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## *Policy brief*

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# Inactive proactive approach

- Failures in implementation of proactive approach principle from the new Law on FAI in Montenegro -

## I Summary

Montenegro's first law regulating issues related to the exercise of the right to access to information was enacted in 2005 as the Law on Free Access to Information. It was a significant step forward in this area as it has allowed the interested public to gain access to information held by public authorities, whom had not been possible to obtain before (or was particularly difficult). However, the scope of the law was limited and therefore did not bring significant increase in the transparency of state institutions. The reason for that was, among other things, the reluctance or unwillingness of the authorities to make their work more visible to citizens and civil society in general, as well as lack of knowledge and understanding of the essence of the law.

As Montenegro started to carve its independent way into the process of European integration it started to harmonize legislation and practices with the international standards. The issue of transparency of the institutions in the context of free access to information began to be treated differently. The institutions have started to pay more attention to their websites, as a mean for informing public. Various documents and data, intended to enable civil society to better understand the authorities in general, the methods of their operation, and moreover to allow it to slowly start to become a part of decision-making process were published. However, as this practice was not formally binding for all of the state institutions, but based on their individual commitment to the issue (mainly conditioned by the officers within the bodies), the overall picture was quite diverse - from the institution that

seemed to have available all sorts of information, to those who did not even have an organizational structure on their websites.

Reports<sup>1</sup> on the implementation of the Law on Free Access to Information showed years of bad implementation and crystallized the major problems that needed to be resolved by adopting a new, more progressive legislation. In 2012 Montenegro adopted a new law that, unlike the previous one, requires a higher level of commitment of the authorities, and their proactive approach (described in Article 12 of the Law) related to disclosure of information of the public interest.

In order to identify possible shortcomings of the implementation of the proactive approach principle within the new Law on FAI, CDT has provided comprehensive research on the mentioned subject. We have monitored the web sites of 16 ministries and have managed to provide the necessary evidence-based input for policy-makers and related stakeholders. The main findings of our monitoring showed poor implementation of the principle of the proactive approach as well as that the official web sites of the ministries are, for the most part, poor organized and unsystematic. The situation with the Guides for FAI is appalling since we still have ministries that haven't updated their Guides for FAI for 7 years.

In order to enhance the respect of the new Law on FAI and to ensure the full respect of the proactive approach principle, CDT proposes two possible approaches. One would be that the ministries, based on our monitoring results and recommendations, should ensure each of them individually the full respect of the principle of the proactive approach by placing omitted and missing documents and making the

web sites more organized and fully updated. Second and preferred approach would be for the Government to adopt the Guidelines for the web sites for the state institutions in which they would prescribe the ways on how an official web site of the institution should look like and what kind of information it should contain. Additionally, the Agency for the protection of personal data and the free access to information should, based on our methodology, monitor the implementation of the proactive approach principle on the half-year basis and fine those state institutions that are violating the new Law on FAI.

## II Evaluation of the proactive approach principle implementation in Ministries

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CDT monitored<sup>2</sup> the web sites of 16 Ministries and used the criteria from the article 12<sup>3</sup> of the Law on FAI as indicators based on which the monitoring was conducted.

Additionally we have analyzed the Guides for FAI since the Law prescribes that state and local institutions must post on their official websites the guide for free access to information. Also, this guide must contain catalogue of types of documents (including public registers, address and e-mail/phone contact for the application, as well as information on responsible personnel, fees, and other information which are of importance to the free access to information). The guide must be updated every year, which is 30 days after information has been changed and it must clearly indicate responsible personnel for this service.

<sup>1</sup> Reports prepared by NGO MANS, available at:

- <http://www.mans.co.me/en/legal-initiatives/reports-on-foi-implementation/> (ENG)

- <http://www.mans.co.me/pravni-program/izvjestaji/> in Montenegrin only.

<sup>2</sup> Monitoring was conducted in the period from 27.09.2013 until 30.09.2013

<sup>3</sup> Namely, state authority body is obliged to publish via its Internet website the following information: 1) guide into free access to information procedure; 2) public registries; 3) programs and work plans; 4) reports and other documents related to work and situation in the fields of their operation; 5) draft, proposals and final texts of strategies, and plans and programs for their implementation; 6) drafts and proposals for laws and other regulations, along with the expert positions regarding those regulations; 7) individual acts and contracts on use of money from public resources and state property; 8) list of civil servants and state employees, along with their official titles; 9) list of public officials and list with accounting of their salaries and other reimbursements related to the exercising of their public functions; 10) ordinances and other individual act of importance to rights, duties and interest of third parties; 11) information upon which the request for free access to information was allowed.

Monitoring results showed that the Ministries partially respect their legal obligations and that they publish only 36% of the information required by the Law on Free Access to Information. Our results also show that the respect of the proactive approach principle in our ministries does not depend on systematical approach, but on the attitude of the leading officials in charge for these issues. The proof for this is the information that there is 54% difference in the individual results between ministries.

Official web sites of the ministries are, for the most part, poorly organized and unsystematic. The situation with the Guides for FAI is bad since we have two ministries that haven't updated their Guides for FAI for 5 years and three ministries that haven't updated their Guide for 7 years.

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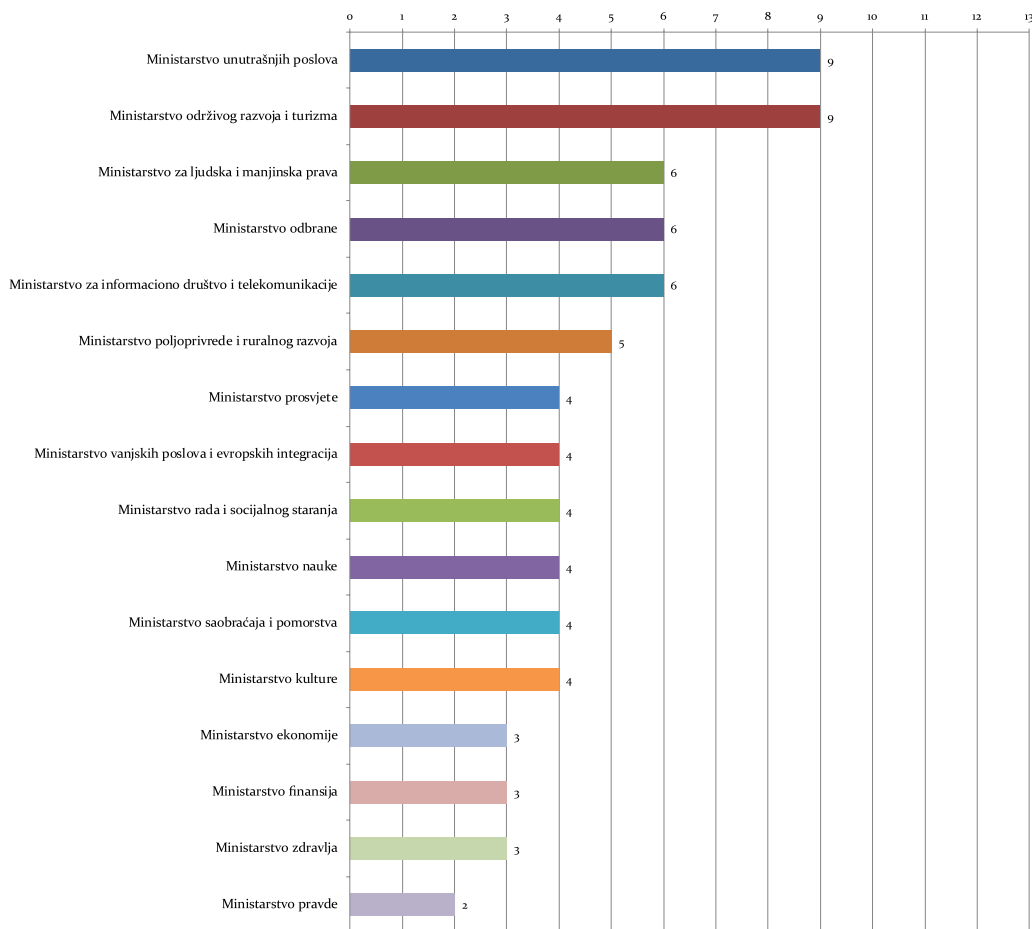
*What is particularly worrying is that the ministries do not publish key information on how they are using budgetary resources. Even 75% of ministries didn't publish any documents related to public procurement, which is their legal obligation.*

### III Poor implementation of the Law on Free Access to Information - bad message to the citizens

As mentioned, the information that CDT obtained during the monitoring are showing poor implementation of the new Law on Free Access to Information. Ministries are only partially complying with their legal obligations and have published only 36% of information required to be published in accordance to the Law.

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**Chart 1** - Rank of ministries showing their result and a big gap between first two and the last ministries



procurement, which is their legal obligation. This kind of work presents ministries' irresponsible behavior towards the public, the citizens whose money is being spent, and is contradictory with the principles and practices of good governance. Bearing in mind that the fight against corruption is a national priority, it rightfully imposes the question why this priority, in this section, is not implemented in practice. Disclosure of information is a significant segment of the fight, and this kind of behavior of the ministries cannot reflect their full commitment to this goal. Lack of responsibility to the public is also shown in a fact that there are ministries that are not disclosing the lists of government officials and their income. Only seven ministries<sup>4</sup> publish this document.

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70% of the ministries do not publish a list of employees with their titles, which is also a legal requirement. This violates not only the Law and the principles of transparency, but it also sends a message to the citizen that for the Ministries is not of great importance to enable and facilitate direct contacts between employees and citizens.

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Ministries, in terms of their websites, do not pay enough attention to the process of drafting laws and regulations, and do not publish opinions of experts on drafts and proposals for laws and other regulations. Namely, seven ministries<sup>5</sup> do not publish drafts and proposals for laws and other regulations. This is another case of sending bad message to the citizens and this actually discourages their potential participation in the creation of rules by which their own lives are regulated.

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## IV Guides for FAI – Guide or obstacle?

Guide for FAI is a significant asset of the Law and a tool for practicing the Law since it provides citizens and CSOs with catalogue of types of documents<sup>6</sup> which are of importance to the free access to information. Monitoring showed that half of the ministries haven't updated their Guide for FAI, and did not act according to the law which obliges them to publish the Guide within 30 days of the commencement of this Act (February 2013th). Illustrative is the fact that the Ministry of Finance, Ministry of Culture and Ministry of Health haven't updated their guide since 2006. The fact that the Ministry of Culture haven't updated their Guide for FAI for so long is even more interesting having in mind that preparation of the Law on FAI was in their jurisdiction.

Within the Guides that could be found on the websites of the ministries, there are significant obstacles to actually exercise the right to FAI by CSOs and citizens. These obstacles lie in a fact that we there are invalid Internet addresses of ministries; e-mail addresses from nonexistent domains, outdated phone numbers and addresses of the seats of some ministries.

## V What are possible options to improve the current situation in long-term?

### 1. Self regulation of Ministries

In order to enhance the respect of the new Law on FAI and particularly of the

<sup>4</sup> Ministry of Interior, Ministry of Defense, Ministry of Science, Ministry of Agriculture and Rural Development, Ministry of Sustainable Development and Tourism, Ministry for human and minority rights and Ministry for Information technology and telecommunication.

<sup>5</sup> Ministry of Defense, Ministry of Finance, Ministry of Foreign Affairs and European Integration, Ministry of Education, Ministry of Science, Ministry of Culture and Ministry of Economy.

<sup>6</sup> Including public registers, address and e-mail/phone contact for the application, as well as information on responsible personnel, fees...

proactive approach principle, CDT sees two possible paths which institutions could choose. One would be that the Ministries, based on our monitoring results, should take into force the recommendations that we have provided and individually correct the monitoring results – that is to individually ensure the full respect of the proactive approach principle by publishing the missing documents and making the web sites more organized and fully updated. Since our previous monitoring<sup>7</sup> has shown that the Government doesn't have many coordinated actions towards improving the attitude in Ministries regarding their openness and accountability, we think that there is a risk for Ministries to have an individual and short term approach again. The problem with that is if the changes are going to be done without long term strategy, web sites would probably be swamped with information that are not easy to find, and then we would end with another more complicated problems.

## 2. Systematic approach

CDT proposes that the Government should resolve this issue in a systematic manner which would assure long-term transparency and efficiency of public institutions. Therefore, the Government should adopt Guidelines for the web sites of the state institutions in which they will prescribe the ways on how the official web site of the institution should look like and what kind of information it must contain. Reasons for adopting these Guidelines lie in the fact that many legislation solutions<sup>8</sup> now stipulate the publication of a large number of documents on the websites of the institutions and our concern is that without these Guidelines, that would clearly

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proscribe the manner of publication of various documents and organization of more systematic websites, it could be counterproductive in practice. We can easily end up in a situation that even if the documents are published they would be hard to find because of the lack of systematization of the web sites.

These Guidelines must be introduced by the Government and the Ministry for Information Society and Telecommunication. CDT will certainly advocate for this kind of solution and will provide the necessary framework for the Guidelines. Framework will include the best solutions from the similar Guidelines from the region and the EU, but having in mind the specific Montenegrin requirements.

One should bear in mind that the Agency for the protection of personal data and the free access to information has a competence to impose monetary sanctions against the institutions that have violated the Law. The fines vary from 200 to 20 000 EUR.<sup>9</sup> In addition, Agency is obliged by the Law on FAI to publish yearly reports (or when the Parliament asks for it) on the

implementation of the Law. Since the methodology for the monitoring of the implementation of the Law (including implementation of proactive approach principle) haven't been developed so far within the Agency, CDT proposes it should be based on the methodology already tested and developed for the monitoring we have conducted. Therefore we offer not only the methodology but the database and training of monitors as well. Based on the results of the monitoring the Agency should put into the force fines that are prescribed by the Law on FAI. By this, the overall picture related to the implementation of the Law on FAI should be radically improved.

<sup>7</sup> DURBIN, [http://www.cdtmn.org/index.php?option=com\\_content&view=article&id=422&Itemid=231&lang=en](http://www.cdtmn.org/index.php?option=com_content&view=article&id=422&Itemid=231&lang=en)

<sup>8</sup> Law on FAI, Law on Local Self-governments, Decree on the Manner and Procedure of Implementation of Public Consultation in Preparation of Laws.

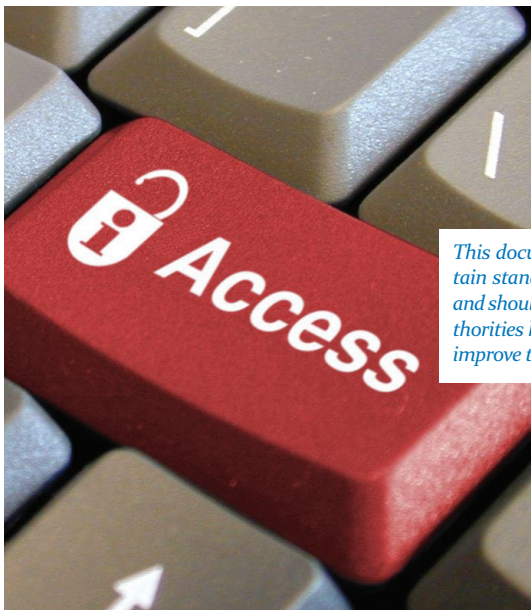
<sup>9</sup> Article 47 of the Law on FAI.

## VI How to enhance the implementation of the new Law on FAI and to ensure the respect of the obligations concerning the proactive approach

In order to enhance the implementation of the new Law on FAI and to ensure the respect of the obligations concerning the proactive approach principle, CDT has developed concrete recommendations.

### 1. Active role of Agency for the protection of personal data and the free access to information

The Agency is granted by the competences enabling it to ensure the full implementation of the Law. Implementation can be ensured by concrete and immediate reaction every time the Law is violated and for that the Agency can introduce the fines that vary from 200 to 20 000 EUR. Since the Agency has no capacities to organize more than one monitoring of the Law throughout the year, in order to improve the functioning of the Agency CDT would offer a comprehensive methodology<sup>10</sup> regarding the respect of the proactive approach prin-



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ciple that is the essence of the Law. Having in mind that there is a big number of institutions obliged to act in accordance to the Law on FAI, CDT recommends that the Agency should start monitoring the following: Parliament, Government, Local Self Government Units, Ministries and other administrative bodies, since they can be easily indentified because they are listed in the laws and by-laws.

The Agency must pay special attention to the Guides for FAI in a sense that they need to be regularly updated since those contain all information crucial for exercise of the right of access to information. In every moment, the instructions and information in the Guide should correspond to the current situation in the Ministries, enabling citizens and CSOs to exercise their rights fully and, moreover, making the institutions more transparent and open.

### 2. Guidelines for the web sites of state institutions

Information that must be published on the web sites of state institutions need to be easily accessible and systematic. In order to gain that, Government and the Ministry for Information Society and Telecommunication need to introduce the Guidelines for the web sites of state institutions. This document should contain standards of openness, and should instruct state authorities how to develop and improve their transparency. Guidelines should be mandatory for all institutions because the experience of countries in the region show that if the rules are not mandatory then they are not respected.

Guidelines will bring the direct benefit to the Government, Ministries and other state institutions since they will offer a set of concrete recommendations the implementation of which will raise the level of the respect of the Law on FAI and will have a

<sup>10</sup> Indicators are based on the article 12 of the Law on Free Access to Information and the source are the web sites of the state institutions, for this kind of monitoring it is advisable to use the scale 0-1 where 0 when the answer to indicator is negative and 1 when the answer to indicator is positive.

crucial effect on narrowing the gap between the institutions.

The citizens will benefit from implementation of the Law by the institutions (through the respect of the Guidelines) in a sense that the communication with the institutions will be less difficult. Administrative obstacles will be removed - which otherwise hinder citizens in their attempts to get an insight into the documents. They will use more organized and comprehensive web sites, offering them a simple way to get information and find important documents. Websites will start to work as a two-way communication tool and they will provide enough space for citizens to give their comments on the institution's work, send suggestions, and communicate with the leading

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officials, bringing us to increased participation. These Guidelines need to proscribe the obligation regarding not just which documents

should be posted but also in which manner and in specific open data format, when possible. In addition, Guidelines need to define:

1. Content of the web site (Types of documents that need to be published)
2. Services for the civil society and citizens
3. Uniform language and official letter of the web sites
4. Uniform Graphic solutions (main menu and banners)
5. Navigation
6. Usability and availability
7. Accessibility
8. Safety of the web site
9. Maintenance of the web site



## VII Conclusion

Law on Free Access to Information has introduced new requirements to the authorities when it comes to their attitude towards the information that they hold in their possession. The authorities now need to show a more proactive approach and make information available regardless whether the civil society organizations or citizens submit a request for access to that particular information or not. Of course, the absolute availability of information is not possible because of the close connection between this law with the laws governing the protection of personal data and data that is considered as a secret. However, despite these limitations, the Law in Article 12 defines the list of information that every public authority shall publish on its website, which, for now, is quite enough to improve transparency to a bigger level.

Special attention need to be put on the respect of the proactive approach principle as it is an essence of the new Law, and Agency for the protection of personal data and the free access to information needs to take an active role in order to ensure the full implementation of this principle. Full implementation of this principle would not bring benefits to the civil society only,

but to the state institutions as well, since the actual need for formal requests for FAI will decrease. The main idea of this principle is that all of the information in possession of the state institutions needs to be put on their web sites with the exception of the information related to the personal data or secret data.

The Law on FAI has not exhausted the list of information to be made public, but the same article stipulates that the authority may disclose the information which is not covered by the list, but one must take care to adequately protect personal information and data marked as confidential.

The significance of this article is not only that it has determined that the information must be disclosed by the authorities, but explicitly specified that the information must be published on the website of the institution. However, the Law failed to prescribe that the information should be easily visible and clear, not just posted without any order. Due to that lack, the Guidelines for the web sites of the state institutions must be enacted by the Government in order for web sites to be more organized and comprehensive, offering a simple way to get information and find important documents.

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