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Building Good Governance by Access to Information in Administrative Matters – Trends in Slovenia, Croatia and Serbia

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Abstract: Access to personal data and public information in the relations with authorities is considered a fundamental principle and a societal value of a modern, democratic community. Most countries, particularly in the European Union, regulate such institution by law, making a distinction between access to file within administrative proceedings and access to public information. The paper provides a normative and comparative study of the regulation of such issue in Slovenia, Serbia and Croatia, and presents the dilemmas arising in the practical implementation thereof. In the selected countries, the degree of awareness of the need for open administration and good governance is rather high, yet regulation alone does not suffice and should be followed by effective implementation. As indicated by the analysis of disputable cases from administrative and court practice in Eastern Europe, implementation indeed leaves room for further development into – as suggested by the author – a single right to information i.e. the right to know. Such right should be defined in a general administrative code reflecting the trends and challenges faced by Eastern European countries setting up a system of good public governance while undergoing processes of transition, modernization and europeanization.

Key words: open administration, access to (file and public) information, right to know, administrative proceedings, good governance, South Eastern Europe

1. Introduction

The primary mission of the holders of social power/authority in a modern society should be proactive establishment and preservation of community welfare. Good governance as a set of approaches to governing public matters thus requires a combined approach by the rulers to design and implement public policies based on participation, inclusion, transparency, and accountability, thus laying the foundations for an open public administration. Nowadays, authority is exercised in various relations and an increasing share thereof falls under certain types of administrative proceedings, from the implementation of laws through administrative subsidiary legislation, administrative agreements, administrative subsidies, to individual administrative decision-making. The latter is the type of procedure that prevails and directly affects the parties, and is therefore considered with priority, as provided in most Central and Eastern European countries by the (General) Administrative Procedure Act (APA). Another prerequisite for authoritative democracy is access to public information which – through laws known in over 90 countries (Freedom of Information Act – FOIA) – allows to exercise particularly the democratic and supervisory functions of open administration (Bugarič, 2003: 127, Kovač & Virant, 2011: 231). In administrative proceedings, which record a growing trend within the modern society, the openness of administration is achieved by means of procedural and legal entitlements of the parties i.e. the ruled in their relations with the rulers. Likewise increasing are the importance and extent of access to information and hence, in addition to its democratic function, also the economic function of open administration.

The purpose of the paper is to analyze the regulatory framework in selected countries of (South) Eastern Europe (SEE) in order to establish how the rights of the parties in administrative proceedings to accede files and other information are defined in principle and

at the operational level.[1] The respect of general principles in fact depends on the (non)implementation of operational rules which allow for an optimal, moderate or heavily restricted protection of values (e.g. by restricting material legitimacy to information). The problem of implementation of democratic principles is particularly topical in countries burdened by the legacy of socialism, i.e. a captured state with no true participation but rather governed by a communist political elite, and undergoing economic transition and related processes. Nevertheless, the trends in the last decades have been promising and directed toward a more »true« openness. The culture of openness and transparency is starting to develop with some incentives, such as promotion of the code of ethics within civil service, the activities of nongovernmental anticorruption commissions, and external pressures from the EU and OECD on NGOs, e.g. Transparency International. In such context, Slovenia is described as an example of a relatively successful country in the sense of Europeanization of its social and political systems. The main research question therefore refers to the effectiveness of the regulatory framework in selected SEE countries with tangible constitutional and procedural rights of the parties in administrative proceedings. The core of the research is a normative analysis of regulation in Slovenia setting a model with open administrative proceedings, and of the dilemmas arising in the implementation of regulations as observed in administrative and court practice, together with a comparison of the regulation in Slovenia, Croatia and Serbia. Normative, dogmatic, historical, comparative and axiological-deontological methods apply. Part of the research focusing on implementation is based on case study, induction and deduction. The analysis of individual cases eventually suggests a model of key factors for an effective regulatory framework of open administration in administrative matters. The principal hypothesis is that, in order to effectively achieve the purpose of open administration within good governance, a single regulation of the rights of the parties toward the administration is necessary. This is confirmed also by recent trends in the EU.

2. Theoretical aspects of open and good administration

2.1. About openness within good governance and good administration

Public governance as decision-making in public affairs implies, at the institutional level, the definition of public policy objectives and, at the instrumental level, the definition of the ways to achieve the set objectives, either by authoritative or non-authoritative administrative actions.[2] In modern society, authority is important to avoid anarchy and the rule of the strong over the weak (physical, capital, etc.). Yet although justified by the will of the democratic majority, authority needs to be restricted.[3] In such context, an inevitable assumption in a democratic society is the openness of authorities. In fact, only the transparency of operations of the institutional bearers of authority allows their accountability and prevents abuse of authority (Ziller, 2011: 5). Yet there is more to it in a modern society than mentioned above. The principle of openness has developed also as a result of the attempts to reduce the democratic deficit in the functioning of public administration, parallel to judicial control and opposite to Weber's theory (Bugarič, 2003: 120-124). Moreover, given the growing

[1] Although this paper and various sources use different expressions, e.g. access to file or documents, access to public information, freedom of (public) information or the right to know, these expressions - unless explicitly provided otherwise - refer to the same right, i.e. the right of the parties to obtain information from administrative authorities in the sense of open and good administration.

2 The classic German and Austrian theories distinguish between *Eingriffsverwaltung* (intervention administration) and *Leistungsverwaltung* (service administration). However, authoritative and non-authoritative actions cannot be fully separated since the functions of public administration imply both the exercise of state authority and the performance of non-authoritative professional activities.

[3] This gave rise to several concepts, such as the state governed by law *(Rechtsstaat,* cf. Künnecke, 2007: 23). The German understanding of the rule of law more closely relates to the separation of power and to the administration being bound by the law than for instance the American one (Pavčnik, 2009: 33). Between the 18th and the 20th century, public law – regulating the relations between bearers of authority – thus evolved into a restrictor of authoritative self-will and abuse of power even in administrative proceedings where decisions concern particularly the individual's legal position toward the authorities.

complexity and scope of relations within the society, more and more relations are regulated in administrative proceedings. Public administration and administrative proceedings *lato sensu* are therefore gaining increasing significance in the relations between authorities and individuals. Particularly from the viewpoint of political science like in the US theory (e.g. Peters & Pierre, 2005: 270, McCubbins et al., 2007: 19), administrative proceedings are examined as a consequence of or a tool for exercising state authority, both in terms of adopting general rules at the level of the administration and in terms of individual decisions or administrative proceedings as the key components of administrative reforms. Therefore, the role of administrative proceedings is defined and changes depending on the role of the state in the society, the tasks of the authorities, the consequent understanding of the principle of the separation of powers between the parliament and the executive, and thereby determined constitutional arrangement. All the more frequently, all proceedings and relations between the administration and private parties are being defined in a uniform manner or at least on the basis of participative democracy, not only individual decisions (by authorities or within public services). As stressed e.g. by Barnes (Rose-Ackerman & Lindseth, 2011: 338-354, cf. Trpin, 2008: 156), the classic distinction of the types of administrative proceedings is – given the intertwining of regulatory and executive functions – becoming more blurred, both at the national and international levels.[4] The most important contemporary shift according to Barnes is in the additional "third generation" of administrative proceedings. The latter is based on the governance model and comprises procedural agreements with the addressees of future general norms, i.e. the alignment of interests in the formulation and implementation of public policies (procedural arrangements, public policy cycle). The third generation focuses on creative partnerships between social groups and thus on greater legitimacy of public policies or authoritative decisions, since they are a system of communication and coordination between the rulers and the ruled.

In the above context, the openness of public administration and administrative proceedings represents the basis to achieve the fundamental principles of good public governance. If good governance is understood as a strategic participative model of public governance (both at the institutional and instrumental levels), it involves a synergic combination of several principles. Many of these are directly related to or dependent on the openness of authority and administration.[5] Given the authoritative position of the state in administrative matters, public administration must above all develop forms of cooperation with the general and expert public, possibly organized as NGOs. Thus, authorities demonstrate to be positively inclined toward partnerships, which should result in synergy effects of policies and in the general development of democracy and authoritative legitimacy, as well as to strive for accountability (of both authorities and citizens by enhancing civic awareness). The increasing transparency of regulatory decisions and their rationale improve the credibility of regulatory responses and the degree of public trust in regulatory institutions, process, and public policy makers (cf. Eymeri-Douzans & Pierre, 2011: 200). If contemporary administration is to be

[4] One of the rare Council of Europe resolutions to refer exclusively to individual administrative matters is the 1977 *Resolution No. 77 (31) on the Protection of the Individual in Relation to the Acts of Administrative Authorities*. More recent documents regulate the adoption of both general rules and individual decisions, e.g. CM/Rec (2007)7 on good administration. Recent German theory suggests a broader understanding of administrative proceedings (*Verwaltungsverfahren*), including individualized administrative decisions and the design of regulations (*Gestaltungsverfahren)* to be issued by the government. However, the classic understanding of administrative proceedings is narrower and refers merely to decisions in specific individualized administrative matters (Galligan et al., 1998: 17–26 for EE, Trpin, 2008: 156, Kovač et al., 2012: 29-38, Koprić, 2011: 3-25).

[5] The concept of good (also known as new, corporate, or sound*)* governance allows different definitions; according to the classification of fundamental principles under the OECD, eight principles apply. Good governance is good if it is at the same time consensus-oriented, participatory, follows the rule of law, accountable, transparent, effective and efficient, responsive, equitable and inclusive (cf. for theory and practical examples Rouban, 1999: 21-24, 55-111, OECD Principles of Corporate Governance, 2004: 7-25, Radaelli & de Francesco, 2007: 29, 117). Hence, the government with hard public law, exclusively public regulators, a state-centered system of democracy, and hierarchically conducted reforms is rather obsolete. Theory outlines a system of governance based on soft law that is agreement-oriented and adopted in cooperation of public and private entities with democratic reforms conducted through networking and open structures (Schuppert in Bevir, 2011: 287–298).

»good«, it needs to be, above all, effective and participative. The evolvement of public administration into an open and cooperative good administration is both a tool and a target by which and toward which the state can transform its public administration model from mere public administering to integral governance and societal progress (Eymeri-Douzans & Pierre, 2011: 8, cf. Nehl, 1999: 13-26). Yet participation, inclusion, partnerships, networking, and freedom of expression (cf. Prepeluh in Šturm, 2011: 591) cannot be achieved if the addressees of administrative proceedings are not first informed of the purposes and goals and of the content and manner of designing and implementing (government) public policies, and are not democratically active. With regard thereto, Gotze (2012: 1-3) argues that the mere knowledge of the existence of (EU) right(s) is already a prerequisite of its invoking. The right to information is thus the first pillar of an open society, (and should be) followed by public participation in decision-making and co decision (OECD, 2004, Radaelli, 2007). Important elements ensuring the right to information in practice include (Pirc Musar in Kovač & Virant, 2011: 232): the content of adopted laws (e.g. what is accessible information, what are the exceptions, which are the deadlines for providing the information required, is there an obligation to publish certain types of information (i.e. proactive transparency), what legal remedies are available, etc.), the tradition of open public administration in a single country, and the legal culture in such country. Openness and transparency of administration are thus at the same time a prerequisite and the objective of good governance.

Since – in order to be restricted and predictable in the sense of the rule of law – authority is law-driven, also good governance needs to be, to some extent, considered from a legal point of view. For centuries, administrative law with its mission of protecting public interest has been regulating public relations at the infra-, supra- and national levels with the purpose to stabilize them, define them as more predictable and restrict the power and will of the majority when the latter might infringe upon fundamental human rights. Thereby, it creates legal certainty as it gives life to the concept of legitimate expectations (*Vertrauenverschutz*), either in substantive or procedural terms.[6] This applies in particular for good administration as part of good governance, which encompasses the broadest selection of basic (mainly procedural and administrative) safeguards for the ruled in their relations with the rulers. Good administration is thus not an intangible construct but rather a corpus of principles and rights which – thanks to the Council of Europe and in particular the tradition of Articles 6 and 10 of the ECHR – concentrated into an explicit *right to good administration* pursuant to Article 41 of the EU Charter of Fundamental Rights.[7] The regulation of administrative proceedings must therefore encourage openness, accountability and effectiveness of public administration. A key method to achieve such is to develop participation and understanding of administrative proceedings in a broader context. This leads to the growing importance of the paradigm of a

[6] The US APA defines legitimacy in administrative proceedings more broadly than similar laws in continental Europe (Craig in Peters & Pierre, 2005: 180, cf. Nehl, 1999: 62). By analogy, e.g. the Finnish APA defines legitimacy as having a substantial impact on life and work, even if no legal interest has been demonstrated pursuant to the sector-specific law. In countries where the right is linked to legal interest, a prerequisite is the legal personality of the party. If the party does not have legal personality, it is not entitled to such right. An example thereof are parliamentary groups representing political parties in parliament which, according to the Slovenian Constitutional Court (I-U-127/2010-23, 12.5.2010) are no more than but groups of individual natural persons.

[7] Ur. l. EU, C 83/337, 30. 3. 2010: *»1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. 2. This right includes: (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions…«* An important reference for the EU is the European Code of Good Administrative Behaviour. Another important source is Regulation (EC) 1049/2001 (OJ L 145, 31 May 2001: 43). More on EU law in Gotze, 2012: 2-7, stressing that according to the survey conducted by the EU Ombudsman in 2011 on 27,000 respondents from the EU-27, as much as 85% does not know (sufficiently) the *Charter of Fundamental Rights*, although the Charter is intended for European citizens and the knowledge of EU rights means the implementation of the basic principles of *equivalence* and *effectiveness* of EU law. Good administration is also a legal principle in EU Member States, enshrined in constitutions and laws (e.g. Finland, the Netherlands or Latvia; Statskontoret, 2005: 15, Venice Commission, 2011: 15).

participative state which is to regulate with greater emphasis on flexibility and the basic legal principles as value criteria (Pavčnik, 2007: 599, Kovač et al., 2012: 40).

2.2. Legal rights of parties to information and openness in administrative matters

The right to information in general is one of the fundamental rights of defense, considered an internationally recognized standard and a constitutional guarantee (Nehl, 1999: 41, 57). It is directly related to constitutional rights such as democracy, rule of law, equality before the law and equal protection of rights, protection of human personality and dignity, effective remedies and judicial control in administrative dispute and constitutional court proceedings, legality and finality.[8] In administrative relations, where the administrative body is a priori superior to the party, these guarantees are particularly important in the sense of protection of public interest. The extent to which authority is restricted in fact indicates the actual degree of (non)democracy of state organization. The right of access to one's file is not merely a technical and distinctive feature of the Slovenian (constitutional and administrative) system, but a significant guarantee of fair procedure and good administration in accordance with acts and case law at the European level, namely the Council of Europe or the European Court of Human Rights, the EU and its institutions, or the United Nations with the Universal Declaration of Human Rights. Access to file is explicitly defined as an autonomous right based on case law (Nehl, 1999: 46-54) and several international legal documents, including the Council of Europe Resolution of 1977 or the Code of Good Administrative Behavior.[9] Other acts and provisions, among which Article 6 of the European Convention on Human Rights or Article 41 of the EU Charter of Fundamental Rights, rank the said right among other fundamental rights, such as the right to due process/fair trial and good administration.

A brief comparative overview of the right of access to file in EU Member States (Statskontoret, 2005: 38-40) reveals that Member States regulate such matter in different ways: Spain, for example, by a constitutional provision, Finland and Estonia under good administration in the APA, and most countries similarly to Austria or Slovenia operationally in the APA. This right is known in all countries (at least in codes, if not in regulations) but the scope of its application varies. In some countries, the right of access to file is granted only to the parties, while in others it depends on broadly or narrowly defined legal interests; in some countries it also includes copying, others allow electronic and/or physical access; exceptions vary in terms of type and extent (e.g. confidential data, business secrets). In the Central European, Germanic or SEE legal setting, two different crucial rights are considered:

(1) the »classic« procedural right of the party and others demonstrating a specific legal interest to access the file in administrative proceedings pursuant to the APA;[10]
(2) the substantive right of any applicant to obtain information and documents qualified as public information in various proceedings pursuant to the (FOIA).[11]

Both rights are positive rights, meaning that they are *ex officio* and pro-actively guaranteed by the state (Trpin, 2008: 157, Kotnik, 2010: 14, Gotze, 2012: 4-7).[12] On the other hand,

[8] More on the right of access to file as a lever for effective legal remedy in Slovenia in Šturm et al., 2011: 392-411.
[9] *Resolution (77) 31* defines, in addition to judicial review, five fundamental rights applying in the relations with authorities: right to be heard, access to information, assistance and representation, statement of reasons, indication of remedies. Cf. for Slovenia Androjna & Kerševan, 2006: 76. On development and difference between the right to be heard and access to public information cf. Nehl, 1999: 45 and the following.
[10] Following is an analysis of three similar laws (APA) in Slovenia, Serbia and Croatia:
- Slovenia: *Zakon o splošnem upravnem postopku* (OG of the RS, No. 80/99 and am.);
- Serbia: *Zakon o opštem upravnom postupku* (OG of the SRY, No. 33/97, 31/01, R. Serbia, No. 30/10);
- Croatia: *Zakon o općem upravnom postupku* (OG of the RC, No. 47/09).

[11] Similarly to APA, the analysis covers FOIA (generally named according to the 1966 US act):
- Slovenia: *Access to Public Information Act* of 2003 (OG of the RS, No. 24/03 and am.);
- Serbia: *Law on Free Access to Information of Public Importance* (2003);
- Croatia: *Act on the Right of Access to Information* (2003).

The beginnings of FOIA in the US, as well, are found in the APA of 1946 (notice and comment, cf. Bugarič, 2003: 125, Radaelli & de Francesco, 2007: 32, Trpin, 2008: 153, highlighting such right at the value level).
[12] According to some authors, Article 10 of the ECHR only recognizes a negative right i.e. freedom to receive information, whereby the state may not limit access to information but does not allow individuals to actively

particularly in Scandinavia (Finland or Estonia as a »new democracy«) a single right to know is emerging. The latter (should) include all rights related to openness of administration and transparency of authority (Gotze, 2012: 4, Radaelli & de Francesco, 2007: 188, cf. comparison between Finland, Slovenia and Croatia in Trpin, 2008: 162-167). This is also the direction taken by the European Parliament in its efforts to draw up a single European APA (Ziller, 2011: 13-14).[13] The proposers wish to pass an act sufficiently universal to include convergence standards that are not only legally binding but also culturally acceptable and effectively implemented in all the countries (particularly the EU, cf. Nehl, 1999: 11, Statskontoret, 2005: 34, Peters & Pierre, 2005: 167). Such act should comprise principles of good administration, thus pursuing the openness of administration in various administrative activities – both as regards access to individual files and general access to public information and participation in the regulation of administrative relations.

3. Legal analysis of regulation on access to file and public information in Slovenia

In the Slovenian legal system, access to file is regulated as a set of several entitlements under Article 82 of the APA. The rights enshrined therein are interrelated yet differ in terms of legal basis for material legitimacy (*locus standi*), their nature under substantive or procedural law, the extent of access, enforcement procedure, etc. The main rights are: (1) the right to inspect the file pursuant to the APA in use since 2000 (almost the same since 1923), and (2) the right to public information pursuant to the FOIA of 2003. Both such rights represent the operationalization of the basic principles of the Slovenian Constitution, the State Administration Act (2002), and the APA: openness, publicity and transparency, user-orientation, protection of the rights of the parties, and the right to be heard (Article 5 of the State Administration Act and Articles 7 and 9 of the APA), i.e. the (formal) legality of the work of the administration (Article 120 of the Constitution, Article 6 of the APA). With the FOIA, Slovenia has had a good regulatory framework since 2003 yet the practical impacts of such act depend on its successful implementation and further amendments, mainly as regards the definition of public information and exceptions thereto in terms of legal protection (Pirc Musar in Kovač & Virant, 2011: 229-244). Another key act is the government *Decree on administrative operations*.[14] The Decree is based on the APA and the State Administration Act and is binding on state and local administration bodies and all bearers of public authority. The Decree is an important milestone in the process of reforming the Slovenian administration. It represents the codification of minimum standards of quality that the state is obliged to provide to its users (a kind of *citizen charter*), i.e. general and specific information on administrative proceedings as well as instruments for ensuring responsiveness (book of comments, annual user satisfaction surveys, etc.). Access is limited depending on the nature and extent of legal interest. The competent body must therefore assess legal interest and related rights on a case-to-case basis, under the concept of subjective affectedness. Yet

require information from public law bodies (Šturm et al., 2011: 593). Pro-activity is e.g. defined in paragraph 3 of Article 10 of the EU Code of Good Administrative Behavior. In order to pursue the purpose of open administration, pro-activity is expected from administrative bodies also under Article 10 of the Slovenian FOIA and Articles 20-21 of the Croatian FOIA. However, it is only possible to require access to information or documents that actually exist (in theory known as the criterion of physical form, Prepeluh in Šturm et al., 2011: 599). According to the Slovenian Information Commissioner, for example, in about 10% of the cases examined in 2007 the appeal procedure revealed that the body that had been asked to provide information did not have the required information at its disposal; in 2010 this share rose to over 30%, which means that in the FOIA such right should be expanded (Pirc Musar in Kovač & Virant, 2011: 239). In addition, as much as 64% (!) of appeals addressed on the Information Commissioner in 2011 were filed due to administrative silence, which points to an evident deviation from the regulation and practice in the US or Scandinavia.

[13] An initiative discussed by the European Parliament in 2012 (Ref. D(2012)1899) after more than a decade of debates, following the model of US regulation and case law: a regulation based on participative democracy for legislative and administrative decision-making (cf. Nehl, 1999: 61, 87). As regards empirical and comparative research as grounds for drafting an EU act based on Art. 298 of TFEU see the website of the agency (www.blomeyer.eu) to which the European Parliament's Committee on Legal Affairs in 2012 commissioned the project. In the words of the Parliament the law »*should codify the fundamental principles of good administration*«.

[14] OG of RS No. 20/05 and amendments, following the previous decree of 2001.

restrictions may only relate to the method of access, not the actual familiarization with the relevant procedural documents, and an explicit legal basis should be provided for exceptions (cf. Šturm et al., 2011: 279). Likewise, a recognized right should not be restricted beyond the purpose in a disproportionate manner (e.g. in relation to costs).[15]

The purpose of the APA is to inform the party – i.e. the person whose right, legal interest or obligation toward the authority is being decided on in the proceedings – of the grounds for decision.[16] Quite different is the right of access to public information: according to the FOIA, given the ultimate purpose which is to ensure openness and thus prevent abuse of authority and responsibility, the party is not required to demonstrate legal interest.[17] In addition to the above rights, the Slovenian system provides other related yet autonomous rights of open administration. Table 1 indicates the model applied in Slovenia with the main differences among individual rights. Roughly speaking, two systems of rights to information can be distinguished. The first one encompasses general and public information for all interested persons, while the second includes rights related to specific legal interests in certain proceedings (same in Statskontoret, 2005: 38-43, or Articles 20-24 of the EU Code of Good Administrative Behavior). The two systems are intertwined but should be separated since there are important differences concerning:

- the procedures to which they refer; general and public information refer to all administrative relations, while access to specific information is limited to specific matters;
- the conditions of access; in case of general and public information, an objective definition is to be provided as to which information is classified as general and which is public, and which applicants demonstrate legitimate interest in the subject matter of the required information; in case of specific information legitimacy is linked to the individual legal interest of the party that exists at the time the request for access is filed;
- the type of legal protection; general and public information imply an entitlement under substantive law and thus a broader range of legal remedies, while access to specific information is a procedural issue with limited protection both under APA and in judicial control over the legality of administrative acts.[18]

Table 1: Overall model of legal rights in administrative proceedings in Slovenia

[15] Costs may not be disproportionately high as they would hollow out the right of access. It is therefore wise to set fixed non-market prices, as provided e.g. in Slovenia by the rules issued based on the APA (e.g. setting the price of a photocopy to EUR 0.06) or Article 34 of the FOIA, whereby access to required information is free but the issuing body may charge to the applicant (only) material expenses for producing the transcript, photocopy or electronic document. This is rather important given the growing share of appeals on grounds of high costs (e.g. no appeals in 2009, 10 appeals in 2010, cf. the reports by the Information Commissioner). According to the court, such costs represent regular work expenses of the administration (AC, U 278/2008-23, 20.10.2009).

[16] Once a person is recognized the status of accessory participant, they automatically acquire the right to accede the file. The status of accessory participant and the right to access the file are both linked to the legal interest of such person. Yet such legal interest is not necessarily the same as deriving from the decision of the Administrative Court (I U 347/2012, 15.3.2012). For example, the right to access project documentation in the procedure for the issue of a building permit is granted to the architect to protect his/her moral copyrights, yet the architect cannot acquire the status of accessory participant since such is reserved only to the owners of the real estate affected by the building. Legal interest in such case was explained in detail by the Constitutional Court (U-I-165/09-34 of 3.3.2011), stating that legal interest exists when it is possible to cumulatively establish (1) personal interest, (2) the basis of such interest in substantive law, and (3) existing - i.e. not future or potential - interest.

[17] More on both rights and differences in Androjna & Kerševan, 2006: 224-226, Jerovšek & Kovač, 2010: 111-113. As regards legal interest defined in the sector-specific law as a precondition for access to information, the FOIA provides a broader definition than the Constitution where it is indicated in Article 39 but not specified by law (cf. Šturm et al., 2011: 589).

[18] The trend of considering procedural rules as substantive rules or the blurring of boundaries between the substantive and the procedural nature of a regulation has been present in the EU for quite some time now (cf. Galligan et al., 1998: 29, Künnecke, 2007: 167–172, Rose-Ackerman & Lindseth, 2011: 342). Such shift is evident in particular in the Anglo-Saxon case law where traditional principles and rules of procedural nature are constitutionally protected only based on substantive law, as in Central Europe.

	Rights to specific and individual information					***Rights to general and public information***		
Differences	***(1) Access to file***	***(2) Receiving, serving…***	***(3) Notifying of suspended act***	***(4) Information about parties***	***(5) Access to personal data***	***(6) Information for the users***	***(7) Public information***	***(8) Media rights***
Basic regulation (article)	APA (82/1-3, 5-6, 8) and Decree on Adm. Operations (19-25)	APA (60/4, 63, 82/7,9 and 86, and related)	APA (82/10, in relation to Constitutional Court Act)	Acts on execution (4), courts (95a), residency (18), supervision (24), attorneyship (10)	Personal Data Protection Act (2004)	Decree on Adm. Operations (6-10, 15-18, 26-30)	FOIA (4, 6)	Media Act
Scope	In individual specific adm. proceedings	In individual specific adm. proceedings	In individual specific adm. proceedings	In individual specific adm. and court proceedings	Concerning indiv. info in existing databases	In authoritative procedures and services provided	In general and individual procedures, all	In general and individual procedures, toward all authorities
Subject of assessment of legitimacy	Legal interest of applicant in specific matters	All parties, accessory participants, public representatives	All parties, accessory participants, public representatives	Competent bodies, applicants, executors, attorneys, experts	Person to which data refer	All information on administration, by actual interest	Document/ data, if public, then actual interest	Any information, if there is no exception
Nature of institution	Procedural (substantive)	Procedural (only part of procedure)	Procedural (only part of procedure)	Procedural (only general)	Substantive law (own matter)	Substantive	Substantive law (own matter)	Substantive law (own matter)
Manner of enforcing the request	By the party orally or in writing, by e-signature, demonstration of legitimacy	Possibly party orally or in writing or by e-signature	*Ex offo* within 15 days from suspension	In writing, the burden of demonstrating legitimacy is on the applicant	The party orally before the administrator, with own proof burden of right	Any (in writing, orally, by phone or e-mail)	Orally, in writing or by e-signature, with subordinate application of APA	Orally or in writing, non-formalized
Bodies competent for decision	As in primary adm. and appeal proceedings (line ministry)	As in primary adm. proceedings	As in primary adm. proceedings	Adm. body conducting the proceeding or keeping the data in file/register	Database administrator (also private, e.g. Telecom)	Competent or other body and line ministries	Anyone who possesses info, Information Commissioner on appeals	Anyone who possesses information
Act containing the decision regarding the right	Decision as procedural individual adm. act	Letter (not an adm. act)	No act issued, *ex lege* effect of suspension	Actual act of provision; if rejected, decision acc. to APA (as certificate)	Actual act of provision; if rejected, decision as substantive adm. act	Actual act of provision or letter (not an adm. act)	Provision at oral request; if rejected and at written request, decision	Substantive act; if rejected, individual public law act
Legal protection by law	Non-suspensive appeal acc. to APA, since 2011 appeal to adm./ const. court	No independent protection	No independent protection	No independent protection when granted, otherwise any legal remedy as for decision	Appeal and other remedies acc. to APA, appeal to adm. court, const. court, ECHR	No independent protection, only general report to adm. inspection	Appeal and other remedies acc. to APA, appeal to adm. court, const. court, ECHR	Mixed, partly appeal proceedings until 2011, law suit since the amendment of the law
Scope of right and exceptions	Entire file for the parties, partial for others; incl. data from registers; excl. draft acts and minutes of meetings, also copying except confidential data	Depending on demonstrated legal interest: personal, written or e-communication	Depending on demonstrated legal interest: personal, written or e-communication	Only limited information for carrying out court or adm. proceedings (e.g. residency of the party), personal, written or e-communication	All data concerning a person; physical and e-access, copying	For all information on the manner of operation; not specific data; comprehensible information, personally, in writing or by Internet	Excluded personal, classified, tax, run procedural data, business secret; physical access and copying, entirely or in part by interest check	Non-formalized

The analysis in the table reveals that the system which is to provide for open administration (in Slovenia) is multifaceted. These multiple facets indeed contribute to openness yet at the same time the regulations are neither transparent nor sufficiently mutually consistent, which leads to problems in practice. In the given system, a number of dilemmas arise as to which rights apply in which administrative field. E.g. according to the Inspection Act of 2002, Slovenia distinguishes between a) right to inspect documents according to the APA, b) general information according to the Decree on Administrative Operations, and c) right to informing the applicants pursuant to the Inspection Act. It needs to be stressed that these rights are parallel rather than excluding, with due consideration of the rule that *lex speciali* (e.g. Article 24 of the Inspection Act) *derogat legi generali* (Article 18 of the Decree and Article 82 of the APA). Quite often even in practice erroneous positions arise stating that e.g. the right to information according to the APA is guaranteed if the person is allowed access to the same data or documents as under the FOIA. Yet these two institutions should be clearly distinguished as they are complementary and not excluding or replacing each other. More so – as decided by the Constitutional Court in cases U-I-16/10 and Up-103/10 (20.10.2011) – the right of access according to the APA, despite being decided on as a side right, deserves independent judicial control. The court argued that the right to access the file for persons with legal interest without the status of a party is an independent and *per se* legal right with a specific purpose according to Article 23 of the Constitution. The court defined this institution contrary to hitherto administrative practice and case law, yet still in accordance with the theory and international understanding, as a matter that is independent from the primary administrative proceedings, regardless of the possibility of access to public information. Thus, it introduced double protection under substantive law for both rights with which the party requires access to the same data. The protection of constitutional guarantees in fact should not mean merely a formal and theoretical (procedural) recognition of human rights, but should provide the possibility of their effective and actual implementation and thus more effective (substantive) protection. The future thus calls for improvements in the sense of a more systematic approach, based on the uniform concept of the right to know.[19]

4. Comparing the regulation of rights to information in Slovenia, Croatia and Serbia

All the countries of the EU and SEE strive – at least on a declaratory level – to meet the principles set by public sector scientific theories, the EU law, and the Council of Europe (cf. Gotze, 2012: 2-7, on European Administrative Space Koprić, 2011: 29, specifically for informing the persons concerned and disclosing relevant information Galligan et al., 1998: 20). The countries presented in this paper – Slovenia, Croatia and Serbia – also share historical and development aspects. They all became sovereign and independent in 1991, with a parliamentary democracy that followed the dissolution of former Yugoslavia.[20] On the other hand, there are several differences among them as arising from the comparison of selected criteria in Table 2.[21]

Table 2: Comparison of the regulatory framework concerning the rights to information – Slovenia, Croatia, and Serbia

[19] As cautioned by Pirc Musar (in Kovač & Virant, 2011: 237), in Slovenia there are many laws that stress the importance of openness of administration (e.g. in relation to environment protection or public sector salaries), yet the Access to Public Information Act (i.e. FOIA) is the only act that generally specifies the exercise of the right to information as it defines the obliged persons, the procedure, and legal protection.

[20] Slovenians, Croats and Serbs had lived in a common country since 1918. Before 1918 Croatia and Slovenia were part of the Habsburg/Austro-Hungarian Monarchy for app. 400 years. Until 2006 Serbia acted under the name of Yugoslavia together with now independent Montenegro. In 2008 independence was proclaimed (and is now partly recognized) also by Kosovo with approx. 2 million inhabitants.

[21] Sources (web pages accessed in January 2013): Eurostat, Cia The World Fact book, World Bank (Governance Indicators, WGI), Transparency International (Corruption Perception Index, CPI), Centre for Law & Democracy and Access Info Europe (RTI), official data of respective countries (for Serbia without Kosovo).

Indicators	*Slovenia*	*Croatia*	*Serbia*	*Key similarities and differences among countries*
			General and regulatory rankings	
App. size/popul. (rank in the world)	20 km2 (155th) 2 m (14th)	56.6 km2 (127th) 4.5 m (123rd)	77.5 km2 (117th) 7.3 m (98th)	All three countries are rather small; owing to the economies of scale, they record a general and institutional development with higher politicization, lack of resources and expertise, etc., hence weaker administrative capacities (cf. Koprić, 2011: 14-20)
EU membership	Full membership 2004/5	Acceding country, planned membership 2013/7	Candidate country 2010-	The differences indirectly yet comprehensively show significant gaps in the socio-economic development
2010 GDP per capita (of EU 27 c.)	15,300 EUR (85%)	8,500 EUR (61%)	6,300 EUR (35%)	Evident huge economic gap, particularly Serbia
2011The rule of law & Regulatory quality -+2.5 (perc. rank.)	+1.07 (84th) +0.63 (73rd)	+0.18 (61st) +0.56 (70th)	-0.33 (46th) +0.01 (53rd)	Evident socio-political and regulatory-implementation gap, particularly Serbia
2011Corruption PI (rank/182 countries)	5.9/10 points (35th)	4.0/10 (66th)	3.3/10 (86th)	Evident socio-political and regulatory-implementation gap
2011 RTI on FOIA (rank/93 countries)	130/150 points (2nd)	114 (9th)	135 (1st)	As regards regulatory assessment, Serbia exceptionally ranks first; Slovenia lost a few points as regards implementation (e.g. lack of training)
			Characteristics of open administration and rights to information	
Constitutional ground for rights to information (year when the Constitution was passed, No. of Article)	(1991, 39/2): *Except in such cases as are provided by law, everyone has the right to obtain information of a public nature in which he has a well founded legal interest under law.*	(1990, 38/2): *The right to access to info held by any public authority shall be guaranteed. Restrictions on the right to access to info 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.*	(2006, 41): *Everyone shall have the right to be informed accurately, fully and timely about issues of public importance... Everyone shall have the right to access information kept by state bodies and organizations with delegated public powers, in accordance with the law.*	The constitutional basis is important as it defines the rights to information as fundamental human rights (Pirc Musar in Kovač & Virant, 2011: 237, Šturm et al., 2011: 589). Slovenia and Croatia regulate these rights within the framework of other guarantees i.e. in relation to the freedom of expression, while Serbia introduced a separate constitutional provision with elements of good administration following the EU ombudsman, thus placing greater emphasis on the rights to information. Nevertheless, in terms of subject matter all the three regulations are analogous and expressed by means of a separate law. In addition, Croatia also stresses the principle of proportionality (cf. Constitutional Court case law in Slovenia, Šturm et al., 2011: 578).
(Passed) APA's No. of Art./par. on rights to information	(1999, in use since April 2000) 82, 10 par.: rights within chapter on communication among participants in procedure	(2009, in use since Jan 2010) 11: the principles of access to information and data protection, 84, 4 par.: informing and access	(1997) 70, 6 par.: access and information	The new Croatian law highlights the principle of openness, applying beyond administrative matters (Trpin, 2008: 161); in other countries such rights are considered as rules due to ex-Yu APA (1956); the Slovenian law is the most detailed one; rights are necessarily tied to legal interest and apply in Croatia most broadly, substantively in all administrative acts.
Passed FOIA (No. of all Art)/APA subsidiary use (Art.)	2003 (33) + APA (14, 21)	2003 (30) + APA (9)	2003 (in effect since 04/11, 50) + APA (21, 28)	All laws adopted nearly at the same time although the Slovenian law served as a model to the other two; first in Slovenia, then Croatia and finally Serbia; the extent and implementation of rights are directed towards maximum openness and effectiveness (Slovenia distinguishes between proceedings initiated upon oral or written request); the effectiveness of regulation does not depend on how detailed the regulation is.
State institution as guardian of openness (+data protection)	non-governmental Information Commissioner 2003-, special Act on IC upon openness & data protection, 1,5 mio EUR annual budget, 33 staff	Personal Data Protection Agency, independent legal entity under Personal Data Protection Act	Commissioner as autonomous and independent state body under Personal Data Protection Act&FOIA (29-36)	In order to effectively protect the rights to information, all three countries recommend and define (although not directly under FOIA) (1) a central, yet (2) independent non-governmental institution (cf. Bugarič, 2003: 134), and have (3) openness and data protection regulated by the same body (in Slovenia since 2005 with the merger of the Data Protection Inspectorate).
Scope of FOIA:	All state bodies, local	All »bodies of public	All »public authorities« / »PA	All countries very broadly define the obliged persons, in terms of status

liable to law + appeal & judicial protection	bodies, public agencies, entities of public law, public powers/service holders & contractors +Info Commissioner + adm. dispute (Art. 31 FOIA) and constitutional complaint	authority« with »public powers« +head of this body until amendment of law in 2012 with Agency in the appeal function /administrative dispute (limited)	bodies« +Commissioner /administrative dispute (limited)	and functions, including the courts; the effectiveness of appeal is greater in case of devolution (as in Slovenia compared to Croatia until 2012) and greater competences of the appeal body (the most in Serbia and the least in Croatia); in all countries, final decision is followed by administrative dispute and constitutional judicial protection; Slovenia also allows bodies autonomous agencies to challenge a decision of Information Commissioner (AC U 1676/2003-31, 23.3.2005, CC U-I-303/08-9, 11.2.2010), with lower effect since this is the largest share of appellants.
Scope of access (No. of Art.) /exceptions/ time limits /pro-activity	Free access principle (5) and partial access (7) according to explicit exceptions by FOIA (6) /20 working days /yes (10)	Free access principle (4), exception by field laws and FOIA itself (8) /15 (+ 30) days /yes (20, 21)	Free access principle 5) with exceptions (9-14) /15 (+ up to 40) days /yes (39, 41)	All three countries pursue a proactive approach and the principle of free access where legitimacy is not bound by legal interest (or the latter is presumed); exceptions are interpreted restrictively (Šturm et al., 2011: 605-633); in terms of effectiveness of the rights and transparency these should better be defined in the FOIA; in the event of violation of deadlines, all countries allow appeal on grounds of administrative silence.
No. of appeals in 2011	857 (549=64% due to 1st instance body silence), 588 in 2010, specifically on FOIA 2009/10/11: 161, 206, 251, app. in 09-11 35% denied	494 (of 51,930 of all claims on 1st instance)	over 3,000 in 2011, 2,900 in 2010, yearly average 1,494 in 2005-11	The number of appeals varies yet evidently grows over the years; all countries report problems of administrative silence; an important task of competent bodies is thus to issue different opinions.

In all the above countries, the regulatory frameworks are among the most modern in the world, both in terms of the general definition of rights and the broad(est) application of provisions regardless of the institution, policy or sectoral law (Ziller, 2011: 10-11). Yet despite their similarities and high rankings on international comparison scales, the countries present significant differences. On one hand, Slovenia and Croatia share many commonalities, which can be attributed to the ongoing processes of Europeanization, although given the wars and the macroeconomic position a better result would be expected from Slovenia (Koprić, 2011). On the other hand, Slovenia is indeed more successful than its two counterparts since it was the first to adopt and apply FOIA and set up the relevant commissioner, and displays a higher degree of procedural and judicial protection of the applicants. In all the above countries – and in (South) Eastern Europe in general – a dual gap is evident, namely (1) between abstract regulation and implementation, and (2) between classification of countries according to general indicators and the assessment of regulation. Slovenia, for example, thus ranks first according to socio-economic indicators but its regulation is rather obsolete. More recent regulations, such as the Croatian APA or the Serbian Constitution, are more consistent with the EU concept of good and open administration yet their political and legal framework is valued less than Slovenia's.[22] It may thus be concluded that the regulatory framework is a necessary and stimulating yet not sufficient factor of development of open and good administration. Democratization is a long-running process and in assessing governance, a distinction needs to be drawn between regulatory framework and actual implementation.

[22] The latter is demonstrated by Serbia's score in access to information according to RTI rating, where it ranks 1st among 93 examined countries, yet at the same time it only ranks in the middle of all countries in the world in terms of corruption and the rule of law, and rather low in terms of economic development. Galligan et al., 1998:19–25, argue that the rule of law and the role of administrative law in (post)Communist countries were formally established in the sense of administration being at service of the people, while in practice they only serve as a tool to ensure partial interests. In comparing the *in abstracto* regulation, it needs to be underlined that transition EE countries are characterized by a gap in the implementation of laws and reforms (cf. Dunn et al., 2006, for Slovenia Kotnik, 2010: 13, Kovač & Virant, 2011: 69, 104, for Croatia Koprić, 2011: 18). According to RTI, all seven countries formed on the territory of former Yugoslavia that adopted modern FOIA after 2000 have, as a group, a comparably large number of points, similarly to the CEE region. At the same time, countries with long democratic tradition scored less (e.g. Denmark ranks 78th, USA 39th). The implementation gap is thus more evident when comparing the »new democracies« with traditional democracies than when comparing among the countries of the same group, e.g. Slovenia (1st), Croatia (2nd) and Serbia (3rd).

5. Key elements of rights to information in praxis in Slovenia, Croatia and Serbia

The cases stated in this paper reveal several important guidelines in responding to the questions as to who has the right to information, what is the extent thereof and in what manner can such right be asserted. Mention needs to be made in particular of the necessary interpretation of rules in the context of the basic principles of constitutional and administrative law (cf. Venice Commission, 2011: 15-17, 21, Ziller, 2011: 10). This applies at the national or EU level (cf. for some cases Gotze, 2012: 3-6, e.g. concerning social security, health care, residency, or personal data protection). The same principles should be observed not only in classic executive and administrative decisions based on legality and the separation of powers, but even more in legislative administrative acts because of their (also discretionary) indefiniteness (Bugarič, 2003: 120, Nehl, 1999: 61). Therefore, administrative bodies, particularly in the first years after the adoption of the FOIA when doctrine is being put in practice (see cases in 5.2), should have acted *in dubio pro reo*. In such context, *res* means common good – the rule of law with an open administration, which (particularly) in extreme situations gives priority to individual rights rather than aggressive authoritative posture, even if the latter may imply apparently more effective public policies.

5.1 Rights under APA and FOIA in Slovenia – major dilemmas and decisions

In Slovenia, the most classic among the rights – i.e. access to (administrative or other) documents in individual administrative matters – is not an explicit constitutional provision or a legally defined principle, except the general right to information based on legal interest in accordance with Article 39 of the Constitution and the FOIA. Thus, it is often erroneously assumed that access to file under Article 82 of the APA – when the party's interest is unambiguous – is merely an operational technical rule. Yet according to Slovenian constitutional practice (cf. Kovač et al., 2012: 165-205), the right to inspect documents is understood as a component of effective legal protection or defense against authority. Otherwise, it would imply a violation of the principle *audi alteram partem*. The latter is, in addition to impartiality, the key element of democracy in any public law matter, even if autonomous special regulation exists or the obliged persons are non-administrative bodies (e.g. courts).[23] Such right is also an expression of personal dignity, generally and directly related to the constitutional right to use one's own language (Articles 11 and 62 of the Constitution, Šturm et al., 2011: 939), which also refers to persons with disabilities. Based thereon, the Constitutional Court in case U-I-146/07 (13.11.2008) established the presence of elements of discrimination concerning blind persons, and all procedural laws in Slovenia had to be supplemented. The new regulation was introduced by the 2010 Equalization of Opportunities for Persons with Disabilities Act, which inter alia provides that blind persons should be guaranteed the most appropriate communication before all courts, administrative bodies and public service providers (e.g. insight in Braille).

But the right to information is not absolute, and a few restrictions apply both under APA and FOIA as well as under sector-specific laws. Given the importance and purpose of such right, however, restrictions should be interpreted in a narrow sense. In sector-specific regulations, access to documents can be restricted in terms of implementation and not in its core sense.[24] The beneficiaries are determined depending on the substantive legitimacy of rights, legal interests and obligations that are being asserted in administrative proceedings. If the legal basis or interest in the primary matter is unambiguous, the same applies to the necessarily corresponding right to access documents in such matter. Two of such restrictions are provided directly by the APA (paragraphs one and six of Article 82) and apply in all matters.

[23] According to the Administrative Court case I U 638/2010, 21.2.2012, the party must be guaranteed basic rights of defense even if such only implies the mutatis mutandis application of the APA in e.g. procedures concerning a university or NGOs financing. As regards the courts as obliged persons, case law is inconsistent (Kovač & Virant, 2011: 241, e.g. acc. to AC R I U 658/2009-10 the local court is obliged to forward a document from a final criminal proceedings based on the FOIA, while according to AC I U 150/2009-10 (8.12.2010), in a labor proceeding the same court decided that access (or not) is provided exclusively by a sector-specific act.

[24] E.g. FOIA does not *a priori* exclude any type of information (Prepeluh in Šturm, 2011: 598); thus, a restricting regulation pursuant to a special law, e.g. Public Procurement Act, cannot serve as basis for absolute exclusion of access, but several rights and interests must be taken into account.

First, based on the protection of public interest the parties or other legitimized persons have the right – in the event of documents containing confidential data[25] – to merely see such documents, but are not allowed to transcribe or copy them. Second, due to the interests of the course of proceedings, there are two types of administrative documents which are not accessible neither to primary parties: minutes of consultation and voting and draft decisions. Likewise, the APA in its general restrictions does not specify the rights of other persons to non-disclosure (e.g. of personal data), which is otherwise a characteristic of similar rights, particularly under the FOIA. A situation of contradictory legal interests is also possible, for example if minors wish to accede the file e.g. to defend themselves from their parents as there might be a conflict of interests between the minors and their statutory representatives, and by analogy between legal persons successors and their predecessors concerning industrial property rights. As arising from the practice of the Constitutional Court, violation of the right of access to documents established at this level is not frequent. The Constitutional Court for example argued (Up-220/05, 29.3.2007) that the right to information or access has some restrictions which, however, are to be interpreted restrictively even according to the European Court of Human Rights as they apply only to the manner of access and not to the actual familiarization with the relevant procedural material, or access is denied only to a small amount of data that have no effect on the decision. In the same context the Supreme Court decided that access to the content of the file and production of duplicates of documents is allowed already under the APA, and in appeal proceedings the court is not obliged to deliver the administrative file to the plaintiff (X Ips 1674/2006, 12.9.2007). Moreover, the Supreme Court (I Up 251/2002, 13.10.2004) stressed that the subject of the review of legality concerning the actions by the administrative body is limited to the question as to whether a plaintiff that is in some way related to the party can accede to administrative files if there are grounds for decision that the plaintiff, as a minor, can also participate in the proceedings as a party.

Another frequent question is how a body should act when the parties wish to accede the documents of the case when such is already closed and final and has already been moved to the archives (e.g. after ten years), since the APA does not specify until when such right applies, or if the body has introduced a certain restriction by internal rules on documentary material. The opposite applies (Kovač et al., 2012: 206): if the APA does not provide otherwise and if material legitimacy to accede the file is unambiguous, i.e. the person has been granted the status of a party in the proceedings or has demonstrated legal interest in any other way; such right is not limited in time. It can only be limited by a sector-specific law that is superior to the APA, if in specific cases such was reasonable or proportionate to the protection of the rights of other persons (e.g. access by an adoptee for only a few years following adoption or age of maturity). More so, in relation to legal remedies the APA explicitly provides that legitimate persons enjoy such right even after the finality of the case (e.g. renewal of proceedings in three years, Article 260 of the APA). Documents concerning administrative proceedings are kept permanently due to external legal effects of administrative decisions, and a body's internal rules relating e.g. to preservation may refer only to matters not specified in the APA, not *contra* or *praeter legem*.

In general, there is a decreasing trend as regards the share of Information Commissioner's decisions challenged in front of the Administrative court, with 16% in 2009 (26/161), 15% in 2010 (31/206) and 13% in 2011 (33/251), despite growing rate of appeals. In 2009 and 2010 most court actions were denied (12 in 2009, 16 in 2010) with 17 actions found as grounded opposed to 14 denied in 2011. In sum app. 52% of Commissioner's decisions in 2009-2011 were confirmed (2009: 70%, 2010: 52%, 2011: 39%). A stable practice can be acknowledged with evidently higher awareness of parties to act upon their interests.

5.2 Key decisions of the Slovenian, Croatian and Serbian appeal agency under FOIA

Considering the similarities in the legal system and social development as well as common

[25] According to the Classified Information Act (OG RS No. 87/01). The provisions of APA were expanded in 2004 since according to the Constitutional Court (U-I-98/91, 10.12.1992) full restriction of access cannot apply at least to main parties.

political heritage, the three selected countries, particularly as regards public information, naturally face similar problems. These are evident in appeal and quite often also court proceedings. E.g. 13% of decisions issued by the Information Commissioner were challenged before Slovenian courts in 2011, with 52% of rulings from 2009-2011 confirming prior decisions. Most dilemmas arise in relation to:

- the system: distinction between rights to information, particularly those according to APA and FOIA, and media rights (media often require information pursuant to the FOIA rather than the Media Act);
- the procedure: the status of the parties in administrative relations or proceedings (who is the beneficiary, who is the obliged party[26] (app. 37% of all cases in 2009-2011 in Slovenia) and who is an accessory participant, who may challenge a decision at court under the FOIA (app. 30 cases annually, that is 13% in 2009-2011 in Slovenia));
- substantive law: what is the subject matter of and what are the exceptions to access to information (under the APA and FOIA; app. 56% of all cases in 2009-2011 in Slovenia, mostly on personal data and business secrecy, but decreasing due to stable practice).

In order to correctly interpret which information is accessible to the parties, it is necessary to carry out proportionality checks and weigh legally protected categories. The most frequent exceptions include the protection of personal and protected data and of business and tax secrets. In all three countries, appeal bodies consistently observe international praxis and the findings of the more experienced (e.g. the Slovenian Commissioner since 2003), and comprehensively explain their decisions. Public expenditure is one of the key criteria of disclosure, e.g. also as regards government procurement from private providers or social subsidies. The control over budgetary funds has priority over the protection of personal data of beneficiaries of social assistance or business entities, since it is otherwise impossible to achieve the purpose of the FOIA, i.e. democratic control over legal and reasonable conduct of (administrative) authorities.[27] Personal data should be an exception also when it comes to salaries and appointments of public employees in Slovenia. However, the Information Commissioner, the Administrative Court and the Supreme Court (IC RS 090-54/2009, 15.7.2009, SC RS X Ips 252/2009, 8.9.2009) developed a uniform practice to determine which personal data of public employees are protected and when priority is given to public interest (e.g. to control budget expenditure). The case concerning public employees' salaries also led to the position whereby the actual providers of the required information (i.e. municipal officials) do not have the status of a party in the proceeding. On the other hand, the courts recognized such status to companies involved in public procurement.[28] Despite some differences, the inconsistency of interpretation of legal interest in positions that the APA considers similar should be critically evaluated. The protection of sensitive data is one of the most frequently justified exceptions in all the three countries, be it personal data e.g. in the request to accede to electoral registers, copyrights on contract documents for the construction of bridges, or confidential data of e.g. security and intelligence agencies.[29]

[26] The obliged persons should be interpreted broadly. They even include e.g. the Slovenian Motorway Company (IC RS 021-83/2007, 1.2.2008) or public radio-television in Croatia (567-06/05-12-02, 9.7.2012), since they carry out public tasks or provide public service and are financed from public funds.

[27] Cf. decision by the Slovenian IC (090-190/2012/14, 30.10.2012) concerning the purchase of speed radars in a municipality or the Serbian IC concerning the campaign Let's Do It Serbia (07-00-297/2011-03, 6.4.2011), or purchase of vaccines in Slovenia (090-161/2009/15, 22.1.2009) and Serbia (07-00-32/2010-03, 2.2.2010), or hiring attorneys in Croatia (567-06/05-12-02, 9.7.2012). On the other hand, it needs to be underlined that sector-specific laws in individual countries are not identical; thus, for example, tax secrecy in Slovenia is deemed an absolute exception to access to public information, while Serbia weighs between disclosure and protection. Cf. case 07-00-02834/2011-03, 5.12.2011, when the tax administration had to deliver to the applicant data on 50 largest tax debtors in terms of employee social security contributions, since the obliged body did not demonstrate any serious legal consequences that could serve as basis for rejecting disclosure.

[28] IC RS 021-18/2005/14, 5.10.2005, AC RS U 2409/2005-20, 30.3.2007, and e.g. in relation to a construction company that also had the status of a party (IC RS 021-83/2007, 1.2.2008, AC RS U 284/2008-35, 22.6.2009). These cases reveal an additional problem since unsuccessful competitors use FOIA to apply for information and challenge the selection of the provider, although there is no interest for information aimed at common good.

[29] E.g. in Croatia, concerning personal data cf. agency decision 567-06/05-12-02, 25.6.2012, copyright cf. case 567/06/01-11-02, 6.4.2011, and confidential data cf. case 567-06/01-11-03, 26.4.2011. The Information Commissioner in Slovenia - which under the Classified Information Act even has the authorization to delete an

Another interesting question is the abuse of the right to information, which is also often observed e.g. in Slovenia. In 2006, the Information Commissioner rejected the appeal by a party claiming about 30,000 documents, stating that such represented an excessive administrative burden for the obliged (maritime) administration. Later on, the court argued that »heavy workload« was not a justified exception pursuant to the FOIA, and that the obliged body should allow access also if it had to cover the excluded personal data among the large quantity of documents (IC RS 021-40/2005/5, 17.1.2006, AC RS U 92/2006-8, 8.11.2007). When – as regards the manner in which a request for information is presented – the applicant exceeds the given procedural entitlement and tries to burden the body with excessive work while also infringing upon the dignity of the body and of official persons,[30] the right should be rejected, although such cases are to be interpreted restrictively. Finally, mention needs to be made of the execution of decisions issued by supervisory bodies and concerning access to information, since direct execution or repression is not possible given the nature of the matter. Authorized institutions may encourage the obliged persons with adequate argumentation and the creation and publication of *de facto* precedence decisions, although the FOIA also provides for procedural sanctions. Most often, the reputation of the commissioner/agency and indirectly public pressure on the obliged bodies are also effective.[31] In all the selected countries, commissioners and agency have user-friendly websites to effectively pursue their mission. This implies in particular raising awareness among the public at large and preventing violations and avoidances of open and good administration.

6. Conclusion

The importance of open administration within the context of good governance is more than a procedural issue since it reaches the value or ethical level of authoritative legitimacy and democracy. In Slovenia - and (S)EE, the gap between the publicly presented political agenda and legal regulation on one side and implementation on the other is significant in all social relations. This is due to several factors, such as post-socialist processes still taking place, the recent neo-liberalist incentives, the economic crisis and lack of resources as an excuse for not running some prescribed and even established procedures. There is also a significant amount of fear to take personal accountability or connections exposed with a domino effect if one should start answering for maladministration and its covering up. The openness and transparency within government and administration are therefore in general in (S)EE seen as great democratic values, most respectable as an abstract goal but very often not implemented when challenged in concrete issues. In order to improve the situation, a multifaceted approach is needed, from legislative amendments and reorganization of the administration to raising awareness among political appointees and officials as public servants, as well as users. As for the concepts of openness and transparency becoming the tool and result of sustainable governance in EE, there is first a need to understand public governance as partnership and network among societal subgroups. Legally speaking, a radical shift could be achieved with an integral understanding of the rights of the parties in administration concerning information in their own case or matters that at least indirectly affect them. *De lege ferenda* it would be reasonable to combine the detailed and almost formalistically defined systems of rights of the parties in administrative proceedings to access the file and of persons requiring public information into a single basic principle of the right to know. Legitimacy for such would be broader than today's dependence on legal interest being directly and actually affected, while the right would be expressed at all levels of relations with the administration, not only in individual administrative matters. To effectively implement the purpose of open administration under good governance, the initial hypothesis expressed in

unjustified designation of secrecy – dealt with several similar cases. Protected exceptions are thus evaluated by actual content rather than purely formal characteristics.

[30] Case IC RS 090/117/20212/3, 20.6.2012, when the party filed 69 requests for information within 5 months (even 5 per day), containing serious insults. This does not allow for the democratic supervisory function of FOIA and APA but rather the opposite – the applicant sets barriers to the body's effective work.

[31] Cf. for example the decision by the Serbian Commissioner (07-00-465/2010-03, 7.4.2010, 07-00-879/2010-03, 1. 6. 2010) concerning the construction of an oil refinery against the obliged municipality.

the survey of selected SEE countries has been confirmed, namely that it would be reasonable to regulate the rights following EU trends. Given the results of the analysis, at least on a medium run rather than focusing on regulations more attention should be devoted to the development of general democratic culture of all participants in administrative relations, since otherwise the law – as exemplary as it is – will not be effective.

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