

## THE ROLE OF THE OMBUDSMAN INSTITUTION IN ENSURING RIGHTS AND FREEDOMS IN THE FIELD OF INFORMATION

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### Abstract

*National protection mechanisms have an important role in ensuring rights and freedoms in the field of information in an era when the information society is being formed. Among these mechanisms, the activity of the Commissioner for Human Rights has a special weight. This activity includes both the consideration of complaints regarding the violation of the right to access information, and the implementation of various educational activities in the field of information. In the article, the role of the Ombudsman in the implementation of the national information policy in the field of information in the Republic of Azerbaijan and the legal regulations on the powers of the Ombudsman in the provision of rights in the field of information were studied, legal and practical proposals were presented as a result of the analysis of the experience of foreign countries.*

**Keywords:** *freedom of information, information ombudsman, personal information, information request, human rights, information policy.*

1. *Ensuring human rights and freedoms as the main direction in the formation of a national information policy in the information sphere in the Republic of Azerbaijan*

In general, the central role in state policy, the main purpose of which is to create conditions and methods for the exercise of power that are acceptable to society, belongs to state authorities. State policy has a broad content and covers all areas serving the interests of the state and society, where the information sphere also has a special weight. The formation of a national information policy is not an arbitrary process, but goes through several stages. According to the UNESCO program, the process of forming National Information Society Policies includes the following:

- increasing attention among decision-makers to the importance and necessity of creating or updating National Information Society Policies;
  - creating advisory expert groups to assist state officials in the formation of National Information Society Policies;
  - involving other social elements of society (private sector, social organizations, etc.);
  - diagnosing national and local conditions supporting the information society.
- Here, the national context is analyzed and the level of e-readiness of the state is compared in relation to the international context;
- main goals and directions for future development;
  - creation of guidelines, budget, staff and programs for the implementation of National Information Society Policies;
  - development of strategies and programs for National Information Society Policies [7, p. 43].

National information policy for each state should first of all be legally established and a normative basis should be created in this area. It is these normative sources that determine the directions of implementation of national information policy. Although the Law "On Information, Informatization and Information Protection" does not

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provide a definition of national information policy, the term informatization is provided for (Article 2). Since this term covers the organizational, socio-economic and scientific-technical process aimed at ensuring everyone's information rights, it has the same meaning as the state's information policy in a certain sense. At the same time, the main directions of state policy in the field of informatization specified in Article 3 of the Law also directly determine the main directions of national information policy.

The national information policy in the Republic of Azerbaijan is implemented on the basis of a number of principles. These principles are based on both the Constitution of the Republic of Azerbaijan and other sources of law. First of all, we should note that all general principles of information law (guarantee of human rights and freedoms, equality before the law, legality, social justice, etc.) should also be guided in the national information policy. In addition, based on relevant sectoral sources, a number of principles of the national information policy can be determined. The principles of informatization are reflected in the National Strategies for 2003-2012 and 2014-2020.

Based on the above, it can be concluded that it is impossible to imagine the concepts of a legal state, a social state and civil society in isolation from each other, and the national information policy of the state has a special role in their development. All measures planned and implemented in various directions of this policy ultimately determine the provision of the supreme goal and declared intentions of the state reflected in the Constitution of the Republic of Azerbaijan.

In the implementation of the national information policy in the Republic of Azerbaijan, three periods can be conditionally distinguished: the period from independence until the adoption of the National Strategy for 2003-2012; the period from 2003 to 2014, that is, until the adoption of the National Strategy for 2014-2020; the period from 2014 to the present day.

Since the first period was a period when independence was just being achieved, there were gaps in the information field, as in all areas within the republic. In such conditions, there was no talk of normal provision of human rights and freedoms. Therefore, first of all, special attention was paid to cleaning up the remnants of the former USSR. The Decree of the President of the Republic of Azerbaijan of August 6, 1998 on additional measures to ensure freedom of speech, thought and information in the Republic of Azerbaijan, which included giving instructions to state bodies in this area, abolishing censorship, adopting relevant legislative acts (the Law on Freedom of Information, the Law on Information, Informatization and Information Protection, etc.), etc., were aimed at ensuring freedom of information in the country. Gradually, national projects began to be developed, and these projects gave wide scope to the application of ICT. A mobile telephone network covering almost the entire territory of the republic was formed, and projects were developed to transfer communication channels to the digital mode.

The approval of the National Strategy for 2003-2012 by the President of the Republic of Azerbaijan in order to eliminate all the problems listed above was essentially the beginning of the second stage. Thus, the main directions of the national information policy within the country began to be rapidly implemented. The goals and objectives reflected in this Strategy, as well as the priority directions, were consistently implemented with the measures envisaged in the "State Program for the Development of Communication and Information Technologies in the Republic of Azerbaijan for 2005-2008 (Electronic Azerbaijan)" and the "State Program for the Development of Communication and Information Technologies in the Republic of Azerbaijan for 2010-2012".

As for the third stage, at this stage, further development of the already formed information society and the transformation of the modern citizen into an active member of society are observed. The National Strategy for 2014-2020 and the "State Program for the Implementation of the National Strategy for the Development of the Information Society in the Republic of Azerbaijan for 2016-2020" adopted for its implementation continue to be implemented continuously.

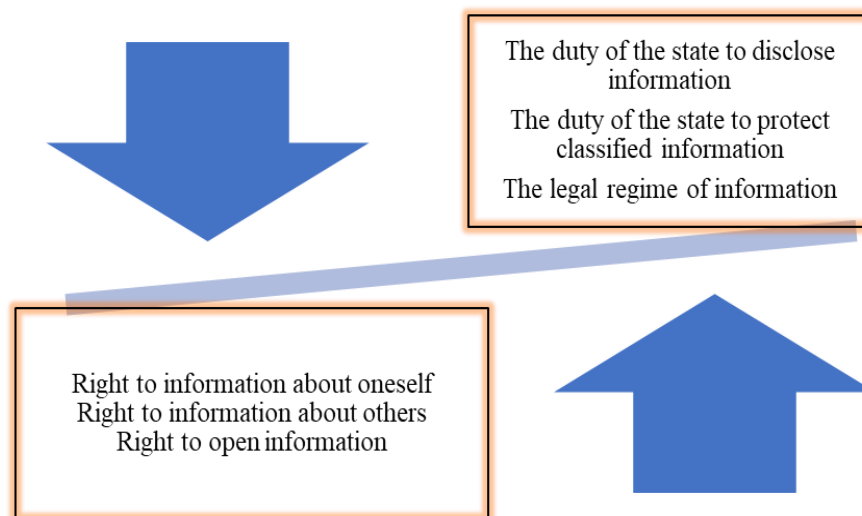
## *2. Legal regulation on the powers of the Ombudsman in ensuring rights in the field of information*

In accordance with Article 42 of the Law of the Republic of Azerbaijan "On Access to Information", the Human Rights Commissioner (Ombudsman) of the Republic of Azerbaijan, as one of the entities exercising control over the implementation of that Law, carries out its activities in accordance with the procedure established by the Constitutional Law of the Republic of Azerbaijan "On the Human Rights Commissioner (Ombudsman) of the Republic of Azerbaijan" dated December 28, 2001. For the purpose of implementing this Article, amendments and additions were made by the Constitutional Law of the Republic of Azerbaijan "On Amendments to the Constitutional Law of the Republic of Azerbaijan on the Human Rights Commissioner (Ombudsman) of the Republic of Azerbaijan" dated June 24, 2011, and the following paragraph was added to Article 1 of the aforementioned Law: "The Commissioner shall exercise control over the fulfillment of the duties of state bodies, municipalities, public legal entities, and their officials (owners of information) arising from the requirements of the Law of the Republic of Azerbaijan "On Access to Information" (Article 1.3).

The main reason for adding the mentioned norm is the establishment of an information society in our republic and ensuring the active participation of citizens in information exchange. Thus, the regulation of the right to access information is of great importance in ensuring accountability, which is one of the main goals of political structures in a democratic system. In this sense, the main purpose of legal regulations that include the right to access information is to develop institutions of accountability and transparency by justifying the operations of public administration on the basis of legal clarity. The rules on the right to access information, which emerged after developments such as the fact that the governed began to think and express opinions about the decisions made by the administration over time, did not accept these decisions as they were, questioned and tested, aim to ensure openness in administration and force the administration to be at the service of individuals. In this way, by increasing public awareness and, in particular, by creating the opportunity to participate in administration, it is possible for the governed to move from a passive position to an active position. Therefore, it can be considered that the recognition of the right to access information is one of the most important conditions for public participation in administration. If there is no information, it will be impossible to govern. Because today, management and power are concentrated in the hands of those who have knowledge [8, p. 129].

As can be seen from the content of the above-mentioned article of the Law "On the Ombudsman", the Ombudsman in our republic monitors the fulfillment of the duties of information owners stipulated in the information legislation. When we look at the list of these duties regulated in Article 10 of the Law of the Republic of Azerbaijan "On Access to Information", we can conclude that the Ombudsman can monitor the provision of all

elements of the right to information of individuals. Thus, we can describe the elements of the right to information as follows:



When we pay attention to the annual reports of the Commissioner for Human Rights, we observe that most complaints are related to the failure of information owners to fulfill their duty to disclose information. Therefore, we consider it appropriate to initially analyze the elements of the right to access information: “the state’s duty to disclose information” and “the right of individuals to open information”.

State bodies that govern the country on behalf of the public and in the public interest use state power and privileges to achieve this goal. This situation inevitably leads to the emergence of unbalanced relations between the state and the individual. In this unbalanced relationship, openness and accountability of the state body must be ensured so that the rights and freedoms of the individual are protected and ensured. Within the framework of the right to access information, individuals should be able to request certain information that does not directly concern them, but will allow them to get acquainted with the activities of state bodies. Such information appears to be information of general interest. In order to ensure that states fulfill their obligations to facilitate access to information, the obligation of states to inform (the obligation to actively provide information) has now been unequivocally recognized in matters of public interest, such as human rights, health and the environment.

The duty of the state to disclose information should be interpreted in the context of the list of open information specifically established by law (Article 29 of the Law “On Access to Information”). In accordance with Article 34.1 of the same Law, information, access to which is not restricted by the legislation of the Republic of Azerbaijan, is considered open information. This norm does not fully express the concept of open information. A more complete interpretation is reflected in Article 2 of the Law “On Information, Informatization and Protection of Information”, where open information is explained as documented information, the access to which, processing, provision or use of which is not restricted by the legislation of the Republic of Azerbaijan and intended for general use. From the definition of documented information in the law, it is clear that this includes information recorded in accordance with specific rules. Therefore, we are talking about information created exclusively by authorized bodies and obtained from reliable sources. As can be seen from the content of the second article, the most important feature characterizing the legal regime of open information is that it is not limited by law. In order to ensure this norm, the legislator has taken a two-fold step: by

determining the scope of information whose access is restricted and establishing a separate legal regime for them; by imposing the obligation to disclose information on specific subjects in the legislative procedure.

In the first case, special regulatory rules have been established for various types of information intended for limited use (state, professional, commercial secrets, etc.). At the same time, these rules are strictly observed in the processes of electronic and informatization.

In the second case, the legislator has defined a number of duties for information owners through the method of instructions, where, first of all, the duty to disclose information that they possess or that was created or obtained as a result of the performance of public duties should be noted (Article 29.1). Who are information owners? - According to Article 9 of the Law "On Access to Information", information owners are not limited to state bodies and municipalities, but also include private legal entities and individuals.

Users of open information are guaranteed to have access, which is set as the duties of information owners "On Access to Information": the owner of information manages public information in such a way that this information is available to everyone who needs it as soon as possible (Article 31.1). The legislation establishes the methods of disclosing information, the most widespread of which is disclosure in Internet information resources. The most leading direction in the management of the National Strategy and State Programs for the Establishment of Information Security is the creation of Internet information resources. The creation of websites of all state and municipal bodies and posting open information about them on those sites, the creation of portals ensure the accessibility of open information for everyone. Based on the analysis of the annual reports of the Ombudsman for the last 3 years, it is possible to access appeals regarding the failure to achieve access to open information. Only in 2022, one complaint was filed regarding the lack of an online information request section on the official website of the Ministry of Ecology and Natural Resources of the Republic of Azerbaijan, which made it impossible to send an electronic request to that ministry. Based on the complaint, the Ombudsman contacted the ministry and recommended that the mentioned gap be taken into account [9].

Complaints sent to the Ombudsman mainly concern information that concerns individuals themselves and others. The analysis of these two elements of the right to information is related to the state's duty to protect classified information. Because in many cases, the legal regime of classified information is taken as the basis, and the execution of the information request is refused. In this sense, the determination of the purpose and reason for the restriction of information rights should be evaluated as a whole, and a conclusion should be reached by creating a balance between the research to be conducted in connection with the application regarding the right to information and the interest of the document requesters in this information and documents. The question of which information and documents are related to the security of the state and its activities, that is, which information and documents, which are often emphasized in the literature, should be described as confidential or secret information, may arise. It is believed that the answer to this question is reserved for legal regulation.

The national legal regulation of the right to information considers it acceptable to realize this right within the framework of an information request. When executing an information request, compliance with imperative norms regarding confidential information is considered an essential condition. Thus, in order to organize control over

the execution of information requests, they are registered by the information owner on the day they are received and information about the request is entered into the document register. After examining the registered request, the information owner may make one of the following decisions: it is possible to refuse to execute the request; it is possible to ensure the execution of the request; since the request does not apply to his jurisdiction, it can be sent to the information owner in accordance with the jurisdiction.

Based on the complaints cited in the annual reports of the Commissioner for Human Rights, it is difficult to determine whether individuals' rights to their own information or the information of others have been violated. In fact, such a distinction would be more practical in terms of the legal regime of closed information.

At the same time, information owners themselves may also have requests regarding closed information. In this case, it is permissible to file a complaint with the Ombudsman if the request is not satisfied. The 2023 Report states that information requests addressed to the Ombudsman as the owner of information were fully and comprehensively responded to within the time period specified by the Constitutional Law on the Ombudsman and the Law on Access to Information. The first of these requests was related to the submission of data on statistics of applications related to domestic violence from the Commissioner, and the second was related to the procedure for making proposals to state bodies [9].

### *3. Is there a need to create an information ombudsman: a comparative analysis of the experience of foreign states with national experience*

First, let's analyze the types of ombudsman. Types of ombudsman can be divided into two groups: general and special-purpose ombudsmen. A general-purpose ombudsman is an institution that investigates complaints arising from all areas of activity of state administration bodies and organizations and tries to provide solutions to problems. General-purpose ombudsmen can be at the national, local or regional level. For example, in the USA there is no ombudsman institution at the national level, but ombudsmen operate at the state level. In individual states, ombudsmen are independent institutions that provide assistance in disputes between various individuals and industrial organizations or government agencies. Ombudsman services are free for the public and are considered a means of resolving disputes outside the court system. However, the Ombudsman Association (USOA), which has been operating in the United States since 1977, is a national organization for ombudsmen in the public sector and includes members of ombudsmen offices and related ombudsmen offices in local, state and federal governments [13].

The ombudsman institution in our republic can also be attributed to the general-purpose type. Because the position of the Ombudsman of the Republic of Azerbaijan was established by law to restore all human rights and freedoms that have been violated (Article 1 of the Law "On the Ombudsman of the Republic of Azerbaijan").

The scope of control of a special-purpose ombudsman is more specifically related to complaints arising from services in the public sphere. Examples of special-purpose ombudsmen include ombudsmen dealing with children, healthcare, the armed forces, the police, prisons, people with disabilities, consumers or students. For example, the German Military Ombudsman, the Norwegian and Swedish Children's Ombudsman, the Canadian Prison Ombudsman, etc. [10, p. 78]. The information ombudsman

operating in Australia [2], Canada [5] and other countries can also be considered as special purpose.

In addition, with the increase in technological development, the interaction between states has increased and the institution of the ombudsman has become an international institution after the Second World War. An example of an international ombudsman is the European Ombudsman, established in 1995 within the framework of the European Union in accordance with the Maastricht Treaty of 1992. There are Rules establishing the norms and rules governing the performance of the Ombudsman's duties, adopted by the European Parliament on 9 March 1994. Any person who is a citizen of a Member State of the European Union and resides in the territory of the European Union may apply to the Ombudsman. At the same time, legal entities registered in any of the Member States of the Union may also apply. Two forms of application are considered: a person may address the Ombudsman personally or through a Member of the European Parliament. The complaint is submitted in writing and the application may be written in free form or in a specific template. The Ombudsman can be contacted in one of 11 official languages [1, p. 313].

Therefore, since the information ombudsman belongs to a special type, his or her scope of authority is also limited and specialized compared to the general type. As an example, it would be appropriate to consider the experience of several countries. In Canada, the Information Ombudsman reports to Parliament and investigates complaints about how federal agencies handle and respond to requests in accordance with information legislation. The Ombudsman's activities are not limited to this, but also include educational campaigns. For example, starting in 2024, September 28, in connection with World Freedom of Information Day, Canada has declared "Right to Know Week" (September 23-29) [3]. The Information Ombudsman of Canada stated in its statement that government information belongs to Canadians and access to information is a means of holding their governments accountable for their decisions and actions. To ensure effective and responsible management of public funds and to combat disinformation and misinformation, measures and decisions must be properly documented and communicated in a spirit of transparency [6].

The Australian Information Ombudsman's work is broader, covering both personal data protection and freedom of information. The institution's website provides individuals with the opportunity to make online complaints about breaches. Personal data here is characterised by a very wide range of content: a person's name, signature, address, telephone number or date of birth; location information on mobile devices (as this can reveal user activity patterns and habits); sensitive data (racial or ethnic origin, political opinions or associations, religious or philosophical beliefs, trade union membership or associations, sexual orientation, criminal convictions, health or genetic data) [12].

In our opinion, the Australian experience can be considered a successful and pioneering experience. Because today, states around the world use information technologies to collect, store and, where necessary, process basic demographic data about individuals in order to facilitate public services. States mainly aim to facilitate the implementation of public services through projects that ensure the collection, registration and processing of personal data on a large scale and in a single center. One of the most important elements of the right to information is that it includes rules that allow individuals to obtain all kinds of information and documents that are under the control of the state about them. However, the inclusion of this element raises some

questions regarding the systems that allow the collection of personal data. What part of this data will be accessible to third parties and on what grounds? Which government agencies will use this information and for what purposes? How accurate is the personal data collected and how is its accuracy verified? – As a result, along with its positive aspects, the spread and power of information technologies give rise to some concerns. Allowing the continuous monitoring of an individual, excluding the individual from the information flow, collecting and storing unlimited personal data without the individual's knowledge, and the possibility of misuse of personal data for various purposes are some of the concerns and shortcomings on the agenda of the time. The increase in the number and diversity of transactions, especially in electronic environments, has necessitated the adoption of new measures and regulations to protect and ensure the confidentiality of personal data. Along with respect for private and family life, the right to the protection of personal data has also begun to be legally recognized in various European countries. The issue of personal data protection was first raised within the Council of Europe in the late 1960s.

In 1981, the member states of the Council of Europe adopted the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data in Strasbourg, and the protection of personal data began to be ensured by all states. The Convention was also ratified by the Republic of Azerbaijan with relevant declarations on 30 September 2009. The Convention also provides certain guarantees for the data subject. Accordingly, the data subject will have the opportunity to determine the existence of a data file subject to automated processing, the purpose of its storage and the identity and function of the body storing it. The data subject will be informed at reasonable intervals and without delay whether personal data relating to him are stored in an automatic data file and, if so, of the data stored. The data subject has the right to obtain access to data processed in violation of the provisions of domestic law drawn up in accordance with the principles of the Convention and, where necessary, to have them erased or rectified. In addition, it has the ability to take legal action if the request for verification, correction, or deletion is not met, if necessary [11].

As can be seen from the provisions of the Convention, an important aspect of the protection of personal data is the right of individuals to receive information about the data stored about them. The purpose of regulating this issue is to minimize the harm that individuals have suffered or will suffer as a result of recent developments in information technologies. Therefore, it is the natural right of individuals to check the accuracy of the data about them and to request its correction or deletion if it is incorrect. Undoubtedly, if no other mechanisms are provided, the right to access information will be the most effective means for individuals to exercise these rights. In this regard, special attention should be paid to the issue of personal data protection in the activities of the Ombudsman.

According to the reports of the Commissioner for Human Rights in our Republic, it is not possible to obtain accurate information on the number of complaints regarding the execution of requests for the provision of personal data. According to the Ombudsman's approach in his reports for 2019 and 2021, the Law "On Access to Information" does not provide for the submission of an identity document in written information requests, except for cases where the requester wishes to obtain personal information. According to Article 4 of that Law, this Law does not apply to proposals, applications and complaints regulated by the Law "On Citizens' Appeals". Despite the

above, the requirements imposed on appeals in the online appeal sections of the official websites of state institutions also apply to information requests, which limits the rights of the persons submitting the request. Taking into account the above, the Ombudsman considers it necessary to bring the online appeal sections of the official websites of state institutions into line with the requirements of the Law "On Access to Information" [9].

We believe that an information request should not be equated with a citizen's appeal. A person exercising the right to appeal either applies with an application to exercise any of his rights, or submits any proposal, or formalizes a complaint regarding any violation. Although information acts as an object here, there is no requirement for the state body to provide any information. In the right to information, the state is obliged to provide the information requested by the person to the person. For example, if the requested information concerns a natural person and is of a nature that will change his legal status, failure to respond may result in administrative disputes as it will lead to legal consequences for the person. This means giving an individual an advantage in terms of forcing the state body to take action on a certain issue. From the point of view of political participation, we can say that the right to access information can be used as a much more effective tool than the right to appeal. This right allows individuals to learn about state policy on issues that interest them and try to influence the government using other means of participation. Thanks to this right, individuals who learn about the points they do not like or lack in state policies have the opportunity to put forward proposals for solutions to these policies and to convey these proposals to the government in various ways.

The online appeal section on the website of state bodies is related solely to appeals (proposals, applications and complaints). Therefore, requiring an identity document is permissible. Because, according to the Law "On Appeals of Citizens", an appeal sent in written form without the citizen's surname, name, patronymic, address, personal or electronic signature (in relation to legal entities, the name and legal address of the legal entity, the signature of its head) is considered anonymous. Anonymous appeals are not accepted and are not considered by the entities considering the appeal and their officials. In addition, it is clear from Article 13 of the Law "On Access to Information" that the execution of an information request is carried out in a different manner.

Based on the above, it can be concluded that special attention should be paid to the powers granted to that institution by law, rather than to the existence of a general or special-purpose ombudsman institution to protect rights and freedoms in the field of information.

#### **4. Conclusion**

In world practice, either an independent information ombudsman institution operates to protect information rights, or a separate department is formed in the Ombudsman's Office. Both from a legislative and practical point of view, information rights are protected along with other rights in Azerbaijan, and a separate institution has not been established. In our opinion, since freedom of information is realized in most cases in conjunction with other rights, there is no need to establish an independent information ombudsman. It is more expedient to simply establish a separate department for the protection of information rights in the Ombudsman's Office, as well as to increase the number of separate regional centers in the territories and have them operate in a coordinated manner. Based on the analysis of the annual reports of the

Commissioner for Human Rights, we can conclude that both the consideration of complaints and the implementation of educational activities regarding the provision of the right to information are of particular importance in the activities of the Commissioner. However, separating complaints regarding access to information related to personal data may be more practical in terms of protecting this data.

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