Great Expectations: The New Croatian Freedom of Information Act

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I. INTRODUCTION

Croatia passed its first Law on the Right of Access to Information[1] in October 2003, and it was the third country among the former Yugoslavia's republics to do so. Bosnia and Herzegovina was the first to adopt FOI law in 2000, followed by Slovenia, Kosovo and Croatia (2003), Serbia (2004), Macedonia and Montenegro (2005). It is interesting to note that among the first 6 European countries with the best ranking position, taking in account the overall legal framework for the right of information, there are four former Yugoslav republics. Serbia has the best FOI law, followed by Slovenia (3rd), Croatia (9th), and Macedonia (13th).[2] So, at first sight, the countries of former Yugoslavia are, at least as to their FOI legal framework, a freedom of information paradise.

According to the Global Right to Information Rating it is therefore evident that during the last decade Croatia has had a modern and very good legal framework. So the question naturally arises why did it adopt a completely new law in 2013? The question is even more interesting having in mind that the first law was amended in 2010. The reason for amending the first law in 2010 was partly implementation of the 2010 constitutional amendment, guaranteeing the right of access to information in the possession of public authorities. The adoption of the new law in 2013 was only marginally related to the fulfillment of some final

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[1] The official title of Croatian law is the Law on the Right of Access to Information. The scientific community and legislation in individual countries alternatively uses different legal terms – access to information (ATI), right to information (RTI), or freedom of information (FOI).

[2] Global Right to Information Rating, http://www.rti-rating.org/country_data.php, last visited on September 28th 2013. Access Info Europe (AIE) and the Centre for Law and Democracy (CLD) launched an improved version of the RTI Rating website in September 2012, containing updated results on all 93 countries with national right to information laws. However, we have some doubts as to the 'update' of national laws. For instance, Croatia has been given 114 points, and its 2003 FOI law is in English version available at the website, but it is not clear whether the score is related to the original FOI law or to its amended version from 2010?

conditions for the Croatian EU membership[3], despite such evaluations from foreign observers.[4]

The crucial reasons for the adoption of the new Croatian FOI law, in the opinion of the authors, lie in dissatisfaction of the civil society actors with the access regime and with the implementation of the 2003 FOI law, even after its improved variant came into effect in 2010. In the last five years civil society organizations had put great pressure on the government and the Parliament, which resulted in several normative breakthroughs in the freedom of information legal structure – first the constitutional amendment guarantying the right to access to information in 2010, then the legislation enacted to implement the constitutional amendment in 2010 (2011), and finally the new law passed in 2013.

The new FOI regime in Croatia is normatively, in the opinion of the authors, one of the most advanced among the EU countries, having in mind the constitutional status of access to public information, introduction of the public interest test and the establishment of the Information Commissioner as a new independent body monitoring the implementation of the Act and reviewing the decisions of public bodies regarding the access to public information. However, it is yet to be seen if this normative framework is sufficient to guarantee the constitutional right to information in a well-established institutional culture of secrecy.

In that respect, this paper will examine the following: **Part II** deals with an overview of the legal (constitutional) development of the freedom of information concept in Croatia during the last two decades[5]; **Part III** focuses more thoroughly on the institutional dimension of the progression (from an ordinary mechanism of legal protection towards a specialized Information Commissioner); **Part IV** in a more detailed way analyzes specific legal provisions and standards embodied in the Croatian Constitution and relevant legislation pertaining to the freedom of information concept (with special emphasis on the issue of "exceptions" to the general rule of "information transparency"); and **Part V**, finally, tries to predict what specific impact of normative values and standards (as they have developed so far

[3] Article 2 of the new Law states that its provisions comply with the Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information and the Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

[4] Croatia Adopts New Freedom of Information Law, available at: http://www.freedominfo.org/2013/02/croatia-adopts-new-freedom-of-information-law/, last visited on September 28th 2013. Some observers claim that „one of the changes required by the (EU) Commission was the creation of a separate regulatory body for freedom of and access to information". See: Karin Retzer and AnjaPoler De Zwart, *Croatia set to join the European Union: What this means for data protection compliance*, available at: http://www.mofo.com/files/Uploads/Images/130626-Croatia-European-Union.pdf, last visited on September 28th 2013.

[5] This period here is taken as a referential one due to the fact that the modern version of the Croatian constitutional development started with the enactment of the Croatian Constitution of 1990.

or could be developed in the future, e. g. in terms of international law, specifically in reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms and to the EU law) could be expected in the Croatian legal system in the domain of freedom of information in the future case-law.

II. HISTORICAL GENESIS

Historical development of the freedom of information concept in the Republic of Croatia, seen from the perspective of the last two decades, may roughly be divided into three distinct periods.

The freedom of information, as well as a number of other modern constitutional commitments of the Croatian "transitional" era, surely was introduced into the **1990 Constitution** (hereinafter: **the Croatian Constitution of 1990**), but only as a part of a wider guarantee of freedom of information. However, this was made only to a rather limited extent: by the explicit wording of the original version of the basic document, it was provided as a right belonging "only" to "journalists".[6] Therefore, it could be said that this first developmental phase (1990 – 2003) was marked by an almost overall absence of legal regulation of the concept of free access to information as such.

The second phase of the historical development (2003 – 2010) in the freedom of information domain started when Croatia adopted its first Law on the Right of Access to Information (hereinafter: **the Law of 2003**) in October of 2003.[7] Despite some rather serious deficiencies, this Law contained all the basic elements of the freedom of information concept,

[6] Thus the Article 38 of the Croatian Constitution of 1990 prescribed the following: *"Freedom of thought and expression shall be guaranteed. Freedom of expression shall specifically include freedom of the press and other media of communication, freedom of speech and public expression, and free establishment of all institutions of public communication. Censorship shall be forbidden. Journalists shall have the right to freedom of reporting and access to information. The right to correction shall be guaranteed to anyone whose constitutional and legal rights have been violated by public information."* The text of the Croatian Constitution of 1990 was published in the Official Gazette (Narodne novine) 56/90.

[7] See: Law on Free Access to Information, Official Gazette 172/03. Due to the fact that this particular period was primarily marked by the enactment and entry into force of a first FOI law, we could label this phase the "legislative" one. The enactment of the Law was surely a result of implementing the Council of Europe Committee of Ministers' Recommendation Rec. (2002) on Access to Official Documents, but at the same time it was also a direct result of the NGO coalition "Citizens have a right to know" advocacy campaign. GONG, Implementation of freedom of information act, http://gong.hr/en/good-governance/access-to-information/implementation-of-freedom-of-information-act/, last visited on September 20th 2013.

in this sense it marked a great "step forward" and in its original version was applied over the period of seven years.

The third developmental phase started with the last **constitutional amendments in 2010** (hereinafter: **the Croatian Constitution of 2010**), which, among other things, included an additional paragraph to the article 38 of the Croatian Constitution in a way as to prescribe an explicit right of free access to information, belonging to everybody and being possibly restricted only pursuant to law and principles of proportionality and necessity in a free and democratic society.[8] However, this was not the end of the road since within only six months from the constitutional amendment, the legislature stepped in once again, this time with the new version of the Law itself (hereinafter: **the Law of 2010**).[9] This particular act was nonetheless short lived, because the Constitutional Court proclaimed its formal unconstitutionality only three months later.[10] Consequently, the Croatian Parliament once again enacted the new version of the Law (this time with a sufficient parliamentary majority) which entered into force in June 2011 (hereinafter: **the Law of 2011**).[11] This version lasted until the new one was voted in the Parliament in February this year (hereinafter: **the Law of 2013**).[12]

Some very particular (technical) issues of such a regulatory development will be analyzed in the Part IV of this paper and we will therefore surely once more come back to the historical method of analysis. But for the time being, so much, in a very short survey, can be said about the pure facts pertaining to the historical perspective. What is more important here is the normative evaluation of the historical development of the free access to information

[8] In 2010 Croatia amended its Constitution primarily to create and strengthen the constitutional basis for the country's full membership in the European Union. See: Branko Smerdel, *The Constitutional Order of the Republic of Croatia on the Twentieth Anniversary of the 'Christmas' Constitution: The Constitution as a Political and Legal Act*, in: *The Constitution of the Republic of Croatia*, Novi Informator, Zagreb, 2010, p. 89. However, at the strong insistence of the civil society associations (GONG, Transparency International Croatia) some amendments strengthening human rights and fundamental freedoms have been included. Among them, Article 38 was amended to include a new section guaranteeing the free access to information. With this constitutional provision Croatia became the 24th European country with explicit constitutional right to information. The principle of proportionality as to the restrictions on the right to access to information was taken from Article 3 of the Council of Europe Convention on Access to Official Documents (2008), although Croatia is still not party to this treaty.

[9] See: Law on the Changes and Additions to the Law on Free Access to Information, published in the Official Gazette 144/10.

[10] See: Decision of the Constitutional Court of the Republic of Croatia U-I-292/2011, March 23rd 2011, published in the Official Gazette 37/11.

[11] See: Law on the Changes and Additions to the Law on Free Access to Information, published in the Official Gazette 77/11.

[12] See: Law on Free Access to Information, Official Gazette 25/13.

concept in Croatia. The crucial question, if only on a general level, is the following: has that concept, in the course of the last two decades, progressed or not?[13]

Moreover, only by taking into account the answer to this specific question, one might reach a more serious opinion about the status of the newest Croatian Freedom of Information Law.

As to the first period of development, it can be said that, in comparison to contemporary tendencies, the absence of a detailed legal regulation of the concept without any doubt reflected a rather weak position the notion of free access to information deserved in the early period of the modern Croatian constitutionalism. However, at least three crucial remarks should be made here. Firstly, it is true that the Croatian approach in that respect was not an isolated instance at all.[14] Secondly, despite such an explicit constitutional formulation, there still had to be taken into account such (doctrinal) interpretations which claimed that freedom of information was making part of (or precondition for) other constitutional rights, principles and contexts.[15] However, on a strictly practical level, it should also be stressed that during that era the Constitutional Court did not have (or did not take) the opportunity to decide on the existence of the constitutional right to information (or to give any further substantive interpretive guidelines thereof), and by now this question has surely been overshadowed by

[13] A kind of a normative perspective is in any case necessary in dealing with any serious historical discourse. From that point of view, much like with other fundamental rights (or other social institutions in general), it seems that two answers are actually possible: either history represents a series of cycles in which nothing actually is new or it has a certain progressive course through which specific institutions (in our case the right to free access to information) undergo specific "progressive" developments, i. e. developments "for the better". Our personal and scientific opinion is here opting for the second approach and we will thus claim that freedom of information in Croatia in the course of the last few years indeed has progressed.

[14] Here, it should be noted that the whole concept of the free access to information, seen from the comparative perspective, actually started to develop only in recent times. See, among other sources: David Banisar, *Freedom of Information Around the World 2006 – A Global Survey of Access to Government Information* Laws, Privacy International (2006), pp.166-168. (available at: http://www.freedominfo.org/documents/global_survey2006.pdf, last visited on October 6th 2013); Thomas Bull and Hugh Corder, *Ancient and modern: access to information and constitutional governance*, in *Routhledge Handbook of Constitutional Law*, edited by Mark Tushnet, Thomas Fleiner and Cheryl Saunders, Routledge, London, 2012, pp. 219-229; John M. Ackerman and Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, Administrative Law Review, Vol. 58, No. 1, Winter 2006, pp. 85-130.

[15] In that particular respect, it should be emphasized that some Croatian constitutional lawyers were of opinion that the right of public to know, meaning the right of access to information held by the governmental bodies, is guaranteed under the Croatian Constitution, considering the constitution in its entirety and using the teleological constitutional interpretation, even before the Constitution was amended in 2010. Moreover, it should also be stressed here that such a teleological or contextual approach to constitutional interpretation was long ago developed by the European Court of Human Rights in Strasbourg. See: Branko Smerdel and Djordje Gardasevic, *The Notion of Security and Free Access to Information: Creation and Development of the Right of Public to Know in European and Croatian Jurisprudence*, Politics in Central Europe, The Journal of Central European Political science Association, Vol. 2., No. 2, Winter 2006/7, pp. 24-37 (also available at: http://www.politicsince.eu/documents/file/2006_2007.pdf, last visited on October 6th 2013); Branko Smerdel, *Ustavna osnova prava javnosti na informaciju* (*Constitutional Basis of the Right of Public to Information*), Informator 5527, Zagreb (2007), pp. 1-2.

further developments. And thirdly, despite all the constitutional deficiencies, it was still true that the right of access to information in the Croatian legal system was not absolutely missing, since it was long ago embedded into other legal acts (i.e. specific laws).[16]

If the concept of the free access to information as such did not exist (or it did only in "traces") for the first 13 years of modern Croatian statehood, then without any doubt it can be stated that the adoption of the Law of 2003 introduced it into the Croatian legal system in an explicit way. The "progressive" course of history was therefore surely present in this case and, taking into account some other constitutional developments in Croatia at the time, we think that this was not by pure chance. Quite to the contrary: not only institutional, but also some specific and very serious developments in the field of human rights have generally taken their place by the year of 2003.[17] The Law of 2003, of course, still suffered from some special flaws (most serious of which are the absence of the proportionality and public interest tests on one hand and deficiencies in institutional protection on the other, both of which are examined later in this paper), but it still marked a significant beginning of a new chapter in the public transparency field. It is also true that during seven years of its application, people increasingly started to use the Law.

The very fact of promoting the right to an explicitly prescribed constitutional level in 2010 has by definition been the most significant step in the history of development of free access to information in Croatia. If the newest version of the Constitution guaranteed a right to "everybody" and included a long wished standards of proportionality, prescription of exceptions only by law and of proving their "necessity in a democratic society" in every particular case, the subsequent laws of 2010 and 2011 started to introduce significant

[16] A more thorough legal analysis of various sources touching upon the issue of freedom of information (during the first historical period examined here) goes well beyond the purposes of this paper, but it might be argued, even though it did not exist as a formulated concept in a sense which is examined here, that some features of the right to access to information existed within certain number of laws (e. g. Law on Institutions; Law on State Statistics; Law on Archives; Law on Libraries; Law on the Croatian Radio-Television; Law on the State Administration System; Law on Protection of Data; Law on Courts; Law on Administrative Procedure etc.).

[17] Again, some more extensive analysis of the whole (constitutional, political, social) context in which the Law of 2003 was enacted cannot be given at this place, but it is necessary to point out that the beginning of the 21st century really was marked by some very important constitutional changes in Croatia. These touched not only upon some issues of state institutional design, i. e. separation of powers (e.g. the Constitutional changes of 2000 and 2001 which respectively transformed the "semi-presidential" system into a "parliamentary" one and abolished the second chamber of the Croatian Parliament), but also improved regulation of human rights and freedoms and advanced procedures of their protection (e.g. inclusion of the principle of proportionality in the Constitution in 2000; improvements concerning the powers of the Constitutional Court, especially in terms of the institute of constitutional complaint etc.). Additionally, it should also be added that, among other things, the right of free access to information legislation came to the focus of interest of both public and authorities together with some other legislative packages designed to serve the objective of transparency (e. g. Law on the Prevention of Conflict of Interest in Performance of Public Duties of 2003; Law on the Financing of Political Parties, Independent Lists and Candidates of 2007).

institutional changes, the process which finally resulted in a completely new mechanism of protection through the Law of 2013. Additionally, it is in this period that the Croatian Constitutional Court finally got involved: if its 2011 Decision was based only on reasons of formal unconstitutionality, it still recognized that freedom of information in Croatia belonged to a catalogue of "core" personal constitutional rights which ought to be regulated by the organic laws.

Therefore, if only on a rather general level, one should recognize that in any case the free access to information concept in Croatia during the last two decades has "progressed". Some specifics of this development are going to be shown in the following text.

III. OVERSIGHT OF THE RIGHT TO INFORMATION: INSTITUTIONAL PROGRESSION FROM THE INTERNAL REVIEW TO THE INFORMATION COMMISSIONER

Oversight over the implementation of the right to information is, in our opinion, one of the most important aspects of a FOI access regime. It is just this feature that has experienced most significant changes in the Croatian FOI law over the years. The FOI law has been amended several times and each time the institutional dimension of the oversight was in the forefront and each time the design of the oversight regime was changed. The main motive was to establish a sufficiently independent oversight body capable to secure effective implementation and serve as an appellate body against violations of the right to information.

At the time of the adoption of the Law of 2003 there were not many countries in Europe with FOI law and there had been limited experiences with different forms of oversight bodies. Just a year before the Council of Europe Recommendation to member states on access to official documents stated in principle IX related to the review procedure:

> *"1. An applicant whose request for an official document has been refused, whether in part or in full, or dismissed, or has not been dealt with within the time limit mentioned in Principle VI.3 should have access to a* ***review procedure before a court of law or another independent and impartial body*** *established by law.*

2. An applicant should always have access to an expeditious and inexpensive review procedure, involving ***either reconsideration by a public authority or review*** *in accordance with paragraph 1 above."*[18]

This principle was repeated later almost in the same words in the Article 8 of the Council of Europe Convention on Access to Official Documents, the first binding international legal instrument to recognize a general right of access to documents.

Except of the procedure before a court of law the Recommendation did not specify or recommend what kind of an independent and impartial body would be desirable. It has been only mentioned in the Explanatory memorandum that in some countries it is possible to complain about refusals or malpractice to an ombudsman.

In different institutional regimes we may find various combinations of three possible oversight mechanisms:

- an "administrative appeal to another official within the institution to which the request was made"[19])
- review procedure before an independent body, and
- review procedure before a court of law.

There are therefore three possible institutional avenues of recourse in case of not receiving the requested information – what Sarah Holsen and Martial Pasquier call internal review, external review and litigation through courts.[20] Their analysis shows that among ten countries with the FOI law they have selected seven have all three institutional avenues prescribed as stages in the appeal process (Germany, India, Ireland, Mexico, Scotland, United Kingdom and Australia, although in Germany appeal to oversight body is an optional step, and in Mexico and Australia internal review is an optional step).[21] Only Canada, Slovenia and Switzerland did not prescribe internal review. In each country there is an oversight body, and there is a possibility of making a final appeal to the court of law, the only difference being in the level of the judiciary to which the appeal could be made.

The crucial questions of the institutional set-up of the oversight bodies, in our opinion, are: is it necessary to provide for an internal review; what kind of an independent oversight

[18]Recommendation Rec. (2002)2 of the Committee of Ministers to member states on access to official documents, available at: https://wcd.coe.int/ViewDoc.jsp?id=262135, last visited on September 28th 2013..

[19] Alasdair Roberts, Access to Government Information: An Overview of Issues, in *Access to Information: A Key to Democracy*, ed. by Laura Norman, The Carter Center, 2002, p. 12.

[20] Sarah Holsen and Martial Pasquier, *Insight on Oversight: The Role of Information Commissioners in the Implementation of Access to Information Policies*, Journal of Information Policy, Vol. 2, 2012, p. 217.

[21]Ibid., p. 218.

body to establish; and which court of justice and on what level of judiciary would be most appropriate to decide finally on appeals?

As to the enforcement of the right to information, the Law of 2003, prescribed the model of 'administrative appeal' against the decision of the public authority to the head of the competent public authority, and against the second-degree decision, i.e. final first-degree resolution of the public authority rejecting the request, the applicant had the right to initiate the administrative dispute by the filing of the lawsuit to the Administrative court, in accordance with the provisions of the Law on Administrative Procedure.[22]

This model of internal review plus an appeal to the court of law was in accordance with the principle IX of the Recommendation to member states on access to official documents because the Recommendation gave the member states two options – first, to provide for an 'administrative appeal' (reconsideration by a public authority) **or** review by another body, and second to choose between a review procedure before a court of law **or** another independent and impartial body established by law. According to the Recommendation, and also according to Article 8 of the Convention on Access to Official Documents it is possible to avoid a review procedure before what is called in these documents 'another independent and impartial body'.

It comes as no surprise that precisely this model was the dominant one at the time, among the three models of enforcement of the right to information elaborated by Alasdair Roberts.[23]The first involves an 'administrative appeal' and afterwards an appeal to a court or tribunal. The second involves a right of appeal to an independent ombudsman or information commissioner, who makes a recommendation about disclosure, and if the institution ignores the recommendation, an appeal to a court is permitted. The third model provides for a right of appeal to an information commissioner who has the power to order disclosure of information. No further appeal is provided for in the access law, although the commissioner's actions remain subject to judicial review for reasonableness.[24]

Roberts was also of the opinion that among the three models he identified the first model is the least preferable. His explanation is relevant today as it was ten years ago:

[22]The Law of 2003, Art. 17.

[23] John M. Ackerman and Irma E. Sandoval-Ballesteros argue that at the time of writing their article only 12 of 62 countries with FOI law have independent Information Commissions at the national level. See their article *The Global Explosion of Freedom of Information Laws*, Administrative Law Review, Vol. 58, No. 1, Winter 2006, p. 105 and footnote 103 on p. 106.

[24]See Roberts, *Access to Government Information: An Overview of Issues*, p. 12-13.

"Administrative appeals are unlikely to produce satisfactory outcomes in contentious cases where senior officials may already have participated in discussions about disclosure, and a further appeal to court may be expensive and time-consuming. Some observers say that the second approach is also preferable to the third. They argue that governments rarely ignore recommendations, and that commissioners with quasi-judicial responsibilities may feel obliged to avoid public advocacy of access rights. Proponents of the third approach argue that it provides a quicker and less costly remedy in cases where recommendations are not followed."[25]

The original Croatian model of oversight has proven to be deficient. First, as to the internal review, i.e. the two-stage decision making within the same public authority, it was clear from the beginning that this procedure only allows a prolongation of the process, as a sort of a 'delaying tactic'[26], and is not, as was expected, a possibility for reconsideration of the initial negative decision of the information officer within a public authority. Namely, it was not realistic to expect that an information officer within a public authority would issue a decision rejecting the application, with no prior consultation with the head of a public authority. But the fact that it was possible to have the two-stage decision-making within the same public authority, prior to initiating a review procedure before a court of law, contributed only to substantial slowing-down of the right of access to information.[27]

Against the decision of the public authority rejecting the request, the applicant had the right to initiate the review procedure by filing of the complaint to the Administrative court.[28] However, after several years of experience with the administrative disputes over the access to information it was obvious to the interested public that the Administrative Court is not a judicial tribunal capable and willing to protect this constitutional right. The rulings of the Court have been almost without exemption disappointing. There were many 'test cases' initiated primarily from civil society organizations (GONG, Transparency International Croatia, Juris Protecta), asking for a disclosure of certain government information, e.g. the content of the contract with the Deutsche Telecom (proclaimed to be business secret), the agenda of the secret sessions of the Government, the omission of some public authorities from the List of public authorities published each year by the Government, biographies of

[25]Ibid., p. 13.

[26] Heather Brooke, *Your Right to Know: A Citizen's Guide to the Freedom of Information Act*, 2nd ed., Pluto Press, London, 2007, pp. 11-12.

[27] David Banisar states that in many countries with FOI law the first instance of review is typically a higher level of a public authority. Such a solution is, in his opinion, not expensive and the appealing procedure is prompt. However, the experience of many countries he analyzed is that the internal review system "tends to uphold the denials and results in more delays rather than enhanced access. In the UK, 77 percent of requests for internal reviews to national bodies were denied in full in 2005." (Banisar, *Freedom of Information Around the World 2006: A Global Survey of Access to Government Information Laws*, Privacy International,, p. 23).

[28] In his analysis of the first Croatian FOI law Banisar argued that complaints could also be made to the Ombudsman, but this was not true. See: Banisar, *Freedom of Information Around the World 2006*, p. 59).

candidates for public functions which are appointed by the Parliament etc. In each and every of these cases the Administrative Court rejected the complaints, mostly because of some formal reasons. In 2009 GONG stated in its report[29]the following: "The Administrative Court does not decide about the content (of the complaint), should public authority give information or not, it only checks whether the procedure is respected. The procedure of receiving a more complex or sensitive information remains complicated, too long and potentially connected with significant expenses for citizens."

Finally, even after the amended Law (the Law of 2010) provided for the test of the public interest, GONG was disappointed that the Administrative Court refused to carry out the test leaving this task to the Constitutional Court.[30] This was hardly surprising because, as stated by Nataša Pirc Musar, the Slovenian Information Commissioner, "public interest test introduces methods of constitutional law into administrative law via legislation on the access to public information"[31], and the judges of the administrative courts are simply not willing to use constitutional law concepts in administrative disputes. However, the procedure of constitutional complaint in case of refusal of access to information is, as a rule, time consuming and could last for years. Even a judge of the Administrative Court confessed that the Court has taken legal standpoints that are subject to criticism, but represent at least a foundation for examining specific provisions of the law and give a direction for its modification.[32]

Croatian experiences with the oversight of the FOI law in the years 2003 – 2010 spoke strongly against relaying only on the system of internal review plus the review before the court of law. When the proportionality test has been inserted into the Constitution in 2010 and afterwards in the amended Law (together with the public interest test) it was even more evident that the public authority itself and also the Administrative Court are not willing to use this test in particular cases. The only possible solution was to provide for an independent oversight body as an appellate instance in the first degree, before the final judicial appeal.

Because of the constitutional amendment of 2010 guarantying the right to access to information held by any public authority and particularly because of accompanying

[29]Analysis could be found at: http://www.gong.hr/page.aspx?PageID=69, last visited on September 28th 2013.
[30] 'The Government and the Administrative Court are ridiculing democracy and GONG', Novi list, 8 November 2011.
[31] Nataša Pirc Musar, *Weighing tests with emphasis on public interest in accessing information of public character*, Slovenian Law Review, Podjetje in delo, Vol. 31, no. 6/7, 2005, p. 1696, (available at https://www.ip-rs.si/fileadmin/user_upload/Pdf/clanki/Weighing_tests_with_emphasis_on_public_interest_test_in_accessing_information_of_public_character.pdf, last visited on September 28th 2013.
[32] See Mirjana Juričić, *The Law on the Right of Access to Information – Implementation and Application*, Aktualnosti upravne prakse i upravnog sudovanja, Informator, Zagreb, 2010.

constitutional principle that restrictions on the right to access to information must be proportionate to the nature of the need for such restriction in each individual case and necessary in a free and democratic society, as stipulated by law, there was a constitutional obligation for the Parliament to change the FOI law. One of the most important changes addressed the question of an independent appeals body.

Non-governmental organizations, the parliamentary opposition and some academics proposed the institution of information commissioner as the appealing body, indicating the comparative popularity of this institution in recent years in different countries with FOI law, and the recommendations of organization Article 19. It was also pointed out that neighbouring Slovenia and Serbia also have this institution as a guardian of the right to information. However, the Government did not accept this solution. It proposed the already existing Personal Data Protection Agency as an independent appeals body. The argument was that such a solution exists in many European countries such as Belgium, France, Hungary, Germany, Slovenia, Switzerland and United Kingdom. This argument was correct as to the fact that these countries have a single body dealing both with the data protection and the right to information. However, the named countries often have the information commissioner as an official or a commission as a body on the top of the agency dealing with protection of these rights. The status of these officials or bodies is much more independent than the status of the head of the Personal Data Protection Agency, which was supposed to resolve appeals against the first-instance decisions denying applicants requests for information.

The Agency was established in 2003 to supervise the implementation of personal data protection, and resolves requests to determine possible violations of rights guaranteed by the Personal Data Protection Act. It was stipulated by the Act that in carrying out its activities the Agency shall be independent and responsible to the Croatian Parliament. However, the Act did not provide for a sufficiently independent position of the Agency's director, especially when the Agency was given the tasks of an independent body for the protection of the right to information in 2010. The Act only prescribed that the director shall be appointed for a period of four years with the possibility of reappointment, and recalled by the Croatian Parliament upon proposal of the Government. It prescribed neither requirements related to professional experience of the director, nor an open procedure of his/her selection.[33] It is enough to say that the last director of the Agency was a political appointee, who resigned when he was elected as the mayor of a small town.

[33]The Act on Personal Data Protection, available at: http://www.right2info.org/resources/publications/laws-1/croatia-personal-data-protection-act, last visited on September 28th 2013.

It is important to state that from the beginning the Agency was only partially positioned as an independent appellate body. The Agency had no authority to review decisions of the Croatian Parliament, the President of the Republic, the Government, the Supreme Court, the Constitutional Court, and the Chief Public Prosecutor. Against the decisions of these state bodies the Act provided only for an administrative dispute initiated before the Administrative Court.[34] Therefore, in a situation when one of the highest state bodies would refuse to give the information in its possession the only remedy would be the Court, and as we said before, the Administrative Court was unable or simply declined to carry out the public interest test.

Because the Agency was not perceived as an independent oversight body, because of its limited function as the appellate body against violations of the right to information, and because of the dissatisfaction with the role of the Administrative Court, especially as to its inability to conduct the public interest test, there was a continuing pressure from the non-governmental organizations and also from the academic community to change the legal framework relating to the oversight body.

In late 2012 the new Government, which had been formed after the 2011 parliamentary election, initiated the procedure to amend the Law on the Right of Access to Information, particularly in parts regulating the need to transpose the EU Directive on the re-use of public sector information, and the obligation of consulting the public in adopting new legislation. This was the opportunity for the interested non-governmental organisations to push for a completely new law, which would also establish the information commissioner as a new oversight body. After several months of public consultations and lobbying, the Government accepted practically all relevant amendments from civil society organisations and the new law, which encompasses highest standards of transparency and oversight, was adopted in February 2013.

The new law establishes an information commissioner, who will be elected by the Parliament, for a five year mandate, including the possibility of re-appointment. He or she must be a renowned expert of recognised ethical and professional reputation and experience in the area of protection and improvement of human rights, media freedom and democratic development, and not member of any political party. The law grants the commissioner oversight functions, and other tasks relating to protecting, monitoring and promoting the right

[34] After the enactment of the new Act on Administrative Disputes in 2010 the administrative dispute in case of the right to access the information may be initiated before the High Administrative Court.

of access to information. The main tasks of the Commissioner are specified in Article 35 of the new FOI Act. He/she is authorized to:

- conduct the tasks of the second degree body in issuing decisions on complaints relating to exercising the right of access to information and the right to re-use information;
- conduct the supervision over the implementation of this Law;
- monitor the implementation of this Law and the regulations referring to the right of access to information and inform the public of the implementation thereof;
- make proposals to the public authority bodies regarding the measures of improving the right of access to information, regulated by this Law;
- inform the public on exercising the beneficiary rights of access to information;
- propose measures for professional education and development of information official in the public authority bodies, and familiarize with the duties of the Commissioner with regard to the implementation of this Law;
- initiate the issuing or amending of regulations for the purpose of implementation and improvement of the right of access to information;
- submit to the Croatian Parliament a report on the implementation of this Law and other reports when considered necessary; and
- fine an indictment proposal and issue a misdemeanour order for any identified misdemeanour.

According to the Law, the Information Commissioner shall be independent in their work and accountable to the Croatian Parliament. He/she could be discharged only if he/she is unable to perform his/her duties in the period longer than six months, or fails to perform duties in accordance with this Law. However, the first Information Commissioner has not been chosen at the time of finishing this paper.[35]

[35] This was especially emphasized at the GONG's sponsored conference held on September 30th, 2013, tilted "Information Commissioner – in limbo" (see http://gong.hr/en/good-governance/access-to-information/commissioner-in-limbo/, last visited on September 28th 2013.

IV. LEGAL STANDARDS OF THE CROATIAN FREE ACCESS TO INFORMATION SCHEME AND THE ISSUE OF EXCEPTIONS

Taking into account what has previously been said about the historical development of the free access to information in Croatia, an appropriate analysis of legal provisions pertaining to and legal standards guaranteeing that right might be divided into at least two crucial categories. The first one would deal with solutions offered on a legislative level, i. e. within the ambit of the Law of Free Access to Information in its original 2003 and subsequent versions. The second one would go one step further and try to also include the constitutional argument (having in mind that the right to free access to information explicitly achieved that level of protection in 2010).

The original **Law of 2003**, as we previously indicated, in many senses contained all the basic elements of the concept of free access to information. Among these, in short, there should be mentioned the following prescriptions[36]:

- the right was given to the widest possible circle of beneficiaries (any physical or legal person, domestic or foreign)[37];
- a wide definition of public authorities under obligation to give information was prescribed ("state bodies, bodies of units of local and regional self-government, legal persons vested with public powers and other persons to whom public powers have been delegated."[38]);
- certain important normative principles were introduced (presumption of publicity of information; right to be informed on whether a certain public authority disposes of the information requested; equality of all beneficiaries using the right of access to information; completeness and accuracy of information; obligation of authority to explain reasons for refusing the access; prescription by law of all the exceptions; principle of a free further disposal of information)[39];
- general right of access could be exercised either through submitting special requests thereof or through the application of the so-called "regular publication" of certain types of information (obligation of public authorities to publish in the official gazettes or on the Internet of all decisions and measures which affect the interests of beneficiaries; information on their work including activities, structure,

[36] The stated purpose of the original law (Article 2) was to enable and ensure the realization of the right on access to information to the natural and legal persons through open and public activities of the public authorities, but the law did not contain a specific provision which would emphasize the benefits of the right to information. The Law also stated in Article 4 that *„all information in possession, at disposal or under the control of public authorities must be available to the interested beneficiaries of the right to information"*, although the right on access to information may be restricted in cases and in the manner prescribed by the law.
[37] The Law of 2003, Art. 3/1.
[38] The Law of 2003, Art. 3/1.
[39] The Law of 2003, Art. 4-7.

and expenditures; information on the use of the Law; information related to public tenders; information on the draft versions of laws and by-laws)[40];

- the applicant was not obliged to state the reasons of submitting request for access to information[41];
- public authorities were obliged to enable to the applicant the access to information within the period of 15 days (with a possibility of further extension in special enumerated cases up to 30 days in total)[42];
- apart from the right of appeal, there was also prescribed a right of filing an administrative lawsuit to the Administrative Court of the Republic of Croatia[43];
- the expenses for gaining access were limited only to coverage of "real material" expenses of providing information[44];
- requestors could also demand that information that was incomplete or inaccurate be amended or corrected[45];
- the Law also imposed a number of other administrative duties on public authorities to improve access (e.g. the appointment of an information officer; development of a catalog of the information in their possession; submission of an annual report on the status of implementation of the Law by all public authorities and by the Government for all the data covering the application of the Law)[46];
- concrete sanctions were also introduced[47];
- a right of partial access to those parts of the information which were not covered by exceptions and a right to gain access once the reasons for refusal have been removed was included in the Law.[48]

So much, in short, could be said about the main characteristics of the Law of 2003. On the other hand, apart from the already mentioned issue of the appeal procedure, it also provoked other types of problems. In this section, we are going to show three of them we think of as "paradigmatic" to the problem of exceptions to the general rule of transparency.[49]

[40] The Law of 2003, Art. 10, 11 and 20.
[41] The Law of 2003, Art. 11/4.
[42] The Law of 2003, Art. 12 and 14.
[43] The Law of 2003, Art. 17.
[44] The Law of 2003, Art. 19.
[45] The Law of 2003, Art. 16.
[46] The Law of 2003, Art. 22 and 25.
[47] The Law of 2003, Art. 26.
[48] The Law of 2003, Art. 8.
[49] We follow this particular course of analysis due to an important methodological reason: although some rather concrete information on the application of the Law on the Right of Access to Information do exist (based on the official annual reports prepared by the Government and issued under the explicit provision of the Law itself), they could to a great extent be misleading since they often contain incomplete data. The Croatian NGO GONG clearly pointed to this methodological problem: for instance, in its own opinion dealing with the governmental report covering the year of 2009, GONG pointed out that out of 4.000 officially designated "public authorities" (the ones having the legal obligation to conform to the provisions of the Law on the Right of Access to Information) only 688 submitted their reports (in 2008 that number was only 748 "public authorities"), which actually meant that the official governmental report was based on data given by merely ¼ of all public authorities. See: http://gong.hr/media/uploads/dokumenti/Clanci/GONG_ZPPI_analiza_sluzbenog_izvjesca_za_2009_.pdf, last visited on October 5th 2013. However, the official reports on the application of the Law, as well as the "independent" NGO sources, must not be avoided and therefore some of the observations we make in the following parts of this text are based on them.

Firstly, as to surely the most delicate issue of all – the one pertaining to the problem of enumerated (i.e. explicitly defined) exceptions – the **Law of 2003** actually prescribed two categories of cases. Firstly, there were mandatory exemptions for information declared either a secret (state, military, official, business or professional) or personal information (both according to special laws). And secondly, there were non-mandatory exemptions in cases where there existed merely a "basis of doubt" that publishing the information would: cause harm to preventing, uncovering or prosecuting criminal offenses; make it impossible to conduct court, administrative, or other hearings; make it impossible to conduct administrative supervision; cause serious damage to the life, health and safety of the people or environment; make it impossible to implement economic or monetary policies; or endanger the right of intellectual property.[50] It seems clear that this solution was not a good one because once the information was proclaimed related to either secret or personal sphere it immediately foreclosed any possibility of disclosure whatsoever. Moreover, in combination with the application of other relevant laws, the situation in that respect was even prima facie rather problematic[51] and some similar observations could also be made in reference to some actual cases.[52]

[50] The Law of 2003, Art. 8. The laws of 2010 and 2011 included the public interest test for both categories of exceptions. See: the laws of 2010 and 2011, Art. 6.

[51] When dealing with the mandatory exceptions, the Law referred to the laws protecting either secret or personal data. In this respect, we could give some brief remarks.

Firstly, the area of secret data was initially (at the time of the enactment of the Law of 2003) regulated by the Law on the Protection of Secret Data which, at least in some instances, was very vague in the definition of certain types of secrets. For instance, the "official" secret was only defined as the *"...data which are collected and used for the purposes of activities of public bodies and which are declared as an official secret by law, by by-law or by other general legal regulation issued by the competent body on the basis of a law."* Very similar and quite vague general clause was contained in the provision of the Law on the Protection of Secret Data defining the "business" secret (prescribing that a business secret may be, apart from other legal sources, determined by a by-law or other general legal regulation of a company, institution or other juridical person and that it would be sufficient that it related to some "other data" disclosure of which could harm economic interests of those subjects). See: the Law on the Protection of Secret Data (Official Gazette 108/1996), Art. 12 and 19. This Law was in 2007 abrogated by the Law on Secrecy of Data which introduced some more concrete standards of classification of data, but it nevertheless retained some previous legal categories (including the "business" secret). See: the Law on Secrecy of Data, Official Gazette 79/2007, 86/12.

Secondly, it seems that the main problem pertaining to the sphere of personal data emerged from the rather vague and "all-inclusive" definition of the notion of "personal data" itself. According to the original 2003 version of the Law on the Protection of Personal Data, it was defined as *"...any information related to an identified or identifiable physical person"* (the Law further specified that and *"...identifiable person is a person whose identity may be determined directly or indirectly, especially on the basis of one or more features characteristic for her physical, psychological, mental, economic, cultural or social identity."*). The Law in its current 2013 version contains the same definition, although it adds that an identifiable person can also be "recognized" by her official identification number. See: the Law on the Protection of Personal Data, Official Gazette 103/03, 118/06, 41/08, 130/11, 106/12.

[52] The list of all relevant cases covering the period of the last ten years, for technical reasons, cannot be shown here and therefore we again limit ourselves to some "paradigmatic" situations that cover the exceptions of secret and personal data. Thus, the list of cases where a disclosure of information was denied includes, for instance: a request of a parliamentary deputy for the information on the names, professional qualifications and working

The **Law of 2013** also defines two categories of exceptions (mandatory and non-mandatory), although with a very significant change that the information related to either secret or personal data are now subject to the balancing procedure, while, on the other hand, new mandatory exceptions include information related to pre-investigative and investigative activities.[53] This solution seems quite better than the previous one.

Secondly, the **Law of 2003** prescribed neither **the public interest test** nor some other comparable standard of strict evaluation of exceptions in actual cases (e. g. **proportionality principle**), leaving thus much of the problem to the discretion of public authorities having the information. This problem was later recognized and corrected in subsequent amendments to both the Law and the Constitution.[54] However, one cannot escape noticing some rather relevant differences in formulation of the "public interest" and "proportionality" standards that appeared in these legal sources. On one hand, the laws of 2010 and 2011 used the same formulation and prescribed that certain types of information could be made public if *"...such an action would be in the interest of the public, necessary for the achievement of a legally prescribed objective and proportional to the aim desired."*[55] While even this particular formulation taken alone stood rather problematic[56], the **Croatian Constitution of 2010**, on the other hand, provided yet another formulation, guaranteeing that *"restrictions on the right to access to information must be proportionate to the nature of the need for such restriction in each individual case and necessary in a free and democratic society, as stipulated by law."*[57]

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places of all persons employed by one county and its companies and institutions in a certain period, as well as on the exact documentation on the employment of one particular person, including a request for a copy of his official certificate on having a state professional exam passed; a request to the Croatian Institute for Employment on the information related to all unemployed persons in a certain municipality, together with a list of persons that applied for social care; a request on the information related to police officers which were involved in an actual case by a person seeking to file a private lawsuit against them; a request to one ministry for a publication of the list of all of its employees, together with data on their professional qualifications (for each person in particular); a request to the municipal court to allow access to those files that contained information on the age of children in cases of divorce of their parents, on a territory of one city and in a specified time period; request for information directed to one town on the ownership of a real estate belonging to a specified person; the content of the contract with the Deutsche Telecom; the agenda of the secret sessions of the Government; biographies of candidates for public functions which are appointed by the Parliament etc.

[53] The Law of 2013, Art. 15 and 16.

[54] The laws of 2010, 2011 and 2013 and the Constitution of 2010.

[55] The laws of 2010 and 2011, Art. 6 and Art. 13.

[56] In that respect, it is unclear why the legislature chose the formulation according to which one was actually obliged to prove that a publication of an information was *"necessary for the achievement of a legally prescribed objective"*, and therefore making completely redundant another important provision of the Law, namely the one guaranteeing that an applicant was not obliged to state the reasons of submitting request for access to information.

[57] The Croatian Constitution of 2010, Art. 38/4.The constitutional formulation therefore approached the whole issue much in a style of the European Convention for the Protection of Human Rights and Fundamental Freedoms, although omitting in the mentioned article itself another yet important conventional standard, namely the one requesting a proof of existence of the legitimate aim of a particular restriction. Although – it should be stressed here – this particular problem on a level of a constitutional interpretation could easily be solved (since

Again, the problem of a missing public interest test proved as a separate and very serious issue in the application of the Law, resulting in public bodies deciding on refusal easily once they could assess the case fell into either category of legally prescribed exceptions.

In that particular respect, the **Law of 2013** introduces its own definition of a single notion called "the proportionality and public interest test" and prescribes that a public body must determine whether the access to information might be limited due to the protection of one of the interests enumerated in the Law itself, whether a disclosure of information requested in each individual case would seriously endanger such an interest and whether a need to protect a right of limitation (to access) is compelling to the public interest (and additionally, if the public interest is compelling to the damage to interests protected, the information should be made public).[58] From an evaluative point of view, it cannot be denied that such a formulation makes advancement in the legal framework, especially when one takes into account that the whole case is nowadays also significantly strengthened by the force of the constitutional norm. The Law of 2013 thus might be deemed a good novelty, although potentially not immune to some implementation or interpretation problems which we discuss in the conclusions to this paper.

Thirdly, the **Law of 2003** also obligated the Government to publish each year in the Official Gazette the list of **"public authorities"** (i. e. the bodies under the obligation to provide access to information they disposed of).[59] Apparently, this particular issue was soon

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the Croatian Constitution contains one general provision pertaining to the "legitimate aim" of restrictions of human rights and freedoms in its Article 16/1), it could nevertheless have provoked serious problems in the implementation of these provisions in practice. The same could also be said about the fact that the laws of 2010 and 2011 on one hand and the Constitution of 2010 actually introduced different standards (i. e. while the proportionality principle as such has been included in both the legislation and the Constitution, the public interest test made part only of the legislation; moreover, as it clearly emerges from comparing the legislative and constitutional texts, the position of the notions of "law" and "legally prescribed" has had quite different implications).

And last but not least, it should also be said here that the principle of proportionality has actually not entered this particular domain through the Law on the Right of Access to Information, but rather through a concomitant Law on the Secrecy of Data from 2007. Yet, this Law provided even its own separate version of the definition, prescribing the following: *"When there is the interest of the public, the owner of the information is obliged to evaluate the proportionality between the right of access to information and the protection of values prescribed in articles (...) of this Law and decide on keeping the level of secrecy, on changing it, on declassification of data or on waiving the obligation of keeping the data secret."* See: the Law on the Secrecy of Data, Official Gazette 79/07, 86/12. As to the public interest test, it has entered the Croatian legal framework on access to information issues through ratification of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) in late 2006. See the Law on Ratification of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Official Gazette (International Treaties) 1/07. The Convention entered into force in Croatia on June 25th 2007.

[58] The Law of 2013, Art. 16.

[59] The Law of 2003, Art. 3/2.

to become one of the main obstacles to the desired implementation of the Law. From the beginning there were some doubts whether the right of access was applicable to all state bodies, to state-owned enterprises (commercial entities that are owned or controlled by the State), to private bodies that perform a public function, and private bodies that receive significant public funding. In some foreign comments it was stated that legislative and judicial bodies were not included in the definition of public authorities[60], but this was not a correct interpretation since all legislative and judicial bodies were to be understood as public authorities within the meaning of the law and they were included in the annual list of public authorities published in the Official Gazette.[61] On the other hand, as to the state-owned enterprises, some of them had not been included in the first list of public authorities in 2004, but were later added, e.g. Croatian Forests Ltd. (in 2005), Croatian Roads Ltd. (in 2006), Croatian Motorways Ltd. (in 2006), Croatian Forests (in 2006), Croatian Railroads Ltd. (in 2006) and Croatian Electricity Company (only in 2009).

Although the Law stated that legal persons vested with public powers are public authorities for the purposes of the Law, municipal companies owned by municipalities were not included on the List of public authorities until 2009.[62]

The lists of public authorities were published until 2010. It was evident that the definition of public authorities, as prescribed by the Law, was not clear and all-encompassing

[60] See: Tonje Meinich, *Comments on the Croatian Law on Access to Information*, Organization for Security and Cooperation in Europe, ATCM (2004) 001, Strasbourg, 7 January 2004,p. 4. Available at: http://www.osce.org/zagreb/13281, last visited on September 28th 2013.

[61] It should be added here that although the Law of 2003 contained no specific provision in this regard, the laws of 2010 and 2011 included a prescription that an appeal against a first instance decision by, among other institutions, the Constitutional Court of the Republic of Croatia was not possible and that an administrative lawsuit with the Administrative Court should be filed directly in cases concerning access to information. See the laws of 2010 and 2011, Art. 17. Therefore, the Constitutional Court was included into bodies under obligation to provide information according to the Law, and it was also included on the list of public authorities. Moreover, according to the official data contained in the annual overviews of the application of the Law (issued by the Government), the Constitutional Court itself was deciding on the requests for access to information submitted to it according to the Law.

However, we challenge the constitutional validity of such an approach because it is a fact that under the Croatian constitutional scheme the Constitutional Court has a rather special legal position (i. e. the special constitutional provision prescribes that all the issues related to the Court are to be defined by a special, the so-called Constitutional Law on the Constitutional Court of the Republic of Croatia, enactment of which requires the same law-making procedure as in the case of amending the Constitution itself, and thus precluding that anything related to the Constitutional Court could be defined by other "lower-level" laws).

[62] Interestingly, the Croatian Radio television, a public broadcasting company, was on the list of public authorities in 2004 and 2005, and then in September 2005 the Government erased it from the list. It reappeared on the list in 2009. Non-governmental organization GONG challenged the Government's published List of public authorities in 2006 and again in 2007 before the Constitutional Court, claiming that the Croatian Radio television, but also some other institutions like the Croatian Tourist Community, the Croatian Academy of Sciences and arts, and the Croatian News Agency, were public authorities and should have been on the list. However, the Croatian Constitutional Court did not decide on the question until 2008 and then refusing to decide on the merits, explaining that lists of public authorities for 2005 and 2006 were no longer valid.

(otherwise it would not be possible for the Government to add or erase some companies or institutions from the list arbitrarily).

The Law was amended in 2010 with two significant changes in this regard. Firstly, the definition of public authorities was broadened to include "legal persons whose programs or operation are determined as public interest by law and are entirely or partly funded by the state budget or the budget of the local and regional self-government units, as well as companies in which the Republic of Croatia or the local and regional self-government units hold individual or joint majority ownership".[63] Secondly, the provision that obligated the Government to publish the yearly list of public authorities was deleted.[64] So, it was upon the Data Protection Agency, as the new independent body determined by the law to perform the activities on the protection of rights of access to information, to make itself a general list of public authorities in accordance with the new definition of public authorities. This was necessary to do because all public authorities were obliged to send to the Agency a yearly report. According to the report of the Agency presented to the Parliament in 2012, before the Law was amended in late 2010 there were 3958 public authorities, and afterwards the Agency identified 5432 public authorities.[65]

The **Law of 2013** has changed again the definition of public authorities, with the stated purpose to remove any doubts as to the question whether some legal entity is a public authority for the purpose of the law.[66]

Apart from these three "paradigmatic" areas that proved to be problematic in the application of the Law in its previous versions, something should also be said about the constitutional dimension of the whole problem. As previously mentioned, a "progressive course" of history in the field was confirmed when the constitution-maker in 2010 decided to explicitly provide for the concept of free access to information and to strengthen it with necessary principle of proportionality, as well as with a request that the exceptions be defined by a law and necessary in a free and democratic society. Soon after, the Constitutional Court

[63] The laws of 2010 and 2011, Art. 2.
[64] The laws of 2010 and 2011, Art. 2.
[65] Agencija za zaštitu osobnih podataka (Data Protection Agency), *Godišnje izvješće o provedbi Zakona o pravu na pristup informacijama za 2012. godinu* (Report on the Implementation of the Law on the Right of Access to Information for 2012), p. 3.
[66] According to Article 5 of the Law, *"Public authority bodies, for the purpose of this Law, are bodies of the state administration, other state authorities, bodies of the local and regional self-government units, legal entities with public competences and other persons holding public competences, legal entities established by the Republic of Croatia or the local and regional self-government units, legal entities and other persons engaged in public administration, legal entities entirely funded by the state budget or the budget of the local and regional self-government units, as well as companies in which the Republic of Croatia or the local and regional self-government units hold individual or joint majority ownership".*

ruled that the law further defining the concept belongs to the category of the so-called "organic laws", special position of which in the constitutional order of Croatia stems from the fact that they must be enacted with a qualified parliamentary majority. Moreover, applying its previously formulated standard that when deciding on whether a particular issue depends on the regulation by an organic law it must – in cases of doubt – examine each particular case separately, the Constitutional Court actually ruled that the right of free access to information belonged to a "core" definition of personal, constitutionally protected rights and freedoms.[67] Therefore, both the Law of 2013 and the whole concept of free access to information are nowadays backed up by some rather serious constitutional arguments: apart from a request for a higher level of political consensus necessary for any further amendment to the Law (as opposed to parliamentary regulation through laws in "general" regulatory activities), the whole issue from now on is expectedly going to be examined under some sort of a "stricter" scrutiny standard of the constitutional review.[68] And finally, the very position of the right to free access to information in the Croatian constitutional document might (or should) have a special "relative" position towards other constitutional and internationally protected rights and freedoms. We are going back to this particular issue in the form of conclusions in the next part of our paper.

[67] See: Decision of the Constitutional Court of the Republic of Croatia U-I-292/2011, March 23rd 2011, published in the Official Gazette 37/11.

[68] The Constitutional Court of the Republic of Croatia has, following some comparative examples, slowly started to build its special approach to different types of constitutionally protected human rights and freedoms, providing a rather "stronger" review when dealing with personal and civil rights (as opposed to "other", economic, social and cultural rights). Since the right to free access to information is now designated as belonging to the former group, it should be expected that in the future it will get some kind of a "stricter" scrutiny constitutional review. More on the development of the standards of constitutional review of the Croatian Constitutional Court in recent years, see in: Djordje Gardasevic, *The Concept of Fundamental Rights: Development, Principles and Perspectives*, in: *Summer Academy "Rule of Law, Human Rights and European Union"*, Centre for SEELS, (eds. Hans-Joachim Heintze et al.), Skopje (2012), pp. 121-136.

V. CONCLUSIONS – THE AGENDA FOR THE FUTURE

As of July 1st 2013 Croatia has been a member of the European Union. Along with all other important implications brought upon this country by the process of accession, one should also clearly recognize that this particular development of events opens new horizons in the field of protection of human rights and freedoms. The specific "EU discourse" in any serious analysis of the position of the free access to information regime thus simply cannot be avoided and it, by definition, belongs to something we may call the "future of FOI" in Croatia. On the other hand, it cannot be denied that one significant part of the human rights protection scheme in Europe depends also on arguably its most recognizable document in the field – the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – **the ECHR**).

In the introduction to this paper we announced that the task of this last chapter was to try to predict what specific impact of normative values and standards (as they have developed so far or could be developed in the future, e. g. in terms of international law, specifically in reference to the ECHR and to the EU law) could be expected in the Croatian legal system in the domain of freedom of information in the future case-law. However, apart from some general references to actual case-law of the European institutions we find indispensable, it is not our intention here to provide a full-scale legal analysis of comparable cases. Taking into account what has previously in this text been said about the constitutional position of the right of free access to information in Croatia, we are rather going to try to make some general observations concerning the possible "interplay" between specific Croatian constitutional and legislative provisions and their European counterparts.

In the first place, the right of free access to information in Croatia today is recognized as a **constitutionally protected right**: apart from being included in the wording of the basic legal document in the country, it is also given a specific protection in the form of regulation through an organic law. What is even more important to this, however, is the fact that it has also been explicitly regarded as such by the Croatian Constitutional Court. These facts have important institutional and functional impact. From the institutional point of view, it is of utmost importance that the regulation of the right depends not upon the will of one, but rather several types of public institutions, an argument in great favor of the model of constitutional

"checks and balances".[69] From the functional point of view, once again, it should not be neglected that a right to free access to information in Croatia since 2010 represents not only some constitutional principle, fundamental constitutional value or similar concept[70]; it does not even represent just "any" constitutionally protected right or freedom; quite to the contrary, it makes part of the most important ("core") rights and freedoms, i. e. "personal" rights and freedoms. This specific feature gives it a special added value and, even more importantly, special relative weight in relation to other rights and freedoms that are protected either on a domestic (constitutional) or international (European) level. This brings us to the next observation.

Therefore, two special points should be made in reference to domestic and international dimension of protection of rights and freedoms. On one hand, in accordance to what has been pointed out in one of the previous footnotes here[71], this means that, on a domestic constitutional level, the right to free access to information should have a rather "stronger" relative (and interpretational) value than some other constitutionally protected rights and freedoms. By the virtue of the case-law approach of the Croatian Constitutional Court so far, this would surely include hypothetical (and practicably quite foreseeable) cases of "collision" between the right of access to information and economic, social and cultural rights. As to the relationship towards the international law, on the other hand, the situation develops in several directions.

It is a fact that the **Council of Europe Convention on Access to Official Documents** has not yet entered into force[72] and thus is not directly applicable in Croatia. Nevertheless, it might have an interpretational value (although at this point quite non-binding) and will surely be called upon in possible disputes concerning the issue of free access to information.[73]

The application of the **ECHR** has already produced some rather clear standards concerning the right of free access to information. Despite the fact that this document does not

[69] In addition to Parliament and Constitutional Court, we should also not forget a special protection of the Information Commissioner and the High Administrative Court.

[70] Although, we must emphasize, we accept the position that the whole concept of the free access to information depends not only on an explicit provision of the Constitution thereof (such as the art. 38/4 of the present Croatian Constitution), but that it also stems from other constitutional norms. See: Branko Smerdel and Djordje Gardasevic, *The Notion of Security and Free Access to Information: Creation and Development of the Right of Public to Know in European and Croatian Jurisprudence*, op. cit.; Branko Smerdel, *Ustavna osnova prava javnosti na informaciju* (*Constitutional Basis of the Right of Public to Information*), op. cit.

[71] See the footnote 68 above.

[72] See: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=205&CM=1&DF=&CL=ENG (last visited on October 6th 2013).

[73] From the point of view of constitutional interpretation, this could most likely mean that the parties to possible future cases would invoke a kind of an argument of the "intention" of the framers of the Convention to provide certain clear definitions or standards.

contain a specific provision thereof, the right itself has been interpreted as being in substantial relationship to other important conventional rights and freedoms, including the freedom of expression (Art. 10), right to respect for private and family life (Art. 8), prohibition of torture (Art. 3) and right to a fair trial (Art. 6).[74] Having in mind the position of the ECHR in the Croatian constitutional order[75] and a fact that the Croatian Constitutional Court has constantly referred to the case-law of the Strasbourg Court, it could easily be presumed that these European standards will play a significant part in the development of the right to free access to information in Croatia in the future.

Furthermore, in light of recent Croatian accession to the European Union, it is obvious that the relevant European legislation in the field becomes an inevitable guideline for development of standards of conduct of Croatian authorities as well. This surely goes for the so far construed practice of application of the **EU Regulation 1049/2001**[76] whose specific influence in the Croatian context, in our opinion, will be extremely important in reference to the applicability of proportionality and public interest tests. As previously indicated, these principles have become a part of the Croatian domestic law and this is exactly a critical point where some actual (European) case-law experience will prove to be indispensable.[77]

At the same time, this is also the area which seems to be hypothetically most problematic for future developments, as they are seen from the perspective of the Croatian **Law of 2013**. Legal definition of exceptions to the free access to information thereof might indeed seem to be legitimate, but one cannot avoid the assumption that some of them on their

[74] See, for instance, the following cases of the European Court of Human Rights: Leander v. Sweden (1987), Gaskin v. the United Kingdom (1989), Autronic v. Switzerland (1990), Herczegfalvy v. Austria (1992), Open Door Counseling and Dublin Well Women v. Ireland (1992), Guerra and Others v. Italy (1998), McGinley and Egan v. the United Kingdom (1998), Cyprus v. Turkey (2001), Bazorkina v. Russia (2006), Youth Initiative for Human Rights v. Serbia (2013). Apart from establishing a relationship towards some specific conventional rights and freedoms (e. g. freedom of expression, right to respect for private and family life, prohibition of torture and right to a fair trial), those specific cases should serve as guidelines in future interpretation of some quite important elements of the free access to information concept as a whole (for instance: regarding the definition of "beneficiaries" of the right of access; regarding the negative and positive obligations of states in providing information; regarding the application of distinct conditions of restrictions of a free access to information, i. e. prescription by a law, furthering of a legitimate objective, necessity in a democratic society).

[75] Art. 141 of the Croatian Constitution prescribes the following: *"International treaties which have been concluded and ratified in accordance with the Constitution, published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law."*

[76] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30th May 2001regarding public access to European Parliament, Council and Commission documents.

[77] Although, we should emphasize once again, the principle of proportionality has by now become an inevitable element of constitutional practice and the Constitutional Court has so far to a large extent started to interpret its specific features (as related to various categories of constitutionally protected rights and freedoms). On the other hand, however, there surely is a lack of relevant criteria in this respect when talking about the specific right of free access to information, and here we expect possible influence of the Regulation 1049/2001 practice to the Croatian case.

face lack concrete criteria of implementation (i. e. they are defined rather broadly). This should be stressed at least for those exceptions that are related to information protected pursuant to international treaties and to "other cases determined by law".[78] Even more precisely, the former case, especially from the strictly constitutional point of view, deserves special care and attention since it may be easily be interpreted as naturally linked to prerogatives which themselves are "immune" to transparency.[79] On the other hand, the latter case is vague by definition. The relevant European standards (the ECHR, the Regulation 1049/2001, previous documents and, of course, the **Charter of Fundamental Rights of the European Union**) construed in this domain should, therefore, be in the very focus of those applying the newly established concepts of the Law of 2013.[80]

[78] The Law of 2013, Art. 15/2. As opposed to that, the Law of 2013 in other cases refers to "classical" exceptions that are, by definition, more concrete (e. g. data which are, according to special laws, designated as secret; information related to investigative and pre-investigative activities; information that could endanger various legal procedures etc.).

[79] Here, for instance, we could note the following: once the situation refers to the "international" dimension of the problem and notwithstanding that the Law prescribes that the exceptions are made "pursuant" to international treaties (thus implying some element of concreteness in definition of possible cases covered), it enters the domain of "external" affairs, thus "foreign" powers and as such logically (expectedly) leans towards claims for secrecy, discretion, exclusion etc. Additionally, it may be expected that some sort of application of the so-called "acts of government" (i. e. the acts whose examination of legality is excluded from the judicial review) doctrine would be invoked especially in these cases. The situation is in any case very complex and valid anticipations surely must combine various elements of possible future argumentations.

[80] In that respect, for instance, one should notice rather important interpretations of the Strasbourg Court related to the issue of margin of appreciation in cases dealing with national security (this example is given here due to its logical link to the problem we discussed in the main text, i. e. the area of international affairs). In that context, among other things, see the judgment in the case of Leander v. Sweden. For a comparable example of relevant EU practice in previous periods, among other things, see the cases of Hautala v. Council and Kuijer v. Council. As for the EU Regulation 1049/2001, relevant cases are numerous and we will thus point to just one that, as a possible paradigm, clearly demonstrates interpretational importance of that particular document for the future application of the Law of 2013. In the case of Access Info Europe v. Council, the General Court reaffirmed the rule that a kind of a "heightened" transparency must be followed in cases of legislative law-making (as opposed to other, possibly more "compelling" exceptions, such as the "national security" etc.). Although particular situations of law-making are not explicitly defined as exceptions in the Law of 2013, they could nevertheless in the future be interpreted as such (under those paragraphs of the Law which refer to those exceptions to free access that include the information that have not yet been created or to those exceptions that protect the "efficiency" of a legally defined procedure). The point to be made here is the following: the European practice really indicates that there is a kind of "imbalance" (or "hierarchy") between various cases of exception (due to their diversity) which must be taken into account, despite the fact that these various cases might be (as they to a certain extent are in the Law of 2013) put under same category (e.g. of non-mandatory exceptions subject to proportionality and public interest scrutiny). The same argument is, for instance, put forward by Wouter Hins and Dirk Voorhoof who, among other things, stress that *"...when the requested documents are related to a matter of public interest, a matter of serious public concern or an ongoing political debate, the states will be under a strict scrutiny as to whether the reasons invoked to refuse a request for access to such documents were relevant and sufficient."* See: Wouter Hins and Dirk Voorhoof, *Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights*, European Constitutional Law Review, 3: 114-126 (2007), pp. 125-126.