Access to court records and FOIA as a legal basis – experience of Slovenia

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Introduction

Access to information of public character is regulated in Republic of Slovenia by Act on the Access to Information of Public Character (FOIA)[1], which has introduced since 2003 the principle of openness and transparency to all the three branches of authorities: executive, legislative and judiciary. Republic of Slovenia therefore has a uniform regulation of access to public information which is exposing to public scrutiny the judiciary in whole not just its administration or so called court management. The exceptions to freely accessible public information are therefore regulated accordingly and exhaustively listed in FOIA[2]. According to regulation such an exception is for example the information which was acquired or assembled for the purposes of criminal prosecution or in relation to it or for the purpose of violation procedure and the disclosure of which could impair their execution. Equally the regulated exceptions are the information which were acquired or assembled for the purposes of administrative procedure and the disclosure of which could impair its execution; and the information which were acquired or assembled for the purposes of civil procedure, non-contentious proceeding or other judicial proceeding and the disclosure of which could impair their execution.

Short comparative overview of legal regulations is presented in the table below.

Table: EXCEPTIONS CONCERNING JUDICIAL PROCEEDINGS WITH REGARD TO ACCESS TO INFORMATION OF PUBLIC CHARACTER (IPC)

COUNTRY	COURTS EXCLUDED FROM ACCESS TO IPC	JUDICIAL PROC. ARE REL. EXCEPTION	JUDICIAL PROC. ARE ABS. EXCEPTION	PRE-CRIMINAL PROCEEDINGS AS EXCEPTION
1. Austria	No	Yes	No	No
2. Belgium	No	No	No	Yes, REL
3. Czech Republic	No	Yes	No	Yes, REL
4. Denmark	No, criminal part only	Yes	No	Yes, REL
5. Estonia	No	Yes	No	Yes, ABS

1 Official Gazette RS; No. 51/06 – official consolidated text and No. 105/06 – ZUS-1, hereinafter FOIA.
2 All the exceptions are indicated in the First Paragraph of Article 6 of FOIA.

COUNTRY	COURTS EXCLUDED FROM ACCESS TO IPC	JUDICIAL PROC. ARE REL. EXCEPTION	JUDICIAL PROC. ARE ABS. EXCEPTION	PRE-CRIMINAL PROCEEDINGS AS EXCEPTION
6. Finland	No	Yes	No	Yes, REL
7. France	No	Yes	No	Yes, REL
8. Germany	Yes	Yes	No	Yes, ABS
9. Greece	No	Yes	Yes	Yes, REL
10. Hungary	No	No	Yes	Yes, ABS
11. Ireland	No, court records are excluded – court administration is included	No	Yes	Yes, ABS
12. Italy	Yes	No	No	Yes, ABS
13. Latvia	Yes	No	No	Yes, ABS
14. Lithuania	No	No	No	Yes, REL
15. Malta	Yes	/	/	/
16. Netherlands	Yes	No	No	Yes, REL
17. Poland	No	Yes	No	Yes, REL
18. Portugal	Yes (“secrecy of justice are protected under special legislation”)	Yes (“postponed until the decision has been taken”)	No	Yes (regulated by regulations outside the IPC system)
19. Slovak Republic	Yes, court administration is included but not the 'decision making' process)	No	Yes	Yes, ABS
20. Slovenia	No	Yes	No	Yes, REL
21. Spain	Yes	/	/	/
22. Sweden	No	No	Some (taxes, e. g.)	Yes, REL
23. Great Britain	No	No	Yes (court records are an absolute exception)	Yes, ABS (court records are an absolute exception)
24. EU	Yes	/	/	/

It becomes evident prima facie from the comparative analysis of legal regulations that these are divided to those where the courts as public bodies are excluded from the system of access to public information (Spain, Slovak Republic, Portugal, Netherlands, Malta, Latvia, Italy, Germany, European union) and those where the courts are included in the system as are other bodies of the public sector (Great Britain, Sweden, Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Lithuania, Poland …). The existing arrangement in Republic of Slovenia follows the second approach to regulation of access to public information which currently prevails globally. This arrangement comparatively prevails in the European legal area since the goal of modern regulation of the access to information of public character is integrated and systematic transparency of all the three branches of authorities: legislative, executive and judiciary. The courts as representatives of the judiciary are in regulations of this type included among the bodies liable to provide access to public information and can be further divided to two groups of regulations: those where the courts are included in whole and those where some or specific court actions are either excluded from this system (Great Britain, Slovak Republic) or regulated in other laws outside the area of access to information of public character.

The subject of protected exemption referring to criminal prosecution or individual court proceedings is the protection of public interest. Each exemption to free access to public information, including the previously mentioned can be either relative or absolute in nature. It is absolute when access should always be refused; and relative when the access should only be refused if the public interest protected by it is greater then the interest of the public to disclosure. In most of these systems also when the exemption is of absolute nature the harm test should be met to estimate the damage which would incur to the protected legal entitlement by disclosure of specific information. In case of the relative exemptions the test of prevailing interest of the public exists by which the danger of menacing serious damage to protected legal entitlement and the public interest for disclosure of specific information are balanced.

Comparative legal analysis shows that almost all the systems which include courts as liable bodies in the context of access to public information, protect execution of proceedings related to detection of criminal acts and proceedings of criminal prosecution as special exemptions to free access to public information thus protecting public interest to detection of perpetrators of criminal acts[3]. The Recommendation (2002) No. 2 of the Council of Europe needs to be mentioned here which specifically defines »the prevention, investigation and prosecution of criminal activities« as legitimate reasons for limiting access. Also the Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents which excludes the courts from this system defines that access to documents whose disclosure would hamper the purpose of inspective, investigative or accounting activities should be refused. It is important to note here that the EU bodies do not deal with the criminal prosecution in the same way as individual member states. Finally we

[3] Those systems which exclude courts from free access to public information regulate the publicity of their work in special regulations as the pre-trial proceeding should not be totally excluded from the context of access to public information. This proceeding is primarily in the domain of investigation bodies, namely the prosecution and police. As these are repressive bodies, their work needs to be included in access to public information in a systematic way representing also one of the forms of control (in the sense of scrutinizing function of the right of free access to public information), while at the same time the possibilities for their effective work need to be continuously ensured.

need to mention the fact that the draft proposal of the Convention on access to public information which is being drafted by the Council of Europe, does not envisage inclusion of the judiciary as a whole but only its administrative part – court management, while the inclusion of the whole judiciary in the draft remains only one of the possible options[4].

Regulation in Slovenia

It is worth noting that the exceptions which protect the criminal prosecution and judicial and administrative proceedings cumulatively define two conditions which should be fulfilled for the exception to be effective:
1. The proceeding must be in progress,
2. The disclosure of information would hamper the execution of the proceeding.

The legislator in passing FOIA, where the term criminal prosecution is used, allowed the possibility to include under protection all the information from all phases of the criminal prosecution. This exception is in part covered also by another exception, namely FOIA protects from disclosure also the information acquired or assembled for the purposes of civil, non-contentious or other judicial proceeding, thus also criminal. The use of one or the other exception depends on the estimation of the liable body from which the information is being requested and on the phase in which the criminal proceeding is.

Exceptions whose purpose is protection of judicial proceedings require the use of so called harm test, according to which the body deciding against the disclosure of the document has to prove that the disclosure would affect the protected legal entitlement or that specific damage would occur in execution of the judicial proceeding. The threat has to be real not just hypothetic. The liable body is therefore entitled to refuse the access if the disclosure would jeopardize the execution of specific actions in the proceeding in such extent that they would become impossible or their execution would become harder or disproportionately more expensive or difficult. The body should for example prove the likelihood of the fact that the disclosure of documents in specific court case would endanger specific judicial proceeding. The harm test must be met in each individual case by the body which has to prove *in concreto* the occurrence of damage. It is often noted by the courts that the transmission of a judgment which is not yet final could have an affect on the decision of the court of appeal however they do not concretely specify what sort of damage would consequently occur. This hypothetic assertion of occurring damage without concrete implementation of the harm test does not meet the required proof of existence of the exception. As the court hearings are public, the journalists attend and comment or report especially from the hearings of greater interest to the media. Freedom of information and developed public opinion are extremely important in preventing abuses and in democratic implementation of state authority thereby also of judiciary. Accordingly these subjects are discussed also outside the courts in public opinion which should not affect the expert work of the judges and their independence and impartiality. On the contrary this threat should not be a reason for limitation of the access to information. If the court would not be able to ensure objective, professional

[4] We are referring to the draft text of the convention, which is being prepared by the group of experts from 15 European countries; Republic of Slovenia as one of the members of the Council of Europe and a member of the group of experts has strongly opposed to such regulation of the scope of liable bodies in relation to access to public information.

and impartial trails in cases of different pressures in particular with the cases which get more media attention, this could lead to violation of Art. 23 of the Constitution of the Republic of Slovenia which guarantees to everyone to have an independent and impartial court constituted by the law without undue delay deciding on his rights, duties and allegations brought against him. Many other public officials or functionaries are exposed to such pressures and it is (reasonably) expected from them to provide expert, independent and impartial exercise of their duties. Refusal of access to judgments which are not yet final solely because this could affect the decision of the court of Appeal does not meet the requirement of serious legal assessment.

It is important to note here that the documents contained in specific pre-criminal or court records include information which are also subject to other exceptions to freely accessible information the most frequent one being the exception of protected personal data in accordance with the Personal data protection Act[5]. Concrete record might therefore contain also other exceptions which are intertwined with the freely accessible information. In evaluating the accessibility of individual documents the starting point should therefore be the principle of ensuring the highest possible level of accessibility to information while the main principle of FOIA is the principle of openness and thus the aim of the law to ensure the public to be informed in the best possible way. Through provisions providing for partial access in accordance with Article 7 of FOIA access to that information should be granted which could be extracted from the document without affecting its confidentiality and taking into account the reasonableness, reasonable time requirements on necessary input of administrative work and standards developed by the European court of Justice in Luxemburg. These are the arguments that prove the fear from exceeding disclosure of personal data or information in relation to the protection of judicial proceedings as ungrounded.

From the practice of the Information Commissioner

According to FOIA, each piece of information originating from work sphere of the body is considered as information resulting from performance of public law tasks or in relation to activity of the body. Information of public character must have been formed in the course of the activities of the body or procedures that fall within the competence of the body. If the first condition is fulfilled, the information of public character can relate to any content of any area of activity of the liable body and can be related to its policy, activity and decisions that fall under the sphere of activities or responsibility of the respective body.

The exercise of the authority of the judiciary which includes trials in specific civil affairs also represents a part of the public law tasks of the body and therefore falls under the sphere of activities of the body. Should it be ascertained in the appeal procedure that the requested document exists, that the body is in possession of the document and that the requested information derives from the work sphere of the body, the basic criterions for existence of information of public character are fulfilled. For that reason, individual documents from court records, such as transcripts of public hearing, orders, decisions and judgments, fulfil all the requirements for existence of information of public character.

[5] Official Gazette RS; No. 86/2004,113/2005, 51/07 – ZUstS-A and 67/07, hereinafter ZVOP-1.

In practice the distinction developed between the right of access to court records under the procedural law and right of access to information of public character under FOIA. Courts as liable bodies have frequently rejected requests for assess on account of procedural law provisions, under which the parties have the right to examine and transcript separate records in which they act as parties. Other persons may be allowed to examine and transcript separate records, but only if they can demonstrate legitimate benefit. In this manner the courts weigh, whether the applicant has legal interest to obtain specific information and the requests for access to information of public character get regularly rejected, despite the fact that FOIA specifically enshrines the principle of free access to information of public character.

Such interpretation of FOIA is according to the Information Commissioner's practice considered inappropriate. Provisions of procedural laws that regulate the right of access and transcription of records are not in relation *lex specialis derogat legi generali*, since they do not regulate the same right. Provisions of procedural laws relate to right of clients in a judicial procedure, i.e. the right of a person who has demonstrated legitimate benefit, to access and transcript of records in a specific court case, whereas FOIA regulates the right of anyone to access different documents – information of public character, that are at the disposal of the bodies. It is about different legal grounds and regulation of two different rights – on one hand the right of access to information of public character, under Para. (2) of Article 39 of the Constitution of the Republic of Slovenia, and on the other hand, the right of clients and other beneficiaries to access and transcript records, which is – enacted under the right to equal procedural guarantees – guaranteed by Article 22 of the Constitution. Right of access and transcription is concretisation of constitutional provision on equal protection of rights, which obligates the legislator to regulate specific judiciary and other proceedings in such manner that everyone is equal in his rights in equivalent situations in a specific proceeding or in other words that the same standards of legal protection are guaranteed. Opposing parties should therefore have equal possibilities to assert their rights (i.e. adversarial principle), and therefore also equal possibilities to access and transcript of court records, which enables the clients to get familiar with the facts and evidence put forward by the other party or in possession of the court. The above means that the right of access and transcript of records guarantees the adversarial principle in a judicial proceeding and not the principle of publicity.

When adopting its decisions in cases on access to information from court records, the Information Commissioner has taken the standpoint, that access to information of public character is a constitutional right and that the body should deal with the request according to the law regulating the exercise of this right, i.e. FOIA. The procedure of access to information of public character is a procedure in which it is being decided about an administrative issue and is therefore not a judicial procedure. The object of protection or right, regulated by such procedure, is completely different. In the procedure of deciding on the request official of the body, responsible for access to public information, is required to act in accordance with the provisions of FOIA, which stipulates that if FOIA does not regulate a specific question provisions of general administration act are applicable, and not the provisions of a procedural law (such as criminal or civil procedural law). The procedure of deciding upon access to information of public character is a procedure of administrative nature. The objects of protection are two different constitutional rights, which do not exclude one another.

The question of access to public information must be assessed in each individual case separately on a case by case basis and in doing so it is not necessary that each piece of information of public character

is also publicly available. It should be noted that the law managing the conduct of courts specifically regulates that the notice board of the court is *inter alia* used for publication of hearings and sessions of which the parties in proceedings have to be notified and in which the public is not excluded either by law or following the decision of the court. All information from the notice board of the court may be published also in electronic form in such manner that provides for public access (e.g. on the internet). These data contain the reference number of the case, case type, date and hour of the hearing or session, data on location and room where the hearing or session will be held of which parties are to be informed, name of the judge or senate president judging in the case and personal name of the parties in proceeding. Other writings may be published as well if this is provided for by the law.

This provision is also applicable in cases, when the complaining party does not notify the court of the change of his address and the court rules that all the following notifications should be carried out by publishing them on the notice board of the court. Such circumstances may arise as soon as the action is filed when the court, provided that the action is incomplete, calls upon the complaining party, to correct the action. If notification at the address of the complaining party is not successful, the court may order that all further notifications are notified by publications on the notice board of the court. The decision to correct the action as well as the decision rejecting the action that follows the first decision if the complaining party does not correct the action in the set time period may thus be published on the notice board of the court. Each decision contains in the introduction several of the pieces of information that are asked for by the applicant: the address of the court, the names and surnames of the president and members of the senate, the name and surname and address of the party and a short declaration on the disputed subject of the case. All decisions of the court must be equipped with the reference number of the case in the upper right hand corner of the decision so that each decision that is attached to the notice board of the court clearly identifies the reference number of the case. All this data may be published by attaching them on the notice board of the court before the summoning of the hearing and their publication is not tied to a certain phase of the procedure and therefore they do not represent protected personal data.

Conclusion

The right of individuals to have access to the records and the right of access to public information are not rights which would be in collision or which would exclude each other. However for implementation of these two rights two different proceedings exist thus the public official of the body responsible for deciding in a matter of request for access to public information is deciding according to FOIA as this is an administrative matter. The question of access to public information should be decided separately in each concrete case and for each document. The position taken in the judgments of Administrative court of Republic of Slovenia[6] are to be understood in light of this, namely FOIA as general law and sector specific laws regulating access to public information are equal. These positions should however in no way be understood as an additional condition regulated in procedural laws neither is it possible to request additional proof of justifiable interest or benefit for granting of access to information from court records.

[6] Sodbe opr. št. U 1676/2003 z dne 23.3.2005 in U 965/2004 z dne 30.3.2005.

It is important to mention that not all the information from court records are necessarily subject to free access and third parties who are not parties to the judicial proceeding might be more likely to get access to court records and documentation then parties to the proceeding who have to prove their legal interest to be granted access. The right of the parties to have access to the court records namely refers to the *entire court record in concrete case*, however in a proceeding regarding a request for access to public information which would be referring to entire court record, *each document from the record* would have to be evaluated separately. The right of a third party who would file a request for access to public information referring to all the documents from specific court record could under no condition be "equal" or stronger then the right of a party in the proceeding to examine specific court record. Each court record includes at least personal data of the parties or accused, of person suffering damage, of witnesses and potential other participants, the disclosure of which would be in violation of personal data protection standards as regulated by the act governing the protection of personal data. This would be also a ground for exception to free access to public information, based on which the body would refuse access to requested information to the applicant. This means that a third party who is not a party in judicial proceeding can be given only specific, therefore partial, parts of the court record by implementing the right of free access to public information therefore he is in his right not equal to someone who has proven his legal interest to be granted access to entire court record and all the documents in it.

In refusing access to information it is often argued by the courts that granting access to information lies outside the legal regulations and principles. Some state that this is an inappropriate mechanism representing extra-procedural public control by in-expert public. This argument seems purposeless from the point of view of access to public information and shows a lack of understanding of the meaning and importance of the judiciary. Judiciary namely represents through jurisprudence a kind of counter-balance to legislative and executive branches of authorities therefore the courts would have to proactively ensure transparency and openness and thus contribute also to effective implementation of all the other human rights, among them of the right to judicial protection.