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THE RIGHT TO INFORMATION FROM PUBLIC AUTHORITIES IN THE SLOVAK REPUBLIC

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ABSTRACT

A right to information allows citizens to participate actively in public matters administration. Timely access to truthful and complete information is necessary condition of free decision-making and action of citizens and the instrument for open and transparent public administration enforcement. The paper deals with the problems of a right for information provided by public authorities and public institutions under the conditions of the Slovak Republic, while the attention is paid to the legal regulation.

KEY WORDS:

public, information, access, law, constitution

THE RIGHT TO INFORMATION AND THE RESTRICTION OF THE ACCESS TO INFORMATION

The right to access information along with other political rights granted by the Constitution of the Slovak Republic (hereinafter referred to as „the Constitution“) allows citizens to actively participate in an administration of public affairs. (I. Palúš, I., Somorová, L.:Košice, 2010, s. 154) Timely access to truthful and complete information is the necessary condition of free decision-making and conduct of citizens. The access to information is an instrument for the enforcement of open and transparent public administration, contributes to good and responsible functioning of administration of public affairs, reduces a risk of corruption and strengthens a confidence of citizens in a state and its bodies.

The right to information as a fundamental constitutional right is guaranteed by the Constitution in Article 26(1) along with the freedom of speech. According to Article 26(2), everyone has the right to express his

views in word, writing, print, picture or other means as well as the right to freely seek out, receive and spread ideas and information without regard for state borders. According to Article 26(5) of the Constitution, public authority bodies are obliged to provide information on their activities in an appropriate manner and in the state language. The conditions and manner of execution shall be laid down by law.

The right to access information available to public authority bodies and other public institutions is regulated in detail by Act No. 211/2000 Coll. on free access to information and on amendments and supplements to certain acts (Freedom of information act) as amended. In relation to special acts that partially regulate the obligations of some public authority bodies and public institutions to inform about their activities, the act on freedom of information has a position of a general law (*lex generaly*). (Hvišč, O.: Košice, 2007, p. 36- 38)

The entities obliged to provide access to information under this Act (hereinafter referred to as the „obliged persons“) shall be state agencies, municipalities, higher territorial units, as well as legal entities and natural persons that have been given the power by law to make decisions on the rights and duties of natural persons or legal entities in the area of public administration, and that obligation applies only within the scope of their decision-making power (e.g. members of water guard and forest warden that is, according to law, authorized to impose fines or non-state high schools at entrance exams). In addition, the legal entities established by law shall also be obliged persons (e.g. public higher education institutions, the Radio and Television of Slovakia and other public institutions) and legal entities established by a state agency, higher territorial unit or municipality under a special law (especially their budget and allowance organizations such as elementary/primary and high schools, the facilities of social services, etc.) as well as the legal entities established by the given obliged persons within the scope of management and disposal of public means, or matters related to living environment (e.g. state-owned companies or trading companies established by state, higher territorial unit or municipality). In accordance with the Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, the obliged persons are defined as a summary of public sector bodies and bodies governed by public law.

It results from Article 26 of the Constitution and Article 3(1) of the Freedom of Information Act that „everyone“ has the right to information,

what means that all natural and legal entities have that right. The entitlement to request information is not limited by a domicile of an applicant or his/her relationship to an obliged person or a citizenship of the applicant. Access to information shall be provided without any need to prove legal or other reason or interest for which information is required.

An obliged person must disclose information that it has available (e.g. information pertaining to its operations or information it uses) or must have available under laws. However, the Freedom of Information Act does not require from the obliged person to create information that does not exist at the moment of the request filing. The examples include the cases when applicants require so that the obliged persons to process analyses, reports or standpoints. The obliged person may refuse to disclose information if it does not have the requested information available.

The Constitution does not guarantee the right to information as an absolute right that is superior to other constitutional rights and freedoms. According to Article 26(4) of the Constitution, the right to information may only be restricted by law, if such a measure is necessary in a democratic society to protect the rights and freedoms of others, state security, public order, or public health and morals. In conformance with the Constitution, the Freedom of Information Act sets forth enumeratively the information categories that are protected and therefore they will not be disclosed. The principle of openness (publicity) of public administration under which the requested information will be disclosed is applied here, except for information that is specifically excluded from such disclosure.

If the requested information includes information excluded from disclosure under the Freedom of Information Act (Articles 8 to 11), the obliged person can not refuse the disclosure of requested information (e.g. the entire document containing personal data or classified facts). It must exclude such information (e.g. to make it unreadable or anonymous) and disclose other information. Therefore, if requested documents contain even some partial information, which is not excluded from disclosure under the law, the obliged person shall be obliged to disclose that information.

In addition to the definition of information excluded from disclosure, some provisions of the Freedom of Information Act also have the principle of prevailing public interest incorporated. The Act defines some situations (exclusions), where, for a public interest, it is needed to disclose information that is otherwise protected under the law (e.g. the impossibility to

apply a trade secret protection at information related to the use of public finance or disposal of state or municipal property). (Wilfling, P.: 2012, pp. 49 -50)

MANDATORY DISCLOSURE OF INFORMATION

The Freedom of Information Act stipulates the obligation to disclose a certain information actively, i.e. without a specific request. Within the framework of so called active disclosure of information, the Act imposes on the obliged persons to disclose information enumeratively specified by law that have principal significance for a contact of citizens with an obliged institution. That basic information shall be published in the seat of the obliged person and all its workplaces on a publicly accessible place. A publicly accessible place is a place that anyone may access anytime. Except for municipalities without a town/city status, the obliged persons also must disclose that basic information in a manner that allows a mass access, usually through the internet.

Selected obliged persons must also disclose some additional information on their activities through the internet and on their own initiative. The National Council of the Slovak Republic and councils of municipalities (villages, towns and cities) and higher territorial units are obliged to disclose, for example, dates of their sessions and meetings of their committees, or commissions and a draft agenda, minutes from public meetings, wordings of the draft legal regulations submitted and wordings of legal regulations passed, within three days after their approval. The National Council of the Slovak Republic, towns/cities and higher territorial units are obliged to disclose that information through the website. The municipalities without a status of a town/city will disclose that information in their seat and all workplaces on a publicly accessible place, while that information can also be disclosed through the website.

Additional informational obligations are incorporated separately for the Government of the Slovak Republic, the ministries, other central bodies of state administration and bodies of local state administration, the Office of the President of the Slovak Republic and Constitutional Court of the Slovak Republic.

All the obliged persons shall also disclose information related to a transfer or passage of immovable property and movable property the acquisition price of which exceeded twentyfold the amount of minimum

wage. The given information shall be disclosed in a way enabling mass access (usually through a website) for a period of at least one year starting on the day the transfer or passage took place. The municipalities without a town/city status may disclose that information also in other way.

The obliged persons that operate information systems shall disclose information contained therein on a freely accessible internet page, unless disclosure of this information is prohibited by a special act. They include, for example, Company Register, Trades Register, publicly accessible information from land registry, register of citizens' associations and so on. A freely accessible internet page means that information may not be provided for a payment and the access to them is without any condition.

The obliged persons may also disclose the given information in other ways and in addition to mandatory information; they also may disclose other information. When information is disclosed actively, it is also necessary to note so as the information protected pursuant to Articles 8 to 11 of the Freedom of Information Act not to be disclosed.

In addition to abovementioned information, the obliged person may optionally disclose, for example through a website or otherwise, also other information, which is supposed to be applied for frequently. In connection with information that has already been disclosed, the obliged persons may, instead of providing the information, inform the applicant on how to find and retrieve such published information (e.g. by a reference to specific website). Should the applicant insist on having access to the information, the obliged person shall provide it. It ensures that the information will also be accessible for the applicants who have no option to make them acquainted with the published information through, for example, a website. (Wilfling, P.: 2012, p. 41)

MANDATORY PUBLISHING OF CONTRACTS, INVOICES AND ORDERS

The aim of mandatory publishing of contracts was to introduce rules that ensure a transparent and economic utilization of public property and public means. It is the consequence of the cases from the past, in which it was obvious that the obliged persons acted unefficiently or uneconomically after receiving and checking the data in contracts. Public was not sufficiently informed about their content. At the same time, a knowledgeability of citizens on the public means spending is supported. (see: Preamble to Act No. 546/2010 Coll., amending Act No. 40/1964 Coll., Civil Code as

amended, and which amends and supplements certain acts.)

Mandatorily published contract is a written contract that is entered to by an obliged person and which contains information obtained with public means used by public administration legal entities including non-state special-purpose funds or which concern the use of public means, using the state property, municipality property or the property of higher territorial unit or property of legal entities established by law or based on law or using the funds of the European Union. (Article 3 of Act No. 523/2004 Coll. on Public Administration Budget Rules and on a change and amendment to some acts as amended.)

The provision of mandatorily published contract that contains information, which is protected under the Freedom of Information Act shall not be published. As well, the parts of mandatorily published contract such as technical pattern, guides, drawings, project documentation, models, method of calculation of unit prices and examples.

The Freedom of Information Act contains an enumerative listing of contracts that may not be mandatorily published (e.g. an employment contract and contract for work carried out outside the employment, a contract concluded within the sphere of competence of the Slovak Intelligence Service and Military Service, see: Article 5a (5) of Act No. 211/2000 Coll. on free access to information and on amendments and supplements to certain acts (Freedom of Information Act).

Mandatorily published contract, a party of which is an obliged person, shall be published in the central register of contracts; excluding the National Bank of Slovakia, municipalities, higher territorial units or their budget or allowance organizations or the obliged persons in which the abovementioned entities have a participation exceeding 50%.

The central register is a public list of mandatorily published contracts kept by the Office of the Government of the Slovak Republic in an electronic form. A mandatorily published contract, which does not subject to the publication in the register, shall be published on the website of the obliged person that is a contractual party, immediately upon the contract conclusion or upon a consent delivery where a competent authority's consent is required for the validity of the contract. If such obliged person has not a website, the contract shall be published on a website of its founder or free-of-charge in the Commercial Bulletin.

A mandatorily published contract shall be published during the exist-

ence of a liability resulting from the mandatorily published contract, however, at least five years from the date of its entry into effect.

If the law stipulates the mandatory publishing of a contract, the contracts shall become effective on the day following the day of its publishing. There is a statutory exception for contracts concluded to remove the consequences of an emergency that immediately threatens life, health, property or the environment that shall become effective without publishing. The provision of a contract containing information that does not subject to a disclosure under a special Act, shall also become effective without publishing. If the contract is not published within three months from the conclusion of the contract, or from giving the consent, it shall be assumed that no contract has been concluded.(see: Article 47(4) of Civil Code.)

With effect from January 1, 2012, there is an obligation of an obliged person to publish data about all orders and invoices without regard to the amount of ordered or invoiced fulfillments. An obliged person that publishes invoices and orders on its website, shall publish data about orders and invoices as provided by law in a structured and well arranged form on its website for period of five years. In case that it has no own website, it shall not publish the orders and invoices.

MANDATORY PUBLISHING OF JUDGMENTS

A significant new feature in the Slovak Republic in the sphere of a freedom of information has been an introduction of the obligation to publish and make accessible judgments for courts under conditions and to the extent of Article 82a of Act No. 757/2004 Coll. on Courts as amended. According to the given provision, the courts are obliged to publish valid judgements on the merits, the judgments that close the proceedings, the judgments on a preliminary measure and the judgments on authority's decision enforceability postponement on the Ministry of Justice of the Slovak Republic's website. However, the judgments taken in the proceedings with public excluded from a trial for all the trial or a part of it shall not be published. Data stipulated by law shall be make anonymous before judgment publishing so as to ensure and protect the rights and interests protected by law of the persons concerned. Other data about a natural person can be make anonymous only if data are of a private nature and upon a written instruction of a judge or a legal officer who took the judgment. Upon the request under the freedom of information act, the courts make accessible

all the judgments, including invalid judgments and judgments that are not ones on the merits. (see: Article 5 of Decree of Ministry of Justice of the Slovak Republic No. 482/2011 Coll. on Publication of Judgements)

DISCLOSURE OF INFORMATION UPON REQUEST

An applicant can apply an obliged person for information that are not mandatorily published by a request. The proceeding on disclosure of information begins by the filling of the request.

Information disclosure shall be free of charge, with the exception of material costs payment. The applicant shall only pay the costs connected with the disclosure such as making copies, delivery of decision and so on or the obliged person may forgive the charges. The details on the costs of disclosure shall be regulated by a generally binding legal regulation of the Ministry of Finance of the Slovak Republic. (see: Decree of Ministry of Finance of the Slovak Republic No. 481/2000 Coll. on details of payment of costs for information disclosure.)

The request may be filed in writing, orally, by fax, e-mail or in an other technically reasonable way. The request must include the name of the obliged person, first name, last name or business name, address or registered office of the applicant, the information concerned and the way of disclosure of information suggested by the applicant. The obliged person reviews the request informally, according to its content. In the event that the request fails to meet the requirements stipulated by law, the obliged person shall invite the applicant without any delay to complete the request within a period of not less than seven day. The obliged person shall instruct the applicant how to complete the request. If the applicant fails to complete the request in spite of the obliged person's notice and information cannot be provided due to this imperfection, the obliged person shall set the request aside.

The request is regarded as filed on the day the obliged person with appropriate competence was notified (the request was delivered to it). If the obliged person doesn't have the requested information available and knows where it is possible to obtain the information, it shall transfer the request within five days from the delivery of the request to the obliged person that have the requested information available, otherwise it shall reject the request by a decision. The obliged person shall notify the applicant of the transfer of request without any delay. The period for handling the

request shall commence anew on the day the obliged person received the transferred request.

The obliged person shall attend the request for information without undue delay, but not later than eight working days after filing the request. In the event that the applicant is a sightless person and applies for information in a Braille type, the period for handling of the request is 15 working days.

The obliged person shall be entitled to extend the period due to serious reasons by a maximum of eight working days (15 working days if the information will be disclosed to a sightless person). Serious reasons mean searching for and gathering of requested information on a place other than the seat of the obliged person that handles the request, searching for and gathering of large amount of separate or diverse information requested in a single request or provable technical problems related to the search and disclosure of information that are expected to be removed within the extended period. (Article 17(2) of Freedom of Information Act). The obliged person shall notify the applicant of the period extension without undue delay, not later than before the expiration of the period for the request execution. The notice must include the reasons leading to the extension of the period.

The request is handled by a disclosure of requested information or by an issuance of the written decision, which refuses the disclosure of requested information. Information, which is simple and easily retrievable, must be disclosed without unnecessary delay.

Information shall be disclosed mainly orally, by inspection of files, including the possibility to make copies or notes, by downloading data to a data carrier, by providing copies of the original with requested information, by telephone, fax, post, e-mail. In the event that information cannot be provided in a way required by the applicant, the obliged person and the applicant shall agree a different way of providing the information.

If the obliged person provides the applicant with required information, it shall issue a decision that is to be recorded in the file that is kept for the matter – i.e. to the request for information. The record in the file must contain basic data including name of the applicant, date of the request for information, type of the requested information, a statement that the information was disclosed, data about the type of information disclosed, date of the decision issue and name, surname and the office of the entitled

person. The decision need not contain the grounds where the request of the applicant was met. If the request was filed by telephone or e-mail, the obliged person need not to keep a file about the request. If it is the case, the decision made by a record in file can be made by a record into above-mentioned data into the requests registration. No appeal si possible against such decision.

If the obliged person fails to satisfy the request, even partially, it shall issue a decision to that effect with the statutory period that must contain the basic requirements of a decision – a verdict, grounds and the advice on appeal. (Sotolář, J., Košice, 2008, p. 111) The decision is delivered by a personal delivery to the applicant. The decision verdict on non-disclosure of information must state that the request for information is denied. If the request for information is denied partially, the verdict must exactly specify, which specific information will not be disclosed. In the decision grounds, the obliged person will state the facts that underlie the decision, the consideration that was taken into account in the assessment of evidences, how did it apply the legal regulations that were the basis of the decision. The obliged person must give reasons for non-disclosure of every specific requested information or every specific type of requested information.

If the obliged person fails to handle the request for information within a statutory period and remains inactive (i.e. it does not disclose information nor issue a written decision refusing the request), it is supposed that it issued a decision by which it refused to disclose the requested information. After the expiration of the statutory period, so called fiction of refusing decision arises, although the obliged person did not issue regular written decision. A fictitious decision is considered to be delivered on the third day following the expiration date of the request handling period. The fictitious decision institute allows the applicant to claim his/her right despite the inactivity of the obliged person and to file an appeal from or a remedy of the decision. The obliged person's inactivity and a reliance on the occurrence of the fictitious decision is always regarded as a breach from the party of the obliged person.

It is possible to file an appeal against the obliged person's decision on the refusal of requested information or against the fictitious decision within 15 days from the delivery of the decision. The decision on the appeal against the decision of the obliged person shall be made by the superior of the obliged person that issued or should have issued the decision. If it is a decision of municipal authority, the decision on the appeal shall be

made by the mayor (city mayor). In case that the obliged person's decision contested is in accordance with the law, the appeal authority will confirm it and refuse the appeal. In the case that the contested decision is unlawful, the appeal authority will reverse the decision and return the matter to the obliged person so as to act in a new proceedings or will change the decision and disclose the requested information. If the appeal authority does not take a decision on the appeal within the specified period of 15 days, analogous to the proceedings on the request for information handling, a fiction of refusing decision occurs.

It is not possible to file an appeal against the decision on the appeal (including a fictitious decision on the appeal), but it is possible to file an action to a court within 2 months from the decision delivery. A regional court will be appropriate to proceed within the district of which the obliged person has its seat. The court will examine the lawfulness of the decision and if the decision is unlawful, it will reverse such decision and return the matter to a competent authority (an appeal authority or obliged person) so as to act and decide again. At the same time, the legal opinion of the court is binding. In justified cases, the court may directly instruct the obliged person to provide requested information to the applicant.

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