



USAID – NAAC

Media and Law for Access to Public Documents

June 2010

Made by: Alma Lama

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1. Introduction

The research for this report is prepared as part of the Hope Fellowship Program, funded by USAID and managed by the National Albanian - American Council (NAAC). The research regarding this topic is done in Kosovo and the United States of America.

All significant aspects of civil life in Kosovo are affected by the central and local government. Their decisions directly affect people's everyday lives. Therefore media - including here the print, online and electronic and broadcast journalists – regularly inform the public about the policies and different actions of the Government. The right to public information, also in Kosovo, as in many countries is regulated by the law. In November 2003 the UNO administration in Kosovo, UNMIK has adopted the Law on Access to Official Documents. The transparency and institutional accountability are the main objectives of the Law on Access to Official Documents. Based on this law, citizens can control how public institutions are functioning, be constantly informed about the use of public money and thus be supervisor of these issues. By having been informed they would reduce the risk of abuse and misuse of public officials, as well as abuse of the power in general, which can have all-round consequences in relation to security, economy, human rights issues, etc..

Countries with democratic traditions such as USA, Canada, European Union countries have adopted and enforce such a law for decades. In such countries the law on access to official documents has find out issues related to the violation of human rights, gender and racial discrimination, mismanagement of public money, etc. Furthermore the documents taken by the media in the archives have many times changed also the perception for historical events.

In the USA there are many examples and findings made by the media which served to the public very significant information about their life and health. For example, using the FOIA (Freedom Of Information Act - which is the law on Access to Federal Documents), a reporter of the newspaper New York Daily News helped to discover that several months after the collapse of the World Trade Center, on September 11, 2001, "Ground Zero" was contaminated with asbestos and other chemicals that endangered the lives of residents. Five days after September 11, both the mayor of New York City and the Environmental Protection Agency (EPA) administrator had declared the area of law risk to environmental dangers. But the EPAs responses to FOIA requests for the document and then the truth about the contamination came over ground.

Kosovo like other regional countries, emerged from communist regimes, where the state was the only owner of everything, have no tradition of respecting the law on access to official documents. This is a right obtained later on, and that is way the major part of the public is not informed about it.

Awareness campaigns in Kosovo by the responsible institutions have been inadequate and not very efficient in terms of achieving the message to the citizens. Also it was the

lack of public debates which will explain in a more comprehensive way the law on access to official documents, complementary legal basis and in the practical aspect of drafting the requirements, deadlines, and procedural issues.

This research examines the problem of media access to official documents in USA and Kosovo, rule of law by public officials and the factors influencing on the creation of the current situation, where the journalists uses in a very limited way this right, because the law has a very limited implementation.

2. Methodology

In this research it is used a mixed methodology that includes research in office, depth interviews and focus groups.

A part of the research is made in the United States, respectively in Washington, implementation of law at the Federal level, and in New York at the state level. In Washington interviews were conducted with representatives of the National Press Club, Reporters Committee for Freedom of the Press, lawyers, and officials of the Office of Government Information Service. In New York we have interviewed the officials of the Committee on Open Government.

In Kosovo, we have interviewed the government officials, representatives of the Ombudsman and journalists.

In this study are considered also the previous publications and researches performed in this field.

The media is monitored regularly for 10 days, the period 10 June-20 June 2010, to see the space that was dedicated about this Law and the writings which were published after the receiving of the document.

The Extensive qualitative interviews were used to determine the main challenges that journalists faces in Kosovo. The Interviews were used in the USA, to see what are the challenges that the journalists faced, how these challenges are overcome and which are the best practices in terms of law enforcement in this country. The officers in USA and media association's representatives were interviewed during the first cycle of interviews, while in the second cycle we have interviewed journalists and officials in Kosovo.

3. USA Practices

In the United States of America the Public's ability to receive information about government has been significantly enhanced by the federal **Freedom of Information Act**, (FOIA) passed in 1966, the **Federal Advisory Committee Act**, passed in 1972 and the **Government in the Sunshine Act** passed in 1976. By making all the documents of the government available to the public, FOIA guarantees the public's right to inspect the storehouse (archive) of the documents.

FOIA provides access to all records of all federal agencies in the executive branches, unless those records fall within one of nine categories of exempt information those agencies are permitted to withhold. The following categories of exempt are: National Security, Internal Agency Rules, Statutory Exemptions, Trade Secrets, Internal Agency

Memos, Personal Privacy, Law Enforcement Records, Bank Reports and Oil and Gas well Data.

The agency must respond to your written FOIA request within 20 days if you have an urgent need for information, the journalists or citizens should ask for exception, but you should show this need to the agency. This is most often granted if health and safety are at issue. If the agency refuses to disclose all or part of the required documentation, or does not respond within 20 days, the citizens may appeal to the agency's FOIA Appeals Officer you may avoid the agency appeal and go directly to the court only if the agency does not respond within the required period time.

In USA each state has an office which functions under the government but as an independent institution. In federal level the public interests for access to official documents is protected and facilitated by the **Office of Government Information Services**, (OGIS) which is opened in September 2009, with the amendment of the Law Freedom of Information Act (FOIA) and the Law on National Archives and Records Administration (NARA). The OGIS staff has been working with the Department of Justice, other agencies and with private sector stakeholders to promote transparency, provide training and resolve requests and agency FOIA issues.

The Mission of this Office:

1. **Review the compliance and policy.** Review policies and procedures of administrative agencies under the freedom of Information Act (FOIA). Review compliance with FOIA by Agencies. Recommend policy changes to congress and the president to improve the FOIA.
2. **Mediate disputes.** Offer mediation services to resolve disputes between persons making FOIA requests and agencies. It may issue advisory opinions if mediation has not resolved.
3. **Serve as Ombudsman.** Select and receive comments and questions from federal agencies and the public regarding the administration of FOIA to improve FOIA process and facilitate communication between agencies and FOIA requests.

This office offers training for the staff of the agencies in the area of dispute resolution among parties, by offering the best practices and assistance whenever possible.

If we are talking on numbers, since OGIS was from September 2009 the office has opened 30 cases in 2009 and resolved 29 of them. In 2010 the office has opened 176 cases and resolved 120 of them since 5 May 2010, where this interview for this research is done.

The mediation of this office is very important saves up the parties from court process, which have a very high expense for them and for the state itself.

While the office in New York state has a long experience in the implementation of the law on the access to official documents.

The first version of Freedom of Information Law (FOIL) of the New York State was passed in 1974. The sponsors and NGOs that the new law was an experiment and the media organizations suggested to create some kind of supervising agencies to provide assistance on law enforcement, to provide advice and serve as a guide and see how

effective will be the implementation of this law. This media pressure led to the creation of the office in New York, Committee on Public Access to Records which is known as Committee on Open Government.

Its function is simple, provide advices and opinions to anyone who has questions about the public access to official documents in New York that are related with FOIL and hold open meetings in relation with the Privacy Protection Law. They get requests for clarification from the state, local government officials, public and media representatives. The purpose of this office is to give correct answer based on law to whom that makes the request. This office is not to support the government, but to give correct answer under the law. Just over a year they get more than 7000 calls, thousands of mails for clarifications, write about 700-800 legal advices, make about 80-90 presentations for the government, public or media interest. Currently there are working only three people in this office, but their number has never been greater than 4. When courts have looked the opinions of this office, 90% they agreed with them. But more often an advice given by phone or mail eliminates sending of a plaint to the court. About 15% of requests for clarification are addressed by journalists.

Furthermore, this office has very effective website that provides extensive information about many questions that public could have. Therein are also published the annual reports regarding the functioning of the law.

In USA there are other practices as well which are used for a better implementation of the law for public access to official documents. In Connecticut State beside the legal advices the officials that are working in the same office as in New York to, have the right to order the issuing of a document. In this country if citizens or reporters have complaints, the issue will be addressed to the Committee. But this practice, although it has very good results requires a longer time to solve the problems. This approach, however, is often used to resolve issues before they come into disputes and go to court.

On the other hand, their journalists and associations in the USA have done and are doing a great job, exercising continuous pressure on institutions to respect the law. They organize many debates, polls and researches year to year to see how the law on access to official documents is respected. Also the journalistic community is knowledgeable about the law. Reporters Committee for Freedom of the Press since ten years ago publishes editions of guidelines for journalists with extensive information provided about the law, regulations, and practical ways how to approach the media to government documents.

4. Legal base in Kosovo

The right of information is one of the fundamental human rights, expressed and guaranteed by numerous international documents, as in Resolution 59 (1) by the General Assembly of the United Nations (1946), Universal Declaration on Human Rights (Article 19) Article 19 of International Convention on Civil and Political Rights, Article 10 of the European Convention. The right to information is used as a general designation, which, in a broadest sense, includes the freedom of expression, the right for access to public

documents and freedom of media. These are different legal categories defined also in the Constitution of the Republic of Kosovo, namely with Article 40 (Freedom of Expression) and Article 41 (Right of Access to Public Documents) Article 42 (Freedom Press).

Currently in Kosovo exists about 70% of the legal basis which is necessary for the implementation of LAPD. So the laws which are facilitating the implementation of the Law on Access to Official Documents are the following:

- Council of Europe Convention on Access to Official Documents, (*Adopted by the Committee of Ministers on 27 November*)
- The Law on Archive Material and Archives - 2008/03
- Law on Protection of Personal Data,
- Administrative Instruction No. 2006 /03 “on Transparency in Municipalities”
- **Law on Public Procurement** 2003/17
- Law on Local Self Government, 2008/03
- Law on Administrative Procedure 2005/02
- Draft law on classification of information and security verification

One of the most important laws to enable the implementation of LAPD is the law for classification of information and security verification, which is already drafted by the Government of Kosovo. Also the law on the Ombudsman 2010/03/195 is drafted and is expected to be approved by the Assembly. The Ombudsman institution currently operates under the UNMIK Regulation 2006 / 6, which replaces the Regulation 2000/38. According to the new Regulation, the Institution of the Ombudsman is mandated to investigate complaints against local authorities or other bodies of the Provisional Institutions of Self Government (PISG), but it does not have mandate to investigate the complaints against international administrative bodies in Kosovo.

5. Responsible Institutions for the Implementation of the LAPD¹

All institutions of legislative, executive and judiciary power at central level and local level, bodies on their dependence of the Republic of Kosovo, as well as independent bodies set out in the Constitution of the Republic of Kosovo are obliged to provide access to official documents:

¹ Realization of the right for access to public documents , Besim M. Kajtazi, 2009

- Assembly of the Republic of Kosovo ;
- President of the Republic of Kosovo;
- Government of the Republic of Kosovo,
- Ministries and their dependent bodies (executive agencies, institutes, etc.);
- Municipalities and their dependent units;
- Courts including here the Supreme Court and Constitutional Court;
- State Prosecutor;
- Police of the Republic of Kosovo;
- Kosovo Security Force;
- Kosovo Intelligence Agency ;

Independent institutions, such as:

- The General Auditor of Kosovo,
- Central Election Commission,
- Central bank of Kosovo,
- Independent supervisory Council;
- Kosovo Judicial Council,
- Kosovo Prosecution Council,
- Independent Media Commission,
- Civil Aviation Authority,
- Institution of the Ombudsman etc,

6. Media and LAPD

Regarding the media, based on all researches made by other organizations, but in [particular for this research, the journalists are informed about the LAPD. Expressed in percentage, 100 percent of journalists have knowledge that the law exists, while 75 percent of them are well informed about its details². However there is some difference between journalists working for national media and those working for local media, since the journalist working for local media are less informed. However, in general journalists use their right for access to public documents in a very limited way and almost negligible compared to the volume of the work they do. Their requests are usually related to the documents that will be transparent, as they are related mainly to the use of budget, contracts or various administrative decisions. In most requests, according to the research made by the author with a number of journalists, they get negative or no response at all. But even if they get answers about their requirements, the deadlines are not respected.

Also based on the research of APJK about the question whether the journalists who seek for official documents get the written or verbal response, the majority (95 percent) reported that negative responses they get verbally. But in many cases there is no response back. However, when they get positive response (5 percent), they are usually late compared to the deadline provided by law. But based on this research, about the question whether they get the reason that it was not allowed the access to official documents, most journalists (91 percent) said they are usually inconstant and therefore completely

² Research made by the Association of Professional Journalists of Kosovo (APJK)

irrelevant, while others (9 percent) admitted that the reasons are consistent³. Therefore, the journalists very few consider and use this right. They try to obtain the documents through unofficial sources within the government or other institutions. It makes very difficult their job because confidential sources are hard to be provided because of the risk of their job. Thus the journalists spend to much energy to provide the documents unofficially, since the right to have these documents is guaranteed by the law. Although the document is often not sufficient to write an article, it usually serves as a good base for evidence-based journalism. In other cases, public officials tend to deny that they have made an official request for documents. Often their requests goes by an office to another one and no one takes the responsibility for giving an answer. According to the statements of the Legal Office of the Government about 70% of public administrations are trained about the law, but journalists in their work face unprofessional responses and behavior by them.

Another feature about the reports of journalists with LAPD is that even when they address the request to the institutions to get documents they do not follow up the legal procedures till the end. This means that they tend not to repeat the request for the document for the second time, as provided by the law. But more important is that journalists are reluctant to seek their rights in other institutions and to the most recent instance. In the institution of Ombudsman, whose mission is monitoring the implementation of this law, since its beginning is not registered any complaints by journalists about the refusal of their requests for access to public documents by the institutions.

The same situation is also in the last instance, in the judiciary.

In the Kosovo courts, based on pronouncement of journalists⁴ it is not registered any claim regarding the refusal of the request concerning the access to public documents. The main reason for this is the lack of trust in the judiciary, which currently does not function satisfactorily, because it is overloaded with many cases and suffers because of the lack of independence. Such cases of the appeal of disrespecting the law on access to official documents compared to other cases dealing with crimes wouldn't be a priority. The Journalists and media where they work in general they do not have sufficient financial resources to address a cease to the court. But even if they address the case to the court it will spend a very long time until they make a decision. So journalists, who needs the official documents for their writings do not feel encouraged to assess their need to be addressed to the Courts.

On the other hand, despite this very unfavorable situation to them, the media in general are few in terms of exerting pressure on institutions in the implementation of the law. Also they do not pay specific attention and informing citizens about their right to access the official documents. There were a very small number of articles or television stories about this issue during the last two years.

³ Research made by the Association of Professional Journalists of Kosovo (APJK)

⁴ Interviews with some journalist of Kosovo, made for this research

Also journalists associations in Kosovo have not done enough to inform the journalists. It is missing a guide which will have all the necessary information about the law and rights of journalists. This will serve as a guide which will help them very much in their activity. Each media or journalist should have such a guide. But financial support is necessary for an initiative like this

7. Main factors that interfere on the implementation of the law

Lack of political will for institutional transparency is the main reason why the LAPD is not functioning properly. This political will should be clearly defined by the highest level leaders of the country, the president and prime minister, and the administration offices and other institutions and agencies. Despite the frequent rhetoric about more transparency, so far there has been no concrete actions that will lead to the application of this law. In the Assembly of Kosovo there have been rare debates, but accountability for implementation of this law is concluded together with the parliamentary session where was discussed.

The lack of transparency comes due to the corruption practices in which are included a large part of Kosovo institutions. The identification of continuous irregularities by the Auditor General, in almost all institutions is a prove of law disrespect and mismanagement. This makes that also journalists and citizens in general to face the refusal responses by the officials about their requests for documents.

Another problem that makes difficult for the journalist to have access to official documents is the lack of their classification. According to the current applicable legislation, this classification should be made by the officers, as appropriate and under their competences. So there is a lack of previous classification of documents. The possibility of abuse here is very high because even the documents that there is no reason not to be made public, could be classified as sensitive documents. For example the processes such as the negotiation about the status have been developed entirely outside the public eyes, because the journalists were not able to get transcripts of the negotiations in meetings or recorded materials.

The mentioned law has become the main obstacle of implementing the LAPD. This law is not taken as a priority by the Government of Kosovo, including here also the preliminary cabinets. Since the law on Access to Official Documents is adopted in 2003, it should be approved also the law on classification, which is necessary for implementation. Currently the government of Kosovo has drafted this law and submitted to the Assembly for review.

On the other hand both the current law and regulations do not foresee any punishment for officials who refuse to provide documents unjustifiably.

the lack of registers in institutions, which should be created is another problem.

Also there is a lack of an information and advisory office for all citizens about the law and procedures. This also is a factor that makes people not to show interest in using their right to information. This office should be located in the institution of the Ombudsman, since in the mandate of this institution which is an independent organization, shall be reviewed the issues relating to affirmed violations of human rights or abuse of

authorizations by public authorities in Kosovo.

The new Law on Access to Public Documents is expected to solve some small problems which are identified in the previous law. First it defines a precise address in each institution for submission of request by interested parties. They will be public information offices. The law also makes the Ombudsman Institution in charge for making promotional campaigns.

Furthermore, the institution of Ombudsman is expected to share one of the four posts of deputies, to oversee the implementation of the law on access to official documents.

8. Recommendations

For institutions :

1. Establishing registers of documents, in all institutions of Kosovo, as defined by law;
2. Publishing of main documents online in order that public and journalists have independent access to them;
3. Approving as soon as possible the law on classification of official documents;
4. Continuing the training of officers who will deal with public documents;
5. Training of the highest level officers, including ministers and directors of agencies concerning the LAPD. (*Practice in the USA has shown that training of senior officials is necessary in order to understand the importance of the law enforcement and to convey this spirit also to their subordinates. The lack of knowledge of the directors of the institutions about the law and its importance often brings to the disadvantage to their employees*);
6. Information concerning the environment must be 100% transparent.
7. Identify administrative punitive measures for employees who refuse documents, unjustifiably;
8. Expanding with more staff the Ombudsman Office, this will deal with the implementation of LAPD. Certain persons should be constantly in communication with the public to give them the necessary information about their rights. (Such an office should have the following functions: to provide advice and opinions to anyone who has questions about access to official documents. The purpose of this office should be to offer correct responses under the law, regardless of who directs the question. These questions can be taken via telephone and email. Also the journalists would benefit from such an office, which will orient them in their demands, and also before sending the case to the court. The legal Opinions issued by this office would be available to the courts too);
9. The office of the Ombudsman should also establish a website which will serve as a guide for citizens where laws and regulations relating to the LAPD should be published, and a section as "Your right to know." There should also be published

- the part of the annual report of this institution, regarding the law enforcement, which should be submitted to the Parliament;
10. The institution of Ombudsman to start as soon as with the awareness campaign about the law;
 11. The institution of Ombudsman should deal with priority with the complaints of journalists, because their job is on duty of the public;

For Journalists

1. Journalists should be more active on making requests for access to official documents;
2. Journalists should plan long term researches, due to the time limits provided by the law;
3. Journalists should publish in any case the rejection of their requests by officials of the institutions;
4. If they suspect that the rejection answer is not justified, should be addressed to the institution of Ombudsman;
5. Journalists should seek to quote the official opinion of the Ombudsman relation with the document their require because this institution has access to all documents. In general it should be strengthen the cooperation with this institution;
6. Journalists also should send to the court the case of officials and institutions that reject their request unfairly;
7. In case of the plaint in the court, journalists should report continuously regarding the mentioned court process;
8. Journalists and media should give more space in their emissions or on the pages of newspapers the interpretation of this law and the monitoring of its functioning. This will serve for better information of the citizens.
9. Journalists' associations should work to issue a guide o regarding the law which will be on the service of journalists;