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Freedom of Information: Legislation and Practice

*Georgia, United Kingdom (Scotland), United States of
America, Estonia – Comparative Analysis*

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I. Introduction

The following study is comparative analysis of Georgian and international legislation the United Kingdom (Scotland), the United States of America, Estonia) prepared within the framework of a project – **“Research on the Effectiveness of the FOIA Provisions in Georgia”**, implemented by the Institute for Development of Freedom of Information (IDFI).

The project **“Research on the Effectiveness of the FOIA Provisions in Georgia”** was implemented by IDFI (March-May, 2012) under the **Good Governance in Georgia Program (G3)** of the United States Agency for International Development (USAID).

The goal of the project was to increase the level of transparency and effective governance of the administrative organs (**the Ministry of Justice, Civil Service Bureau, the Competition and State Procurement Agency, Chamber of Control of Georgia, Government of the Autonomous Republic of Ajara**) through studying the best international practice of access to information and overcoming shortcomings in this sphere.

The modern world has long recognized the direct proportional relation between the transparency of activities of the state agencies and the quality of democracy. The belief that “democracies die behind closed doors¹” has become a driving force to make information available to the public as “the oxygen of democracy”².

The idea that the information stored in the state agencies is the public benefit is supported by many international documents and national laws of certain countries. The present research aims at providing a general review of international standards in the field of freedom of information and the analysis of legislative guarantees of the United Kingdom, Scotland, the United States of America, Estonia and Georgia.

Collapse of the Soviet Union and later, attack performed at the World Trade Center, revealed the challenges that the countries were facing, of which an important part was the need of implementation of a new, more transparent system of government. The countries of the former communist bloc have responded to these challenges with the introduction of standards ensuring

¹ “Democracies die behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately.” Judge Damon Keith, U.S. Sixth Circuit Court of Appeals;

² Organization Article 19 calls democracy “the oxygen of democracy”;

freedom of information. Among them, the Estonian Public Information Act, is one of the most progressive legislative documents and deserves special attention of the researchers in this field.

The Freedom of Information Act of the United States is considered to be one of the most effective acts in the world ensuring access to the information kept in the state agencies. Along with legislative regulation, the practical examples of this country must be taken into account, because in 2000 the federal government spent approximately \$ 1 on each citizen for the administration of the act, which makes a total of \$ 253 million³.

The United Kingdom, which adopted the Freedom of Information Act in 2000 and postponed its implementation after the events of September 11, till 2005, is interesting by the fact that despite numerous drawbacks, reasonable implementation of norms in the practice made it possible for the United Kingdom to become a model of Independent Media. The research overviews the example of Scotland as well, which has its own Freedom of Information Act.

By adoption of the General Administration Code in 1999 Georgia made an important step on the path to freedom of information and transparency of state agencies. For strengthening of obtained progress and elimination of drawbacks existing at the legislative level and practice, it is important to share experience of other countries. For this purpose, the study includes specific recommendations, consideration of which will help state agencies to make more transparent and available their information.

II. Freedom of information: International and National standards

1. International guarantees

Freedom of Information legislation originated in Sweden, where the world's first Freedom of Information Act was adopted in 1766. Today, nearly two centuries after this date, freedom of information is recognized as one of the fundamental human rights on all continents of the world, including by the United Nations, the Council of Europe, the Organization of American States and the African Union. However, prior to this universal recognition, certain countries and international organizations had to pass through many stages.

In this regard, one of the most important steps was taken at the first session of the UN General Assembly in 1946, when in the Resolution 59 (I) adopted at the session, the freedom of information was named the fundamental human right⁴.

³ The World's Right to Know; by Thomas Blanton;
http://www.foreignpolicy.com/articles/2002/07/01/the_worlds_right_to_know

⁴The text of the resolution is available at the following link: <http://daccess-ods.un.org/TMP/6700160.50338745.html> ;

In 1948, in Article 19 of the Universal Declaration of Human Rights, the right to receive information had the following wording: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and **to seek, receive and impart** information and ideas through any media and regardless of frontiers."

International Covenant on Civil and Political Rights⁵ is one more international document that recognized the right to receive and impart information. Article 19 of the document states: "Everyone has the right to freedom of opinion and expression; ***this right includes freedom that regardless of frontiers to seek, receive and impart any information orally, in writing or by means of the press and of expression by means of artistic form or other forms at discretion.***"

In addition to the documents adopted by the United Nations, the right to information is also reflected in the regional conventions. For example, the European Convention on Human Rights⁶ also guarantees the right to information. Pursuant to Article 10 of the Convention "everyone has the right to freedom of expression. ***This right shall include freedom to hold opinions and to receive and impart information*** and ideas without interference by public authority and regardless of frontiers. "

In all the mentioned documents, the right of receiving information shall be reviewed as part of the right of thought and expression. However, in practice, it has been given a broader definition and the freedom of information has been recognized as a separate right. In 1993, the UN Human Rights Commission appointed a Special Rapporteur for practical implementation of Freedom of thought and expression, which, in the report⁷ of 1998, based on the international pact of Civil and Political Rights, defined the right of opinion and expression, as the right of any human to seek, receive and impart information, which implies ***a positive obligation on states*** to ensure access to information. Under the information the Rapporteur meant information kept at state agencies, regardless of its form.

In order for the states to provide the effective performance of the obligation of ensuring effective access to information, it was important to agree on the principles, on which the national legislation adopted with this purpose would be built. The organization "Article 19-International Center Against Censorship", working at the issues of Freedom of Information, based on the international standards of transparency and publicity of information, as well as using positive examples of other countries, set up the list of principles, with which the legislation of Freedom of Information must comply:

Maximum openness - openness presumption should apply in relation to the information kept at the state agencies. The agency, which refuses to issue information, shall have to prove, that the issuance of information was refused within the exceptions stipulated by the legislation. The law should have

⁵ For Georgia effective since August 3, 1994;

⁶ In Georgia came into force in May 1999;

⁷The report can be viewed at the following link:

<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/7599319f02ece82dc12566080045b296?Opendocument>

a wide range of application, which is reflected in the fact that the circle of persons entitled to request information should not be limited. At the same time, the number of these agencies that have responsibilities under the law must comprise all agencies that have public functions.

Duty to publish – state agencies should be responsible for publication of information related to their activities, interested to the public. Disclosure of information will increase the level of awareness of citizens and, therefore, reduce the number of information requests submitted to the state agencies.

Facilitating open governance - the guidelines aimed at access of information must serve changing the existing culture of secrecy in the state agencies. Training of public servants, encouragement of successful officials responsible for issuance of information and imposing certain sanctions against violators belong to more or less efficient methods of achieving the mentioned goal. It is also important to conduct an information campaign for improvement of people's awareness of their right to receive information.

A limited circle of exceptions - in some cases, the administrative agency is authorized to classify the kept information, though such instances should be strictly regulated and meet the following criteria: a) information should belong to exceptions stipulated by the legislation; b) disclosure of the information should substantially harm the interest protected by the law; c) the damage caused by the disclosure of the information will outweigh the public interest. All exceptions shall be subject to the so-called "Public interest" test.

The process directed to simplification of information access –all applications requesting information must be reviewed quickly and fairly. However, in case of refusal to issue information, there should be a possibility of review of such decision by an impartial person and / or the Court.

Expenses – the fee established for issuing the information should be reasonable and should not represent an obstacle for submitting an application to the administrative agency.

Openness of the meetings – the meetings conducted in the state agencies must be open for the public.

Priority of maximum transparency of information - legislation should reflect this principle as much as possible. This principle also implies that in case of a conflict between the standards ensuring classification and access of the information, the legislation should act in favor of the publicity.

“Whistleblowers”⁸ protection - persons, who provide information to the public about violations of the law, must be protected by law⁹.

⁸ “Whistleblower” is used in the research as the Georgian term equivalent of “whistleblower”.

⁹ The full description of principles see at: <http://www.article19.org/pages/en/freedom-of-information-more.html>

In report of 2000 on issues of freedom of opinion and expression, the Special Rapporteur of the UN Human Rights Commissioner, recognized the mentioned principles as reflecting the norms of international law and urged all states, to bring their internal legislation in line with the international standards. In the same report, the speaker formulated the so-called UN principles, on which the internal legislation of the countries should be based with regard to freedom of information.¹⁰ Later, in 2002, the Committee of Ministers of the Council of Europe adopted R (2002) 2 recommendation, which defines in more detail the principles of access to official documents¹¹.

On 27 November 2008, adoption of Convention of the Council of Europe on Access to Official Documents caused a significant shift¹² from the point of view of ensuring international guarantees of freedom of information. According to the explanatory report¹³ of the Convention, it is the first international document of such content, which will be binding for participating states. The Convention defines the right to access and withdraw "official documents"; any information preserved in any form in the state agencies is considered to be public information. The principles established by the Convention apply to all the institutions, which perform administrative function. The states are also given the opportunity, at their own discretion, to add to this list legislative and judicial authorities, as well as subjects of private law performing administrative functions. Convention strictly defines the circumstances when access to information may be limited for various reasons. Such cases are subject to the so-called "Public interest" and "the damage caused by the disclosure of information" test. The Convention will enter into force after its ratification by 10 Member States of Council of Europe¹⁴. Georgia acceded to the Convention on June 18, 2009, but the stage of ratification of the document is still to be passed¹⁵.

When speaking about international documents providing access to information, it should be considered, that in addition to the above-mentioned documents of general content, there are the so-called Related Documents, which establish standards of openness of the information existing in the given area. Among these documents, one of the most important is the Convention about access of

¹⁰ Special Rapporteur on Freedom of Opinion and Expression, Abid Hussein's report; the United Nations Economic and Social Council, 2000. The report is available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G00/102/59/PDF/G0010259.pdf?OpenElement>

¹¹ Recommendation of EU REC (2002) 2 and its explanatory memorandum, see at: http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec%282002%29002_en.pdf

¹² The Council of Europe Convention on Access to Official Documents; approved by the Committee of Ministers on 27 November 2008. See the text of the Convention at: <https://wcd.coe.int/ViewDoc.jsp?id=1377737>

¹³ The text of the explanatory report of the Convention is available at: <http://conventions.coe.int/Treaty/en/Reports/Html/205.htm>

¹⁴ By the moment of drawing up of the present research, only 5 states have ratified the Convention. These are: Bosnia and Herzegovina, Hungary, Montenegro, Norway, Sweden;

¹⁵ The updated information on the status of signing and ratifying the Convention is available at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=205&CM=1&DF=&CL=ENG>

information on environmental issues, public participation in decision-making and access to issues of justice in this area (the so-called Aarhus Convention)¹⁶.

One more important initiative related to access to information is "Partnership for Open Government." The partnership was founded in 2011, when its founder countries (Brazil, USA, Indonesia, Mexico, Norway, Philippines, South Africa, and the United Kingdom) signed a declaration of open governance and developed individual action plans to achieve such governance. The countries participating in the partnership take responsibility to promote transparency, to give citizens the opportunity to participate in decision-making, to struggle against corruption and use the latest technological innovations to achieve better governance¹⁷. One of the major commitments of the participants of the partnership is increase of access to information related to the activities of the state, including by means of proactive publication of information with regard to spending of the state funds and performance of public functions. Georgia is a part of the mentioned partnership, and currently it is in the process of developing an action plan in order to meet its commitments.

2. Domestic guarantees

The number of countries, where statutory acts ensuring access to information are in force, nowadays exceed 90. This is an important progress, given that at the beginning of 1990s only 13 countries had such laws.

It is assumed that the laws adopted in the recent past are much more progressive and represent a certain standard, as to what guidelines should regulatory acts on freedom of information contain. Examples are often given from the countries of the former socialist bloc who have recently become members of EU (including Estonia)¹⁸.

This assumption is also reinforced by the rating drawn up on the basis of analysis of legislation of the freedom of information in the world's 89 countries. The legislation of the countries was assessed based on 61 indicators, which in turn, are divided into 6 main categories: information access right; the area of application of the law; information request procedure; exemptions and basis for refusal to release information; appeal; sanctions for violations; obligation of conducting measures facilitating access to information. Those countries having a relatively "young" legislation and the age of this legislation is average 5 years fell in the top twenty (one hundred points and more) of the rating made on the basis of summarizing the scores received while assessing each of these indicators. In contrast,

¹⁶ See the text of the Convention at: http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en; In Georgia the Convention is in force since 2000;

¹⁷ See information about the partnership at: <http://www.opengovpartnership.org/about>

¹⁸ Access to Information: a Fundamental Right, a Universal Standard; Briefing Paper; 17 January, 2006; Access Info Europe; p.3

the last twenty was drawn up mainly from the states of Europe which adopted laws on freedom of information comparatively earlier. As a rule, the area of application of legislative acts of these countries is limited and is characterized by weak mechanisms of appealing decisions made by administrative authorities.¹⁹ However, it should be noted that while drawing up the rating a theoretical study of the legislative acts was performed and the guarantees of practical implementation of these standards were not evaluated.

Freedom of information, which includes the right to request information held by the state, is strengthened not only by legislative acts, but in the constitution of many countries. For example, article 44 of the Estonian Constitution of 1992 stipulates the rights of the citizens to request information kept by public institutions, as well as obligation of the government, in compliance with the rule established by the law, to provide information about its activities to the interested parties. This constitutional guarantee was reflected in the bill of freedom of information, which was drafted in 1997 by the Estonian government. The law was adopted in 2000 and entered into force in 2001²⁰. Other important legal documents that govern the issuance and processing of information by public agencies, is the Act of 2001 about state secrets; the Act of 2003 Act on the Protection of Personal Data; the Act of 1998 on Archives, as well as the Act on petitions²¹.

Unlike Estonia, the United Kingdom has no constitutional provision, ensuring freedom of information. This right is protected by the Human Rights Act of 1998, which, although is not a constitutional law, but to some extent it has a special status. Human Rights Act speaks of freedom of expression, which, according to the definition of the courts of the country, includes the freedom of information²².

In general, the United Kingdom is considered to be a quite controversial example in this context. In the country where the media enjoys unprecedented freedom, government offices are prone to unreasonable secrecy.²³ The effort to adopt a special law for ensuring transparency of information failed in 1978 and despite this fact that in eighties the relevant legislation was in force in many developed countries (New Zealand, Australia, etc.), Britain passed the law only in 2000. After terrorist act on September 11, 2001 in the United States, the issue of coming into force of the main provision of the law in the United Kingdom was postponed until 2005²⁴.

¹⁹ See information about the rating at: <http://rti-rating.org/results.html>

²⁰ Freedom of Information and Access to Government Records around the World; David Banisar; Privacy International, April 2011. p.9;

²¹ Rule of Law and Information Society: Constitutional Limits to Active Information Provision by Government; by Ivo Pilving. - <http://www.juridicainternational.eu/rule-of-law-and-information-society-constitutional-limits-to-active-information-provision-by-government>

²² Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 133;

²³ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 134;

²⁴ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 134;

UK Freedom of Information Act does not apply to Scotland, which has a separate law. Freedom of Information Act (Scotland) was passed in 2002 and, like the British analogue of the law, entered into force in January 2005²⁵.

The United States Constitution contains firm guarantees of the freedom of expression of the opinion. The mentioned constitutional provisions are expressed in negative terms, and prohibit Congress from adopting any law which may restrict freedom of press or speech. However, the U.S. Supreme Court decided that the freedom of thought and expression guaranteed by the Constitution cannot be interpreted in such a way that it covers the individual's right to access the public information kept in state agencies²⁶.

Despite disputes regarding interpretation of constitutional guarantees, the United States was one of the first countries which adopted law on access to information. The law was adopted in 1966 and the recent amendments to it were made on December 18, 2007 by passing the law on open governance²⁷.

Georgia belongs to those countries that have asserted guarantees of freedom of information constitutionally. Pursuant to article 24 of the Constitution of Georgia -everyone has the right to freely receive and impart information, express and disseminate opinion verbally, in writing or by other means. And article 41 of the Constitution stipulates: every citizen has the right to inspect information that state institutions have about him (her) according to the rule established by the legislation, as well as the existing official documents, if they do not contain state, professional or commercial secrets.

By adopting the General Administrative Code in 1999, the regulative standards of access to information became even more extended, because the third chapter of the code is devoted to the issue of freedom of information.

We must remember that in many parts of the country, the standards regulating publicity and access to information are given in different acts. Different aspects of the information right may be regulated by different laws. Thus, in Britain, along with the Freedom of Information Act, there is the Data Protection Act; in the United States a separate law governs so called "whistleblowers" protection issues. In Georgia there is a law on state secrets, and so on.

²⁵ The distribution of the action area of British and Freedom of Information Act (Scotland) is as follows: BRITISH Freedom of Information Act 2000, applies to the United Kingdom government departments, including those operating at the territory of Scotland; also to public officials in England, Wales and Northern Ireland. British and Scottish Freedom of Information Act also applies to the House of Lords and the House of Commons, as well as the Assemblies of Wales and Northern Ireland. Freedom of Information Act (Scotland) 2002 provides the same guarantees in relation to the information held by executive, public servants and the Parliament. The implementation of the UK Act is overseen by the United Kingdom Information Commissioner, and the Scotland Act is overseen by Scottish Information Commissioner.

²⁶ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 142

²⁷ Along with the Freedom of Information Act, the most important legislative acts in this field include: Electronic Freedom of Information Act; Federal Advisory Committee Act; Government in the Sunshine Act; the Privacy Act;

3. The scope of law-definition of the administrative body

The standards containing guarantees of freedom of information can be efficient only when the area of their dissemination is wide and covers all institutions having public function. However, standards regulating freedom of information sometimes do not apply to some public institutions, proceeding from their functions. In most countries, the courts and legislative bodies represent such an exception. In some places, security and intelligence services are added to such list of exceptions. In states with a parliamentary system documents submitted to the cabinet, as well as the minutes of the Cabinet meetings are not intended for publicity²⁸.

"Public Information Act" of Estonia does not mention such terms, as a public institution or an administrative body. Instead, the act lists the "data owner" institutions which are committed to releasing public information. They include the central and local government bodies, legal entities of public law and others²⁹. The act also provides for a concept like institutions "equal to the owner of information". Here belong institutions which due to dominant position, special or exclusive rights at the market represent monopolies. Such institutions are required to publicize information about terms and quality of their services. Non-profit associations, funds and companies, founded by the state, or where the state owns a share belong to the same category. Such institutions are required to disclose information about expenditure of funds received from the state budget³⁰.

UK Freedom of Information Act differs from similar acts of other countries by providing the list of agencies covered by the law. This list consists of all state departments, various legislative bodies, armed forces and other organizations listed in alphabetical order. It should be noted that the list is not static, and the Secretary of State, under certain conditions, is authorized to amend it or add to the list those institutions that perform public / social function or are a subcontractor of a public institution. According to the law, if an organization is a state body only in part, with regard to certain information, then the law applies to this part of its activities³¹.

The provisions of the General Administrative Code of Georgia, which deal with the issues of freedom of information, apply to "public institutions". This term is defined as "an administrative agency, public or legal entity of private law financed from the local budget funds within the framework of such financing".³²

²⁸ Freedom of Information International Trends and National Security; David Banisar; Paper presented at the Workshop on "Democratic and Parliamentary Oversight of Intelligence Services", held in Geneva 3rd-5th October 2002; p.5

²⁹ Public Information Act (Estonia), article 5(1).

³⁰ Public Information Act (Estonia), article 5(3).

³¹ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris; p. 135

³² General Administrative Code of Georgia, paragraph "a" of article 27;

For its part, the code defines the administrative body as "a body or an institution of all state or local self-government, legal entity of public law (other than political and religious associations), as well as any other person who performs a public legal authority on the basis of the law." ³³

The difference between unitary and federal states should also be noted. In the unitary states, the law, as a rule, applies to the agencies of all levels of governance (central, regional and local). As for the federal states, although this law applies to the organizations of federal level, the vast majority of federation subjects determined an independent statutory regulation of transparency of public information. ³⁴

For example, the area of application of the law of the United States comprises the whole executive department at the federal level, as well as institutions founded by the executive government, though the law does not apply to local or state authorities.

The Georgian Administrative Code applies to both central and local government bodies and agencies, as well as to the activities of those bodies, which in accordance with the General Administrative Code, shall be considered administrative bodies³⁵.

Information about the decision-making process of the head of government, as well as his close advisors, is traditionally one of the exceptions, and is not subject to publicity in many countries. However, in the modern world there is a tendency to publicize documents related to decision-making process of the head of the executive authorities, especially if there is high public interest with respect to such documents. ³⁶

For example, in the UK the information related to the activities of the Cabinet does not constitute an exception. Release of such information can be refused only in case, if the information in its essence, represents communication between the Ministers or a document related to formulation of policy and most importantly, in both cases, the information is subject to the so-called "Public interest test".³⁷

The central offices of The White House of the United States do not fall into the area of application of the Freedom of Information act. ³⁸ The legislation applies to the president's administration, but not directly to the President, his immediate subordinates, adviser and assistants (including the Vice - President, National Security Adviser, White House National Security Consul and White House

³³ General Administrative Code of Georgia, subparagraph "a" of the first paragraph of the second article;

³⁴ The Right to Information and the Increasing Scope of Bodies Covered by National Laws Since 1989; Sandra Coliver; p. 6;

³⁵ General Administrative Code of Georgia, the first paragraph of the third article;

³⁶ The Right to Information and the Increasing Scope of Bodies Covered by National Laws Since 1989; Sandra Coliver;. 10;

³⁷ The Right to Information and the Increasing Scope of Bodies Covered by National Laws Since 1989; Sandra Coliver; p. 12;

³⁸ FOIA Facts: Who Isn't Covered by the FOIA by Scott A. Hodes - <http://www.llrx.com/columns/foia6.htm>;

Consul). However, documents related to the White House, which are kept in other agencies, are subject to disclosure.³⁹

Rather than including a list of agencies, which are not covered by the Freedom of Information Chapter, the General Administrative Code of Georgia defines the type of information kept in various agencies, which is not subject to publicity. For example, provisions of the Administrative Code and accordingly, Freedom of Information do not apply to the appointment at and dismissal from the positions stipulated by Georgian Constitution performed by the President of Georgia, as well as exercising of some authorities stipulated by article 73 of Georgian Constitution;⁴⁰ information related to performance of international agreements and treaties and implementation of foreign policy also falls under this category.⁴¹ The same rule applies to information relating to the decision-making in military issues, as well as the issues of the military discipline, if it does not affect rights and freedoms of the individual granted by the Constitution of Georgia;⁴²

According to the Administrative Code, the Freedom of Information act does not apply to the activities of the executive bodies, which are connected with the participation of Georgian state in the proceedings ongoing before making the final decision and review of the case in the international arbitration or foreign courts.⁴³

Judicial and legislative bodies represent traditional exceptions to the application of the Freedom of Information Act. In the U.S. the law does not apply to the Congress and Senate, as well as to the judicial authorities.⁴⁴ Freedom of Information Acts of the UK and Scotland do not cover the activities of the courts and tribunals.⁴⁵

Although other provisions of the General Administrative Code of Georgia do not apply to the judicial authorities, the Freedom of Information Code is binding for these agencies.⁴⁶

The precedents when the Freedom of Information regulatory acts apply to non-government institutions and those subjects of private law, which receive state funds for implementation of certain

³⁹ The Right to Information and the Increasing Scope of Bodies Covered by National Laws Since 1989; Sandra Coliver; p. 12

⁴⁰ General Administrative Code of Georgia, Article 3 - paragraph 4 subparagraph "e";

⁴¹ General Administrative Code of Georgia, Article 3 - paragraph 4 subparagraph "f";

⁴² General Administrative Code of Georgia, Article 3 - paragraph 4 subparagraph "d";

⁴³ General Administrative Code of Georgia, Article 3 - paragraph 5;

⁴⁴ FOIA Facts: Who Isn't Covered by the FOIA by Scott A. Hodes - <http://www.llrx.com/columns/foia6.htm>

⁴⁵ Short Guide to the Freedom of Information Act and Other New Access Rights; Version 1.0, January 28 2005. Campaign for Freedom of Information; p. 5

⁴⁶ Georgian legislation does not set the exception for the activities of the judicial authorities, but defines the area of activities of the executive bodies, to which the standards of Freedom of Information do not apply. Information related to: criminal prosecution of the person due to a crime and criminal proceedings; operative investigation activities; enforcement of resolutions made by the court and having legal force; enforcement of acts stipulated by Georgian legislation "On Enforcement Proceedings" is deemed to be such;

public projects.⁴⁷ Public Information Act of Estonia applies to the legal entities of private law and physical persons, if they, on the law or contract basis, perform public functions, including education, health care, social services.⁴⁸

Private entities, exercising public functions, as well as those who are contracted to perform certain types of services, can fall into the sphere of application of both British and Scottish legislation, if a special parliamentary decree will be published for this purpose. In this case, the mentioned private entities may be requested to release information related to performance of public functions.⁴⁹

The U.S. Freedom of Information Act applies to all federal entities and federal regulatory bodies; however, it does not apply to private corporations that may perform public functions.⁵⁰

Public legal entity or legal entity financed from the local budget is deemed to be a public agency by the chapter of Freedom of Information of Georgian General Administrative Code, within the framework of such financing.⁵¹

4. The scope of law-definition of public information

One of the vital components of Freedom of information legislation is determination of the range of data, to which the disclosure presumption applies. As a rule, the "Information" means a record or a document existing in writing.

According to the most common practice, the access right is limited with information which already exists in written form. Many countries of Western Europe apply the mentioned right only to the "official documents", which does not include the draft of the document or the document for internal use.⁵²

Public Information Act (Estonia) defines "public information" as data that is documented or recorded in any form and means.⁵³

Freedom of Information Act of UK and Scotland also indicate that information recorded in any form is deemed to be "public information". Information stored on the computer, audio or video cassettes, maps, photographs, handwritten notes, as well as any other form of recorded information is

⁴⁷ Freedom of Information International Trends and National Security; David Banisar; Paper presented at the Workshop on "Democratic and Parliamentary Oversight of Intelligence Services", held in Geneva 3rd-5th October 2002; p.5

⁴⁸ Public Information Act of Estonia, article 5(3)

⁴⁹ Short Guide to the Freedom of Information Act and Other New Access Rights; Version 1.0, January 28 2005. Campaign for Freedom of Information; p. 5

⁵⁰ US Freedom of Information Act;

⁵¹ The General Administrative Code of Georgia, paragraph "a" of article 27.

⁵² Freedom of Information International Trends and National Security; David Banisar; Paper presented at the Workshop on "Democratic and Parliamentary Oversight of Intelligence Services", held in Geneva 3rd-5th October 2002; p.5

⁵³ Public Information Act, Estonia, the first paragraph of the third article;

considered to be “public information”. Both acts apply to any such information kept in the public agency, regardless of whether the information was drawn up in the agency or outside it. In addition, the date of creation of information is not significant and the law also applies to information existing before its receipt. Information, which has no written form, but it is known to public servants, is not considered to be public information.⁵⁴

The U.S. Freedom of Information Act, uses the term “record” in relation to information kept in the public agency. The term is defined as any information kept in a public institution, regardless of its format, including electronic records.⁵⁵ The Open Governance Act of 2007 introduced an addition to this definition and applied the effect of the Freedom of Information Act to the records that for the purposes of records management are physically stored with the contractor specially hired for this purpose by the administrative body.⁵⁶ In some cases, even the electronic communication among the workers of the administrative agency, which deals with public issues, can be deemed as a record for the purposes of Freedom of Information Act.⁵⁷

⁵⁴ Short Guide to the Freedom of Information Act and Other New Access Rights; Version 1.0, January 28 2005. Campaign for Freedom of Information; p. 5

⁵⁵ The U.S. Freedom of Information Act, f (2) (A)

⁵⁶ Treatment of Agency Records Maintained For an Agency By a Government Contractor for Purposes of Records Management, US Department of Justice, Office of Information and Privacy - <http://www.justice.gov/oip/foiapist/agencyrecords.htm>

⁵⁷ Does E-Mail Constitute a Record? Reporters Committee For Freedom of the Press - <http://www.rcfp.org/arkansas-open-government-guide/iii-state-law-electronic-records/d-how-e-mail-treated/1-does-e-mail-c>

The official document (including drawing, model, plan, scheme, photograph, electronic information, video and audio recordings), that is information kept in the state agency, as well as information received, processed, created or sent by the public agency or its officer in relation to official duties;⁵⁸ according to the latest changes in the Code, the proactively published information belongs to the public information.⁵⁹

III. Information request

1. Management of information kept in the administrative agency

For timely and effective publication of information kept in the state agencies existence of proper system of recording, registration and management system is required. Equally important is to disseminate information about the type of data stored in one or another institution. For this purpose, law of many states stipulates special provisions for recording, registration and classification of information.

Law of Estonia requires public institutions to have an electronic list of information kept by them. The date of receipt of the document, as well as the term required for its review and the structural unit in charge for the review with reference to the relevant official, must be recorded in the registration database of the information kept in the institution. All documents incoming to the institution are registered according to this rule, including applications submitted for request of information.⁶⁰

The General Administrative Code of Georgia provides for the obligation of keeping register of information kept in the public agency. According to the law, the agency must register the kept information in the public register, where the reference to the public information shall be made

In the United Kingdom, according to the practice established by the Information Commissioner, the correspondence sent by personal e-mail of the public officials represents public information, if the correspondence is related to the performance of public functions. The need of establishment the mentioned rule was caused by the efforts of the representatives of the Ministry of Education to avoid the obligation to publicize their correspondence by using personal e-mails for official purposes.

<http://www.guardian.co.uk/politics/2011/dec/15/private-emails-foi-information-commissioner>

⁵⁸ General Administrative Code of Georgia, subparagraph "1" paragraph 1 of article 2;

⁵⁹ General Administrative Code of Georgia, subparagraph "1" paragraph 1 of article 2;

⁶⁰Public of Information Act (Estonia), article 12(4);

within 2 days after its receipt, creation, processing or issuance. The title of the public information is subject to registration in the register, with reference to the date of its receipt, creation, processing, issuance, the physical or legal person, the public official, from whom this information was received or to whom it was sent.⁶¹

The rule of registration of the existing information in the public agency, in most cases, is separated from the Freedom of Information Act and is regulated by the law. From this point of view, the practice of the United Kingdom and Scotland is especially sophisticated. In 2002 in the United Kingdom the Lord Chancellor developed the Code of Practice about the management of records within the framework of authority assigned by the Freedom of Information Act. The mentioned Code, in unity with the act of public records of 1958, makes a detailed and complex unity of the rules in the area of administration of the information kept in the public institutions.

The Act about public records for supervision of practice of institutions in the area of records management, stipulates the obligation of appointing a special official (public records keeper-Keeper of Public Records).⁶² The same Act stipulates activities and functions of the agency created with the objective of public records management.

As to the code of practice that deals with records management it applies to all institutions, which fall under the effect of public records act. Its performance is supervised by the Information Commissioner, who, in case of violation of the Act by public bodies, issues practical recommendations to remedy the violations.⁶³ The Code establishes the obligation of the person responsible for data management, who, in the ideal case, must at the same time be a person responsible for release of public information.⁶⁴ The public institutions must also establish internal procedure for management of existing data and records.⁶⁵

Records Management Code of Practice of Scotland was adopted in 2003 and its provisions are similar to those of the UK Code of Practice.

In the United States of America, the minimum standards for information storage and management are stipulated by "federal records act".⁶⁶ The act was adopted in the fifties of the twentieth century and many of its provisions are out of date. According to the Act, "records" are all magazines, papers, maps,

⁶¹ General Administrative Code of Georgia, Article 35

⁶² UK Records Management Code of Practice

[http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/code-of-practice;](http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/code-of-practice)

⁶³ UK Records Management Code of Practice

[http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/code-of-practice;](http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/code-of-practice)

⁶⁴ Records Management Code of Practice

[http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/code-of-practice;](http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/code-of-practice)

⁶⁵ UK Records Management Code of Practice

[http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/code-of-practice;](http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/code-of-practice)

⁶⁶ US Federal Records Act of 1950;

photos or other documentary materials, regardless of physical form of storage. In addition, the "records" refer to information kept by the federal authorities which are obtained in connection with the exercise of public functions.⁶⁷ It should be noted that the correspondence of the employees of public agencies can potentially be attributed to federal records.⁶⁸ Implementation of measures for practical realization of the Federal Records Act is the competence of the National Archives and Records Administration (NARA).

Federal Records Act, which was developed at an early stage of technology development, was focused on the system of creation and storage of paper-based documents, which in view of modern technical capabilities caused unreasonable costs for public institutions. As a counterbalance to the archaism of the act, on November 28, 2011 Presidential Memorandum on Federal records management was published. The memorandum states that its adoption was determined by the technical progress achieved in the 21st century, which the federal authorities must keep pace with in the process of electronic management of records. One of the expectations of the memorandum is reduction of costs associated with records management and ensuring more transparency in the operation of these bodies.⁶⁹

Under the Memorandum all the heads of the federal agencies were assigned to develop a plan in order to improve management practices and introduce electronic systems. Based on the analysis of the reports received from public agencies, the special agencies (the head of Office of Management and Budgeting, and the head of the National Archives) will issue a directive about federal records management. Also, it is planned to review all federal legislative acts in order to bring them into conformity with the memorandum.⁷⁰ The regulatory documents existing in the sphere of records management particularly highlight the role of e-mail and social media for efficient implementation of functions of public institutions.⁷¹ In addition, the act of reduction of "paper" documents in the public institutions⁷² and the act of electronic management⁷³ point out the strong priority of the United States, to optimally use human and financial resources of the public agencies by way of implementation of modern technical means.

⁶⁷ National Archives, Frequently Asked Questions About Federal Records Management - <http://www.archives.gov/records-mgmt/faqs/federal.html>

⁶⁸ National Archives and Selected Agencies Need to Strengthen E-mail Management; US Government Accountability Office - <http://www.gao.gov/products/GAO-08-742>

⁶⁹ White House Official web page, Presidential Memorandum text - <http://www.whitehouse.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>

⁷⁰ We Can't Wait: Bringing Records Management into the Twenty First-Century - <http://www.whitehouse.gov/blog/2011/11/28/we-cant-wait-bringing-records-management-twenty-first-century>

⁷¹ White House Official web page, Presidential Memorandum text - <http://www.whitehouse.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>

⁷² The Paperwork Reduction Act;

⁷³ E-Government Act of 2002;

The tendency of using the latest technical capabilities with the objective of public information management has been more or less observed in Georgia as well. In 2012, the amendments made to the Administrative Code envisaged the possibility of using united automated data management features. The mentioned change in the conditions of modern technology progress is a step forward, but it should be noted that Georgia is still far from the desired outcome. In particular, the unified rule of activities approved by the decree N 414 of July 1999 of the President of Georgia, which stipulates the rule of creation and registration of documents, is quite outdated and needs to be revised.

US Department of State web-page - <http://foia.state.gov/foiareq/foialetter.asp> - is equipped with the function of online generating of applications.

2. Submission of an application

One of the essential components of ensuring Freedom of Information is granting the right to the interested persons to request the desired information through submitting of an application to the state agency. The circle of those persons, who enjoy the right to request information in a public institution, is different in different countries. The legislation of UK provides especially liberal terms from this point of view. The law grants the right to "any" person to request the desired information. In addition, the range of persons enjoying the above-mentioned is not limited only by the citizens of the country and applies equally to foreigners, regardless of their location.⁷⁴

Like the United Kingdom, the law of the United States stipulates that not only citizens or persons living in the United States enjoy the right to request information, but any person, regardless of nationality and location. Legal persons also enjoy such right.⁷⁵ Georgian law grants the right to request information kept in the state agencies to everyone equally and this right is not limited on the grounds of nationality.⁷⁶

As a rule, the details of the application to be submitted to the public agency are stipulated by the legislation. Estonian legislation is quite flexible in this regard and allows interested parties to submit an application by different means, including, using the latest methods of information exchange, for receipt of information. In particular, the law allows for two main forms of release of the information: oral and written.⁷⁷ Oral request for information can be submitted to the agency by a telephone application. Written statements mean direct submission of an application to the state agency, as well as its sending by mail (including e-mail) or fax.

⁷⁴ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 135

⁷⁵ US Freedom of Information Act;

⁷⁶ General Administrative Code of Georgia, paragraph 1 of article 37;

⁷⁷ Public information Act (Estonia), article 13

In the UK, a written form is stipulated for submission of a written application, which shall include the applicant's name, address and details of the information interesting for the applicant. Applications submitted by e-mail can also be reviewed, if the request received in this form is clearly formulated and makes it possible to identify the requested information. According to some explanations, the application made by means of social networks can also become the reason for release of information by the state agency⁷⁸.

In addition to submitting the application in the form stipulated by UK Freedom of Information Act, in Scotland it is allowed to submit an information request in the form, such as audio or video recording. Also, a voice message sent to any public official in Scotland is deemed to be an information request.⁷⁹

The United States law does not establish uniform application form and issuance of regulation with regard to this depends on state agencies. Accordingly, sending of the application by e-mail is allowed in some places, while in others, request for information stipulates a more formal procedure.

The General Administrative Code of Georgia stipulates a mandatory written form for submission of an application.⁸⁰ In the Freedom of Information Section of the Code amendments made in May 2012 stipulated the possibility of requesting information in an electronic form by means of electronic resources of the public agencies. The standard of request of information in electronic form is defined by the relevant normative act, which is scheduled to be adopted in September 2013.⁸¹

As a rule, while the filing of the application, the person seeking the information is required to submit certain personal information to the public institution. In Estonia, while submitting oral, as well as written application, the applicant must submit the following information: name of the applicant (in the case of a legal person – name of the organization), contact information, and description of the information interesting for the applicant or any detail of the requested document known to the applicant; if the information requested by the applicant contains sensitive or personal information, the institution possessing the information performs identification of the applicant.⁸² In other cases, it is permissible to consider the anonymous applications.

UK law does not impose the obligation to state the reason or aim in the information request application.⁸³ The same rule applies to the United States, where the law does not define what details

⁷⁸Information Commissioner's web - page, frequently asked questions section - http://www.ico.gov.uk/Global/faqs/freedom_of_information_for_organisations.aspx#f48D09023-3208-408D-9948-10DC0B2FB9EE

⁷⁹ Short Guide to the Freedom of Information Act and Other New Access Rights; Version 1.0, January 28 2005. Campaign for Freedom of Information; p. 6

⁸⁰General Administrative Code of Georgia, paragraph 2, article 37;

⁸¹ General Administrative Code of Georgia, paragraph 3 and 4 of article 37;

⁸² Public Information Act, Estonia, article 14 (2)

⁸³ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 135

the information request application should satisfy. These standards are established by public institutions, however, as a rule, the applicant is required to submit to the public agency data (name, address, and phone number) that will be required for him to receive information. The applicant shall be entitled to indicate the desired form of receipt of information, however, in practice, many administrative bodies cannot ensure provision of the information in electronic form due to lack of adequate resources.⁸⁴

According to the General Administrative Code of Georgia, it is not required to indicate in the application the reason or aim of request of information. While submission of applications requesting other's commercial secrets, the applicant, except as provided by law, shall submit a consent of the person certified by a notary or a respective administrative body.⁸⁵

Information, which includes data of the person, who seeking personal data or data of another person, in many cases, is subject to special regulation. In Estonia, in case of request of such information, the application must specify the purpose of use. It should be noted, that this rule applies to the cases when the information is requested by a representative of a state agency for fulfillment of official duties.⁸⁶ According to the law, a person who requests the information for the official purposes is not authorized to use such information for any other purpose⁸⁷.

A regime of special regulation must apply to the information of personal character in the United Kingdom⁸⁸, Scotland⁸⁹, Estonia⁹⁰, the United States⁹¹ and Georgia⁹². If the Freedom of Information Act regulates access to public information, independent statutory acts are dedicated to personal data protection.

⁸⁴ Effective FOIA Requesting for Everyone, a National Security Archive Guide, p.12;

⁸⁵ General Administrative Code of Georgia, paragraph 2, article 37;

⁸⁶ Public Information Act, Estonia, article 14(4)

⁸⁷ Public Information Act, Estonia, article 14 (5)

⁸⁸ UK Data Protection Act of 1998;

⁸⁹ UK Data protection Act applies to Scotland as well;

⁹⁰ Personal Data Protection Act, 2003, Estonia;

⁹¹ Privacy Act of 1974

⁹² Law of Georgia "On Personal Data Protection", of December 28, 2011 which was launched in May 2012, and therefore, considering the present study, it is impossible to analyze the effectiveness of its implementation in practice;

3. Officer responsible for release of information

The practice of appointing of a special officer in charge for review of the received applications and

The United States Environmental Protection Agency (Environmental Protection Agency) has a hotline through which information seekers connect to the officer responsible for the release of information and get information about the status of review of their application.

issuance of information is established in many countries of the world.

In the United States, any information which the public agency releases by means of media is deemed to be a “record” and is subject to the rules stipulated by Public Information Act. (<http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2011/states-get-social>)

Estonian legislation imposes the obligation for the organization and access of information to the officials of the institutions, possessing this information, and in case of physical persons- to these persons⁹³.

The agency possessing the information is entitled to determine the structural unit or officer who will be responsible to respond to applications, publish information, as well as identify the information request and publish internal procedures⁹⁴. If such a structural unit or officer is not defined then the person to whom the information request was transferred or in whose name the application was made shall be responsible for the release of information.⁹⁵

The manager of the state agency, who has the right to delegate the authority to the proper person, is responsible for the proactive disclosure of information.⁹⁶

UK Freedom of Information Act does not impose an obligation to determine particular officers in charge of release of information. However, code-of-practice⁹⁷, adopted in 2004, stipulated that state

⁹³ Public Information Act, Estonia, article 10(1)

⁹⁴ Public Information Act, Estonia, article 10(2)

⁹⁵ Public Information Act, Estonia, article 10(3)

⁹⁶ Public Information Act, Estonia, article 10 (4)

⁹⁷ <http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/code-of-practice>

agencies must make available contact information of the departments or, where possible, officers responsible for review of the application on information request.⁹⁸

According to the U.S. Freedom of Information Act, all administrative agencies must determine the Freedom of Information Senior Officer,⁹⁹ who shall be a high-ranking official. The law describes in detail the authorities of such person: he is responsible for the implementation of requirements of the Freedom of Information Act in the scale of an administrative agency; oversees the implementation of the law in the mentioned agency and provides reports to the agency head, senior lawyer and the Minister of Justice. Freedom of Information Officer makes recommendations to the head of a public institution, in order to achieve greater transparency and about changes made in the practices and procedures of the agency. On the basis of consultation with the Head of the institution, the information officer shall submit periodic reports to the Secretary of Justice, with regard to fulfillment of Freedom of Information Act.

One of the most important functions of the information officer is to determine, for internal use, exceptions in the rule of application and classification of information. Chief Freedom of Information Officer, is supported in fulfillment of official duties by so-called mediators of freedom of information appointed by him (FOIA Public Liaisons), who, at the same time, provide consultations to the applicants with respect to the rules of obtaining information.¹⁰⁰

The General Administrative Code of Georgia requires public agencies, to define a public official responsible for ensuring access to public information and proactive publication of information.¹⁰¹ The legislation does not provide any details about the powers of such public official, therefore, an administrative body, within the powers granted to it by law, has sort of freedom, to determine the mentioned issue itself.

4. The terms of review of the application and release of information

Timely receipt of information is very important for the seekers of information. In many cases, determination of improper terms for the release of information, significantly infringes on the rights of persons to obtain interesting for them information, which is kept in the state agency. One of the most important problems in the field of freedom of information –is the prolonged term of release of information. Therefore, in many countries, the law imposes an obligation of release of information immediately, or as soon as possible.

⁹⁸ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 142

⁹⁹ Chief FOIA Officer

¹⁰⁰ US Freedom of Information Act;

¹⁰¹General Administrative Code of Georgia, article 36;

Under Estonian law, the information required by the application should be answered immediately, but no later than within 5 working days¹⁰². In case of receipt of the incomplete application, the representative of the administrative agency should contact the applicant within 5 working days and offer to make corrections. The following terms shall be counted from the next working day after receipt of the application.¹⁰³

The law provides for the possibility of extending the term of reviewing the application up to 15 working days in cases where the application is not complete or its review requires more time than usual. However, the applicant must be notified within the term of 5 working days, with indication of the relevant reason¹⁰⁴.

According to the General Administrative Code of Georgia, the public agency must issue public information immediately (including information requested electronically). This period may be extended up to 10 days, if the answer to the request for public information, requires from the public institutions:

- ✓ Search and processing of information in its structural subdivision located in other urban area or any other public institution;
- ✓ Search and processing of separate documents of high volume not connected to each other;
- ✓ Consultation with its structural subdivision located in other urban area or other public institution;

If a 10-day period is required for release of information, the public agency must notify the applicant thereon in advance.¹⁰⁵

Administrative bodies in the UK have 20 working days to respond to the information requests from the applicants. If the release of information stipulates payment of a fee, the period from submission to the applicant of a request of payment, till its payment will not be considered. Taking into account the category and the content of the requested information, the 20-day term stipulated for the release of information can be extended up to 60 days by the Secretary of State.¹⁰⁶

The procedure is slightly different in case, if the public interest must be taken into account prior to issuance of information. In this case, the administrative authority is not obliged to release information as long as it is "reasonable in the given circumstances." The applicant must be informed

¹⁰² Public Information Act of Estonia, article 18(1);

¹⁰³ Public Information Act of Estonia, article 18 (2), (3);

¹⁰⁴ Public Information Act of Estonia, article 19;

¹⁰⁵ General Administrative Code of Georgia, article 40;

¹⁰⁶ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 135;

about it within 20 days, indicating the approximate date when the relevant decision will be made. If the final decision is made in favor of classification of the information, then one more notification is sent to the applicant, with indication of the reasons for the denial.¹⁰⁷

Unlike the United Kingdom, the Freedom of Information Act of Scotland does not recognize the authority of the extension of the term and all information requests must be answered within 20 working days. This rule applies to the information, which is subject to the so-called "Public interest" test. Only the requests, which are submitted to the National Archives of Scotland and guardian of public records, represent exception to the rule. This body has the right to extend the term of release of information for 10 days in case of request of such information, which has not previously been published.

In the United States any public institution, regardless of its activities, has a standard 20 day term for review of the applications of information request. Under certain circumstances, the mentioned term can be extended by 10 days. The notification must contain the reason and arguments.¹⁰⁸

In some cases, the law of the United States allows to review the application on an expedited basis. In particular, the information request applications which would prevent the health or life of a person from threat will be reviewed on an expedited basis. The same rule applies to the cases, when the release of information on an expedited basis is necessary for provision of the right of a fair process. In this case, for expedited process, it is necessary to submit arguments proving the existence of such circumstances and only the fact that the document is to be submitted to the court in a particular period of time, will not be considered. These two cases established for the expedited process are general and compulsory for all public institutions. In addition, the public agency is entitled to allow for other basis of expedited processes by internal procedures.¹⁰⁹

One of the difficulties faced by individuals interested in receiving information is identification of the public agency, where a certain type of information is kept. Some of the countries, responded to this challenge by the relevant legal guarantees and imposed an obligation on the public agencies, to forward application submitted to them to the appropriate agencies. According to Public Information Act of Estonia, if the application is submitted to improper agency, the administrative agency must determine the agency which has the requested information and immediately, but not later than 5 working days, send a request for information and at the same time, notify thereon the applicant.¹¹⁰

¹⁰⁷ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 136;

¹⁰⁸ US Freedom of Information Act;

¹⁰⁹ <http://www.foia.gov/faq.html#howlong>

¹¹⁰ Public Information Act (Estonia), article 21 (1)

If the recipient administrative body is authorized to explain to the applicant the possibility of application to such agency, instead of sending the request to the appropriate administrative body.¹¹¹

The obligation of sending the application to the appropriate recipient is not imposed on the private legal or natural persons, to whom the application was submitted.¹¹²

In the United Kingdom, in case of submitting the application to the improper agency, the agency receiving the application, at the legislative level, is not obliged to forward the application to the agency which has the information. According to Practical Code of 2004,¹¹³ this drawback of the Freedom of Information Act was filled and the administrative authorities were imposed an obligation to inform the applicant of the agency having the information interesting for them and its contact information. If in a particular case, a "more appropriate" action would be to send a request to the owner of the information; this can be done by contacting this agency and determining the fact of possessing of information, as well as on the basis of the applicant's consent. The applicant must be immediately informed of sending information to another administrative body. The deadline for submission of information, in this case, will be calculated from the date of receipt of the application by another authority.¹¹⁴

The law of the United States does not envisage such provisions, and the administrative bodies, which receive request of such information which is kept in another public institution, are not obliged to send the application to the appropriate recipient.¹¹⁵

Some administrative bodies, proceeding from their functions, can be imposed special terms of review of applications for information requests. For example, in the UK, schools are given 60 days to review the applications received during holidays or within short time after the holidays. If the requested information is kept abroad, or if a query can be answered only by the person who is preparing for a military operation, Information Commissioner may request to extend the term of review up to 60 working days.¹¹⁶

5. Release of information

The technical form of receipt of information is often very important for the applicants. Some forms of release of information are stipulated by the legislation of Estonia:

¹¹¹ Public Information Act (Estonia), article 21(2)

¹¹² Public Information Act (Estonia), article 21(3)

¹¹³ Section 45 Code of Practice, <http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/code-of-practice> ;

¹¹⁴ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 136;

¹¹⁵ US Freedom of Information Act;

¹¹⁶ Short Guide to the Freedom of Information Act and Other New Access Rights; Version 1.0, January 28 2005. Campaign for Freedom of Information; p 9;

- ✓ Electronic-by sending an e-mail to the electronic address;
- ✓ Recording the information to the electronic bearer;
- ✓ The copy of the document transferred to the paper-by transferring to the applicant or sending to the mailing address;
- ✓ Fax;
- ✓ Verbally;
- ✓ Introduction of the original document to the administrative authority;¹¹⁷

The following forms of receipt of information are recognized in the UK and Scotland:

- ✓ Issuing information at the letterhead or other established form of the agency;
- ✓ Reviewing the record or document in the administrative body;
- ✓ Based on the analysis of information kept in the public agency issuance of data or general information on the letter head or other form stipulated by the legislation;¹¹⁸

The public institutions must apply all efforts to issue information in the form, preferred by the applicant. In the United Kingdom and Scotland, the agency possessing information is required by the law to transfer the information to the applicant in the form preferred by the applicant, except for the cases, when the mentioned is connected with inappropriate expenses.¹¹⁹ Similarly, according to the Public Information Act of Estonia, the information must be submitted to the applicant according to the request.¹²⁰ If the preferred form of receipt of information is not clarified by the application, the administrative authority must contact the applicant to determine the preferred form of receipt of information.¹²¹

On the basis of the General Administrative Code of Georgia, everyone has the right to request public information regardless of its physical shape and condition of preservation and choose the form of receipt of public information, if it exists in various forms, as well as to get acquainted with the original¹²². According to the Code, information can be processed by unified automated means.¹²³

The law provides for such cases, when taking into consideration technical resources of the public agency, information can be transferred in the form, different from the one, indicated in the application. For example, in Estonia, information is issued in the form requested by the applicant provided that there are technical means for that. If the applicant wishes to receive information in the

¹¹⁷ Public Information Act, Estonia, article 17 (1);

¹¹⁸ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 136;

¹¹⁹ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 136;

¹²⁰ Public information Act, Estonia, article 17(1)

¹²¹ Public information Act, Estonia;

¹²² General Administrative Code of Georgia, paragraph 1, article 37;

¹²³ General Administrative Code of Georgia, article 35¹;

oral form, the administrative authority shall be authorized to use another form, if it deems that it will take an officer a long time to transfer it in the oral form.¹²⁴

If the information interesting for the applicant is already published and available in other resources, the administrative authority may refuse to provide written copies, except for the cases when the applicant needs copies officially certified by the agency.¹²⁵ By the amendment of the General Administrative Code of Georgia of 2012 the mentioned issue will be regulated differently. According to the changes, proactive publishing of the public information does not release the public agency in case of request of the same or other public information, from the obligation of issuing such information according to the established rule.¹²⁶

According to the Public Information Act of Estonia, oral information will be released only in case, if it concerns review of the petition, memorandum or application submitted by the applicant, or the person is asking for the information, on whether the requested information is kept in the agency or not¹²⁷;

Although the U.S. legislation allows the applicant to indicate the desired form of receipt of the information, the administrative agency, is not obliged to conduct a new research or analysis, or to answer questions in writing, or make new records for satisfaction of the interests of the applicant.¹²⁸

According to the General Administrative Code of Georgia, if there is a danger of damage of the original document, the public agency is authorized to offer the applicant another form of receiving information. Such alternative forms include offering the applicant the opportunity to get acquainted with the original under supervision of the representative of the administrative authority or receive a duly notarized copy.¹²⁹

In case of lack of indication of the preferred form of receipt of the application, the public institutions, based on the circumstances of the case, must choose the most efficient form of transferring the information. Under Estonian law, if the preferred form of receipt of information is not indicated in the application, and if it is not possible to determine it before the deadline for the submission of information on the basis of consultation with the applicant, the information must be released on the basis of the details of the application, in the form chosen by the administrative agency. If possible,

¹²⁴ Public Information Act, Estonia, article 17 (2)

¹²⁵ Public Information Act, Estonia, article 17 (3); 17(4)

¹²⁶ General Administrative Code of Georgia, paragraph 3, article 40;

¹²⁷ Public Information Act of Estonia, article 17 (5)

¹²⁸ <http://www.foia.gov/faq.html#what>

¹²⁹ General Administrative Code of Georgia, paragraph one, article 37;

the owner of the information must transfer the information in such a form, in which the request of information was submitted¹³⁰.

6. Refusal to release information

Estonian legislation provides for the absolute basis of refusal to request information and also cases when the administrative agency has discretionary authority to make a decision with regard to release of information, by assessing certain circumstances. The absolute grounds for refusal to release information are:

- ✓ Information interested for the applicant belongs to one of the exceptions stipulated by the legislation;
- ✓ The agency, receiving the application does not possess information interesting for the applicant and the agency/official possessing the requested information cannot be identified.
- ✓ The request cannot be satisfied because the information request does not specify what information is requested by the applicant;
- ✓ The applicant did not pay the state fee or other fee for obtaining information;

Apart from the mentioned, the law stipulates cases, where the administrative authority has the discretionary authority to satisfy or deny the information request. The following cases fall under this category:

- ✓ The person has been provided with the required information and cannot prove the need to re-obtain the information;
- ✓ The information requested from legal or natural person is not connected with their exercising of public authority;
- ✓ Issuance of the requested information or processing of the request would lead to unjustified changes in the organization of the work of the institution, could prevent the agency from exercising of its public functions or would cause disproportionate, unreasonable costs due to large volume of the requested information;
- ✓ It is impossible to fulfill the request by issuing one-time information;
- ✓ For the response to the request additional systematization and analysis of information would be required and based on this, compiling of new information. Such request is treated as a petition and will be responded based on the act about petitions;
- ✓ The person requesting the information has been recognized by the court as incapable;
- ✓ The phone number or the address of the person requesting the information is not specified in the application.

¹³⁰ Public Information Act of Estonia, article 17 (8)

In case of refusal on the basis of all these grounds, the applicant must be notified of the decision within 5 working days;¹³¹

In the UK there are 3 general and approximately 20 special grounds for refusal to release information. The examples of general exceptions are: "fixed" or repeated requests; information that is already quite accessible for the applicant, even if it is necessary to pay a fee for this; information which is planned to be published and issuance of which on the basis of an application would not be reasonable, even if the final date of disclosure of information is not determined;¹³²

The following information belongs to special exceptions:

- ✓ Information which deals with activities of the tribunals and agencies performing state supervision;
- ✓ Information which must be classified for protection of national security; or disclosure of which would harm the country's defense;
- ✓ Information, disclosure of which could harm the ongoing investigation of the criminal case;
- ✓ Information related to judicial records;
- ✓ Information which is protected by parliamentary privilege;
- ✓ Information which is related to communication with the Queen;
- ✓ Information which is prohibited to be issued by any other law or obligations undertaken before EU and so on.¹³³

In case of refusal to issue information, the administrative agency must explain to the applicant the reason for refusal, indicate the relevant legislative provisions and explain the procedure for appealing the decision in the administrative body, as well as by submitting an appeal to Information Commissioner.¹³⁴

In the United States the application can be refused for several reasons. Among these, in cases, if the information belongs to one of the exceptions stipulated by the legislation, the requested record cannot be found, the fee for the information has not been paid; the agency, due to the content of the information, cannot confirm or refuse the fact of possessing information or the requested information does not belong to "record", covered by the Freedom of Information act.

¹³¹Public information act of Estonia, article 23;

¹³²Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 139

¹³³Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 140

¹³⁴Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 136

Prior to refusal to satisfy the application stating that the requested record cannot be found in the agency, the administrative body must show reasonable efforts in search for the required data. In addition, the request should be interpreted broadly, so as not to limit the area of search.¹³⁵

In case of refusal to provide information, the administrative agency must inform the applicant of the position and name of the decision-making official, as well as explain the procedure of appealing.¹³⁶

According to the General Administrative Code of Georgia, the applicant must immediately be informed of the refusal of public institution to release information. The public agency must explain in writing the rights and the procedure of appealing within 3 working days, as well as indicate the structural subdivision or public agency, with whom consultation was conducted while making decision on the refusal to release information.¹³⁷

7. Expenses associated with release of information

Review of the information requests require significant financial and human resources from the state agency, therefore, establishment of a fee for provision of public information is an accepted practice in many countries. However, it is important that such fees be reasonable and moderate so that they would not become an obstacle for submission of an application to the public agency.

In some countries, fee related to the release of information bears symbolic nature and requires the applicant to cover costs related to copying. At the same time, in many places, a certain number of copies will be issued without any reimbursement. For example, in Estonia, according to the general rule, the applicant is charged only a mandatory, symbolic fee for copying (3 crowns for each copy). If the required number of copies does not exceed 21 pages, information is given out without any fees.¹³⁸ Georgian legislation also contains similar provisions, according to which, no fees shall be charged for public information, except for copying costs.¹³⁹

In some countries, while calculation of costs related to release of information, the compensation of the time, which the employee of the public institution will spend for the search of information will be taken into account. Scotland and the UK are examples of it.

In particular, in the UK, as well as in Scotland, a certain financial limit is stipulated, within which the information requests must be formulated. The existence of the limit does not mean that the costs related to the review of information will be imposed on the applicant. The financial limit is established for the case if the financial resources required for release of information exceed the

¹³⁵ Effective FOIA Requesting for Everyone, a National Security Archive Guide; p. 35

¹³⁶ Effective FOIA Requesting for Everyone, a National Security Archive Guide; p. 29

¹³⁷ General Administrative code of Georgia, article 41;

¹³⁸Public Information Act, Estonia, article 25;

¹³⁹General Administrative Code of Georgia, article 38;

established limit; in this case the public institution is authorized to refuse reviewing of such application.

For example, for the state department of the United Kingdom the limit of costs related to release of information is 600 £. Given the fact that hourly wages of a person employed in a public facility is 25 £, the mentioned limit is equivalent of three days and a half spent by a public officer on search of the information. For other structures that limit is 450 £, which is equal to two and a half days with the same salary.

While calculating resources, required for release of information, the administrative authority may take into account the time that is spent to determine whether the requested information is in the agency, as well as for information search and separation, the time required to record information in the form requested by the applicant. The time, which the administrative agency requires for taking a decision whether to issue information or not, shall not be taken into account while calculating the costs.¹⁴⁰

If the requested information exceeds the mentioned limit, the administrative body has the right to refuse to issue the information and consult the applicant on the reformulation of the request and fitting the limit. Alternatively, in case of consent of the applicant to completely cover the costs related to release of information, the administrative agency can release information if the limit is exceeded. However, this authority of the administrative agency is discrete and is subject to assessment of circumstances in each particular case.¹⁴¹

Under Scottish law, the information, release of which is connected with the amount more than 100 £, including the fee for copying, will be transferred to the applicant without payment of any fees. If the cost associated with the release of information exceeds this limit, the public agency is authorized to charge the applicant with 10% of the cost. Due to the fact that maximum hourly remuneration of the officials of the public agency is 15 £, the fee imposed on the applicant may not exceed 1,5 £ for each hour required for the review of the application.¹⁴²

In the US, as a rule, the information seeker is exempt from payment of the fee for the first two hours of search and the first 100 pages of copies. However, if by the evaluation of the administrative agency, the fee for the information requested by the applicant exceeds \$ 25, the applicant is notified thereon and offered to reduce the request. The applicant shall pay a fee, if it is determined, that the

¹⁴⁰ Short Guide to the Freedom of Information Act and Other New Access Rights; Version 1.0, January 28 2005. Campaign for Freedom of Information; p. 11

¹⁴¹ Short Guide to the Freedom of Information Act and Other New Access Rights; Version 1.0, January 28 2005. Campaign for Freedom of Information; p. 12

¹⁴² Short Guide to the Freedom of Information Act and Other New Access Rights; Version 1.0, January 28 2005. Campaign for Freedom of Information; p. 11-12;

record requested by him/her does not exist, cannot be found or the information is the exception stipulated by legislation, which is not intended for publicity.¹⁴³

In many cases, the law establishes circumstances under which the applicants can be exempted from payment of fee related to release of information. In the US, the case, when the information requested by the applicant is the subject of public interest and the information will increase awareness of the public about activities of the administrative agency falls under such circumstances.¹⁴⁴ The fee is not to be paid in Estonia in case when its collection is economically unprofitable, or when the information seeker requires information for the realization of personal rights. The people who require information for scientific/research purposes are also exempt from the fee and cannot pay the fee due to hard economic situation¹⁴⁵. The General Administrative Code of Georgia, authorized any person, to receive free of charge copies of the documents containing personal data before making amendments to it in May 2012¹⁴⁶. After the changes, the mentioned provision of the Administrative Code about protection of personal data applied to the law. The current wording of paragraph 5 of article 21 of personal data, authorizes the person to familiarize with the personal data, kept in the public agency and receive free of charge copies of this information, *except for the data issuance of which stipulates payment of fee*¹⁴⁷.

¹⁴³ <http://www.foia.gov/faq.html#cost>

¹⁴⁴ <http://www.foia.gov/faq.html#cost>

¹⁴⁵ Public Information Act, Estonia, article 26;

¹⁴⁶ As a result of changes in the General Administrative Code of Georgia, article 39, which regulated the mentioned issue was removed.

¹⁴⁷ Law of Georgia on the Protection of Personal Data, paragraph 5, article 21;

IV. Limited information (exceptions)

Even the most progressive freedom of information acts of the world take into account the category of information, which, due to its contents, is subject to particular form of regulation. The information which deals with the national defense, international relations, professional, commercial or personal secrets belongs to the number of most common exceptions. On the one hand, the existence of such exceptions is necessary to protect particular public interest, and on the other hand, it is important the range of exceptions to be very strictly limited, and their practical use - moderate.

Exceptions and conditions of use shall be strictly regulated at the legislative level. There are cases when the law, along with determination of information belonging to exceptions, contains the list of data, which cannot be considered as exception. Public Information Act of Estonia is based on these principles.

According to the Act, in order to fall under exceptions provided for by law, access to information must be limited on the basis of the procedure established by law of Estonia. The head of the public institution, who assigns the status "for internal use" to the data which falls under exception, exercises the right to classify information¹⁴⁸.

The law defines the list of information which is appropriated the label "for internal use". Such include: felony-related data; the information related to the supervision process; information, publication of which would undermine the country's foreign relations; information about military units and deployment and arming of armed forces which is a State secret; information disclosure of which would jeopardize the protected areas,

The efficient use of the exceptions was described by a former Canadian information commissioner, John Raid, who was appointed to this position in 1998. Following his nomination, in order to exchange experiences he met with his predecessor, John Grace. Grace said that during 15 years of work, which he spent on review of state records for determination of legitimacy of their classification, he never came across any case, when the information belonged to true secret. At the anniversary of the appointment, Raid also had the same experience. He said that officials classify information because it represents the means for control and power, and not because the information which they possess is specially sensitive by its content.

¹⁴⁸ Public Information Act, Estonia, article 34

protected species and their environment; technological information, the disclosure of which would jeopardize the owner of information or considering this information “for internal use” is stipulated by the agreement, signed with the legal entity of private law; personal information, and so forth¹⁴⁹.

The list of information, which is not subject to “internal use” document classification, is stipulated by the legislation. Such is: the results of public opinion surveys; generalized statistical surveys / polls; economic and social forecasts; current information about the state of the environment; information about the quality of goods and services necessary for the protection of consumers' rights; results of research or analysis conducted/ordered by the central or local government, except for the cases where the disclosure of such information could create a threat to national security or defense; documents which reflect the use of budgetary funds by the central and local government, legal entities of public law, as well as information about payments and compensations received from the state budget and so on.

It should be noted that the categories of information that cannot be classified, equally apply to non-entrepreneur unions, foundations and companies, which are funded by the central or local government or legal entities of public law or where the central or local government or a legal entity of public law owns a share. Information about transfer of budgetary funds by the central or local government to the persons of private law is not subject to classification.¹⁵⁰

Documents related to the investigation of criminal cases, under the legislation of Estonia do not constitute an absolute exception and if such information constitutes public interest, the public agency must release it. Information should be given out in the portions that will not interfere with the investigation or the determination of the reason which caused the accident. The person, who manages the investigation or supervises determination of the cause of the accident, will define in what portion the information should be released.¹⁵¹

Georgian legislation, similarly to the Estonian model, establishes a list of information that is public in all cases and cannot be made secret. Such include: information about the environment, as well as data on the danger that threatens the life or health; main principles and directions of the activities of the state agency; description of the structure of the state agency, identification and distribution of personnel functions, as well as the decision-making procedure, and so forth.¹⁵²

The Administrative Code defines three categories of classified information. Such is considered to be information, which contains personal data, state or commercial secrets, received, processed, created,

¹⁴⁹ Public Information Act, Estonia, article 35 (1)

¹⁵⁰ Public Information Act, Estonia, article 36

¹⁵¹ Public Information Act, Estonia, article 38(1)

¹⁵² General Administrative code of Georgia, article 42;

or sent by the state agency or its officer.¹⁵³ Furthermore, the issue of considering the information as a state secret is determined by the law on state secrets, and regulation of the issues related to personal data is the task of the law on personal data protection.

UK Freedom of Information Act, which is considered to be one of the most progressive laws in the field, contains a wide range of exceptions of information access, which with their restrictive effect exceed the practice existing in other countries. Therefore, the approach towards the exceptions is considered to be the Achilles 'Heel of the law'.¹⁵⁴

Besides the Freedom of Information Act, various other laws setting limits to this or that type of information are in force in the UK. At the same time, the Secretary of State is authorized to amend the standards setting restrictions to the information access. This right of the Secretary of State is seen as an important mechanism to secure transparency of the information kept in the public institutions, but precedents of application of this authority in practice are still pending.¹⁵⁵

Information related to the exceptions, in turn, is divided into two groups. Exception information, classification of which is subject to excepted or alleged damage tests in case of its disclosure, belongs to the first type. In particular, according to the law, there is no disclosure obligation if, taking into account all the circumstances, the public interest of classification of information exceeds the public interest of its disclosure.¹⁵⁶

The so-called absolute exceptions belong to the second group. It is implied, that disclosure of such information could cause damage, and therefore, it is not subject to the "public interest" test.¹⁵⁷ Such is information which can be obtained by other means as well, without requesting from the administrative body; information relating to the security agencies; court cases / records; parliamentary privileges; details of the implementation of parliamentary authority; personal information; information, the disclosure of which is prohibited by any other law or based on the obligation undertaken before the EU;¹⁵⁸

It should be noted that the restriction is imposed on an important part of information only for certain period and according to the general rule stipulated by the Freedom of Information Act, this term is 30 years¹⁵⁹.

¹⁵³ General Administrative code of Georgia, subparagraph "m" of article two;

¹⁵⁴ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 137

¹⁵⁵ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 138

¹⁵⁶ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 138

¹⁵⁷ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 138

¹⁵⁸ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 138

¹⁵⁹ Ministry of Justice of the UK, <http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/exemptions-guidance/foi-exemptions-about>

Some officials defined by law, exercise the authority to confirm the correctness of considering certain information as classified by a public agency. For the information falling under the Parliamentary privilege, the speaker of the House of Commons or Parliament Clerk has this authority. The confirmation issued by the official does not constitute a mandatory precondition for publication of exception, but is considered to be a significant proof in cases, when the administrative agency has to prove justification of the decision taken in favor of classification of information.¹⁶⁰

The decision of the administrative body, to attribute information to any exception stipulated by law, is subject to review by the Information Commissioner. The Commissioner assessed the legitimacy of the decision and taking into account the public interest towards the information, where appropriate, issues an order¹⁶¹ about transfer of the information considered classified to the applicant. The ministers of the cabinet have the veto right towards this decision, which seriously reduces the capacity of the Commissioner to protect public interest.¹⁶² It should be noted that the veto is subject to review by the court.¹⁶³

The U.S. Freedom of Information Act provides presumption of maximum publicity of information existing in the public institutions. The presumption mentioned by the court practice is strengthened by the fact that the administrative authorities are obliged to explain precisely 9 exceptions stipulated by Freedom of Information Act.¹⁶⁴

It is important that the information attributed to exceptions can be reviewed in terms of its legality. Classification, as a rule, is established for certain period and most part of information, 10 years after its classification, becomes available for all interested persons. For the information of more sensitive character this term is 25 years. The documents having historical value will be made public after 25 years, if the law does not stipulate a special exception.¹⁶⁵

While interpreting the exceptions, the court resolutions on the relevant issues are very important. For example, the court established a precedent that the rules and procedures of internal use of institutions, regardless of general exceptions, can be subject to publicity, if the document in any way relates to or affects the member of society.¹⁶⁶

Information deemed to be an exception, is subject to so-called «Public interest test», although the law stipulates absolute exceptions as well. A classic example, in this term, is the records of the

¹⁶⁰ The Ministry of Justice of the UK, <http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/exemptions-guidance/foi-exemptions-about>

¹⁶¹ Decision Notice on Enforcement Notice, Freedom of Information Act of the UK, article 53;

¹⁶² Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 138

¹⁶³ ¹⁶³ The Ministry of Justice of the UK, <http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/exemptions-guidance/foi-exemptions-about>

¹⁶⁴ Effective FOIA Requesting for Everyone, a National Security Archive Guide; p. 38

¹⁶⁵ Effective FOIA Requesting for Everyone, a National Security Archive Guide; p. 39

¹⁶⁶ Effective FOIA Requesting for Everyone, a National Security Archive Guide; p. 40-41

intelligence agencies. With regard to such information, the public agency exercises not only the authority to classify it, but also has the right not to confirm or deny the possession of the information. Information about national security, reports drawn up by agencies regulating or supervising financial institutions are not subject to assessment of damage.¹⁶⁷

The Secretary of Justice gave recommendations to public institutions, not to count information as exception only because it technically meets all its criteria. According to the instructions of the Secretary, the administrative bodies should use their discretion rights in favor of publicity. Doing so, the public institutions promote the aspiration of the president of US, the current administration to be recognized the most transparent in the history of the country.¹⁶⁸

V. Proactive publication of information

1. Legislation

Freedom of Information implies not only the right of individuals, to apply to the public institution for obtaining information interesting for them, but also the positive obligation of the public institutions, to proactively publish information kept with them. Disclosure of information by the initiative of public institutions, in spite of request of information, serves two purposes simultaneously: on the one hand, the transparency of the public institution increases, because the public is better informed about its activities. The second advantage of proactive publication lies in the fact that while publishing the information on its own initiative, the public agency reduces the number of applications submitted by the interested parties requiring unavailable information in other cases, and thus, saves financial and human resources required for the review of the application.

The growing interest towards proactive publication is reflected at the national level, taking into account the obligation to disclose information in the law of some countries, as well as by initiatives implemented at the international level. For example, the OSCE Special Representative in Freedom of the Media area, in 2007 noted that kind of "Copernicus revolution", whose integral part is the commitment to the proactive publication of information, is taking place in the sphere of Freedom of information. He also recommended that public institutions should have the positive responsibility, to publish information about their structure, personnel, activities, rules, regulations, decisions or purchases. Any other information, which constitutes the sphere of public interest, should be subject to proactive publication. It is important that such information should be published on a regular basis,

¹⁶⁷ Effective FOIA Requesting for Everyone, a National Security Archive Guide; p. 36

¹⁶⁸ <http://www.foia.gov/faq.html#important>

using modern computer technologies, as well as in public reading halls and libraries, which provides easy and unhindered delivery of information to interested persons¹⁶⁹.

The Council of Europe Convention on Access to Official Documents imposes an obligation on public institutions, to proactively publish information about their activities. According to the Convention, public authorities should take all measures at their own initiative in order to publish official documents kept with them, publicity of which favors transparency of public administration and improves public participation in the decision-making process.¹⁷⁰

The issue of proactive publication is further extended by the Explanatory Memorandum of the Convention. It lists several categories of information that must be subject to proactive publication. Such include: information about the structure of the public institution, staff, budget, activities, rules, policies, decisions, delegating the authority. According to the same report, the policy of applying to public institution with the request of information and any other information attributed to public interest.¹⁷¹

The memorandum also states that *information request applications submitted to the public institution, are a reliable indicator as to what type of information constitutes the public interest and, therefore, what kind of proactive disclosure of information will be effective.*¹⁷²

In addition to the general nature of the documents, there are thematic international documents regulating the issue of proactive publication. They include the 2003 United Nations Convention against Corruption and the Aarhus Convention¹⁷³. Convention against Corruption requires participating states to publish information related to nomination of public officials at the positions, promotion and dismissal, funding of political parties and candidates or information related to state procurement. The Convention also provides for the access to anti-corruption policy documents of the state and obligation to periodically publish reports regarding corruption risks existing in the public administration area.¹⁷⁴

¹⁶⁹ Proactive Transparency: the Future of the Right to Information? by Helen Darbshire, The World Bank, Access to Information Program; p.19

¹⁷⁰ Convention on Access to Official Documents, Article 10;

¹⁷¹ Proactive Transparency: the Future of the Right to Information? by Helen Darbshire, The World Bank, Access to Information Program; p 20

¹⁷² Proactive Transparency: the Future of the Right to Information? by Helen Darbshire, The World Bank, Access to Information Program; p. 20

¹⁷³ Convention on access to information related to environmental issues, public participation in decision-making process and issues of justice in this field. Georgia signed the Convention in 1998 and ratified in 2000;

¹⁷⁴ Proactive Transparency: the Future of the Right to Information? by Helen Darbshire, The World Bank, Access to Information Program; p. 21

The Aarhus Convention contains the most detailed regulation of proactive publication of information, among international documents, which establishes mechanisms for the dissemination of general information about the environment.¹⁷⁵

By the combination of different standards and practices established by international documents, a minimal standard for the information which is subject to proactive publication can be established:

Institutional information – legal basis of foundation and activities of the agency, internal regulations, functions and powers;

Organizational Information - organizational structure, including names of personal and contact information;

Operating Information - strategy and plans, policies, activities, procedures, reports and assessments - including the information and data that are the basis for any decision or report;

Decisions and acts - acts and decisions that affect the community, indicating the information and data that are the basis for the adoption of such acts;

Information about public services – description of the service offered to public, as well as brochures, leaflets, standard forms and information about fees and terms for such services;

Information about the budget - the budget forecast, the actual revenues and expenses (including salary information), as well as other financial information, including the auditor's report;

Information about public meetings - information on meetings held in public institutions, including the public hearings, which are free to attend. The procedure for obtaining the right to attend such meetings;

Decision-making process and public participation - information about the decision-making process, as well as in the process of community involvement and public consultations;

Information about subsidies - information about the beneficiaries of subsidies, purpose, amount and usage of subsidies;

About Public Procurement – about the process of public procurement, selection criteria and the results of the tender announcements; as well as a copy of the purchase contract and the contract execution process;

¹⁷⁵ Proactive Transparency: the Future of the Right to Information? by Helen Darbshire, The World Bank, Access to Information Program; p. 21

Lists, registers and databases - information on lists kept in the public institutions, the registers and the databases. Also information on how to gain access to the data (electronically, via the website, and so on);

Information about the data kept in the public institution - a registry of the information kept in the public registry with short description of the mentioned information;

Information about publications – information about publications of the public agencies, as well as the rule and the price of obtaining these publications (if any);

The Right to receive public information - procedure for requesting public information and contact information of the person responsible for release of public information¹⁷⁶;

Estonian law requires the agency which possesses information to proactively publish it and sets the list of the information which must be published. This list contains such information, as:

- ✓ General economic statistics and forecasts about central and local government;
- ✓ General statistics about the crimes and violations;
- ✓ Charter/regulations of the central and local government and their structural units;
- ✓ Special form or letterhead, for submission of an application to an institution, as well as instructions for filling out the forms;
- ✓ Description of the functions of the central and local government officials, a full list of their positions, as well as the names, surnames, education, sphere of specialization, telephone number and e-mail address of the persons who occupy positions in such agencies;
- ✓ Information about the danger to the life, health or property of the persons;
- ✓ Information about results of activities and implementation of the authority of the central and local government;
- ✓ Supervisory Board and Managing Board members of the legal entities of public law, their names and e-mail addresses;
- ✓ The report of revenues and expenditures, as well as management reports of the legal entities of public law.
- ✓ The budget and the draft of the budget of central and local government bodies, as well as the information about performance of the budget;
- ✓ Information about receiving funds from the state budget;
- ✓ Information about the state of the environment, risk and negative impacts on the environment;
- ✓ Provisions related to the state supervision or supervisory control.¹⁷⁷

¹⁷⁶ Proactive Transparency: the Future of the Right to Information? by Helen Darbshire, The World Bank, Access to Information Program; p. 21-22;

According to the law, the Estonian public institutions are obliged to identify the official who is responsible for the disclosure of information, and who may be contacted for explanations and definitions of the published information¹⁷⁸.

Estonian legislation defines methods and tools for publishing information. According to the law, the information must be placed on the web-page of the institution. In addition, it is permitted to use such means as TV / radio broadcasting or print media, placement of the document for public discussion in a conspicuous place in the premises of a local authority or a public library, an official press agency and so on.¹⁷⁹ The method which ensures the most efficient and timely access to information for all interested parties should be selected for publication of information¹⁸⁰.

Information related to a person's life, health or property, as well as any threat to the environment shall be made public immediately. For publication of such information the most quick and suitable method must be chosen.¹⁸¹

The central and local authorities are obliged to deliver to TV / radio and media all available information on the facts and events, which may become interesting to the public.¹⁸²

Estonian Public Information Act includes a list of the institutions that are required to maintain their own web - page. The Parliamentary Chancellery, the President's Secretariat, Office of the Chancellor of Justice, the State Auditor, the courts, and the general staff of the defense forces, state agencies, and legal institutions belong to these institutions.¹⁸³

The legislation also provides for the minimum standards that must be met by the web-page of any public agency. In particular, information on the web – page must be placed thematically, be reliable and regularly updated. The institutions must immediately eliminate all technical problems that

The public institutions in the United States, while proactive publishing are guided by so-called "Third rule", which means that two or more applications requesting one and the same information is considered to be an indicator of public interest and such information is published proactively.

¹⁷⁷Public Information Act, Estonia, article 28;

¹⁷⁸Public Information Act, Estonia, article 28(2);

¹⁷⁹ Public Information Act, Estonia, article 29(1), (2);

¹⁸⁰ Public Information Act, Estonia, article 30 (1);

¹⁸¹Public Information Act, Estonia, article 30 (3);

¹⁸²Public Information Act, Estonia, article 30 (4);

¹⁸³Public Information Act, Estonia, article 31;

impede receipt of information by the web-page. The web-page must contain the date of publication of the information as well as the date of its latest update. The web-page of the State Chancellery, ministries and local authorities must contain links to visit web-pages of the public institutions subordinated to them.¹⁸⁴

Legislative guarantees include not only responsibility of public institutions to maintain the web-page and proactively publish information, but also the right of citizens to access information provided by such services. The public libraries of the country represent an area, where the interested persons are encouraged to use the internet and receive information about the activities of administrative agencies¹⁸⁵.

The original edition of the UK's Freedom of Information Act, unlike Estonia, did not contain the list of proactive publications. Instead all state agencies were required to develop and implement individual schemes of proactive publication of information. This commitment meant that the public institutions were allowed to define what type of information to release in a proactive manner. In drawing up the scheme of proactive publication of information, the public agency had to take into account high interest of society towards certain categories of information and to provide access¹⁸⁶ to such information. The scheme of publication of information by the public institution was subject to agreement with the Information Commissioner.¹⁸⁷

The mentioned approach of the law granted freedom to every public institution, to independently choose the information that will be published proactively by this institution. The existence of the list of proactive publications at the legislative level caused a significant imbalance in terms of transparency of other institutions, therefore, in January 2009, a new regulation adopted by the information Commissioner entered into force, which within the limits of the powers of the Information Commissioner stipulates a minimum standard of the information subject to proactive publication without changing Freedom of Information Act.¹⁸⁸ Freedom of Information Act of Scotland also provides for a similar regulation.

In 2010, the Civil Service Reform Act was adopted in Scotland¹⁸⁹, which requires the Ministries of Scotland and the public institutions listed in the law to regularly publish important information related to their activities. At the end of each financial year the institutions are obliged to publish information on the expenses incurred during the year, which are related to:

¹⁸⁴ Public Information Act, Estonia, article 32;

¹⁸⁵ Public Information Act, Estonia, article 33;

¹⁸⁶ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 137;

¹⁸⁷ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 137;

¹⁸⁸ Proactive Transparency: the Future of the Right to Information? by Helen Darbishire, The World Bank, Access to Information Program; p. 6;

¹⁸⁹ Public Services Reform (Scotland) Act 2010;

- ✓ Public relations;
- ✓ Travel outside of the country;
- ✓ Receiving and entertainment of guests;
- ✓ Invitations of consultants;
- ✓ Expenses that exceed £ 25,000 (excluding salaries);
- ✓ The names and number of employees who received remuneration more than £ 150,000 during the year.

The issue of proactive publication of information acquired particular importance in the US after the country's president, by memorandum about Freedom of Information Act¹⁹⁰ published in 2009, called on public institutions to perform their activities transparently and act with the presumption of publicity towards information kept with them. According to the memorandum, if there is any doubt, the choice between disclosure and classification of information must be made in favor of disclosure of information.¹⁹¹ In turn, the "presumption of disclosure" was interpreted as a positive obligation of public institutions to publish information about their activities on their own initiative¹⁹². Based on the mentioned memorandum, in March 2009, the Justice Secretary developed guidelines for all agencies of executive government¹⁹³.

The manual says that open governance requires proactive activities of the public institutions. The administrative bodies should regularly publish information without request of such information. In addition, the officer responsible for release of information in each public agency was assigned to submit an annual report to the special division of the Justice department about performance by the agency of the obligation of proactive publication.

The General Administrative Code of Georgia did not envisage provisions related to proactive publication of information before changes made to it in May 2012. By May changes, the term "publication" used in the Administrative Code was interpreted as "registration of public information in the public register according to the rule established by the legislation and ensuring the access of public information to the public, as well as *proactive publication of information*"¹⁹⁴. Proactive publication according to the code means placement of the information of public interest in the electronic resources by the public agency according to the rule defined by the relevant regulatory act¹⁹⁵. The public agencies must be imposed the obligation of appointing the officer responsible for proactive publication of information¹⁹⁶, and determination of the rule of proactive publication of the

¹⁹⁰ See the text of the Memorandum: http://www.whitehouse.gov/the_press_office/FreedomofInformationAct

¹⁹¹ The principle, according to the memorandum, is defined as follows -: „in the face of doubt, openness prevails“;

¹⁹² Proactive Transparency: the Future of the Right to Information? by Helen Darbshire, The World Bank, Access to Information Program; p. 6;

¹⁹³ Office of Attorney General, 19 March 2009, Memorandum for Heads of Executive Departments and Agencies, FOIA;

¹⁹⁴ General Administrative Code of Georgia, subparagraph "f", article 27;

¹⁹⁵ General Administrative Code of Georgia, subparagraph "k", article 27;

¹⁹⁶ General Administrative Code of Georgia, article 36;

information fell under the regulation of statutory act published for this purpose¹⁹⁷. The standards related to proactive publication of information shall come into force from September 1, 2013.

2. Proactive disclosure practice

Note: This chapter discusses the practice of proactive publication of agencies, whose functions are more or less equivalent to those of the Ministry of Justice, Chamber of Control, Public procurement agency and the Civil Service Bureau. For drawing parallels between the central and local authorities, the research provides analysis of the activities of the government of Scotland.

“The Ministry of Justice”

Under the conditions of development of modern technologies, electronic means became the best form of publication of information. At the same time, two methods of publication of information are mostly used for publication of information by internet: **the first means publication of information on its web-page by each public agency, and the second-setting up a centralized portal for transparency.**

UK public institutions mostly use the first model. Here, almost all web pages of the administrative institutions have link “public information”¹⁹⁸, which transfers the user to the section dedicated to freedom of information. The web page of the Ministry of Justice of UK is based on this system as well. The mentioned Ministry has a special role in the regulation and implementation of the issue of independence. In addition to the regulatory function, the Ministry of Justice, as a public body, falls under the sphere of application of the Freedom Act and has the same obligations of information access, as any public institution.

UK Ministry of Justice website contains the procedure of requesting the information from the Ministry. In particular, the procedure of submitting an application to the Ministry is explained, as well as other details, which will simplify the process of receipt of information by the applicant.¹⁹⁹

The Ministry publishes at its web-page all the data, which was released in response to applications submitted by the interested persons²⁰⁰. The data is presented thematically, as well as according to the department subordinated to the Ministry issuing information. The web-page contains the link, through which receipt of statistical information about this department can be obtained.

The example of unified transparency portal is data.gov.uk, where the information about activities, budget spending, state contracts of all agencies of executive branch is gathered. A similar portal was

¹⁹⁷ General Administrative Code of Georgia, paragraph two, article 28;

¹⁹⁸ „access to information“ or “freedom of information”

¹⁹⁹ <http://www.justice.gov.uk/information-access-rights/foi-requests>

²⁰⁰ <http://www.justice.gov.uk/information-access-rights/foi-requests>

created in the US-data.gov, which brings together the generated databases of the executive branch of the federal authorities.

United States Department of Justice, as the federal agency responsible for information disclosure, with the purpose of improving proactive release of information created the web-page foia.gov, which explains how the freedom of information legislation works, as well as describes the rule of application of the mentioned legislation. The web-page is a comprehensive resource, which contains information on the activities of the executive bodies in the sphere of freedom of information, including contact information of the officer responsible for release of information of each agency. The information in the web-page is displayed in such format, which enables the user to classify information, ensures the possibility to process and re-use information.

The renewed web-page <http://www.justice.gov/oip/> of the information policy division of the department of Justice contains all main manuals available in the area of freedom of information, as well as the overview of the resolutions of the courts regarding this issue. The web-page allows the customer to electronically submit the information request application and monitor the stages of its review. Besides the mentioned department, the web-page of the Ministry of Justice contains links for transmission to web-pages of all structural units displayed in its system. It should be noted, that the web-page of each of these units has all the functions, which provide the most efficient execution of the obligation of publication. For the purpose of proactive publication, the Justice Department is also actively using social media resources (Facebook; Twitter; YouTube).

The web-page of the Estonian Ministry of Justice http://www.just.ee/?set_lang_id=2 according to the requirements of the legislation, is structured thematically and it contains links according to the main areas of the activities of the Ministry. The web-page also contains a section - "Practical information" – the method of search is described in a simple and clear language; it also contains information about legal aid.

“Chamber of control”

The UK National Audit Office, which is more or less identical to the functions of the Chamber of Control shall, on its web - site-<http://www.nao.org.uk/> - the scheme of proactive publication of the agency, as it is required by the Freedom of Information Act. The scheme includes detailed information about the institution's functions and objectives, budget and its spending, priorities, decision-making rules, policies and procedures, lists and registers, as well as the results.

This web-page contains the structure of the organization (in PDF format); remuneration of the officials of the institution (in PDF format); business trip expenses (Excel table; information about funds paid to the suppliers for different goods or services according to months and years; it should be

noted that the receipt of public information from the mentioned agency is possible by submitting an application by e-mail or telephone.²⁰¹

The web-page of the Audit Office of Scotland- <http://www.audit-scotland.gov.uk/about/ags/> -contains the scheme of proactive publication of the institutions, the rule of receipt of public information from these bodies and the list of data which the institution issued in response to the information request applications.²⁰² The web-page contains the audit reports and other statistical information.

The Freedom of Information Act does not apply to the activities of the United States Government Accountability Office, unlike similar agencies of the United Kingdom and Scotland. However, the web - page - <http://www.gao.gov/about/index.html> - indicates that it is called to voluntarily comply with the basic principles of the Freedom of Information Act, and to publish such information, which is not an exception defined by the legislation. As a result, the body itself developed internal regulation and policies on access to the data, which is published along with the contact information of the officer responsible for providing the information.²⁰³ Apart from this positive example, the accountability agency, as a public institution, must publish information about its expenses and procurement. Comprehensive information about this is provided on the web-page of the institution²⁰⁴.

The National Audit Office of Estonia proactively publishes important information related to its activities on its web-page - <http://www.riigikontroll.ee/Avaleht/tabid/36/language/ru-RU/Default.aspx>. The web-page provides information about the legal basis, structure, budget, contracts signed with suppliers. The web-page also contains the information register of the institution. It is also indicated that the information request can be submitted by means of a special form displayed at the web-page or by e-mail.

“Procurement agency”

Numerous rules and regulations existing in the sphere have a significant impact on public procurements of the United Kingdom. Therefore, it is difficult to find such regulatory authority of public procurement, whose functions are similar to those of the Procurement Agency. However, the practice established in the United Kingdom, the agreements signed in the sphere of procurement to become accessible by internet is worth mentioning, because it constitutes an important leverage of transparency of public institutions. The portal -<http://www.contractsfinder.businesslink.gov.uk/> - which contains the agreements on public procurement signed by the administrative bodies or tender documentation nationwide illustrates the mentioned.

²⁰¹ http://www.nao.org.uk/about_us/structure_governance/transparency.aspx

²⁰² <http://www.audit-scotland.gov.uk/foi/docs/publicationscheme.pdf>

²⁰³ <http://www.gao.gov/about/products/foia.html>

²⁰⁴ <http://www.gao.gov/about/products/expenditures.html>

In the United States, the division of executive procurement of the Department of Justice is responsible for the supervision and regulation of the procurement.²⁰⁵ The mentioned authority proactively publishes at its web-page http://www.statebuy.state.gov/content.asp?content_id=170&menu_id=45 - information about officers responsible for procurement of each agency of the executive authority. It also contains information on procurement agreements.

In Estonia, the supervision and control of public procurement is performed by the Ministry of Finance. The web-page of the mentioned agency, contains the main legislative material in the field of public procurement, purchasing registry and other important information in the procurement section - <http://www.fin.ee/index.php?id=79361>.

“Public service bureau”

In the United States of America, the general administration of the regulatory agency of public service sector (US General Services Administration) web - page - <http://www.gsa.gov/portal/category/100000> - is complex and involves not only the databases on the agencies, but also numerous links, which are related to governmental institutions.

Local government

The government of Scotland efficiently uses its web-page - <http://home.scotland.gov.uk/home> - for public consultations, which means, that a certain issue discussed by the government is submitted for public discussion and the user has the opportunity to express own opinion with this regard. The web - page contains information about the expenses and business trip expenses incurred by the government. The web-page user can get information about the scheme of proactive publication of the government of Scotland and information that was released in response to the information request.

²⁰⁵ Office of the Procurement Executive

VI. Control and supervision over the implementation of law

1. Monitoring agencies

Freedom of Information legislation, even ideal, can become an effective tool for obtaining information only when there are control and supervision mechanisms for its implementation.

In Estonia, the implementation of Public Information Act is overseen, on the one hand, by data protection inspectorate, and on the other hand, the superior authority of each administrative agency²⁰⁶ .

The data protection inspectorate, on its own initiative or on the basis of received complaints, exercises control on how the public institution fulfills its legal duty to register all information request applications submitted to it, reviews all such requests within the term stipulated by the legislation and refuses to release data kept by it only in cases stipulated by the legislation. The inspectorate also performs monitoring of the web-pages of the public institutions.²⁰⁷

The Information Commissioner is responsible for implementation of the UK Freedom of Information Act, who, at the same time, is responsible for the supervision of the Data Protection Act. The Commissioner is accountable to Parliament. He coordinates the schemes of proactive publication developed by the administrative bodies, shares information about the best practices in public institutions, and takes care of public awareness on the access²⁰⁸ of public information kept in the public agency. The Information Commissioner of Scotland must monitor the execution of Freedom of Information Act of Scotland.

In addition, the UK Freedom of Information Act, provides for supervision and regulation of implementation of various components of Freedom of Information legislation by the Secretary of State and Lord Chancellor. In particular, it is the authority of the Secretary of State, to oversee the procedure and practice of public institutions for the review of information request applications and develop the code of practice for the administrative bodies to be guided by²⁰⁹. Development of the code of records management practice in the public institutions is the responsibility of the Lord Chancellor.²¹⁰ When developing the code, the State Secretary, as well as Lord Chancellor, must consult Information Commissioner.

²⁰⁶ Public Information Act, Estonia, article 44

²⁰⁷ Public Information Act, Estonia, article 45

²⁰⁸ UK Freedom of Information Act, article 47;

²⁰⁹ UK Freedom of Information Act, article 45;

²¹⁰ UK Freedom of Information Act, article 46;

The state office of government information service established in the National Archives & Records Administration of the US²¹¹, is the agency, which has the function of an ombudsman²¹² and it is kind of intermediary between the seekers of information and the federal agency. The ombudsman offers the information seekers and public institutions an alternative mechanism of dispute resolution. As to the performance of procedural obligations of the administrative agencies, the control over the mentioned issue is performed by the information policy service established in the department of Justice.²¹³

2. Appealing of resolutions of the state agencies

The right of all interested parties to have access to information kept in a public institution, would not be of full value, had there not been the opportunity to appeal and review the negative decision on release of information by public agencies. Such decision can be appealed by the administrative rule (a superior official or supervising body), or by court procedures. In some countries, special courts were set up for review of negative resolutions of the public agencies.

As a rule, before the review of the negative response by the court, the applicant will be required to appeal the adverse decision to a higher official or body. Besides Georgia, where the review of the appeal according to the administrative rule is the mandatory precondition for court appeal, this practice is characteristic for the United States and the United Kingdom.

UK Freedom of Information Act imposes the obligation of exhaustion of internal administrative mechanism for appealing of decisions of public agencies. The first stage of appealing implies submission of the claim to the decision-making administrative agency. Only after that the Information Commissioner and Information Tribunal can review the decision of the administrative body.²¹⁴

The procedure of submission of a claim to the administrative decision-making body is defined by the Practical Secretary of Constitutional Affairs in the proactive code adopted within the authority granted by section 45 of Freedom of Information Act²¹⁵. According to the code, any dissatisfaction expressed in writing with regard to the decisions made by the administrative body, shall be treated as

²¹¹ Office of Government Information Services within the National Archives and Records Administration;

²¹² Information about the ombudsman of Freedom of Information is available at the following link: <https://ogis.archives.gov/about-ogis/ogis-procedures.htm#General+Responsibilities>

²¹³ Information about the policy service is available at its web-page: <http://www.justice.gov/oip/>

²¹⁴ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 140

²¹⁵ The code is available at the following link: <http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/code-of-practice>

a complaint. In Scotland, the complaint may be submitted in writing, by fax, email or in the form of audio recording submitted to the public agency.²¹⁶

The public institutions are entitled to establish the complaints procedure themselves, which should give the possibility of an honest review and resolving of the issue. The complaint must be reviewed by the official supervising the officer who made the appealed decision. The law does not establish any deadline for the review of the appeal. Such period, in each particular case, shall be defined by the agency reviewing the appeal and the applicant will be informed thereof while submitting the complaint²¹⁷.

If in the UK the administrative complaint is reviewed by the official supervising the officer who received the appealed decision, according to the legislation of Scotland, any employee of the agency, who was not involved in making the appealed decision, has the right to review such complaint²¹⁸.

The establishment of the internal procedure of review of the complaint is the authority and not the obligation of the administrative agency; therefore, in case of lack of such procedure, the interested person can apply to the Information Commissioner for appealing of the decision.²¹⁹

In case of violation of the law while considering the appeal, the Commissioner shall issue instructions, by which he will instruct the institution to fulfill the requirements of the Freedom of Information Act²²⁰. The failure of the public agency to comply with such instructions shall be subject to appeal in court²²¹.

For its part, the decision of the information commissioner may be reviewed by the Information Tribunal, at the initiative of the complainant, as well as the public institution. The Supreme Court of the country, which has the authority to review decisions made by the Information Tribunal, is the higher instance of reviewing the decisions made by the public institutions²²².

²¹⁶ Short Guide to the Freedom of Information Act and Other New Access Rights; Version 1.0, January 28 2005. Campaign for Freedom of Information; p. 17-18

²¹⁷ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 140

²¹⁸ Short Guide to the Freedom of Information Act and Other New Access Rights; Version 1.0, January 28 2005. Campaign for Freedom of Information; p. 17-18;

²¹⁹ Short Guide to the Freedom of Information Act and Other New Access Rights; Version 1.0, January 28 2005. Campaign for Freedom of Information; p. 19;

²²⁰ Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 141

²²¹ Short Guide to the Freedom of Information Act and Other New Access Rights; Version 1.0, January 28 2005. Campaign for Freedom of Information; p. 22

²²² Freedom of information, comparative legal research; Toby Mendel, second edition. UNESCO, Paris, p. 141

The obligation of application the administrative procedure before taking legal actions is approved by the legislation of the US. The public agencies have the authority to determine the procedure and terms of review of the complaint²²³.

A person dissatisfied with the decision taken by a public agency has a 6-year limitation period for submission of the case to the court²²⁴. While reviewing the case, the court will consider the legal as well as the factual circumstances and while confirmation of the fact of violation by the officer making the appealed decision, initiates disciplinary proceedings against him. The official making decision, as well as the relevant administrative authority are notified thereof.²²⁵

The applicant has the opportunity to appeal against the decision of an administrative agency in the State Department of Information Services²²⁶, which is kind of mediator between the complainant and the administrative agency and is an alternative to a court trial.²²⁷

Any interested person who wishes to appeal against a decision made by an administrative agency of Estonia, has the opportunity to apply to the authority supervising the decision-making agency, Commissariat of data protection and administrative court personally, as well as through a representative.²²⁸

While considering the appeal, the inspectorate is authorized to peruse the documents available at the administrative body, including the classified information.²²⁹

If as a result of study of the circumstances of the case it is determined that the administrative body has breached its obligation under the law, the inspectorate shall issue an indication about bringing the activities of the institution to conformity with the law. For its part, the administrative authority shall, within 5 days, make a recommendation or appeal it in the administrative court. If an administrative agency avoids execution of the instructions and does not appeal it in the court, the inspectorate shall be authorized to initiate the administrative procedure or in exchange, the administrative agency in violation, shall file an appeal to the higher authority with the request of implementation of supervisory control. The higher administrative body has one month for the review of the applications of the inspectorate and reporting the result to it.²³⁰

It should be noted that the law attaches great importance to the control and supervision of the transparency of decisions. For example, the decision made on the basis of the complaint of the

²²³Effective FOIA Requesting for Everyone; A National Security Archive Guide; 2008; p.30

²²⁴ Effective FOIA Requesting for Everyone; A National Security Archive Guide; 2008; p. 53

²²⁵ US Freedom of Information Act;

²²⁶ Office of Government Information Services within the National Archives and Records Administration;

²²⁷US Freedom of Information Act; 5 U.S.C. 552(h)(3);

²²⁸Public Information Act, Estonia, article 46

²²⁹ Public Information Act, Estonia, article 50 (1)

²³⁰ Public Information Act, Estonia, article 53

interested person by the inspectorate in the process of implementation of control is passed not only to the complainant and the administrative body, but it is subject to mandatory publication at the webpage of inspectorate.²³¹

3. Accountability

The imposing of an obligation to the representative of the executive authority to periodically submit a report on implementation of legislation by them became one of important components of Freedom of Information regulatory acts. Such an obligation may be imposed on a separate administrative body, as well as on the agency supervising the implementation of the law. As a rule, these reports are addressed to the legislative authority.

In Georgia, submitting of an annual report to the president and the legislative branch is the obligation of each public institution²³². In the United States, the obligation of preparation of the annual reports is imposed not only on the individual public institutions, but also the Departments of Justice - as agencies responsible for compliance with the law²³³. In Estonia, the inspectorate of data protection submits an annual report to the Constitutional Committee of the Parliament and the Chancellor of Justice²³⁴. In the United Kingdom, like in Estonia, the obligation to submit a report is not the responsibility of only a separate administrative authority, but of the Information Commissioner who reports to both Chambers of the Parliament every year.²³⁵

The details of the annual reports prepared by the public institutions or supervisory agencies, as a rule, are defined by law. For example, Public Information act of Estonia stipulates, that the report of the data protection inspectorate must reflect all cases of violation of the Freedom of Information legislation indicating the violating agency. The report must also contain data about measures taken on each fact of violation and responsibility imposed on the violators.²³⁶

According to the U.S. Freedom of Information Act, the report prepared by the public agency must reflect the statistics of the number of refusals of release of information requested by applicants, indicating the reasons and legal basis for each such refusal. Along with other data, the report shall contain the medium term, which the public agency spent on review of each application²³⁷.

²³¹Public Information Act, Estonia, article 50 (2)

²³² General Administrative Code of Georgia, article 49;

²³³US Freedom of Information Act, 5 U.S.C. 552 (e)(1);

²³⁴ Public Information Act, Estonia, article 54

²³⁵ US Freedom of Information Act, article 49;

²³⁶ Public Information Act, Estonia, article 54(2)

²³⁷US Freedom of Information Act; 5 U.S.C. 552 (e)(1);

The details of the annual reports to be submitted by the administrative agencies are defined by Georgian legislation as well²³⁸, however, the General Administrative Code of Georgia does not provide for the access of such report by way of proactive publication, as prescribed by the legislation of Estonia or the United States. According to the U.S. Freedom of Information Act, the administrative bodies, as well as the Justice Secretary, must publish annual reports at their web-pages²³⁹. The annual report of the inspectorate of Estonian Data Protection Act on the implementation of public information act is also published on the web page of the inspectorate²⁴⁰.

Besides the discussed law enforcement mechanisms, many countries introduced the practice of imposing responsibility on the unabiding officers. Based on the law of Estonia, public official can be imposed not only administrative, but also criminal responsibility for the violation of the freedom of information regulations²⁴¹. Disciplinary proceedings against public servants are also stipulated by the legislation of the United Kingdom, Scotland and U.S.

VII. Recommendations

The example covered by the survey shows that along with legislative guarantees of Freedom of Information Act, the public institutions themselves must lay foundations for the practice, which ensures maximum access to the information kept by them to all interested persons.

Implementation in Georgia of the best practice of the countries discussed by us, in most cases, requires legislative changes, but considering of some of the proposed recommendations by the public institutions, will significantly improve the existing practice in the field of freedom of information and will bring it closer to the international standards.

Management of information kept in the public agency

Despite the fact that the legislation provides relatively poor regulation in the issues of management of records and documents kept in the public institutions, this gap can be filled by the internal procedures established by them. The administrative bodies must use the benefits of the electronic systems and actively implement automatic means of documents flow in their daily activities, which will significantly reduce the expenses required for administration of documentation, save time of the public institution employees, and improve the quality of the information, which is released in response to the applications of the interested persons.

The practice of receipt, review of applications and release of information

²³⁸ General Administrative Code of Georgia, article 49;

²³⁹ US Freedom of Information Act;

²⁴⁰ Public Information Act, Estonia, article 54

²⁴¹ Public Information Act, Estonia, article 54¹; 59;

The changes made to the General Administrative Code of Georgia in May 2012 allow the use of electronic means of information exchange for submission of an application. The mentioned change requires setting up of a system of receipt of applications in the electronic form and ensuring its efficient operation. Accordingly, the public agencies must apply the appropriate resources for creation of necessary practical foundation for realization of novelties introduced by the legislation.

While review of the application the institutions must ensure the possibility of receipt of information within shortest time, for which especially effective is defining the internal procedure for review of information. Such rule will establish a special mode of management of issues on the information request applications, the role of the officer responsible for release of information in the process, which, based on consultations with the relevant structural units, will ensure release of information within the terms established by the legislation.

In the process of release of information the implementation of consultation system with the information seekers is very important. In many cases, this kind of communication helps to determine the size of the requested information, as well as to establish the desired form of receipt of information. Ideally, the applicant must be informed of the names and contact information of public officials who are responsible for reviewing the application.

Accountability and the officer responsible for release of information

The General Administrative Code of Georgia establishes the obligation of public agencies to prepare annual reports on the implementation of the Freedom of Information Act. The legislation provides the list of data, which should be reflected in this report.

The effective way of fulfillment of this obligation would be determination of standard form of accountability of public institutions, which can be developed at the level of individual public institution, as well as in coordination with other public institutions. This initiative will significantly improve the quality of the report submitted by the public institutions and will at the same time, determine a manual useful for the officer responsible for preparation of the report. Since preparation of the report requires participation of different structural units of the public institution, the existence of a unified form will simplify and shape the process of compiling the report.

The information contained in the report should be used effectively by the public institution itself. The information and tendencies contained in this report must be analyzed regularly, that will facilitate the identification of problems of the public institution and elimination of defects.

When the public institution fulfills the obligations stipulated by the Freedom of Information chapter, the officer responsible for release of information should be assigned a special role. The General Administrative code does not provide any directives about the functions of such responsible person,

which offers the public institutions the possibility, to determine the preferred rules themselves. The position of the officer responsible for the release of information must give the opportunity to make decisions independently and his/her role must not be limited only by review of the incoming applications. He/she must define the policy of the public institution in the sphere of Freedom of Information, establish internal procedures and give recommendations about the measures for improvement of practice of the public institutions.

It must be mentioned that after changes of May 2012, the obligations related to proactive publication of information were added to the functions of the officer responsible for the release of information, which the public institutions must envisage while defining the authorities of the mentioned official.

Appropriate consideration should be given to informing employees of the public institutions about the legislative regulations in the field of freedom of information and internal policy of the institution. The procedural documents related to processing, issuance and publication of information must be provided to all structural units. Delivery of information on this topic to the employees through trainings is very important.

Public institutions should establish the practice of imposing disciplinary sanctions for officials who violate the regulatory norms of freedom of information.

Proactive publication of information

Proactive disclosure of information will significantly save the resources required for review of the applications and the search of the information by public institutions. Therefore, it is important to ensure the access to information before submission of the application to the public institution. Moreover, the proactive publication of information is imposed on the public institutions by the law.

One of the most convenient means to achieve this goal is web-pages of the public institutions. Such web-page must be permanently updated and important documents related to the activities of the institution must be placed on it. The web-page must contain the charter of the institution, structure, budget, procurement information, contact information of officials, their salaries and other data, which are not subject to classification under the law.

For determining of the information which is of public interest, the public institutions must analyze the applications submitted by the information seekers. The proactive publication of most frequently requested information on the web-page will reduce the number of applications of the interested persons to the public institutions. The adding of the search function of the web-pages and subscribing to news by e-mail will significantly increase the efficiency of its use. Along with the web-pages, the public institutions must efficiently use the growing potential of the social media.

In addition, the administrative body should take into account the interest of those persons who do not have access to internet and place information in a conspicuous place in the buildings of the institutions. The alternative method for proactive publication of information must be printed media (official and unofficial), TV and radio.

While using any means of delivery of information, the public institutions must pay the relevant attention to the rights of persons of different national origins, so that they can receive information in the language they understand.