

# MANUAL FOR CONDUCTING THE HARM TEST

PROJECT: PROMOTING TRANSPARENCY AND ACCOUNTABILITY IN PUBLIC  
ADMINISTRATION

## MANUAL FOR CONDUCTING THE HARM TEST

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ACCESS TO PUBLIC INFORMATION

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Printed by:

\_\_\_\_\_, Skopje

35:005.332(497.7)

## MANUAL FOR CONDUCTING THE HARM TEST

Skopje 2021. 30 pages

Graph. order; 23 cm

Footnotes to the text

ISBN 978-44-9

a) PUBLIC ADMINISTRATION - transparency and responsibility - Republic of North  
Macedonia

COBISS.MK-ID

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of the European Delegation - Skopje.

This document was prepared within the project "Promoting Transparency and  
Accountability in Public Administration", financed by the European Union, and  
implemented by a consortium led by PwC. The document was prepared for the needs  
of the Agency for the Protection of the Right to Free Access to Information of a Public  
Character and only for the purposes and according to the conditions agreed upon in  
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## 1. INTRODUCTION

The right to free access to public information in modern society is one of the key, fundamental rights of citizens. It is a human right that ensures transparency and openness of public bodies, enables public control over their work by preventing corruption and other illegalities, is an extremely powerful tool that contributes to accountable work and efficient use of public funds and creates a basis for good governance and trust of the citizens in the work of the institutions.

The laws that regulate the right to access to information determine the way to exercise this right, primarily through the obligation to proactively publish information to public authorities, and then through the procedure for requesting free access to information, as well as supervision of compliance with legal obligations by side of the public authorities.

An integral part of most laws regulating this right is the so-called **Harm test**, which is essentially an obligation and an instrument for assessing whether the public interest in the availability of information prevails over the need to limit access to information for the

purpose of protecting certain rights prescribed by law. Consequently, if we talk about the right of access to information as a constitutionally guaranteed basic human right of citizens to access information held by public authorities and as a preventive anti-corruption tool and means for the rule of law and strengthening the accountability of public authorities, then the harm test is its fundamental institute.

Simply put, the harm test is a decision of the highest degree and discretion, made by a public authority in deciding on a request for free access to information of a public nature, which determines whether the public interest in keeping the requested information within the scope of access restriction prevails. or whether the public interest will prevail for the requested information to be exempted from the existing restriction and made available to the requester, and thus to the general public.

In the Republic of North Macedonia, free access to information held by public authorities is guaranteed by Article 16 of the Constitution. The method of exercising this right is determined by the Law on Free Access to Public Information<sup>1</sup> (in the following text: **LFAPI**) in which, among other things, a special procedure is prescribed after a submitted request for free access to public information<sup>2</sup>, the exceptions to free access <sup>3</sup> as well as the application of the harm test<sup>4</sup>.

Within the scope of the current practice of the Agency for the Protection of the Right to Free Access to Public Information (hereinafter: **The Agency**), the public authorities - holders of information do not properly implement the harm test. When faced with a request for free access to information that is potentially subject to one of the law's exceptions, the practice of holders is simply not to carry out the test

1 ("Sl. Gazette of RSM" No. 101/19)

2 chapter IV of LFAPI

3 see article 6 paragraph 1 of the ZSPJ

4 see article 6 paragraph 3 of LFAPI

and to ignore article 6 paragraph 3 of LFAPI ("the information is protected, the request is rejected"), or to implement it incorrectly (eg without the appropriate steps), without explaining the reasons for the way the request was processed.

Consequently, this Manual aims to support the official - that is, the manager of the holder of the information, as well as the officials authorized to mediate public information - to properly and expediently carry out the harm test, and thus to enable citizens to exercise their constitutionally guaranteed right to free access to information, in cases where it is not necessary to restrict access.

## 2. WHO PERFORMS THE HARM TEST

The official person for mediating public information is the person who in principle takes care of the implementation of the Public Information Act and ensures its application to the holder of information.

**According to LFAPI, the procedure for the request for access to information is carried out by the official.** <sup>5</sup>However, considering that the harm test is the highest decision that the holder of information can make when assessing whether it is in the public interest to allow or restrict access to a given information, it is a recommendation and good practice when implementing the test, in addition to the official to other relevant officers or

employees of the holder of information also participate.

In that sense, the responsible person at the holder of the information can appoint a working group or commission to carry out the harm test, in which, in addition to the official for mediating information, members will be experts or managers responsible in the organizational unit that has the requested information and, as a rule, persons from the legal profession, all with the aim of making a correct decision. Such a working group can be established by decision of the manager or other authorized person at the holder, as permanent or ad hoc (that is, a dedicated working group depending on the content of the requested information).

As a rule, the members of such a group are the official person for mediating information, a lawyer (e.g. head of legal service or similar), while the changing members, depending on the requested information, are representatives of the organizational unit in whose domain of work it is. the requested information. Thus, depending on the type of constraint, the test team members may be e.g. personal data protection officer, personal classified information security officer, etc. The holder, i.e. the official or the responsible person in the institution should assess, depending on the importance of the requested information and its specificity, whether the test will be carried out individually or in a wider composition, taking into account the principle of economy and efficiency of the procedures<sup>6</sup>.

<sup>5</sup> see article 19 of LFAPI

<sup>6</sup> see Article 7 of the Law on General Administrative Procedure ("Official Gazette of the Republic of Moldova" No. 124/2015 and No. 65/2018)

In any case, and especially when it comes to more complex or extensive requests for free access, the person in charge of the information holder is obliged to establish and maintain an appropriate system of communication and support between the officials for mediating public information and other employees in the institution, in order to properly implement the entire procedure, including the harm test.

### 3. GUIDELINES AND STEPS FOR CONDUCTING THE TEST

In principle, when acting on a request for free access, the holder of information has the right to refuse access to requested public information, while he is obliged to make an assessment of the interests, circumstances and consequences arising from or related to the publication, i.e. non-publication of the requested information.

This right of the holder is determined in Article 6 of the Law on Free Access to Public Information, according to which access to public information can be refused in certain taxatively specified cases.

In addition, LFAPI prescribes<sup>7</sup> that as an exception, even if the information falls within one or more of the legally established exceptions, the holder of the information may still provide access to the requested public information. In that case, even if the publication of the requested information causes "harm" to the protected interest of the holder of the information, when implementing the harm test, the public interest in publishing the requested information may prevail over the interest in not publishing it, and consequently the information must be published.

## **NOTE:**

Despite the fact that they are in a specific procedure following a submitted request identify a legal basis for denying access to the requested information, the holder cannot automatically deny access, but must assess the relationship between two protected interests – the interest for the protection (non-disclosure) of the requested information and the interest in publication of the information.

It is important to note that both of the interests cited are legitimate and represent a certain aspect of public interest by the very fact that they are regulated by law and recognized as legitimate.

Often (though not exclusively) it is about two opposing, equivalent, constitutionally guaranteed rights, such as the right to protection of personal data or property rights in relation to the right to access information or other values protected by Constitution, such as freedom of expression. Therefore, the goal is to estimate whether the public interest in providing access to the information outweighs the potential harm that would result from publishing the the information.

7 see article 6 paragraph, 3 of LFAPI

In order to properly implement Article 6 of the LFAPI and Article 13, paragraph 3 of the Instructions on the method and procedure for the implementation of the LFAPI<sup>8</sup>, the holder of the information is obliged to carry out the following steps:

- 1) Determination of the protected interest;**
- 2) Determining an appropriate exception from those specified in Article 6, paragraph 1 of LFAPI;**
- 3) Checking whether the legal provisions of Article 6 of the LFAPI correspond to the established protected interest;**
- 4) Checking whether partial access or a change in the way of getting to know the information is possible (principle of proportionality);**
- 5) Checking whether there is a public interest in publication that prevails over the interest in protection (non-publication) of the information;**
- 6) Making a decision whether:**
  - a. to provide access to all requested information**
  - b. to deny access to any requested information;**
  - c. to deny access to part of the requested information;**

After the above six steps are carried out, the information broker should carry out one more step which is very important:

- 7) To provide a written explanation in the administrative act (with which he acts upon the request) how the above six steps were carried out in relation to the specific relevant facts.**

## **NOTE:**

LFAPI does not provide for the form of the harm test, it is the same conducts meritorious for each separate request, depending from the requested information, its context and the circumstances which result from its publication, i.e. non-publication. In addition, for a certain type of information, the harm is determined in advance, according to special legal regulations<sup>9</sup>.

## 4. LIMITATIONS BY LAW

Restrictions on access to information can only be prescribed by law. This stems from the fact that in the Republic of North Macedonia, the right of access to public information is primarily guaranteed at the constitutional level<sup>10</sup>. Also, the corresponding provisions of the LFAPI prescribe the exceptions to that right.

<sup>8</sup> ("Official Journal of RSM" No. 60/2020)

<sup>9</sup> See point 7.1. of this Handbook

<sup>10</sup> see article 16 of the Constitution of the Republic of North Macedonia

### 4.1. Limitations prescribed by LFAPI

Article 6 paragraph 1 of the Law on Free Access to Public Information of the Republic of North Macedonia from 2019 prescribes the appropriate limitations (exceptions) to the right to access information. They are:

- 1) information that, based on the law, is classified information with an appropriate level of classification;
- 2) personal data, the disclosure of which would mean a violation of the protection of personal data;
- 3) information, the provision of which would mean a violation of the confidentiality of the tax procedure;
- 4) information acquired or compiled for investigation, criminal or misdemeanor proceedings, for the implementation of administrative and civil proceedings, the provision of which would have harmful consequences for the course of the proceedings;
- 5) information that threatens industrial or intellectual property rights.

### 4.2. Other relevant statutory provisions on exemptions

The Law on Classified Information<sup>11</sup> (in the following text: **LCI**) and the Law on Protection of Personal Data<sup>12</sup> (in the following text: **LPPD**) prescribe in more detail the exceptions related to the protection of classified information and personal data.

Specific provisions establishing more details on the substance and application of certain exceptions can be found in the Tax Procedure Law<sup>13</sup>, the Law on the National Bank of the Republic of North Macedonia<sup>14</sup>, the Law on Criminal Procedure<sup>15</sup>, the Law on general administrative procedure, the Law on civil procedure<sup>16</sup>, the Industrial Property Law<sup>17</sup> and friend the law.



A separate chapter on access to environmental information and the established restrictions on access to it has been added to the Law on the Environment (Chapter VII, Articles 51-58).

Access to information related to personal data is prescribed by the Law on Protection of Personal Data (2020).<sup>18</sup>

11 ("Official Journal of RSM" No. 275/2019)

12 ("Official Journal of RSM" No. 42/2020)

13 ("Official Gazette of the Republic of Moldova" 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, 129/15, 23/16 and 35/18 and "Official Gazette of RSM" no. 275/19 and 290/20)

14 ("Official Gazette of the Republic of Moldova" No. 158/10, 123/12, 43/14, 153/15, 6/16 and 83/18 and "Official Gazette of the RSM" No. 110/21)

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

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

17 ("Official Gazette of the Republic of Moldova" No. 21/09, 24/11, 12/14, 41/14, 152/15, 53/16 and 83/18 and "Official Gazette of the RSM" No. 31/20 )

<sup>18</sup>see article 19 of the Law on Personal Data Protection

## NOTE:

Refusal of access to public information should be based not only on the relevant legal provision from Article 6 paragraph 1 of LFAPI but also the corresponding provision of the special law that prescribes the limitation given, whether the refusal is partially or completely.

The provisions of the respective special law should be taken into account to be reflected in the reasoning of the decision to deny access, together with the legal basis according to the LFAPI.

For example, when refusing access to classified information, apart from referring to Article 6, paragraph 1, point 1 of the Civil Code, the authority should also cite the corresponding provision of the Law on Classified Information.

## 5. PROTECTED INTERESTS

The list of protected interests can be easily determined on the basis of the relevant provisions of LFAPI as well as international standards. The provision of Article 3, paragraph 1 of the Convention on Access to Public Documents<sup>19</sup> (in the following text: **The convention**) lists 11 categories of interests that could justify limited access to documents.<sup>20</sup> Most of them are listed in almost all national laws on access to information. Common protected interests are:

- national security, defense and international relations;
- public order and peace;
- personal privacy;
- trade secrets;

- integrity of inspection supervision carried out by public authorities;
- criminal investigations.

Macedonian legislation covers most of the listed protected interests. For example, according to LFAPI, classified information is listed as an exception to free access.<sup>21</sup> According to the Law on classified information, the purpose of data classification is the security and defense of the state, its territorial integrity and sovereignty, the constitutional order, the public interest and the freedoms and rights of man and citizen.<sup>22</sup> This is consistent with the interests outlined in the Convention, namely, national security, defense and international relations.<sup>23</sup>

<sup>19</sup> CETS 205 – Access to Official Documents, 18.VI.2009

<sup>20</sup> The Republic of North Macedonia signed the Convention in 2009. It entered into force in December 2020 after being ratified by ten countries. The official text can be found at: <https://rm.coe.int/1680084826>

<sup>21</sup> see article 6, paragraph 1, point 1 of the LFAPI.

<sup>22</sup> see article 6, paragraph 2 of the Law on classified information.

<sup>23</sup> see article 3, paragraph 1, point "a" of the Convention.

Personal data is listed as a protected interest in the LFAPI,<sup>24</sup> which corresponds to the similar interest protected by the Convention.<sup>25</sup>

Both the LFAPI and the Convention prescribe the protection of information received or acquired for the purpose of investigation, criminal or misdemeanor proceedings and for the purpose of conducting administrative and civil proceedings.

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

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

Certain interests specified in the Convention are protected to a narrower extent by the LFAPI. For example, in the Convention, commercial or other economic interests are mentioned, while with LFAPI the exception refers only to industrial, that is, intellectual property, not including other economic interests.

## 6. DETERMINATION OF PROTECTED INTEREST

This part of the harm test aims to determine whether there is a protected interest in the requested information and whether the interest refers to the relevant provision of Article 6, paragraph 1 of LFAPI.

When determining the protected interest, the holder is obliged, in each individual and concrete case, to determine the probability that providing access to the requested information would cause a serious violation of the interest protected by the exceptions of Article 6 paragraph 1 of the Civil Code. The exception itself implicitly or explicitly contains the public interest in protecting the requested information. In other words, the public

authority must justify the probability that the protected interest will be harmed, that is, that it is in the public interest to protect the information from the public.

On the other hand, the fact that the requested information falls within one of the legal exceptions does not mean that the automatically protected interest will be seriously harmed by providing access to the information, that is, the harm must be certain, concrete and precisely determined.

**In other words, the holder of the information must not speculate, to assume and/or to be used with the institute argumentum in terrorem (argument of intimidation) about the occurrence of possible harm when publishing the information, but to give it clear and unambiguous identification of the reasons why the publication of a certain information will lead to harmful consequences for the protected interests.**

In the next section, some examples are given that demonstrate how it is determined potential harm from securitythe disclosure of public information:

24 see article 6, paragraph 1, point 1 of the LFAPI.

25 see article 3, paragraph 1, point "f" of the Convention.

## 6.1. Classified information

If the official for mediating information considers that the requested information relates to national security and international relations, he should check whether it is classified according to the Law on classified information. If the information is not formally classified and labeled in accordance with the provisions of the LCA, then there is no harm in publishing it.

This conclusion is valid even if the information broker believes that releasing the requested information would jeopardize the interests of national security, defense, and international relations. This is because the Classified Information Law precisely determines the duties of the classified information security officer, as well as the criteria, measures and activities for the protection of classified information. Only officers who are authorized under the CPA and who have access to classified information can make assessments of the potential harm of releasing classified information.

According to the above, if the requested document is classified according to the CPI, the information broker cannot unilaterally decide to provide access to the information. In addition, due to limited access to classified documents (according to the "need to know" principle), the official often does not have access to their content and therefore will not be able to assess the potential harm of their publication.

Consequently, any re-assessment of harm can only be carried out by an official (officer) who has the appropriate authority to classify or declassify information.

### **NOTE:**

There are cases when information is classified according to a special law, other than the LCI. For example, the Law on the National Bank of RSM prescribes a special categorization<sup>26</sup> of information related to banks whose sensitivity is assessed according to special criteria about the potential risk in case of publication.

## 6.2. Personal data

Personal data is any information that relates to an identified natural person or an identifiable natural person. This means that only a natural person can be affected by the

publication of specific public information. Accordingly, the exception related to the protection of personal data cannot be applied in cases where the requested information is related to a public institution, business entity or other legal entity such as an association or foundation.

If a legal entity and not a natural person is covered, then there is no harm to the protected interest. In addition, if the natural person with whom the information is related is no longer alive, the harm that would occur to his protected interests is significantly reduced and most of the time such information is published.

26 see article 34, article 57 and article 74 of the Law on NBRSM

#### **NOTE:**

If the requested information refers to the use of public funds, and it is not classified, certain personal data that are some of the requested information is not considered to be disclosure information would mean a violation of the protection of personal data.

Example: Information related to the gross salary amount of an administrative officer or appointed official in a public company, scholarship which a state authority awarded to successful students, the sale of state property through a state authority of a private trading company, persons who were hired by the Government with a contract to work as freelancers, etc

**6.3. Information related to the confidentiality of tax procedures** This exception<sup>27</sup> is applicable to the procedures established in accordance with the Law on Tax Procedure<sup>28</sup>. This means that this exception is not applicable to any other administrative procedure that is carried out according to another law. This is the case even when there is a similarity in the way the authorities operate, as is the case with inspections.

Also, this exception does not apply to all procedures involving tax authorities. For example, the procedures for appointing staff in the tax authorities or for issuing instructions on how to implement the tax procedure are not covered by this exception.

Hence, if the information broker considers that there is potential harm from e.g. the premature publication of information related to the consultation regarding the preparation of a draft regulation for the implementation of a certain tax procedure, the person cannot refer to the exception from Article 6 paragraph 1 point 3) of LFAPI.

#### **6.4. Information acquired or compiled for investigation, criminal or misdemeanor proceedings**

This exception applies to all documents contained in the subject of an official investigation, criminal or misdemeanor proceeding. However, it does not cover documents that are not part of the procedure. Usually, the cases for such procedures are kept at the Public Prosecutor's Office or at the police, i.e. the Ministry of Internal Affairs.

The purpose of protection under this exception is to prevent the destruction or otherwise compromising of information that could be obtained as evidence against a particular suspect.

The protected interest is aimed at ensuring security and integrity of the procedure and

justice for the established criminal actions.

The protection resulting from this exception lasts only until the case arrives in court or until the proceedings are terminated. Consequently, from that moment on, there is no further harm from publishing the information.

27 see article 6, paragraph 1, point 3 of the LFAPL.

28 ("Official Gazette of the Republic of Moldova" 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, 129/15, 23/16 and 35/18 and "Official Gazette of RSM" no. 275/19 and 290/20)

However, this exception does not cover other documents that are at the disposal of, for example, the Ministry of Internal Affairs, such as the budget, reports, statistics, etc. nor does it include all the data in the criminal case, such as, for example, the name of the public prosecutor working on a specific criminal investigation, the date of the submitted criminal report, etc.

#### **NOTE:**

In free access to information of a public nature, the public interest is value neutral, so its existence we can also determine it by restricting access to the requested information.

In other words, during the conduct of the harm test it can be determined that the public interest lies in the need to limit the right of access to the requested information, for the reason that it is in the public interest that the information should not be published, but it should be precise it is detected which harmful consequences would occur with the publication of the information.

#### **6.5. Information acquired or compiled for the implementation of an administrative procedure**

This is information related to procedures regulated by the Law on General Administrative Procedure and the Law on Administrative Disputes.

In case of denial of access in accordance with this exception, the holder must determine the existence of a probability that the publication of the requested information would jeopardize the integrity of the procedure, that is, the work of the institution conducting the procedure would be made impossible. Consequently, the holder may restrict access to the requested information if, by publishing it:

- efficient, independent and impartial management of the administrative procedure or administrative dispute, execution of a court decision or sanction would be impossible.
- the work of the bodies that carry out administrative and inspection supervision, ie control of legality, would be impossible.

This is the case for all current administrative procedures for issuing documents such as birth certificates, diplomas, driver's licenses, patents, building permits, extract from a detailed urban plan (DUP) and many others.

In other cases, public authorities have control over, for example, the form of inspections. In these cases, prematurely providing access to information could impair proper fact-finding and benefit the subject of the inspection.

## NOTE:

In all cases, it is understood that after the procedure is over, everything will be done made a final decision, the information created and collected in the course of the procedure will become publicly available. That means there won't be harm from their publication.

### 6.6. Information acquired or compiled for the implementation of civil proceedings

This is information related to ongoing civil litigation. If access to information can be provided by a court or public authority that is a party to the proceedings, such action opens the door for the opposing party in the dispute to request access to documents before they are presented to the court as evidence. Hence, the principle of equality of the parties will be violated and this may have negative consequences on the adherence to the principle of fair trial.

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 the subject of a request for access to public information, for the reason that these are primarily documents for a specific procedure in which only the parties to the procedure have any legal interest, which they enforce in the procedure in question.

In any case, this exception does not apply to information about the status of the case or to the question of when and where the next public hearing will be held in court. This information should always be publicly available and published upon request.

### 6.7. Information that infringes intellectual property rights

The different forms of intellectual and industrial property are determined by the Law on Industrial Property<sup>29</sup> (LIP) and the Law on Copyright and Related Rights<sup>30</sup> (LCRR) Patent, industrial design, trademark, designation of origin, geographical indication, copyright and related rights are covered by this exception.

The restriction of access to public information pursuant to this exception may only be applied if:

- the requested information is an integral part of the documentation for registration/certification of a certain type of industrial property, in accordance with the provisions of LIP or
- after an expressly given restriction (ban) by the rights holder, in accordance with the LCRR.

## NOTE:

In the case of copyright and related rights, even if the holder determined that the publication of the information would cause harm to the property interests of the author, the holder should through the test of harm to exhaust any possibility of allowing a modicum of access to the requested information, by enabling partial access, by communicating with the author in order to obtain his consent, reducing the risk of harm by allowing only insight instead of transcript/photocopy/electronic record etc.

29 ("Official Gazette of the Republic of Moldova" No. 21/09, 24/11, 12/14, 41/14, 152/15, 53/16 and 83/18 and "Official Gazette of the RSM" No. 31/20 )

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

## 7. WHEN IS THE HARM DETERMINED?

harm assessment can be done:

- in advance;
- when the request will be submitted.

### 7.1. A pre-application assessment

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

An example of this is the exception for **classified information**. In these cases, documents containing sensitive information are classified in advance by authorized officials according to a procedure detailed in the relevant law (LCI). This harm assessment is also applicable in **the protection of industrial property**, where it is registered/certified according to a special procedure.

In these cases, the harm assessment is done at the time of completion of the specified procedure (classification, patent registration), which is usually before the access request. In these specific cases there is already an indication that the publication of the information could cause harm to the protected interest.

### 7.2. An assessment that is made after a request is submitted

In another group of cases, the assessment of whether providing access to certain information would be harmful to the protected interest is carried out by the holder of the information, after a specific request has been submitted. This is the case with most of the exceptions prescribed by Article 6 of the LFAPI.

**For example, will there be harm to an individual (natural person) if they are publish a document, it should be assessed when the request for information. This is also the case with the information received or collected for investigative, criminal or misdemeanor proceedings and enforcement administrative and litigation procedures.**

In these cases, the assessment is carried out by the information broker. It may consult with other appropriate officials in the authority who work with the information on a daily basis and better understand its nature and potential interests that may be harmed.<sup>31</sup>

## 8. DURATION OF INFORMATION PROTECTION

The duration of information protection is a concrete form of application of the harm test.

In a democratic society there cannot be perpetual exceptions to access to information because it is considered that the risk of harm to the protected interests may <sup>31</sup>see point 3 of this

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it only exists for a limited period of time. This is partially determined in Article 6 paragraph 2 of the LFAPI, according to which public information, even when subject to an exception from the LFAPI, "becomes available when the reasons for their unavailability cease".

The duration of the exceptions reflects the assumption that after a certain period of time

there will no longer be a risk of harm to the protected interest. After the expiration of that time interval, the document, that is, the information can be published, if it is requested.

In other words, the sensitivity of the protected information decreases over time and at some point the protection is no longer applicable. When this moment comes, or as the law says, when the reasons for unavailability cease, then the information becomes available and the information broker should provide access to it.

### 8.1. Determination of the period of protection

The period of information protection can be determined:

- by express provision in law,
- with the lifetime of the data subject;
- depending on the specific circumstances that exclude the applicability of the protected interest.

With certain exceptions, the period of protection is determined by law. In others, the period is not determined and here the test of harm is applied when the information broker has to assess whether there will be harm from the publication of the requested information.

#### **1) Time limit for the protection prescribed by law:**

For example, even for the most sensitive information concerning of the interests of national security and defense, in the Law on classified information is set time limits for their protection.

#### **2) Protection period determined by nature:**

For example, when it comes to personal data, protection lasts as long as it is natural person alive and it is not applicable after the person's death

#### **3) Protection period determined by specific circumstances:**

If the patent expires or is withdrawn by a competent public authority or by a court, then the intellectual property exception no longer applies.

## 9. PROPORTIONALITY IN THE APPLICATION OF EXCEPTIONS

The principle of proportionality is a fundamental principle that is based on the constitutional level. According to the Constitution of the RSM, certain human rights and freedoms can be limited by law, in exceptional circumstances, when the limitation is necessary for the purpose of protecting the security of the Republic, for the purpose of conducting criminal proceedings or the protection of people's health, for the purpose of protecting the public interest, etc.

Due to the fact that free access to information, among other things, is achieved through a special administrative procedure, it is important to point out that the Law on General Administrative Procedure itself, in Article 6, stipulates that:

"(1) When conducting the administrative procedure, the public authority should enable the party to exercise and protect its rights and legal interests, if they do not harm the rights and legal interests of other parties or third parties and do not harm of the public interest established by law.



- (2) When obligations are imposed on the parties in the procedure, the public authority is obliged to apply those administrative actions that are more favorable to the parties, if such actions are sufficient to achieve the goal established by law."

It follows from the above that the principle of proportionality can be identified through three elements:

1. Legitimacy of the measure, i.e. the goal to be achieved by the restriction of rights (in other words, is the measure prescribed by law)
2. The necessity of the measure to achieve the goal to be achieved by restricting the right (in other words, whether the measure corresponds to the achievement of a legitimate goal, i.e. whether it can be established the connection of the measure with the protection of a legitimate goal)
3. Determination of proportionality in the narrower sense, which is manifested by finding a balance between a measure that limits the guaranteed rights in order to achieve a certain goal and the permissible degree of intervention in the guaranteed rights (in other words, is the measure necessary in a democratic society) .

As a rule, if the answer to any of these questions is negative, the restriction of rights is not considered justified, that is, it is not proportionate to the objective.

Hence, the application of the principle of proportionality in free access requires the holder of the information to carefully and correctly apply the exceptions from the LFAPI. This means that the official person for mediating information should refuse access only to that part of the information that is necessary to protect the interest according to Article 6 paragraph 1 of LFAPI. According to European standards and national legislation, proportionality is applied in the following ways:

- Narrow interpretation of exceptions;
- Determination of the form of access;
- Enabling partial access.

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

### 9.1. Narrow interpretation of exceptions

The right of access to public information is a basic human right recognized at the constitutional and legal level. This specificity leads to the fact that any exception specified in Article 6 paragraph 1 of the LFAPI should be applied as an exception to the principle of openness and transparency.

Consequently, when acting upon a request for free access, the holder must not exceed the legal limits of the exceptions in Article 6 paragraph 1 of the LFAPI and should be as restrictive as possible in their application.

The determination of the protected interest and its relevance to the exceptions specified in Article 6 paragraph 132, explains how the "narrow interpretation of exceptions" principle applies.

### 9.2. Determination of the form of access

According to LFAPI, the holder of the information can provide the requested information in

a different form than the one that the requester chose<sup>32</sup>. In these cases, the holder is obliged to give a justification for this way of acting. This reasoning should be noted in the decision with which the holder acts upon the request.

**For example, intellectual property, including copyright right is protected by Article 6 of the LFAPI. However, if a document protected by copyright is produced by a private company for public authority, then access can be provided in the form of an inspection of the document in the authority's premises or by providing a printed one instead of a digital sample, if when conducting the test of harm, the holder has determined that it is reduced by this action the harm.**

**This behavior is considered an extremely positive practice, since reason that at the same time access to information is enabled, and yet the interest of the holder of the right is also protected intellectual property.**

### 9.3. Enable partial access

The provision of partial access is prescribed by Article 20, Article 22 and Article 25 of LFAPI. The concept of partial access requires that exceptions to access to information apply only to that part of the information that relates to the protected interest.

Hence, the holder of the information should allow access only to the part of the information that is outside the scope of the exception. On the other hand, he should refuse access to a part of the information that affects the protected interest. Such action should be explained in detail in the decision with which the holder acts upon the request.

**A typical example of the application of partial access is personal data. In those cases it is usually not a problem to black out (anonymize) or to delete personal data and provide access to another part from the information, for example, a report, letter, official decision, agreement etc.**

<sup>32</sup> see point 6. of this Manual

<sup>33</sup> see Art. 21 st. 2 of LFAPI

## 10. BALANCING THE HARM AGAINST THE PUBLIC INTEREST OF DISCLOSURE

After the official for mediating information has determined that the protected interest is threatened and that the interest coincides with one or more of the exceptions of Article 6, paragraph 1 of the LFAPI, the next step is to apply the principle of proportionality as stated above. If a partial approach is not possible, then the official should resort to balancing the conflicting interests. Then, based on the balancing, the information broker will decide whether to deny or allow access to the information.

At this point, the official has already concluded that providing the requested information will affect the protected interest. Now, it must be determined whether there is an overriding public interest in publishing the requested information.

### 10.1. Overriding public interest in publishing the information

In LFAPI it is prescribed that there is a presumption of public interest in a number of specified cases.<sup>34</sup> The definition of public interest in LFAPI is not exhaustive but only indicative. The Macedonian legislator has not established reasons for the prevailing public interest, but comparative practice and international standards have developed a series of

arguments in favor of free access to public information.

The holder should determine whether, in a specific case, providing access to the requested information will contribute to the public interest in terms of achieving the basic values of the public authorities, such as **good governance, legality, accountability, integrity, efficiency of the social order and specific principles of effectiveness, good financial management and responsible disposal of public funds, equality** and similarly.

In other words, the holder should determine whether the publication of the information would contribute to the possibility of understanding a public debate, of an issue or understanding the consequences of the decisions of the public authority, the responsibilities of the public authority in the performance of its functions, responsibilities for the disposal of public funds, public safety, health or environmental protection.

**NOTE:**

The prevailing public interest is determined only in cases where the requested information falls within the protection of the exceptions and when would there was harm to the protected interest when the information was published.

Otherwise, there is no need to assess the public interest if the holder of the information has not determined harm or if there is no interest what is protected by the exceptions specified in Article 6, paragraph 1 of the LFAPI. If there is none too bad, the information should simply be published.

34 article 3, paragraph 7 of LFAPI

## 10.2. Circumstances of public interest

Seven cases of potential publication of information due to overriding public interest are described in LFAPI. Public interest exists when the information:

- 1) will reveal abuse of official position and corrupt behavior;
- 2) will reveal illegal acquisition or spending of budget funds;
- 3) will reveal a potential conflict of interest;
- 4) will prevent or detect serious threats to people's health and life;
- 5) will prevent or detect threats to the environment;
- 6) it will help to understand the issue for which public policy is being created or parliamentary debate is being conducted;
- 7) will enable equal treatment of every citizen according to the laws.

In these cases, the information officer may judge that the legal protection of the exceptions, although they exist, is less than the public interest in publishing the information and therefore provide access to the information.

## 10.3. Purposes of publication in the public interest

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

- Contributing to increased integrity of public authorities and legal spending of

- public money (categories 1 – 3);
- Ensuring protection of health and the environment (categories 4-5);
- Enabling informed consent and civil participation (category 6);
- Enabling equal treatment of citizens by public authorities (category 7).

These objectives should be taken into account when the official for mediating information applies Article 6, paragraph 3 of LFAPI.

## 11. SOLUTION FOR FREE ACCESS TO PUBLIC INFORMATION

When acting upon a request for free access, the holder of information is obliged to prepare an administrative act - Decision. The law reflects this duty in Article 20, paragraph 1 of the LFAPI, according to which "if the holder of the information responds positively to the request or if the request is partially or completely rejected, it will issue a decision".

The relevant legal regulations, as well as the administrative and judicial practice, emphasize the key importance of the reasoning in the administrative act, because it allows the party to become familiar with the arguments used by the public authority in making decisions, but also to protect their rights and try to refute the allegations of the decision.

If the decision does not have a rationale or is such that, according to its content, it does not represent an adequate rationale (e.g. it is reduced to the wording: "the holder, after conducting the harm test, determined that the request of the applicant cannot be respected", etc.), the same is in contradiction with clearly established norms from the Law on General Administrative Procedure.

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

"The reasoning should be understandable and contain: a brief presentation of the party's request, if any, the established facts according to which the administrative act was issued, the legal regulations and the reasons for which, based on the established facts, the administrative act was adopted, the reasons for which some of the demands, claims or proposals of the parties are not accepted, as well as the reasons why some of the statements made during the procedure were not taken into account. In the case of an administrative act adopted on a discretionary basis, the main reasons must be stated for which the right to decide on a discretionary basis was applied in the manner as in the administrative act..."

In other words, if the decision does not contain an appropriate rationale, the requester of the information is placed in an unequal position in relation to the holder and cannot fully exercise his constitutionally guaranteed rights.

### NOTE:

The steps from point 3 of this Manual should be detailed  
 reasoned in any refusal or provision decision  
 full or partial access to the requested information. Otherwise,  
 The agency, as a secondary authority in the appeal procedure, can  
 annul the decision as illegal for non-existence or insufficient  
 explanation of the contested decision.

In addition, according to Article 8 paragraph 3 of LFAPI, the official for mediation with information keeps a separate record of the received requests for free access to public information. From exceptional importance is in the records<sup>35</sup> to state the reasons for any rejected or denied claim. This means that if the request (or part thereof) is rejected on any grounds, a synopsis of the test of harm (carried out for each separately rejected request) must be an integral part of the records, otherwise it will be considered as incomplete.

<sup>35</sup> The records are further incorporated into the Annual Report which is submitted to the Agency, in accordance with Article 36 of LFAPI

## EXAMPLE

### Request:

Information contained in the biography of a public official or a high-ranking civil servant or an expert appointed by the Government to carry out an important task.

#### **Step 1: Is there a relevant exception?**

The applicable exception is prescribed by Article 6, paragraph 1, point 2 of the Civil Code.

#### **Step 2: Is there a protected interest?**

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

#### **Step 3: Is there any harm in publishing?**

The information is indeed related to a natural person. Therefore, providing the information would cause harm because a natural person usually does not want any information related to him to be published.

#### **Step 4: Is there a greater public interest?**

On the other hand, data related to the profession/function is generally less protected. Profession/function is part of the social aspect of life as an individual, not of private life. Also, in this case, the data was used to select a person to perform a public function, which is paid from public funds.

Relevant questions are:

- Is the person a public figure (official, expert)?
- Is the requested information related to the public task?

- Will the information increase knowledge about the implementation of the public task?

In this case, the resume reveals the qualifications. The answer to all these questions is yes. Therefore, it can be easily concluded that the publication of this information would serve the following interests in the definition of "public interest" according to Article 3 of the LFAPI:

- Contributing to better integrity of public authorities and administration and disciplined spending of public money (categories 1 – 3);
- Enabling informed choice and public participation (category 6);

### **Step 5: Proportionality**

The overriding public interest relates to data on education and qualifications. However, it does not apply to the citizen's unique identification number (UBCN), contact data (such as personal email address, mobile phone, address). Therefore, if there are such data in the biography, they should be anonymized.

### **Step 6: Making a decision to provide or refuse to provide the information**

The information contained in the curriculum vitae with the exception of EMBG and contact details should be provided.

Therefore, a Decision should be made to grant partial access to the requested information.

### **Step 7: Explanation of the solution**

The solution should contain a description of the above steps.





The project is financed by  
the European Union

Promotion of  
transparency and  
accountability in public  
administration