ATTEMPT TO INCREASE THE TRANSPARENCY

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Abstract: The author deals with problems related to the Amendment to the Freedom of Information Act in the Slovak Republic in this article. In the introduction, the author assesses the legal regulation of the use of the right to information in the Slovak Republic. Subsequently, the author discusses the legal regulation of the use of the right to information in the Slovak Republic and expresses its attitude towards the legal regulation of the use of the right to information in the Slovak Republic, underlining the possibility of adopting legislative changes. It is also concerned with the Amendment to the Freedom of Information Act and with the practical problems associated with the right to information.

Key words: the right to information, Amendment to the Freedom of Information Act, problems in application practice

INTRODUCTION

In the Slovak Republic, not only the law enforcement in the field of public administration, but also the law enforcement, in general, is currently a frequently solved subject in the legal theory, legal practice, and general public. In our opinion, the main reason is that the issue of law application and of its enforceability is being more important than the issue of the law creation itself. During the first years after the establishment of the independent Slovak Republic, the greater emphasis was placed on the change of the legal system and the establishment of a democratic country legal order system. Nowadays, when a democratic legal system has already been established in the Slovak Republic, there are emerging deficiencies in the field of law application, which can result in „the unenforceability of the law „.

Currently, the issue of the law on information is also a very topical issue in the Slovak Republic. This is evidenced by several amendments to the Act no. 211/2000 Coll. on Free Access to Information and on amendment of some Acts (hereinafter referred to as the „Freedom of Information Act „), the Civil Code, which has been made in recent years. Let us say that these amendments exist as a result of the constantly increasing democratization of society and result of the increased interest of society in public sector.

The topicality of this issue is highlighted by the fact that the Slovak Republic is currently undergoing a major reform of the Freedom of Information Act, which stems from the need to increase the transparency in public administration. The amendment to the Freedom of Information Act[1] was prepared by the Ministry of Justice of the Slovak Republic (hereinafter referred to as "the Ministry")

[1] The Act amending Act no. 211/2000 Coll. on the Free Access to Information and on the amendment of some Acts (Freedom of Information Act), as amended, and supplementing the Act of the Slovak National Council no. 71/1992 Coll. on court fees and the fee for an extract from the criminal record as amended.

which, subsequently, after the text of amendment to the Freedom of Information Act was prepared, initiated an inter-ministerial commentary procedure[2].

The interest of the professional and general public in increasing the transparency in public administration is huge in the Slovak Republic, which has been reflected in the high number of comments on the amendment to the Freedom of Information Act received in the inter-ministerial commentary procedure. In the inter-ministerial comment procedure, the number of collective comments[3] received on the amendment to the Freedom of Information Act is 15 and the number of ordinary comments raised on the amendment to the Freedom of Information Act is 776.

The number of collective comments and the number of ordinary comments made on the amendment to the law in the inter-ministerial commentary procedure say about great interest in the forthcoming amendment to the Freedom of Information Act. However, on the other hand, these high numbers also set out questions whether the attempts for a major amendment to the Freedom of Information Act, which comes from the need to increase the transparency in public administration, is prepared good enough to meet stated goal.

ATTEMPT TO INCREASE THE TRANSPARENCY

The amendment to the Freedom of Information Act was prepared by the Ministry of Justice of the Slovak Republic as a draft law amending and supplementing the Act no. 211/2000 Coll. on Free Access to Information and on amendments of some Acts (Freedom of Information Act), as amended and supplementing the Act of the Slovak National Council no. 71/1992 Coll. on Court fees and the fee for extracting from a criminal record as amended (hereinafter referred to as „the draft law"). After the text of the amendment to the Freedom of Information Act was prepared, the Ministry initiated an inter-ministerial commentary procedure.

The draft law was prepared by the government and it involves two fundamental tasks:

1. "The Government of the Slovak Republic will consistently apply the principles of open government to create a space for citizen participation in public policy making as well as principles of transparency in public administration decision-making processes and thereby, the Government of the Slovak Republic will create better opportunities for increasing the scope for public control and narrowing the scope for corruption." [4]
2 "The Government of the Slovak Republic will endorse the international initiative of the Partnership for Open Government and support the application of the principles of open government. By achieving these goals, the Government of the Slovak Republic will raise the standards of

[2] Inter-ministerial commentary procedure – legislative process no. LP/2017/678.

[3] Art. 1, Paragraph 7 of the Legislative Rules of the Government of the Slovak Republic, cit. *"The contradictory proceedings with the public representative may take place if the presenter fails to accept the comments made by a larger number of people from the public and at the same time, the public representative's mandate to represent a public is part of this comment (hereinafter referred to as" mass comment"). The contradictory procedure with a public representative always takes place if the presenter has failed to accommodate a massive comment shared by at least 500 people. If a mass comment has been applied electronically via the portal, the list of people expressing a massive comment may be sent to the presenter in a manner other than via the portal."*

[4] Reasoning Report – general part.

public administration transparency and public use of the information available to the public administration."[5]

The draft law itself, however, also brings confusion and the possibility of a varied interpretation, which will cause application problems in practice. In the end, it will not only increase the transparency but, on the contrary, it will also increase the public's mistrust of public administration.

First of all, we state that the interpretation of the concept of information, for the purposes of the Freedom of Information Act, was only doctrinal for the whole period of its existence, and there was no definition of the concept of information in the Slovak legal order. Therefore, this concept was not always accepted uniformly by the case law or the decision-making practice of the administrative authorities. We consider this as appropriate to define the concept of information legally. The draft law itself defines information as the content recorded on any material medium, in particular, the content of a written record in the paper form, the content of a written record stored in electronic form or the content of a recording in a sound, visual or audio-visual form.[6] We appreciate this effort very positively since it is a concept which determines the very content of the Freedom of Information Act.

However, on the other hand, we do not consider such a legal definition to be appropriate for several reasons. First of all, it is necessary to state that the Freedom of Information Act does not already contain a definition of information for the purposes of re-use of information in Section 21 b paragraph 2 of the Freedom of Information Act. In this context, we propose to align the definition of the term "information" with the definition of this term as it is stated in Section 21 b paragraph 2 of the Freedom of Information Act, at least in one of its content meaning, as this may lead to further interpretation problems in practice.

Furthermore, within the context of a positively defined concept of information in the draft law, which by its scope corresponds to the amendment of Section 3 paragraph 3 of the Act of the Czech Republic no. 106/1999 Coll. on free access to information as well as to Directive 2003/98/EC, we recommend introducing an exception for a computer program, also because of the provisions of Sections 87 to 89 of the Copyright Act no. 185/2015 Coll. Legislation of the Act of the Czech Republic no. 106/1999 Coll. on free access to information, as well as Directive 2003/98/EC, define the information in the same way as a draft law, however, they exclude a computer program from the concept of information.

In this context, we propose to introduce a negative definition of the term information as part of the content definition and legal definition of the term. We also suggest that in addition to the computer program, the negative definition of the term information also include interpretative opinions, analyzes, reports, expert opinions, political opinions, forecasts and interpretations of legislation. The draft law modifies this group confusedly. The phrase "access to information does not apply to" is indefinite. At one point, it is said that the law will not govern the provision of interpretative opinions, analyzes, reports, expert opinions, political opinions, forecasts and interpretations of legislation, however, in another place it is stated that in case of such information, it is necessary to issue a decision on non-disclosure of information pursuant to Section 18 paragraph 2 of the Freedom of Information Act since the information is not available. In our opinion, the Freedom of Information Act should not apply to the above mentioned category of information (opinions, law interpretations, etc.), which the obliged person does not have at the time of application received. We propose to

[5] Reasoning Report – general part.
[6] The draft law – point 8.

modify the wording of that provision so as to make it clear that the information does not fall within the scope of the law. Therefore, if applications relate to such information, we cannot proceed under the Freedom of Information Act.

In this case, we suggest that the legislator, when creating a negative definition of the term information, i.e. for the purposes of the Freedom of Information Act, does not consider as information the interpretations of legal norms, opinions, statements and legal opinions, evaluation reports and integrated databases in any electronic form, inquiries to generate new information, i.e. also information which a mandatory entity would have to create for a specific request from the applicant.

Another fundamental issue addressed and introduced by the draft law is the accusation in the matter of a mandatory contract publication. In this regard, I appreciate the effort to grasp this issue, since from the long-term perspective we have pointed to the fact that the Freedom of Information Act has established a new institute of the mandatory published contract, and by means of Section 47a of the Civil Code set up the moment of entry into force of the mandatory published contract. The question remains as to how to proceed if a mandatory published contract was concluded and entered into force, however, was never published. What is more, on the basis of such contract concluded but not published there has been its performance. The draft law seeks to answer this question, however, not very clearly and appropriately.

The draft law modifies, cit. "(1) If deeds are performed on the basis of a mandatory published contract, which has not yet entered into force, or if it is performed on the basis of a mandatory published contract for which it was decided that it was not concluded, based on the legal action the court may be required to decide that deeds were performed on the basis of a mandatory published contract that has not yet entered into force, or that deeds are performed on the basis of a mandatory published contract for which it was decided that it was not concluded. (2) Under paragraph 1, a legal action may also be required when liable entity is making a claim for a property benefits obtained by performing a mandatory published contract which has not yet entered into force or when liable entity is making a claim for a property benefits obtained by performing a mandatory published contract for which it was decided that it was not concluded." [7]

First of all, it should be noted that this issue is partly solved in the legal order by means of a prosecution. The legal regulation in Section 5aa should be formally included in the amendment to the Act no. 40/1964 Coll. The Civil Code, as amended since it is a matter of legal relations between entities, i.e. a natural person and/or a private legal person. Furthermore, a legal regulation relating to Section 5ab should be formally incorporated into the amendment to Act no. 60/2015 Coll. The Civil Proceedings Code for Adversarial Proceedings, as amended. This will ensure better transparency and effectiveness of the legislation.

Secondly, we also object to the content of the proposed legislation and we do not find it as appropriate. If enforcement is based on an ineffective or void contract, the current legislation already in its current wording gives the legally authorized entities the necessary effective tools to enforce the right to issue the unjust enrichment in court. Defining other legally authorized entities in relation to the right to sue an unlawful enrichment in favour of a third party (the liable person) or to bring a legal action does not address the fundamental problem of the fulfilment (or non-fulfilment) of obligations by the liable persons. This fundamental problem cannot be solved by business entities indirect penalizing, which involves at least bearing the considerable costs of judicial and preliminary judicial

[7] The draft law – point 25.

proceedings if they are not obliged to publish the contract and properly perform their contractual obligations. Moreover, the right to bring an action for a declaration that it has been performed without a legal basis creates a legally unintentional nonsense situation. It is not clear what the real effects and the applicability of such court decisions are expected. In such case, the courts will decide disputes where the judgment itself will lack any direct applicability (it will not be applicable as an enforceable title). Such action will uselessly burden the state budget, as well as the business entities, which are not responsible for the existing situation at all. Thus, the proposed legislation can create nonsense legal disputes. The timely or continuous provision of performance under the mandatory published contracts is usually the benefit for the liable entity. It is unacceptable that in such cases the business operators, which are trying to prevent the potential impacts associated with late performance or discontinuance of performance are indirectly penalized. The proposed amendment is contrary to the requirement of proportionality when not taking into account such situations but applying the same approach to speculative conduct by the liable persons, as well as to proceedings which are justified by the decisive circumstances. Compliance with liable persons' obligations should be ensured by instruments directly applicable to such liable persons and by appropriate control.

In this regard, we also draw attention to the fact that the proposed wording of the provision of Section 5aa says that it is limited to the possibility of bringing an action by the liable party, The Supreme Audit Office of the Slovak Republic, the Prosecutor General of the Slovak Republic, and the Government Office of the Slovak Republic, while ignoring the possibility of bringing the accusation by the second contracting party that has the mandatory published contract concluded. Obviously, this does not follow the constitutional principle of access of second contracting party to the relevant judicial instance in case of legitimate protection of its rights, or of the protected interest arising from a mandatory contract.

Another major problem which can cause problems in practice and which gives the possibility for liable persons not to provide requested information to the applicant asking for disclosure of information is the fact that the draft law gives the possibility for a liable person to postpone the request for information if he/she cannot make the information available to the applicant in the required form. This is clearly not an appropriate solution contributing to transparency. Moreover, we consider this fact a step backward compared to the current legislation. Under the applicable law, if the information cannot be made available in the form specified by the applicant, the liable entity and the applicant shall agree on another way of accessing information.[8] We consider the current legislation appropriate since the purpose of the information disclosure process is to provide the information to the applicant and the liable person should seek the way to make the information available rather than postpone the formal request of the applicant and not disclose the information, unless the information can be made available in the requested form. Under any circumstances, the new law in this point does not meet the objective set out in the introduction to this article, i.e. increasing transparency and openness of governance. On the contrary, this shift simplifies the procedure and responsibilities of obligated persons, however, in the field of public administration, it is not always necessary to take into account the efficiency and simplification of procedures. In the field of public administration, the fulfilment of a right to information, which is guaranteed by the constitution, has to be at the forefront.

For these reasons, we disagree with the possibility of postponing the application due to reasons that the applicant does not reply within the prescribed time limit to the liable person's notification of

[8] Section 16, paragraph 1, second sentence of the Freedom of Information Act.

the proposal for (other) possible ways of making the information available and to leave only the possibility of disclosing information in a way that places the least burden on the liable person or to leave current legislation. In case of keeping an alternative, it is likely that the obligated persons will regularly postpone the requests. The possibility of postponing the application can be considered in case of explicit denial of the proposed (substitutable) way of information disclosure by the liable party.

Last but not least, we would like to draw attention to the draft legislation, especially in the part of reimbursement of costs, i.e. if the information disclosure requires more than 200 photocopies or new scans of multi-page documents, the obligated person, with the exception of a municipality, which is not a city, can also require a fee of 5 cents for each additional scanned document. The preceding sentence shall also apply if the applicant requests within 21 working days to make information available and the disclosure of which requires the production of more than 200 photocopies or document scans together.[9]

The proposed legislation in the law itself sets the limits, as well as a specific price for photocopying or scanning. We consider this legislation to be inappropriate. The Freedom of Information Act itself has already governed the reimbursement of material costs associated with making the copies, obtaining technical media, and sending information to the applicants, while referring to the Decree of the Ministry of Finance of the Slovak Republic no. 481/2000 Coll. on details of reimbursement of the cost related to disclosure of information. This decree has not been amended or modified since its adoption, and we find it very simple, however, in the light of the above, we consider the current legislation to be more appropriate. Anyway, we express the need to amend the Decree of the Ministry of Finance of the Slovak Republic no. 481/2000 Coll. on details of reimbursement of the cost related to disclosure of information

CONCLUSION

The paper focuses on a major amendment to the Freedom of Information Act, which comes from the need for increasing the transparency in public administration. The amendment to the Act on Freedom of Information was prepared by the Ministry of Justice of the Slovak Republic. Consequently, after the own text of the amendment to the Freedom of Information Act was prepared; an inter-ministerial commentary procedure was initiated.

The need to amend the Freedom of Information Act is also evident from the interest of the professional public, as well as the general public in increasing the transparency in public administration. This strong interest is evidenced by the number of comments on the amendment to the Freedom of Information Act raised in the inter-ministerial commentary procedure.

The fundamental objective of amending the Freedom of Information Act is to increase the transparency of decision-making processes in public administration and to improve public use of information available to the public administration.

The draft law itself, however, also brings confusion and the possibility of a varied interpretations, which will cause application problems in practice. In the end, it will not only increase the transparency but, on the contrary, it will also increase the public's mistrust of public administration.

[9] The draft law – point 67.

Instead of looking for the material nature of the right to information and making information available to increase the transparency, the draft law brings excessive formalism, confusing legislation, and ease of decision for obligated persons.

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the draft law amending and supplementing the Act no. 211/2000 Coll. on Free Access to Information and on amendments of some Acts (Freedom of Information Act), as amended and supplementing the Act of the Slovak National Council no. 71/1992 Coll. on Court fees and the fee for extracting from a criminal record as amended

Reasoning Report – general part

Reasoning Report – specific part

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