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Legal Framework and Media Regulations: Global and European Standards

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Security Sector Reform and the Media

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In the last decade, governments around the world have become increasingly more open. Over 50 countries now have comprehensive laws to facilitate access to state records; many more are in the process of enacting such legislation.

Although freedom of information laws have existed since 1776, when Sweden passed its Freedom of the Press Act, the last 10 years saw an unprecedented number of states adopting access to information legislation.

There are a number of reasons for this. Since the 1980s, the collapse of authoritarianism and the emergence of new democracies have given rise to new constitutions that include specific guarantees of the right to information. These constitutional guarantees often require the adoption of new laws on information access. International bodies such as the Council of Europe and the Organization of American States have drafted guidelines or model legislation to promote freedom of information. The World Bank, the International Monetary Fund and other donors are also pressing countries to adopt access to information laws as part of an effort to increase government transparency and reduce corruption. Finally, there is agitation from media and civil society groups, both domestic and international, for greater access to government-held information and for more participation in governance.

In addition to comprehensive freedom of information laws, many countries have legislated access to specific types of information. In some countries, new "data protection" laws now enable individuals to obtain their own records held by government agencies and private organizations. In others, specific statutes give rights of access to information in such areas as health and the environment. There are also codes of practice that spell out the procedures for access.

The trend toward greater information access is bound to continue. Many countries in Eastern and Central Europe, Africa and Asia are currently reviewing proposals to adopt comprehensive acts. In Western Europe, only Germany and Switzerland lack legislation. Nearly all Central and Eastern European countries have adopted laws as part of their democratic transitions. Nearly a dozen Asian countries have either enacted laws or are on the brink of doing so.

The mere existence of an information act, however, does not always mean that access is possible. In many countries, the access and enforcement mechanisms are weak or unenforceable. Governments resist releasing information. They also delay the processing of information requests or impose unreasonable fees to discourage access. Sometimes, courts undermine the intent of the law, so citizens give up. In addition, independent bodies that process information requests can succumb to political pressure or are made ineffective by lack of funds. In countries such as Zimbabwe, the access laws that have been enacted actually legislate censorship rather than freedom of information.

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Since the September 11 attacks, some developed countries have limited information access. The restrictions have been most profound in the United States and Canada where proposals to limit national and local freedom of information acts have been adopted. In the UK, implementation of the long-awaited information act has been delayed until 2005. The war against terror is beginning to roll back the advances that have been made in the last fifteen years.

In Europe, new restrictions, such as those imposed by laws protecting classified information, are also being put in place. Many countries in Central and Eastern Europe are adopting these acts in order to qualify for North Atlantic Treaty Organisation (NATO) membership. NATO, however, has so far refused to provide a copy of the draft legislation it is requiring the countries to enact. In addition, the European Union has also adopted new restrictive regulations to bar disclosure of classified information, but these restrictions are currently being challenged in court by the European Parliament.

Freedom of information has always been seen as a fundamental human right. During its first session in 1946, the United Nations General Assembly adopted Resolution 59(1) which states:

Freedom of information is a fundamental human right and... the touchstone of all the freedoms to which the UN is consecrated.

As this Resolution notes, freedom of information is both fundamentally important in its own right and is also key to the fulfilment of all other rights. It is only in societies where the free flow of information and ideas is permitted that democracy can flourish. In addition, freedom of expression is essential if violations of human rights are to be exposed and challenged. For these reasons, the Member States of the Council of Europe in 1982 adopted a Declaration stating that among the objectives sought to be achieved in the area of freedom of expression was "the pursuit of an open information policy in the public sector, including access to information, in order to enhance the individual's understanding of, and his ability to discuss freely political, social, economic and cultural matters."

In 2002, the Committee of Ministers of the Council of Europe adopted a detailed Recommendation on Access to Official Documents, which states:

III. General principle on access to official documents

Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

IV. Possible limitations to access to official documents

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

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- i. national security, defence and international relations;
- ii. public safety;
- iii. the prevention, investigation and prosecution of criminal activities;
- iv. privacy and other legitimate private interests;
- v. commercial and other economic interests, be they private or public;
- vi. the equality of parties concerning court proceedings;
- vii. nature;
- viii. inspection, control and supervision by public authorities;
- ix. the economic, monetary and exchange rate policies of the state;
- x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.

The Council has recommended that all member states should be guided in their law and practice by these principles.

The 'harm test' outlined under 'IV. Possible limitations' is crucial. This is linked to the test under Article 10(2) ECHR that any restrictions should be 'necessary in a democratic society' and means that it is not sufficient for a State merely to show that certain information falls within a proscribed category; it must also show that disclosure of the information will in the particular case cause substantial harm.

Scope of the Serbian draft Law

Articles 6 and 7 states the general principle that everyone shall have access to information that falls within the scope of the act, without discrimination. The scope of the draft Law is determined, in a somewhat roundabout way, through another four separate provisions. Article 1 states that the Law "regulates the right to access to information of public importance held by public authority bodies". Article 3 defines 'information of public importance' as "information on everything anyone has a justified interest to know," regardless of the format in which it is held. Under Article 4, public authorities are defined as all state, regional or local bodies or persons vested with public authority, any legal person wholly or partly funded by a state body, and any other person whose operations are directly managed or controlled by a state body. Article 5 states that "[i]t shall be deemed that there is a justified interest of the public ... to know ... information created during the work or regarding the work of a public authority; information kept by a public authority or kept at the order, on behalf or at the expense of a public authority; information older than twenty years unless a public authority proves its disclosure is not justified in the public interest." Paragraph 1 of Article 5 creates a separate category for information that may disclose a threat to the protection of public health or the environment. This should always be disclosed.

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Analysis

The right of access to information by public authorities is a fundamental human right, crucial in the functioning of democracy. A law implementing this right should be as straightforward as possible, clearly stating its scope and any exceptions to it. From the draft law's Title and Articles 1 and 3, a reader could easily infer that the scope of the draft law is limited to information 'of public importance'. Although paragraph 2 of Article 5 clarifies that 'information of public importance' covers all information held by a public authority, this approach is unnecessarily complex and likely to lead to misunderstandings.

Secondly, it is not clear why there should be a separate category, in Article 5, for information older than twenty years disclosure of which may be blocked if this is deemed "not in the justified public interest". The law should establish a single exceptions regime covering all information held by public authorities, in line with the Council of Europe recommendation and the ARTICLE 19 Principles. A document's age cannot be a deciding factor in determining whether or not it should be disclosed.

Recommendations:

The drafting of the operative provisions determining the scope of the Bill should be simplified, clearly stating the presumption that all information held by a public authority should be disclosable.

There should be no exceptions to the principle of disclosure based on the age of a document.

Open Meetings

Under Article 9 of the draft Law, "[j]ournalists shall have the right to directly follow the work of a public authority, especially by personally attending meetings i.e. sessions of public authorities." This 'right' appears to be unlimited.

Analysis

Principle 7 of the ARTICLE 19 Principles establishes that the public should have access to all formal meetings of public bodies with decision-making powers as well as all meetings of elected bodies and their committees, and such bodies as planning boards, boards of educational authorities and public industrial development agencies. Principle 7 establishes that meetings may be closed, but only in accordance with established procedures and where adequate reasons for closure exist (for example, to protect national security interests).

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Article 9 only partly implements Principle 7. Principle 7 envisages that meetings should be open to all. While it is commonly accepted that journalists, because of the special role they play in a democratic society, may enjoy certain privileges, such as a reserved press gallery and access to ICT equipment, the right to attend meetings should not be reserved exclusively to them. Under international standards, this right extends to all persons – for example, an NGO working on environmental issues should be allowed access to a meeting, as should a class of school children on a trip to learn about principles of democracy.

Furthermore, it is not feasible for this to be an unqualified right. As drafted, this provision appears to grant a right to attend the meetings of a hypothetical law enforcement committee in which the names and addresses of police informants may be mentioned. This would be unworkable and lead to conflict over this provision's scope of application.

Recommendations:

- The draft Law should establish a presumption that all sessions of public bodies are open to the public, not just journalists.
- The exceptions to this presumption must be clearly laid down in the law.

Exceptions

Article 10 states that “[t]he rights in this Law may be exceptionally subjected to limitations prescribed by this Law if that is necessary in a democratic society in order to prevent a serious violation of an overriding interest based on the Constitution or the law.”

The heart of the exceptions regime is formed by Articles 15-17. Article 15 provides that access may be refused on a number of non-controversial grounds, such as the prevention of crime or if disclosure would substantially undermine the government's ability to manage the national economy. However, under the fourth bullet point of Article 15, access must be refused if disclosure would “[m]ake available information or a document qualified as secret by regulations or an official document based on the law, i.e. if such a document is accessible only to a specific group of people and its disclosure could legally or otherwise prejudice the interests that are protected by the law and outweigh the access to information interest.”

Under Article 16, access must be refused if disclosure would “violate the privacy, honor or any other right of a person ... except if the person has agreed [or] such information regards a personality, phenomenon or event of public interest, especially a holder of a state or political post, and is relevant with regard to the duties that person is performing.” Under the last bullet-

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point, information may also exceptionally be disclosed “[I]n other events when the rights of privacy, honour or another right of the person the information personally regards is not violated” – which appears circular and unnecessary in light of the general rule established by the same Article that access may be refused if disclosure would violate these interests.

Article 17 provides an ‘overriding interest’ clause that runs contrary to the public interest override advocated by the ARTICLE 19 Principles and the Council of Europe Recommendation. It states that “[a] public authority ... shall not allow insight in a document ... if it would thereby seriously violate a justified interest overriding the applicant’s interest in free access to public information.”

A number of other limitations are provided in Articles 11-14. Article 11 states that access may be refused if the applicant “is abusing” the right of access. Article 12 states that access may be refused if the information has already been made publicly available, for example on the Internet, in which case the applicant must be advised where the information can be found. Article 14 states that if access is requested to a document parts of which cannot be disclosed, partial access should be granted.

Analysis

Although many parts of the exceptions regime are uncontroversial, there are several important loopholes that need to be addressed.

First, it should be made absolutely clear that the requirement in Article 10 that access may be refused only to prevent a ‘serious violation’ of an ‘overriding interest’ applies to each of the provisions that follow. This is a strict test, but it appears not to be followed in Articles 15 and 16. For example, under the first bullet-point of Article 16, access may be refused if disclosure would ‘violate the rights of privacy, honour or any other right’. This is inconsistent with the higher threshold of ‘a serious violation’ of an ‘overriding interest’ established by Article 10 of the ECHR.

Second, Article 11 allows for access to be refused if the applicant ‘abuses’ the right of access. However, the draft Law fails to define what constitutes ‘abuse’, thereby allowing this provision itself to be abused by refusing access for political purposes or other illegitimate reasons.

Third, the draft Law fails to provide an exhaustive list of aims in pursuit of which access may be refused, as mandated by the Council of Europe Recommendation. Although Articles 15 and 16 provide a list of aims, both contain significant loopholes. For example, Article 16 allows restrictions on disclosure in pursuit of ‘any right’ of a person, and Article 15 (last bullet-point) allows for disclosure to be restricted through additional regulations and laws but fails to specify in pursuit of which the aims. The latter provision seems to be aimed at national security concerns, but the drafting is insufficiently precise to exclude its use for other purposes.

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Fourth, the 'overriding interest' provision in Article 17 – providing that access must be refused if disclosure would 'seriously violate a justified interest' – provides the exact opposite of the 'public interest override' required by both the ARTICLE 19 Principles and the Council of Europe Recommendation. As set out in Section II, above, the international standard requires that even if it can be shown that disclosure of the information would cause substantial harm to a legitimate aim, the information should still be disclosed if the public interest in disclosure outweighs the harm that would be done.¹ This provision is missing from the draft Law.

Recommendations:

- The exceptions regime should be redrafted to provide a single, high-threshold test allowing access to be refused only if disclosure will substantially harm a listed aim.
- The draft Law should include a public interest override, providing that information should be disclosed if the public interest in disclosure outweighs the harm that disclosure would cause.

The Federation of Serbia and Montenegro, of which the Republic of Serbia forms a constituent part, is a party to the International Covenant on Civil and Political Rights (ICCPR) and on 3 April 2003 signed the European Convention on Human Rights (ECHR). It formally joined the Council of Europe on the same day. Article 19 of the ICCPR and Article 10 of the ECHR protect freedom of expression in similar terms. Article 19(2) of the ECHR states:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Under Article 10 of the Serbia and Montenegro's federal Constitutional Charter, both Article 10 ECHR and Article 19 ICCPR are directly applicable in Serbia and Montenegro.

ARTICLE 19 welcomes the "Draft Law on Free Access to Information of Public Importance" produced by the Serbian Government to enact freedom of information legislation. We have commented on earlier proposals and the present draft represents a big step forward. If adopted and implemented, the draft Law will provide strong protection of the right of access to information.

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However, we do believe that, in places, the draft can be improved as I've set out in this presentation. In particular, there are significant loopholes in the exceptions regime, no fee schedule is provided for, and the drafting is not always very clear. But we remain willing to assist in any way that is desired by the government here in Serbia.

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