



Law on Free Access to Information amended away from the public eye

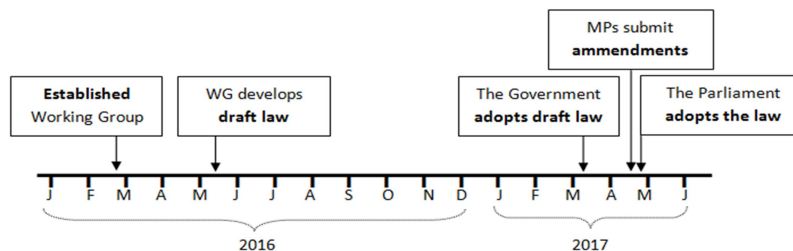
STATE SECRETS – SCREEN FOR CORRUPTION

The recently adopted amendments to the Law on Free Access to Information enable institutions to conceal information that may indicate a violation of law or corruption, contrary to the recommendations of the European Union. This document shows how the law has been changed without the knowledge of the public and what problems it will cause in practice.

In early 2016, the Ministry of Culture set up a working group to draft amendments to the Law on Free Access to Information¹ with the task of regulating the issue of data re-use in compliance with European directives. Almost a year after the draft was made, the government submitted the Proposal of amendments to the law to the Parliament,² at the very moment when all opposition parties boycotted the work of the Parliament.

The government's initial proposal referred only to the re-use of information, but it later accepted the amendments of MPs of the ruling party which significantly limited the access to information.³ The institutions responsible for the implementation of the law were not consulted when proposing the controversial amendments,⁴ nor was the opinion of the European Commission asked.⁵

The same day when the MPs proposed the amendments, there was a session of the Parliament at which the amendments were adopted. On that occasion, 12 minutes were dedicated to the discussion on the re-use of information, while the disputable amendments were not even once mentioned.⁶ The public learned about them only two weeks later, when they were revealed by the media.⁷



MPs' amendments do not contain any justification, contrary to the usual practice of the Parliament. There is no reasoning provided in the minutes of the meeting of the Committee on Political System, Judiciary and Administration, where the amendments were discussed. It is only stated that there was

¹ The working group, established by the decision of the Ministry of Culture on 23 February 2016, consisted of eight government representatives and one representative of the Agency for Protection of Personal Data and Free Access to Information and civil society.

² Proposal of amendments was established at the government session held on 10 March 2017, while the working group made the draft in the middle of 2016.

³ The amendments were submitted by all members of the Committee on Political System, Justice and Administration, who come from the ranks of the Democratic Party of Socialists, and the amendments were discussed at the Committee meeting held on 27 April 2017.

⁴ Representatives of the Agency for Protection of Personal Data and Free Access to Information, as the second instance authority responsible for the application of this law, were not invited to the session of the Committee, nor otherwise consulted with regard to the content of the controversial amendments.

⁵ Parliament of Montenegro, *Minutes of the Eighth Session of the Committee on Political System, Judiciary and Administration held on 27 April 2017*, Podgorica, May 2017. More information available on <http://www.skupstina.me/zakoni/web/dokumenta/sjednice-radnih-tijela/1695/4240-:pdf>.

⁶ Plenary session held on 27 April 2017; speakers were Zeljko Rutovic, representative of the government, and DPS MP Bogdan Fatic.

⁷ T.P., M.R., *Amendments to the law crucial for controlling the authority: A path to hiding abuses*, Daily „Vijesti“, Podgorica, 13 May 2017. More information available on www.vijesti.me/vijesti/put-do-sakrivanja-zloupotreba-937664.

a “short discussion” on the amendments.⁸ It is not known whether the MPs discussed the reasons for proposing the amendments during the debate on the government's initial proposal, as the minutes of that meeting were not released a month later.

Declaring secret without explanation

After the amendments enter into force, the institutions will be able to conceal information about their work without any explanation.

So far the authorities have carried out a so-called damage test before the declaration of the secret data and determine whether it is more important to limit the access to information or to let the public know.⁹ On this basis, the Administrative Court has annulled hundreds of decisions of the executive power to restrict the access to data.

However, **the institutions will no longer be required to conduct the damage test when declaring a piece of information secret**, because the amendments provide that the law does not apply to the information that are necessarily kept confidential, in accordance with the law governing the confidentiality of data.¹⁰

The government has usually declared secret data on the spending of public money, as well as large privatization and infrastructure projects. Thus, information about the privatization of the largest state-owned companies, such as the Aluminum Plant Podgorica (KAP) and Telekom, where there were numerous allegations of corruption, were concealed for years. Now, all the information on highway construction, the largest infrastructure facility in the history of Montenegro, are being hidden the same way.

Even the names of the items on the agenda of the Government are state secrets, and when the time for which the document was declared secret runs out, the government declares a higher degree of confidentiality without any explanation. There are numerous cases in which the government declared secret or increase the degree of confidentiality of data only after having been requested to publish the data.

Vicious circle of decision-making

Amendments to the law enable stalling of the process, which is used as a method for hiding information.

After the amendments enter into force, the Agency for Protection of Personal Data and Free Access to Information will not be obliged to make final decisions on appeals, so the procedures can last forever. That is, the institutions will be able to continually make illegal decisions that the Agency will permanently annul and so on.

Instead of explicit legal obligation of the Agency to adopt the so-called decision on the merits under the threat of misdemeanor, the amendments stipulate that this procedure is under the Law on

⁸ Minutes of the 8th session of the Committee on Political System, Judiciary and Administration, held on 27 April 2017.

⁹ Damage test is not conducted for information under Article 14, Item 1 al. 1 and 2 of the law, or in the case of protection of privacy, security and defense, and external, monetary and economic policy of Montenegro, in accordance with the regulations governing the data confidentiality.

¹⁰ Article 1 of Law amending the Law on Free Access to Information, Official Gazette of Montenegro No. 30, Podgorica, 9 May 2017.

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Administrative Procedure. This law stipulates that a decision on merits can be made upon an appeal, which authorities, as a rule, do not do in practice.

The new Law on Administrative Procedure envisages the obligation of the second instance decision-making, but only in the retrial, after the second complaint. In this way, it takes twice as long to get the requested information. However, this new law was adopted three years ago, but its application has already been postponed three times, and it is not certain that it will really start to be implemented in July this year, as planned.

Before the establishment of the Agency, which has been given authority to make decisions on the merits, institutions often avoided disclosure of important information by permanently adopting illegal decisions to prohibit the access to information, and the court repeatedly annulled them. Thus, it was not possible to access public information in practice, especially if they could point to the corruption.

For example, the Court issued four judgments quashing the illegal decisions of the institutions to restrict the access to information on the privatization of Telekom. This very case has been the subject of investigation by institutions of the United States, on suspicion of corruption.

Citizens denied constitutional rights

According to Article 51 of the Constitution of Montenegro, everyone has the right to access information held by public bodies and organizations exercising public authority, and that right may be restricted if it is in the interest of protecting a life, public health, morality and privacy, criminal proceedings, the defense and security of Montenegro, and foreign, monetary and economic policy.

The amendments to the law provide that the institutions can restrict the access to information by declaring them secret **in any field, not just those that are prescribed by the Constitution.**

At the invitation of MANS, the leaders of five parliamentary parties submitted a proposal to review the constitutionality of that provision of the law in late May.¹¹ Thus, the proceedings to review the constitutionality was automatically initiated and decision-making of the Constitutional Court in relation to citizens' initiatives, which takes longer procedure, was accelerated.

Recommendations of the European Union

The amendments are contrary to the recommendations of the European Commission and the European Parliament, which seek greater transparency and disclosure of information that may indicate corruption.

Thus, in the latest Progress Report on Montenegro, the European Commission states that "public institutions need urgently to improve implementation of the law and comply promptly with access to information requests, especially in corruption-prone matters."¹²

¹¹ The proposal to review the constitutionality was submitted by the leaders of the Democratic Montenegro, DEMOS, the Social Democratic Party, the Socialist People's Party and the Civic Movement URA, on 26 May 2017.

¹² European Commission, *2016 Report on Montenegro*, Brussels, 9 November 2016, p.59.

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Moreover, the Commission notes that "it is also a matter of concern that in some cases first-instance authorities seem to abuse the possibility of declaring requested documents confidential in order to restrict access to information."¹³

The European Parliament stressed that it was necessary to properly implement the court's decision regarding the access to information and warned that they should stop the practice of concealing information. They invited the government "to improve access to public information, especially in relation to large infrastructure projects such as the construction of highways, privatization, public procurement and judicial operations."¹⁴

¹³ Ibid, p.59.

¹⁴ European Parliament, *European Parliament resolution on the 2016 Commission Report on Montenegro*, Brussels, 2 March 2017.



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