# Weighing tests with emphasis on public interest test in accessing information of public character

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**Summary**

With the public interest test, legislation on freedom of access to public information is supplemented by certain aspects of constitutional law. For better application of public interest test, good understanding of proportionality and harm tests is an advantage. Public interest test is applied to determine whether certain information may become public even though its disclosure might cause damage to the holder of a specific right, i.e. that public interest prevails over potential damage. Public may be defined as quantitative or geographical entity, and treated differently from case to case. Public interest test may not be used in cases of absolute exemptions; it can only be applied on relative exemptions. The Slovenian law defines most of the 11 exceptions as relative; only four of them are absolute, including documents marked with the two highest secrecy levels according to the Secrecy Act, »top secret« and »secret«.

Key words – access to public information, public interest test, proportionality test, harm test, three-part test, amendment to FOIA, freedom of expression, right to privacy

## 1. Introduction

Public interest test is a new aspect which has been brought into public sector by the new Access to Public Information Act (ZDIJZ – A[1]). This is only the second time the term »test« has appeared in Slovenian laws. It was first mentioned in the Archives and Archives Material Act (ZAGA), which authorises the Government of RS, to shorten the process to access public archive documentation to physical and legal entities provided »the use of public archive documentation is necessary to pursue a scientific goal, and if public interest overrules the interest which need to be protected.[2] This is an early form of the test, and has been entrusted to the Government of RS. To my knowledge, it has not been applied so far.

Thus the application of this test is one of the early tools which can be applied in dealing with access to public information. The majority of countries adopted it after 1997[3]. Since 2002 it has been recommended to all the member countries of the Council of Europe by Recommendation 2 (2002).[4] However, the test has been known to Slovenian acquis, since the weighing test was laid down directly by Aarhus convention[5] from 2004 (six years after signing the convention in Aarhus, Denmark, and was ratified by the National Assembly of RS[6]). The public interest test can also be found in the Directive 1049/2001 on public access to the documents of European Parliament, Commission and the Council[7], which is, like the Aarhus convention, a directly applicable act in Slovenian legal system.

Quite a number of countries already have a public interest test, among others Ireland, Great Britain, Japan, South Africa, Trinidad and Tobago, New Zealand, Canada, Australia, Lichtenstein, Bosnia and Herzegovina, Estonia, Jamaica, Israel and Germany.

On May 11, 2005 a new law on access to public information together with public interest test was adopted in India, which is the second largest country in the world in terms of population.

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[1] Official Gazzette, No. 61/2005

[2] Official Gazzette, 20/91 with amendments, see Art 42.

[3] Ireland 1997, Estonia 2001, Great Britain 1.1.2005, India 16.5.2005…

[4] Recommendation 2(2002): »Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.«

[5] Official Gazzette, No. 62/04.

[6] It can be found in Art. 4. of the Convention, which refers to the method of access to envrionmental information and limitations: »the reasons for refusal can be treated with limitations by taking into account public interest for dosclosure, and whether the required information refers to to emissions into environment.«

[7] Available at http://www.dostopdoinformacij.si/index.php?id=247.

It also needs to be mentioned that there are only 56 countries which have adopted the acts on access to public information. Among European the countries without such lay are Germany (only four federal states have it), Malta and Luxemburg.[8]

Public interest test is the highest form of judging the issue of access to public information for any country. It is said that public interest test lies at the very core of the Act on access to public information. Due to its extremely loose definition (which practically doesn't exist), many countries avoid it, knowing that it could broaden the manoeuvring space in opening what should remain closed. It is particularly evaded in those countries whose interest is to disguise the mistakes of its public sector, and foremost in the countries ruled by authoritarian regimes, which for obvious reasons detest all and any control. These are especially those most autocratic countries with the world's highest corruption levels, many of them even without an Act on access to public information. These are Belarus, Russia, China, Iraq, Iran, Chad, Algiers, Angola, Morocco, Tunis, Congo, Azerbaijan, Ukraine, Ivory Coast, Kenya…

There are three types of weighing tests:
1. Harm test, which is already contained in the ZDIJZ (and other laws, e.g. Companies Act – Par. 2. Art. 39[9]),
2. Proportionality test, used by constitutional courts, and
3. Public interest test, which has been introduced by the new ZDIJZ.

In this article I will primarily try to analyse the public interest test - when and how to apply it. Public interest test introduces methods of constitutional law into administrative law via legislation on the access to public information. The proportionality test, based on which the commissioners (i.e. the appeal bodies for the protection of access to public information ), have developed the so called three-part tests, which is an extremely useful and indispensable tool for applying the public interest test. In my opinion the public interest test is a variety of constitutional proportionality test. We need to bear in mind the difference between the two: the proportionality test is used when two or more basic human rights or other constitution-

[8] Banisar David, Freedom of Information and Access to Government Records Law Around the World, Freedominfo.org, 2004, http://www.freedominfo.org/survey/global_survey2004.pdf.
[9] Official Gazzette, No. 30/98, 82/94, 20/98, 84/98, 6/99, 45/01, 59/01, 57/04: Whether or not these are stipulated by provisions of previous paragraph of this article, a trade secret means also the information, where it is obvious that **a significant damage might be caused**, if the information is disclosed to an unauthorised person. Partners, workers, or body members of companies and other persons are responsible for infringements, if they knew, or should know about the character of such infromation.

protected rights or goods are in collision, while the public interest test may be implemented also with the exemptions to free access to information which do not mean the protection of some human or other constitutional right or good: e.g. the rights of companies (trade secret), or public sector bodies (confidential data, tax secrets of legal entities …). Further on I will try to explain the difference between two terms: "public interest" and the "overriding interests of the public". Due to the differences, which in my opinion do exist, the English term *Public Interest Test* should be correctly called the **overriding public interest balancing test**.

The term » public interest test« has already been used in Slovenian legal practice: Dr. Urška Prepeluh, in the title to one of the chapters of her doctoral dissertation uses the term »overriding public interest balancing test«, however, later she generalises the term using the formulation »public interest test«.[10] The same diction is also used by the Government of RS and the Ministry of Public Administration, who use this term when referring to the assessment of the conditions and reasons for adopting the new Access to Public Information Act.[11] The diction used in the new act does not contain this term, thus a new term, which in my opinion is legally more correct, should not interfere with statutory provisions. Personally, I believe that the term "public interest balancing test" is legally more correct, and for this reason I will further on use this term, and also explain why it is more appropriate.

## 2. Definitions of weighing tests

For using the public interest balancing test it is necessary to know three definitions: the definition of harm test, which needs to be applied prior to the public interest balancing test, the definition of the public interest balancing test itself, and also the definition of proportionality test which is an intermediate phase to final decision making and assessing the overriding interest of the public.

**Harm test** – ZDIJZ in Art. 6. enumerates five exemptions, in which a harm test needs to be applied prior to refusing the access to public information. The exemptions are mentioned in points 6., 7., 8., 9. and 11. Based on the harm test it is necessary to assess whether the

[10] Prepeluh dr. Urška, Doctoral dissertation, »Pravica dostopa do informacij javnega značaja«, Ljubljana, September 2004, pp. 169.

[11] http://www.mju.gov.si/fileadmin/mju.gov.si/pageuploads/mju_dokumenti/doc/Predlog_zakona_o_spremembah_in_dopolnitvah_ZDIJZ.doc.

disclosure of a document or the information of public character could cause harmful effects to a particular interest or a right.

When in decision making we come to testing the overriding public interest, we can apply the proportionality test which helps us from a legally argumented decision.

**Proportionality test** – is governed by the principle of proportionality and stems from the fundamentals of constitutional law. This principle allows only those limitations to human and other constitutional rights which are indispensable for protecting the interests of the public[12] (and the rights of others).

**Public interest balancing test**– In applying the overriding public interest test it is necessary to assess whether the interest of the public for disclosing the information of public character is greater than the potential harm which might be done by disclosing the information, regardless of legal limitations which work in favour of closing the information.

## *2.1 Definitions of interests*

For better comprehension I will try to define the concept of public interest. The definitions of concepts, as used by Dr. Gorazd Trpin[13] are interesting from the sociological and legal aspects. The author differentiates between five types of interests: individual interest, common interest, general interest, social interest and public interest.

**1. Individual interest** refers to an individual and his/her mental response with regard to material or immaterial goods, or personal situation.

2. **Common interest** is when several individuals pursue a common goal. It is understood as cooperation which is necessary to achieve a certain goal.

[12] BVerfGE 65, 1 (odstavek 157) – Sammlung der Bundesverfassungsgerichtsentscheidungen (a collection of decisions of the German Federal Constitutional Court).
[13] Trpin Gorazd: Pravni položaj premoženja javnih zavodov, Javna uprava, Vol. 41, No. 2-3, Ljubljana 2005, pp. 357-362.

3. **General interest** lies within an individual since there is no "generality" outside an individual which would be able to think and feel and be the holder of a general interest. General interests develop as a direct result of human coexistence and their relationships. Humans as social beings within their coexistence form a network of mutual relationships and the relationships give the meaning to their actions. Dr. Trpin notes that individuals via their interactions, and following their own interests in the process of adaptation and changes, need to form a common interest which then provides a framework for common actions. This common interest is not completely identical with the interests of individuals. An individual needs not be directly aware of the content of common interest; what is important is that within the framework of pursuing the common goals his/her own interest are being realised as well. Thus in relation to the general interest, the individual interest is always primary, since the general always results from the individual.

4. **Social interest** – is derived from the definition of the general interest with institutional aspect being added. Humans live in a society, intertwined with their mutual relationships. In this sense the society is not an independent entity but a phenomenon which results from human coexistence in a particular space. The society does not have its own interest; it is rather related to individuals who form a social community. Dr. Trpin concludes that the social and the general interest actually denote the same phenomenon, the difference being that in defining the social interest, the institutional aspect of the general interest and its relationship with the social system is emphasized. Thus the social interest could also be called the interest of individuals, living in a social community, where via social interests the individuals can consequently pursue their particular interests.

**5. Public interest** is even more institutionally related. Compared with the general interest, which is a social phenomenon, the public interest is a normative phenomenon. It is related to the state as an institution which exercises political power, thus public interest is narrower in meaning than the general or social interest. Political authority carries social power, giving those, who control the state as an institution for exercising political power, a possibility of imposing their own interest on others, indirectly by declaring an interest as a public interest which then the state as coercive organisation can provide.[14] For the reason that public interest is a normative phenomenon it is differently defined in regulations.

[14] Ibidem, p. 358.

From the definitions given by Dr. Trpin we can conclude that public interest is definitely not something that all the individuals who use the "services" of the state would agree to. Public interest is for example to maintain peace and order which the state can provide via its bodies by regulations and mechanisms of compulsion. It is in public interest that the state ensures environmental protection, appropriate space management, public security, traffic safety and provides commercial and non-commercial public services. For example, public interest in the field of culture is expressed by enhancing creativity, providing communication, and protecting cultural heritage at the state and local level.[15] It is also in public interest – as we may deduce from the law using the method of teleological explanation, though not explicitly mentioned -- to »close« those documents, the disclosure of which might be harmful and against the interest of the state (e.g. public security, defence, foreign affairs or intelligence and security of the state).[16] Public interest is mentioned also in other laws (e.g. Sports Act[17]), while the term "interest of the public" does not appear since professional community has not yet analysed in detail the overriding the public interest. So far there has been no need to make a distinction between these two terms since the overriding public interest has always been used as a non-defined sociological term and not as a legal one.

Let me explain the difference between "public interest" and the "overriding public interest": We need to accept the standpoint that public interest is not equal to the overriding public interest. In some cases these two concepts are the same but it does not mean that they have the same meaning or are similar in content. The difference between public interest and the overriding public interest is that the former is normed, while the latter has not been defined in

[15] Act on Enforcing Public Interest in the Field of Culture, Official Gazzette RS, No. 96/02, Art 2.

[16] Classified Information Act, Official Gazzette RS, No. 87/2001 with amendments, see Art. 5.: »By provision of this act, an information may be defined as classified if it is so important that its disclosure to unauthorised persons could or might obviously prejudice the security of the country or its political or economic interests, and is related to:

1. public security;
2. defence;
3. foreign affairs;
4. the intelligence and security activities of government agencies of the Republic of Slovenia;
5. systems, appliances, projects and plans of importance to the public security, defence, foreign affairs and intelligence and security activities of government agencies of the Republic of Slovenia;
6. scientific, research, technological, economic and financial affairs of importance to the public security, defence, foreign affairs and intelligence and security activities of government agencies of the Republic of Slovenia.«

[17] Official Gazette RS, No. 22/98, see Art 2: Public interest in sports domain encompasses activities of national and local character, defined by the National sport programme (hereinafter: national programme) and the programmes of local communities, particularly in the field of sport education, sport recreation, quality sports, top-level sports, and the sports for the handicaped.

legislation. The interest can only be assumed and judged from case to case, often in different ways. The best way to explain the difference is through the explanation of the public interest balancing test.

By analysing the diction used in foreign legislation on the access to information we can see that the articles, referring to balancing the interest of the public, use formulations which make it obvious that it is not public (normed) interest in question but the prevailing interest of the public, the word public meaning a non-defined concept which encompasses a smaller or larger group of people. In Estonian legislation we can find that the holder of information must disclose information (in cases set down by the law) if the facts contained in this information could raise the interest of the public.[18] However, the definition of interest of the public is not given. In the British law (*Freedom of Information Act 2000*) we can also find the term public interest test and the wording »*public interest*« should be translated as the prevailing interest of the public and not as public interest.[19] In this British source too, the public interest is not defined. However, an interesting point has been given by Meredith Cook[20], a British professional. In her article she questions the issue by asking *what does* »***in*** *the public interest*« *mean?*) and says that the British law does not define what is the interest of the public (she does not talk about public interest). Further on she states that the interest of the public is an amorphous (non-defined) concept which has not been defined by any law and that the term public has not been defined by the legislators on purpose, the reason being that the term changes over time and depends on the circumstances of each individual case.

The development of legislation in the field of access to public information has shown that it is indeed difficult to formulate the definition and that the test has changed over time. However, it is true that only the public interest balancing test can point to hidden errors and

[18] Par. 38/2: »A holder of information shall disclose information concerning facts which **arouse public interest** and which are related to an offence or accident before the final clarification of the circumstances of the offence or accident to an extent which does not hinder the investigation or supervision or clarification of the reasons for the accident. The competent official who organises the investigation or supervision or who clarifies the circumstances of the accident shall decide on the extent of disclosure of such information.« The law ias available at: http://www.esis.ee/ist2004/106.html.

[19] Paragraf 2:»Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either- (a) the provision confers absolute exemption, or (b) in all the circumstances of the case, **the public interest in maintaining** the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, section 1(1)(a) does not apply.«

[20] Cook Meredith, Balancing the Public Interest: Applying the public interest test to exemptions in the UK Freedom of Information Act 2000, The Constitutional Unit, School of Public Policy, UCL, London, 2003, str.11.

irregularities which occur in the public sector. Through the development of legislation it has also been proved that it is good to avoid too many absolute exemptions. However, we need to be aware that the public interest balancing test is an exemption over all exemptions and that it needs to be applied with caution and care and only in cases when its application leads to something which would contribute to a broader discussion and understanding of matters relevant to the broader public.

It is necessary to constantly bear in mind the proportionality and balance, which are crucial in judging between providing information of public character and protecting human rights. Public information access practice shows that a human right may collide with the right to privacy. Only if both rights are pursued with equal consideration, balance can be achieved and disproportions in limiting access to information and interference with the privacy of individuals can be prevented.

What is the meaning of the term »public«? There is no definition for this term in any law. The author Cook notes that, according to her research which encompassed mainly the English speaking countries of the Commonwealth, the term is used as a geographical concept, e.g. residents of towns, citizens of countries. It can also be used in quantitative meaning, e.g. the majority of population of a certain town. Thus it is always upon the decision makers who will need to decide which part (or parts) of the society the public interest balancing test has impact on.

It is also necessary to set a limit at which we can still talk about public domain. Does the term public domain refer to two people, or is it a group of people pursuing the same goal (e.g. clean environment), or, is at a group of people who act in favour of marriages among homosexuals? A pragmatic answer would be: yes, this may also be public, but not necessarily.

In the field of public relations we can talk about various forms of public domain: internal, external (which can be further divided into professional, general, political ...). For implementing the public interest balancing test it is therefore not relevant how large the public domain is, or what kind of public it is. What is important is that the public interest balancing test must not be implemented when it is evident from the appeal that only private interest of one or more individuals is in question. This aspect has been pointed out in the doctoral dissertation by U. Prepeluh, who notes that European theory draws to the need for applying a

strict principle, namely that it is not the private interests but the prevailing interest of the public for the disclosure of information which should always be in the forefront,.[21]

Going back to the theory by Trpin, I can conclude that the overriding interest of the public is closer to the definition of social interest, while in a legal context of access to public information, the individual and general interests could be interpreted as individual interests. Thus individual interest is not the one which should be weighed in the public interest balancing test.

## *2.2. Three-part test, deriving from the proportionality test*

As a tool for weighing the proportions we may use the constitutional-legal proportionality test. As a rule, this test is rather loose and not precisely defined, thus we need to adapt to the situation. When legislation provides no firm guidelines as to when and how to use particular information for example, we can only make decisions on the so called case by case basis.

An important tool in implementing the public interest balancing test is the so called three-part test. It has been designed as a type of proportionality tests by the courts and is based on two international acts: the European Convention for the Protection of Human Rights and Human Freedoms of the Council of Europe[22], and the United Nations Convention on Civil Rights [23] . Both acts are directly applicable in Slovenian acquis and serve as a basis in evaluating the legality and constitutional compliance of individual constitutional rights. When weighing between the right for personal data protection and the right of the public to be informed, the three-part test can help us decide whether and when the right to freedom of expression is stronger than the right to personal data protection.

The three-part test, which is used by other commissioners and the courts in matters relating to access to public documents, is based on the following presumptions:

[21] dr. Urška Prepeluh, doctoral dissertation, Pravica dostopa do informacij javnega značaja, Ljubljana, September 2004, pp. 171.

[22] Official Gazette RS, No. 7/1994, see Art. from 8 to 11.

[23] Adopted by the General Assembly of the United Nations, Dec 16, 1966 with resolution No. 2200 A (XXI), with effect from March 23, 1976 according to Art 49.

1. Is the limitation of the right to information of public character (and consequently information freedom which is part of freedom of expression) laid down by the law? Defining and determining a legally defined goal (interest).
2. Would the disclosure of information present a threat and cause serious damage to the legal goal (interest)? Serious harm test.
3. Is the damage to be done to a legally protected goal (interest) greater than the interest of the public for obtaining the information? Defining and determining the interest of the public.

With item one we need to find out if there is any legal basis for the refusal. According to Slovenian legislation we need to take into consideration the exemptions laid down by Art. 6. of the ZDIJZ as *numerus clausus*. The new ZDIJZ makes a reference two laws which determine conditions for not disclosing the information: the law which regulates public finances and the law on public tenders.
Item two is the level at which harm test needs to be applied.
Item three represents the implementation of the public interest balancing test.

The three levels of assessment mentioned above, which help in decision making only in the segment of applying the proportionality test, are not only used by the commissioners but by public sector bodies as well; that is in defining whether the information has public character, whether it is necessary to refuse the access to information, or allow only partial access. With the public interest balancing test the pubic sector bodies are limited in action, since only the bodies authorised by the new ZDIJZ can implement it (explained in more detail further below).

## 3. Applying the public interest balancing test

When can we apply the public interest balancing test? It is definitely in cases when it is stipulated by law that particular information is not public, or that it is protected as trade secret or personal or confidential information. This is also the key difference between the proportionality test and the public interest balancing test. The latter allows ignoring the secrecy label on the document. And since the »power« of this test is such, we need to use it extremely cautiously and professionally in order not to jeopardize legal protection. This test

is an upgrade to the legislative provision which lays down exemptions to free access of information. In dealing with exemptions we need to differentiate between the absolute and relative exemptions. Relative exemptions are those in which we can implement the public interest balancing test in spite of the legal limitations, and may decide that a document (or part of it) is public. This is a way of »loosening« legislative provisions. When dealing with absolute exemptions, the public interest balancing test cannot be applied (ZDIJZ mentions only four exemptions). Therefore there should be as few absolute exemptions as possible in every country.

It should be emphasized that one characteristic of the public interest balancing test is that it cannot be implemented in its opposite direction, i.e. after it has been explicitly and legally determined that a particular document is public. This means that closing a document, which is already public, is not possible. The test is used when we deal with information of public character which completely corresponds (or has attributes of information with partial access) to the provisions of Art. 6. and 7. of the ZDIJZ. Conversely, this test cannot and must not be applied, meaning that making a document inaccessible is not possible in spite of the fact that there is legal basis for it to become public (e.g. the information on the salaries of public official). In my opinion we cannot weigh the issue of public interest and proclaim the salaries of public officials »non-public« just for the reason that the disclosure might present a threat to someone -- e.g. possible bribery by the »enemies«, or when »secrecy« has not been explicitly laid down by the law. Such harmful aspects need to be envisaged by legislators. There is one special case of exemption, not listed among the general exemptions in the ZDIJZ, which was laid down by the Salary System in the Public Sector Act and refers only to the information on the salaries of security and intelligence officials, while the salaries of other public service employees are public.

## *3.1. When and how to apply the public interest balancing test*

Let us take a closer look at the public interest balancing test. In cases of administrative dispute an official -- the commissioner as an appeal body, and the courts -- need to apply this test to weigh whether the right of the public to know overrules some other right or exemptions according to ZDIJZ, (e.g. protected personal data, tax secrets, trade secrets, confidential information), even if the disclosure of information might cause a damage. The British

commissioner for information claims that the public interest balancing test does not reveal what is INTERESTING TO the public but what IS IN THE INTEREST OF THE PUBLIC.[24] In other words, something which is »of interest to the public« is something which serves the public interest. In applying the test, the body simply decides whether the interest of the public could be better satisfied if the information is disclosed (or not disclosed) regardless of the legal exemptions to free access. The bottom line of the entire law is the accessibility and this should be treated as a platform which in itself is of public interest.

In the introduction to the *Freedom of Information Act 2000* the British commissioner for public information lists the following factors of public interest which should foster the disclosure of information:

- Furthering the understanding of and participation in the public debate of issues of the day. This factor would come into play if disclosure would allow a more informed debate of issues under consideration by the Government or a local authority.

- Promoting accountability and transparency by public authorities for decisions taken by them. Placing an obligation on authorities and officials to provide reasoned explanations for decisions made will improve the quality of decisions and administration.

- Promoting accountability and transparency in the spending of public money. The public interest is likely to be served, for instance in the context of private sector delivery of public services, if the disclosure of information ensures greater competition and better value for money that is public. Disclosure of information as to gifts and expenses may also assure the public of the personal probity of elected leaders and officials.

- Allowing individuals and companies to understand decisions made by public authorities affecting their lives and, in some cases, assisting individuals in challenging those decisions.

- Bringing to light information affecting public health and public safety. The prompt disclosure of information by scientific and other experts may contribute not only to the

[24] Personally I agree with this definition, particularly for the reason that it supports my thesis that the test needs to be called the way as proposed in this article.

prevention of accidents or outbreaks of disease but may also increase public confidence in official scientific advice.

Of course, this list is not exhaustive and there may be other factors which should be taken into account depending upon the request for accessing information. For instance, the disclosure of information may contribute towards scientific advancements, ensure the better operation of financial and currency markets or assist in the access to justice and other fundamental rights.[25]

## *3.2 The new ZDIJZ and the public interest balancing test*

In designing the new ZDIJZ (ZDIJZ-A) the government of R Slovenia anticipated that the public interest balancing test would be allowed in all the exemptions mentioned in Art. 6. Eventually, the decision was not to allow weighing in cases of confidential data labelled with two top secrecy labels. That means that the public interest balancing test may be used only with documents classified as INTERNAL USE ONLY and CONFIDENTIAL[26]. Thus absolute exemptions remained only for the documents labelled TOP SECRET and SECRET. The exemptions are also tax secrets related to physical entities and the information collected and used by the Central Bureau of Statistics for statistical analyses. Among absolute exemptions are also documents containing confidential information or documents containing confidential information of other countries or international organisations with whom Slovenia has a contractual obligation for the exchange or provision of confidential data, or documents with tax information which the Slovenian bodies have obtained from the bodies of other countries.

We may only hope that the public sector will not trade on two top secrecy labels laid down by the Classified Information Act, assuming that the public will never be able to obtain this information. In any case, the commissioner can access such documents, analyse them and alert the competent authorities on possible abuse, while the applicant may, according to the new law, require the removal of the secrecy label. However, not every body of first instance will have the power to decide on the requirements for the removal of secrecy label or on public interest balancing test.

[25] http://www.informationcommissioner.gov.uk/cms/DocumentUploads/AG%203%20-%20Pub%20Int%20reform%20may05.pdf.
[26] Classified Information Act, Official Gazette RS No. 135/2003, see Art 13.

The Slovenian legislators are aware of the current situation that public sector bodies do not have enough knowledge on how to weigh different rights. For this reason the legislators have decided not to entrust the right to decision making to every public sector body in implementing the public interest balancing test (this being a different procedure). Art. 22. of the ZDIJZ states that when an applicant in the appeal refers to the overriding public interest for disclosure of information according to par 2, Art. 6 of the law, or if the head of the body or an authorised official considers that this provision should be applied, the following bodies shall make a decision:

- the government; if the public sector body is a state administration, attorney general, or public prosecutor, a public law official, founded by the state, a public powers holder, or public service contractor at the state level;
- the supreme court, if the liability lies with the court;
- the council of self-governing local community, if the public sector body is a self-governing local community, a public law official, founded by a self-governing local community, a public powers holder, or public service contractor at the self-governing local community level;
- the body itself if other bodies than those listed above are in question.

The commissioner for access to public information is authorised for processing the appeals against the decisions rejected or dismissed by another body, including the decisions in which the body has implemented the public interest balancing test to decide that the interest of the public does not override the disclosure of information.

# 4. Conclusions

Let me conclude with some guidelines for applying the public interest balancing test. They can be best illustrated by the governing rules used by the Northern Ireland Fire Brigades (found on their web page). The following guidelines should be used:

1. STOP,
2. THINK,

3. JUSTIFY.[27]

The public interest balancing test should not be done in haste. A thorough consideration is needed and when after implementing the public interest balancing test we have judged that a particular document should be disclosed to the public, we need to be able to justify our decision. Thus in the process of legal considerations the weighing tests, described in this article, may be of great help.

To conclude, the essential element in the philosophy of access to public information is to reformulate the currently valid paradigm, changing it from »the need to know « to »the right to know«.

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