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Promoting Transparency and Accountability in Public Administration



HARM TEST IMPLEMENTATION GUIDELINES

Project implemented by:



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PROJECT: PROMOTING TRANSPARENCY AND ACCOUNTABILITY IN PUBLIC ADMINISTRATION

HARM TEST IMPLEMENTATION GUIDELINES

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1. INTRODUCTION

The right to free access to public information in the modern society is one of the key fundamental civil rights. It is a human right which provides transparency and openness of the public authorities, facilitates public control of their work through prevention of corruption and other illegalities, it is an exceptionally powerful tool that contributes to accountable operations and efficient use of the public assets and creates new base for good governance and citizen trust in the work of the institutions.

The laws that regulate the right of access to information prescribe the method of realization of that right, primarily through the obligation for proactive publication of information by the public authorities and then through the procedure for application for free access to information as well as supervision of the public authorities' compliance with the legal obligations.

Most of the laws that regulate this right include so called **Harm Test**, which is essentially an obligation and instrument for assessment whether the public interest in the availability of the information prevails over the need to limit the access to information due to protection of certain rights prescribed by law. Consequently, with respect to the right to access to information as a constitutionally guaranteed basic human right for access to the information in possession of the public authorities and as a preventive anticorruption tool and means of the rule of law and strengthening of the accountability of the public authorities, the harm test is its fundamental instrument.

Simply, the harm test is a decision from the highest degree and discretion made by a public authority in relation to the application for free access to public information which prescribes whether the public interest prevails to withhold the requested information in the scope of limitation of the access or whether the public interest to exempt the requested information from the existing limitation and make it available to the applicant and consequently to the public at large.

In the Republic of North Macedonia, the free access to information possessed by the public authorities is guaranteed in article 16 of the Constitution. The method of realization of this right is prescribed in the Law on Free Access to Public Information¹ (hereinafter: **LFAPI**) which, among the other, prescribes a special procedure upon application for free access to

¹ („Сл. весник на РСМ“ бр. 101/19)

public information², exemptions from the free access³ as well as the application of the harm test⁴.

According to the current practice of the Agency for Free Access to Public Information (hereinafter: **the Agency**), the public authorities – information holders do not implement the harm test properly. In case of an application for free access to information which may potentially fall within some of the exemptions prescribed by the law, the information holder's practice is simply not to implement the test and ignore the article 6 paragraph 3 of LFAPI ("the information is protected, the application is rejected") or implement it incorrectly (for example, without the necessary steps) failing to explain the rationale of the way the application has been processed.

Therefore, these Guidelines' goal is to provide a support for the official – manager of the information holder, as well as for the information officers to implement the harm test properly and appropriately, thus enabling the citizens to realize their constitutionally guaranteed right to free access to information in cases when there is no need to limit the access.

2. WHO IMPLEMENTS THE HARM TEST?

The information officer is the person who in principle takes care for the implementation of the LFAPI and ensures its implementation at the information holder.

According to LFAPI, the procedure upon the application for access to information is implemented by the official⁵. However, considering that the harm test is the highest-level decision which can be made by the information holder when assessing whether there is a public interest to allow or limit the access to given information, the recommendation and good practice that in addition to the official, other relevant officers or information holder staff should take part in the implementation of the test.

In that sense, the responsible person at the information holder may appoint a working group or a committee to implement the harm test with participation of the information officer and professionals or managers in the organizational unit that has the requested information and as a rule, persons from the legal profession, in order to make the proper decision. Such working group may be established with a decision issued by the head or other authorized person at the information holder, as standing or ad hoc (special purpose group depending on the content of the requested information).

² Chapter IV of LFAPI

³ See article 6 paragraph 1 of LFAPI

⁴ See article 6 paragraph 3 of LFAPI

⁵ See article 19 of LFAPI

As a rule, the members of such group include the information officer, lawyer (for example, the head of legal department etc.), while the ad hoc members, depending on the requested information are representatives of the organizational unit in which domain is the requested information. Therefore, depending on the type of limitation, the members of the test implementation group may include, for example, the information officer, the classified information security officer etc. The holder i.e., the official or the responsible person in the institution should assess, depending on the validity of the requested information and its specificness, whether the test will be conducted individually or in wider group, considering the principle of cost effectiveness and efficacy of the procedure⁶.

In any case, especially in case of more complex application for free access to information, the responsible person at the information holder is obligated to establish and maintain relevant communication and support system between the information officers and other staff in the institution for proper implementation of the entire procedure, including the harm test.

3. GUIDELINES AND STEPS FOR IMPLEMENTATION OF THE TEST

In principle, in the procedure upon requests for free access to information, the information holder has the right to decline access to the requested public information and is obligated to assess the interests, circumstances and consequences which derive or are in relation with the disclosure i.e., non-disclosure of the requested information.

This right of the information holder is prescribed in article 6 of the Law on Free Access to Public Information and according to this article, access to public information may be declined in certain listed cases.

Additionally, LFAPI prescribes⁷ that as exemption, even if the information belongs to one or several of the legally prescribed exemptions, the information holder, may, nevertheless, provide access to the requested public information. In that case, even if the disclosure of the requested information causes “harm” to the protected interest of the information holder, the test may show that the public interest for disclosure of the requested information may prevail over the interest for its non-disclosure and consequently, the information has to be disclosed.

⁶ See article 7 of the Law on General Administrative Procedure (“Official Gazette of RM” no. 124/2015 and no. 65/2018)

⁷ See article 6 paragraph 3 of LFAPI

NOTICE:

Despite the fact that in certain procedure upon request, legal basis for denial of the access to the requested information is identified, the information holder cannot deny the access automatically but has to assess the relation between both protected interests – the interest in protection (non-disclosure) of the requested information and the interest in disclosure of the information.

It is important to note that both cited interests are legitimate and represent certain aspect of the public interest with the fact that they are prescribed with a Law and recognized as legitimate.

Often (if not exclusively) they are two confronting, equivalent, constitutionally guaranteed rights such as the right to personal data protection or ownership right in relation to the access to information or other values protected by the Constitution such as the freedom of expression. Thus, the aim is to assess whether the public interest for provision of an access to the information exceeds the potential harm which would be caused by the disclosure of the information.

The proper implementation of Article 6 of LFAPI and Article 13, para 3 of the Guidelines for the manner of the implementation of the LFAPI⁸, requires that the information holder should perform the following steps:

- 1) **Identification of protected interest;**
- 2) **Identification of an applicable exemption among the ones listed under Article 6, para. 1 of LFAPI;**
- 3) **Checking whether the legal provision under Article 6 of LFAPI corresponds to the identified protected interest;**
- 4) **Checking whether partial access or change of the method of familiarization with the information is applicable (proportionality test);**
- 5) **Checking whether there is a public interest in the disclosure which prevails over the interest in the protection of the information;**
- 6) **Making decision whether:**
 - a. **Provide access to all the requested information;**
 - b. **Deny access to all the requested information;**
 - c. **Deny access to part of the requested information;**

After performing the above six steps the information officer should perform one more, last step, which is very important:

- 7) **To provide written explanation in the administrative act (acting upon the application) how the above six steps were performed in the light of the specific relevant facts.**

NOTICE:

LFAPI does not prescribe the form of the harm test, it is conducted based on the merits for each individual request depending on the requested information, its context and the circumstances which come from its disclosure i.e., non-disclosure. Additionally, for certain type of information the harm is determined in advance according to special legal regulations.⁹

⁸ ("Official Gazette of RNM" no. 60/2020)

⁹ See item 7.1 of these Guidelines.

4. RESTRICTIONS UNDER THE LAW

Limitations on access to information can be provided only by law. This derives from the fact that in the Republic of North Macedonia the right of access to public information is recognized under the Constitution.¹⁰ Also, the relevant provisions of LFAPI prescribe the exemptions of that right.

4.1. Restrictions under LFAPI

Article 6 of the 2019 Law on Free Access to Public Information of the Republic of North Macedonia lists exhaustively the relevant restrictions (exemptions) on the right of access to information. These are

- 1) Information that based on law is classified information with relevant classification degree;
- 2) personal data, the disclosure of which would cause harm to the protection of personal data;
- 3) information, the disclosure of which would harm the confidentiality of the tax procedure;
- 4) information obtained or compiled for investigation, criminal or misdemeanor proceedings, for the conduct of administrative and civil proceedings, and the provision of which would have detrimental consequences for the course of the proceedings;
- 5) information that threatens industrial or intellectual property rights.

4.2. Other relevant legal provisions on exemptions

The Classified Information Law ¹¹ (hereinafter: **CIL**) and the Personal Data Protection Law ¹² (hereinafter: **PDPL**) regulate the exemptions connected with the protection of classified information and personal data in more detail.

Specific provisions adding details to the substance and application of certain exemptions can be found in the Tax Procedure Law¹³, the Law on National Bank of the Republic of North

¹⁰ See article 16 of the Constitution of the Republic of North Macedonia

¹¹ ("Official Gazette of RNM" no. 275/2019)

¹² ("Official Gazette of RNM" no. 42/2020)

¹³ ("Official Gazette of RM" no. 13/06, 88/08, 159/08, 105/09, 133/09, 145/10, 171/10, 53/11, 39/12, 84/12, 187/13, 15/15, 97/15, 129/15, 154/15, 23/16 and 35/18 and ("Official Gazette of RNM" no. 275/19 and 290/20)

Macedonia¹⁴, the Criminal Procedure Law¹⁵, the Law on General Administrative Procedure, the Civil Procedure Law¹⁶, the Intellectual Property Law¹⁷ and other laws.

A separate chapter on the access to environmental information and the applicable restrictions to this access is incorporated in the Law on Environment (Chapter VII, articles 51-58).

Access of the data subject to personal data is regulated under the Personal Data Protection Act (2020).¹⁸

NOTICE:

A denial to provide access to information, either partially or entirely should refer not only to the relevant legal provision under Art.6 of LFAPI, but also to the relevant provision in the special law regulating a given restriction.

The provisions of the relevant special law should be taken into account and reflected in the explanation of a decision for denial together with the grounds under the LFAPI.

For example, in a refusal to provide classified information, the public body should also specify the relevant provision under the Classified Information Law in addition to the referral to Art.6, para.1, item 1 of LFAPI.

5. PROTECTED INTERESTS

The list of protected interests can be easily identified on the basis of the relevant provisions from LFAPI as well as from the international standards. The provision of Article 3, paragraph 1 of the Convention on Access to Public Documents¹⁹ (hereinafter the **Convention**) lists 11

¹⁴ ("Official Gazette of RM" no. 158/10, 123/12, 43/14, 153/15, 6/16 and 83/18 and ("Official Gazette of RNM" no. 110/21)

¹⁵ ("Official Gazette of RM" no. 150/10, 100/12, 142/16 and 198/18)

¹⁶ ("Official Gazette of RM" no. 79/05, 110/08, 83/09, 116/10 and 124/15)

¹⁷ ("Official Gazette of RM" no. 21/09, 24/11, 12/14, 41/14, 152/15, 53/16 ("Official Gazette of RM" no. 83/18 and "Official Gazette of RNM" no. 31/20)

¹⁸ See article 19 of the Personal Data Protection Law

¹⁹ CETS 205 – Access to Official Documents, 18.VI.2009

categories of interests that could justify limited access to documents.²⁰ Most of them are reflected in almost all national laws on access to information. Typical protected interests are:

- national security, defense and international relations;
- public order and safety;
- personal privacy;
- trade secrets;
- integrity of inspections by public bodies;
- criminal investigations.

Macedonian legislation also covers most of the listed protected interests. For example, according to LFAPI, the classified information is listed as exempted from free access.²¹ According to the Classified Information Law, the aim of the data classification is the state security and defense, its territorial integrity and sovereignty, the constitutional order, the public interest and the human and civil freedoms and rights.²² This corresponds to the interests listed under the Convention, namely national security, defense, and international relations.²³

Personal data is also listed as protected interest under LFAPI,²⁴ thus corresponding to a similar interest protected under the Convention.²⁵

Both LFAPI and the Convention provide for the protection of information obtained or compiled for investigation, criminal or misdemeanor proceedings, and for the conduct of administrative and civil proceedings.

In the Convention these interests are listed in two separate categories. They are explained subsequently as:

- 1) the interest in “the prevention, investigation and prosecution of criminal activities”;
- 2) the interest in “the equality of parties in court proceedings and the effective administration of justice”.

Some interests listed in the Convention are protected in a narrower scope under LFAPI. For example, the Convention lists the commercial or other economic interests, while LFAPI

²⁰ The Convention was signed by the Republic of North Macedonia in 2009. It came into force in December 2020, after completing ten ratifications. The official text is available at: <https://rm.coe.int/1680084826>

²¹ See article 6 paragraph 1 item 1 of LFAPI.

²² See article 6 paragraph 2 of the Classified Information Law.

²³ See article 3 paragraph 1 item “a” of the Convention.

²⁴ See article 6 paragraph 1 item 1 of LFAPI.

²⁵ See article 3 paragraph 1 item “f” of the Convention.

extends the exemption only to industrial or intellectual property and trademarks, excluding other economic interests.

6. IDENTIFICATION OF THE PROTECTED INTEREST

This part of the harm test is aimed to identify whether there is a protected interest in the protected information and whether it does correspond to the relevant provision of Article 6, para 1 of LFAPI.

In the identification of the protected interest, the holder is obligated, in each individual case, to identify the probability that the provision of access to the requested information would cause serious breach of the interest protected by the exemptions from article 6 paragraph 1 of LFAPI. The exemption itself implicitly or explicitly includes the public interest to protect the requested information. In other word, the public authority has to explain the probability that the protected interest will be harmed i.e., that the public interest is to protect the information from the public.

On the hand, the fact that the requested information is one of the legal exemptions does not mean that the protected interest will be seriously harmed automatically with the provision of the access to the information i.e., the harm has to be certain, specific and precisely identified.

In other words, the information holder must not speculate, assume and/or use the institute “argumentum in terrorem” (intimidation argument) regarding the occurrence of possible harm of disclosure of the information but should provide clear and undoubtful identification of the reasons why the disclosure of certain information will have harmful effects for the protected interests.

Examples that demonstrate how potential harm arising from the provision of public information is identified are provided in the next part:

6.1. Classified information

If the information officer is of the opinion that the requested information relates to national security, defense and international relations, he/she should check whether it was classified under the Classified Information Law. If the information has not been formally classified and marked in correspondence with the provisions of CIL, then there is no harm if it is provided.

This conclusion is valid even if the information officer is of opinion that the disclosure of the requested information would jeopardize the interests of national security, defense and international relations. This is because the Classified Information Law specifies the information officer's duties, as well as the criteria, measures and activities for protection of the classified information. Only officers authorized according to the provisions of CIL can make assessment on the potential harm of disclosing classified information.

According to the above, if the requested document is classified according to the CIL, the information officer cannot unilaterally decide to enable access to the information. Additionally, due to the limited access to classified documents (according to the "need to know" principle), the officer usually does not have access to their contents thus will not be able to assess the potential harm of their disclosure.

Consequently, any re-assessment of the harm could be carried out only by the officer entrusted with information classification/declassification authority.

NOTICE:

there are cases when information could be classified under a special law, different from CIA. For example, the Law on the National Bank of RNM provides for special categorization²⁶ of information related to banks, which sensitivity is assessed under special criteria of potential risk in cases of disclosure.

6.2. Personal data

Personal data is any data related to an individual that make him/ her identified or identifiable. This means that only a natural person could be affected by the provision of specific public information. Consequently, the exemption related to personal data protection cannot be invoked in cases when the requested information relates to a public institution, business entity or another legal person such as association or foundation.

If a legal entity is involved, but not a physical person, then there is no harm to the protected interest. Also, there is no harm if the physical person to whom the information relates is not alive, and the harm to their protected interests is reduced significantly and usually such information are not disclosed.

²⁶ See article 34, article 57 and article 74 of the Law on NBRNM.

NOTICE:

If the requested information relates to use of public funds and it is not classified, certain personal data which are part of the requested information are not deemed information whose disclosure would mean harm to the personal data.

Example: Information related to gross salary of the administrative officers or appointed official in public enterprise, scholarship granted by a state authority to successful students, sale of state-owned property through state authority to private company, persons hired by the Government with a service contract as part time staff etc.

6.3. Information related to the confidentiality of tax proceedings

This exemption²⁷ applies to the procedures prescribed in the Tax Procedure Law²⁸. This means that this exemption does not apply to any other administrative procedure conducted according to another law. This is the case even when there is a similarity in the manner of operation of the authorities, such as in the case of inspections.

Also, this exemption does apply to all the procedures that involves the tax authorities. For example, proceedings about appointment of staff in tax authorities or about issuing guidance how to conduct tax proceedings are not covered with this exemption.

This, if the information officer would see harm in the premature provision of information related to the consultation of a draft guidance on how to conduct tax proceedings, the person cannot refer to the exemption stipulated in article 6 paragraph 1 item 3 of LFAPI.

6.4. Information obtained or compiled for investigations, criminal or misdemeanor proceedings

This exemption extends to all the documents collected in the file of an official criminal investigation or misdemeanor proceeding. However, it does not cover documents that are not part of the proceeding. Typically, criminal investigation files are kept by the Public Prosecution Office or the police i.e., the Ministry of Interior.

²⁷ See article 6 paragraph 1 item 3 of LFAPI.

²⁸ ("Official Gazette of RM" no. 13/06, 88/08, 159/08, 105/09,133/09, 145/10, 171/10, 53/11, 39/12, 84/12, 187/13, 15/15, 97/15, 129/15, 154/15, 23/16 and 35/18 and "Official Gazette of RNM" no. 275/19 and 290/20)

The purpose of this exemption is to prevent the information that could be collected as evidence against certain defendant to be destroyed or otherwise compromised. The protected interest is to provide security and integrity of the procedure and justice for the identified criminal activities.

The protection that derives from this exemption lasts only until the case comes to the court or until the procedure is terminated. Consequently, after that moment there will be no more harm from the disclosure of the information.

However, this exemption does not cover other documents in the disposal of for example, the Ministry of Interior, such as the budget, reports, statistics etc. neither covers all the data in the criminal case such as, for example, the name of the public prosecutor who works on the specific criminal investigation, the date of the criminal charges etc.

NOTICE:

Regarding the free access to public information, the public interest has neutral value, thus we cannot identify its existence through restriction of the access to the requested information.

In other words, the harm test may identify that the public interest is in the need to restrict the right to access the requested information because the public interest is not to disclose the information, but it should be detected precisely which harmful consequences may occur with the disclosure of the information.

6.5. Information obtained or compiled for the conduct of administrative proceedings

These are information relating to procedures regulated in the Law on General Administrative Procedure and in the Law on Administrative Disputes.

In case the access is denied according to this exemption, the information holder has to establish that there is probability that the disclosure of the requested information would endanger the integrity of the procedure i.e., would disable the work of the institution that is implementing the procedure. Consequently, the holder may limit the access to the requested information in case after it is disclosed:

- It would make it impossible to impartially conduct the administrative procedure or administrative dispute, enforce a court decision or sanction.

- Would make impossible for the authorities conducting administrative and inspection supervision i.e., control of the legality to work.

This is the case with all ongoing administrative procedures for issuing documents such as birth certificates, diplomas, driver's licenses, patents, construction permits, excerpts from the detailed urban plan (DUP) and may other.

In other cases, the public authorities have control over, for example, the form of the inspections. In such cases, the early disclosure of the information could harm the relevant establishment of the facts and the inspected entity may benefit from that.

NOTICE:

In all cases it is understood that once the proceedings are over and a final decision is taken, the information created and collected in the course of the proceedings become publicly available. This means that there will not be harm resulting of its disclosure.

6.6. Information obtained or compiled for the conduct of civil proceedings

This information is related to a pending civil court trials. If access to the information held by the court or by the public authority which is party to the proceedings could be disclosed on information application, this opens the door for the opposite party in the litigation to seek and access documents before they are presented in the court as evidence. Hence the principle of equality of the parties will be impaired and this could have negative effect on the adherence to the fair trial principle.

In such cases, the requested documents (information) are provided with a proposal to the court, which should provide them ex officio, Such information cannot be a subject of an application for access to public information because they are documents pertaining to a specific procedure in which only the parties in the procedure have some legal interest realized in the procedure.

In any case, this exemption does not apply to the information regarding the situation of the case or issue when and where to hold the next public hearing in the court. This information should always be publicly available and to be disclosed upon request.

6.7. Information that threatens the intellectual property rights

The different forms of intellectual and industrial property are explained in the Intellectual Property Law ²⁹ (IPL) and in the Law on copyright and related rights³⁰ (LCRR)/ This exemption covers patent, industrial design, trademark, designation of origin, geographical designation, copyright, and related rights.

The access to public information according to this exemption can be limited only if:

- The requested information is an integral part of the documentation for registration/certification of certain type of industrial property in accordance with the provisions of IPL, or
- Upon expressed limitation (ban) by the holder of the rights in accordance with the LCRR.

NOTICE:

In the case of the copyright and related rights, even if the holder establishes that the disclosure of the information would cause harm to the property interests of the author, the holder should conduct the harm test in order to exhaust any option to enable a modus to access the requested information through enabling a partial access, communicating the author in order to get his/her permission, reduction of the risk of damage through enabling review instead of copy/photocopy/electronic record etc.

7. WHEN IS THE HARM IDENTIFIED?

The assessment of harm could be made:

- in advance;
- at the time of the application.

7.1. Assessment made before the time of the application

In some cases, the legislation provides that the assessment of whether the provision of information may harm the protected interest should be carried out in advance.

An example for this case is the classified information exemption. In these cases, documents containing sensitive information are classified in advance by authorized officers and under

²⁹ ("Official Gazette of RM" no. 21/09, 24/11, 12/14, 41/14, 152/15, 53/16 and 83/18 and "Official Gazette of RNM" no. 31/20)

³⁰ ("Official Gazette of RM" no.115/10, 140/10, 51/11, 147/13, 154/15 and 27/16)

the procedure prescribed in detail in the relevant law (CIL). Such harm assessment is also applicable to the industrial property protection where it is registered/certified according to a special procedure.

In such cases the assessment of harm has been made at the time of the completion of the specified procedure (classification, registration of a patent), which is usually prior to the application for access. In these particular cases there is already an indication that the disclosure of the information could cause harm to the protected interest.

7.2. Assessment made at the time of the application

In other group of cases, the assessment of whether the provision of certain information would harm the protected interest is left to be carried out by the information holder at the time of an individual information application. This is the case with most of the exemptions listed under Art. 6 of the LFAPI.

For example, whether there will be harm to an individual (natural person) if a document is disclosed, should be assessed at the time of the information application. This is also the case with information received or collected for investigation, criminal or misdemeanor proceedings, and for the conduct of administrative and civil proceedings.

In these cases, the assessment is made by the information officer. He/she may consult other relevant officers in the public authority who work with the information on an everyday basis and have better understanding of its nature and the potential interests that may be harmed.³¹

8. DURATION OF THE PROTECTION OF INFORMATION

The duration of the protection of information is a specific form of the application of the *harm principle*.

In a democratic society there cannot be eternal exemptions from access to information because it is believed that the risk of harm to the protected interests could exist only for a limited period of time. This is partially prescribed in article 6 paragraph 2 of LFAPI that stipulated that public information, even when they are subject of an exemption from LFAPI, “become available when the causes for their unavailability cease to exist”.

³¹ See item 3 of these Guidelines.

The duration of the exemptions reflects the presumption that after a certain period of time there will be no more risk of harm to the protected interest. After that time expires the document i.e., the information can be provided upon request.

In other words, the sensitivity of the protected information decreases over time and at a certain moment the protection is no applicable anymore. When this moment comes or, as the law says, “the reasons for unavailability cease to exist”, then the information becomes available, and the information officer should provide access to it.

8.1. Determining the protection period

The period of protection of the information could be determined:

- by an express provision in the law,
- by the lifespan of the data subject;
- by specific circumstances precluding the applicability of the protected interest.

In the case of some exemptions, the period of protection is specified in the law. In others, it is not specified and this is where the harm test applies, when the information officer should assess whether there will be harm in the disclosure of the requested information.

1) Time-limit for the protection provided by law:

For example, even for the most sensitive information pertaining to the interests of national security and defense the time-limits for its protection are specified in the Classified Information Law.

2) Period of protection determined by nature:

For example, in cases when personal data is involved, the protection extends to the lifetime of an individual and is not applied after his/ her death.

3) Period of protection determined by specific circumstances:

If a patent expires or was revoked by the competent public authority or by a court, then the intellectual property exemption is not applicable anymore.

9. PROPORTIONALITY IN THE APPLICATION OF EXEMPTIONS

The principle of proportionality is a fundamental principle that is founded at constitutional level. According to the Constitution of RNM, certain human rights and freedoms can be limited by law in exceptional circumstances when the limitation is necessary for the protection of the security of the Republic, for conducting criminal procedure or protection of the human health, protection of public interest etc.

Because the free access to information, among the other, is realized un a special administrative procedure, it is important to emphasize that the article 6 of the Law on General Administrative procedure prescribes that:

“(1) During the course of the administrative procedure, the public authority should enable the party to realize and protect its rights and legal interests if they do not harm the rights and legal interests of the other parties or third parties and do not harm the public interest prescribed by law.

“(2) When the parties in the procedure are imposed obligations, the public authority is obligated to apply the administrative actions that are more favorable for the parties if such actions are sufficient to achieve the goal prescribed by law.”

Due to the above, the principle of proportionality can be identified through three elements:

1. Legitimateness of the measure i.e., the goal which should be achieved with the limitation of the rights (in other words, whether the measures is prescribed by law)
2. The necessity of the measure for the realization of the goal which has to be achieved with the limitation of the right (in other words, whether the measure corresponds to the achievement of a legitimate goal i.e., whether the connection of the measure with the protection of a legitimate goal can be established)
3. Identifying proportionality in a narrower sense which is manifested through finding balance between measure that limits the guaranteed rights in order to achieve certain goal and the allowed degree of intervention in the guaranteed rights (in other words, whether the measure is necessary in a democratic society).

As a rule, if the answer to any of these questions is negative, the limitation of the rights shall not be deemed necessary i.e., it is not proportional to the goal.

Hence, the application of the proportionality principle in the free access requires from the information holder to apply the exemptions from LFAPI carefully ad correctly. That means that the information officer should deny access only to the part of the information which is necessary to protect the interest according to article 6 paragraph 1 of LFAPI. According to

the European standards and the national legislation, the proportionality is applied in the following ways:

- Narrow interpretation of the exemption;
- Determining the form of access;
- Granting partial access.

The application of each of these three elements is demonstrated below.

9.1. Narrow interpretation of the exemptions

The right to access public information is a fundamental human right recognized at a constitutional and statutory level. These specifics lead to the consequence that any exemption listed under Article 6 of LFAPI should be applied as an exception from the principle of openness and transparency.

Consequently, when acting upon application for free access to information, the information holder must not exceed the legal limits of the exemptions stipulated in article 6 paragraph 1 of LFAPI and should be restrictive as little as it is possible in their application.

The identification of the protected interest and its relevance to the exemptions listed under Article 6 paragraph 1³², explains how the principle of “narrow interpretation of the exemptions” applies “.

9.2. Determining the form of access

According to the LFAPI, the information holder can provide the requested information in a form which is different than the one chosen by the applicant³³. In these cases, the information officer should explain why the public body refers to another form of access than the one specified by the applicant. This explanation should be recorded in the decision to grant access to information.

For example, intellectual property including *copyright* is protected under article .6 of LFAPI. However, if a document protected by copyright is prepared by a private company for a public authority, then access to it may be given in the form of review of the document in the premises of the authority or by the provision of a paper rather than digital copy, if the harm

³² See item 6 of these Guidelines

³³ See article 22 paragraph 2 of LFAPI

test shows that it should reduce the harm.

This is deemed as especially positive practice because it enables access to the information and at the same time protects the interest of the intellectual property right holder.

9.3. Enabling partial access

The provision of *partial access* is provided in article 20, article 22 and article 25 of LFAPI. The concept of partial access requires that access to information exemptions should be applied only to that part of information which pertains to the protected interest.

Therefore, the information holder should grant access only to the part of the information which falls outside the scope of the exemption. On another hand, it should deny access to the other part of the information in a document, which affects the protected interest. This action should be explained in detail in the motivation part of the decision issued by the information holder.

A typical example for the application of partial access is in cases where personal data are involved. In such cases normally there is not a problem to blacken (anonymize) or delete personal details and to provide access to the other part of the information, e.g., a report, a letter, an official decision, a contract etc.

10. BALANCING THE HARM AGAINST THE PUBLIC INTEREST IN THE DISCLOSURE OF INFORMATION

After the information officer has identified that a protected interest is at stake and that it falls under one or more of the provisions under Article 6, paragraph 1 of LFAPI, then the next step is to assess the application of proportionality as demonstrated above. If partial access is not applicable, then the officer should resort to *balancing* of the competing interests. Then, on the basis of this balancing, the information officer will decide whether to deny or provide access to the information.

At this point, the officer has already concluded that the protected interest will be harmed by the provision of the requested information. Now it should be determined whether there is an overriding public interest which requires the disclosure of the requested information.

10.1. An overriding public interest in the disclosure of the information

LFAPI provides that there is a presumption of a public interest in cases a series of stated cases.³⁴ The definition of the public interest in LFAPI is not exhaustive but indicative. The Macedonian legislator has not identified reasons for overriding public interest, but the comparative practice and the international standards have developed a series of arguments in favor of the free access to public information.

The information holder should identify whether in the specific case, the provision of access to the requested information will contribute to the public interest regarding the achievement of the basic value of the public authorities such as good governance, legality, accountability, integrity, social order efficiency and the specific principles of effectiveness, good financial management and responsible disposal of the public assets, equality etc.

In other words, the holder should identify whether the publication of the information would contribute toward possibility to understand the public debate, for issues or understanding of the consequences of the public authority, responsibilities of the public authority in the execution of its functions, responsibilities for disposal of public assets, public safety, health, or environmental protection.

NOTICE:

The overriding public interest test applies only in cases when the requested information falls under the protection of exemptions and there would be harm for the protected interest of the disclosure of the information. Otherwise, there is no need to assess the public interest if the information holder did not find harm or there is no interest protected under the exemptions specified in Article 6, paragraph 1 of LFAPI. If there is no harm, the information should be just provided to the applicant.

10.2. Public interest cases

The LFAPI describes seven cases of potential disclosure of information due to an overriding public interest. There is a public interest when the information:

- 1) shall reveal abuse of official position and corrupt conduct;
- 2) shall reveal illegal acquiring or spending budget funds;
- 3) shall reveal potential conflict of interests;

³⁴ article 3, item 7 of LFAPI

- 4) shall prevent and reveal serious threats to people's health and life;
- 5) shall prevent and reveal environmental hazard;
- 6) shall help to understand the issue for which a public policy is created, or a parliamentary debate is held;
- 7) shall enable equal treatment of every citizen under the laws.

In these cases the information officer can take a decision that the legal protection of the exemptions, although exists, is lower than the public interest of disclosure of the information and consequently provide access to the information.

10.3. Purposes of the disclosure in public interest

The seven cases of public interest (categories) listed in LFAPI serve the following purposes of public interest:

- Contribute to better integrity of public authorities and administration and discipline public money expenditure (categories 1 - 3);
- Ensure the safeguarding of health and the environment (categories 4 – 5);
- Enable informed choice and public participation (category 6);
- Facilitate equal treatment of citizens by public bodies (category 7).

These purposes should be borne in mind when the information officer applies Article 6, paragraph 3 of LFAPI.

11. DECISION FOR FREE ACCESS TO PUBLIC INFORMATION

When acting upon application for free access to information, the information holder is obligated to prepare an administrative act – Decision. The law provides this obligation in article 20 paragraph 1 of LFAPI, according to which “if the information holder accepts the application or if it rejects the application partially or completely, it shall issue decision for that matter”.

Relevant legal regulations, as well as the administrative and judicial practice emphasize the key importance of the explanation in the administrative act since it enables the party to familiarize with the arguments used by the public authority when making the decision, but also to protect its rights and try to refute the allegations in the decision.

If the decision does not contain explanation or it is such its contents does not make a relevant explanation (for example has the formulation like: “the holder, after conducting the harm test, the authority has established that the applicant's application cannot be approved,”

etc.), it is contrary to the clearly established norms in the Law on General Administrative Procedure.

Namely, according to article 88 paragraph 4 of the Law on General Administrative Procedure:

“The explanation should be understandable and contain: short elaboration of the party’s application, if any, the established facts on which bases the administrative act has been issued, the legal regulations and the reasons why, based on the established facts, the administrative act has been issued, the reasons why some of the requests, claims or proposals of the parties have not been sustained as well as the reasons why some of the statements given during the procedure are not taken into account. In case of an administrative act issued discretionary, the main reasons should be stated why the discretionary decision was made in a way such as in the administrative act.”

In other words, if the decision does not include relevant explanation, the applicant is put in an unequal position in relation to the information holder and cannot completely realize its constitutionally guaranteed rights.

NOTICE:

The steps stipulated in item 3 of these Guidelines should be **explained in detail** in each decision for rejecting or providing complete or partial access to the requested information. Otherwise, the Agency, as a second instance authority in the appellate procedure may annul the decision as illegal due to lack or insufficient explanation of the contested decision.

Additionally, according to article 8 paragraph of LFAPI, the information officer keeps special records on the received application for free access to public information. It is especially important that the records³⁵ should include the reasons for each rejected or refused application. Therefore, if the application (or a part thereof) is rejected on any basis, synopsis of the harm test (conducted for each individual rejected application) should be an integral part of the record, or otherwise it shall be deemed incomplete.

³⁵ Then the records are incorporated in the Annual report which is submitted to the Agency in line with article 36 of LFAPI.

EXAMPLE

Application:

Information contained in the CV of a public official or a high-ranking civil servant, or an expert assigned by the Government to implement an important task.

Step 1: Is there a relevant exemption?

The applicable exemption is under Article 6, para. 1, item 2 of LFAPI.

Step 2: Is there a protected interest?

All the information related to a person is protected. The law does not formally exclude certain category of data from the definition of “personal data”.

Step 3: Is there harm in the disclosure?

The information indeed relates to a natural person. Consequently, the provision of the information would cause harm as usually a person is not happy if any of information related to her/ him goes public.

Step 4: Is there an overriding public interest?

On another hand, profession/function related data are in principle less protected. A profession is part of the social aspect of the life of an individual, not of private life. Moreover, in this case the data was used to select a person to fulfil a public task. It is also paid for with public money.

The relevant questions are:

- Is the individual a public figure (official, expert)?
- Is the requested information related to a public task?
- Will the information enlarge the knowledge about the implementation of the public task?

In the particular case, a CV reveals the qualifications. The answer to all three questions above is “yes”. Therefore, it can be easily concluded that the disclosure of this information would serve the following interests under the definition of “public interest” under Article 3 of LFAPI:

- Contribute to better integrity of public authorities and administration and to discipline of public money expenditure (categories 1 - 3);

- Enable informed choice and public participation (category 6);

Step 5: Proportionality

The overriding public interest applies to the education and qualifications data. However, it does not apply to personal identification number (PIN), contact details (such as personal email address, mobile phone, address).

Therefore, if such data are in the CV, they need to be blackened (deleted).

Step 6: Taking a decision to provide or deny information

The information contained in the CV should be given, except for PIN and contact details.

Therefore, a decision to provide partial access to the requested information should be issued.

Step 7: To explain the decision

The decision should contain a description of the above steps.