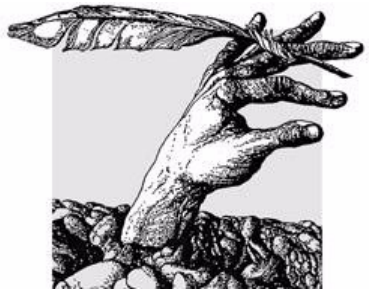

The Representative on Freedom of the Media

Comments on Legal Regulations on Access to Information and State Secrets in Albania

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Introduction

The public right of access to information is an essential element of a functioning democracy. This has been widely recognized worldwide in both international conventions and national laws. Albania is among the nearly 70 countries who has adopted a national law on access to information. However, the existing system of access in Albania has not proven to be adequate and needs improvements in both law and practice. The proposed amendments to the Law on Information Classified "State Secret" would further exacerbate the problem.

Because the general laws on access to information have been previously examined by the OSCE Representative on Freedom of the Media (RFOM)[2], this review will focus mainly on the Law on Information Classified "State Secret" and other related laws and will propose changes to a number of laws and practices to improve access to information.

Existing System of Access to Information in Albania

The legal recognition of the right of access to information in Albania has made significant progress in the past ten years. The most important development was the adoption of Article 23 of the Constitution which provides for the right of every person to access information held by state bodies and to attend public meetings.

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[1] Homepage: http://www.privacyinternational.org/foi
[2] See Article 19, Memorandum on The Albanian Law on the Right to Information on Official Documents, September 2004. http://www.osce.org/documents/rfm/2004/09/3760_en.pdf

Albania has also recognized through international agreements that it realizes the importance of access to information. In 2002, Albania ratified the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) which requires that countries adopt laws on access to environmental information.

As a member of the Council of Europe, Albania has committed to follow the 2002 Committee of Ministers Recommendation Rec(2002)2 to member states on access to official documents.

More recently, in May 2005, Albania signed the "Declaration on 10 joint measures to curb corruption in South Eastern Europe" which commits members of the Stability Pact for South Eastern Europe Anti-Corruption Initiative (SPAI) to improve access to information as a means to fighting corruption within one year. The signatories agree to:

> Enhance the free access to public information and ensure regular cooperation, coordination and consultation among public authorities, the business community and the civil society by establishing an accountable and transparent institutional framework.

These national and international agreements are all promising and Albania should be commended for these efforts. However, it is also generally recognized by commentators that the existing system of access to information as has been functioning is not adequate. This is both due to problems with the laws and more importantly with the practice and implementation of the laws.

The 1999 Law On the Right to Information over the Official Documents incorporates the right of access into national law and sets out procedures for access and appeals. A review commissioned by the RFOM in 2004 found numerous problems with the adequacy of the law.[3] The most significant problem with the law is the absence of specific provisions which set out in detail the exemptions for justifying the withholding of information, the level of harm needed to substantiate the withholding and the balancing of interests that should be considered before something is withheld. Instead, Article 4 of the law merely states that withholding is allowed when it is restricted by another law. This lack of defined exemptions is nearly unique among national freedom of information (FOI) laws and does not meet the standards of most international agreements and recommendations. Another significant problem is the lack of adequate remedies. The People's Advocate is given oversight authority but does not have the authority to order bodies to revise their decisions.

Local NGOs and institutions have found significant problems with its implementation. A 2003 survey by the Centre for Development and Democratisation of the Institutions (CDDI) found that 87 percent of public employees were not aware of the act, no institutions had published the required information and few had appointed officers.[4] In 2005, the People's Advocate recommended that disciplinary measures be imposed against officials who five years after the adoption of the law on access on the right to information intentionally or

[3] Id.
[4] CDDI, Rapport on monitoring process on Albanian Public Administration for the implementation of the law for the "Access of Information on Official Documents", 2004.

negligently violate the law.[5] This was further recognized by the US State Department in their recent 2005 Human Rights Report which noted that "this law has not been fully implemented, and limited access to public information for citizens and noncitizens remained a problem. A lack of government information offices and limited understanding of the law by government officials contributed to the problem."[6]

Thus, it appears that while the legal structure is mostly sound, there are clearly amendments needed to improve its effectiveness and there needs to be increased efforts to implement it for both public officials and users.

Recommendation

- *The existing system of access to information should be revised to examine its effectiveness in light of international standards and obligations. The review should consider both amendments to the law and improvements in implementation.*

Law on Information Classified "State Secret"

This section will review some of the important provisions of Law nr 8457 dated February 11, 1999 on Information Classified "State Secret".[7] Generally, the law is mostly consistent with international practices. There are a few areas where it can be improved.

Scope of State Secrets

The law sets out relatively reasonably narrow categories of information that can be classified as state secrets. Article 1 requires that for something to be classified as a state secret, it must be classified in accordance with the law and "might endanger national security." "National Security" is defined as "the protection of the independence, territorial integrity, constitutional order and foreign relations of the Republic of Albania."

Article 6 of the law sets out five categories of information that can be subject to classification:

> a) military plans, armaments or operations;
> b) capability or weakness, capacities of systems, installations, projects and plans that have to do with national security;
> c) activity of the information services, with the forms and methods of work, with cryptology in objects and technical means, in places where information is processed and the archives where it is kept;
> ç) information of foreign governments, international relations or with international activity of the Republic of Albania, as well as with confidential sources;
> d) scientific, technological and economic issues that are related to national security.

[5] Annual Report of the People's Advocate for 2004, 2005.
[6] US State Department, Country Reports on Human Rights Practices - 2005, March 2005.
[7] Translation provided by the OSCE

Article 3 sets out three levels of classification:

> a) "top secret," when unauthorized disclosure might cause especially serious damage to national security.
>
> b) "secret," when unauthorized disclosure might cause serious damage to national security.
>
> c) "confidential," when unauthorized disclosure might cause damage to national security.

In general, these definitions and categories are consistent with international practices. However, the definitions of harm in the categories should be tightened to limit unnecessary over-classification. For example, the Bulgarian Law for the Protection of Classified Information sets the harm for the unauthorized release of "Top Secret" information to that would, "endanger in exclusively high degree […] or would be able to create danger from occurrence of irrecoverable or exclusively big damages" and information disclosed in the "Secret" level, "would be able to create danger from occurrence of difficult to recover or big damages". In Macedonia, the Law on Classified Information requires that the disclosure of a "State Secret" (the highest level available) would, "cause irreparable damage to the vital interests of the Republic of Macedonia" and the release of "highly confidential" information (the 2nd level) "would cause extremely serious damage".

Recommendations

- *Strengthen the definitions of harm in the levels of classification.*

Categories of information prohibited from being classified

The Law is not as well defined when it comes to categories of information that should not be classified for reasons of important public interests. Article 10 sets out three categories of information that cannot be classified as a state secret. These are:

- hiding violations of law, ineffectiveness or mistakes of the administration
- depriving a person, organisation or institution of the right to know
- hindering or delaying the giving of information that does not require protection in the interest of national security.

This section is more limited than most other similar laws on state secrets found in the region. Typically, state secrets acts in most countries recognized that there are certain areas that the public's right to know is always stronger that the need to protect the information through classification schemes. These include issues such as citizen's rights, environmental hazards and disasters, constitutional, human and citizens' rights, condition of the environment, natural disasters and calamities, statistical information on socio-economic issues such as living standards and education, illegal actions by officials and public authorities and information under international treaties that cannot be classified.

The following are some other examples of information that is not restricted elsewhere:

- *Environmental hazards.* The Georgian Law on State Secrets prohibits classification of information on "natural disasters, catastrophes and other extraordinary events which have already occurred or may occur and which threaten the safety of the citizens."

- *Human Rights.* The CIS Interparliamentary Assembly Model Law on State Secrets recommends that information on "mass repressions for political, social and other reasons" not be subject to classification as a state secret.[8]

- *Personal information about leaders and benefits.* The Russian Federation Law on State Secrets and the CIS Interparliamentary Assembly Model Law on State Secrets[9] prohibit the classification of information about the health of leaders, "privileges, compensations and benefits granted by the State to individuals, officials, and also to enterprises, institutions, and organizations".

- *Basic statistics and information.* The Lithuanian Law on State Secrets prohibits the classification of "statistical data concerning the state of economy and finances […] as well as the state of health care, education, ecology, social and demographic situation, [and] results of social studies." Georgia prohibits the classification of international agreements and treaties, most normative acts, and non-military maps. The Georgian, CIS and Russian laws all prohibit classification of information on currency and gold reserves.

- *Embarrassment.* The US Executive Order on Classified National Security Information prohibits the classification of information to "prevent embarrassment to a person, organization or agency, retain competition."

Recommendation

- *The categories of information that cannot be classified as a State Secret should be expanded.*

Duration of Secrets

The Law on State Secrets sets the default maximum classification period for all categories at ten years. In the region, this is among the better defined and should be commended.

However, a better practice would be to tie the duration of the secrets to the level of classification. For instance, in Macedonia, the Law on Classified Information sets the duration for "State Secret" at ten years, "Highly Confidential" at five years, "Confidential" at three years and "Internal" at two years.

This is important because even with the inclusion of provisions on declassification when something is no longer sensitive, the general practice in most countries is not to review these records and release them until the "official" date.

[8] Model Law On State Secrets. Adopted at the twenty-first plenary session of the CIS Interparliamentary Assembly (decision № 21-10 of 16 June 2003).
[9] Id.

Another issue is the lack of limits on the total duration of classification. The fourth paragraph also allows, "A classifying authority may extend the time period of classification or may re-classify a piece of information for continuous periods that do not exceed 10 years." This would appear to allow for nearly indefinite extensions and gives too much discretion. Most information, especially from the Cold War-era period should be made available.

Access to historical documents and the relation of the law with other laws such as those regulating state archives appears to still be a problem. The Cold War International History Project reports that there is confusion over access to archives from the Communist era including Communist party files and finding aids.[10]

It should be obvious that nearly all records over twenty years old have little sensitivity and should be made public. They were written long before modern recognition of the importance of making information public and are largely over-classified. This is especially true of Cold War-era documents. The release of these documents will free up valuable resources that are currently being used for their protection and allow government authorities to focus on keeping important information secret.

Recommendations

- *The duration of the categories should be set accordingly to their sensitivity.*
    - *Top Secret –10 years*
    - *Secret – 5 years*
    - *Confidential – 2 years*
- *The maximum number of extensions of classification should be limited in law. Additional justifications should be required for any extensions.*
- *Any remaining files from the Cold War-era governments should be declassified and released.*

Protecting Whistleblowers and Public Interest Releases

Another weakness in the law is the failure to recognize that there are instances where information should be released in the name of public interest, even if it is properly classified and may cause harm. This provision should both recognize the release in the public interest and also protects the person who made the release (the whistleblower).

There is a growing awareness of this issue globally. The Council of Europe Civil Law Convention on Corruption (CETS No 174), which was ratified by Albania in 2000 and went into force in November 2003, recognizes that employees who disclose information about

[10] CWIHP and Its Partners Seek Greater Access to Albanian Cold War Files, Passport: The Newsletter of the Society for Historians of American Foreign Relations, April 2005.

corruption should not be subject to sanctions.[11] It is also recognized in the UN Convention against Corruption and other international instruments.

Other countries in the region include this in the freedom of information law. For instance, in Moldova, the Law on Access to Information states:

> 7(5) No one can be punished for the fact that he or she made public information with limited access, if releasing this information does not damage or cannot damage legitimate interests related to national security, or if the public interest for knowing the information is larger than the damage that can result from its dissemination.

Similar provisions also exist in the freedom of information laws in Montenegro and Macedonia.

Recommendation

- *A provision allowing for public interest whistleblower protection should be incorporated.*

Draft law - New "Official Secrets" Category

In 2006, the government introduced a Decision on Proposing a Draft Law "On Some Changes and Amendments to Law No. 8457, Dated 11 February 1999 "On Information Classified as "State Secret". The draft bill proposes a number of changes to the State Secrets Act apparently to synchronize Albanian law with NATO requirements on the security of information. However, the draft goes beyond the apparent NATO standards by creating new restrictions on information which would significantly restrict access to public information in Albania.[12]

The largest concern with the draft law is the creation of the new category of "Restricted" information. Article 2 of the draft defines "Restricted" as applying when:

> "unauthorised exposure may damage the activity or the effectiveness of state institutions in the national security area."

We recognize that this is an improvement over the previous version of the draft which defined the category as when "[…] unauthorized exposure may damage the normal state activity and the interests or effectiveness of the state institutions."

However, the amendment remains problematic because of the broad scope of information that would be potentially covered by it. It is not clear why it is necessary in the Act on State Secrets. Currently, the lowest category of information "Confidential" already restricts the release of information "when unauthorized disclosure might cause damage to national security."

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[11] Council of Europe, Civil Law Convention on Corruption, ETS No 174. http://conventions.coe.int/treaty/en/Treaties/Html/174.htm

[12] Note that the NATO standards themselves are non-public restricted documents and that numerous attempts by civil society and academic to obtain the standards have been denied by the NATO secretariat.

The amendment appears to create a new class-based exemption that would cover all information on the activities of the national security agencies no matter whether it was sensitive or not and even if there is a strong public interest in knowing the information. It would not require any showing of damage to national security but rather expand it into the much more vague categories of "activity" or "effectiveness" without giving any definitions or limitations on this areas. This could cover important information such as budgets and procurement, the role of the armed services in non-military missions such as disaster response and other non-sensitive areas where national security bodies play an important (but unclassified) role. The information can be classified for an indefinite period.

This problem is compounded by the lack of adequate means of challenging decisions in the existing Act on State Secrets and the lack of exemptions and balancing tests in the Law on the Right of Access to Information.

This undermines the overall purpose of the legislation which is to protect the nation from harm to its security. This is also inconsistent with the obligations under the Constitution and the many international instruments that Albania has agreed to that regulate access to information.

It would be more appropriate if there are legitimate concerns about this type of information being released under the Law on the Right to Access to propose amendments to that law and to discuss it in the appropriate forum relating to the working of that act, which as noted above, has also been found to be lacking.

Recommendation

- *This proposed category of "Restricted" should be eliminated.*

Criminal Code

In addition to the law on State Secrets, there are also provisions in the Criminal Code relating to the protection and release of state secrets. Article 294 prohibits disclosure of state secrets by those entrusted with them. Of more particular concern is Article 295 on "Divulging of state secrets by citizens" which states:

> Divulging, spreading, or informing facts, figures, contents of documents or materials which, according to a publicly known law, constitute state secrets, by any person who becomes informed of them, is punishable by a fine or up to three years of imprisonment.
>
> When the same act is committed publicly, it is punishable by a fine or up to five years of imprisonment.[13]

These provisions are problematic because of their overbroad scope. They apply to all persons who come across the broadly defined "state secrets" no matter of their importance. Of particular concern is the apparent application of this provision to the media. This issue

[13] Criminal Code No. 7895, dated 27 January 1995

becomes even more critical if the proposed amendments to the law allow the addition of information relating to "normal state activity" and "effectiveness of state institutions" become state secrets.

It is also unlikely that these provisions are consistent with international obligations, especially if the definition of state secrets is expanded. The UN Human Rights Committee has been critical of states that use these types of provisions to repress important information, finding that it is a likely violation of the UN Declaration on Human Rights and the International Covenant on Civil and Political Rights. In 2001, the Committee criticized the United Kingdom government for using the Official Secrets Act against whistleblowers and journalists:

> The Committee is concerned that powers under the Official Secrets Act 1989 have been exercised to frustrate former employees of the Crown from bringing into the public domain issues of genuine public concern, and to prevent journalists from publishing such matters.
>
> The State Party should ensure that its powers to protect information genuinely related to matters of national security are narrowly utilised, and limited to instances where it has been shown to be necessary to suppress release of the information.[14]

Recommendations

- *The Criminal Code provisions on dissemination of state secrets should be limited to only those who have received the secrets as part of their employment (recognizing as noted above the need for whistleblower and public interest releases) or in cases of espionage. They should not apply to the public or media.*

Conclusion and Recommendations

The laws governing access to information in Albania are generally consistent with international obligations on access to information and protection of state secrets. However, there are noted weaknesses in the Law on the Right to Information such as its lack of specific exemptions and weak appeals mechanism and more importantly its implementation that need to be addressed.

The Law on Information Classified "State Secret" is also generally consistent with international obligations. There are certain areas which could use improvement such as a better clarification of state secrets, the duration of secrets and recognition of public interest releases and protection of whistleblowers.

The proposed amendment to the Act would significantly weaken access to information by creating a new undefined category of state secrets that would potentially capture vast amounts of non-national security-related information and prevent its release.

[14] Concluding Observations of the Human Rights Committee : United Kingdom of Great Britain and Northern Ireland. 05/11/2001. CCPR/CO/73/UK,CCPR/CO/73/UKOT.

It would also threaten freedom of speech and the freedom of the media through existing provisions of the Criminal Code that criminalize access and dissemination to classified information by the public and the media.

Recommendations

- Improve awareness within the public bodies and practices for implementing the law on access to information.

- Meet with stakeholders to examine changes to the law on access to information.

- Eliminate new category of restricted information.

- Amend the law on state secrets to allow for releases in the public interest and protection of whistleblowers.

- Tie in the duration of classification to level of classification. Set limits on classification duration for 10 years maximum for top secret, and 5 years for secret and 2 years for "confidential". Limit maximum period of time that information can be classified.

- Better define categories to limit classification in cases of environmental information, health of leaders and other areas.

- Improve the declassification system.

- Amend the Criminal Code to limit application of unlawful access to classified information by the public and media to cases of espionage.