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Office of the Representative on Freedom of the Media

Legal Analysis of proposed amendments to the "Law on Free Access to Information of Public Character"

Commissioned by the Office of the OSCE Representative on Freedom of the Media
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The former Yugoslav Republic of Macedonia has had an access to information law in force since 2006, with a series of subsequent amendments.

This analysis is of the amendments proposed in the "Draft Law amending and supplementing the Law on Free Access to Information of Public Character."

1. Overview

The proposed amendments to the Law on Free Access to Information are generally positive from the access to information perspective. They aim to improve the law in a number of important ways, ensuring its smooth application and bringing it into line with the OSCE and other international standards.

These changes include strengthening the law to ensure that information is available on a range of matters of public interest; ensuring that a full list of information holders is online; bringing the exceptions closer into line with international standards; strengthening proactive publication requirements; reducing the timeframes for response from public bodies as well as establishing a deadline of 15 days for decisions from the Commission; strengthening reporting mechanisms; and defining new sanctions for not meeting deadlines or not complying with Commission decisions.

The Law is already a reasonably strong one from a comparative perspective, scoring 105 out of 150 points on the Right to Information Rating (RTI Rating). and these changes, if passed into law, could raise that, making this one of the stronger laws globally.

Nevertheless, there remain some important aspects of the law that need to be addressed, specifically improved clarity on the scope and a revision of the exceptions regime, for which specific recommendations are made.

These recommendations are detailed after each point of the analysis below. The five key recommendations are:

1. To strengthen the definition of the scope of the Law on Free Access to Information by adding clearly that it applies to bodies operating largely with public funds.
2. To take political parties out from the draft as the information about public funding by public bodies should be obtained in accordance with the law from the relevant public bodies with no additional provision.
3. To conduct a revision of the exceptions to bring them into line with the international standards, including the Council of Europe Convention on Access to Official Documents, as informed by relevant jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union. In the meantime, to remove current exceptions 3 and 7 of Article 6(1) but not exception 6 on commercial secrecy, to introduce a clear harm test for every single exception and also to introduce a hard public interest test for information that would reveal wrongdoings or would permit public debate and participation, and/or defence of rights.
4. To conduct a review of the information to be published proactively and to establish a protocol for ensuring the publication of information that is in the public interest while ensuring that in certain cases the privacy of individuals is protected. This is a role that could

also be given to the Commission for the Protection of the Right to Free Access to Information of Public Character.

5. To require that public bodies report to the Commission on the time taken to respond to requests, with relevant details on time for acknowledgements, clarifications, refusals, and so forth, and to specify in the law the details of what should be, at a minimum, in the Commission's annual reports.

2. Relevant International Standards

The analysis has been conducted in line with international standards that the county is bound to uphold.

These international standards include, those established by the OSCE Representative on Freedom of the Media, along with other special mandates on freedom of expression, and flow from the recognition that: "The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions."

In order to comply with this right, the OSCE recommends that public authorities should be required to publish pro-actively, even in the absence of a request, a range of information of public interest. They also require that procedures for accessing information should be simple, rapid and free or low-cost, and that exceptions be narrow and carefully tailored to ensure maximum access while protecting specific interests, including privacy, from harm, barring an overriding public interest. There is also a recommendation of the possibility to appeal any refusals to an independent body with full powers to investigate and resolve such complaints, and there should be sanctions for non-compliance.[1]

Another key text that establishes standards with which this law should be harmonised, is the Council of Europe Convention on Access to Official Documents, which the counrty signed on 18 June 2009, but which it has not yet ratified.[2] As noted in this analysis, the Convention includes a wide definition of public bodies, establishes a limited set of exceptions, each of which is subject to both a harm and public interest test, and establishes clear procedures for handling requests. Of particular relevance for the country is the exceptions regime, and this revision of the law is an

[1] See Joint declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression of December 2004, on Access to Information, https://www.osce.org/fom/38632

[2] Treaty 205, Council of Europe Convention on Access to Official Documents, Tromsø https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205/signatures?p_auth=KO0ApMoo

opportunity to bring the legal framework into line with, and hence to permit ratification of, the Convention.

The standards also include General Comment Number 34 of the United National Human Rights Committee (July 2011), which the country is bound to take into consideration as a party to the International Covenant on Civil and Political Rights.[3] The UN Human Rights Committee has made clear that the right of access to information is an inherent part of freedom of expression and opinion, and has confirmed that the right applies to The UN Human Rights Committee stated that the information to which the right applies to all "records held by a public body, regardless of the form in which the information is stored, its source and the date of production."[4] Furthermore, the Committee adopted a wide definition of public body, including all levels of government.

These standards also include the rulings of the European Court of Human Rights, in particular jurisprudence in the case *Youth Initiative for Human Rights v. Serbia* (June 2013) in which a decision of the Serbian Information Commissioner was upheld by the court.[5] Importantly, in the decision, the European Court of Human Rights confirmed the existence of a right of access to information and cited General Comment No. 34 of the UN Human Rights Committee as well as declarations by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression, and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression, which also confirm the existence and scope of the right of access to information. Hence all of these references are standards to which the country must aspire in its access to information law as well as in complying with the right of access to information in practice.

A further ruling of the European Court of Human Rights that is relevant for the former Yugoslav Republic of Macedonia is the ruling of 8 November 2016 in the case of *Magyar Helsinki Bizottság v. Hungary*. In this landmark judgment, the Grand Chamber of the European Court of Human Rights found that the Hungarian authorities' refusal to provide the Hungarian Helsinki Committee (Magyar Helsinki Bizottság) with information relating to the work of ex officio defence counsels was in breach of Article 10 of the European Convention on Human Rights (ECHR), which guarantees the right to freedom of expression.

The Court noted that the refusal impeded the Hungarian Helsinki Committee's capacity to contribute to discussion on an issue of obvious public interest (the functioning of the judicial

[3] International Covenant on Civil and Political Rights, 1966
https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en#1

[4] UN Human Rights Committee General Comment 34 Paragraph 18.

[5] *Youth Initiative for Human Rights v. Serbia*
http://hudoc.echr.coe.int/eng?i=001-120955

system). The Grand judgment is of particular relevance in terms of the obligations of countries to ensure that civil society (including journalists, bloggers, academics, and NGOs) can make full use of the right of access to public information in order to conduct investigations as part of their role as "public watchdogs".

The European Union transparency standards are also relevant, including the EU's own access to documents regulation (Regulation 1049/2001) and the jurisprudence of the Court of Justice of the European Union, The EU treaties make clear the importance of openness in decision making as part of ensuring good governance and participation in democratic life.

3. Amendment to Articles 1 and 2

Article 1

In paragraph (1) of Article 1 of the Law on Free Access to Information of Public Character (Official Gazette of the Republic of Macedonia Nos. 13/06, 86/08, 6/10, 42/14, 148/15 and 55/16), after the words "public enterprises" the words "public sources of financing of political parties and" shall be added, while after the words "public office" the words "and activity of public interest" shall be added.

Article 2

In sub-paragraph 1, paragraph (1), Article 3, following the words "public enterprises" the words "political parties" shall be added.

A new sub-paragraph 7 shall be added following sub-paragraph 6, which shall read as follows:
- "public interest" in the exercise of the right to access to information shall mean, but shall not be limited to, interest in information, the publication of which, i.e. the exercise of the right to access thereto, shall:

- *Disclose malfeasance and corruptive conduct;*
- *Disclose unlawful acquiring or unlawful spending of public budget funds;*
- *Disclose potential conflict of interest;*
- *Prevent and disclose serious threats to the health and life of people;*
- *Prevent and disclose environmental threats;*
- *Help get better understanding about an issue for which a public policy is to be designed or about which there is a parliamentary debate; and*
- *Enable equal treatment of all citizens under the law.*

Hence, Article 1 would read:

> (1) This Law shall regulate the requirements, the manner and the procedure for exercising the right of free access to public information that the state bodies and other bodies and organizations determined by law, the bodies of the municipalities, the City of Skopje and the municipalities in the city of Skopje, the institutions and the public services, public enterprises, *public sources of financing of political parties and,* legal entities and natural persons performing public authorizations [offices], *and activity of public interest,* determined by law (hereinafter: holders of information) have at their disposal.

This amendment, by extending the right of access to information would seem to confirm that the right of access to information applies in all cases in which public funding is involved and all aspects of public office.

As such, the provision seems aimed to bring Article 1 into line with the higher standards of the Council of Europe Convention on Access to Official Documents, which provides at Article 1 (2)(a) that

> *"ii) Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that the definition of "public authorities" also includes one or more of the following: … 3)* ***natural or legal persons insofar as they perform public functions or operate with public funds, according to national law****. (emphasis added).*

With respect to **political parties**, if the objective is to make public funding by public bodies transparent, this should be possible to obtain under the law from the relevant public bodies with no additional provision. The State needs to provide relevant information related to allocation of public funding and therefore political parties as such should not be part of the Law on Free Access to Information of Public Character.

In case there is a concern related to funding of political parties, it is recommended to include this in separate legislation on political parties or on transparency of political party financing.

As to **activity of public interest**, this is something that is defined in the amendment to Article 2, which in fact reads much more like a set of hard public interest overrides to exceptions than a definition of public bodies.

It is confusing to a definition of the scope of a law that combines the type of body, and the nature of the activity, especially when that is not specifically the activity of the body as would be defined in any law, but rather is the type of illicit activity that the information to be disclosed might reveal.

The recommended construction for the definition of the scope of a law is the bodies to which it applies be clearly defined and then that this definition be supplemented by activity when it comes to performance of public functions (which definition will usually be found in relevant laws) and by the use of public funds (as noted above). Such an approach gives legal certainty as to the bodies to which requests might be filed.

Furthermore, given that the right of access applies, *prima facie*, to all information held by all bodies under the scope of the law, there is no specific need in the definition of information to mention any type of information in particular. To that end, the definition of "public information" to be found in Article 3 of the current law is more than sufficient, as it reads: "*information in any form, created by or at the disposal of the holder of information in accordance with its competences (hereinafter: information).*"

A more appropriate solution would be to take the definitions of types of activity in the proposed amendment to Article 2, and incorporate them into Article 6, either in Article 6(3) or in a new Article 6(4), which would read:

An overriding public interest shall always be deemed to exist where the requested information will:

- *Disclose malfeasance and corruptive conduct;*
- *Disclose unlawful acquiring or unlawful spending of public budget funds;*
- *Disclose potential conflict of interest;*
- *Prevent and disclose serious threats to the health and life of people;*
- *Prevent and disclose environmental threats;*
- *Help get better understanding about an issue for which a public policy is to be designed or about which there is a parliamentary debate; and*
- *Enable equal treatment of all citizens under the law.*

Such a public interest test would be in line with the highest international standards and would give much greater clarity for requesters in terms of knowing to which body to submit a requests, and for public officials, the Commission for the Protection of the Right to Free Access to Information of Public Character, and the courts, when determining the validity of an exception. The public interest test would enable a body of decisions and jurisprudence to be built up that would limit the exceptions (some of which currently do not have a strong harm test) and would better advance the right of access to information.

Summary of Recommendations for Article 1 & 2

- Strengthen the definition of the scope of the Law on Free Access to Information by adding clearly that it applies to bodies operating largely with public funds.
- Exclude political parties from the list as the information about public funding by public bodies should be obtained in accordance with the law from the relevant public bodies with no additional provision. Funding of political parties could be covered in a separate law.
- Rather than having a definition of activity of public interest in Articles 1 and 2, add a hard public interest test to Article 6.

4. Amendment to Article 5

Article 5 is hereby amended and shall read as follows:

"The Commission for the Protection of the Right to Free Access to Information of Public Character shall post on its website a List of holders of information of public character and of the official persons at holders of information of public character.

The Commission for the Protection of the Right to Free Access to Information of Public Character shall regularly update the List referred to in paragraph (1) of this Article."

In part this article updates the previous requirement that the Commission publish list of holders of information in various places, to a 21st Century requirement for the list to be on the Commission's website. Internet penetration in the country appears to be around 70%.[6] This does still mean that 30% of the population does not have such access and it might be prudent to provide that a paper copy list could be given to or send by normal post to anyone requesting it by post or by phone.

The list is also to be updated "regularly". This is a change from the previous provision of an annual update and is presumed to be more often than once per year. It would, however, be wise to specify this, saying, for example, that the list must be updated whenever the Commission is aware of changes to the identity or contact information of a public body or of the names of an official person, and at least quarterly.

Summary of Recommendations for Article 5

- Add that the list of holders may also be obtained in hard copy upon request.
- Clarify that the list of holders of information and names of official persons shall be updated upon notification to the Commission of changes and at least once per quarter.

5. Amendment to Article 6

Items 3), 6) and 7), of paragraph (1), Article 6 shall be deleted.

Article 6 contains the exceptions to the right of access to information. The amendment here would remove the following provisions:

> 3) information related to the archival work determined as confidential
>
> 6) information concerning commercial and other economic interests, including the interests of the monetary and fiscal policy the release of which shall have harmful consequences for their operation;
>
> 7) information from a document under preparation that is a subject to coordination within the holder of information, and the disclosure of which would cause misinterpretation of the content

The removal of the protection of archival secrecy and of documents under preparation is only positive as these are not permissible exceptions under international standards, including the list in the Council of Europe Convention on Access to Official Documents.

[6] 2016 internet penetration of 69.2% according to Internet Live States http://www.internetlivestats.com/internet-users/macedonia/

The full list from the Convention on Access to Official Documents is in Box A below.

Box A: Limitations in Council of Europe Convention on Access to Official Documents

Article 3 – Possible limitations to access to official documents

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

a) national security, defence and international relations;
b) public safety;
c) the prevention, investigation and prosecution of criminal activities;
d) disciplinary investigations;
e) inspection, control and supervision by public authorities;
f) privacy and other legitimate private interests;
g) commercial and other economic interests;
h) the economic, monetary and exchange rate policies of the State;
i) the equality of parties in court proceedings and the effective administration of justice;
j) environment; or
k) the deliberations within or between public authorities concerning the examination of a matter.

All of these must be subject to harm and public interest tests

It will be noted here that the Convention does contain an exception for both commercial and other economic interest and for the economic, monetary, and exchange rate policies of the State. These are exceptions that are very standard in access to information laws and have a legitimate basis. The author of this analysis is not aware of the debate in the country leading up to the proposal of these amendments, but would be surprised if there had not been instances where the application of such exceptions was justified and reasonable.

It is recommended that this exception be maintained, possibly separated into two, to make clear that the commercial and other economic interests are of private actors, whereas the economic, monetary and exchange rate policies are of the State. In all cases there must be a demonstrated harm and performance of a mandatory public interest test.

While evaluating Article 6, of the Law on Free Access to Information, it is noted that other exceptions are not completely in line with international standards.

In the first instance, the introduction line of Article 6(1) could be strengthened to state that the rejection of information requests can be if the information would harm one of the enumerated interests (rather than if it refers to the subject matter).

In particular, Article 6(1)(1) on classified information is far too broad. The acceptable standard would be information that has been classified on grounds of protecting national security and

defence. There is guidance from NATO on how to do this and how not to over-classify documents. Specifically NATO advises that "both over-classification and under-classification should be avoided in the interests of effective security as well as efficiency."[7]

It is also noted that the exceptions provision fails to include some exceptions that could be of value. Such as protection of public safety and protection of inspection, control and supervision by public authorities. Decision making is another legitimate provision, which must be limited in application, as the Court of Justice of the European Union has made clear,[8] but for which there is a place in keeping some space to think inside government.

In all cases a specific harm must be required, and this will be overridden by a public interest test.

It is therefore recommended that the country undertake a more thorough review of the exceptions provisions in its law. This could useful be informed by real world cases that have come up during the course of the implementation of the law in recent years.

Summary of Recommendations for Article 6

- Remove the exceptions 3 and 7 of Article 6(1) but not exception 6 on commercial secrecy.
- Introduce a clear harm test for every single exception.
- Conduct a revision of the exceptions to bring them into line with the international standards, including the Council of Europe Convention on Access to Official Documents, as informed by relevant jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union.
- As noted above, introduce a hard public interest test for information that would reveal wrongdoings or would permit public debate and participation, and/or defence of rights.

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[7] See: NATO Policy on the Public Disclosure of NATO Information https://www.nato.int/cps/en/natohq/75504.htm and NATO Documents C-M(2002)49-COR12 and and ENCLOSURE "B" to C-M(2002)49, available at www.freedominfo.org/documents/C-M(2002)49.pdf

[8] See for example the cases *Access Info Europe* v *Council*, T-233/09, EU:T:2011:105, and *De Capitani v European Parliament*, Case T-540/15, ECLI:EU:T:2018:167, in which the Court recognises the legitimacy of the decision making exception, while placing limits on its application, noting that "*If citizens are to be able to exercise their democratic rights they must be in a position to follow in detail the decision-making process*" in line with the requirement in the EU Treaties (Article 10(3) TEU) that every citizen is to have the right to participate in the democratic life of the Union and that decisions are to be taken as openly and as closely as possible to the citizen. (*AIE v Council*, Paragraph 69).

6. Amendment to Article 10

The amendments proposed to Article 10 are a series of updates to the proactive publication obligations of public bodies in general, as well as from the Treasury, with relation to the execution of the budget.

Overall this is a good list of classes of information to be made public.

Once detail that could well be clarified is whether there will be any circumstances in which information might not be published due to data protection considerations. This is usually something that needs to be thought through and defined, particularly in the European context of very strong data protection regulations, and indeed the broad definition in the Macedonian law at Article 6.

What sometimes needs to happen is for there to be specific consideration given, either in a law or in a regulation, as to which details will be made public. Hence for example, the EU mandates Member States to publish data on farm subsidy payments to individual farmers for amounts over around €1,250. On the other hand, not all state subsidies going to individuals, such as payments for unemployment, disability, care of children, etc., will be made public. These details do need to be worked through using real-world examples.

Summary of Recommendations for Article 10

- Conduct a review of the information to be published and establish a protocol for ensuring the publication of information that is in the public interest while ensuring that in certain cases the privacy of individuals is protected. This is a role that could also be given to the Commission for the Protection of the Right to Free Access to Information of Public Character.

7. Amendment to Articles 13, 15, 17, 21, 22

There follow as series of amendments, some of which are clarifications of terminology, and others which, although small in nature, are worth highlighting, because they are positive improvements to the law.

It is noted that the revision to Article 15 makes clear that the provisions of the Law on Free Access to Information prevails in the treatment of access to information requests.

The amendment to Article 17 provides legal certainty for requesters by requiring public bodies to adopt a rejection decision if they believe that the clarification of a request has been insufficient. This puts the requester in a stronger provision to appeal.

The amendment to Article 21, reduces the timeframe for answering the request to 20 days instead of 30, which is positive and brings it more into line with the European standards (the European average and the EU timeline is 15 working days).

Similarly, the revision of Article 22 means that extensions are reduced from a possible 40 to a more acceptable 30 days, and that applicants shall be informed immediately or within 7 days of the application of an extension.

8. Amendment to Article 26

The revised Article 26 will read: “The holder of information may issue a decision fully or partially rejecting the request if it establishes that the requested information is information referred to in paragraph (1) of Article 6 of this Law, taking into consideration the results of the implemented harm test”.

This is positive but what is missing is to explicitly state that a public interest test shall be carried out, especially given that the proposal above is to strengthen the public interest test.

Summary of Recommendations for Article 26

- Add the public interest test so that it is clear that a decision must justify why there was harm and also why there is not an overriding public interest in provision of the information.

9. Amendment to Article 28

The revised Article 28 will read: “The holder of information shall be obliged to enforce the decision of the Commission for the Protection of the Right to Free Access to Information of Public Character within 15 days from the date of its receipt and shall accordingly inform the Commission for the Protection of the Right to Free Access to Information of Public Character."

This is a positive revision as it helps ensure the timely implementation of decisions of the Commission. It is noted that the European Court of Human Rights has stated that news is a perishable commodity, the same is also true of information, which is often needed for participation or for holding public bodies to account, and timeliness is everything. As the European Ombudsman has said “Access delayed is access denied!” 9

10. Amendment to Article 37

Article 37 shall be amended and read as follows:

> "(1) The responsible person at the information holder shall be obliged to prepare an annual Report about the implementation of this Law and shall submit the Report to the Commission about the previous year, until 31 January of the current year.
>
> (2) The Report referred to in paragraph (1) of this Article shall contain the following;
> - Information about the designated Public Information Officers at holders of information;

[9] See most recently, European Ombudsman decision in Decision in case 2110/2017/THH on the Council of the European Union’s refusal to provide full public access to an opinion of its Legal Service relating to draft legislation concerning the prevention of money laundering https://www.ombudsman.europa.eu/en/decision/en/102143

- Number of filed requests;
- Number of granted requests;
- Number of rejected requests, along with the reasoning for each rejected request;
- Number of unprocessed requests; and
- Number of appeals lodged against first instance decisions issued by holders of information, along with a summary of the decision appealed against and the reasoning for repeated decision rejecting the release of the requested information.

(3) The Commission shall prepare a Report about the implementation of this Law based on information gathered from Reports submitted by holders of information and shall submit the Report to the Parliament of the Republic of Macedonia, about the previous year, until 31 March of the current year.

(4) After the Parliament of the Republic of Macedonia shall have considered and endorsed the Report referred to in paragraph (3) of this Article, the Report shall be published in the media outlets (bulletin, website).

These amendments are positive as they provide clarity about how the Commission will obtain the information needed for its annual reports, something that was absent from the law previously.

What seems to be missing from this data is the time taken to respond to requests. As noted above, time is absolutely of the essence with the right of access to information and it is therefore important that the Commission has access to such data.

What has been removed from this provision is details of what the Commission's report should contain. It is suggested that some detail on the core elements could be maintained. These could also include, in addition to data, information on its activities more broadly, such as promotion of the law, international cooperation, systemic problems and recommendations, proposals for law reform, etc.

Summary of Recommendations for Article 37

- It is recommended that the law require that public bodies report to the Commission on the time taken to respond to requests, with relevant details on time for acknowledgements, clarifications, refusals, etc. This will help the Commission identify systemic problems and make recommendations.
- Consider specifying the core elements of the Commission's annual report.

11. Amendment to Article 44

A new provision is added to Article 44: "(2) A misdemeanour fine of EUR 500 up to EUR 800 in denar counter value shall be imposed on the official or the person holding a managerial position at the holder of information if he/she:

- Without any grounds, does not act within the prescribed period, in pursuance with Article 21 of this Law, and
- Shall not enforce the decision of the Commission in pursuance with paragraph (5), Article 28 of this Law."

This provision creates two very important sanctions: one for not complying with the timeframes for providing information, and the other for not complying with the decisions of the Commission, which also means, thanks to the proposed amendments, disclosing information within 15 days. These are very positive provisions, which should help with the implementation of the law.