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AGJENCIA PËR INFORMIM DHE PRIVATËSI
AGENCIJA ZA INFORMACIJE I PRIVATNOST
INFORMATION AND PRIVACY AGENCY



GUIDELINES

on Conducting Harm and Public Interest Test

[when restricting or denying a request for access to public documents]



xxx 20xx

LIST OF ABBREVIATIONS

AIP	Agency for Information and Privacy
LAPD	Law on Access to Public Documents
LPPD	Law on Personal Data Protection
LGAP	Law on General Administrative Procedure
PI	Public Interest

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INTRODUCTION

According to the Law on Access to Public Documents, the Agency, decides for complaints filed against actions or failures to act of any public institution that restricts or denies access to public documents to applicants.¹ The second instance is the administrative court. The need for these Guidelines stems from the requirement to ensure that access restrictions, respectively rejections, are in line with the principle of proportionality, as provided in the Law 05/L-031 on General Administrative Procedure². This document is intended to serve as a guidance to responsible officials (chief administrative officials in public institutions)³ when considering a request for access to public documents, prior to deciding to restrict or reject the requested access.

The aim of these guidelines is to assist public institutions in handling and deciding on requests for access to public documents, as provided under the law on Access to Public Documents, by means of harm and public interest tests, detailed herein. This is the first time that specific guidelines for such a purpose are being developed in Kosovo and, therefore, a number of practical examples have been listed in order to enable institutions to carry out tests as provided in these Guidelines prior to restricting or denying access to a public document to applicants who have filed a request for accessing such information.

Appeals against access restrictions or denials can be filed at the Agency for Information and Privacy⁴ (hereinafter: the Agency), as a first instance body for reviewing such appeals. The Agency is an independent body with powers to oversee the implementation of legislation on access to public documents and protection of personal data, with a view to protect the fundamental rights and freedoms of natural persons in relation to their personal data processing, and guarantee access to public documents to natural and legal persons. The Agency's material competencies are laid down under the Law No. 06/L-082 on Protection of Personal Data⁵ and the Law No. 06/L-081 on Access to Public Documents⁶.

The weighing of the public interest when making a document publicly available is relative and depends on the circumstances at the time when the request for access is filed, therefore, different decisions may be issued for the same document at different times. A harm and public interest test should be carried out prior to deciding on a request for access to a public document, to determine whether the legally safeguarded interests override the public interest.

¹ The complaint can also be filed before the Ombudsperson Institution, as an independent body, that according to the Law on Access to Public Documents is responsible to help residents in exercising their right to access public documents.

² Law 05/L-031 on General Administrative Procedure, 21 June 2016.

³ Responsible official in this specific case means a responsible official as defined by Article 26 of the Law No. 05/ -031 on General Administrative Procedure, who carries out the administrative proceedings at the request of the party for access to public documents. Furthermore, the responsible official within the meaning of Article 27 of this Law shall, apart from conducting the proceeding for access to documents, decide on the request, sign the decision and notify the party, unless otherwise provided by a special law.

⁴ The link of the Agency is available at <https://aip.rks-gov.net/>.

⁵ Law No. 06/L-082 on Protection of Personal Data⁵, 25 February 2019.

⁶ Law No. 06/L-081 on Access to Public Documents, 4 July 2019.

The Law on Access to Public Documents allows access to public documents to every natural or legal person, without discrimination on any grounds. Nevertheless, under Chapter V, the Law also outlines a set of permissible grounds for restricting or rejecting access to public documents and cases when access is always granted. A test is to be carried out only where the Law allows restriction or rejection of access, whereas it is not required in instances where access is always granted upon a request.

In order for the public institution to enhance public trust, it is paramount to provide a well-established justification for rejecting or restricting access by laying down both the grounds in favor of and against granting access in the decision to restrict or reject, so that each decision on restriction or rejection is weighed properly through the test detailed hereunder. In addition, the justification should also list the alternative ways considered to enable access to the party, as provided under Chapter 5 of these Guidelines.

Annex 1 to these Guidelines details, *inter alia*, the steps that the responsible official should follow when establishing the public interest, while Annex 2 includes a diagram illustrating the weighing of the public interest on the one hand and the need for withholding the requested information on the other.

1. CASES WHERE EXCEPTIONS TO THE TEST APPLY

The Law on Access to Public Documents, in Article 17, paragraph 3, lists cases where access to public documents shall always be granted. These cases include the following:

- 1. the public document requested is related to public money expenditures;*
- 2. the public document relates to the discharge of public functions or employment relationships of public officials, except in cases where personal protected data is involved or when specified differently in the relevant laws;*
- 3. the requested public document relates to the environment, waste, hazardous substances or information of environmental safety reports as provided for by the relevant environmental protection law.*

Notwithstanding the above, if only a part of a requested public document is covered by any of the exceptions listed in paragraph 2 of Article 17, the remaining parts of the public document shall be released, as presented in detail in the next Chapter.

2. CASES WHERE EXCEPTIONS TO ACCESS TO PUBLIC DOCUMENTS MAY BE APPLIED DUE TO AMBIGUITIES IN THE REQUEST

According to the Article 17, paragraph 5 of the Law on Access to Public Documents, the public institution to which a request for access to public documents has been addressed may refuse to grant access if:

- 1. regardless the assistance by the public institution, the application remains quite unclear to enable the identification of a document; and*
- 2. if the conditions and requirements from paragraphs 2 and 4 of Article 17 are met.*

Where the request for access to a public document is unclear to enable the identification of a document, the public body to which the request for access has been addressed should inform and assist the party in exercising its rights as guaranteed by the Law in order to prevent failure of access to a public document due to a party's lack of awareness. According to the Law on Access to Public Documents, the public body should also inform parties about their rights, as well as the legal consequences of their actions or inactions.

A public body conducting an administrative proceeding shall ensure that the ignorance of a party shall not result in weaker protection to its rights and legitimate interests, which the party is entitled to pursuant to the law. A public body shall, in particular, inform the party of its rights and

obligations in the administrative proceeding and indicate the legal consequences of their actions or inactions during the proceeding.

A public body to which a request for access to a specific document has been addressed should provide such assistance to the party throughout the process. Furthermore, the public body should be diligent with respect to filing a request about providing the party with accurate, clear and understandable information concerning the manner in which to file a request, legal requirements and any other legally required formality, time limits and legal remedies available to the party in the event that access to the public document, as the party had requested, is restricted or denied.

According to these Guidelines, the obligation of a public body to provide information and active assistance the party consists in providing general information on the way how provisions on the stipulated information are usually interpreted and applied. If, despite the clear instructions of the public institution to indicate clearly in the request the public document to which access is being requested, the party fails to file a request clearly indicating the public document to which access is requested, the institution rejects the party's request for access.

3. CASES WHERE EXCEPTIONS TO ACCESS TO PUBLIC DOCUMENTS APPLY

The Law on Access to Public Documents guarantees the rights of every person to access public documents and prohibits public institutions from refusing access to public documents without a prior harm and public interest test for accessing the relevant public document in order to prove that the damage that would be caused to the protected interest overrides the public interest in accessing that public document.

Limitation of the right of access to public documents should be exercised in accordance with the principle of proportionality pursuant to the applicable Law on General Administrative Procedure and in accordance with the Article 17 of the Law on Access to Public Documents and only for the purposes of protection of:

- 1. life, health and public security;*
- 2. national security, defense and international relations;*
- 3. prevention, investigation and persecution of criminal activities in cases where the publication of public documents may damage the investigation process;*
- 4. disciplinary investigations in cases when the publication of public documents may damage the disciplinary procedure;*
- 5. inspection, control and supervision by public institutions in cases of handling classified information;*
- 6. right to privacy and right to erasure ('right to be forgotten');*
- 7. commercial confidentiality such as business, professional or company secrets;*
- 8. documents for which the public institution or third parties hold intellectual property rights;*
- 9. state economic, monetary and exchange policies;*

10. statistical confidentiality;

11. equality of parties in court procedure and efficient administration of justice; and

12. the deliberations within or between the public institutions concerning the examination of an issue, which contains a classified document.

If only a part of a requested public document is covered under any of the exceptions listed above, the remaining parts of the public document shall be released.

4. CONDUCTING A HARM AND PUBLIC INTEREST TEST TO DETERMINE WHETHER THE HARM IT WOULD CAUSE TO THE PROTECTED INTEREST OUTWEIGHS THE PUBLIC INTEREST FOR GRANTING ACCESS TO THE PUBLIC DOCUMENT

A public institution that receives a request for access to public documents should process and issue a decision on the request within the timelines provided under Article 12 of the Law on Access to Public Documents. Where the party is granted full access to the public document or documents, the public institution does not need to conduct a harm and public interest test.

Notwithstanding, if in its decision the public institution restricts or refuses access to the requested public document, then, prior to issuing such a decision, a harm and public interest must be conducted in accordance with these Guidelines, by the responsible official in the public institution to whom the request for access to the public document has been addressed.

4.1 HOW TO IDENTIFY THE PUBLIC INTEREST WHICH MAY BE ULTIMATELY HARMED BY THE GRANTING OF ACCESS TO THE PUBLIC DOCUMENT?

Processing and deciding upon the request for access to a public document might be a difficult task. The level of complexity will of course vary on a case-by-case basis, for instance, if the document in question is classified, it will be easier to restrict or deny access depending on the level and volume of the classification applicable to the relevant document. In contrast, in cases of legally prescribed circumstances permitting restriction or rejection of access, the task of the official will be much more difficult. These Guidelines aim to assist responsible officials by means of premises laid down hereunder to determine whether restricting or rejecting, access is permissible pursuant to the law.

Before reaching a conclusion to restrict or reject access to a document, responsible officials should first consider the purpose of the request, as well as the nature and content of the information included in the relevant document.

4.2 WHAT IS THE "PUBLIC INTEREST"?

The public interest is primarily an equivalent of the concept of the public good and, as such, encompasses a broad set of principles and values associated with the public good and what is in the interest of society. When dealing with a concept as broad as the public interest, one should also consider the risk that the responsible official may be subjective in certain cases as a first instance compliant body. Therefore, the second instance practices as well as case law will be of paramount importance in establishing consistency to the extent possible when assessing what represents a public interest. Public interest can also mean any government action directed to protecting and benefiting citizens at large, whereby essential goods and services are provided for the welfare of the population.

The public interest outweighs the harm to the individual interests when interest of the community or a considerable number of members of society is concerned. In such a case the public institution, for the sole interests of individuals cannot refuse to disclose the requested information. Thus, the exempted information can be disclosed if the same is in larger public interest meaning thereby that access to the exempted information can be allowed if public interest is served in providing the information

In a case brought before it, the High Court of New Zealand has noted the following in this regard: “[...] *it is necessary to draw attention to the distinction between matters properly within the public interest, in the sense of being of legitimate concern to the public, and those which are merely interesting to the public on a human level - between what is interesting to the public and what it is in the public interest to be made known*”⁷.

The “public interest” term does not necessarily imply affecting the interests of every citizen when providing access to a particular public document. This term should be understood in the meaning that the public interest is that which is provided by law towards the common good, rather than the one, which can be conceived or believed in the moral aspect by the individual. Moreover, the public interest concept is broad and flexible enough so as to accommodate the facts and circumstances associated with a particular case.

Another helpful interpretation of the public interest is found in the decision of the Supreme Court of Victoria, Australia stating that: “*The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the wellbeing of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals.*”⁸

⁷ TV3 Network Services Ltd vs. Broadcasting Standards Authority [1995] 2 NZLR 720 dated 15 May 1995. For more information, visit the following link: https://www.bsa.govt.nz/oldsite/assets/High-Court-Appeals/TV3_v_BSA_15_May_1995.pdf

⁸ Carter, M. Bouris, A. Freedom of Information, *Balancing the Public Interest*, p.5, Second Edition, May 2016, Published by the Constitution Unit School of Public Policy, University College London.

4.3 HOW TO CONDUCT THE TEST BEFORE DECIDING WHETHER TO GRANT, RESTRICT OR REJECT ACCESS TO A PUBLIC DOCUMENT?

Responsible officials should take the following steps in relation to a request for access to a public document:

- 1. Identify the case when access to the requested document may be restricted or rejected as provided by law;*
- 2. Identify elements which are in favor of the public interest to disclose the requested information; and*
- 3. Determine the relative weight of these competing interests and decide whether the public interest to disclose information or grant access outweighs the necessity to withhold such information.*

4.3.1 HOW TO IDENTIFY ELEMENTS OF PUBLIC INTEREST IN FAVOR OF GRANTING ACCESS?

To carry out this task, responsible officials should first *consider the purpose of the request, as well as the nature and content of the information* contained in the relevant document. When it comes to the content of the document, responsible officials should carefully read and examine the information that is being requested. This is a necessary step in each and every case, in order to determine whether the grounds for restricting or rejecting access are applicable. In addition, in order to understand whether the content of the information is such that, if published or if access to it is granted, it would benefit the public interest, responsible officials should consider the timing context, public administration transparency and accountability, delivery of justice, health, security and environment aspects.

The Timing Context

While conducting a harm and public interest test, responsible officials should consider the circumstances which exist at the time when they review the request for access to a given public document. Differing decisions may be issued for the same document at different times. Therefore, it is crucial that the context of the timing of the submission of a request and examination thereof is taken under consideration during the test, prior to restricting or denying access. For instance, if the request concerns a document produced, received, maintained or controlled by a specific public institution about an internal disciplinary procedure, access to such a document should be denied for as long as the disciplinary commission procedures are underway. In contrary, granting access would undermine commission's efforts to reveal the facts about alleged misconduct. However, once the disciplinary commission procedures are over and there is no longer a risk of undermining such procedures, access to the party can be granted as initially requested.

Transparency

Transparency is one of the most fundamental elements of good governance and as such it should be continuously sought and encouraged, to protect the common interest. Besides encouraging good governance, transparency also fosters better management of public money. Moreover, transparency contributes to increased public trust towards public institutions.

Practical examples of situations which are relevant to transparency to this end may arise quite often. For instance, after receiving a request for access to a public document, the public institution may find that there are no grounds for restricting or rejecting access and, in addition to granting access to the document in question, the responsible official should also make it available to the wider public on the official website of the institution or through other forms of public outreach.

Public Administration Accountability

Accountability over actions, or inactions, is very important both for the political level leadership and civil service members in respective institutions. In this context, accountability means that the leadership of institutions, whether they be politicians or public service staff members, should be held accountable for how they render decisions and exercise their responsibilities, including the way how they spend public money.

A practical example would be a contract for service delivery or acquisition of goods that a public institution has signed with a private contractor. If there aren't any grounds to restrict or deny access with respect to the information contained in this specific document or contract to a requesting party, then the party should be necessarily granted access, thereby fostering public administration accountability towards citizens in terms of exercising their public functions.

Health, Safety and Environment

Health, safety and the environment are a concern for every citizen, and always fall under the domain of the common interest to keep the public adequately informed about the risks to these public values and the measures or actions taken to protect or promote them.

Certainly, public institutions will also receive requests for access to documents related to health, safety or the environment. For instance, if the document to which access is requested contains valuable information on protecting forests from fire, then in the said case a responsible official should keep in mind the importance of such information and grant the requesting party access to the document.

Delivery of Justice

Delivery of justice also falls under the common interest domain. It concerns the proper and efficient functioning of the justice system and the important principles that underpin this system, including access to justice. The justice system encompasses civil and criminal law, but may also include special administrative proceedings.

Normally, as explicated above, access can be denied for each of these elements if dealing with a case where access restriction and/or rejection can be applied as provided by law, but only after the test has been performed.

4.3.2 FACTORS THAT ARE IRRELEVANT TO CONSIDER WHEN GRANTING REQUESTED ACCESS TO PUBLIC DOCUMENTS

When assessing whether access to the requested public document should be granted or whether a harm and public interest test should be conducted, responsible officials should under no circumstances take into account the following elements:

- a) *Such information would put the relevant institution or public institutions in an unenviable position;*
- b) *The information is of a technical nature or may be difficult to understand;*
- c) *The information is likely to be seen out of context, misunderstood or misinterpreted, and*
- d) *There is a likelihood that the publication of such information will cause unnecessary confusion or debate.*

Where an institution is concerned that information may lead to misunderstanding, it always has the opportunity to provide clarification to both the public and stakeholders in order to place the requested information in the right context and to help the applicant understand and interpret the information provided as per request for access to it.

5. CONSIDERING ALTERNATIVE OPTIONS TO STRIKE THE RIGHT BALANCE WHEN RESTRICTING OR DENYING ACCESS TO PUBLIC DOCUMENTS

If after conducting the test in accordance with these Guidelines, the responsible official decides that there is a legal ground allowing restriction or rejection of access to the requested document, he/she should make an effort to determine whether there are any other alternative ways to give the applicant the requested document.

The responsible official should always consider whether there is any alternative way to strike the right balance between the grounds for granting access to the applicant and restricting or rejecting the requested access. Such a balance can be achieved in one of the following ways:

- *by redacting (anonymizing or pseudonymizing) the part of the document for which there is a legal basis to restrict or deny access;*
- *by providing access to certain parts or summaries of the requested document, e.g. findings and recommendations contained within the requested document;*
- *by providing access in some other way other than the requested one, if possible;*
- *by providing verbal explanations in face-to-face meetings, in order to minimize harm, if it would offer the applicant access to the requested document, and*


- *by providing access to a third party, e.g. to a lawyer, notary, or practitioners of other professions that are subject to regulation by special professional codes of ethics.*


Annex 1 - Steps to follow for determining the public interest


<p>1. Principle of document availability</p>	<p>The responsible official should always be guided by this principle. An official document should be made available to the applicant, except for cases where the law allows for restricting or rejecting access to it.</p>
<p>2. Identify grounds for restricting or denying access</p>	<p>The responsible official should check if any of the legal grounds allowing for access restriction or rejection can be applied to the specific document requested.</p>
<p>3. Identify the public interest when granting access to the requested document</p>	<p>The responsible official should have an understanding of whether the content of the document is such that if published or given access to would promote the public interest. The responsible official should take into account, <i>inter alia</i>, the context of the timing of request, transparency, public administration accountability, health, safety and environment, as well as the administration of justice.</p>
<p>4. Weighing the relative weight of interests competing with one another (granting access or restricting/rejecting it)</p>	<p>The responsible official must strike a balance between the interests in granting access to the applicant and restricting or rejecting such access, in the following manner:</p> <ul style="list-style-type: none"> • If the public interest in granting access outweighs the need to restrict or reject access, then access should be granted to the applicant; • If the public interest in granting access does not outweigh the need to restrict or reject access, then access may be restricted or denied; • If these competing assessments are equally balanced, access may be restricted or denied. This is because the public interest in providing access must outweigh the need to restrict or deny it.

<p>5. Consider other alternative ways to striking the right balance</p>	<p>The responsible official should always consider whether there are any alternative way to strike the right balance between the grounds for granting access to the applicant and for restricting or rejecting the requested access. Such a balance can be achieved by redacting the piece of information for which there is a legal ground to restrict or deny access; granting access to certain parts or summaries of the requested document, e.g. findings and recommendations contained in the document; provide access in any manner other than that requested if possible; provide verbal explanations in face-to-face meetings in order to minimize harm, if it would give the applicant access to the requested document; give access to a third party such as a lawyer, notary, or other professional practitioner who is subject to regulation by special professional codes of ethics;</p>
<p>6. Decide on the request for access</p>	<p>If the responsible official determines that the party can be granted full access as requested, then there is no need to perform the test or provide a justification. If access is restricted or denied to the applicant, then, the responsible official should conduct the test according to these Guidelines, while in the justification of the administrative act an explanation of the grounds for restricting or denying access should be provided and any considered alternatives to enable access to the party listed, as mentioned in point 5 of this Annex.</p>

Annex 2 - The diagram for weighing the public interest and the need to withhold the requested information (illustration)

<p>If the public interest in granting access outweighs the need not to provide the requested access, access should be granted to the applicant</p>	 <p>[Need to withhold information (e.g. Health) < Public interest] = grant access</p>
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<p>If the public interest in granting access does not outweigh the need to withhold the requested information, the information may be withheld</p>	 <p>[Need to withhold information (e.g. Security) > Public interest] = restrict/deny access</p>
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<p>If the need to withhold the requested information and the public interest weigh equally, the information may be withheld because the public interest</p>	 <p>[Need to withhold information (e.g. Security) = Public interest] = restrict/deny access</p>
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should outweigh the need to withhold information, in order to enable the party to be granted the requested access.