

TRANSPARENCY OF PUBLIC ADMINISTRATION IN THE REPUBLIC OF SLOVENIA

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1 Significance of Transparency of Public Administration in the Republic of Slovenia	1
2 Institution of Access to Public Information in Employing the Principle of Openness in Public Administration	4
2.1 Bodies Obligated to Follow FOIA – Freedom of Information Act - Rules	5
2.2 Personal Data Protection as an Exemption	6
2.3 Partial Access	7
2.4 Public Interest Test.....	7
2.5 Costs for the Requestor	8
2.6 Silence of the Body.....	9
2.7 Competencies and Powers of the Information Commissioner	9
3 Conclusions.....	9
4 Literature	Napaka! Zaznamek ni definiran.

1 Significance of Transparency of Public Administration in the Republic of Slovenia

On the basis of principles which have been actively developing particularly over recent decades in the broader European area, as well as world-wide, Slovene public administration has undergone fundamental changes over the past twenty years. The principle of transparency¹, which is one of the foundations of the modernization of public administration, has engendered some significant changes. This principle has been created mostly as a consequence of efforts in searching for solutions to bridge the lack of democracy in the workings of public administration². Despite the fact that there is no unified document in Slovene legal order which would set forth an integral strategy in ensuring transparency in the operations of public administration, this principle is integrated - either as a goal or as means - in a number of strategic documents in the field of public administration, including, for example, within the 2006 programme for eliminating administrative barriers³ and the eAdministration strategy⁴.

The principle of openness binds public administration to direct active communication with the user, which is provided at various levels⁵. Further herein, we have analysed in more detail that level which is defined as access to public information, and accordingly represents a pre-condition for implementing all other levels of the said

¹ Openness and transparency are frequently used as synonyms within the European milieu; see Pličanič, 2005, pp. 48, for more on this.

² See Bugarič, 2003, pp. 2-4.

³ Slovene document available at: http://www.mju.gov.si/fileadmin/mju.gov.si/pageuploads/mju_dokumenti/pdf/Program_ukrepov_OAO.pdf
English document for 2006 available at: http://www.mju.gov.si/en/better_regulation/reduction_of_administrative_burdens/, Leaflet in English available at: http://www.mju.gov.si/fileadmin/mju.gov.si/pageuploads/Boljsi_predpisi_OAO/zlozenka_eng.pdf.

⁴ http://www.mju.gov.si/en/legislation_and_documents/important_documents/.

⁵ Trpin (2004, pp. 411-413) talks about the following levels: informing the users, consulting with the users, partnership between the administration and the users, delegation of decision making authority onto users, partial control over the administration by the users.

principle. Informing users is namely the key which opens all other levels of transparency in public administration, as thence only when all the necessary information is made available can the user-consumer effectively actively participate in the work of public administration (which represents the remaining element in the principle of transparency).

Several functions of the right of access to public information are stated in legal theory⁶. The most important among them is without doubt the democratic function, which is predicated on upon the user-consumer being well enough informed to make proper decisions in relation to issues pertaining to public administration; besides which, the right of access to public information enables them to exercise a number of other democratic rights (e.g. the right to vote, the right to legislative initiative, legislative referendum, to petition...)⁷. The next significant function is the control function, by way of which the user-consumer may exercise oversight over a part of public administration by being able to access public information, thus preventing poor performance, abuse of power and corruption.⁸ Exceedingly important (however, not used frequently enough in practice) is the economic function, whereby public information represents a new market, which engenders some new commercial opportunities for business. In this era of information society, the e-administration aspects of public information - which introduces the Internet as a new means of communication between the public sector and the consumer-user - enable a more rapid and effective flow of information.

The significance and the extension of the right to access public information are rapidly increasing, which is reflected mostly in the fact that over 90 countries world-wide now have legislation pertaining to access to public information, which embraces around 5 billion people.⁹ However, surveys reveal that the trend towards transparency of public administration per se is not enough to ensure the right of access to public information in practice.¹⁰ Important factors underpinning the provision of this right encompass the content of adopted legislation (e.g. what is defined as public information or how the exemptions are defined, or whether the deadline for the provision of requested information is set forth, or whether the principle of free access is in force; whether there exists a duty of public notification re certain information – so called proactive transparency; the mandate and authority of the appellate body, whether the requestor enjoys any possibility of legal protection...), and the tradition of transparency in public administration within a particular country. Those countries with the longest traditions of transparency (e.g. Sweden, Finland, Denmark...) are usually cited as examples of best practice in surveys researching this area; this, however, is not an absolute rule, since, for example, the Republic of Slovenia, which for many years had had a closed public administration regime, and only adopted its first Access to Public Information Act (ZDIJZ) in 2003, has ever more frequently been mentioned in the company of countries with good practice in the field of access to public information.

In Slovenia, one speaks about the transparent workings of public administration mostly in conjunction with access to public information. As explained previously, the two terms do not coincide as regards content. The principle underlying the transparent working of public administration is a broader tenet which does not merely encompass the institution of access to public information, but is a reflection of a wider social trend, according to which the workings of public administration should be as open as possible to all, and thus transpire in the closest possible relationship with the citizen. The reflection of the broader principle of transparency is also the procedural right of parties in an administrative procedure, as well as the right of those persons who establish a justifiable interest to be able to access documents relating to cases they were involved in¹¹. The significant difference between the right of access to public information and the right of parties to have access to files pertaining to an administrative process is in the establishment of legal interest. In accordance with the principle of free access, everyone enjoys the right to of access to public information without resort to establishing either

⁶ See Bugarič, 2003, pp. 9-10 and Pličanič, 2005, pp. 49-51.

⁷ In the countries which were among the first to adopt laws in the field of access to public information (e.g. Sweden, Finland, Denmark, the Netherlands), the corruption is less spread out, which is shown by the corruption index for 2010 on the website of the organization Transparency International: http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results.

⁸ In the countries which were among the first to adopt laws in the field of access to public information (e.g. Sweden, Finland, Denmark, Norway, the Netherlands) the level of democracy is higher, which is shown by the democracy index for 2010 on the website of the organization Economist Intelligence Unit: http://graphics.eiu.com/PDF/Democracy_Index_2010_web.pdf

⁹ See Article 19, 2010, p. 1.

¹⁰ The survey of the organization Sigma has shown that for the European area the transparency of public administration represents reality only in a few European countries. For more information, see; Sigma, 2010, p. 10. The similar arises also from a survey of the organization Transparency International, 2010, p. 3

¹¹ Official Gazette of RS, No. 51/06 – official consolidated text, and 117/06 – ZDavP2.

justifiable interest or some other legal entitlement, whereas the procedural right of access to a file can only be executed by those parties involved in a procedure and persons who can establish a legal interest.

Notwithstanding the fact that in Slovene legal order there is no law which would systematically or integrally regulate access to the workings of public administration, individual provisions, which implement the principle of transparency, are to be found in several laws from the field of public administration. From Article 6 of the Public Administration Act (ZDU -1)¹² it arises that *Administration shall be obliged to make its service public* subject to regulations governing the protection of personal data, secret information and other ordinance. It is interesting that in organic law regulating the civil service, i.e. the Civil Servants Act (ZJU)¹³, the principle of publicity is not placed in the primary provisions of the law, namely among the common principles underscoring the operations of the civil service, but in special provisions relating to civil servants in state bodies and local authorities detailed in the second part of the Act. The meagre provision of Article 32 of the ZJU (Principle of publicity) hence merely provides that *“Bodies shall keep the public informed of their service and of the results of work performed by officials, in a manner provided by law and executive regulations.”*

Taking into consideration the fact that the ZDIJZ was adopted later than the ZJU, it is not completely clear to which law Article 32 of the ZJU refers. However, the Public Sector Salary System Act (ZSPJS)¹⁴ is more definitive, and precisely instigates the principle of transparency in the public sector salary system. The first paragraph of Article 38 of the ZSPJS hence provides that public sector salaries shall be a matter of public record, whereby information on position, title or function, on basic salaries, bonuses and performance-related pay, with the exception of the length-of-service increment, shall be publicly accessible. Public sector budget users shall be obliged to submit information on salaries to the ministry responsible for the public sector salary system as well as to the Agency of the Republic of Slovenia for Public Legal Records and Related Services, which then publishes such data on the Internet, but devoid of any personal data pertaining to the recipients. Here we would like to draw attention to the sixth paragraph of Article 38 of the ZSPJS, according to which public access shall be provided in relation to individual data on the gross salaries of a public servant or official without any deduction pertaining to the execution of loan repayments or other personal liabilities in relation to taxation or national insurance contributions. This means that the publicly accessible data on the salary of an individual civil servant and/or official, together with their name and surname, and not merely statistical data with a job title, as wrongly understood by some. By way of this provision, Slovenia places itself among the rare countries, by world-wide standards, which observes complete transparency in the appropriation of public finance, and public sector salaries, as set forth by law.¹⁵

The principle of publicity, as one of the basic tenets applied in relation activities impacting the environment, is also set forth by the Environmental Protection Act (ZVO-1)¹⁶. Article 13 of this Act provides that environmental information shall be public, and that the public shall have the right to participate in the procedures for the adoption of policies, strategies, programmes and plans concerning environmental protection in accordance with this Act. As a special law, which regulates the work of public agencies, the Public Agencies Act RS (ZJA)¹⁷ also realizes the principle of publicity. Article 33 of this Act stipulates the publicity of service provision, and maintains that public Agencies are obliged to appropriately notify (potential) users as to their service provision,

¹² So stipulates Article 82 of the General Administrative Procedure Act, Official Gazette No. 24/2006 – official consolidated version, 105/2006– ZUS-1, 126/07- ZUP-E, 65/08-ZUP-F in 8/2010- ZUP-G, hereinafter: ZUP, which also stipulates that parties have the right to inspect documents relating to their case and may, at their own costs, copy the required documents in a physical (paper) or electronic form. This right can also be exercised by any other person who can prove that they enjoy some legal benefits thereof.

¹³ Official Gazette of RS, Nos. 52/02, 56/03, 61/04, 123/04, 93/05, 89/07, 126/07, 48/09 and 8/10.

¹⁴ Official Gazette RS No. 56/02, with amendments.

¹⁵ Besides Article 38 of the ZSPJS, which represents the legal basis for the public nature of public sector salaries, the publicity of salaries also arises from the third paragraph of Article 6 of the ZDIJZ, which also stipulates that if the considered is information related to the use of public funds (even if it is an instance of personal data) it cannot represent an exemption from public information deemed freely accessible. From the explanation of the draft of the Act on the Amendments of the Access to Public Information Act, urgent procedure, Bulletin of the National Assembly of the Republic of Slovenia (No. 35, 3. 6. 2005, p. 13), observations from practice, it arises that one of the purposes of the 2005 amendments to the ZDIJZ, in the scope of which the provisions of the third paragraph of Article 6 were adopted, was to further increase the transparency of public sector authorities.

¹⁶ Official Gazette RS, Nos. 41/04, 17/06, 20/06, 49/06, 66/06, 33/07, 57/08, 70/08, 108/09.

¹⁷ Official Gazette RS, No.. 52/02.

together with their work, their tasks and powers, as well as the rights and obligations of their users and the procedures of their enforcement, together with other relevant circumstances affecting relations with the user-consumer. Since the principle of publicity has an important role in procedures regarding the disposition of the physical assets of the state and municipalities, the Physical Assets of the State, Regions and Municipalities Act RS (ZSPDSL) ¹⁸ stipulates as its basic tenets the principles of transparency (Article 7) and publicity (Article 8). The latter stipulates that the handling of material assets of the state and municipalities is of a public nature, save for when otherwise provided for under special legislation. It is interesting that the Classified Information Act RS (ZTP) ¹⁹ is also based on the principle of transparency. When estimating the situation and the reasons for the adoption of this Act, the entity which prepared the legislation referred to the basic human right of access to public information and its significance in a democratic society. The platform for the ZTP was also the observation that it is *duty* of state authorities to provide access to data and information within the framework of defined conditions and limitations ²⁰. The above is particularly interesting because the Act which stipulates access to public information the ZDIJZ - was only adopted two years after implementation of the ZTP ²¹.

2 Institution of Access to Public Information in Employing the Principle of Openness in Public Administration

The second paragraph of Article 39 of the Constitution of the Republic of Slovenia enshrines the right of access to public information as a basic human right within the scope of freedom of expression ²². Slovenes had to wait twelve years for this constitutional provision to be implemented and the relevant law to be adopted, thus they were unable to effectively exercise this right for quite a long period of time. The ZDIJZ, which entered the statute book on 22nd March 2003, has systematically and integrally regulated the sphere of freely accessible information, and its narrowly defined exemptions ^{23 24} to freely accessible information. From the purpose of this Act ²⁵ it arises that on the one side it protects the right of natural persons and legal entities to obtain public

¹⁸ Official Gazette RS, No. 86/10.

¹⁹ Official Gazette RS, No. 87/01, with amendments.

²⁰ Proposed Classified Information Act, first reading, Bulletin of the National Assembly of the Republic of Slovenia, No. 10/2000.

²¹ Proposed Classified Information Act, first reading, Bulletin of the National Assembly of the Republic of Slovenia, No. 10/2000.

²² It is also interesting to note that even prior to the adoption of the ZDIJZ in 2000, the draft of the Classified Information Act (ZTP) foresaw the public's right of to public information and the exemption to this rule as regards so-called classified information. It also foresaw that any refusal must include an explanation, against which the party enjoys a right of appeal. This provision was deleted in the second reading in the National Assembly (Slovenia's parliament), with an explanation that *»the right of access to public information, including possible limitations thereof, shall be governed by a special law.«*

²³ Second paragraph of Article 39 of the Constitution of RS (Constitution RS, Official Gazette Nos. 33/91, 42/97, 66/00, 24/03, 69/04, 68/06): *»except in such instances as are provided by law, everyone has the right to obtain information of a public nature in which they enjoy a well founded legal interest under law«.*

²⁴ Eleven exceptions from freely accessible public information are listed under the first paragraph of Article 6 of the ZDIJZ:

1. Information which, pursuant to the Act governing classified data, is defined as classified;
2. Information which is defined as a business secret in accordance with the Act governing companies;
3. Personal data which, if disclosed, would constitute an infringement of the protection of personal data in accordance with the Act governing the protection of personal data;
4. Information which, if disclosed, would constitute an infringement of the confidentiality of individual information on reporting units, in accordance with the Act governing compilation of the state's statistics;
5. Information which is a tax secret or which, if disclosed, would constitute an infringement of confidentiality in the tax procedure in accordance with the Act governing tax procedure;
6. Information acquired or drawn up for the purposes of criminal prosecution or in relation to criminal prosecution, or misdemeanors procedure, and the disclosure of which would prejudice the implementation of such a procedure;
7. Information acquired or drawn up for the purposes of an administrative procedure, and the disclosure of which would prejudice the implementation of such a procedure;
8. Information acquired or drawn up for the purposes of civil, non-litigious civil procedure or other court proceedings, and the disclosure of which would prejudice the implementation of such procedures;
9. Information from a document that is in the process of being drawn up and is still the subject of consultation by the body, and the disclosure of which would lead to a misunderstanding of its contents;
10. Information of natural or cultural value which, in accordance with the Act governing the conservation of nature and cultural heritage, is not accessible to the public for the purpose of protecting said natural or cultural value;
11. Information from the document drawn up in relation to the internal operations or activities of bodies, and the disclosure of which would cause disturbances in the operations or activities of the body.

²⁵ Article 2 of the ZDIJZ, which defines the aims of this Act, provides to ensure that the work of the bodies is public and open, as well as enables natural and legal entities to exercise their rights to acquire information held by public authorities.

information in line with the envisaged procedures, while on the other it also sets forth the obligation of the bodies that they should *endeavour*²⁶ to inform the public as to their work to the greatest possible extent. We would also like to warn that the ZDIJZ legally protects only that right of access to information which exists in a materialized form. From the definition of public information it namely arises that public information shall be deemed to be information originating from the field of work of the bodies and occurring in the form of a document, a case, a dossier, a register, a record or other documentary material drawn up either by the body, or by the body in co-operation with another body, or acquired from other persons²⁷.

Thus the ZDIJZ does not create a direct obligation for the liable bodies to reply to the requestors' questions, prepare abstracts from documents, explain legal acts or provide explanations. Public information is only an already existing document, which has already been created and/or a document that a liable body has drawn up or acquired within the compass of its work. This is a condition known in theory as the "criteria of materialized form". This is also one of the deficiencies which, over time, also been revealed in practice. The Information Commissioner regularly establishes that liable bodies do not dispose of the requested information: such was the subject of 10.8% of appeal procedures in 2007, rising to 30.4% in 2009, as is evident from the comparison of statistics in the Information Commissioner's annual reports²⁸. In the other words, even the liable bodies are evermore aware that the ZDIJZ does not foresee the obligation of active procedures – if they do not have a document, they can refuse a request, even if they could have replied in such a way that they would reply to the question or provide a short explanation. Through such actions these institutions do not adhere to the intention of the law, which foresees that the liable bodies shall *actively endeavour* to ensure that the public is well informed as to their activities; however, since no (legal) sanctions are foreseen in relation to such (in)actions, reference to the 'non-existence' of a document is becoming an ever more frequent practice.

2.1 Bodies Obligated to Follow FOIA – Freedom of Information Act - Rules

From Article 1 of the ZDIJZ²⁹, which sets forth which bodies are liable to act in accordance with this law, it arises that this legislation encompasses the broadest circle of organs and authorities, and covers all three branches: executive, legislative and judicial. It is appropriate and of significance that the ZDIJZ encompasses the judiciary and courts of law, which - if making a comparison from a legal perspective - does not occur as a rule. In its formulation³⁰, the body preparing the ZDIJZ actually excluded courts of law from the domain of this law; however, this provision was later deleted in the legislative procedure. The ZDIJZ hence also includes courts of law; nonetheless, court documents may be exemptions pursuant to Items 6 and 8 of the first paragraph of Article 6 of the ZDIJZ, according to which the access may be denied if information has been acquired or drawn up for the purposes of criminal prosecution and the disclosure thereof would prejudice that procedure. The explanation of the provisions of the ZDIJZ and special laws referring to access to public information in practice is still not uniform. On several occasions the Information Commissioner has taken the position that the ZDIJZ shall apply to all documents that those bodies, bound by the ZDIJZ, dispose of, and namely such shall also encompass access to judicial records. In relation to this, liable bodies have initiated several procedures at the Administrative Court RS, whereby the case-law as regards this issue is still not settled.³¹

²⁶ The obligation of the so called proactive transmission of information is laid down in Article 10 of the ZDIJZ which provides that each body is obliged to publish on the Internet certain public information, in particular consolidated texts of regulations pertaining to the field of work of the body, proposals for regulations, publications and tender documentation in accordance with regulations governing public procurement, together with information on the body's activities and administrative, judicial and other services.

²⁷ See Article 4 of the ZDIJZ.

²⁸ See Information Commissioner (2008, p. 12) and Information Commissioner (2010, p. 12).

²⁹ See Article 1 of the ZDIJZ, which provides that state bodies, local government bodies, public agencies, public funds and other entities of public law, holders of public powers and public service contractors are all liable authorities under this Act.

³⁰ See Article 1 of the proposed text of the ZDIJZ, first reading, Bulletin of the National Assembly of the Republic of Slovenia (No. 73, 17.7. 2002, p.47) which expressly states that 'this Act shall not apply for the courts of law.'

³¹ The Administrative Court of the RS, in the case under Ref. No. IU 658/2009-10, in relation to the examination of the eligibility appeal against the Decision of the Information Commissioner No. 090-34/2009/4 of 2nd April 2009, took the position that pursuant to ZDIJZ, the District Court in Ljubljana is obliged to transmit to the applicant the requested document (public information) from a prosecution file, because the procedure in the said criminal case had been concluded with the force of *res judicata*. In another, essentially similar case, the Administrative Court of the RS, by way of its judgement under Ref. No. I U 150/2009-10 of 8. 12. 2010, granted the appeal of the plaintiff and annulled the Decision of the Information Commissioner No. 021-101/2007/15 of 6. 1. 2010, by way of which the IC had imposed the transmission of records of the main hearings (without personal data) and remanded the case for, among other reasons, the erroneous application of material law. In its explanation of this judgement, the court recorded that the ZDIJZ regulates access to public information in general and that the defending party (i.e. the Information Commissioner) is in the renewed procedure obliged to make its decision by taking into consideration the provision of Article 150 of the Civil Procedure Act which provides who has the right to inspect and copy the legal documents in labour tribunals.

The next challenge, that the Information Commissioner as well as the liable bodies face in practice, is the question as to what information can be the subject of a request according to the ZDIJZ, and/or the question as to what is the relation between the ZDIJZ and other laws which in some manner regulate data protection and set conditions for access to certain data through establishing the legal interests. Indeed, the ZDIJZ does not explicitly regulate this issue; however, from the definition as to what is and what is not public information³² we can establish that the ZDIJZ encompasses 'all' information that the bodies dispose of in their field of work, and that they are obliged to operate in accordance with the provisions of this Act³³. In other words: pursuant to the ZDIJZ, no information is *a priori* excluded from the said regime. It is essential - and this very clearly arises from the ZDIJZ - that the requestor does not have to prove any legal interest in relation to access to public information and/or that this law gives legal interest to *everyone* in the right to familiarization with public information³⁴. If the requested information is public information within the meaning of Article 4 of the ZDIJZ, then the liable bodies cannot deny access merely by referring to a special, sectoral law, save for those instances when law explicitly regulates the issue of access to public information differently than is set forth in the ZDIJZ (i.e. that the provisions of the ZDIJZ are unambiguously excluded).³⁵

Another issue derives from the fact that not all public information is also freely accessible public information. In the first paragraph of its Article 6, the ZDIJZ foresees an exemption when access to the requisite information may be denied due to the protection of other legal interests. Taking into consideration the principle of free access, pursuant to which is free access to information, exemptions should be interpreted narrowly, while the burden of proof of exemptions should forever be on the side of the liable body. In other words, liable bodies must firmly establish and substantiate the existence of an exemption, the mere abstract referral to an exemption is not sufficient. If in doubt, one should act to the benefit of the requestor, and grant access to the requisite information.

2.2 Personal Data Protection as an Exemption

The exemption, liable bodies encounter most frequently in practice, is that which involves the issue of personal data protection as an exemption.³⁶ The right to the protection of personal data in the Republic of Slovenia is also a fundamental human right, laid down in Article 38 of the Constitution of the Republic of Slovenia. In connection with the question as to what personal data is within the scope of exercising the right of access to public information, we would like to emphasize that the Personal Data Protection Act (ZVOP-1) does not protect personal data in general, but merely enables the prevention of unconstitutional, illegal and unjustified interference into the privacy and dignity of individuals. In other words: providing personal data to the public is - in certain cases - admissible. Articles 8 and 9 of the ZVOP-1 provide, as a general rule, that personal data may be processed if the processing of said data and the personal data being processed are provided by statute, or if the personal consent of the individual concerned has been explicitly provided.

³² See Article 4 of the ZDIJZ.

³³ Such opinion can also be detected in legal theory; see Prepeluh 2004, p. 149.

³⁴ See Article 5 of the ZDIJZ, free access principle: »Each applicant shall have, at his request, the right to acquire information from the body by acquiring such information for consulting it on the spot, or by acquiring a transcript, a copy or an electronic record of such information.«

³⁵ An example of such limitation is the provision of the sixth paragraph of Article 22 of the Public Procurement Act (Official Gazette of RS, Nos. 128/06, 317/07, 16/08, 34/08, Official Gazette of the EU Nos. 314/09, Official Gazette RS, No. 18/10), which, among other things, provides that the provisions of the law regulating access to information of a public character, concerning insight into contract documents between the time of the opening of tenders and the adoption of the decision on the contract award, shall not apply. A special provision regarding the protection of documents, which refers to ZDIJZ, can also be found in the Foreign Affairs Act (ZZZ-1, Official Gazette of RS, Nos. 45/01, 78/03, 20/06, 76/08, 108/09 and 80/10). Article 45 a of the ZZZ -1, among other things, stipulates that during the decision-making process, access to data which pertains to the implementation of foreign policy where disclosure might harm international relations or the interests of the Republic of Slovenia, shall, pursuant to the Act which regulates confidential data, be denied.

³⁶ The said exemption is defined in the third item of the first paragraph of Article 6 which defines as an exemption that personal data which, if disclosed, would constitute an infringement of the protection of personal data in accordance with the Act governing the protection of personal data. The ZDIJZ thus refers to the application of the Personal Data Protection Act, Official Gazette of RS No. 94/2007-UPB1, hereinafter ZVOP-1 which in the first item of the first paragraph of Article 6 provides that *personal data* - is any data relating to an individual, irrespective of the form in which it is expressed. An *individual* - is an identified or identifiable natural person to whom personal data relates; an *identifiable natural person* - is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to their physical, physiological, mental, economic, cultural or social identity, where the method of identification does not incur large costs or disproportionate effort, or require a large amount of time. The ZVOP does not protect personal data in general, but merely enables the prevention of unconstitutional, illegal and unjustifiable encroachment into the privacy and dignity of individuals.

Processing personal data within exercising the right to access public information is also admissible if there exists a legal basis in a special law which provides that the data in question is public information. An example of such legal provision can be found in the first indent of the third paragraph of Article 6 of the ZDIJZ which specifies admissibility if this is also information, related to the use of public funds or information, related to the execution of public functions or the employment relationship of a civil servant, except in instances described under point 1. and points 5. to 8. of the first paragraph, as well as in cases, when the Act governing public finance and the Act governing public procurement stipulate otherwise.

In other words, pursuant to the ZDIJZ, liable bodies cannot deny processing information on the appropriation and application of public funds or matters relating to civil servants or officials in their employ, even if the information represents personal data which would otherwise be protected under the law, regulating personal data protection. This means, that under the ZDIJZ, data as to which civil servants are employed within a public sector body, their duties, employment conditions, fulfilment of conditions and their salaries, are germane. However if the personal data in question pertains to individuals who are not civil servants, such does not represent an issue of public interest. As a rule, and pursuant to the ZDIJZ, personal data represents an exemption from freely accessible public information. Such data is thus protected personal data and if no legal foundation for the processing of such data is present under the ZDIJZ and no personal consent was given by the individual concerned, then there exists the possibility of a breach of law regulating personal data protection.

2.3 Partial Access

Slovene legal order otherwise also includes the institution of so-called partial access³⁷ which facilitates that in those cases, where a document includes protected personal data, such data is concealed in the document (if this is possible), and grant the requestor a partial access to the requested information. The institution of partial access is stipulated in Article 7 of ZDIJZ, which provides that if a document or a part of a document contains only a part of the information referred to in Article 6 (e.g. personal data), which may be excluded from the document without jeopardizing its confidentiality, an authorized person of the body shall delete such information from the document and refer the contents or render the re-use of the remainder of the document to the applicant. In conjunction with the principle of the transparency of public authorities, laid down in Article 2 of the ZDIJZ, this shall mean, that it is the duty of an authority to resort to institute partial access, save for if this would not be feasible according to the criteria under Article 21 of the Decree on the data submission and the re-use of public information³⁸ and/or when (and if) partial disclosure would jeopardize the confidentiality of protected information.

2.4 Public Interest Test

Incorporated into the ZDIJZ in 2005 by way of an amending act, the public interest test is an important legal institute, which enables greater transparency in the work of public sector bodies³⁹. Two and a half years after the adoption of the ZDIJZ, development in practice had revealed, that it is better for there to be as few absolute exemptions as possible. It is difficult to put the definition of this test into writing, because it is changing through time. However, the fact remains, that this test points to those most hidden mistakes and irregularities which occur within the public sector. In practice, the public interest test is used by the Information Commissioner when assessing appeal procedures; however, it is less used by the liable bodies at first instance and administrative

³⁷ See Article 7 of the ZDIJZ.

³⁸ Official Gazette RS, Nos. 76/05, 119/07.

³⁹ Public interest test is laid down in the provision of the second Paragraph of Article 6 of the ZDIJZ, which provides that without prejudice to the provisions in the first paragraph, the access to the requested information is sustained, if public interest for disclosure prevails over public interest or interest of other persons not to disclose the requested information, except in the next cases:

- for information which, pursuant to the Act governing classified data, is denoted with one of the two highest levels of secrecy;
- for information which contain or are prepared based on classified information of other country or international organization, with which the Republic of Slovenia concluded an international agreement on the exchange or transmitting of classified information.
- For information which contain or are prepared based on tax procedures, transmitted to the bodies of the Republic of Slovenia by a body of a foreign country;
- Information the disclosure of which would constitute an infringement of the confidentiality of individual information on reporting units, in accordance with the Act governing Government statistics activities;
- Information the disclosure of which would constitute an infringement of the tax procedure confidentiality or of tax secret in accordance with the Act governing tax procedure;

court procedures for redress in relation to the decisions of the Information Commissioner. Since 2005, the Information Commissioner has issued 26 decisions in which the requisite information was assessed from the perspective of a public interest test. In one of its decisions, the essence of the test was explained through the following argumentation:

The possibility of relativising an exemption is important in any assessment of overriding public interest. Relativisation needs to remain limited only to such cases, where the interest of the public in the disclosure of a document is stronger than the interest of others, who may wish to protect the document, and thus ensure it is treated as an exemption from free access. When using the overriding public interest test, it is necessary to assess whether public interest in disclosing public information is stronger than the potential damage which may be caused through the disclosure of a document. Theory emphasizes, that the overriding public interest test needs to be used extremely cautiously and conscientiously, since it requires higher level of decision making in weighing two opposing rights or interests. Such a test should only be used when it is anticipated that it might reveal something, which would contribute to the broader discussion and understanding of an issue important to the broader public. Any test as to overriding public interest involves weighing and assessing, whether a certain public right to know prevails over another right, or exemption from ZDIJZ, and to establish, whether or not to disclose the information. Public interest in disclosing information is, for example, very strong in situations, which concern the procurement or disbursement of public funds, public security, public health, responsibilities and transparency in decision making, which trigger public or parliamentary debate. Public interest is not as precise and defined as the vested interests for non disclosure. It is rather abstract and general and manifested as a demand for transparency of the activities of a public sector body in acting conscientiously in decisions on public matters or the spending of public funds. Public interest is also manifested by open discussion on important social issues. The concept of public interest is not the same in every case and cannot be defined in advance as it may appear in many different forms. Also, public interest may change over time and depends on numerous circumstances. Therefore, public interest is not a constant; it is changeable and depends on the momentary situation. With this in mind, public interest tests require assessment on a case by case basis, considering differing and variable factors which form public interest. In relation to the application of the public interest test, one should also stress that this test shall only be used in instances where exemptions to freely accessible information actually exist. If, during the procedure, one establishes, that the conditions for the existence of the exemption from freely accessible public information have not been fulfilled, then the public interest test shall not be carried out, because the information in question is freely accessible information.

2.5 Costs for the Requestor

An important question, related to exercising each of the rights in practice, is that of the efficiency, speed and cost of the pertaining procedure. The procedure, regarding the right of access to public information is quick, effective and - as regards the price - affordable (the first and second instance procedures are free of administrative tax and hence completely free of charge to the plaintiff, as is the appeal procedure). The ZDIJZ foresees twenty working days as the deadline for the provision of public information⁴⁰ which the liable bodies may extend only exceptionally and in circumstances laid down by law.⁴¹ In the event that the body fails to decide on a request (silence of the body) within this timeframe, and/or does not refuse the request by way of a decision, it shall be deemed, that the requestor's request has been denied. In such an event, the requestor may appeal to the Information Commissioner, as well as against the decisions of the Information Commissioner; legal protection in an administrative dispute is provided by the Administrative Court of the Republic of Slovenia.

An essential question, connected with exercising the right of access to public information is also the one of fees, which a body may charge the requestor for the transmission of the requisite information. Of late there has been a perceptible increase in appeals filed with the Information Commissioner which pertain to the costs of access to public information⁴². As regards fees, the ZDIJZ stipulates that insight shall be free of charge; however, a body may charge the requestor material costs in relation to the transmission of a copy, photocopy or electronic record

⁴⁰ See Article 23 of ZDIJZ.

⁴¹ The first paragraph of Article 24 of the ZDIJZ provides that a body can prolong the decision deadline to a maximum of 30 days under the ZDIJZ in the event that more time is needed for the transmission of the requested information due to partial access to public information, in accordance with the provisions of its Article 7 or due to the sheer volume of requested documents. A body is obliged to decide on the extension of the deadline, including an explanation of the reasons for the extension, and the requestor shall be provided with a copy of the said decision. The body is obliged to adopt such decision no later than in 15 working days after the receipt of the request.

⁴² The number of appeals addressed to the Information Commissioner in relation to charges increased in 2010, when there were ten such cases, whereas in 2009 there were no such appeals, and only one in 2008; source: statistics on decisions issued by the Information Commissioner, published on the website: <http://www.ip-rs.si/informacije-javnega-znacaja/iskalnik-po-odlocbah>.

of the requisite information⁴³. The issue of material costs is regulated in more detail in the Decree on the transmission and reuse of public information⁴⁴, which in the first paragraph of its Article 19 provides that a body shall set the price of the material costs in such a manner, that it takes into consideration the average 'market' prices for the 'service of the transmission of information' together with its own average price of labour costs and depreciation of equipment. As regards the issue of charging fees, the practice of the Information Commissioner is very strict: a body must fulfill numerous preconditions before it can charge the requestor any costs. The body must publicly display the tariff for the transmission of requested information on the Internet as well as warn the requestor each time as to the payable costs in advance; if the requestor so requests, then the body must also communicate the amount of these costs for the transmission of data in advance. If a body omits one of the above preconditions, then they shall not be allowed to charge the requestor.⁴⁵

2.6 Silence of the Body

From the perspective of the efficient protection of the right of access to public information, it is essential that the requestor has an explicitly acknowledged right of appeal, even in the event when a body does not reply and/or react - the so-called silence of the body. It is evident from the Information Commissioner's annual reports⁴⁶ that the number of appeals is increasing every year (in 2009 the Information Commissioner processed 302 appeals, rising to 361 in 2010). This situation is partly due to the fact that the number of requests for access to public information is increasing, and partly because the requestors are more familiar with the procedure for accessing public information, and thus, more appeals are filed as a consequence.

2.7 Competencies and Powers of the Information Commissioner

The Information Commissioner is an independent state body having the role of a second instance appellate authority. Within the scope of the appeal procedure under the ZDIJZ, the Information Commissioner disposes of powers, which can influence the efficiency of the appeal as well as 'force' the liable bodies to execute its decisions. The Information Commissioner can impose a fine on the responsible person of the body, if the body does not file an appeal against the IC decision through initiating an administrative dispute, while at the same time not transmitting the information to the requestor as imposed by the Information Commissioner's decision⁴⁷. The fine for the responsible person is also prescribed in the event, that this individual, after being summoned by the Information Commissioner, does not provide all the documents which are the subject of processing in a particular case and/or when a responsible person disposes of the documents, but does not wish to transmit them to the Information Commissioner⁴⁸. In such an event, the Information Commissioner also has authority, in accordance with the law, to carry out an inspection. That means that the Information Commissioner can, on its own and at its own volition - and without the permission of the liable body - enter premises and confiscate documents which are the subject of the appeal procedure. In the context of the procedure, the Information Commissioner can inspect all the documents which are the subject of the requestor's request, including tax secrets and confidential information (the Information Commissioner enjoys the legal right to access classified data, whilst other employees must undergo security checks).

3 Conclusions

As explained in the introduction to this paper, an important factor in implementing the principle of transparency in practice, besides the adopted legislation, is also the legal culture and the length of the tradition of the transparency of public authorities in a particular country. Behind us are eight years of the implementation of the

⁴³ Stipulated by Article 34 of the ZDIJZ.

⁴⁴ Official Gazette RS, Nos. 76/05 and 119/07.

⁴⁵ Arising from the Information Commissioner's Decision No. 090-38/2011 of 17th March 2011.

⁴⁶ Annual reports of the Information Commissioner in English available here: <http://www.ip-rs.si/index.php?id=388>.

⁴⁷ Thus provided under the second paragraph of Article 15 of the Information Commissioner Act, Official Gazette RS, Nos. 113/05 and 51/07 – ZustT-A.

⁴⁸ Thus provided under the first paragraph of Article 15 of the Information Commissioner Act, Official Gazette RS, Nos. 113/05 and 51/07 – ZustS-A.

ZDIJZ in Slovenia, and regardless of the fact, that this Act has been established quite successfully in practice⁴⁹, the first shortcomings of legislative regulation in this field have become evident.

Besides the problems that we have exposed in this paper (the definition of public information, the relation between the ZDIJZ and process laws which regulate access to data and the charging of costs), we should also consider the question that in the event the ZDIJZ is amended, whether the existing exemptions from freely accessible public information⁵⁰ also protect all legitimate interests that need to be protected in relation to access to public information⁵¹. A new question arises thereof, namely: shall we draw a new line between the work of public administration and data protection? Is the operation of Slovene public administration too transparent? Not in our opinion. Despite the fact, that Slovene legislation represents a good normative framework for the establishment of the principle of transparency in practice, it also represents a significant challenge for the future; namely, the further implementation of this principle in practice. Closely linked to this is also the change in the way of thinking of civil servants, and that the documents which are created during their work are not their personal 'property', and neither are they the 'property' of public authorities, but rather the 'property' of the people on behalf of whom the public administration operates. The practice shows that such a way of thinking has partially changed over recent years; however, there is still room for improvement in practice. Changing the culture of officials is a process which takes longer. However, good legislation and strong appellate authorities can accelerate the change in the way of thinking.

4 Literature

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Keywords for the index

- Aarhus Convention;

⁴⁹ Such is also evident from the fact that the requestors' resort to the institution of access to information is ever more frequent. From the joint annual reports on implementing the ZDIJZ, drawn up by the Ministry of Public Administration as the line ministry and that the number of the filed appeals at the first instance is increasing from year to year:

http://www.mju.gov.si/si/delovna_podrocja/nevladne_organizacije/informacije_javnega_znacaja/porocilo_o_stanju/.

⁵⁰ See first Paragraph of Article 6 of the ZDIJZ.

⁵¹ ZDIJZ does not define the protection of privacy as the exemption from freely accessible information, but merely the protection of personal data which may in certain cases be inappropriate, because the persons, to whom a requested document pertains, can still be identified despite the deletion of personal data, e.g. from the description of an event. Also not excluded from the scope of the ZDIJZ are the private law documents and the documents, created within the scope of procedures in front of various control authorities, however it is not a case of an administrative or judicial procedure.

- democratic;
- access to public information;
- European Union;
- European Convention on Human Rights and Fundamental Freedoms;
- European Court of Human Rights;
- implementation;
- public information;
- exemptions;
- public funds;
- civil servant;
- Convention of the Council of Europe on Access to Official Documents
- Treaty of Lisbon;
- modernization;
- transparent public administration principle;
- free access principle;
- control;
- legal interest;
- transparency;
- pro-active;
- requestor c;
- Republic of Slovenia;
- cooperation;
- courts of law;
- Universal Declaration on Human Rights;
- costs;
- Council of Europe;
- user;
- protection of environment;