Promoting effective anti-corruption framework in the CEE countries.

THE FREE ACCESS TO INFORMATION

oživení

CHANCES OF CITIZENS DEMANDING INFORMATION:

Analysis of the enforceability of the Freedom of Information Act and recommendations for improvement

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INTRODUCTION

This paper was prepared under the "Promoting effective anti-corruption framework in the CEE countries" project, a joint project of 5 countries (Visegrad 4 and Estonia). The project's overall objective is to enhance institutional anticorruption (AC) frameworks in CEE countries for more effective enforcement of AC measures. The project sets a broad approach to so-called soft corruption areas which are often regarded as a preventive area for hard corruption. This approach consists of researches, comparative analyses, best practice studies and recommendations for the specific situation of post-communist EU countries. Results from researches and best practice studies will be used for formulating a set of general recommendations for CEE countries on specific AC measures enforcement, including the possibility of establishing or improving of a national ACA, according to international commitments.

The most favourable factor in this project is the multiplication of experience and expertise thanks to the cooperation of 5 national anticorruption NGOs: Oživení Czech Republic, The Institute of Public Affairs Poland, EKINT Hungary, Transparency International Slovakia and Transparency International Estonia.

The aim of the national analyses is an in-depth description of the enforcement situation in the **3 selected AC areas** and existing AC institutional framework of each partner's country: showing national advantages and deficiencies and a comparison with other post-communist countries, preparing the playing field for national recommendations.

The basic assumption is that each country (V4 and Estonia) does have some legislative provisions on the 3 areas mentioned and thus institutional enforcement mechanisms exist to some level in each country.

The purpose of the national analysis is not to give a comparison of the legislation as whole, but only in one certain aspect ie. enforcement which is in line with the idea or principle that the quality of the legislative provisions is not the only aspect to be considered, but the conditions for its implementation as well. The implementation of legislation regardless of its level in terms of quality or range depends more or less on the institutional enforcement mechanisms. Infrastructure including a combination of awareness-raising instruments, transparency policies, rules and standards, as well as deterrent measures is needed. For better implementation, more training and access to organisational support are considered necessary.

Given the extent of this paper, the authors will deal with the following enforcement mechanisms: the position of addressees (entities) of legislation (their role in law enforcement), institutional oversight, monitoring and auditing, sanctions, guidance, transparency and public involvement. These institutional enforcement mechanism will be analyzed regarding:

i) the conditions set in the legislative provisions which are a must for any further implementation, and
ii) how these conditions are exercised.

The methodology chosen for this paper is a standardised content analysis of relevant documents. This qualitative analysis is based on national and international comparative studies focusing on the issue of public access to information. The content analysis was further supported with data obtained during the resolving of specific information disputes as part of the professional activities of the authors, as well as regulations defined in relevant laws. The paper also employs a secondary analysis of data/results of research done in the field so far[1]. The methodology for this analysis was chosen also with regard to the fact that the Czech Republic does not carry out any systematic monitoring of access to information, transparency or openness of public administration.

[1] DISMAN, Miroslav. *Jak se vyrábí sociologická znalost: Příručka pro uživatele*. 3rd ed. Praha: Karolinum, 2000, 374 p. ISBN 80-246-0139-7, p. 166.

1. BACKGROUND

The right to information is one of the most important elements of the relationship between public administration and citizens. It guarantees that public administration acts within the confines of the law and assists citizens who wish to contribute to the management of public affairs and monitor public activities. For public administration, informed citizens are a source of feedback, an important qualitative factor as well as a safeguard against misuse of power. Openness of public administration is the driving force of modern democracies and economies; it is also generally recognised as a strong tool in the fight against corruption.
In the Czech Republic, the institutional right to information is implemented through Act No. 106/1999 Coll., the Freedom of Information Act[2] (hereinafter FOIA) and the special Act No. 123/1998 Coll., on the right to information about the environment[3], addressing the institutional right to a friendly environment. While the adoption of these laws has considerably improved the accessibility of information on public administration, both also have raised multiple questions regarding their interpretation. This result is understandable, as there are many different interests clashing here – the information needs of the public against the long-established practice of public administration behind closed doors, the rights of those who request information against the rights of third parties or the state's right to protect certain types of information. Political aspects are another issue, particularly those that lead to legislative compromises.
This analysis is primarily based on the FOIA, as the law contains a number of legal institutes that are shared by both acts. In fact, it has been argued that there is no justifiable explanation for the differences between the two laws and multiple attempts have been made to merge them together, though the attempts were ultimately unsuccessful[4].

The legal framework defining the accessibility of information touches upon many areas of public life and is therefore naturally affected also by other legal regulations, including those of a lesser legislative power[5] or international documents[6] as well as other related laws and acts that were not however included in this analysis.

It needs to be said that this paper focuses on access to information from the perspective of an ordinary citizen and his or her options, and not the right to information from the perspective of other entities defined by other legal regulations[7].

[2] The Freedom of Information Act of 11 May 1999 No. 106/1999 Coll., on free access to information.
Available at: http://portal.gov.cz/app/zakony/zakonInfo.jsp?idBiblio=47807&fulltext=&nr=106~2F1999&part=&name=&rpp=15#local-content
[3] Act on the right to environmental information No. 123/1998 Coll.
[4] For more information, see: KORBEL, František et al. *Právo na informace: zákon o svobodném přístupu k informacím: zákon o právu na informace o životním prostředí; komentář.* Praha: Linde, 2004. ISBN 80-720-1465-X.
[5] Government Regulation No. 364/1999 Coll., on the cooperation between public administration bodies and municipalities regarding the duties of municipalities defined in Act No. 106/1999 Coll., on the free access to information; Government Regulation No. 173/2006 Coll., on the principles of determining costs and licence remuneration for providing information in accordance with the Freedom of Information Act; Regulation No. 442/2006 Coll., on the structure of information published about obligated bodies and availability of remote access
[6] International Covenant on Civil and Political Rights (1966, implemented with Regulation No. 120/1976 Coll.); Directive 2003/98/EC of the European Parliament and of the Council on the re-use of public sector information; the Aarhus Convention (implemented with Notification No. 124/2004 in the Collection of International Treaties)
[7] See e.g. the rights of representatives of municipalities defined in Section 82 of the Municipalities Act, Section 34 (1) of the Regions Act or Sections 87 (2) and 51 (3) of the Capital City of Prague Act.

2. LEGAL FRAMEWORK

2.1. CONSTITUTIONAL FRAMEWORK

In the Czech Republic, the right to information is defined by the **Charter of Fundamental Rights and Freedoms** (hereinafter the Charter) in its Article 17 which says that the right to information is guaranteed and may be only limited by law if necessary in a democratic society for the protection of the rights and freedoms of others, the security of the state, public security and protection of public health and ethics[8]. This main source of the constitutional right to information is found in Chapter Two (Human Rights and Fundamental Freedoms), Division Two (Political Rights).

In a broader sense, the right to information is also described in other parts of the Charter, such as the right of detained persons to be informed of the grounds for the detention in Article 8 (3) of the Charter, the freedom of thought in Article 15 (1) of the Charter, the freedom of scholarly research and of artistic creation in Article 15 (2) of the Charter, the freedom of religious conviction and manifesting of this conviction in Articles 15 (1) and 16 (1) of the Charter, the right to participate in the administration of public affairs in Article 21 (1) of the Charter, the rights of national or ethnic minorities to disseminate and receive information in their native language in accordance with Article 25 (1), (2) of the Charter, the right to education in Article 33 (1) of the Charter, the right to legal and language assistance in Article 37 (2), (4) and Article 40 (3) of the Charter and the right to a fair trial in Article 38 (2) of the Charter.

2.2. THE FREEDOM OF INFORMATION ACT

As stated above, the right to information guaranteed in the Charter is implemented with the FOIA effective from 1 January 2000. The FOIA is a complex law defining basic aspects of the right to information, in particular the duty to actively publish information and to provide information upon request. It also addresses some issues related to the provisioning of information, such as the compensation of costs, some internal procedures of bodies obliged to provide information, contents and details of the published information and more.

2.2.1. Scope of the law

The bodies obliged to provide information shall be state authorities, territorial self-administration entities and their authorities, and public institutions. This includes executives (cabinet) and adminsitration including all ministries, departments, local government, public schools, public health care bodies, the police, the armed forces, security services, and bodies owned or controlled by any of the above.
The conceptual definition of public institutions is left to court jurisprudence and legal theory. The basic features of the concept were defined primarily by jurisprudence of the Constitutional Court. Common signs of public institutions are: establishing by law (or an act of public authority); fulfilling a public purpose; scope and powers defined in law; public institutional oversight, review or other possibility of state control over the activities of the institution.
The obligation applies to all material held by or on behalf of public authorities which is recorded in any format, regardless of who produced it[9].

[8] The 1993 Charter of Fundamental Rights and Freedoms. Available at: http://www.usoud.cz/en/charter-of-fundamental-rights-and-freedoms/
[9] Section 3 „(3) For the purpose of this Act, 'information' shall mean any contents or its part in any form recorded on any medium, namely the contents of a written record in a document or a record in an electronic format or an audio, visual or audiovisual record."

Cases in which the bodies obliged to provide information may refuse to provide certain information are exhaustively listed down in § 7 and § 11 of the FOIA.

The obligated body <u>shall not</u> provide information:

- if the requested information is designated as classified information and the applicant does not have authorized access;
- information pertaining to personality, manifestations of personal nature, privacy of a natural person and personal data shall only be provided by the obligated body in accordance with legal regulations governing their protection (Certain personal data shall nevertheless provide for the beneficiaries of public funds in accordance with § 8b - first name, last name, year of birth, place of residence, and the amount, purpose and conditions provided by public funds.)
- if the requested information represents a trade secret;
- any information obtained under any legislation on taxes, fees, pension and health insurance or social security regarding the personal worth of a person who is not an obligated body;
- if such information has been created without the use of public funds , has been supplied by a person who is not obligated to do so under the law, unless such person has given his/her consent with the provision of such information,
- if such information is published by the obligated body pursuant to a special law in pre-determined regular cycles,
- if such provision represents a breach of the protection of rights of third parties to subjects of copyright
- Information received by the obligated body from a third party in the course of performing tasks within its control, supervisory, surveillance or similar activities under a special legal regulation
- on pending criminal proceedings,
- on decision-making activities of the courts except for judgments,
- on tasks performed by intelligence services,
- on the preparation, course and review of results of inspections at the Supreme Audit Office bodies
- on activities of the Ministry of Finance under the Act on Certain Measures Against Money Laundering and Terrorist Financing or the Act on Implementation of International Sanctions
- information protected by copyright and related rights, if they are held by e.g. radio or television broadcasters.

The obligated body <u>may restrict</u> the provision of information if such information:

- applies solely to internal instructions and staffing regulations of the obligated body;
  is new information ascertained during the preparation of a decision of the obligated body, unless stipulated otherwise by law; this shall apply only until the preparation is completed by the decision;

- was provided by the North Atlantic Treaty Organization or the European Union, which is in the interest of national security, public safety or the protection of the rights of third parties

3. FOIA ENFORCEMENT MECHANISMS

3.1. THE POSITION OF ADDRESSEES OF LEGISLATION – THEIR ROLE IN LAW ENFORCEMENT

In the Czech Republic, the burden of exercising the constitutional right to information lies on the applicant. In order to help citizens defend this right, the laws of the Czech Republic define the right to lodge an appeal against a decision made by an obligated body; this appeal will be investigated by a superior office or another authority (e.g. for independent local administration units). In other words, if a citizen wishes to learn something, he or she needs to submit a request for information and, if it is denied, apply additional measures to seek remedy.

A superior authority may only cancel an invalid decision and order an obligated body to reopen the application, but may not order the information to be published. These limited powers of superior authorities often result in a situation when obligated bodies repeatedly and unlawfully keep refusing to provide certain information, even though they are technically following their legal obligations towards a superior authority. Obligated bodies may always provide new reasoning for their refusal, based on any legal or pseudo-legal clause. This results in a situation known as "administrative table tennis", in which the appellate body is constantly cancelling all decisions made by the obligated entity, but without any consequence for the applicant. In analysing the cases, superior authorities often only focus on a lack of justification, but not the issue as such[10].

The position of the applicants is made even more complicated by the fact that for certain reasons for not providing information, the FOIA does not make it possible to verify whether public interest in publishing this information is stronger than the reasons for protecting it through a "public interest test"[11]. This test is now only implied by court practice, and therefore there are no clear rules for its application. If a superior authority agrees that a specific piece of information should not be published, the applicant may defend his or her right through legal action[12]. An often misused justification for not providing information is the protection of trade secrets or personal data.

Another risk making the current legal system prone to abuse is the calculation of costs of providing information. Even though the law is rather specific in defining the conditions under which the costs may be reimbursed, many obligated bodies are only willing to provide information for unreasonable costs borne by the applicants, assuming that this will discourage them from pursuing the matter any further.

Another issue is inaction. If the period for providing information has expired and information has not been provided, and a decision to refuse the information was not even issued (or the "decision" cannot be considered a decision), the applicant is entitled to file a complaint. In the case that the superior authority also fails to remedy on the basis of the applicant's complaint it is possible to defend in court action. After a court decision, it is possible for the obliged body to deny providing information, and the applicant has to defend in court action again.

Even though the FOIA as a whole is a clear and relatively concise piece of legislation, applicants are having considerable difficulties in exercising their rights. When enforcing their rights, they must rely on publicly available sources of information about the issue[13] or on current court practice, because there is no state-guaranteed institution that would be systematically providing guidance.

[10] For an example of a specific case, see: http://detizeme.cz/zprava.shtml?x=2288519

[11] This is a proportional test for situations where two constitutional rights are in conflict; in the Czech context, this typically means the right to information and protection of privacy, personality and personal data.

[12] The basic conditions of protection are defined in Articles 36 (1) and (2) of the Charter and Articles 6 (1) and 13 of the Convention which guarantee the right to a fair trial, including the right to an effective remedy against a decision that must be provided by an impartial and independent court.

[13] For example: http://portal.gov.cz/portal/obcan/situace/152/163/ (MV)

3.2. INSTITUTIONAL OVERSIGHT, MONITORING AND AUDITING

There is no oversight body in the Czech Republic that would promote access to information in particular cases and also formulate a conceptual and long-term policy of openness. There is no single body or separated bodies responsible for access to information.
In May 2007, the Organization for Security and Cooperation in Europe published an overview of the right to information in the OSCE region[14] where, after a detailed analysis of key elements of the law, it mentions the existence of a single-purpose monitoring body and recommends this institution to its member states: „There should be an adequate mechanism for appealing each refusal to disclose. This should include having an independent oversight body such as an Ombudsman or Commission which can investigate and order releases. The body should also promote and educate on freedom of information"[15].

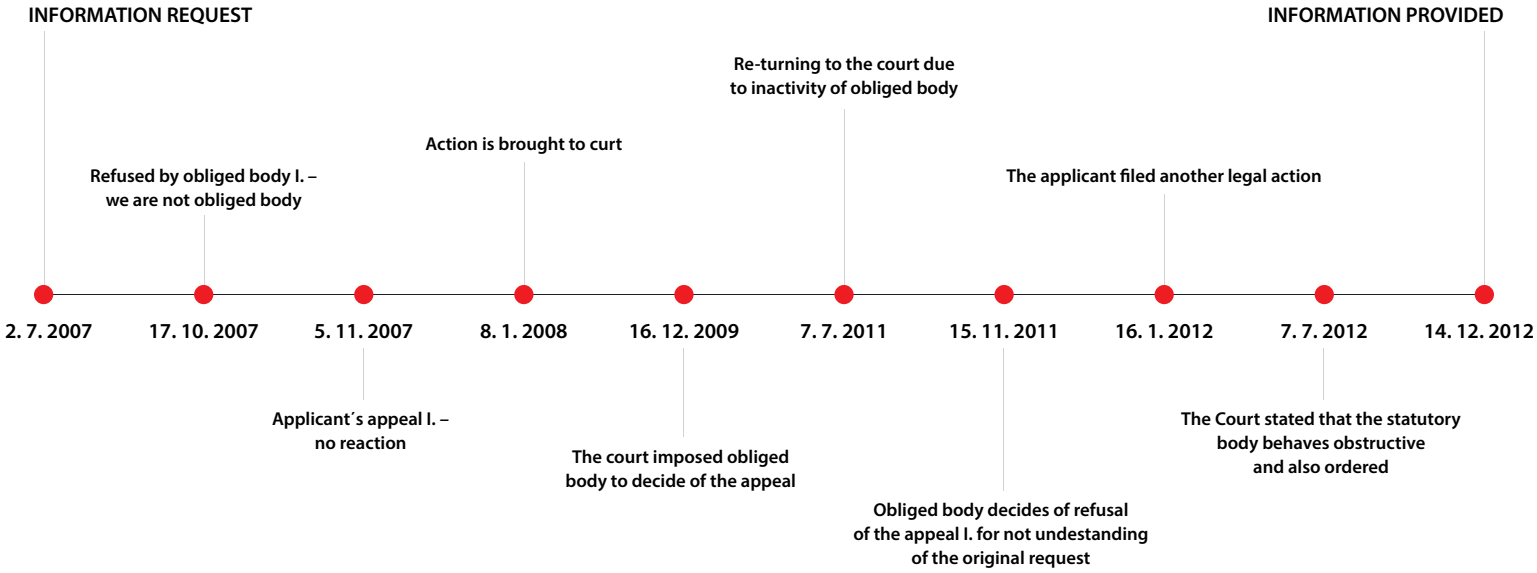
If a request for information is refused, applicants may first file an appeal with an appellate body. Depending on the nature of the obligated entity, the law distinguishes between three basic types of appellate bodies:
a) **public administration bodies** (or local administration bodies with transferred powers),
b) **municipality administration bodies**,
c) **heads of other institutions** managing public funds.

In the case of state/municipality owned enterprises, the situation is more complicated when the superior authority is the legal representative of obliged body him/herself and therefore enforcement is very low.
If the appellate body confirms the decision to refuse the request, the applicant may turn to an administrative court. The court procedure, however, takes a very long time, essentially making the right to information meaningless. The price of information drops over time. Under the FOIA the court in these cases cannot order to provide information, but only to issue a decision. Subsequently after the court decision, the obliged body may decide not to provide the information, and the applicant must appeal again. There are no deadlines for court decisions in actions concerning the right to information.
An analysis[16] of the efficiency of the FOIA conducted in 2011 compared 25 randomly selected cases of the Supreme Administrative Court. This comparison showed that when a decision of the 2nd degree is appealed against, the case takes the 1st degree court 1.8 years to resolve, and the full process until a decision is made regarding a court complaint (which does not mean that the information must be provided at this point) takes almost three years:

Period	Days	Years
From submitting an application to issuing a decision	64	0.2
From filing a complaint to issuing a 1st degree judgement	661	1.8
From judgement to decision on issuing a court complaint	307	0.8
Total (not including the typical period of approximately 2 months between issuing a decision and filing a complaint)	**1031**	**2.8**

The court charges an administrative fee of CZK 3,000. If applicants win their dispute, they have the right to reimbursement of all costs justifiably spent on the dispute, including the fee, but also the costs of legal representation, travel expenses to court, missed earnings related to presence at court hearings, etc.
An illustrative example of the process of requesting information is a specific dispute between an applicant and the Transport Company of the Capital City of Prague[17] where after five years, two court disputes and one execution order, the right to information was finally fulfilled and the information was provided – see the chart:

[14] The Organization for Security and Cooperation in Europe (OSCE) primarily consists of European countries. Its 57 members are European and Mediterranean states together with some countries of the Caucasus and Central Asia as well as the USA and Canada.
[15] OSCE Yearbook 2007: the OSCE Representative on Freedom of the Media, ISBN 978-92-9234-626-3 available at: http://www.osce.org/fom/32992
[16] Analýza účinnosti zákona o svobodném přístupu k informacím / Analysis of the Efficiency of the Freedom of Information www.mvcr.cz/odk2/soubor/analyza-ucinnosti-zakona-o-svobodnem-pristupu-k-informacim-zip.aspx
[17] For details of the case, see: http://www.bezkorupce.cz/exekuce-dpp/



Source: Oživení o. s.

Unfortunately, after five years the requested information lost much of its value. For example the content of contracts may have already been delivered, which makes it very hard to contest the contract in any way.

3.3. SANCTIONS

Even though there have been several proposals to introduce legal sanctions, the FOIA currently does not define any direct penalty for violating the set duties. Two options were suggested in the past: (a) classification of a clerical error when responding to an information request as an offence, or (b) classification of violations of duties defined in the FOIA as an administrative offence. These proposals were rejected primarily by public administration bodies, typically on the grounds that it is impossible to impose sanctions on a specific civil servant responsible for violating the duties ordered by law. The author of the proposal, the Ministry of Interior, also concluded that it was not necessary to introduce such sanctions, as it would not have the intended effect of resolving issues in application[18]. The lack of sanctions is probably one of the reasons why the right to information is being violated on a large scale[19].

3.4. GUIDANCE

In the Czech Republic, there is no institution responsible for information access. The issue partially falls within the agenda of the Ministry of Interior, which is defined by the Competency Act as the "state administration body for internal affairs"[20]. In practice, the Ministry of Interior is providing methodological assistance, often upon individual request, to regional self-governing units[21]. This competence, however, does little to address the real need of the support of openness in public administration or the requirements of an informational society. This role is partially adopted by non-profit organisations who are compensating for this deficit by providing consultations or representing citizens in legal disputes[22], processing quantitative and qualitative analyses of the issues[23] or creating tools to make information access easier[24].

[18] Shrnutí legislativních změn, jejichž provedení je navrhováno k posílení účinnosti zákona o svobodném přístupu k informacím a k odstranění jeho aplikačních nedostatků / *A summary of legislative changes that are being proposed in order to strengthen the efficiency of the Freedom of Information Act and resolve its shortcomings in application* (Ministry of Interior, 2011)
[19] Global Right to Information Rating, http://rti-rating.org/view_country.php?country_name=Czech%20Republic
[20] Section 12 of Act No. 2/1969 Coll., on establishment of ministries and other institutions of central government of the Czechoslovak Republic
[21] http://www.mvcr.cz/odk2/clanek/dokumenty-odk-odbor-dozoru-a-kontroly-verejne-spravy.aspx?q=Y2hudW09Mw%3D%3D
[22] http://www.bezkorupce.cz/kauzy/pristup-zastupitele-a-clena-financniho-vyboru-do-ucetni-databaze/
[23] http://www.otevrete.cz/knihovna/pravni-analyzy1/
[24] http://www.infoprovsechny.cz/

The Czech Republic in particular lacks the following key functions of an openness policy in public administration:

- transparency monitoring (statistics of requests, analysis of the duration and efficiency of providing information)
- intermediary and methodological assistance in specific information disputes (both for applicants and for authorities)
- education and methodological assistance for authorities
- education and consultations for citizens regarding access to information

These functions are partially provided by consultation offices of non-governmental organisations; their capacities, however, are very limited and absolutely cannot compensate for the lack of a dedicated institution. Even though this issue was raised many times in discussions with representatives of the state, the current unfavourable situation remains.

3.5. TRANSPARENCY AND PUBLIC INVOLVEMENT

The issue of information access is one of the key topics in the development of a civil society. Information access concerns all fields of activity of individuals as well as of public or private organisations. One of the potential tools for citizen engagement is involving the public in the legislative process, as guaranteed in the Constitution and the Charter of Fundamental Rights and Freedoms. Specific conditions of the implementation of this right are defined in internal normative acts, such as the government's legislative rules.
The options for citizens to influence the legal framework of access to information lie in actively exercising their rights in individual cases where any decision made by the courts may represent a breakthrough and a precedent for future cases. Another option is to utilise the opportunity to submit comments to proposed legislative. The situation is similar with citizen initiatives, associations and other citizen groups[25].
Current experience with the right to information shows that the public monitoring of access to information is primarily performed by non-governmental organisations and, in rare cases, by individuals. This can be illustrated for example with the latest proposal for an amendment of the FOIA from 2012 that aimed to add several measures that would considerably and negatively influence the application of the right to information. After several ministries voiced their strong objections stating that the amendment violates the principle of openness, and after many complaints by citizens and civil initiatives who sent hundreds of comments to the proposal, the controversial amendment was rejected[26].
Even though the current legislation defines access to essentially all types of information on public administration (with some exceptions defined by law), the FOIA establishes an additional duty to actively publish selected types of information. This makes actively published information more easily and quickly accessible without the need to submit individual requests. The process primarily applies to general information that is required by a relatively large number of people. Section 5 of the FOIA and Regulation No. 442/2006 Coll. set forth the structure of information published about obligated bodies in a way that allows remote access. The regulation is essentially a long list of information starting with the obligated body, the reason for its establishment and character, and continuing with its organisational structure, filing office, superior administrative body and budget, and only then defining how the information itself should be provided. It must, however, be said that failure to provide information in the scope required by law does not carry the risk of any sanctions, and that there is essentially no entity that would be monitoring these duties.

[25] Legislative Rules of the Government: Article 5 (11): If the body that drafted the intention of the law deems it appropriate, it shall send the intention either on paper or electronically also to other institutions to solicit their comments, such as professional associations, interest groups of businessmen or consumers or scientific and expert institutions.
[26] http://www.vz24.cz/clanky/novelu-zakona-o-pristupu-k-informacim-mv-prepracuje-rekl-kubice/

Active publishing of information is closely related to another pressing issue – the format of data published electronically in a way that makes it possible to automatically and reliably process, merge and evaluate it ("open data"). The duty to actively publish information compensates for the currently lacking network of open data registries. A precise and detailed report on the openness of Czech databases was carried out by the Open Data Census initiative[27]. In the evaluation of access to open data on the state budget, elections, public transport and pollution of the environment, the Czech Republic scored 42 out of 77 points.

Another evaluation is provided through an Action Plan of the Open Government Partnership[28] in the Independent Reporting Mechanism: Czech Republic Progress Report 2012–13[29]. This analysis shows that in this period, the implementation of open data standards was limited only to creating a legal and technical solution that will be providing access to important public data in open data formats. Public discussion on open data opened up, and the issue was included in the government strategy.

Specific deficiencies of the individual data registries are being identified by the professional public[30]. The vast majority of data from central or local institutions still has not been processed in a clear, machine-readable form and is being published in many different formats.

[27] The Open Data Census assesses the state of open data around the world. Available at: okfn-labs.org/opendatacensus

[28] The Open Government Partnership (OGP) is an international initiative promoting openness, transparency and the fight against corruption.

[29] http://www.opengovpartnership.org/sites/default/files/Czech_Republic_OGP_IRM_public_comment_czech.pdf

[30] *Technické překážky k přístupu k datasetům – souhrn* [online]. [quoted on 2013-12-17]. Available at: nedostatky.jdem.cz.

4. CONCLUSION

Even though there has been a growing worldwide trend of opening up public administration in recent years, the Czech Republic still experiences numerous problems in the practical application of the right to information. Applicants are often automatically seen as "complainers" who should be watched carefully. The combination of this mistrust with the often lacking legal qualification of obligated bodies also derives from the historical experience of a dominating public power. At a time when the number of engaged citizens is growing and in the context of a developing informational society, the result of this situation is that public authorities are systematically rejecting all attempts to considerably open up public administration.

The FOIA has been amended several times since 2000[31], but after more than ten years it can still be considered inadequate in many ways.
A key deficiency lies in the enforcement of the current law, where citizens are facing considerable difficulties in seeking remedy against an unauthorised refusal to provide information or against inactivity. It is becoming commonplace for citizens to be unable to obtain information for years to which they have a right. The current position of applicants is frequently misused to keep public information secret, and it is impossible to penalise this behaviour in any way. Obligated bodies also have nothing to lose; they can only gain more time and with it make the information worthless.

The main problems of the right to information in the Czech Republic today are as follows:

– Low law enforcement in the case of breaching the law – unauthorized denying and inaction

There are (in addition to the cases of smooth and fast provision of information) procedural delays, un/intentional wrong legal assessment and unauthorized denying of information. The FOIA does not deal with the so-called "administrative table tennis" when bodies obliged to provide information repeatedly deny information and superior authority cancels an incorrect decision and returns it to obliged body for reconsideration. Enforcement is very low and mostly ends up in court. A court hearing is time consuming and thus negates the sense of the right to information. Arguments and reasons for not providing information very often may not be relevant or justified – it is not necessary, since the aim of any argument is often just to stretch out the whole procedure. Several years of litigation often eliminate the possibility to enforce any liability (prescription, change of responsible persons ...) Arguments, no matter how irrelevant, are the best way to get the time required to make the information lose its value. This situation is also mentioned in related international comparisons[32]. Applicants are forced to take up a permanent fight and invest maximum effort into obtaining the information to which they have a right, often without success.

– Proactive disclosure of information

Bodies obliged to provide information often fail to publish basic information about their activities. The outline of the obligatory disclosure of the information, does not meet all obliged bodies[33]. At the same time, there is no complex proactive disclosure policy. The structure of mandatory information is already outdated and does not capture key information that is nowadays expected from public institutions. Bodies also lack knowledge on the issue of the re-use of information (Re-use), providing such information to be used repeatedly, and the issue of "open data" - actively providing the data files in a usable form.

The lack of a proactive information publishing policy may be considered a key issue, as many of the types of information that are being sought by applicants with considerable difficulties are readily available in many other countries and do not have to be obtained through individual applications[34].

– System deficiencies

The Czech Republic faces an absence of key institutional provisions for monitoring the transparency and access to information, mediation and methodological support and other guidance functions.
In the application of the right to information, there is a lack of activities that could provide harmonisation or offer methodological assistance to obligated bodies and take part in the processing of specific requests; this makes the position of those who request information and the enforceability of the law in general very problematic.

[31] ZÁKON O SVOBODNÉM PŘÍSTUPU K INFORMACÍM. Historie [online]. [quoted on 2013-12-17]. Available at: http://www.zakonyprolidi.cz/cs/1999-106/info
[32] The 2005 implementation report to the UNECE committee reported a number of problems with access rights including conflicts between the laws on access to information and the Administrative Procedures Act, poor enforcement even when there is a court judgment ordering release of information, slow and "ineffective" court reviews and failure of government officials to release information and follow the dictates of the laws. http://www.freedominfo.org/regions/europe/czech-republic/
[33] C.f.: http://www.pirati.cz/_media/lide/diplomka_michalek.pdf , (str. 62)
[34] C.f.: http://www.datablog.cz/clanky/slovensko-hleda-napady-pro-otevrene-vladnuti-cesko-je-zatim-pozadu

5. RECOMMENDATIONS

New demands of the developing information society must have an adequate counterpart in legislation and in the actions of public authorities or obligated bodies, in accordance with the support of availability of information and the participation of citizens in the management of public affairs. This approach is consistent with the concept of public administration as a service to citizens. Any amendments of the current laws, which seem to be necessary in order to improve the enforceability of the right to information, must primarily focus on the objective, i.e. the support of providing information to citizens, and not on attempts to pare down[35] the options of citizens to access information from public administration authorities. Specific recommendations include:

– Promoting a proactive approach to publishing information – supporting the principles of publicity and a presumption of openness

Introducing a public interest test (proportional test) for all types of information, i.e. "unless public or private interest in protecting the information is stronger, the information shall be provided". It is also necessary to define a methodology for the proportionality test that would ensure a unified approach and application by various obligated bodies.

– Providing information in a format that enables further processing and repeated use; extending the scope of mandatory published information

Introduce the duty to publish information, primarily if it is related to the state's economic activities (contracts, invoices, information on public contracts and other defined databases), through open data (machine-readable format). Give supervisory bodies the competence to define data structures, a data catalogue and the method of publication. It is necessary to extend or adjust the scope of mandatory published information through publication schemes and to implement compliance monitoring and enforcement of the publishing duty. It is however unacceptable to give specific types of data a special status that would place them outside the scope of the FOIA (e.g. information on salaries).

– Make access to information faster and more efficient – information orders, sanctions and settlements of cases out of court

The introduction of an information order gives supervisory authorities the option to enforce their decision regarding an obligated body. This body may defend itself through a court complaint. This situation would resolve the "administrative table tennis" and transfer the burden of filing complaints to the obligated body.

Due to the duration of court disputes and the loss of value of information over time, the introduction of the option of an out-of-court settlement seems like an effective improvement of the enforceability of information access. Institutionally, there should be a body that would act as an intermediary during the proceedings.

[35] For example see the political statement of the Civic Democratic Party from 14 March 2014 http://www.novinky.cz/domaci/330427-ods-se-sesla-se-starosty-chce-menit-zakony.html

Introduction of sanctions for violating the law in the form of penalties against a person (offence) or entity (administrative offence) would improve the enforceability of the law. Sanctions should very specifically target the responsible person and apply for example for:

a. not processing a request within a set time limit;
b. issuing a decision that is against the law;
c. deliberately providing false information;
d. destroying the information without justification in order to make it impossible to be published.

– Provide methodological guidance, education, coordination and monitoring

Methodological, educational, consulting, coordination and monitoring activities require special attention. Currently, these issues are rarely explored on the local government level. The introduction of counselling, methodological guidance and education seems absolutely essential. It is also necessary to provide the monitoring of information access from the perspective of public interest in the information (statistics of requests, analysis of the duration of time and efficiency of providing the information, handling of information by authorities with regard to its publication, systematic active publishing, misuse of the legal institutes of trade secrets, protection of personal data, calculation of costs, the law, etc.) in order to be able to defend public interest in the law and sub-legal regulations. A key aspect is to provide a consistent approach on the national level as well as coordination of the international level, for example through proposals to join or implement international contracts and agreements.

– Establish an independent supervisory body for the issue of free access to information

The establishment of an independent supervisory body seems to be a suitable solution providing the necessary functions and competencies for implementing the measures described above that could be handled by this authority (in particular the methodology of the proportional test, publication schemes for obligatory information and monitoring, enforceability through information orders and sanctions, intermediary, educational and coordination roles etc.). A convenient solution would be to establish an independent body outside the agenda of the Ministry of Interior. An alternative could be to expand the powers of the ombudsman or the personal information protection office, or to create a new institution (information commission or commissioner). Due to the disagreement voiced by both existing authorities and with respect to the experience from abroad, where joining the agendas of monitoring compliance with the right to information and the right to protection of privacy invariably proved problematic, perhaps the best solution would be to establish a new office of an information commissioner.

– Harmonise the legislative

The two currently overlapping laws on information access, Act No. 106/1999 Coll. on free access to information, and Act No. 123/1998, on the right to information about the environment, should be merged to resolve the differences in the process of providing information.

Appendix 1

Czech Republic – Access to information	
Existence of legal right to access	Yes
Existence of FOI-specific law	Yes
Constitutional requirement for access to information	Yes
Access to drafted legal instruments	No
Access to enacted legal instruments	Yes
Access to annual budgets	Yes
Access to annual chart of accounts/expenditures	Yes
Access to annual reports	Yes
Written requests for information accepted	Yes
Electronic requests for information accepted	Yes
Oral requests for information accepted	Yes
Maximum 15-day response deadline	Yes
Actual response deadline (days)	15 days
Right to extend response time	Yes
Amount of additional response time (in days)	10 days
Maximum total response time of no more than 40 days	Yes
Actual maximum total response time	25 days
Nominal fees mandated	Yes
Coverage	Fee schedule
FOIA enforcement body	No
Name of FOIA enforcement body	Not applicable
Category of enforcement body	Not applicable
Public Interest test 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 protected interests, unless there is an overriding public interest in disclosure.	No
Harm test Exemptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information.	No
Exemptions to coverage	Yes
Administrative sanctions	No
Banned from practice or office	Not applicable
Dismissals	Not applicable
Suspensions	Not applicable
Warnings / Censure	Not applicable
Fines	No
Criminal sanctions	No

Source: World Bank Public Accountability Mechanisms (PAM) Initiative, Public Accountability Mechanisms (PAM) Initiative, https://agidata.org/Pam/Profile.aspx?c=54 (2011)

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LEGAL FRAMEWORK:

- Charter of Fundamental Rights and Freedoms, 1993, Article 17
- Law on Free Access to Information, 1993
- Law on Access to Information on the Environment, No. 123, 13 May 1998
- Personal Data Protection Act
- Government Regulation No. 364/1999 Coll., on cooperation between public administration bodies and municipalities regarding the duties of municipalities defined in Act No. 106/1999 Coll., on free access to information
- Government Regulation No. 173/2006 Coll., on the principles of determining costs and licence remuneration for providing information in accordance with the freedom of information act
- Regulation No. 442/2006 Coll., on the structure of information published about obligated bodies and availability of remote access
- Act No. 123/1998 Coll., on the right to information about the environment
- The European Convention on Human Rights (1950), as ratified (implemented with Notification No. 209/1992 Coll., as amended)
- International Covenant on Civil and Political Rights (1966, implemented with Regulation No. 120/1976 Coll.)
- Directive 2003/98/EC of the European Parliament and of the Council on the re-use of public sector information
- Act No. 500/2004 Coll., Administrative Procedure Code
- Act No. 150/2002 Coll., Code of Administrative Justice
- The Aarhus Convention (implemented with Notification No. 124/2004 in the Collection of International Treaties)
- Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, in particular its Articles 4 and 5
- Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC

COURT DECISION:

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- Ruling of the Constitutional Court, File No. I. ÚS 453/03
- Ruling of the Constitutional Court, File No. I. ÚS 517/10
- Judgement of the Supreme Administrative Court of 14 January 2004, File No. 7 A 3/2002
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