribed by law, as well as in cases where it is about the performance of public affairs (e.g. authors of studies or reports of public authorities, members of working groups, etc.), about which there are also publicly available Information Commissioner's Guidelines for conducting the test of proportionality and public interest.

After a three-year legal battle, Gong obtained data on loans from the Croatian Bank for Reconstruction and Development (HBOR) from the bank's founding in 1992 until the end of 2018, i.e. three years after the request based on the right to access information. HBOR, after carrying out the test of proportionality and public interest, refused to provide information to Gong citing bank confidentiality and that, given that the requested information is not stored in a single electronic system, its collection would paralyze the system in its regular work and regular performance of HBOR's primary activities. After Gong's appeal, the Information Commissioner of the time, Zoran Pičuljan, ordered the delivery of the requested information. HBOR then appealed to the High Administrative Court, again citing bank confidentiality, but the court ruled in favor of the Commissioner and Gong.

Gong received data on loans on 552 pages in closed PDF format, the total amount of credit placement was HRK 109.3 billion, and the table contained data on the program, the beneficiary, and the loan amount. In addition to the fact that the data was delivered in a non-searchable format, which was later opened by Code for Croatia, the decision stated that the data was a bank secret so that it would not be presented further. Such a warning is contrary to the principle of disposing of information from Article 9 of the ZPPI, which states that a user who disposes of information under this Law has the right to disclose that information publicly.

The extent to which public authorities do not understand the provisions of Article 16 was also questioned by the Information Commissioner in the Report on the Implementation of the Act on the Right of Access to Information for 2023. The report states that by processing data from resolved complaints related to the restriction of access to information due to business and professional secrecy, it was observed that the authorities still do not take into account that information on the disposal of public funds should be available even without the implementation of the test of proportionality and public interest, about the personal name or title, the amount and purpose of the funds, especially when it comes to payments, which again resulted in a high percentage of annulled decisions, despite the published practice of the Commissioner and the High Administrative Court and the published Guidelines on access to information and business secrecy.

Gong realized that it was a problem to get information about the closest associates of the members of the Government when we asked for the names of the ministers' special advisors. So on December 18, 2023, through the "We Have a Right to Know" platform, together with other ministries, we asked the Ministry of Croatian Veterans whether there are special advisors under the State Administration System Act, who they are, and when they were appointed. To avoid possible ambiguities regarding the protection of personal data and the right to access information, the Information Commissioner has issued Guidelines on exercising the right to access to information in relation to the protection of personal data. And while all other ministries immediately provided the requested information, the Ministry of Croatian Veterans refused Gong's request citing the protection of personal data. They also added that this could potentially lead to the misuse of data on special advisors, as revealing their identity would represent an unnecessary intrusion into their personal lives. Nevertheless, they conducted the test of proportionality and public interest.

In a decision dated April 24, 2024, the Information Commissioner annulled the Ministry's decision and ordered that the names of the special advisors be submitted, thereby confirming Gong's arguments. The Commissioner also pointed out that the explanation of the contested decision was completely unclear, as was the reason why the Ministry conducted the test of proportionality and public interest in the first place. Information about special advisors can be found in media reports from as early as 2023 about the events attended by Ministry representatives and special advisors to the Minister, where the name of one of them, Ante Zelić, is clearly mentioned.

The publication of agreements concluded between public authorities and private entities represents a minimum level of transparency in the work of public authorities that must be respected. When concluding such agreements and doing business with public authorities, private economic entities must take the risk of "exposing" the veil of secrecy in the name of public interest for greater transparency, and public authorities must be aware that they are dealing with public affairs and public contracts. For this reason, there is no room for restricting access to information when it comes to spending funds from the state and local budgets.

Cases such as hiding the names of special advisors represent an abuse of the right to access information and an unnecessary burden on the Information Commissioner. In some cases, it is difficult to assess whether the interest in making information available to the public outweighs the interest in protecting its access. However, the problem is when the test is used in cases where there are no legal restrictions on the publication. Since the deadline for the delivery of information is extended by an additional 15 days due to the implementation of the test of proportionality and public interest, its abuse can easily be used to buy time. Additionally, negative decisions in matters for which there is an obligation of proactive publication, or which undoubtedly fall under information concerning the consumption of

public funds, unnecessarily burden the Information Commissioner who decides in the appeal procedure. Therefore, Gong proposes misdemeanor sanctioning for the misuse of the test of proportionality and public interest conducted to conceal data the publication of which is prescribed by law, i.e. for which there is an undoubted public interest.