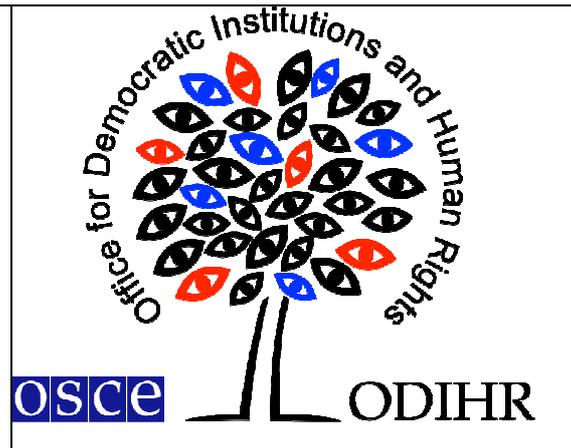


Warsaw, 29 May 2015

Opinion-Nr.: FOI-KAZ/268/2015 [RJU]

[www.legislationline.org](http://www.legislationline.org)



**OPINION**  
**ON THE DRAFT LAW ON ACCESS TO INFORMATION**  
**OF THE REPUBLIC OF KAZAKHSTAN**  
**AND ON RELATED AMENDMENTS TO OTHER**  
**LEGISLATIVE ACTS**

**based on unofficial English translations of the draft Law and Amendments**

*This Opinion has benefited from contributions made by Prof. Maeve McDonagh, University College Cork, Ireland, and has also been the subject of consultations with the Office of the OSCE Representative on Freedom of Media*

OSCE Office for Democratic Institutions and Human Rights

Ulica Miodowa 10

PL-00-251 Warsaw ph. +48 22 520 06 00 fax. +48 22 520 0605

*OSCE/ODIHR Opinion on the draft Law on Access to Information of the Republic of Kazakhstan and related Amendments to other Legislative Acts*

**TABLE OF CONTENTS:**

**I. INTRODUCTION**

**II. SCOPE OF REVIEW**

**III. EXECUTIVE SUMMARY**

**IV. ANALYSIS AND RECOMMENDATIONS**

**1. International Standards**

**2. General Principles and Scope of the Draft Law**

**3. Information Users and Information Holders**

**4. Restrictions to Access to Information in the Draft Law**

**5. Procedures and Time-limits**

**6. Liability for Violations of the Law and Enforcement**

**7. Appeals Procedures**

**Annex 1: Draft Law on Access to Information of the Republic of Kazakhstan**

**Annex 2: Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on the Issues of Access to Information (*Annexes 1 and 2 constitute separate documents*)**

***OSCE/ODIHR Opinion on the draft Law on Access to Information of the Republic of Kazakhstan and related Amendments to other Legislative Acts***

**I. INTRODUCTION**

1. *Since 2010, the Mazhilis (lower chamber) of the Parliament of the Republic of Kazakhstan has been in the process of drafting a new Law on Access to Information. ODIHR has issued Opinions on previous drafts of this legislation in 2010<sup>1</sup> (“the 2010 Opinion”) and in 2012<sup>2</sup> (“the 2012 Opinion”). A Working Group on drafting Laws on Access to Information and on Amendments to some Legislative Acts related to Access to Information was created by the Internal Affairs, Defence and Security Committee of the Mazhilis.*
2. *On 6 May 2015, the Head of the OSCE Programme Office in Astana forwarded to the OSCE’s Office for Democratic Institutions and Human Rights (OSCE/ODIHR) a letter from the Head of the Working Group and of the Internal Affairs, Defence and Security Committee of the Mazhilis. In this letter, the Head of the Working Group requested a legal opinion that would review the draft Law on Access to Information of the Republic of Kazakhstan (hereinafter “the draft Law”) and Amendments to some Legislative Acts related to Access to Information (hereinafter “the Amendments”) for compliance with international standards.*
3. *By letter of 21 May, the Director of the OSCE/ODIHR confirmed the OSCE/ODIHR’s readiness to review the draft Law and the Amendments for their compliance with OSCE commitments and international standards.*
4. *This Opinion has been prepared in response to the above-mentioned request.*

**II. SCOPE OF REVIEW**

5. This Opinion analyzes the provisions of the draft Law and the Amendments against the background of their compatibility with relevant international human rights standards and OSCE commitments.
6. The Opinion is based on unofficial English translations of the draft Law and the Amendments. Errors may therefore result.
7. In view of the above, the OSCE/ODIHR would like to make mention that this Opinion is without prejudice to any written or oral recommendations and comments to the draft Law and the Amendments, or other laws of Kazakhstan regulating freedom of information or expression that the OSCE/ODIHR may make in the future.

**III. EXECUTIVE SUMMARY**

8. OSCE/ODIHR welcomes the new draft Law, which constitutes an improvement to earlier draft versions. At the same time, there is a need for greater clarity on both sides of the balance between the free access to information on the one hand and legitimate and necessary restrictions on the other. The draft Law still

---

<sup>1</sup> Opinion on the Draft Law of the Republic of Kazakhstan on Access to Public Information, 16 November 2010, available at <http://www.legislationline.org/documents/id/16070>

<sup>2</sup> Opinion on the draft Laws of the Republic of Kazakhstan on Access to Information, 18 April 2012, available at <http://www.legislationline.org/documents/id/17108>

***OSCE/ODIHR Opinion on the draft Law on Access to Information of the Republic of Kazakhstan and related Amendments to other Legislative Acts***

appears to proceed from the assumption that there are certain types of information which are *per se* restricted, and other types of information which are accessible. However, it is not possible or practicable to categorize all information in this manner. International standards require that the principle of maximum disclosure be used as the starting point for any type of regulation of access to information, regardless of its classification as open or secret; this does not mean, however, that such information will automatically be disclosed, as necessary and legitimate grounds for non-disclosure may exist. At the same time, listing in a law which legislation shall be accessible, and which shall not, may lead to a situation where certain information is made public which should remain undisclosed, such as information on the private life of individuals. Finally, provisions in the draft Law on liability for non-compliance, oversight and appeals require further clarification, and it is recommended to enhance the mechanism for implementation of the law, including by creating the position of an Information Commissioner, as recommended in previous Opinions.

Based on the above, OSCE/ODIHR recommends the following amendments to the current version of the draft Law:

**Recommendations:**

- A. To remove the differentiation between restricted and non-restricted information throughout the draft Law, and replace it with a system whereby public information is *a priori* accessible to the public, unless there are serious and weighty reasons for non-disclosure [pars 16-19];
- B. While retaining the recommendation that all information should in principle be accessible to the public, to include the commercially sensitive nature of certain information and the right to privacy of individuals as potential grounds for restriction [pars 27-29];
- C. To narrow the scope of grounds for rejection under Article 11 par 18 to cases where the provision of information would genuinely interfere with the integrity of the decision-making process [par 35];
- D. To introduce an independent Information Commissioner into the draft Law [par 55].
- E. To make the language of the proposed Article 159-1 of the Criminal Code more specific, by stating which actions will lead to criminal liability [pars 51-53] and to clarify provisions on the appeals procedure [pars 57-60].

***Additional Recommendations, highlighted in bold, are also included in the text of the opinion.***

#### **IV. ANALYSIS AND RECOMMENDATIONS**

##### **1. International Standards**

9. This Opinion analyses the draft Law from the viewpoint of its compatibility

***OSCE/ODIHR Opinion on the draft Law on Access to Information of the Republic of Kazakhstan and related Amendments to other Legislative Acts***

with international standards that Kazakhstan has undertaken to uphold relating to the freedom of information and expression, as well as important OSCE commitments in this area.

10. It is important to reiterate at this point that any transparent and democratic government is held to provide its population with access to public documents. This is specified in international human rights instruments such as the International Covenant on Civil and Political Rights (hereinafter “the ICCPR”), more specifically its Article 19, which focuses on the right to freedom of expression, including the 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 [one’s] choice”.<sup>3</sup> This includes a general right of access to information held by public bodies,<sup>4</sup> as embodied in relevant legislation.<sup>5</sup>
11. The right protected by Article 19 of the ICCPR, is, however, not unlimited. It may be restricted by law, but only in cases where this is necessary for the respect of the rights or reputations of others, for the protection of national security or of public order (*ordre public*), or of public health or morals.
12. In 2010, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression reiterated that governments shall take the necessary legislative and administrative measures to improve access to public information for everyone. Any access to information policy should observe, among others, the maximum disclosure principle, the presumption of the public nature of meetings and key documents, broad definitions of the type of information that is accessible, reasonable fees and time limits, independent review of refusals to disclose information, and sanctions for non-compliance.<sup>6</sup> In 2013, the Special Rapporteur issued another report to the UN General Assembly, focusing on the importance of freedom of information for obtaining remedies for past human rights violations.<sup>7</sup> The 2011 UN Human Rights Committee General Comment No. 34 on Freedoms of Opinion and Expression provides further guidance on the shaping of Freedom of Information laws<sup>8</sup>.
13. OSCE participating States have committed to respect the right to freedom of expression of everyone, individually or in association with others, including the right to freely disseminate information of all kinds, and to remove any restrictions inconsistent with these obligations and commitments.<sup>9</sup> In the 1999

---

<sup>3</sup> United Nations International Covenant on Civil and Political Rights (adopted by General Assembly resolution 2200A (XXI) on 16 December 1966. The Republic of Kazakhstan ratified this Covenant on 24 January 2006.

<sup>4</sup> UN Human Rights Committee General Comment No. 34, Freedom of Opinion and Expression (Article 19), CCPR/C/GC/34, July 21, 2011, par 18.

<sup>5</sup> UN Human Rights Committee General Comment No. 34, Freedom of Opinion and Expression (Article 19), CCPR/C/GC/34, July 21, 2011. par 19.

<sup>6</sup> See the Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Information and Expression, *op cit* note 2, par 32.

<sup>7</sup> Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Information and Expression, submitted to the UN General Assembly at its 68<sup>th</sup> session on 4 September 2013.

<sup>8</sup> UN Human Rights Committee General Comment No.34, Freedom of Opinion and Expression, par. 19.

<sup>9</sup> See the Final act of the 1st CSCE Summit of Heads of State or Government, Helsinki, 1975, as well as the Concluding Document of Vienna – the Third Follow-up Meeting, Vienna, 15 January 1989,

*OSCE/ODIHR Opinion on the draft Law on Access to Information of the Republic of Kazakhstan and related Amendments to other Legislative Acts*

Istanbul Document, participating States reaffirmed the importance of the free flow of information, as well as the public's access to information.<sup>10</sup> In 2012, the OSCE Ministerial Council emphasized the importance of free access to information in preventing and combating corruption, the financing of terrorism, and money-laundering.<sup>11</sup>

14. At the domestic level, Article 20 par 2 of the Constitution of the Republic of Kazakhstan<sup>12</sup> (hereinafter “the Constitution”) states that everyone shall have the right to freely receive and disseminate information by any means not prohibited by law. A list of items constituting state secrets shall be determined by law.

## **2. General Principles and Scope of the draft Law**

15. Overall, it is noted positively that the draft Law has undergone some revisions since ODIHR's 2012 Opinion, and that certain problematic provisions have since been reworded or removed.
16. At the same time, some key challenges remain. Notably, Article 3 par 3 no longer specifies that the draft Law shall not apply to the provision of classified information. Nonetheless, numerous provisions of the draft Law continue to state that the usual procedures and criteria for providing public information shall not apply if this information is “restricted”. In particular, Article 11 par 2 (Information provision by request) provides that “any information may be provided by request except for restricted one”. Restricted information is defined in Article 1 par 4 of the current draft Law as “information related to state secrets or other protected secrets as well as the information meant for internal use only”, which would again appear to relate to classified information. The terms “state secrets” and “information meant for internal use only” are not defined in the draft Law (but are presumably defined in other legislation, notably the Law on State Secrets).
17. As already outlined in the 2012 Opinion, legislation regulating access to public information should follow the principle of maximum disclosure, which means that all information held by public bodies shall be accessible to the public. No information shall automatically be declared non-disclosable, and exceptions to this rule shall only be applied on a case by case basis, if there is a legitimate aim for restricting the information, and if disclosure of certain information would threaten to cause substantial harm and such threat would outweigh the public interest in disclosure.
18. This general principle is still not reflected in the draft Law, which continues to differentiate between restricted and non-restricted information; while access to non-restricted information is automatically granted, any information that somehow relates to “state secrets”, or is for internal use only is automatically

---

par 34 and the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, par 9.1.

<sup>10</sup> See the Istanbul Document, Istanbul, 19 November 1999, par 26.

<sup>11</sup> OSCE MC Declaration 2/2012 on Strengthening Good Governance and Combating Corruption, Money-Laundering and the Financing of Terrorism, available at <http://www.osce.org/cio/97968?download=true>

<sup>12</sup> The Constitution of the Republic of Kazakhstan was approved by [referendum](#) on 30 August 1995 and last amended in 2011.

*OSCE/ODIHR Opinion on the draft Law on Access to Information of the Republic of Kazakhstan and related Amendments to other Legislative Acts*

inaccessible.

19. In this context, it should be noted that the definition of non-restricted information (Article 1 par 4) merely refers to the type of information that shall be considered restricted, but does not contain any reference to threats of substantial harm, and/or to a balancing of interests. It is important to recall that the mere classification of certain information as a state secret is, due to the vagueness associated with this term, not sufficient by itself to restrict access to public information. As already indicated in the 2012 Opinion, the mere classification of a document does not yet specify whether or not it contains information that may or may not be shared with the public.<sup>13</sup> **The differentiation between restricted and non-restricted information should thus be removed throughout the draft Law, and replaced with a system whereby public information is a priori accessible to the public**, unless there are serious and weighty reasons for non-disclosure (in particular, where such information threatens to cause substantial harm, and such threat outweighs the public interest).
20. For the same reason, **it would be advisable to amend the wording of Article 4 of the draft Law, which mentions “non-disclosure of state and other secrets protected by the law” as a general principle of ensuring access to information**. Given that non-disclosure of information should be applied on an exceptional and case by case basis, and should not be part of the process of providing access to information, this part of Article 4 is somewhat out of place, and should be removed.
21. Article 3 par 4 on the scope of the draft Law contains a blanket exclusion of inquiries “for which the order of consideration are established in the legislation of the Republic of Kazakhstan on National Archive Found and Archives”. The reasons for excluding such inquiries from the scope of the draft Law are unclear. Where other information holders do not have certain requested information, or where this information is not within their competences, for example because it has been transferred to the National Archives, **the request should be referred to the body holding the information and the information user should be so informed, as set out in Article 11 par 11 of the current draft Law**.
22. On a more general note, it is reiterated that, throughout the draft Law, there remains, as in the 2012 draft Law, a tendency to cross-reference other legislation in a very general manner, namely by merely stating that something is regulated in another law, without specifying which law, or which type of law. The draft Law should, however, constitute a self-contained and comprehensive legal regime for access to information in Kazakhstan. Examples for such vague cross referencing are Article 2 par 1, which refers to “other regulatory acts of the Republic of Kazakhstan” which are not listed; Article 14 par 1, which discusses the open nature of meetings of the various Kazakh governmental bodies, but does not specify the circumstances in which sessions are closed by cross-referencing any relevant legislation; and Article 16 par 5, subsection 1, which states that judicial acts are to be published, except for the ones which are not subject to placement in open access, without specifying which judicial acts

---

<sup>13</sup> ODIHR’s 2012 Opinion, par 18.

or relevant legislation it is referring to in this regard. This manner of referencing continues throughout the draft Law, and raises issues concerning the clarity and foreseeability of its provisions. **It is thus recommended to include proper cross-references in the draft Law, at least by stating the name or type of law.**

### **3. Information Users and Information Holders**

23. While Article 7 outlines the rights and duties of persons requesting information (information users), Articles 8 and 9 identify who shall provide information (information holders) and their rights and duties.
24. Article 8 on information holders has been changed, in that it now specifies that “recipients of budget funds in terms of information on utilized budget funds allocated by the state budget” shall be information holders (par 4), as shall “subjects” with monopolies in the market, in terms of information on prices for goods that they produce/sell (par 5). Likewise, par 6 refers only to legal entities possessing information on environmental issues, or on matters pertaining to emergency situations, and other areas that impact the health or “security of citizens, settlements and industrial facilities”. These limitations are positive, as is the fact that individuals are no longer mentioned as information holders. However, Article 8 still does not seem to cover cases where private bodies hold information necessary to protect or carry out a right, or where they carry out statutory or public functions. Also, recipients of budget funds may also be required to disclose information that does not relate to utilized budget funds. **Consideration should be given to expanding Article 8 accordingly.**
25. At the same time, in relation to “subjects of quasi-government sector” (par 3), it is still not clear what types of subjects this refers to, and whether the current draft Law applies to all three branches of government (the executive, legislative and judicial branches), as also noted in the 2012 Opinion.
26. As already specified in the 2012 Opinion, the “rights of information holders” listed in Article 9 merely repeat certain aspects of the procedure for requesting and obtaining information under Article 11. The extension of terms for consideration, or forwarding information to the appropriate information holder are not rights *per se*, same as clarifying the content of requests, or rejecting them. When speaking of the right to access public information, it is also not clear what rights the information holders would have, given that this right applies to information users only. Thus, **it is recommended to delete par 1 on the rights of information holders, and to limit Article 9 to their duties (currently par 2).**

### **4. Restrictions to Access to Information in the Draft Law**

27. There are no detailed provisions on restricting access to information in the draft Law. Rather, while Article 5 sets out the general principle of how the right to access information may be restricted, mention of restrictions is included in numerous provisions pertaining to unrestricted information (Article 6), rights and duties of information users and holders (Articles 7-9), and the procedure for requesting and obtaining information (Article 11). At the same time, some of

*OSCE/ODIHR Opinion on the draft Law on Access to Information of the Republic of Kazakhstan and related Amendments to other Legislative Acts*

the provisions on restrictions to accessing information are unclear, or not sufficiently developed.

28. For example, although Article 4 sets out as a general principle the “inviolability of privacy, personal and family secrets”, the draft Law does not contain a specific provision on limiting the right of access to information in cases where the disclosure of such information would reveal personal information of third parties. Article 6 par 1, which states that information on emergencies threatening “the security and health of citizens” shall not be restricted, also does not foresee any exceptions in relation to personal information of such citizens. This may result in unjustifiable violations of privacy, e.g. where personal (medical) information of individuals is revealed during such emergencies.<sup>14</sup>
29. While Article 4 refers to the general principle of the “observance of rights and legal interests of legal entities”, the draft Law also does not foresee any restrictions of access for commercially sensitive information. While retaining the recommendation that all information should in principle be accessible to the public, **it is still recommended to include the commercially sensitive nature of certain information and the right to privacy of individuals as potential grounds for restriction** (the latter would also fall under the protected interest of human rights and freedoms under Article 5).
30. Article 5 provides that the right to access information can be restricted “exclusively by the laws and only in the extent necessary to protect constitutional system, public order, human rights and freedoms, public health and morals.” Although these grounds for restriction are not in themselves problematic, they would benefit from further qualification. In order to avoid excessive restrictions to access to information, **Article 5 should specify that such restrictions are only permissible if, in individual cases, the disclosure of certain data or information threatens to cause substantial harm to the protected interests mentioned in Article 5, and if the harm outweighs the public interest in disclosure.**
31. In this context, it is again noticed that, while included in Article 19 of the ICCPR as a permissible ground for restricting the right to freedom of access to information, national security is not included in the protected interests listed in Article 5. Perhaps this was not considered necessary, given that most documents relating to national security would anyhow be classified as state secrets, and thus automatically not be accessible. However, if the decision would be taken to substantively change the approach taken in the draft Law to one that follows the international principle of maximum disclosure, **then it may be helpful to include national security as a protected interest under Article 5, which could then be invoked, on a case by case basis, to justify non-disclosure of information that could pose a danger to national security.**
32. The title of Article 6 of the draft Law on unrestricted information likewise implies that information not covered by this provision may be restricted. At the same time, certain information mentioned under this provision is qualified, in that the respective paragraphs specify that information containing texts of regulatory acts (par 8), on budget making and spending (par 9), and on control

---

<sup>14</sup> In this context, see also par 32 of ODIHR’s 2012 Opinion.

*OSCE/ODIHR Opinion on the draft Law on Access to Information of the Republic of Kazakhstan and related Amendments to other Legislative Acts*

- over national local budget spending (par 10) is restricted where it relates to state and other secrets.
33. Other information, such as information on emergency situations, or acts of terrorism, is unrestricted. As already specified in the 2012 Opinion, this approach also creates problems, as certain information pertaining to such matters may need to be restricted based on the protected interests mentioned in Article 5. For this reason as well, the clear separation between restricted and non-restricted information does not appear to be practicable. **It is thus recommended to reconsider this approach in Article 6 as well, and to replace this article with a provision stating that all public information shall be accessible to the public, except in cases where the disclosure of such information would lead to a substantial threat for, among others, public order, human rights and freedoms, and public health and morals.**
34. Currently, Article 11 par 16 lists the reasons for not providing requested information as part of the procedure of requesting and obtaining information outlined in this article. However, the exceptions currently set out in this provision are of such importance **that they should be dealt with in a separate article on exceptions.** That article should specify an exhaustive list of grounds based on which access to information is not provided, or may be refused (currently the refusal of requests is set out in Article 11 par 18). These grounds should include not only administrative grounds for not providing access such as those provided for in Article 11 par 16 subsections 1, 2 and 5, but also substantive grounds for refusing access. In the wording of this article, **it should be clear that substantive exceptions to the maximum disclosure principle shall only be permissible if they have a legitimate aim, and if the requested information would threaten to cause substantial harm and would be contrary to the public interest as required by international standards,** as already outlined in pars 16-19 *supra*. As for cases where information is not provided because “the content of the inquiry does not allow identification of the information requested”, or because “the inquiry does not meet the requirements of this Law” (Article 11 par 16, subsections 1 and 2), **the information holder should first, together with the information user, attempt to clarify the requests, as already outlined in the 2012 Opinion, and as also stated, under Article 9 par 1 (3) (rights of the information holder).**
35. Article 11 par 18 sets out a number of grounds for refusing access requests, all of which are connected to decisions or procedures that have not yet been finalized. It is generally possible to refuse requests for information with the aim of protecting the deliberative processes of information holders. However, the wording used in par 18 is quite vague and potentially very broad. Such an exception to the principle of maximum disclosure should be directed only at preserving the integrity of the decision-making process. It should not, as this provision does, constitute a blanket exception for all information collected by an information holder or exchanged within government or with foreign states or international organisations in the course of a policy formation or decision-making process. **It is therefore recommended to narrow the scope of grounds for rejection under par 18 to cases where the provision of information would genuinely interfere with the integrity of the decision-making process.**

*OSCE/ODIHR Opinion on the draft Law on Access to Information of the Republic of Kazakhstan and related Amendments to other Legislative Acts*

36. When responding to requests for information (Article 11 par 14), it is noted that information holders are required to adhere to certain formal requirements, but are not obliged to provide reasons for refusing to comply with a request for access to information. **It is recommended to include this in the list of items that need to be part of the response contemplated in Article 11 par 14.** This principle should apply to responses to written and to oral requests (and responses to oral requests should also be made in writing, at least in the cases set out in Article 11 par 4 (4), (6), and (7)).

## **5. Procedures and Time-limits**

37. Article 10 outlines the ways in which information may be made accessible to the public (e.g. provision of information upon request, displaying or placing information on the holders' premises, in mass media, or Internet resources, or by providing access to sessions of sessions of public bodies), the details of which are then outlined in Articles 11 – 16. Article 11 stipulates the procedure for responding to requests for information.
38. In this context, the fact that Article 11 par 1 provides that information shall be provided free of charge is welcome. However, it appears to be contradicted by Article 11 par 13, which provides that information users must reimburse information holders for copying/printing costs. Ideally, the provision of information, regardless of whether on paper or not, should be free of charge. At the same time, it is also understandable that extensive requests for information could also create a burden for information holders. For this reason, **the respective provision of the 2012 draft Law, specifying that charges would be levied only where printing or copying exceeded 50 pages, is preferable, and should be reinstated.** In addition, **it is recommended that users should be informed in advance of the volume of information available, in response to their request and the likely cost of acceding to the request,** as discussed in the 2012 Opinion.<sup>15</sup>
39. In addition, it is noted that the provisions on oral requests (Article 11 par 4) have been changed, in that oral requests are now only permissible for specific types of information regarding administrative structures, contact information and administrative procedures and deadlines. While this differentiation is in principle positive, **it is recommended to reinstitute the requirement to register oral requests, which was included in the 2012 draft Law, in particular for subparagraphs 3-9,** as it may be important to document that certain individuals have received relevant information pertaining to procedures and deadlines. Moreover, par 4 should also outline a time limit for responding to oral requests, and should be more specific on related procedures. The recommendations pertaining to the registration and responses to oral requests set out in pars 52 and 55 of the 2012 Opinion may be useful in this respect.
40. According to Article 11 par 11, an inquiry in writing delivered to the information holder whose competencies do not include the provision of the requested information, "shall be referred to appropriate information holder within three work days of the inquiry registration with simultaneous notification of the information user who submitted the inquiry". This seems

---

<sup>15</sup> See the 2012 Opinion, par 65.

*OSCE/ODIHR Opinion on the draft Law on Access to Information of the Republic of Kazakhstan and related Amendments to other Legislative Acts*

unnecessary where the information is indeed in the possession of the information holder to whom the request is sent. **It is recommended that the wording of Article 11 par 11 should be altered so that requests should only be transferred where the requested information is not in the possession of the information holder to which the request is originally submitted**, as also recommended in the 2012 Opinion.

41. It is noted that there is now a 10 day time-limit for responding to requests to information (Article 11 par 10), which is longer than the 5 day time-limit contained in the 2012 draft Law. **A shorter period would be preferable, and it is thus recommended to consider re-introducing the 5-day time limit into the draft Law.**
42. As stated above, Article 11 par 10 specifies that the response to a request for access to information shall be delivered within ten days of the registration of the request. At the same time, par 17 states that substantiated responses rejecting requests for information submitted in writing “shall be delivered to the information user within five days since the inquiry registration”. Thus, Article 11 seems to suggest that a request must be responded to within 5 days if it is rejected, but within ten days if the response is positive. **It is recommended, if necessary, to clarify this.**
43. Aside from deadlines, Article 11 also regulates other formalities, e.g. in par 5, which states that persons requesting information electronically shall attach their digital signature. This requirement appears to be an unnecessarily onerous formality, and **should ideally be removed from Article 11.**
44. Articles 12-16 outline other means of providing information, e.g. by displaying/placing it at holders’ premises, providing access to sessions of public bodies, and placing information in the media and in the Internet. As pointed out in the 2012 Opinion, **the impact of these provisions would be enhanced if they would specify the time-frames in which this information shall be made available, and require regular updates of the information.** In relation to sessions of public bodies, to enhance the usefulness of Article 14, **it would be important to specify that information on the dates and modalities of such sessions should be available to the public well ahead of time.**
45. As to Article 12, which deals with visual displays of information on information holders’ premises, it is recommended to specify the type of information which must be made available by way of visual display under this provision. **The restrictions under par 2 of this provision are the same as those listed in Article 11 par 18, and should be clarified in the same manner** (see par 35 *supra*).
46. Article 16 specifies in detail which types of information shall be placed onto Internet resources of public institutions. It is welcome that the list of information is quite extensive, and that the procedure for placement is more flexible than that outlined in the 2012 draft Law, which required supervisory government organs to approve the list of information to be published beforehand.
47. Bids and tenders should be published on the Internet as well, in accordance with Article 16 par 2, subsection 11. While this provision is welcome, it is important that information on the results of bids and tenders should also be

published. **It is recommended to add this wording to Article 16 par 2, subsection 11.**

## **6. Liability for Violations of the Law and Enforcement**

48. The draft Law, similar to its previous versions from 2010 and 2012, does not go into detail with regard to possible consequences for violations of the Law. Article 19 of the draft Law merely states that violations of the Legislation on Access to Information shall result in the responsibility established in the laws of the Republic of Kazakhstan. As already stated in the 2012 Opinion, this provision does not provide sufficient information as to who will be liable for which types of actions, and in particular which actions will be considered to be in violation of the Law.<sup>16</sup>
49. While Article 11 par 19 specifies that information holders' management shall be personally responsible for requests pertaining to processing arrangements, conditions of accepting requests, registration, accounting and processing, it is also not clear whether this means that only the management will bear responsibility under the Law, or whether in certain cases, individual case managers will also be held responsible.
50. The proposed new Article 456-1 of the Administrative Offenses Code, which shall be included pursuant to the Amendments, is more specific in this regard. It provides for the imposition of administrative liability for, *inter alia*, "unlawful refusal to provide information, or provision of incomplete or deliberately false information or failure to place information on the Internet resource in accordance with the relevant legislative acts of the Republic of Kazakhstan, or placement of incomplete or knowingly false information". **This provision would appear to opt for individual liability of the case manager, but this should perhaps be clarified.**
51. In addition, the Amendments propose adding a new Article 159-1 to the Criminal Code, which declares punishable by fine or correctional labour, or community service an "unlawful restriction of the right to access to information, if this has caused substantial harm to the rights and lawful interests of individuals".
52. As already stated in ODIHR's 2010 and 2012 Opinions, serious offences that prevent access to public information should be treated as criminal offences.<sup>17</sup> At the same time, given the serious implications of being held criminally liable for an act, criminal provisions need to be specific as regards the type of actions that are prohibited. In this context, it is not clear what type of "unlawful restrictions" Article 159-1 is referring to. In particular, this Criminal Code provision is much less specific in its formulation than Article 456-1 of the Administrative Offenses Code, which raises concerns given the more serious nature of criminal offenses (and the higher punishment) as opposed to administrative offenses.
53. **It is thus recommended to make the language of the proposed Article 159-1 of the Criminal Code more specific, by stating which actions will lead to**

---

<sup>16</sup> See ODIHR's 2012 Opinion, pars 87-89

<sup>17</sup> See ODIHR's 2012 Opinion, par 91.

***OSCE/ODIHR Opinion on the draft Law on Access to Information of the Republic of Kazakhstan and related Amendments to other Legislative Acts***

**criminal liability.** There should be a clear distinction between serious offences preventing access to information (e.g. the obstruction of access to, or destruction of records<sup>18</sup>), which should lead to criminal liability, and less serious offences, such as those currently listed in Article 456-1 of the Administrative Offences Code.

54. As for monitoring and enforcing the provisions of the Law, once adopted, Article 18 of the draft Law foresees the creation, under the President of the Republic, of a “Public Council on Access to Information” for this purpose. This is preferable to oversight by prosecutors’ offices, as proposed in previous versions of the draft Law. At the same time, concerns regarding the effectiveness of oversight through such a Council remain, seeing as this is merely an advisory and consultative body, which would thus presumably not have any powers to react in cases involving violations of the Law. Moreover, Article 18 does not provide any information on the mandate and composition of this Council, but merely states that these, along with the relevant procedures, shall be identified in a government resolution. While the details of procedures may be outlined in such a resolution, **it would be preferable if basic information as to the composition, appointment of members and mandate would be included in the draft Law, to enhance transparency, and clarify the actual role of the Council.**
55. Overall, the most appropriate body to conduct oversight and monitoring would be a body that is independent from government, legislature and the judiciary. As already outlined in detail in the 2012 Opinion<sup>19</sup>, **it is once more recommended to introduce an independent Information Commissioner into the draft Law.** Such an Information Commissioner should be an independent administrative body accountable only to the Parliament, but otherwise not attached to any government or executive body. He/she should be able to examine appeals against administrative decisions on non-disclosure, and should thus have access all information materials and documents relevant to the case in order to take an informed decision on the matter. The decisions of the Information Commissioner should be binding on all administrative bodies, and at the same time appealable to the competent courts. Next to his/her role as an appeals body, the Information Commissioner could supervise the implementation of the draft Law in general, and conduct awareness-raising activities in this respect. The Commissioner would be obliged to produce an annual report which would include, *inter alia*, statistical information on requests and appeals received. Such annual reports would be useful tools to identify remaining constraints to the free flow of information and measures for improvement.
56. Moreover, it is noted that welcome provisions regarding whistle-blowers that had been introduced to the 2012 draft Law, have been omitted from the current draft Law. Considering the valuable role that whistle-blowers can play in

---

<sup>18</sup> See e.g. Article 61 par 3 of the Croatian Law on the Right of Access to Information of 2013, which foresees punishment where a natural person “damages, destroys, hides or in another way renders unavailable the document containing information, aiming to prevent exercising of the right of access to information”. See also, as an example for numerous similar provisions in the OSCE area, Section 303a of the German Criminal Code, in the version promulgated in 1998, last amended in 2015, which punishes the unlawfully deletion, suppression, rendering unusable or altering of data.

<sup>19</sup> See ODIHR’s 2012 Opinion, pars 77-79.

*OSCE/ODIHR Opinion on the draft Law on Access to Information of the Republic of Kazakhstan and related Amendments to other Legislative Acts*

revealing abuses of power and other information that is in the public interest, **it is recommended to reconsider this step, and to re-introduce a provision on whistle-blower protection in the draft Law.**

**7. Appeals Procedures**

57. Under Article 17, appeals against actions or inactions of officials and on decisions of information holders shall be submitted to higher-ranking officials within three months. An appeal may be raised with the competent court directly if the appropriate higher-ranking official is unavailable, or where the applicant raises an objection against the administrative decision made. It is not clear what type of unavailability of a higher-ranking official this provision implies – should this simply mean that there is no higher-ranking official, then **this should be stated more explicitly in the draft Law.**
58. As for the case where an applicant raises objections against the decision made on appeal, it is noted that there are no provisions in the draft Law relating to the procedures to be followed in such a scenario. **Article 17 should be supplemented accordingly, ideally also with reference to the competent court and procedures to be followed in these cases.**
59. Moreover, it is noted that the current draft Law no longer mentions applications or complaints to the Human Rights Commissioner (this was foreseen in the 2012 draft Law). **It would be preferable to re-introduce this possibility**, as it could help reduce the burden on courts; the proceedings before the Commissioner could proceed simultaneously with administrative and court proceedings.
60. Finally, as already stated, an Information Commissioner could also handle administrative appeals against decisions of information holders. Next to reducing the burden on courts and administrative bodies, such a body would have the advantage of being highly specialized in all matters pertaining to access to information.

*[END OF TEXT]*