

# Access to Information Programme

## Current Situation of Access to Information In Bulgaria 2002



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## Introduction

The team of Access to Information Programme (AIP) presents to the readers the report “Current Situation of Access to Information in Bulgaria 2002”. The conclusions in the report are results from monitoring and advocacy for more modern legislation on freedom of information and above all, for its implementation and practicing. The purposive advocacy of AIP could not be successful without broad practicing of the rights under APIA on behalf of journalists, NGOs and citizens.

The Access to Information Programme works in several strategic directions, in order to aid the process of implementation of the Access to Public Information Act.

In 2002, in cooperation with Article 19 (Global Campaign for Free Expression), later with the American Bar Association - Legal Initiative for Central and Eastern Europe (ABA CEELI) AIP organized and conducted one-day training courses for officers from the national, territorial and local bodies of the executive power.

Simultaneous to this, AIP actively continued to assist the demand for public information through dissemination of handbooks on APIA and elucidation of the right to information in the media, as well as on meetings throughout the country.

A major part of the work of AIP was legal assistance and legal representation in court of citizens, NGOs, journalists in cases of denied access to information by institutions, obliged to provide it.

Even though the discussions on the legal acts, concerning the limitations of the freedom of information, in which AIP has actively participated, have not always led to the results desired by us, they at least helped to make the broader public acquainted with the standards in the field of freedom of information.

In 2002 AIP again conducted a special research on the readiness of the institutions to meet their obligations under APIA. The results of that survey have been published in a special report “The Year of the Rational Ignorance”<sup>1</sup>.

The efforts of AIP and its network of coordinators throughout the country are part of the global movement of the advocacy on freedom of information, which in 2002 continued to expand and organize internally.

Part of this process was the initiation of the Freedom of Information Advocacy Network on September 28, 2002 in Sofia. The global community of advocates consolidates and expands. The sharing of experience, information, joint purposive efforts on endorsement of internationally recognized standards for transparency and accessibility of the

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<sup>1</sup> “The Year of the Rational Ignorance” (results from a sociological survey), AIP, Sofia, 2002

information transform the access to information in a global value and at the same time support the efforts of the organizations from the network on national level.<sup>2</sup>

On February 21, 2002, Recommendation (2002)2 of the Committee of Ministers of the Council of Europe on access to official documents was adopted. In 2002, followed a research on the legislation on access to information and its implementation in the member-states of the Council of Europe. The result from this survey and the coordination of the efforts for adoption and implementation of such legislation were discussed in a seminar, organized by the Council of Europe in November 2002. AIP was invited to participate in this seminar along with other non-government organizations.

The purpose of this report is to present systematically the changes in access to information legislation, as well as the practices of implementation of Access to Public Information Act.

A new moment in the report for 2002 is the attempt for systematization of the court practice on APIA. Even though the legal system in Bulgaria is not a based on common law, we hope that the court practice currently being created will lead to better implementation of the Act. Citizens, who decide to exercise their right to access to information, held by public institutions, don't have any other mechanism of protection in case of denial, except appeals in court. On these court decisions largely depends people's confidence that they can exercise their basic rights in a democratic way. Furthermore, these decisions serve in strengthening the path chosen by Bulgaria of creation of transparent, accountable and serving the citizens administration. Taking into account the importance of the created court practice on APIA, and the need of its rationalization and development, AIP published the book "Access to Information Litigation in Bulgaria"<sup>3</sup>, in which we have presented eleven cases conducted in the period from the adoption of the Act (in July 2000) to the summer of 2002.

In the preparation of the current report took part Gergana Jouleva PhD, Darina Palova, Fany Davidova, Alexander Kashumov, Kiril Terziiski, and Nikolay Marekov.

The overall systematization and editing is made by Gergana Jouleva PhD and Alexander Kashumov.

Following the practical approach in the field of access to information we again offer recommendations to the decision-makers on specific policies in this area, as we confirm our strategic goal to further assist the right of access to information in Bulgaria.

Gergana Jouleva PhD.

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<sup>2</sup> See <http://www.freedominfo.org>

<sup>3</sup> "Access to Information Litigation in Bulgaria" selected cases, AIP, Sofia, 2002. The complete text could be found on [http://www.aip-bg.org/books\\_bg.htm](http://www.aip-bg.org/books_bg.htm)

## Recommendations

It's obvious that the rights and the obligations incorporated in the Access to Public Information Act are the basis of the relations between administration and citizens in a democratic society. These rights and obligations are essential both for the public participation in the process of decision-making, as well as for the establishment of transparent and working for the benefit of the citizens administration.

### I. Necessity of legislative changes

- The following amendments are necessary to be adopted in the Access to Public Information Act:
  - Ø Bringing the Act in compliance with the principles, incorporated in art. 10 of the European Convention for Human Rights (ECHR) and Recommendation (2002)2 of the Committee of Ministers to the member-states, on access to official documents from Feb. 21, 2002. The necessary amendments are related to clarification of the principles concerning the restrictions of the right of access to information:
    - The right of everyone to have access to information is the principle, while the restrictions are exception to this principle. That's why they have to be, 1) set down precisely in law, 2) be proportional to the goal of protecting constitutional rights, and 3) be necessary in a democratic society (“harm test” and the “balance of interests” test);
    - Introduction of tests including “harm test” and “balance of interests” as a necessary part of any restriction of the right to information, meaning that access to public information could be denied only if its revealing would or could harm the law protected interests, unless there is a prevailing public interest demanding disclosure of this information.
  - Ø Well-defined outlines (in law) of the governmental body that would be responsible for controlling the implementation of the Act.
  - Ø Clear regulation for a special unit or officer, in charge of receiving and deciding on requests.
  - Ø More precise regulation, combined with increase in sanctions for non-fulfillment of obligations under APIA, as well as introduction of a right for compensation to the persons affected by this non-fulfillment in legal proceedings in front of the Administrative Court.
- In the Protection of Classified Information Act and the Regulation for its implementation, the following amendments should be adopted.
  - Ø Overall appliance of the “harm test” throughout the whole act (abolishment of art. 30, paragraph 3)
  - Ø Introduction of “balance of interests” test, which would create opportunity for declassification and disclosure of documents in cases of prevailing public interest.

- Ø Overall appliance of the principle that any information, which does not fall into the definition given in art. 25, and whose revealing is not likely to cause harms, is available for the public (abolishment of art. 25, paragraph 2 from the Regulation for Implementation of Protection of Classified Information Act in its present edition)
  - Ø Introduction of clearly defined competence for classification (amendments to art. 31, paragraph 1)
  - Ø Bringing the annex-register of art. 25 in compliance with the present realities (abolishment of the economic categories, editing the categories concerning the so called “Strategic Governmental Procurements”);
  - Ø Re-formulation of the definition for national security
- In the Personal Data Protection Act the following amendments should be adopted:
  - Ø Bringing the definition of personal data in compliance with the international standards for protection of personal data and guarantee of access to official documents (abolishment of art. 2, paragraph 2)
  - Ø Bringing the procedures concerning access of persons to their own data and access of third parties to personal data, in full compliance with the procedure of APIA
- In the Regulation on Keeping the Register of the Administrative Structures and the Acts of Bodies of Executive Power the following amendments are necessary to be adopted: restoration of the broad range of legal definition of “acts”, as it is stated in art. 2 (abolishment of the present edition of the regulation and restoration of the previous edition)
- In the Environment Protection Act the following amendments should be adopted:
  - Ø Broadening of the range of information, which should be actively reported to the population (in cases of danger for a major pollution or damage to the environment; explicit formulation of obligations in cases of industrial accidents and fires)
  - Ø Broadening of the range of obliged subjects through the inclusion of the legal and physical entities, whose activities affect the environment;
  - Ø Introduction of bound competence for the administration in cases of denial of information, aiming at providing for complete and effective judicial control (abolishment of the phrasing “can” in art. 20, paragraph 1)
  - Ø Clear and unambiguous introduction of the “harm test”, as well as precision of the regulation of art. 20, paragraph 4, so that a clear and unambiguous introduction of the “balance of interests” test could be included. The new edition of the regulation should contain a clear explicit statement, that once the balance of interests test has shown that benefits from the disclosure of certain information exceed the harms, information must be disclosed to the public.

- In the legislation concerning the access to information kept in archives, the following amendments should be adopted:
  - Ø The right of access to archival information should be proclaimed and guaranteed in the National Archive Fund and the Archives Act, as part of the constitutionally guaranteed right to information access, and should be subject to the standards and guarantees for freedom of information.
  - Ø The right of access to documents of the former national security services (State Security and the Intelligence Service of the General Staff) should be proclaimed and guaranteed by the Act. It should be considered part of the right of access to information, and accompanied by implementation of effective procedures for exertion of the individual right of access to this information, and for its active publishing.
- In laws, containing some restrictions to the right of access to information, the following amendments should be adopted: synchronization with the legal regulations included in APIA and PDPA (in the latter act - as long as they create standards for approach to the restrictions), by clear formulation of the protected interest and the categories of information, subject to restricted access.

## ***II. Necessity to increase the administrative capacity and create the administrative infrastructure for APIA implementation***

- Improvement of the control over the informational massifs throughout the institutions. This requires the following:
  - Ø Examination of the existing secret documents from the point of view and on the basis of Protection of Classified Information Act (PCIA) and Personal Data Protection Act (PDPA), in observance of the harm test, in connection with the predominant public interest, and observing the time limits for the restrictions, provided for in PCIA;
  - Ø Clear responsibilities of the officers or the unit, conducting this activity
  - Ø Internal regulations for work with documents, in compliance with the basic principle of accessibility to public information
- Special efforts should be made for strict compliance with the legal regulations of APIA, concerning the accountability of the work on APIA, including analysis of the problems in the annual report of the Minister of State Administration
- The practice of introduction of additional, not stipulated in APIA, requirements to the applications, should be abolished.
- Separate register should be maintained for APIA requests
- Special place is necessary to be provided for review of the conceded information (reading-rooms);
- It's necessary to appoint administrative unit (officer), which/who should respond to applications on APIA.



### **III. Necessity of education on communication skills and on APIA, PDPA, PCIA**

Besides the proposed legislative changes, the practice of implementation of the Access to Public Information Act and the acts related to it shows, that special efforts are necessary for the creation of culture of transparency and accountability throughout the administration.

Besides the legislative approach, there is one more approach for establishing a well-working administration under APIA - the practical one. There is a need for regular training both on communication skills for offering better services to the people, and on certain law provisions, regulating the freedom of information in Bulgaria.

### **Changes in the legislation, related to the right of access to information in 2002**

#### **General View**

In 2002, the legislation related to the right of access to information and its restrictions was subject to serious changes. The Protection of Classified Information Act (PCIA) and the Personal Data Protection Act (PDPA) were adopted, which regulate the especially important grounds for restrictions of the right of access to information – state and official secret and the protection of personal data. The adoption of PCIA was accompanied by intensive public debate, in which Access to Information Programme actively participated.

At the same time, the proposed at the end of 2001 amendments to the Access to Public Information Act (APIA) were not introduced to Parliament for plenary hearings, but instead the Regulation of Terms and Procedures for Keeping the Register of the Administrative Structures and the Acts of Bodies of Executive Power was altered, which deals with the obligation of the executive power to publish its acts. The range of the acts, which the administrative structures are obliged to publish in Internet, was severely constrained.

Legal acts were adopted, regulating the right of access to information and the procedure of its exertion in several particular areas like environment, privatization, and taxes. In these acts was allowed a setback from the standards of the right of access to information.

Changes occurred, as well, in the field of access to information, in possession of the national archives. With the adoption of the Protection of Classified Information Act, the Access to Documents of the Former State Security Service and the Former Intelligence Service of the General Staff Act (ADFSSSFISGSA) was repealed. After its abolishment, the regime of access to this documentation remained unclear. In December, 2002 the Council of Ministers introduced to Parliament a bill on National Archive Fund and Archival Documents, in which the European standards were not incorporated.

At the same time, there is lack of willingness and initiative for the necessary changes in the legislation. The amendments to APIA are impeding, imperative changes for the legal regime concerning the business secret, and the access to statistical information are not introduced

The introduction of changes in one part of the legislation and the lack of such changes in other, is evidence of two things:

- lack of understanding of the necessity to bring into conformity all legal provisions concerning the access to information and its restrictions,
- and lack of will for strict appliance of international standards in this area.

The lack of synchronization of various legal provisions is evident on the levels of the following interrelations:

- *general act – specific act*, both when it comes to the content of the right of access to information<sup>4</sup>, as well as when it comes to the procedure<sup>5</sup> of its exertion
- *statutory act – secondary regulation*<sup>6</sup>

The conformity with the international standards demands in first place abiding by art. 10 of the European Convention on Human Rights and the Fundamental Freedoms<sup>7</sup>, art. 19 of the International Pact on Citizenship and Political Rights, and art.13 and 17 of the Convention on the Rights of the Child. The incorporated in art. 10 standard is further developed in Recommendation (81)19 for reaching highest level of access to information, as well as in Recommendation (2002)2 adopted last year by the Committee of Ministers of the Council of Europe, which is directed toward the member-states and concerns the access to official documents<sup>8</sup>. Legislative changes are necessary for conformity to these standards. The incorporation of the stipulated in Recommendation(2002)2 triple test, which every restriction should pass, is imperative for the Access to Public Information Act. This was not included in the introduced to Parliament Amending Act to APIA, even though the proposed amendments would still have a positive impact. In PCIA the triple

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<sup>4</sup> Example of this is the correlation between the substantial law provisions of art. 37 of Access to Public Information Act and art. 20 of Environment Protection Act. The way of formulation and the number of the restrictions of the right of access to information is different in the texts of the two acts. The information, defined as generally accessible in EPA is of higher public interest, while at the same time there is a greater number and a greater scope of restrictions of the right of access, than in APIA.

<sup>5</sup> This is the case in the correlation between art. 30 of APIA and art.32 paragraph 2 of PDPA, which fix a different period of extension of term for answers in cases of applications for access to information. The lack of synchronization is obstacle in front of realization of the right of access to information, because it could not be expected from the citizens to predict on their own, when would be applied one act and when – the other, so that they won't miss the term for appealing a possible denial of information.

<sup>6</sup> Thus for example art. 25, paragraph 2 of Protection of Classified Information Regulation (secondary regulation) allows termless restrictions of the public right of access to information to the entire register of classified information. This provision is in contradiction with PCIA, in which it is not exclusively stated that the Regulation could impose additional restrictions to the access to information.

<sup>7</sup> From now on we will refer to it as ECHR

<sup>8</sup> From now on these Recommendations would be referred to as Recommendation (81)19 and Recommendation (2002)2. They are available in English language on the web site: <http://www.aip-bg.org/eurolaw.htm>

test was partially included, more precisely the so-called harm criterion. However this criterion is not taken into account in all regulations, for example, the act foresees classification of all documents, when few or even one of them falls into the requirements for classification<sup>9</sup>.

## **Legislative changes concerning the right of access to information and its restrictions**

### **Legislative changes concerning the restrictions of the right of access to information**

#### Protection of Classified Information Act

The act was promulgated in State Gazette issue 45/30.04.02. It redefined the state and the official secret. Until the adoption of PCIA, the state secret was regulated by the List of Facts, Information and Objects Constituting State Secret, as well as partially by the Regulation on Implementation of the Law on Ministry of Interior<sup>10</sup>. This legislation was incomplete. The regulation of official secret was dispersed throughout several acts and secondary regulations. Even thought revealing of any of the two types of secrets led to a penal persecution<sup>11</sup>, until this moment there was a lack of definition of the terms *official secret* and *state secret*.

The advantages of PCIA could be observed in two areas – creation of complete legislative organization of this matter and definition of the concepts *state secret* and *official secret*. The major shortcoming of the act is the approach to the secret – instead to be viewed as an exception to the principle of free access to any information, held by the state, it is perceived as existing on its own, without connection with the freedom of information. Out of this incorrect premise develop the other shortcomings of the act – deficits in the definitions of state and official secret, imperfections in procedure and terms of secrecy.

#### Definitions of *state* and *official* secret

Under art. 25 of PCIA state secret could be introduced only in the presence of three prerequisites, taken together:

- To be set down in law (with complete mentioning of categories of information in a list);

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<sup>9</sup> More detailed analysis of the legislative acts, dealing with the right of access to information and its restrictions could be found in Bulgarian at [http://www.aip-bg.org/libra\\_bg.htm](http://www.aip-bg.org/libra_bg.htm)

<sup>10</sup> For more information on the pre-existing legislation concerning the state secret see the texts “Secrets and Lies” and “The NEC Case” at [http://www.aip-bg.org/publi\\_bg.htm](http://www.aip-bg.org/publi_bg.htm) and at [http://www.aip-bg.org/books\\_bg.htm](http://www.aip-bg.org/books_bg.htm)

<sup>11</sup> Art. 357-359 from the Criminal Code describes the felonies against the state secret, while art. 284 and art. 360 describe felonies against the office (with some conventionality) secret. The lack of definition of these two types of secrets was leading until now to natural impediment for understanding of the concept, which led to inability to predict the consequences of revealing one or another piece of information. In result among the state officials appeared auto-censorship, which exceeded the limits of the legitimate secret and thus was undermining the adequate public debate on various issues of the government.

- To aim at protecting the national security, defence, foreign policy or constitutional order;
- Its revealing could create risk of harming the interests mentioned above.

This definition in general follows the triple test, introduced by art. 10, paragraph 2 of ECHR and Recommendation (2002)2<sup>12</sup>. Many of the categories in the List–annex to art. 25 of PCIA however do not conform to the protection of the corresponding interest, but go beyond it<sup>13</sup>. The settlement of the protected interests is also problematic: national security is quite broadly formulated<sup>14</sup>, constitutional order is not defined<sup>15</sup>, the position of the defence and international security is unclear<sup>16</sup>.

The introduction of the requirement for possible “harm” in the definition for state secret is a major positive achievement. However, the element “balance of interests” was not included. The principle of harm also was not included in some major regulations of the act, because the obligatory marking as secret of a stack of documents is in obvious contradiction to it<sup>17</sup>.

### *Terms, competence for classification, procedures*

In appliance of the harm principle for the first time in our country, terms were introduced for restriction of the public access to information. This is a positive step forward. The change in the level of secrecy, which determines the term of the restriction of access, however lies in the competence of the person, who has the right to classify the document. At the same time the State Commission on Security of Information could prolong the term by the same period on its own judgment, when “the national interest demands it”<sup>18</sup>. These unclear possibilities for change in the terms undermine the guarantees of the right to information, contained in the objective fixing of time limits.

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<sup>12</sup> See art. 4, paragraph 1 and 2 of the Recommendation. The text is available in Bulgarian at: [http://www.aip-bg.org/documents/rec2\\_bg.htm](http://www.aip-bg.org/documents/rec2_bg.htm)

<sup>13</sup> This is the case with the entire section 3 of the list – the so-called information related to the economic security of the state. Apart from this, some categories of the other sections are obscurely defined and give opportunity for broad interpretation, like for example section 2, p. 10 – “information about assigned and spend budgetary funds or state property for *special purposes related to national security*”.

<sup>14</sup> Additional decrees, paragraph 1, p. 13. The irrelevantly broad definition already cause problems – representatives of the executive and even of the legislative power, began to use often the term in context of debates, remote from the problems of the legitimate national security, like the one related to the privatization.

<sup>15</sup> Access to Information Programme, prior to the adoption of the act, expressed its critical opinion on the spreading of national security over the internal order. These are two separate grounds for restriction of the right of access, are with different degree of importance and it is irrelevant to mix them (see art.37, paragraph 2; art. 41, paragraph 1, item. 1; art.105, paragraph 2 of the Constitution; compared with Recommendation (2002)2, art.4, paragraph 1, p. 1-2)

<sup>16</sup> Traditionally they are related to the national security. See art.24, paragraph 2 of the Constitution

<sup>17</sup> Art.30, paragraph 3

<sup>18</sup> Here, again, the requirement for evaluation of the possible harm of the free access to information is absent. The expression “national interests” is also too general and doesn’t correspond to the clearly described in art. 25 of the act protected interests

There are gaps in the regulation of document destruction, the personal competence on classification of documents is vaguely defined<sup>19</sup>, and the register of classified documents is not public.

A group of Members of Parliament made an appeal for proscribing as unconstitutional of several of the texts of PCIA, including art. 33, paragraph 3, concerning the register of classified documents, as well as paragraph 38 of the Additional and Final Provisions of the Act, which abolishes ADFSSSFISGSA<sup>20</sup>. With court order 3/2002 on constitutional case 11/2002, the Constitutional Court rejected the appeal.

After the decision of the Constitutional Court, in art. 25 paragraph 2 of the Regulation on the Implementation of Protection of Classified Information Act was exclusively prescribed, that the register of the classified documents is accessible only for persons, who have been granted permission. The conformity with the law of this regulation is questionable, taken into the account that after the expiration of the term, the documents listed in the register become publicly accessible. Therefore this is a violation of the principle, on whose basis terms of restrictions of public access to information are introduced. This is the principle, according to which the right of access to information is the rule, while the restrictions are the exception<sup>21</sup> and should be applied only under specific conditions, one of which is the exempt period. General restriction of the right of access of anybody to the register makes the existence of exempt periods pointless.

The main problem in the procedure of classification is caused again by the comprehension that state secret exists naturally. From the provisions of art. 25 of the act it is evident, that state secret is considered to appear at the moment of creation of a certain document, and is not in relation with the activity of the relevant officer responsible for administrative assessment of the necessity of restricting the public access. This leads to lack of precise concretisation of the personal responsibilities for classification and delegating control over the alteration of secrecy level<sup>22</sup>.

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<sup>19</sup> In this relation there are more problems, because in paragraph 1, p. 3 of the Complementary Regulations there is a permission for companies to classify information (through the expression of “organization unit”). Such possibility existed in the past, when only for a few months in 1994 the list of these companies was public – promulgated in State Gazette. In 1998 Access to Information Programme publish the actual at the time list in “Access to Information. Acts and Practices.”, Sofia 1998 ([http://www.aip-bg.org/books\\_bg.htm](http://www.aip-bg.org/books_bg.htm)), but which firms are included in the present analogical list is unknown to us.

<sup>20</sup> Access to Information Programme presented its position on the constitutional case, in which it supported the request for proscription concerning art. 33, paragraph 3 and art. 38 of PCIA.

<sup>21</sup> Stated by the Constitutional Court in court order № 7/1996 on const. case № 1/1996

<sup>22</sup> In the act it’s evident, that for the operation of determining information as a secret is used the term “mark”, not “classify” (which is not used at all). The information therefore has, according to the legislators, quality of being “classified” at the moment of its creation, prior to the marking.

### *Official secret*

The grounds for restriction of the right to information access, defined as official secret, reflect a backward vision<sup>23</sup>. As its name shows, it is a restriction, which is not defined by substance, but is defined by persons and places (official).

In general, official secret is bounded to three prerequisites, analogical to those of the state secret, but more vaguely formulated. Instead of the listed in the Constitution protected interests, in the text of art. 26 of PCIA "interests of the state" or "other legally protected interest" are introduced. The clarification of the categories of protected information and the concretisation of the protected interest is left to the concrete acts, which will deal with this type of secret. Therefore, all conditions are present, so that official secret will continue to exist in scattered and unsynchronised (in term of degree and subject of regulation) acts.

The Act also mentions the so-called "foreign classified information". Its regulation is extremely laconic and without connection with the other provisions of the act. As long as it will cover exclusively the interests of NATO (these interests were used as a justification for the adoption of PCIA), these provisions could be incorporated in a separate, smaller legal act. In this way it would be easier to achieve a greater necessary liberalization of the regime, dealing with the state and official secret.

### Personal Data Protection Act

The act was published in State Gazette issue 1/04.01.2002 and came into force on Jan. 01, 2002. The Act guarantees a right, related to the protection of the personal life<sup>24</sup>, which for the first time received detailed regulation. The guarantee of this right is incorporated in a general prohibition for the state administration, business companies and even common citizens to collect and use<sup>25</sup> personal data without following certain requirements, prescribed by the Act. These requirements are introduced with a view to the development of automatic processing of personal data, which creates opportunities for fast and easy creation of databases with significant amount of information, about certain people<sup>26</sup>.

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<sup>23</sup> Official secret is especially typical to the socialist countries. At the time of the public debate on the Protection of Classified Information Draft Act, Access to Information Programme stressed on the archaism of this type of secret – see section 2, p. 3 of the standpoint at: [http://www.aip-bg.org/documents/zski\\_bg.htm](http://www.aip-bg.org/documents/zski_bg.htm)

<sup>24</sup> The first international standard in this area is art. 8 of ECHR, guaranteeing the right of privacy of personal and family life, home, and correspondence. In view of the practice of the European Court on Human Rights, the right of protection of personal data relates to the right of the person of self-determination of identity

<sup>25</sup> For all operations, related to personal data, in the act is used the term "processing" – paragraph 1, p. 1 of the Additional Regulations

<sup>26</sup> See the definition for register of personal data – paragraph 1, p. 2 of the Additional Regulations

In general, the Bulgarian act follows the international standards of this type of legislation<sup>27</sup>. As long as it provides for obligations for the controllers of personal data to not place personal data at the disposal of third parties, unless certain requirements are met, PDPA regulates one restriction of the common right to information access, created and preserved by the state. The legislator has taken into account the interaction between APIA and PDPA, which is evident in the amendments to APIA adopted in January 2002, as well as in the provisions of art. 35, paragraph 1, para. 2 of PDPA. However, a successful resolution of the problems is not found in the act.

The first problem is caused by the range of the definition of the concept of personal data. This definition includes not only the stipulated in the Directive and in Convention 108 data, but also data related to the participation of the persons in executive and controlling bodies of legal entities, as well as in functions of state bodies<sup>28</sup>. Such broadening of the circle of protected personal data is rather embarrassing and directly violates legal norms concerning access to public information<sup>29</sup>. It creates obstacles to the right of the citizens of broader access to information, in particular for public persons, whose significance is stressed by the Constitutional Court in the interpretation of art. 39 - 41 of the Constitution<sup>30</sup>.

Extremely serious are the problems of the access to personal data from procedural point of view. Formally, the procedure of access of persons to their own data is different from the procedure of access of third parties. The person, who seeks access to his/her personal data should submit an application to the controller in charge. The controller should consider this application in 14 days, a term that could be extended to 30 days, if there are reasonable grounds. As for third parties, they should submit an application under chapter five<sup>31</sup> of PDPA. The controller takes decisions in a 30-days term, which cannot be extended. When the sources of data are public registers or documents, containing public information, the access is settled in law<sup>32</sup>. This procedure is extremely complicated and unclear, especially in cases when documents contain both own data and third party's personal data<sup>33</sup>.

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<sup>27</sup> These standards are prescribed by the Convention on Protection of Persons in Automatic Processing of Personal Data adopted on 28.01.1981 (ETS No. 108) and Directive 95/46 EU of the European Parliament and the Council on 24.10.1995 for Protection of Persons in Automatic Processing of Personal Data and Free Transfer of These Data. Standards for personal data protection are developed in a number of acts of bodies of the EU and Council of Europe

<sup>28</sup> Art. 2, paragraph 2 of the Act. Here we won't discuss the imperfections of the grammar in this sentence of the regulation

<sup>29</sup> Art. 2, paragraph 1 of APIA defines the concept "public information" through the possibility of formation of opinion for the work of the state institutions. The same comprehension of the purpose of the legislation concerning access to public information is incorporated in the Preamble of Recommendation 2002/2. According to art. 5 of the Trade Law the trade register is public.

<sup>30</sup> Decision # 7/1996 in constitutional case # 1/1996

<sup>31</sup> In other words, through the procedure, which the person follows when seeking access to his/her own personal data

<sup>32</sup> Whatever that means

<sup>33</sup> This is the reason why in the legislation of some countries, the procedure of granting access to any information, including personal data, is one and the same for facilitation of the requester

The problems pointed out are still in the field of PDPA only. When APIA is also taken into account, for example in cases of seeking access to documents, containing public information and personal data of third parties, the question is whether permission is necessary on the basis of art. 31 of APIA, including cases, when the person whose personal data would be revealed is a body of power. It's unclear what term for answering would be applied - the one under APIA or the one under PDPA, and under what procedure a denial of information would be appealed.

Strange, as well, is the regulation incorporated in art. 34, para. 1 of PDPA, according to which access to personal data could be denied on the basis of "certain legal grounds". The review of PDPA reveals, that such grounds are not defined, at least not in this act.

### **Access to Public Information Act**

An Amending Draft Act to the Access to Public Information Act was introduced to Parliament in the end of 2001. The Draft Act has passed by the three responsible Parliamentary Committees<sup>34</sup> in the spring of 2002, but has not been introduced for discussion in a plenary session. Although insufficient, the proposed amendments in the draft are of positive character. However, the considerable time that this Amending Act has been delayed indicates that the legislators lack the will to guarantee the effective implementation of the right to information access. The following issues are covered by the amending draft act to APIA:

The definition of "*public information*"

The draft clarifies and simplifies the definition of the term "public information". According to the amending version, public information is "all information created by or stored in the obliged institutions"<sup>35</sup>.

*Exemptions from the right to access*

The amending draft act introduces a "balance of interests" test in relation to the exemptions from the right to information access. According to this standard, when officials take decisions on information requests, they should consider whether the public interest of disclosing information exceeds the eventual harm of a certain interests. Officials should not take decisions to deny access to information solely on the basis whether documents formally fall into a list of categories of protected information<sup>36</sup>. If the requestee establishes that public interest prevails, he/she should disclose the requested information.

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<sup>34</sup> Civil Society Affairs Committee, Human Rights and Religious Affairs Committee, and Legal Affairs Committee

<sup>35</sup> This definition is set as a standard in art. 1 of Recommendation (81)19 of the Committee of Ministers of the Council of Europe and in art. 1, item 3 and art. 2, item 1 of Recommendation (2002)2 of the Committee of Ministers of the Council of Europe

<sup>36</sup> The new revision of the amendment obliges the institutions to disclose information of public interest, including cases when "the requested information falls into one of the exemptions, but the public interest from disclosure prevails over the protected interest". In practice this means that the requestee should consider the question whether a certain document is state secret or other protected information, on every information request



The amending act provides for a limitation of the period, in which access to preparatory documents under art. 13 para. 2 item 1 of APIA can be exempt from access, only to the moment of publishing the final act<sup>37</sup>. This proposed change is of great importance, because one of the main purposes of APIA is to create opportunities for public participation in the decision-making process<sup>38</sup> and for informed criticism of the decisions taken.

The amendments lack, however, a full implementation of the triple test in relation to the exemptions from access, stipulated in art. 10 of the European Convention for the Protection of Human Rights and in Recommendation (2002)2.

### *Other changes*

The Amending Act provides for an opportunity for the requestors to receive information as a result of court decision, rather than start the procedure of requesting from the beginning. Also, if the draft amending act is passed by Parliament, every institution will have to assign officials, who will be responsible for taking decisions on APIA requests.

A serious omission in the current text of APIA, which slows down the implementation process, is the lack of a provision for a Commission or an Ombudsperson facilitating the right to information. It is also necessary to include a provision, protecting public officials, who have disclosed information, which formally falls into one of the exemptions from information access<sup>39</sup>.

## **Regulation on Keeping the Register of Administrative Structures and Acts of the Executive Power**

The regulation was passed by a decree of the Council of Ministers (CoM) in conformity to art. 61 of the Administration Act (AA) and was published in State Gazette issue 44 of 30.05.2000. According to the provision of art. 61 of AA the Council of Ministers must establish a register of the administrative structures, their bodies of power and the acts that they adopt. Article 2 of the Regulation included these three categories of information. This article also defined acts as *all normative, individual, and common administrative acts, with the exception to internal documents, those documents contained in other registers, and those containing state or official secret and information directly concerning national security*. The Register is available on the Internet<sup>40</sup>.

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<sup>37</sup> The 20-year period in which this information could be exempt from access was decreased to two years with the amendments of APIA published in State Gazette issue 45/30.04.02

<sup>38</sup> Citizens cannot participate in the decision-making process effectively, unless all documents are available for access, including the recommendations given, opinions and comments on a project.

<sup>39</sup> In the standards, identified by Article 19, the Global Campaign for Free Expression this principle is formulated as whistleblowers. This right of protection is set as standard in many national laws, because it is a mechanism for revealing and in that way preventing corruption and other irregularities.

<sup>40</sup> We have to note here, that according to art. 15 para. 1 item 2 of APIA all administrative structures of the executive system also have the obligation to publish all acts, created as part of their duties.

During the year 2002 the Regulation was drastically changed in issue 83/30.08.2002 of the State Gazette. The activities of the institutions became less transparent. The principle that all acts should be included in the register, with the exception of few specified categories of information has been completely reversed. According to the new Regulation, the register should contain only the individual administrative acts of the bodies of administrative power in connection to their duties of exercising governmental control<sup>41</sup>.

The severe restriction of the range of the acts of executive power that are to be published in the Register is a violation of art. 61 para. 1 of AA, which provides for publishing all acts of the executive power. In practice, the adoption of the amendments of art. 2 of the Regulation of the Council of Ministers, relieves the Minister of State Administration from a large part of his obligations, imposed by art. 61 of the Administration Act.

The amendments not only diverge from the will of Parliament, but also are indication of “lack of transparency” policy. The active distribution of information is provisioned in art. XI of Recommendation (2002)2 and is considered a most important element of a transparent government. If institutions publish at their own initiative public information, which they hold, this will facilitate the implementation of the right to information and vice versa; if institutions fail to actively make such information public, this should be viewed as a purposeful impediment of the right to information access.

## **Changes in right to information legislation, concerning different governmental areas**

### **Environment Protection Act**

The new Environment Protection Act (EPA) was published in State Gazette issue 91/25.09.02. The assertion of the legislators was that the adoption of the EPA is needed in order to conform to international standards in the area. Despite this assertion, the act in fact deviates from these standards, at least in relation to access to environmental information, civil participation and the right to receive justice. The Act was adopted by Parliament without any changes, although it had previously been vetoed by the President.

The EPA creates several problems in relation to implementing the right to access to environmental information. The Act introduces new exemptions to the right to information access, compared to APIA and the old EPA. One of the exemptions: “information that could have an unfavorable effect on the components of the environment” is formulated too broadly and unclearly. In an area with a traditionally high standard of public access, where a higher than usual public interest exists, it is unreasonable to introduce more exemptions from the right to access, making the range of available information smaller. The natural approach should be just the opposite;

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<sup>41</sup> Obviously, immediately after the adoption of the Regulation amendments, the Government started creating and changing these registers in the Ministries. Different lawyers called the office of AIP seeking our opinion on the new Regulation.

provisions connected with trade secret or intellectual property should be applied solely as exemptions in regard to APIA cases<sup>42</sup>. In contrast to APIA, where there is an imperative obligation of the institutions to provide access, EPA provides only an opportunity for the obliged bodies to disclose important information. The right to information access can be restricted only after careful consideration, rather than if the requested documents formally fall into one of the exempt categories. The decisions whether to grant or refuse information should have been tied to the principle of harm, so that these decisions could be appealed and be subject to judicial control<sup>43</sup>. The legislators have tried to introduce the principle of balance-of-interest, which is something positive, although unfortunately with no great success<sup>44</sup>.

The range of institutions, obliged to provide information under EPA has become smaller in comparison with the previous Act<sup>45</sup>.

Parts of the obligations of the institutions to actively distribute information have also been repealed.<sup>46</sup>

Problems also arise because of the different periods provided in APA and APIA<sup>47</sup>. We have to note here, that the more complicated procedure on access to environmental information, in comparison to the procedure existing before adoption, contradicts with art. 5 and art. 6 from the Aarhus Convention on access to information, public participation and access to justice in environmental matters.

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<sup>42</sup> We believe that the following categories of information have unreasonably been included as exemptions from the right to information: intellectual property, personal data, and information that “could have an unfavorable effect on the environment”. It is quite unclear what kind of personal data is contained in documents, revealing the condition of the environment, the safety and health of citizens, and other categories of information under art. 19 of EPA. It is also unacceptable to refer to intellectual property, when there is an obligation in law to collect and publish information of importance for the health and life of citizens.

<sup>43</sup> The current provision raises the question, whether there might be a case when an official acting in discretion, may cause a situation, where judicial control cannot cover the administrative act as a whole. We believe that a formulation analogical to art. 25 of PCIA would guarantee in a greater degree the right to information access.

<sup>44</sup> According to art. 20 para. 4 of EPA officials should recognize the public interest in their decisions to grant or refuse the requested information. The provision is not clear, however, because officials had to be clearly instructed to make a balance-of-interests test and, in cases when public interest in disclosure prevails, information should be presented to the requestor, even if it formally falls into one of the exempt categories.

<sup>45</sup> According to art. 12 of the old Act natural persons and legal entities also had an obligation to disclose environmental information.

<sup>46</sup> For example, the new act repealed the obligation of the public officials to inform the citizens in cases of a direct danger from environmental pollution, an obligation that was included in art. 13a of the old act.

<sup>47</sup> According to APIA a decision on APIA requests should be taken no later than 14 days after the institution receives the request. EPA does not provide for a term, in which a decision to disclose or refuse information should be taken, but information must be disclosed 14 days after the decision. These inconsistencies will cause problems in the implementation of the right to information access.

## **Changes in legislation regulating access to information about the privatization.**

In 2002 a new Regulation on Access to Information, Related to Issues of Privatization, was adopted<sup>48</sup>, replacing the Regulation on the Procedures of Providing Information, Regarded as Official Secret in Cases of Sales under the Act on Restructuring and Privatization of State and Municipal Companies. Both regulations give a thorough list of documents and papers that constitute official secret<sup>49</sup>, and a relatively short period for which such documents can be exempt from access. According to the abolished regulation official secret could be: the report of the licensed evaluators of the company and connected structures, documents and facts in relation with the preparation of acts of the institutions under art. 3 of the Act on Restructuring and Privatization of State and Municipal Companies (ARPSMC), including documents with no significance on their own, like opinions, recommendations, comments and consultations, positions and other relevant information in connection with ongoing negotiations; results from negotiations between the institution under ARPSMC and the potential buyers, parts of the offers of the potential buyers, containing the business plans, which they have explicitly declared as trade secret<sup>50</sup>. Such information is considered official secret and should be restricted from access until the end of the privatization procedure, or until a buyer is selected<sup>51</sup>. The old Regulation didn't mention the term, after which the reports of the licensed evaluators and offers, containing trade secret, stop being exempt from access. According to art. 3 para. 1 from the Regulation, documents that are not official secret, should be provided for access under the procedures of APIA<sup>52</sup>. The institution under art. 3 of ARPSMC could publish information, which is official secret, in order to make the procedure more transparent<sup>53</sup>.

The new Regulation includes a rather brief definition of information, that constitutes official secret: documents and reports, related to preparation of the acts of institutions under ARPSMC, including those with no significance on their own – opinions, recommendations, views of the institution or on its activities, consultations or information, described by the potential buyer as trade secret. Analyses of the legal situation and evaluations of the companies should not be deemed official secret,

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<sup>48</sup> The full name is Regulation for Obligatory Information, Disclosed to Persons, Wishing to Participate in the Privatization Process under The Act on Privatization and Post-Privatization Control and on Documents and Facts, Constituting Official Secret, adopted by a Council of Ministers Decree and published in State Gazette issue 87/13.09.2002, in force from 13.09.2002.

<sup>49</sup> The number of categories of information, classified as official secret was larger in the old Regulation, but this does not mean that the scope of official secret now is smaller.

<sup>50</sup> Art. 2, para. 1, items 1- 5 from the old Regulation

<sup>51</sup> Results from conducted negotiations.

<sup>52</sup> Indeed the term “persons with legal interest” can only cause bewilderment, having in mind that APIA – the act that the Regulation refers to - provides the right to information access for everyone. In the new regulation the term is changed with “a person who declared his/her will to participate in privatization” and there is no referral to APIA.

<sup>53</sup> Art. 6 from the Regulation. According to art. 1 information is disclosed after the start of the privatization procedure.

according to the explicit regulation of art. 26, para. 4 of the Act on Privatization and Post-privatization Control. The exemption periods for documents constituting official secret are the same as in the repealed Regulation. The new Regulation lacks a provision, referring to the procedures of APIA, after the exemption period has expired. As in the previous Regulation, institutions can choose to reveal information that is regarded as official secret<sup>54</sup>.

## **Official Secret according to the Tax Procedural Code**

The Tax Procedural Code (TPC), as a regulation defining official secret was twice changed in 2002. Changes were published in the State Gazette issue 45/30.04.02 and issue 112/ 29.11.02., but they failed to regulate the problem with providing access to public information, constituting official secret according to Additional provision, para. 1 item 1 of the TPC. Such a regulation is indeed necessary, because otherwise the principle of proportionality between the exempted information and the protected interest would be violated<sup>55</sup>, and the tax administration would have the opportunity to keep secret a large amount of information about its activities<sup>56</sup>. There is no regulation on access to information contained in tax declarations of politicians and higher-level officials, which leads to a lack of conformity between the TPC and the Public Information on the Property of Higher-level Officials Act.

Instead of solving the above-mentioned problems, Order 350/12.06.02 of the Chief Tax Director needlessly complicated the procedure for access of third parties to information contained in the tax declarations. In contradiction to the purpose and principles of APIA the requestors of such information are required to first receive written consent of the individual, whose data they are requesting<sup>57</sup>. This regulation does not render an account of the fact, that the requestor may not always be aware of who that individual might be, the requestor could be seeking this information simply to get an idea of the activities of the state bodies.

## **Changes in the legislation, regulating access to archival information**

### **Access to Information, Contained in Documents of the Former State Security Services and the Former Intelligence Services of the General Staff Act**

With the adoption of the Protection of Classified Information Act (published in State Gazette issue 45/30.04.02) the Access to Information, Contained in Documents of the Former State Security Services and the Former Intelligence Services of the General Staff

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<sup>54</sup> By including the information in the public register, kept by the respective institution.

<sup>55</sup> Recommendation (2002)2, Article IV, para. 1

<sup>56</sup> In court case 10496/01 Totev v. Chief Tax Director (CTD) of the Supreme Administrative Court a refusal to grant access to a copy of a letter of the CTD was appealed. The requestor wished to obtain a copy of the letter in the part, concerning tax handling of interest on ZUNC bonds, explicitly stating that he does not wish access to personal data of the recipient of the letter. The decision to refuse access to the requested information was reversed by the SAC.

<sup>57</sup> Item 14. 1 of the Order.

Act (ADFSSSFISGSA)<sup>58</sup> was abolished. The procedure for access to parts of this information was regulated with the Instruction on access to information, contained in the archival documents of the Ministry of Internal Affairs, adopted by the Minister of Internal Affairs<sup>59</sup>. This instruction has not been promulgated. It contains provisions, similar to those of APIA and PDPA, but with some significant differences, for example, the period for answering an information request is 30 days.

It is totally unacceptable to regulate a constitutional right by a regulation, which is not promulgated, and besides that lacks a provision, regulating the active distribution of information about higher-level officials, contained in these archives<sup>60</sup>. The publishing of such information would widen the range of information that is available for public access and would encourage the society to make informed choices.

### **National Archives Draft Act**

In 2002 a National Archives Draft Act was introduced to Parliament. This draft act is not in conformity to the international standards and in particular to Recommendation (2000)13 on access to archives of the Committee of Ministers of the Council of Europe<sup>61</sup>.

Above all, according to Recommendation (2000)13 the right to access to archives should be a right of everyone and thus should be viewed as part of the right to information access. The refusal to grant access to archival documents should conform to a special test, similar to the one in the Recommendation.

The draft, introduced to Parliament does not regulate the right of everyone to access to archives, neither does it touch on the exemptions of the right to access and the requirements for certain archival document to be restricted from access. There is indeed an obligation for the Archive Services to provide public access to archival documents or copies of them, but there is no means of judicial control if this obligation is not fulfilled. Recommendation (2000)13 requires the inclusion of a possibility for control on these institutions, including through appeals in court. The introduced draft contains no provisions in this direction.

The definition of archival documents is unclear and incomplete and does not conform to the definition of “archive” and “archival document” in the sense of the Recommendation.

From the arguments presented, it is seen that the National Archives Draft Act does not follow the international standards in that area. It is obvious that even minimal efforts have not been made to bring the Act in conformity to the international standards.

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<sup>58</sup> Para. 37 of the Additional and Final Provisions

<sup>59</sup> A copy of this Instruction was kindly presented to us by a journalist of Dnevnik newspaper.

<sup>60</sup> These positions are thoroughly listed in para. 2 of the Additional provisions of ADFSSSFISGSA (repealed).

<sup>61</sup> Will be referred to as Recommendation (2000)13. Available in English on <http://www.aip-bg.org/eurolaw.htm>

## **Fulfillment of the obligation under APIA by the Bodies of the Executive Power 2002<sup>62</sup>**

The presented data is form the survey, held between October 10, 2002 and October 30, 2002.

The survey was held in all central bodies of the executive power and their territorial branches, as defined by the Administration Act and listed in the Register of the Administrative structures.

Besides the bodies of the executive power, we interviewed officials from the 101 largest municipalities in Bulgaria by population, out of the total 263 municipalities.

The expansion of the range of the participating institutions by including the bodies subject to public law entities (The National Health Insurance Fund, The National Social Insurance Fund, The Auditing Chamber, etc.) corresponds both to the large public interest of the activities of the mentioned institutions<sup>63</sup>, and to the standards introduced in Recommendation (2002)2 of the Committee of Ministers of the Council of Europe<sup>64</sup>.

Our interviewers turned towards officials from 394 bodies of the executive power with a request to fill in the questionnaire. In 308 cases the officials agreed to participate in the survey, while in the other cases we received either a silent or an explicit refusal of the officials.

In 2001 16,5% of the institutions refused to participate in the survey, whereas in 2002 their number has increased to 21,8%.

| Visited Institutions | Community |               |            | Interviews held | Refusals |
|----------------------|-----------|---------------|------------|-----------------|----------|
|                      | Sofia     | Regional town | Small town |                 |          |
| Ministries           | 18        |               |            | 8               | 10       |
| State agencies       | 22        |               |            | 13              | 9        |
| State Commissions    | 15        |               |            | 8               | 7        |
| Executive agencies   | 23        |               |            | 18              | 5        |
| Municipalities       | 2         | 26            |            | 26              | 2        |

<sup>62</sup> The full text of the report is published: The Year of the Rational Ignorance (Results from a Sociological Survey), AIP, Sofia, 2002, <http://www.aip-bg.org/>

<sup>63</sup> Since its establishment AIP provides legal assistance in cases of information refusals by the bodies of the executive power. We have registered 1043 such cases in our electronic database after the adoption of APIA. In 89 cases the refusals have been made by bodies subject to public law. Out of the fifty appeals that our lawyers have filed twelve are against bodies subject to public law.

<sup>64</sup> According to Recommendation (2002)2 “public authorities” shall mean both “government and administration at national, regional or local level” and “natural or legal persons insofar as they perform public functions or exercise administrative authority and as provided for by national law”.

|   |   |    |    |     |    |
|---|---|----|----|-----|----|
| Regional administration                                       | 5 | 26 | 73 | 96  | 8  |
| Regional branches of the executive power (RBEP) <sup>65</sup> |   |    |    | 131 | 41 |
| Others <sup>66</sup>  |   |    |    | 8   | 4  |
| Total   |   |    |    | 308 | 86 |

The interviewers had to find and give the questionnaires to officials that were appointed to review APIA requests. Most often the interviewed persons were directors of the institutions, deputy directors, or heads of a department (32%), public relations officers (17,5%), administrative secretaries (16%), experts (15%) or lawyers (11%).

### ***Citizen's orientation information***

#### **Publication of current public information**

art. 15. (1) In order to achieve transparency of the administration's activities, and for the purpose of maximum facilitation of access to public information, every chief officer of an administrative structure within the system of the executive power shall publish on a regular basis up-to-date information containing:

1. description of his/her powers as well as data on the organizational structure, the functions and the responsibilities of the administration led by him/her.
2. list of the acts issued within the scope of its powers;
3. description of the data volumes and resources, used by the respective administration,
4. the name, the address, the telephone number and the working hours of the respective administration's office which is authorized to receive applications for access to public information.

<sup>65</sup> These were, for example, the Territorial Tax Directors, The Labour Bureaus, the Regional Police Departments, etc.

<sup>66</sup> The National Health Insurance Fund, The Auditing Chamber, Regional Agricultural Fund, The Institute of Hygiene and Epidemiology, The Electronic Media Counsel, The National Social Insurance Fund, The National Grain Service, etc.



(2) Every chief officer under sub-art. 1 shall prepare an annual report on the applications for access to public information, which shall contain among others data on the refusals made and the reasons therefore. This annual report shall be part of the annual reports under art. 61, sub-art. 2 of the Administration Act.

#### Duties of the Minister of the state administration

art. 16. (1) The Minister of the State administration shall publish an annual summary of the reports on the bodies and their administrations, containing the information under art. 15., as well as other information relating to the implementation of this act.

(2) The Minister of State administration shall be responsible for distributing the summary. The information contained in the summary shall be made available in every administration for review by the citizens." (APIA)

The publishing of certain categories of information aims to assure transparency of the administration activity and to ease to a maximum extent the access to public information.

The Access to Public Information Act obliges every head of an administrative structure in the Executive power system to periodically publish current information, which consists of administrations competence, description of the structure and functions of the administration; list of the acts issued; information volumes and resources; the name, address, telephone number and working hours of the unit which is responsible for handling applications and granting information access.

The Regulation on the Conditions and procedure for keeping the register of the administrative structure and acts of the executive power bodies<sup>67</sup>, which was passed and published before the adoption of the Access to Public Information Act, determines the course, by which that can happen for **parts of the information**<sup>68</sup>. The register is maintained as a unified electronic database. In his answer to a parliamentary enquiry, the Minister of State Administration Dimitar Kalchev said that the data under art.15, are an essential part of the Register of administrative structures and acts of the executive power bodies, which gives a clear picture about the structure of the executive powers and the issued acts"<sup>69</sup>. The data in the register are indeed just a part of the data that is

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<sup>67</sup> Adopted with a Council of ministers Decree 89/26.05.2000, published in State Gazette issue 44/30.05.2000, amended in issue 83/30.08.2002, in force from 31.10.2002

<sup>68</sup> The amendment of the Regulation Keeping the Register of the Structure and Acts of the Executive Power Bodies, from year 2002 narrowed the span of the obligations in relation with the acts issued.

<sup>69</sup> Source: Express minutes One hundred fifty third session of Parliament, Sofia, Friday, 4th of October 2002, p. 36-39

compulsory published, according to art.15. Moreover, the obligations, arising under an act could not be equal to the obligations provided by a regulation, which generally aims to describe the procedure of the obligation accomplishment. So, the obligations under the regulation are not the same as the ones under art.15 APIA.

The "list of the issued acts" and the "description of the information arrays and resources" remain outside the scope of the secondary regulation. Their publishing as a current public information stays as an obligation to every head of an administrative structure in the executive system.

Since the law does not provide sanctions for failure to comply with the obligations under art.15, till now a number of the institutions have not created a mechanism for publishing of the current information. The results of the answers to the question, whether the information under art.15 has been published, can be seen in the table below.

| Art. 15, para. 1 APIA   | Institution |                |                   |                |                |                         |       |        | Total |
|---|-------------|----------------|-------------------|----------------|----------------|-------------------------|-------|--------|-------|
|   | Ministries  | State agencies | State Commissions | Exec. Agencies | Municipalities | Regional administration | RBEP  | Others |       |
| Description of the structures and functions of the administration | 100,0%      | 76,9%          | 75,0%             | 55,6%          | 75,0%          | 80,0%                   | 67,0% | 100,0% | 73,6% |
| List of issued acts and decisions                                 | 87,5%       | 46,2%          | 62,5%             | 44,4%          | 50,0%          | 67,0%                   | 31,6% | 71,4%  | 49,6% |
| Description of information structures                             | 62,5%       | 38,5%          | 57,1%             | 27,8%          | 38,1%          | 48,4%                   | 32,5% | 42,9%  | 39,9% |
| Name, address, phone and workplace of the responsible person      | 50,0%       | 38,5%          | 50,0%             | 33,3%          | 50,0%          | 50,0%                   | 45,6% | 71,4%  | 47,2% |

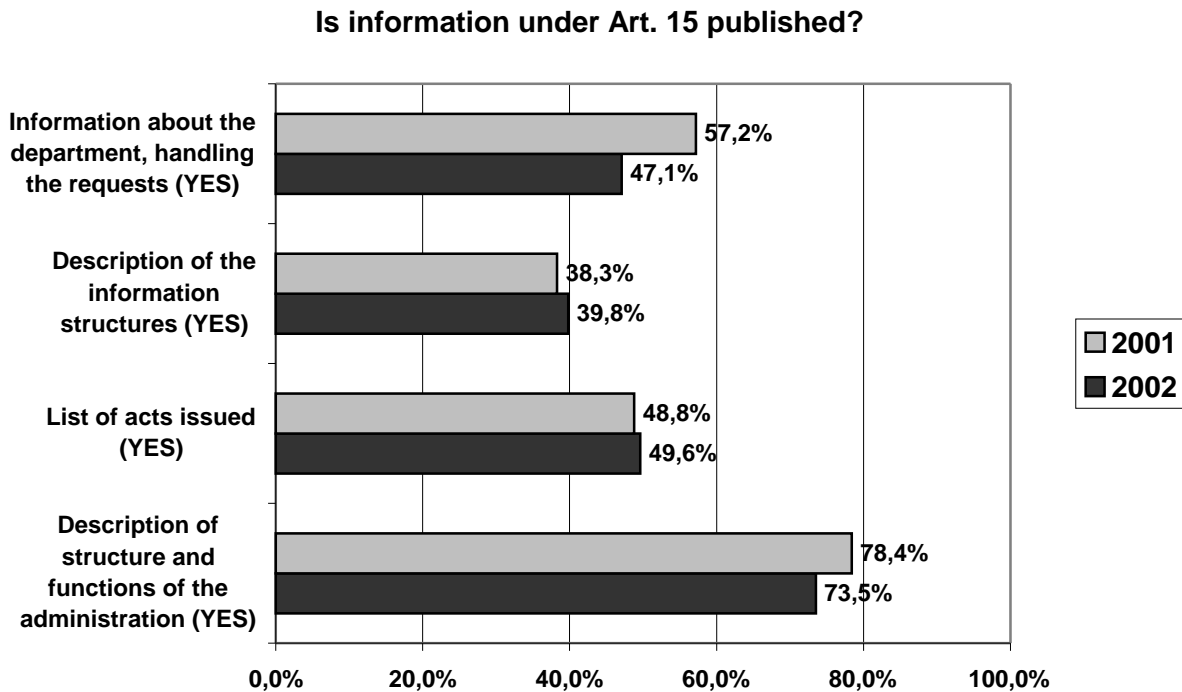
It is clear that the simplest of the obligations under art.15, p.1, p.1 are fulfilled by 73,6% of the interviewed administrative structures, though it has to be pointed out that 24 of the officials who took part in the survey did not answer this question.

Concerning the announcement of the unit, which is responsible for the acceptance of the access to information applications - an obligation arising under art.15, p.1, p.4 - 47,2% answered that this is done, while 26 did not answer the question. At the same time 66% of those who took part in the survey claim that their institution has appointed a certain official to deal with the access to information applications. The percentage is higher compared to last year's survey - 61,4%.

The announcement of a unit, that would accept the applications, does not require any specific resources and stands as a preliminary condition for the access to public information right implementation by the ones looking for information.

These data are as well confirmed by the questionnaire situation description given by our interviewers reports. According to them, 46% of the visited institutions had an appointed official and there were no problems finding him/her.

About 40% of the officials filled in the questionnaire in front of the interviewers. If we compare the results of the 2001 survey and the results of the recent survey on the fulfillment of the obligations under art. 15, we would get the following:



### List of the issued acts and description of the information arrays and resources

The publishing of those lists and descriptions is also an obligation under art. 15, p.1. Without such information the seekers of information would be impeded to clearly formulate his/her request which on the other hand would make it difficult for the officials to solve the unclear information requests.

The data, listed in the "electronic register"<sup>70</sup> as "acts" does not in any way ease the search. The database, available now through the Internet preconditions preliminary knowledge of the act, its number, kind, publishing date, etc. That database does not represent a list of acts, which would facilitate the consumers. There apparently were other criteria for structuring the information in the register, rather than to facilitate the seekers of public information or to fulfill the obligations of APIA.

<sup>70</sup> <http://www1.government.bg/ras/>

## *Administrative readiness and capacity for APIA fulfillment*

### **Determination of a unit/official dealing with the applications**

In order to apply a law, it is necessary to dispose of institutions, resources and mechanisms and most of all prepared and motivated officials.

**The first and simplest condition is to authorize an official (or a certain unit at larger institutions), who would accept information access applications, be responsible for the active information access, and be aware of the normative base, regulating that sphere.**

The determination of an official or unit, in larger administrative structures in the Executive power system, who would be responsible for the application's acceptance, is not only an obligation under the law, but would as well facilitate the work of the administration, in providing its services, because:

- The responsibility and the ruling of the process would be clear;
- Other officials won't waste time;
- The specialization and education of that officials would be more effective;
- The accounting and review of the obligations fulfillment by the authorized bodies under APIA would be easier.

Another equally important advantage of determining an official or unit is the facilitation for those who are looking for information.

### **Are there such officials appointed?**

There is an obvious dependence between the number of interviewers visits to the institution and the way by which the official is authorized, especially if there is a written order for his/her authorization. It seems that when the individualization is more distinct and concrete, the interviewer loses less time. The verbal order is to a greater extent concrete, because it presents a direct order by the head, while the job characteristic formulates the obligations in a far more general way and the specialization itself is made by the official.

| How was the official appointed? | Days to receive the questionnaire | Average number of visits to the institutions |
|---------------------------------|-----------------------------------|--|
| Printed order                   | 2,96                              | 1,89   |
| Verbal order                    | 3,16                              | 1,96   |

|                     |      |      |
|---------------------|------|------|
| Job characteristics | 3,65 | 2,25 |
| Other               | 4,64 | 3,26 |

As it was already shown, the interviewer's task was to find and interview the officials who are responsible under APIA. Whether the interviewed are the ones who are obliged under APIA, or at a certain institution prevails the idea that the director is the one who would exhaustingly answer the questions and would be responsible for them, we could not know. It is a fact that compared to last years survey, the percentage of the experts has grown from 10,3% up to 20,4%, as well as the percentage of the lawyers- from 5,3% to 11,4%, while in the same time the number of the institution heads has declined from 28,6% to 20,1%.

### Position of the interviewed person:

|  | Ministries | State agencies | State Commissions | Exec. Agencies | Municipalities | Regional administration | RBEP  | Others |       |
|--|------------|----------------|-------------------|----------------|----------------|-------------------------|-------|--------|-------|
| Director, mayor                        | 12,5%      | 15,4%          | 12,5%             | 11,1%          | 16,0%          | 8,2%                    | 32,8% | 12,5%  | 20,1% |
| Deputy director                        |            | 7,7%           |                   |                |                | 3,1%                    | 1,5%  |        | 1,9%  |
| Department head                        |            | 15,4%          | 37,5%             | 5,6%           | 4,0%           | 7,2%                    | 11,5% | 12,5%  | 9,7%  |
| Admin. secretary                       |            | 23,1%          | 25,0%             | 16,7%          | 16,0%          | 35,1%                   | ,8%   | 25,0%  | 15,9% |
| Expert                                 | 25,0%      | 15,4%          |                   | 16,7%          | 24,0%          | 8,2%                    | 16,0% | 12,5%  | 14,0% |
| Registrar                              |            |                |                   |                |                | 4,1%                    | 1,5%  |        | 1,9%  |
| PR                                     | 62,5%      | 7,7%           | 12,5%             |                | 28,0%          | 15,5%                   | 18,3% | 25,0%  | 17,9% |
| Lawyer                                 |            | 7,7%           |                   | 50,0%          | 8,0%           | 11,3%                   | 8,4%  | 12,5%  | 11,4% |
| LASC <sup>71</sup> , RST <sup>72</sup> |            | 7,7%           |                   |                | 4,0%           | 7,2%                    | 5,3%  |        | 5,2%  |
| Anonymous                              |            |                |                   |                |                |                         | 1,5%  |        | ,6%   |
| Other                                  |            |                | 12,5%             |                |                |                         | 2,3%  |        | 1,3%  |
| Number of responses <sup>73</sup> :    | 8          | 13             | 8                 | 18             | 25             | 97                      | 131   | 8      | 308   |

The average period that an official occupies a certain position is three years and two months, as the time period decreases for the central power and executive agencies bodies. The longest period for occupying a certain position is observed in the municipal administration and the executive power bodies (see the table below).

### How long have you been working on this position (approx. number of months)?

|                      | Institution |                |                   |                |                |                         |      |        | Total |
|----------------------|-------------|----------------|-------------------|----------------|----------------|-------------------------|------|--------|-------|
|                      | Ministries  | State agencies | State Commissions | Exec. Agencies | Municipalities | Regional administration | RBEP | Others |       |
| Months (average)     | 19,3        | 21,5           | 25,6              | 14,9           | 16,2           | 44,1                    | 44,0 | 49,9   | 38,2  |
| Number of responses: | 7           | 12             | 8                 | 18             | 24             | 93                      | 124  | 8      | 294   |

<sup>71</sup> LASC = Legal and Administrative Services for the Citizens.

<sup>72</sup> RST = Registration and Services for the Taxpayers.

<sup>73</sup> Indicates the number of responses to this question in absolute figures.

The survey results from the question whether there is a certain official, who would deal with the public information access applications, are close to the ones received last year.

### Has your institution appointed an official to deal with APIA requests?

|     | Institution |                |                   |                |                |                         |       |        | Total |
|-----|-------------|----------------|-------------------|----------------|----------------|-------------------------|-------|--------|-------|
|     | Ministries  | State agencies | State Commissions | Exec. Agencies | Municipalities | Regional administration | RBEP  | Others |       |
| Yes | 75,0%       | 38,5%          | 71,4%             | 55,6%          | 92,0%          | 73,7%                   | 61,4% | 28,6%  | 66,3% |
| No  | 25,0%       | 61,5%          | 28,6%             | 44,4%          | 8,0%           | 26,3%                   | 38,6% | 71,4%  | 33,7% |
|     | 8           | 13             | 7                 | 18             | 25             | 95                      | 127   | 7      | 300   |

On the one hand the percentage of those who gave positive answers has increased, compared to last year from 61,4% up to 66,3%, but on the other hand the ones who stated that this has happened by a written order has decreased - from 54,4% down to 48,8%. Whether the percentage has really decreased or part of the authorized officials have it as a part of their job characteristic, so it is not accepted as an written order, we could not know, as it is a matter of internal organization of the institution. More important indicators for the lack of development in that sphere are the results concerning the officials' authorization. The same as last year, we received the following results to the question whether the official could rule on the applications and who actually rules on them:

### Who takes decisions whether to grant or deny access to information under APIA?

|                        | Institution |                |                   |                |                |                         |       |        | Total |
|------------------------|-------------|----------------|-------------------|----------------|----------------|-------------------------|-------|--------|-------|
|                        | Ministries  | State agencies | State Commissions | Exec. Agencies | Municipalities | Regional administration | RBEP  | Others |       |
| The appointed official | 20,0%       | 7,7%           | 14,3%             | 6,7%           |                | 11,8%                   | 8,3%  | 16,7%  | 9,1%  |
| The director           | 60,0%       | 61,5%          | 57,1%             | 80,0%          | 92,0%          | 74,2%                   | 88,4% | 66,7%  | 80,7% |
| Lawyer                 |             | 15,4%          | 28,6%             | 6,7%           |                | 8,6%                    | 1,7%  |        | 5,3%  |
| Committee              |             |                |                   | 6,7%           | 4,0%           | 3,2%                    | ,8%   | 16,7%  | 2,5%  |
| Other                  | 20,0%       | 15,4%          |                   |                | 4,0%           | 2,2%                    | ,8%   |        | 2,5%  |
| Number of responses:   | 5           | 13             | 7                 | 15             | 25             | 93                      | 121   | 6      | 285   |

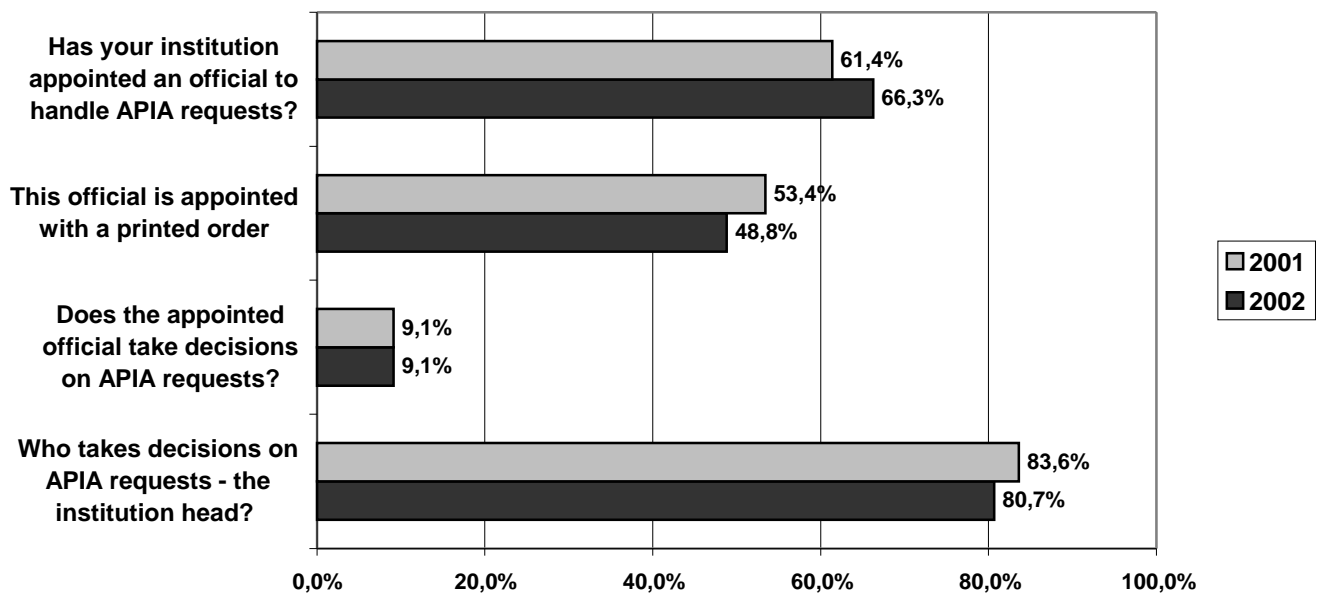
The 2001 survey showed the same results, concerning the coincidence of the official, who accepts the applications and the one who rules on them - 9,1%. Eventhough the common percentage does not change, the actual situation has changed. Untill last year only 7,7% of the officials from the ministries were accepting and taking decisions on the applications. Now, at the ministries the percentage has increased up to 20%. Just the opposite dependence is observed over district municipal administrations: here the percentage has fallen from 7,7% down to 0%, on the account of the head. The percentage of those who have pointed out the head as the one who takes decisions on the applications, has slightly decreased.

According to us, an explanation of those results could be found if they are compared to the results of the question: "Usually whom do you usually ask for advice, when handling the applications under APIA?". Apparently, gaining practice on the law, especially when some of the denials are being appealed in front of the court, the necessity of a lawyer consultation is becoming tangible. The number of consultations with a lawyer has increased. The number of consultations with the head has increased as well. According to us, that fact is related to the understanding that there is a liability to be worn, concerning the applications. Those interpretations are inspired mostly by the AIP's experience in consulting cases of denial and appealing denials of access to information in front of the court. Whom do you usually ask for advice?

### Whom do you usually ask for advice?

|                      | Institution |                |                   |                |                |                         |       |        | Total |
|----------------------|-------------|----------------|-------------------|----------------|----------------|-------------------------|-------|--------|-------|
|                      | Ministries  | State agencies | State Commissions | Exec. Agencies | Municipalities | Regional administration | RBEP  | Others |       |
| Head, director       | 42,9%       | 16,7%          |                   | 14,3%          | 22,2%          | 28,2%                   | 39,8% | 28,6%  | 31,6% |
| Lawyer               | 28,6%       | 83,3%          | 100,0%            | 42,9%          | 72,2%          | 66,2%                   | 52,7% | 71,4%  | 60,5% |
| Colleagues           | 28,6%       |                |                   | 28,6%          |                | 5,6%                    | 6,5%  |        | 6,5%  |
| APIA                 |             |                |                   |                |                |                         | 1,1%  |        | 0,5%  |
| AIP                  |             |                |                   | 14,3%          | 5,6%           |                         |       |        | 0,9%  |
| Number of responses: | 7           | 6              | 6                 | 7              | 18             | 71                      | 93    | 7      | 215   |

### Appointed official to handle APIA requests



There is another important circumstance that we should mark out as an indicator for the administrative capacity of the executive power bodies to fulfill the obligations under

APIA. Those data give an explanation to the difficulties that our interviewers met while finding the responsible officials under APIA and to the impressions they shared, concerning the unprepared officials on APIA.

According to the interviewed, only 7,4% of the determined officials deal solely with the access to information applications. The remaining 92,6% have other obligations as well. Apparently the work under APIA is something additional and accidental for the registrar, the one who accepts the complaints and requests of the citizens and for the one who is responsible for the public relations; they see their work on APIA as something additional to their essential obligations.

### Other duties of the appointed official?

|                                 | Institution |                |                   |                |                |                         |       |        | Total |
|---------------------------------|-------------|----------------|-------------------|----------------|----------------|-------------------------|-------|--------|-------|
|                                 | Ministries  | State agencies | State Commissions | Exec. Agencies | Municipalities | Regional administration | RBEP  | Others |       |
| Receives requests and complains | 75,0%       | 14,3%          | 40,0%             | 15,4%          | 35,0%          | 23,2%                   | 18,2% |        | 22,8% |
| PR                              |             | 28,6%          | 20,0%             | 7,7%           | 40,0%          | 18,8%                   | 35,1% |        | 26,4% |
| Registrar                       |             |                |                   | 30,8%          | 10,0%          | 27,5%                   | 16,9% | 100,0% | 20,3% |
| Lawyer                          |             | 14,3%          |                   | 23,1%          |                | 5,8%                    | 3,9%  |        | 5,6%  |
| Admin. secretary                |             |                | 20,0%             | 7,7%           |                | 2,9%                    | 1,3%  |        | 2,5%  |
| Administrative services         | 25,0%       | 28,6%          | 20,0%             | 7,7%           | 5,0%           | 18,8%                   | 15,6% |        | 15,7% |
| Others                          |             | 14,3%          |                   | 7,7%           | 10,0%          | 2,9%                    | 9,1%  |        | 6,6%  |
| Number of responses:            | 4           | 7              | 5                 | 13             | 20             | 69                      | 77    | 2      | 197   |

The determination of a unit or official under APIA happens as a result of the increased information search in the institution. That was an apparent trend throughout last year as well. The increased search for public information forces state bodies to create special units and to authorize an official under APIA. It could be stated out, that as a rule the stimulus comes from outside, especially if there is a court appeal of the access to information denials and the law provided procedure has not been followed.

In larger administrative structures, such as ministries, the unit determination has to be accompanied by a clear description of the whole process of accepting, directing and deciding on applications, i.e. an internal rule or instruction for the applications treatment is needed. According to our observations and conversations with officials, we could say that the unpleasant results, like unmotivated (silent) denials, missing APIA deadlines<sup>74</sup> etc., are due namely to the lack of such a mechanism and thanks to the unpreparedness of the first unit that receives the requests, which is to meet the requirements of the APIA for the application's acceptance.

<sup>74</sup> Through conversations with officials from the Ministry of the Economics and the Ministry of the Science and Education, it becomes clear that the longest process is the way, which the application has to pass, until it gets to the one who is in his competence to rule over it, especially if the application itself does not refer to the APIA. The latter is not a compulsory prerequisite under APIA.



Apparently the officials who are authorized to deal with the applications do need some kind of instructions, education and consultations. By now only 37% of the interviewed stated to have used a written instruction, in order to distinguish the APIA applications from other requests. Nearly 70% of those use the AIP handbook "How to Get Access to Information?"<sup>75</sup>.

### ***Trainings for officials***

The 2001 survey showed that 16,7% of those interviewed have passed a training course. During 2002 the percentage of those who have passed through training has increased up to 41,4%. A substantial part of them - 75,8% have passed a one-day training arranged by the AIP and ABA/CEELI. One of the basic outlines pointed out by the officials who took part in the last year survey was the necessity of training and elucidation of the regulations of other acts, with which they deal in their everyday work. The generalized recommendations, from our meetings and train ings for the officials, show the necessity of specialized training, which would render an account of the specifics of the institution and the information arrays, preserved by it.

### ***Applications acceptance and registration unit/desk***

art. 25 item 3 of APIA "Every filed application for access to public information shall be registered in accordance with the procedure adopted by the relevant agency".

Even though the registration is a must, every authority decides on its own how and where to perform that - through a common or through a special institution registry.

Of the officials interviewed in 2001 61,8% claimed they have an APIA applications registry. Our attempt to get some concrete data on the received applications showed that this was almost impossible, which indicated that if there were APIA applications at all, they had been enrolled in the common registry, in a way that makes their identification and counting difficult. That conclusion is confirmed by the answer results of the following questions:

#### **Is there a special place/desk where people can file APIA requests?**

|     | Institution |                |                   |                |                |                         |       |        | Total |
|-----|-------------|----------------|-------------------|----------------|----------------|-------------------------|-------|--------|-------|
|     | Ministries  | State agencies | State Commissions | Exec. Agencies | Municipalities | Regional administration | RBEP  | Others |       |
| Yes | 75,0%       | 69,2%          | 87,5%             | 58,8%          | 92,0%          | 78,4%                   | 73,4% | 50,0%  | 75,3% |

<sup>75</sup> Handbook "How to get Access to Information", second updated edition, AIP, Sofia, 2002. The full text in Bulgarian can be found at: [http://www.aip-bg.org/books\\_bg.htm](http://www.aip-bg.org/books_bg.htm)

|                      |       |       |       |       |      |       |       |       |       |
|----------------------|-------|-------|-------|-------|------|-------|-------|-------|-------|
| No                   | 25,0% | 30,8% | 12,5% | 41,2% | 8,0% | 21,6% | 26,6% | 50,0% | 24,7% |
| Number of responses: | 8     | 13    | 8     | 17    | 25   | 97    | 128   | 8     | 304   |

### Are there any other requests filed on this desk/place?

|                      | Institution |                |                   |                |                |                         |       |        | Total |
|----------------------|-------------|----------------|-------------------|----------------|----------------|-------------------------|-------|--------|-------|
|                      | Ministries  | State agencies | State Commissions | Exec. Agencies | Municipalities | Regional administration | RBEP  | Others |       |
| Yes                  | 85,7%       | 90,9%          | 100,0%            | 92,3%          | 100,0%         | 95,0%                   | 92,0% | 100,0% | 93,9% |
| No                   | 14,3%       | 9,1%           |                   | 7,7%           |                | 5,0%                    | 8,0%  |        | 6,1%  |
| Number of responses: | 7           | 11             | 7                 | 13             | 24             | 80                      | 100   | 5      | 247   |

### Do you keep a register of APIA requests?

|                      | Institution |                |                   |                |                |                         |       |        | Total |
|----------------------|-------------|----------------|-------------------|----------------|----------------|-------------------------|-------|--------|-------|
|                      | Ministries  | State agencies | State Commissions | Exec. Agencies | Municipalities | Regional administration | RBEP  | Others |       |
| Yes                  | 42,9%       | 53,8%          | 42,9%             | 35,3%          | 82,6%          | 63,5%                   | 55,2% | 37,5%  | 57,8% |
| No                   | 57,1%       | 46,2%          | 57,1%             | 64,7%          | 17,4%          | 36,5%                   | 44,8% | 62,5%  | 42,2% |
| Number of responses: | 7           | 13             | 7                 | 17             | 23             | 96                      | 125   | 8      | 296   |

The data taken into such a register, if there is one at all, would facilitate the officials meeting the application deadlines, and they would aid the accounting and control over the applications operation.

The 2002 survey points out the fact that a lot of surplus data is collected. Even though the law and the handbooks, sent by the AIP to all the municipalities and state bodies, expressly state that no other data than the correspondence address should be required from the applicant, in some large municipalities we came across a Personal Identification Number and Tax Number requirement as well as requirement of showing interest rationale and the aim of the search, which is totally repugnant with the international standards.

The computer and specialized software usage situation for the maintenance of the registry has not changed a lot. While in the 2001 survey 28,1 % of the interviewed stated, that the registry, if there is one at all, is kept in a computer, in year 2002 29,6% state that they take the registry electronically.

### ***Information granting forms***

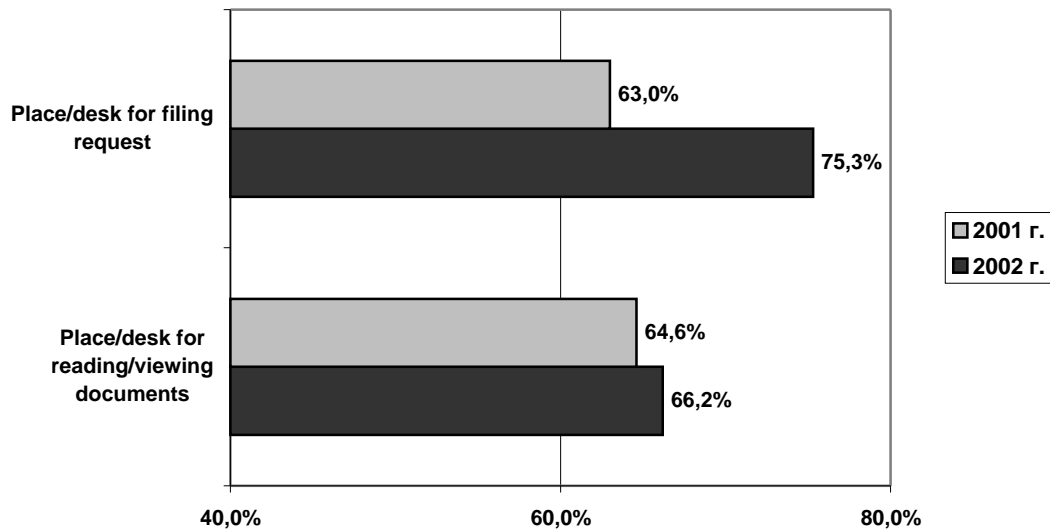
According to the APIA regulations (art. 35, p.2), when information is operationally granted, a document signed by the requestor and the relevant official is prepared. Although there is no normatively affirmed form for those documents, APIA requires the inclusion of a description of the granted pieces of information.

The distribution of such documents, certifying the granting of the searched information is quite poor. According to data from the 2001 survey such forms existed only in 15,4% of the institutions, while the 2002 data show that 22,8% of the institutions use such forms.

### ***Public information examination and reading room***

An important condition for the implementation of the right to access to public information is the allotment of special premises or a room, where citizens could check the granted information and could decide whether they would like copies of some of the documents. Most of the institutions (66,2%) affirm that they have provided such a site. The registries, information units, conference rooms, and reception rooms are used for that purpose. The table below compares the results from the two surveys of 2001 and 2002.

**Places for filing applications and reading**



### ***Number of applications, decisions and denial***

The officials that took part in last years survey found it very difficult to answer how many are all the received applications for access. The question was hard especially for the institutions that had not provided for APIA fulfillment. The general number of the received applications was 43,399. The comparison of the number of received applications to the number of solved applications showed that a great number of applications (24,065) have not been ruled over. When checking the surprising figures, given by small municipalities for applications received, it turned out that the officials did not distinguish between an administrative service request and an access to public information application.

In this year survey, there are not so many inconsistencies.

**Total number of APIA requests:**

|                                       | Institution |                |                   |                |                 |                         |       |        | Total |
|---------------------------------------|-------------|----------------|-------------------|----------------|-----------------|-------------------------|-------|--------|-------|
|                                       | Ministries  | State agencies | State Commissions | Exec. Agencies | Municipal ities | Regional administration | RBEP  | Others |       |
| Total number of requests:             | 4401        | 57             | 85                | 58             | 1085            | 6852                    | 20313 | 6      | 32857 |
| Verbal requests:                      | 1130        |                | 8                 | 39             | 778             | 154                     | 11424 |        | 12403 |
| Written requests:                     | 1936        | 53             | 75                | 14             | 307             | 6709                    | 8912  | 6      | 18012 |
| E-mail requests:                      | 1355        | 4              | 2                 | 5              |                 | 1                       | 12    |        | 13    |
| Access provided immediately           | 1498        |                | 8                 | 48             | 660             | 394                     | 12882 |        | 13992 |
| Access provided within 14 days        | 2683        | 53             | 77                | 7              | 180             | 534                     | 6855  | 4      | 10393 |
| Access provided after the 14-day term |             |                |                   | 1              | 1               | 6039                    | 607   | 2      | 6650  |
| Number of responses:                  | 5           | 9              | 7                 | 10             | 20              | 85                      | 95    | 7      | 238   |

According to the generalized data 6650 of the applications were answered after the law provided 14 days term.

The number of verbal requests is very big - 12,403, but having in mind the stated above applications registry situation, apparently the problem with the verbal requests is not very clear to the ones who grant information. Such a conclusion could be drawn out just on the grounds of our interviewers experience. Obviously, the verbal request is not apprehended as an the initial step towards granting immediate access to public information to those who seek it in the available form, but rather as a conversation with an inquirers, a journalist press-conference, etc.

The sense of the verbal request as part of the stipulated APIA procedure, is to facilitate the seekers of information. However, this for of requesting presumes a good management of the information, from the moment of its originating in the institution. This system should work well both for information which is apparently public by nature, and for documents, to which the access is restricted on clear grounds, and the restriction period and the responsibilities for the review after the expiration of this period are distinctly established. Obviously such a system does not exist throughout our institutions.

The lack of such a system and a system of regular officials training, as well as the "rational ignorance" of the information seekers, makes some of the rights provided by the APIA look exotic.

Examples are:

- receiving information by verbal requests;
- partial access to information;
- other fine points of the information right exercising, for instance the granting of information in the form requested, including the rights of people who suffer from

sight impediments or hearing/talking disabilities, "who could demand access in the form, meeting their communicative potentials." (art. 26, p. 4 APIA).

Referring to the access to information denial grounds, the 2002 survey results show that denials have increased their number as an absolute figure, but not as percentage (0,8%), which means that there are no more or less denials, but the records have improved. The 2001 survey results show that the number of the access denials is 1% of the number of the given access decisions. The decisions of the applications received represented 44% of the total number, stated by the officials.

There was an inconsistency between the total number of denials - 71 and the denials, made on a certain, law provided ground -107.

A similar inconsistency between the total number of denials (273) and the denials, made on certain grounds (266) is observed as well in the 2002 survey results.

The decisions given over the received 32,857 applications represent 94% of that number, which shows a kind of accounting development.

## Cases

### *General characteristics*

From its very establishment, Access to Information Programme has been registering cases, in which citizens, journalists, and NGOs have been refused access to information. The legal team of AIP comments each case referred to us and gives specific recommendations for further actions. In some cases the requestors seek our assistance before they submit their information application and we help them with its form and content. All cases have been entered in an electronic database<sup>76</sup>.

For the last year we have registered 515 cases when there have been problems with the implementation of FOI legislation and when our assistance has been sought. Of these cases 414 concern the right to information under the Access to Public Information Act. The rest of the cases concern violation of the broader constitutional right to seek, receive and disseminate information, rather than a refusal under APIA. In part of the cases information has been provided to the seekers.

The cases referred to the office of AIP show increased knowledge on the APIA procedures. Compared to the previous year (2001), cases in which the procedure of APIA has been followed by the requestors have increased both in absolute numbers and as a percentage of all cases.

Although the percentage of registered written APIA requests has not changed since last year, the cases, when information has been sought in a written form under the procedures

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<sup>76</sup> Statistics of cases registered in the office of AIP can be found at <http://www.aip-bg.org/cases.htm>.

of the Act has increased in absolute numbers from 46 to 52. Citizens and NGOs most often use written requests to seek information under APIA. From the beginning of January until the end of December of 2002 we have registered fifty-two written APIA requests.

Compared to last year, the number of citizens who seek public information using the procedures of APIA has increased significantly<sup>77</sup>. We attribute this to the increased awareness of the citizens of their rights under APIA and with the possibilities that the Act gives them.

In the office of AIP the information seekers can receive free legal assistance. It is in person or in written form (for the last year 380 written consultations have been given by AIP lawyers), on the phone or by e-mail (21 e-mail consultations for 2002), by preparing a written APIA request (52 requests for 2002) or through a court representation in cases when the right to information access has been violated (26 court appeals in 2002). Legal assistance provided by AIP lawyers always depends on the specific information requested. Sometimes people turn to us just for advice on how to act in a specific case, which institution to request information from, whether they should file a written request or not, what documents could the requested information be contained in. Formulating the request turns out to be one of the major problems of the information seekers. Although APIA does not provide for a specific format of the information requests, it is sometimes difficult to specify the request content. Often citizens request a large scope of documents related to some issue, rather than concrete documents. In such cases we need to study the topic and the legal acts connected with it, in order to specify the information request. There are regulations in APIA (art. 15 for example) that facilitate the requestors, but these regulations are not always followed. If institutions fulfill their obligations under art. 15 of APIA (to make available a description of their functions, the acts issued, description of the information massifs), citizens will not have to guess whether certain information is held in the institution or not, and would be really facilitated in their search for the requested information.

The cases in which citizens seek our assistance help us to identify some of the weaknesses of the system for providing information:

- Poorly developed mechanisms for publication of current and important information;
- Information about the type of documents kept by the institution is not easily accessible;
- Unfamiliarity with the obligations under APIA;
- An unnecessary formal approach towards requestors even by officials who are aware of their obligations<sup>78</sup>;

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<sup>77</sup> In 2001 we have registered 56 cases when citizens have sought assistance of AIP. For 2002 this number has increased to 101

<sup>78</sup> Often citizens are literally forced to submit written requests without being given any explanations, although the APIA provides for the possibility of submitting a verbal request. The choice whether to file a written request or to request information verbally is left to the information seeker. (art. 24)

- Conflicts between the requestors and requestees are often caused by the above problems.

How can the information seekers, who turn to AIP for assistance, be classified? These are on the one hand NGOs, which most often seek information about governmental programs and strategies and their implementation, decisions and specific acts of the executive power. Active citizens seek information connected with the topics of interest and issues discussed in the press. More often than before citizens use the procedures of APIA to request information in support of their rights.

### ***Journalists as information seekers.***

Traditionally, journalists are the largest group of information seekers. At the same time they are least likely to use the written form of an APIA request. Journalists prefer verbal requests and this is perfectly understandable, as they most often need information “here and now”. In this aspect, the formal attitude towards them is unacceptable. Often they are forced by some officials and press secretaries to file written information requests.<sup>79</sup>

Journalists more often rely on the fact, that APIA obliges institutions to actively publish information. Art. 14 para. 1 introduces obligation for publishing of information of public interest, while art. 14 para.2 obliges the institutions to distribute information that is of nature to prevent some threat to the citizens' life, health or security, or to their property, or if information could be of interest to the public.

As part of their duties to publish current information, institutions publish and distribute official information bulletins, usually prepared by their press-centers. Such practices existed even before the adoption of APIA.

There are a number of cases, registered in the electronic database of AIP, showing that journalists are unhappy with the contents and distribution of the information bulletin of the Ministry of Internal Affairs (MIA). The number of registered cases coming from the Police Offices (Regional Departments of MIA) for the last year is 64. All these cases have been referred to us by journalists, who are the most dedicated group of seekers of such information. Most often information about certain events is either missing from the bulletin of the Police Offices, is scarce, or is published with considerable delay, only after appearing in the bulletin of MIA. Frequently (especially in cases of verbal requests), due to the lack of specific rules on the provision of information and due to “operational necessity”, press secretaries of the Police Offices refuse to grant any information, or transfer the requestors to the MIA in cases they don't feel comfortable answering.

Here are the conclusions that we have drawn from monitoring the activity of press-centers:

1. The lack of specific written rules on the preparation of daily bulletins leads to omission of important information or inclusion of inaccurate facts, which is

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<sup>79</sup> We have received such complains related to the activities of the Council of Ministers press-center

the main reason why most journalists complain about the work of Police Offices.

2. Because of the above the flow of information is incomplete, forcing some journalists to improvise in writing about specific events, which on the other hand leads to publishing wrong or inconsistent facts.

We have to note here, that we have not registered in our electronic database any cases of systematical problems with the preparation and distribution of the regular information bulletins in other institutions besides the Regional Departments of MIA.

In the report on the access to information situation in Bulgaria in 2001 we indicated that according to data received in the office of AIP, officials are not well aware of their obligations to actively publish and distribute information of significant public interest. Unfortunately, this situation has not changed much in 2002. We continue to register cases, when events of fire and other disasters (like floods and pollution), mayors, environmental inspectors, and civil protection officials are mostly concerned with preventing further damage. In such cases publishing information is not a priority and journalists themselves have to look for details on the disaster, the measures taken and the damage caused. A typical example is a Civil Protection Office, which stopped providing information about disasters in its region. Officials stated, that only their head can provide such information, but he could not be found after the end of his working hours (after 5 p.m.) and during weekends. Because of this journalists could not receive important information about an earthquake in the region.

In large number of institutions, there is no official appointed to provide current information of public importance in cases of disasters. This sometimes leads to the distribution of false or misleading information.

We have tried to present the overall situation when journalists, people who present the news of the day, seek information. Using the procedures of APIA, journalists have started to realize that information received through filing requests could be useful in investigative journalism. Indeed, the Access to Public Information Act is not an act for journalists, who reflect the news of the day, but rather for those who create the news after some investigation. The number of cases, in which journalists use the procedures of APIA to request information in relation to privatization contracts and revisions by state bodies, has increased. The journalists for Tunja newspaper in the city of Yambol are the most active in this respect, having filed alone more than ten APIA requests to the Privatization Agency, the Agency of Internal State Financial Control, the Accounting Office, the Regional Prosecution Office in Yambol, etc.

### ***Information sought by citizens***

As we indicated earlier, an increasing number of citizens are using the opportunities that APIA presents them and request information following its procedures. We have



registered 101 cases when citizens have turned to the lawyers of AIP for assistance. They can be classified into two groups.

Some citizens turn towards us seeking assistance in receiving documents, concerning their personal problems, for example involving property restitution, unclear issues concerning auctions and competitions, as well as problems with the municipalities.

Active citizens form the second group of information requestors. They usually are well aware of the important social events in the state and follow closely the activities of the state bodies. Those active citizens seek for example information about important privatization contracts, Government contract, activities of politicians, etc. In January 2002 a citizens turned towards us, wanting to find out how certain acts have been voted on by MPs. We prepared for him an information request, directed to the Parliamentary Information Center, wishing to obtain access to all registers, created at the time of voting on these acts. After we received the requested information, it not only became clear how each of the MPs had voted on each law provision, but it also turned out that some of the text have been adopted without the necessary quorum.

After reading publications in the press an active citizen filed an APIA request to the Minister of Finance, wishing to obtain access to the contract between the Government and the British Company “Crown Agents” and the tri-monthly reports on the contract implementation<sup>80</sup>. The refusal of the Minister of Finance to present copies of the contract and the report resulted in two court appeals in front of the Supreme Administrative Court.

### ***Information sought by NGOs***

One of the major groups of information seekers is the NGOs. For the year 2002 we have registered 45 cases when NGOs have sought public information. In some cases NGOs request information, which they need in the course of some investigation. In other cases they seek documents, related to the implementation of a project or when they conduct monitoring of the activities of certain state institutions.

Most often environmental organizations request measurements data related to the environment, from examinations of the Regional Environmental and Water Inspections, from the National Construction Control Department, etc. An example is a civil committee protesting against the construction of a gas station in the town of Haskovo. They filed an APIA request, wishing to obtain a number of documents, among which the regulation plan, the Report on the impact on the environment, protocol from a public discussion of the Report, and an evaluation of the impact on environment and health done by an independent expert.

In other cases NGOs have requested documents, in order to perform some analyses and evaluate existing regulations and practices, and to give recommendations on them. When

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<sup>80</sup> Although we did not receive the contract itself, the Ministry of Finance gave a written response, indicating the contract purpose and the price paid.

the Institute for Market Economics (IME) prepared a report ordered by the Center of Independent Living “Political Economics and Financing of People with Disabilities”<sup>81</sup>, IME filed a number of request to a number of institutions, among them the Ministry of Health, the Ministry of Labor and Social Policy, Rehabilitation and Social Integration Fund, National Social Security Fund, and the Labor Executive Agency (LEA). With the exception of LEA, all institutions presented the requested information<sup>82</sup> within the terms of APIA. NGOs also seek information related to securing basic human rights on behalf of the state. For example, the Bulgarian Helsinki Committee requested information related to child crime in Bulgaria, as well as steps taken by the state to lower such crime. Request were filed to the Central Commission for Fighting Crime by Minors, and to the Territorial branches of the Commission in Batak, Vidin, Lom, and Troyan, wishing to get access to the reports on child crime for the previous year. Copies of the reports were presented to the requesting organization.

### ***Business organizations seeking information***

Business organizations also find useful the procedures of APIA to get access to public information. Documents they request and receive are used by sociological agencies, producers of electronic legal software, etc.

### **Court practices**

A relatively rich court practice under the Access to Public Information Act was developed in 2002. Most of the appealed refusals to grant access to public information were reversed and some of them were even proclaimed void. A number of important conclusions can be drawn in different directions. First, citizens and NGOs are increasingly determined to defend their rights of information access, when they believe this right has been violated. Second, the officials from the executive power are still not prepared to implement the law, and are sometimes openly reluctant to fulfill their obligations under APIA. It is still common for an official not to give any answer to an APIA request. Third, courts and especially the Supreme Administrative Court act as an independent body, guaranteeing the constitutional right of access to information. The courts in their rulings and decisions have given interpretations on many unclear provisions in APIA, thus creating a court practice that helps solve many problems in the implementation of the law.

Different problems have been raised in the course of the court practice both of adjective and substantial matter. Questions of the applicability of exemptions of the right to information access in different situations have not been considered in detail by the courts. There have not been many cases on the two recently adopted acts, regulating the exemptions - PCIA, which is the law specifying requirements for the most important exemptions related with state and official secret and the PDPA.

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<sup>81</sup> See: “From Disabled People Towards People with Disabilities”, CIL, Sofia, 2002

<sup>82</sup> LEA presented the requested information in the course of the court case in 2003

## *Questions of adjective matter*

### **Silent refusals**

Institutions (even the Council of Ministers<sup>83</sup>) continue to refuse to give decisions on APIA requests in the terms provided by law. One of the questions needed to be answered first in the implementation of APIA was whether appeals against silent refusals were admissible. This question came up because there was no a provision in APIA, condemning an eventual lack of an answer as a silent refusal. In two cases, the five-member panel of the Supreme Administrative Court adopted the view that the lack of a decision on an APIA request can be appealed against<sup>84</sup>.

Initially courts used to repeal the silent refusals as contradictory to the law<sup>85</sup>. Later, after a few cases when the question was raised by the requestees whether the term for appeal was met, in two decisions from December 2002 the Supreme Administrative Court proclaimed silent refusals void, because the decision was not in written form, as APIA clearly stipulates<sup>86</sup>. In the motives of the decisions, the form of the decision on APIA requests is given particular importance, as a guarantee of the constitutional right to access information set down in law.

Several silent refusals were repealed as contrary to the law by III-A, III-B, III-C, III-D, and III-G panels of the Sofia City Court<sup>87</sup>.

### **Request for re-examination of information requests**

There have been a number of cases, when requestors file a second information request after a certain amount of time, wishing to receive access to an already requested and refused information. Usually people do this because they have missed the appeal term, possibly because they had not been aware that refusals can be appealed, or after a change of a law or the factual circumstances. According to decisions of the SAC, appeals against successive refusals to grant information should be declared inadmissible and left without

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<sup>83</sup> Such was the case with a silent refusal to grant access to information to a Capital newspaper journalist. The silent refusal was proclaimed void with Decision 12234/29.12.02 of SAC, appealed by the CoM.

<sup>84</sup> In Decision 8645/16.11.2001 SAC adopted the following stance: "In the absence of regulation in special legislation, the general law should be applied. Therefore when obliged bodies in the sense of art. 3 of APIA fail to rule within the time limits an APIA request, tacit refusal in the sense of art. 14 para.1 of APA would be in place, which is subject to judicial control. Adopting the opposite view would in practice mean denial of justice. Courts cannot deny justice even in the absence of law provisions."

<sup>85</sup> Decision 1795/26.02.2002 on administrative case 7176 of SAC Fifth panel; Decision 2764/25.03.02 on administrative case 1763/ 01 of SAC Fifth panel.

<sup>86</sup> Decision 11218/10.12.02 on administrative case 6471/02 and Decision 12234/29.12.02 of SAC, appealed. In the first decision the court notes: "The grammatical and logical analysis of the law leads to the conclusion that, in order to meet the purpose of APIA, which is to guarantee the constitutional right to information access, decisions on APIA requests should be in written form".

<sup>87</sup> Decisions on administrative case 510/02, administrative case 511/02, administrative case 512/02, administrative case 515/02, administrative case 723/01, administrative case 882/01 /partially repeals the decision of the institution/ of the Sofia City Court, Administrative panel, not yet entered into force.

examination by the court, according to art. 32, para. 4, item 2 of the Administrative Proceedings Act<sup>88</sup>.

There are a number of problems arising from these decisions. What would happen, if between the two requests a new act comes into force, according to which the requested information should no longer be prevented from access<sup>89</sup>? If we accept the view, that no judicial control of the second refusal is possible, than this will put citizens who have requested certain information before the adoption of an act into a more unfavorable position compared to those who have filed their requests after the enforcement of the new regulation. A similar situation would arise if two people request access to a document before and after the expiration of the term of art. 34 para. 1 of the Protection of Classified Information Act. Let us assume that the first refusal is well grounded, something, which the requestor can see from the motives of the refusal. But should he/she be punished for his/her “premature curiosity” by being denied the possibility to appeal against the second, ill-grounded refusal? There is another group of problems, reported to AIP, caused by the fact, that refusals to grant access often lack a description of the procedure and terms for appeal. This violation of the act often leads to denial of justice, because citizens often do not know the procedures and miss the terms for appeal. This motivates them to file another request, hoping that they can defend their right to access after a subsequent refusal<sup>90</sup>. This problem will have to find its adequate solution in a law<sup>91</sup>.

### **Legal interest of appealing**

In some cases the institution that initially refused information to a certain information, actually presented it to the requestor in the course of the court proceedings. In these cases the court has adopted the view that there is no legal interest in appealing the refusal because the right to information access had actually been exercised<sup>92</sup>. According to the court decisions the institution had itself reversed its refusal, and in this way had provided information to the requestor. Although this is a convincing argument, some additional

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<sup>88</sup> See Ruling 8400/23.09.02 on administrative case № 4653/02 of SAC Fifth Panel; Ruling 9190/ 02 on administrative case 8526/02 of SAC Five-member panel; Ruling 11278/02 on administrative case 9775/02 of SAC Fifth panel.

<sup>89</sup> This was for example the case when Rositsa Dimitrova in 2000 was lawfully refused access to requested information, in relation to a privatization contract, which constituted official secret. In 2002 Mrs. Dimitrova requested again the same information, indicating that according to an International Regulation, which had entered into force between the two requests, such information should not constitute official secret after the completion of the contract. Despite this fact, in Ruling 11278/02 a five member panel of SAC adopted the view that this was a request for re-examination.

<sup>90</sup> The assumption that citizens are aware of the law provisions in this case transfers the necessity of quick and effective actions to the requestors and thus provides a lower degree of protection of a constitutional right. The short period for appeal, the lack of information about it, and the impossibility for its renewal with a subsequent information request forces citizens to look for assistance from a lawyer even on this early stage of information seeking. This fact seriously impedes the implementation of a right, which usually is not connected with financial benefits to the requestor.

<sup>91</sup> This puts a broader question related to the right of judicial protection. In some countries this problem is solved, by considerably prolonging ex lege the appeal period, in cases when decisions on APIA requests lack instructions on the possibilities for appeal. In these cases, the wish of the officials to enforce their acts motivates them to strictly follow their legal obligations.

<sup>92</sup> Ruling 9190/ 02 on administrative case 8526/02 of SAC Five-member panel.

questions have to be considered. There is no doubt that by presenting a sealed copy of the requested documents, the requestee recognizes the right to access, and this is how the legal dispute could be considered over in this respect. According to art. 4 of APIA, however, the right to information access is an individual right that could be satisfied only if the documents are presented to the requestor in the way he/she had specified in the information request. Presenting the documents in court cannot be considered in this sense as satisfactory to the requestor's right to information. For example, in one of the court cases the requested document was presented in a court session, after the court obliged the institution to present it as evidence. The court wished to gather evidence in order to judge whether the refusal to deny access to the requested information had been lawful. According to the court order, the document had to be kept separately from the case file. This order was not followed and the requested information remained part of the file. We do not consider this situation as equal to a reversal of the silent information to grant information.

### ***Questions on the definition of the right to access public information and the exemptions from this right***

#### **Who is obliged to grant access to information under APIA?**

The question which institutions are obliged to grant access to information was raised after the adoption of APIA. APIA does not clearly define who is actually obliged to answer information requests in a certain state or municipal institution. According to the provision of art. 3 para. 1 of APIA there is indeed an obligation for the state and municipal institutions. There are cases however, when decisions to refuse access to information have been signed by persons, different from the body of power himself/herself, like for example heads of administrative departments. Not taking into consideration the early inconsistent decisions, SAC adopted the view that no official can take a decision to refuse or grant information, unless explicitly empowered in the meaning of art. 28, para. 2 of APIA<sup>93</sup>.

A question has arisen whether public law entities and their branches are obliged in the sense of art. 3 para. 2, item 1 of APIA to provide access to information, like the National Health Insurance Fund (NHIF) and its regional branches. Several appeals have been filed by citizens and organizations against decisions of the NHIF to present information about its budget<sup>94</sup>. In the six court cases that have been finalized, the Sofia City Court decided that the National Health Insurance Fund is obliged under APIA<sup>95</sup>.

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<sup>93</sup> Decision on administrative case 7189/01 of the Supreme Administrative Court, Fifth Panel. For more details see "Access to Information Litigation in Bulgaria. Selected Cases." Sofia, 2002, Access to Information Programme, pp. 20-22

<sup>94</sup> A significant number of appeals were filed by General Practitioners Association – Veliko Turnovo.

<sup>95</sup> Decisions on administrative cases (511/02 of III-G Administrative division (AD), 512/02 of III-C AD, 515/02 of III-A AD, 510/02 of III-D AD, 2295/01 of III-C AD, 514/02 of III-Zh AD, all of them in the Sofia City Court.

The question has been raised whether the bodies of the judicial system are obliged under APIA, although the provision of art. 3 para. 1 of APIA, according to which all bodies of the executive power and municipal institutions are obliged to provide access to public information, seems quite clear and according to us would not cause problems<sup>96</sup>. In the decisions of the Regional Court of Yambol and the Supreme Administrative Court this question was clearly solved. Both courts assumed that judicial institutions and the prosecution in particular are obliged under APIA and the refusal of the Regional Prosecution Office was repealed<sup>97</sup>.

Another very important question is whether officials should reply to an information request if they don't possess the requested information. In a decision, a three-member panel of the Supreme Administrative Court dismissed the objection of the requestee, who claimed that the request was wrongly addressed. The court decided that requestees should judge whether it is of their competence to answer APIA requests, or eventually transfer the requests to another institution<sup>98</sup>. This court decision is of great practical importance, because in many cases officials are reluctant to answer information request, and later their lawyers claim in court that information could be found somewhere else, or was non-existent. In such cases there is a problem of ensuring effective legal protection of the right to public information. Even if such a decision (or lack of it) was repealed, the requestor would have to start the procedure of information seeking all over again.

### **Which information is “public”?**

The term “public information” has not been defined precisely by the lawmakers, as was later noted in the practice of the Supreme Administrative Court. The provision of art. 2 para.1 of APIA is unclear, in contrast with art. 10, art. 11, etc. These latter articles define the two kinds of public information – official, contained in the acts of the institutions, and administrative information, which is collected, created and kept in connection with official information, as well as in the course of the activities of the bodies and their administrative structures. Obviously (something that can also be seen in court practice) these regulations give a better idea on which information is public<sup>99</sup>. So far courts have been abiding by a wider definition of “public information” assuming that the purpose of the Act is to extend to a maximum the categories of public information<sup>100</sup>. The court also assumed that the subjective views of the obliged officials under APIA should not determine which information is public. We have rarely encountered arguments that certain information is not public by the institutions. There is no single court case in which a court has assumed that certain requested information is not public. In the case “Alexey Lazarov vs. the Council of Ministers” the five-member panel of SAC gave an interpretation of the concept “public information” tying it to the purpose of the law and in connection to the

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<sup>96</sup> This question was put by the Sliven Military Prosecutor, in relation to a request by the Bulgarian Helsinki Committee.

<sup>97</sup> Decision 48/25.04.02 on administrative case 162/ 01 of the Yambol Regional Court; Decision 708/29.01.03 of SAC Fifth panel on administrative case 6269/02.

<sup>98</sup> Decision 7616/29.07.02 on administrative case 3631/02

<sup>99</sup> Many court decisions of SAC refer to these provisions when determining whether the requested information is public

<sup>100</sup> Decision 9822/02 on administrative case 5736/01

international standards and more specifically Recommendation (2002) 2 on of the Committee of Ministers of the Council of Europe to member-states on access to official documents<sup>101</sup>.

### **Formulation of the request**

Two court cases raised the question whether citizens need to formulate precisely their information requests. This question is related to the interpretation of art. 25 para. 1 item 2 of APIA “information requests should include a description of the requested information” and art. 29 para.1, according to which, if a request is too broadly formulated, the requestor is notified that he/she should specify what information he/she is seeking access to. In the case *Lazarov vs. the Council of Ministers* the five-member panel of the Supreme Administrative Court adopted the view that the request was “broadly formulated” and did not contain a description of the requested information, although Mr. Lazarov had requested a copy of the minutes of a Council of Ministers session from July 26, 2002<sup>102</sup>. The court did not indicate how the request could possibly be made more specific. In another case, when two inspectional reports copies of two schools in Sliven were requested under APIA, the Sofia City Court adopted the view that the information request didn’t specify what information was requested.<sup>103</sup>

We believe that the purpose of art. 25 para. 1 item 2 is not to create an opportunity for the officials to refuse access to the requested information. Just on the contrary, as we can see from the meaning of art. 25, an information request should contain a minimal set of data, that would allow the officials to register it and fulfill their obligations under APIA<sup>104</sup>. In any case, an obvious consequence of the above interpretation of the court is, that lawyers of the obliged institutions under APIA have started arguing that information requests are not well formulated in every court case.

### **Exemptions. Right to partial access**

Among the limitations of the right to information access most common are the cases of refusal due to official secret, when information concerns a third party, or when information falls into the limitation of art. 13, para. 2, item 1 of APIA. With the adoption of the Personal Data Protection Act and the Protection of Classified Information Act in 2002 the exemptions from the right to information access were somewhat clarified, something that also resulted in clarifying which information should be accessible. There was however, some controversy on how to interpret some provisions of the newly adopted acts in connection with APIA.

The right to partial access, i.e. the right to access only parts of a requested document, has not been implemented until now. In their practice, courts assume that such right should be

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<sup>101</sup> Decision 4694/02 on administrative case 1543/02

<sup>102</sup> Decision 4694/16.05.02 on administrative case 1543/02

<sup>103</sup> Decision 109/04.03.02 on administrative case 2001/01 “*Social Barometer Association vs. Head of the Internal State Financial Control Agency*”

<sup>104</sup> Detailed arguments can be found in the cited book on APIA Litigation p. 26

exercised, so that the disclosure of personal data could be avoided, while in the same time the right to information access should not be impeded<sup>105</sup>. Unfortunately, we have not registered any cases, when an obliged institution has used the opportunity provided in APIA to actually present partial access.

## **State and official secrets**

The adoption of the Protection of Classified Information Act (PCIA) created for the first time in Bulgaria a more complete regulation of the state and official secrets. Some appeals have already been filed to the courts against refusals, based on provisions of PCIA.

So far, the courts have given decisions on cases, related to official secret, but there is no decision concerning state secret.

There have been several cases, in which the obliged institutions have motivated their refusals to grant information with official secret, contained in the Internal Financial Control Act, The Tax Code, and The Act on Special Investigative Means. Usually the refusals to grant information access include only the provision defining certain information as protected, rather than more complete arguments and proofs that the requested information, if presented, could harm a certain interest. No explanation is included on the constitutional interest that a certain exemption protects. No institution has considered providing partial access, nor even indicated whether partial access might be possible. No evidence has been given in support of the argument that there is indeed an exemption provided in law. Often no specific description of the facts is present, i.e. the refusal lacks a formulated factual argument.

These actions of the public officials are stimulated by unclear or broadly formulated legal provisions, for example the definition of the term “official secret” in art. 3, para. 4 and art. 12, para. 3 of the Internal State Financial Control Act (ISFCA). These problems can also be noticed in the practice of SAC. Following the international standards on access to information, the court noted that there is a lack of a provision in ISFCA, according to which the requested information (in this case the contents of an inspection act) could be considered official secret<sup>106</sup>. In this way, the bodies of both the judicial and the executive power are inculcated to follow the standards in the FOI area when motivating a decision to refuse access to concrete information. It should be noted however, that the court practice in relation to the right to access information contained in inspection acts is quite inconsistent<sup>107</sup>.

According to the court practice, a decision whether certain information is official secret should only be taken while also considering the constitutional right to information access.

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<sup>105</sup> Decision 6017/02 on administrative case 10496/01 of SAC First Panel; Decision 9822/01 on administrative case 5736/01 of SAC Fifth panel

<sup>106</sup> Decision 10539/02 on administrative case 5246/02 of SAC Fifth panel

<sup>107</sup> Compare to Decision 7340/19.07.02 on administrative case 3363/02



The court has emphasized the serious obligation of the institutions under APIA to indicate the legal basis and the circumstances in every refusal to grant information<sup>108</sup>.

We think that the practice of SAC is very positive, but we cannot agree with one of the courts decision about statistical information. According to a SAC III panel statistical information can constitute official secret even when it is not provisioned in law and the principle of harm is not applied (art. 26 of PCIA)<sup>109</sup>.

## **Information in preparatory documents**

One of the most common reasons used in refusals is that the requested information has no meaning on its own, when it is contained in opinions, recommendations, analyses used in the preparation of acts of the executive power.

In this aspect, a question was raised whether the term “operational preparation of the acts” should have a narrow or a broad application. It is not clear which information in connection to the preparation of acts, was meant by the legislators. The second question is whether this exemption is tied to the criteria of the Protection of Classified Information Act. The general definition of the term “official secret” is given in art. 26 of PCIA. This would suggest that information under art. 13 para. 2, item 1 of APIA could only be exempt from access according to the provisions of PCIA<sup>110</sup>. This means that the institutions under APIA have the obligation to formulate adequately the categories of information that can be restricted from access, having in mind the list of information, which should be classified as state or official secret<sup>111</sup>. We believe that when an institution judges whether certain information falls into one of categories from the list, the decision to refuse access to this information should also contain analyses of the eventual harm, which could result from revealing such information. This is the only way to follow the provision of art. 26 of PCIA and the meaning of Ruling 7 of 1996 of the Constitutional Court of the Republic of Bulgaria. According to the Constitutional Court the right to information under art. 39 – 41 of the Constitution can be restricted in exceptional cases, when a disclosure of information would harm a constitutional right or interest<sup>112</sup>.

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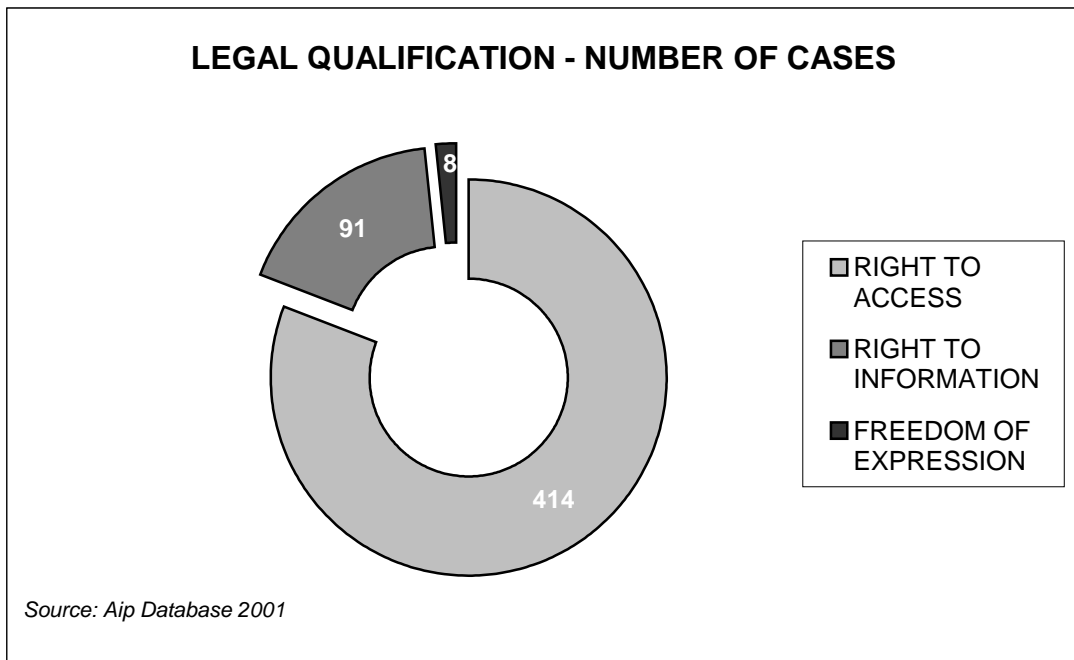
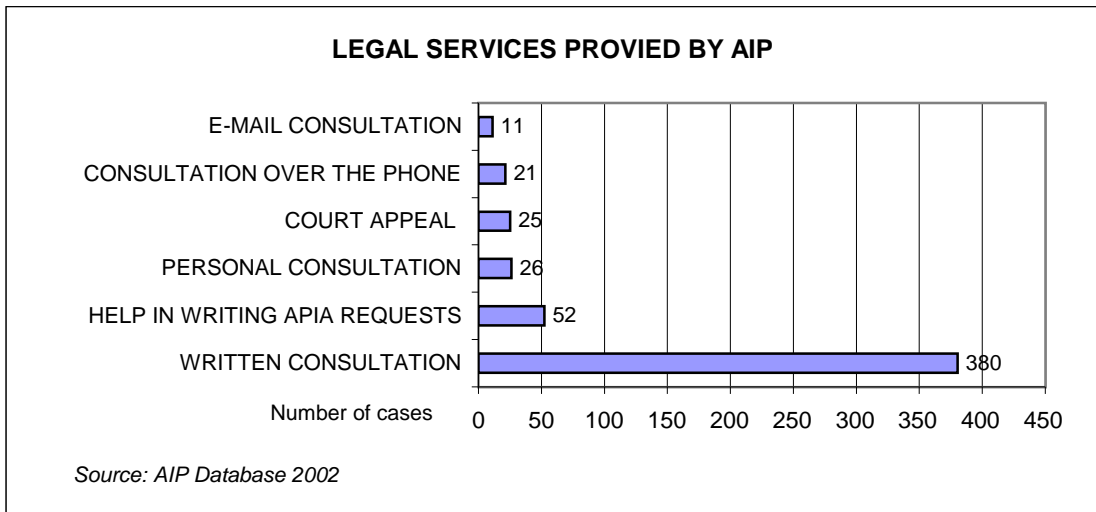
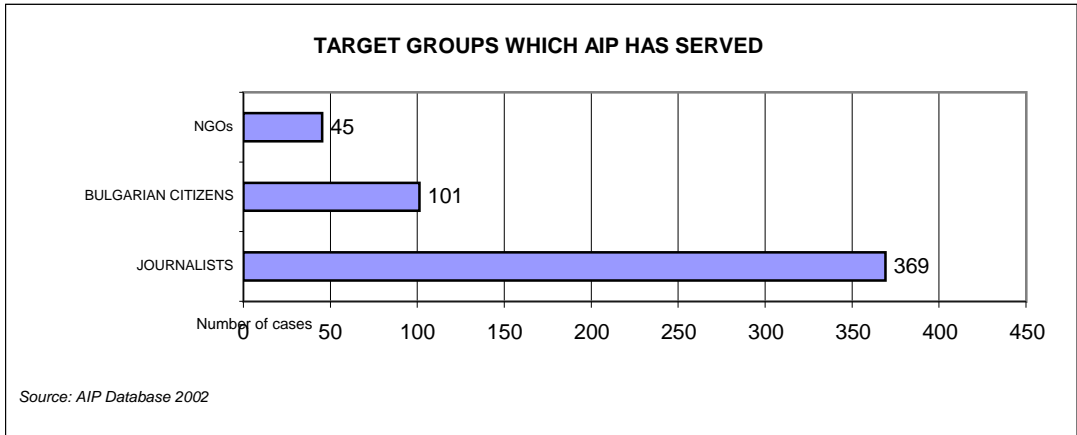
<sup>108</sup> Decision 6017/02 on administrative case 10496/01 of SAC First panel

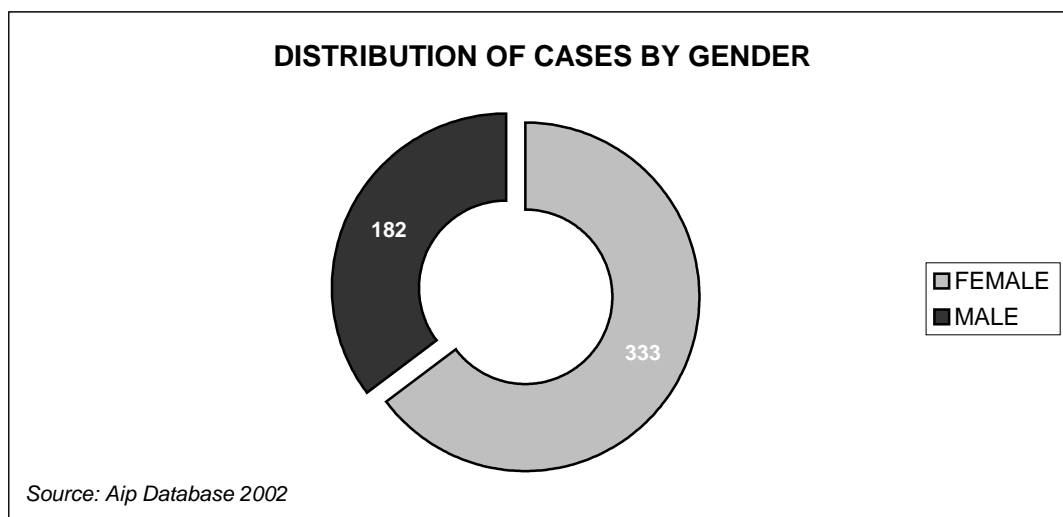
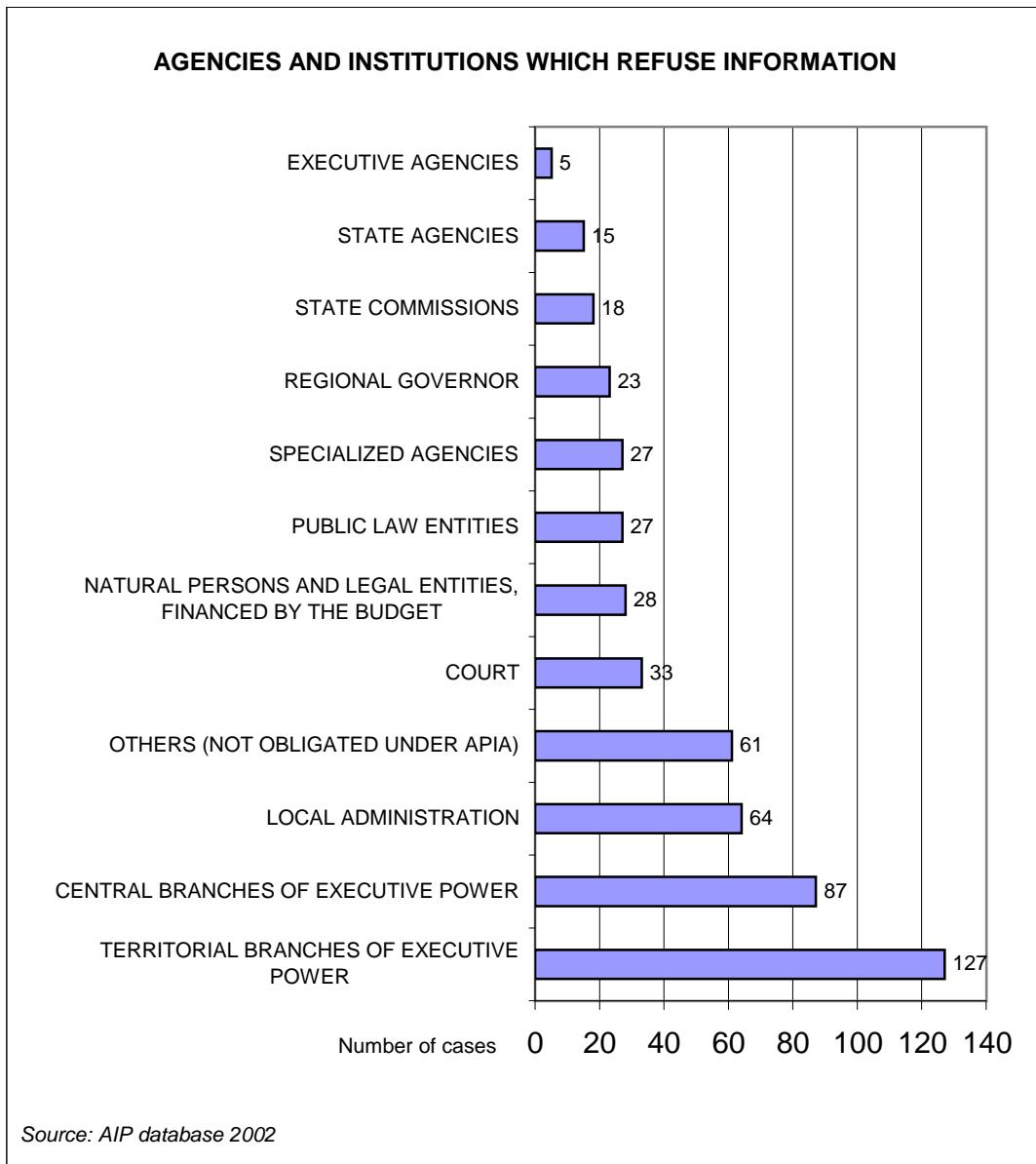
<sup>109</sup> Decision 6480/02 on administrative case 103/02 of SAC Third panel on the number of permissions for the usage of special investigative means for a specified period

<sup>110</sup> Decision 4694/02 on administrative court 1543/02 of SAC Fifth panel

<sup>111</sup> Decision 4694/02 on administrative court 1543/02 of SAC Fifth panel

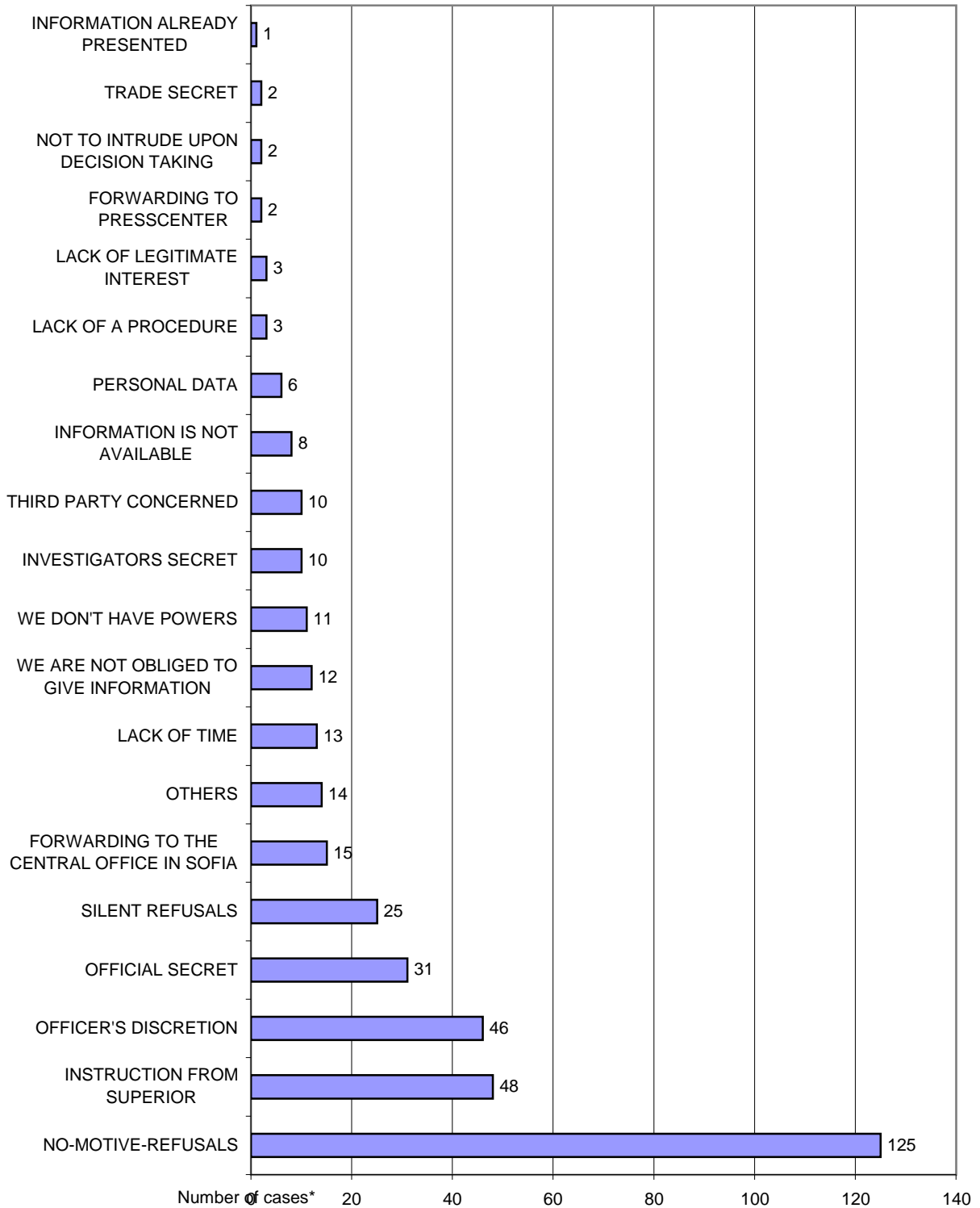
<sup>112</sup> Ruling 7/1996 on Constitutional case 1/1996





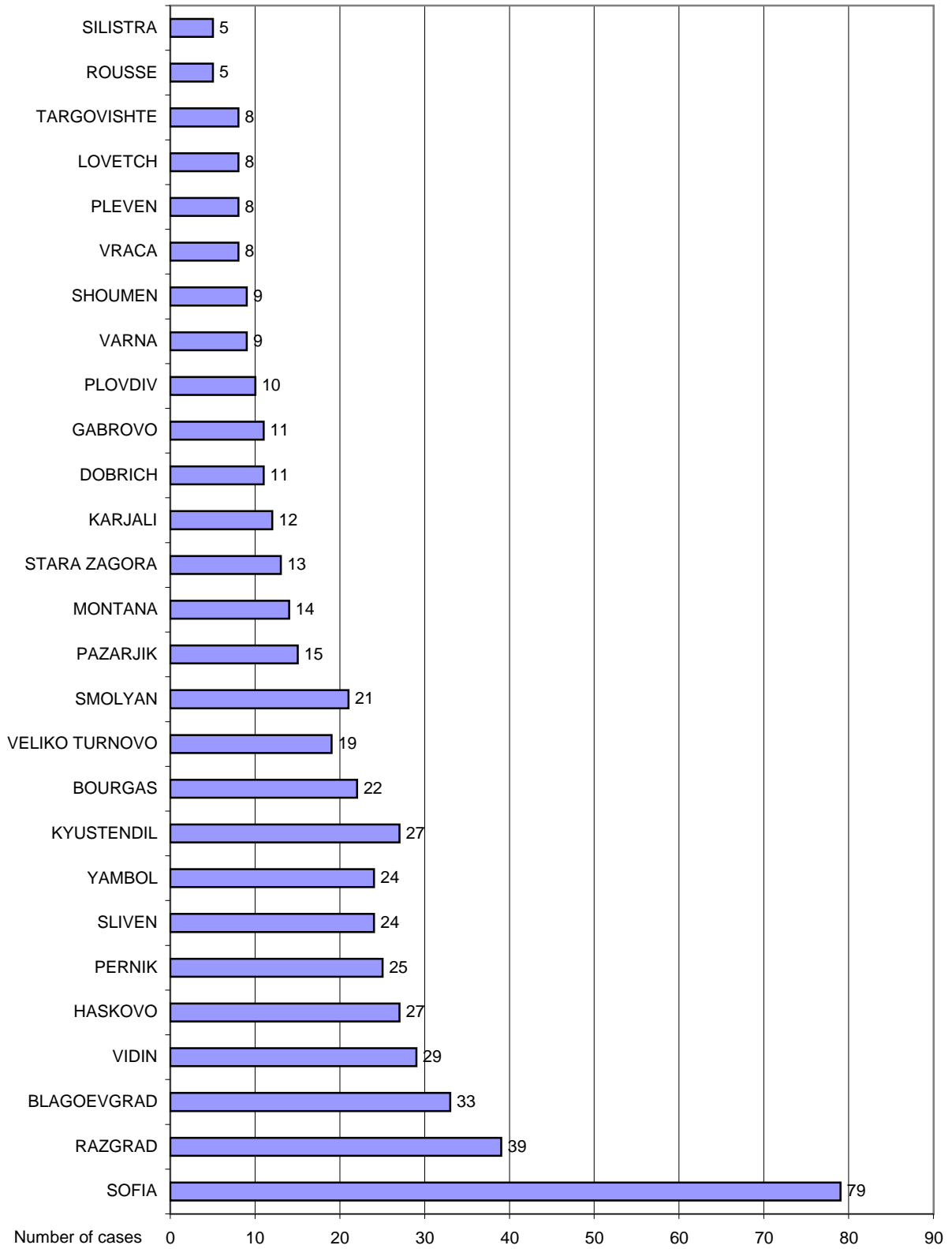
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**GROUNDS FOR REFUSALS**



\*The sum is less than 515 because in some cases information has been presented, while in others the procedure on APIA has not been started

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Source: AIP Database 2001