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Submission to Montenegro's Working Group on Law on Free Access to Information

This document sets out serious and urgent concerns about the proposed amendments to Montenegro's Montenegrin Law on Free Access to Information.

The majority of the proposed changes would be negative, and would take Montenegro further away from international standards on transparency, and would result in a law that is in direct breach of Montenegro's commitments, including its ratification of the Council of Europe Convention on Access to Official Documents, its obligation to protect freedom of expression and information under the European Convention on Human Rights and under the International Covenant on Civil and Political Rights.

Even where the changes are not regressive, they fail to significantly improve the law to bring it into line with international standards. These are not the advances on transparency that Montenegro has pledged to make as a member of the Open Government Partnership.

Access Info Europe, a specialist international access to information organisation, summarises in this submission the main concerns and has analysed them in the context of international standards.

For the main proposed amendments, we here set out the current provision and the proposed revision, along with analysis and recommendations. This document builds upon Access Info's previous analysis of the Montenegrin law, available on the [Access Info website](#).

1. Blanket limitations and exclusions are not legitimate

Article 1 Current Law

The right of access to information and re-use of information in the possession of authorities shall be exercised in the manner and according to the procedure prescribed by this Law.

The provisions of this Law shall not apply to:

- 1) parties in judicial, administrative and other proceedings prescribed by the law, for whom the access to information from these proceedings is prescribed by a separate regulation;*
- 2) information for which there is an obligation of maintaining confidentiality, in accordance with the law governing the area of classified information;*
- 3) information that represents classified information in the possession of international organizations or by other countries, as well as classified information of government authorities that is created or exchanged within the framework of cooperation with international organizations or other countries.*

Proposed revision to Article 1

In the Law on Free Access to Information ("Official Gazette of Montenegro", No. 44/12 and 30/17) in Article 1 Paragraph 2, Items 2 and 3 shall be amended to read:

"2) information in the field of the security and intelligence sectors, for which there is an obligation to maintain confidentiality, in accordance with the law;

3) information that is marked as classified and owned by international organizations or other countries, as well as information in the possession of authorities, marked as classified and created or exchanged within the framework of cooperation with international organizations or other countries."

Analysis

The proposed changes to Article 1 seem to be a step in the right direction, but still contain two serious blanket limitations on the right, namely with a broad exclusion for information classified by the intelligence and security services, and an unusual and remarkably broad exception for any information shared with international bodies and/or third countries that the government has chosen to mark as classified.

Without proper assurances that classified information will be reviewed upon receipt of a request, this provision opens the door to abuse of the classification system to hide information that is simply politically inconvenient rather than likely to cause harm to a legitimate interest such as national security or international relations.

To exclude wholesale requests for information that falls within the fields of security and intelligence, or information emanating from or shared with international organizations or other states, whether or not it is classified, is a blanket exception to access to information, something not permitted by international standards

The Council of Europe Convention on Access to Official Documents states

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

Therefore, whilst certain limitations are permitted to the right of access to information, these limitations must ensure that disclosure of information is only refused if it would or would be highly and demonstrably likely to cause harm to a protected interest; and in all cases the application of the exception must be balanced against a public interest test whereby the value of the information for public debate and scrutiny of government is considered.

The list of permitted limitations is set by international conventions and a access to information law should not make a general reference to "other laws". Furthermore, even when a document has been classified under some other law, upon receipt of a request there should be a case-by-case evaluation made using that access to information law as to whether the requested information / documents can be released.

Previous recommendations given to Montenegro regarding the analysis and recommendations of their Law on Free Access to Information in June 2018 still stand:

Summary of recommendations:

- » Delete all but the first paragraph of Article 1, so that the Article simply and clearly establishes that this law prevails on access to information issues;
- » Ensure that the Law on Free Access to Information makes clear that every request for information, be it information previously classified or not, previously refused or not, must be taken on a case-by-case basis and there must be an evaluation done at the time that the request is received.
- » Ensure the body holding the information bears the burden of carrying out the balancing test (harm and public interest) and deciding on release or not of all or parts of the requested information.

2. Requesters should be helped to clarify requests rather than having them rejected as abusive

Proposed new Article 7a

After Article 7, a new Article shall be added to read:

*“Prohibition of abuse of the right to access information
Article 7a*

The authority shall not allow the applicant to exercise the right of access to information if the applicant clearly abuses the right of access to information by submitting a request that is unreasonable, if it is a frequent request from the same applicant for identical or already provided information, or if too much information is being requested, which would hinder the authority’s ability to function properly, or otherwise abuses the right to access information contrary to the goal and purpose of this Law.

Analysis

The provisions on abusive requests are unacceptable as the definition of “unreasonable” requests is far too vague. The use of the term “unreasonable” alone adds a vague subjective element to deciding if a request is abusive, this could therefore lead to discrepancies in how requests are handled between departments.

The provision on one applicant making frequent requests for identical information may be acceptable although it should be clear that “frequent” means a large number of times (multiple times per day for example), not just repeating a request that for technical reasons did not prosper the first time around. It should also be clear that if information has already been provided but that it may have changed (for example, an active database) this should never count as a repeat request.

The provision prohibiting request for “too much information” is extremely worrisome and is out of line with international standards and practice. There are far better legislative and practical solutions to voluminous requests, which include negotiated solutions, something that the EU’s Regulation 1049/2001 recommends, or providing information over time, and so on.

What is unacceptable is to bring in the criterion of “would hinder the authority’s ability to function properly”. Any public authority with a half-decent information management system should be able to handle requests for somewhat large quantities of information. This is particularly true in the digital

age.

Access Info recommends that this amendment not be adopted.

Rather, if an applicant sends a request that is very wide or vague, the public body should aid the requester to clarify and therefore narrow their request. In the experience of many countries, broad requests seeking much information are usually presented because the requester is not clear on what he or she wants. Often a constructive discussion with the public authority can result in a more refined request.

Montenegro's law on Free Access to Information currently requires at Article 20 that public authorities assist applicant when requests are "incomplete or incomprehensible", a provision which should result in help being provided whenever requests are unclear or vague or broad.

If after provision of genuine assistance to the requester, the public authority asserts that the request is not sufficiently clear, and hence intends to refuse access, then in line with Article 30 of the Law on Free Access to Information, detailed reasons should be provided. In this way, the applicant will have recourse to the Agency and/or the Courts should he or she feel that the rejection was unjustified.

3. Right must apply to all information, not just that of "public importance"

Article 9 - Current

The terms in this Law have the following meaning:

- 1) **authority** is a state body (legislative, executive, judicial, administrative), local self-government body, local government body, institution, company or other legal entity founded, co-founded or whose majority owner is the state or local self-government, a legal entity whose operations are largely financed from public revenues, or a natural person, entrepreneur or legal entity exercising public authority or managing a public fund;
- 2) **information in the possession of an authority** is the factual possession of the requested information by a public authority (own information, information provided by another authority or a third party), regardless of the basis and manner of acquisition;

Proposed amendments to Article 9

In Article 9 Paragraph Items 1 and 2 shall be amended to read:

- 1) **authority** is a state body (legislative, executive, judicial, administrative), local self-government body, local government body, institution, company or other legal entity founded, co-founded or whose majority owner is the state or a local self-government, a legal entity exercising public authority and whose operations are largely financed from public revenues or managing a public fund, or a natural person or entrepreneur exercising public authority;
- 2) **information within the meaning of this Law** is any information actually possessed by an authority in the form of a document, part of a document, data or data set, in any form (written, printed, video, audio, electronic), **which is of public importance** and has arisen or is related to the work, organization and competence of the authority;" [emphasis added]

Analysis

On the one hand this proposed amendment broadens the existing provision so that it applies to information recorded in any format, which is positive.

On the other hand, limiting the information to which the law applies to information “of public importance” is a narrowing of the scope of the law in a highly problematic manner. Specifically, the new language opens the door to excluding much information from public access at the mere whim of a public official who decides that it is not of public importance. Article 2 of the Council of Europe Convention on Access to Official Documents states that

“Each Party shall guarantee the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities.”

Official documents is defined as “all information recorded in any form, drawn up or received and held by public authorities.”

Similarly the UN Human Rights Committee has made clear in its General Comment Number 34 that the right of access to information applies to “records held by a public body, regardless of the form in which the information is stored, its source and the date of production.”

At the European Union level, the right of access to documents applies to “to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession.”

There is no indication in any of the international standards that the information that falls within the right to access to information needs to be of public importance, it simply has to be held by public authorities. Therefore this additional criterion goes against international standards.

Furthermore, Montenegro is a party to the European Convention of Human Rights (ECHR), which is signed as an independent state on 3 April 2003, and the ECHR officially came into force in Montenegro on 6 June 2006. Article 10 of the Convention guarantees the right to freedom of expression, which the European Court of Human Right, along with other human rights courts, has affirmed embraces a right of access to information .

According to Article 10, paragraph 2, of the ECHR, domestic authorities in any of the contracting states may interfere with the exercise of freedom of expression only where three cumulative conditions are fulfilled:

1. the interference (meaning “formality”, “condition”, “restriction” or “penalty”) is prescribed by law
2. the interference is aimed at protecting one or more of the following interests or values: national security; territorial integrity; public safety; prevention of disorder or crime; protection of health; morals; reputation or rights of others; preventing the disclosure of information received in confidence; and maintaining the authority and impartiality of the judiciary;
3. the interference is necessary in a democratic society

The proposed limitation fails two key considerations of this test, as it is not an internationally accepted limitation, nor is it necessary in a democratic society.

In conclusion, the limitation of the right to request information to information of “public importance” would seriously undermines the entirety of Montenegro’s access to information regime, and runs directly counter to international standards (Council of Europe, European Union, UN Human Rights Committee, OSCE, etc.) which make clear that the right of access to information applies, *prima facie*, to **all** information possessed by public bodies, regardless of its origins. Only once this broad right of access has been established, may limitations be invoked, and only then provided that these limitations

are subject to strong harm and public interest tests.

4. Exceptions not permitted by international standards should be eliminated

Proposed revisions of Article 14

Article 14 shall be amended to read:

“Authority may restrict access to information or a portion of information after a harmfulness test has been carried out in accordance with Article 16 of this Law in order to:

4) Exercise official duty, to protect against disclosure of information relating to:

- initiating and conducting disciplinary, judicial and administrative proceedings,*
- international or diplomatic relations;*

5) the protection of commercial and other economic interests against the disclosure of data relating to the protection of competition and trade secrets in relation to intellectual property rights ;

*6) if the information is protected by **intellectual property rights** in accordance with the law, unless the author or the owner has given his consent;*

8) for other reasons prescribed by law. ”

Analysis

It is of concern that the limitations to be contained in Article 14 include intellectual property. That is not in and of itself a legitimate reason for not providing information (although it may place some limits on how it can be reused). See, *inter alia*, the Council of Europe Convention on Access to Official Documents.

Access Info Europe has previously (June 2018) recommended to the Montenegrin Government to revise Article 14 to make clear that protection of commercial and business interests is a legitimate exception but that it must be subject to the harm and public interest test. We also stated that “Intellectual property is not, per se, a ground for refusing access, even if it may limit use/reuse of certain information.” It is not clear why more has not been done to evaluate this recommendation and to propose a reform in line with international standards.

The new Article 14.8 is another provision which risks seriously weakening the Law on Free Access to Information by providing any other law to establish exceptions. It must be made clear that international standards do not permit limitless grounds for exceptions but only those that are necessary in a democratic society, and that list has been agreed upon by the members of the Council of Europe, of which Montenegro is one. This new provision should be eliminated.

The Council of Europe Convention on Access to Official Documents, and therefore its list of limitations to access to official documents, was created bearing in mind Article 10 on freedom of expression of the ECHR. These specific limitations are seen to strike an appropriate balance and are seen as accepted in a democratic society. This creation of two new exceptions within the Law on Free Access to Information goes against the Council of Europe Convention on Access to Official Documents and therefore breaches Article 10 on freedom of expression of the ECHR.

The primary role of Article 10 is to protect everyone's freedom of expression. Therefore, the Court established rules for strict interpretation of the possible restrictions provided for in paragraph 2.

In *The Sunday Times v. the United Kingdom*, the Commission held that:

[s]trict interpretation means that no other criteria than those mentioned in the exception clause itself may be at the basis of any restrictions

The case established the legal standard that, in any borderline case, the freedom of the individual must be favourably balanced against state's claim of overriding interest.

As a ratifying state of the ECHR, Montenegro should not include any exceptions that contravene freedom of expression.

5. Harm Test must apply to all exceptions

Article 16 Current Law

Access to information shall be restricted if disclosure of information would significantly jeopardize the interest referred to in Article 14 of this Law, or if there is a possibility that disclosure of information would cause adverse consequences for an interest that is more important than the public interest to know that information, unless there is an overriding public interest referred to in the Article 17 of this Law.

The harmfulness test shall not be carried out for the information referred to in Article 14 Item 1 Lines 1 and 2 of this Law.

Request for access to information containing information marked as classified shall be resolved by the authority, in accordance with the consent provided by the authority which has determined the information should be confidential.

In the case referred to in Paragraph 3 of this Article, the authority which has determined the information should be confidential shall be obliged to submit the required document to the competent authority that decides on the request for access to information within 10 days from the date of receipt of the request to access the information.

The harmfulness test shall not be carried out for the data contained in the information classified as confidential by another state or an international organization.

Article 16 Proposed Changes

Article 16 shall be amended to read:

"Access to information shall be limited to the extent that it is proportionate to the objective being protected if, on the basis of a careful assessment of all the circumstances in each individual case, it is determined that disclosure of the information would cause serious and certain detrimental consequences to the interests referred to in Article 14 of this Law, which are of major public interest to the disclosure of information unless there is an overriding public interest referred to in Article 17 of this Law."

A request for access to information containing information marked as classified shall be decided by the authority which has determined the information should be confidential.

If the request referred to in Paragraph 2 of this Article has been received by another authority, it shall immediately, without delay and within 3 days at the latest, refer the said request to the authority which has determined the information should be confidential and inform the applicant accordingly.

The harmfulness test shall not be carried out for the information referred to in

Article 14 Item 1 Lines 1 and 2 of this Law.”

Analysis

This provision lays out an instance where the “harmfulness” or harm test shall not be applied, therefore adding a blanket exception to the right of access to information.

As discussed above, whilst exceptions are valid, they must always be subject to a harm and public interest test, as required by the Council of Europe Convention on Access to Official Documents. This is a binding international legal instrument which Montenegro has both signed and ratified therefore it must comply.

Blanket exceptions to the right to access to information without a harm test are unacceptable.

Access Info has also previously recommended to ensure that the harm test applies to every single exception, and we call upon the working group to amend the current proposal so that this is achieved. To fail to do this means that the law falls against international standards in some of its core aspects.

This provision should be amended to delete the final two lines which state:

“The harmfulness test shall not be carried out for the information referred to in Article 14 item 1 Lines 1 and 2 of this Law.”

Statement prepared by Access Info Europe

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