Strasbourg, 29 February 2012

CDL(2012)016 *

Opinion no. 666/2012

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW

ON FREE ACCESS TO INFORMATION

OF MONTENEGRO

by

Ms A. PETERS (Substitute Member, Germany)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

Law on Free Access to Information (Montenegro)
Comments on the draft of Dec. 2011 by Anne Peters (with research assistance by Lukas Musumeci), 24 February 2012

A. European and international standards

In this comment, the draft law is assessed against the following legal standards:
- Council of Europe Convention on Access to Official Documents of 18 June 2009 (not yet in force) – in the following ECAOD.[1]
- Art. 10 ECHR, the right to receive information.
- Art. 19 ICCPR.

Including General Comment No. 34 of 21 July 2011.

The topics of this comment are:

- The regime of exceptions (especially in relation to data protection).
- The complaint proceedings.
- The short deadlines.
- Further remarks.

B. The regime of exceptions to access to information

I. Standards

Art. 10 ECHR has in the recent case law been interpreted more broadly, not only as a right to receive information which is already in the public realm, but in the direction of a right of access to administrative data and documents.[2]

Art. 3 ECAOD enumerates the admissible exceptions in an exhaustive manner: Exceptions must be 'set down precisely in the law', they must be 'necessary in a democratic society, must have the aim of protecting certain objectives which are enumerated in the provision of Art. 3(1) ECAOD, and they must be 'proportionate to the aim of protecting' those (Art. 3(1) ECAOD). These requirements reflect the normal requirements for the restriction of a fundamental right under the ECHR.

Art. 3(2) ECAOD concretises the proportionality test through the mechanisms which are typical for freedom of information laws: harm test und public interest override. The explanatory reports makes clear that states have a large margin of appreciation as to how to implement the harm test and the public interest override: 'The "harm test" and the "balancing of interests" may be carried out for each individual case or by the legislature through the way in which the limitations are formulated. Legislation could for example set down varying requirements for carrying out harm tests. These requirements could take the form of a presumption for or against the release of the requested document or an unconditional exemption for extremely sensitive information. When such requirements are set down in legislation, the public authority should make sure whether the requirements in the statutory exceptions are fulfilled when they receive a request

[1] Adopted 18 June 2009 (CETS No. 205), not yet in force (needs 10 ratifications, currently 5 ratifications). Besides Montenegro also Bosnia, Hungary, Norway, Sweden have ratified the Convention. Nine states have signed but not yet ratified: Belgium, Estonia, Finland, Georgia, Lithuania, Moldova, Serbia. Slovenia, Macedonia.

[2] See notably ECtHR, no. 37374/05, *Tarsasag v Hungary*, Judgment of 14 April 2009, para. 35, 'towards the recognition of a right of access to information'.

for access to such an official document. Absolute statutory exceptions should be kept to a minimum.'[3]

Art. 10(2) ECHR and Art. 19(3) do not impose stricter standards than the ECAOD.

The EU Commission on the previous legislation of Montenegro had opined: 'A better balance needs to be struck between the Information Secrecy Act, the Law in protection of personal data and the Law on free access to information, in order to prevent undue restriction of access to information which needs to be made public and to consolidate the monitoring role of civil society.'[4]

II. Conformity with these standards

(1) Legal basis: The law allows for exceptions to access to information (denial or restriction of access) only on the basis of the law itself (Art. 13). This satisfies the requirement of a legal basis.

(2) Grounds for limiting the right of access: In the draft law, the enumeration of exemptions is much more detailed than in other countries. However, it is unclear whether the list is exhaustive or not.

(3) Protected values: All grounds for restriction of access to information in the draft law (Art. 15) are covered by the grounds enumerated in Art. 3(1) ECAOD.
However, some questions remain. What is meant by 'owners and numbers of accounts opened in a bank' (Art. 15)? To what extents are banks public authorities in Montenegro?

(4) Proportionality: The draft law requires balancing and allows for restriction only when disclosure would 'significantly undermine' the protected interests.

(5) Precision of the law. The ECAOD requires that 'limitations shall be set down precisely in law.' The draft law's exceptions are very detailed. But still there seems to be the problem that the regime of exceptions is **confusing:**

It is unclear to me how Articles 15, 16 and 17 relate to each other. Art. 15 foresees a strict harm test ('would significantly undermine'). But what is the legal consequence of the precedence of personal data protection under **Art. 16? Will there be a more lenient harm test or no harm text and balancing at all?** I read the reasoning (p. 5, first indent) as stating that Art. 17 will also apply to personal data, but this is not clear from the text of the draft law itself.

Conclusion: Overall, the exceptions regime is, although confusing, in conformity with the European and international legal standards set out above. I recommend revisiting the legal systematics of Art. 15, 16, and 17 and clarify the relationship between those provisions.

C. Complaint procedure (Art. 36 et seq.)

I. Standards

Art. 8(1) ECAOD requires 'a review procedure before a court or another independent and impartial body established by law'.

[3] Council of Europe Convention on Access to Official Documents, Explanatory Report, no date, para. 38.

[4] Analytical Report accompanying the Commission Opinion on Montenegro's application for membership of the European Union, 9 November 2010, SEC (2010) 1334, 26.

The Explanatory Report states: 'This review body must be able, either itself to overturn decisions (…) or to request the public authority in question to reconsider its position'.[5]
Under Art. 8(2) ECAOD, the complaint proceeding must be 'expeditious' and 'inexpensive'. It must involve either reconsideration by the first instance authority or review to an independent body (in accordance with Art. 8(1) ECAOD).

Further standards are Art. 13 ECHR and Art. 2 (3) ICCPR.

II. Conformity with these standards

The draft law foresees an independent supervisory authority (Art. 36, 'Agency'), which is, *inter alia*, the complaint authority in instances of limitation or denial of access to information.

- It is unclear to me whether that Agency can mandate itself access to the requested information or not. Art. 41 states that the Agency shall 'take the measures set forth by the law'. However, it is not stated which measures the Agency can actually take.
- Also, the relation between Art. 36 (right to a complaint) and Art. 46 (court protection) is unclear. Is the complaint to the Agency a pre-requisite for a complaint to court or both venues alternatives? (Maybe this follows from general procedural laws in Montenegro). What seems clear is that only courts can decide on disputes about the classification of information (Art. 46).
- Complaints must be dealt with in 15 working days. This is, in comparison to other European laws, a very short deadline: Switzerland foresees 30 days. Other states such as Germany or France do not have explicit delays, but only prescribe that complaints must be dealt with speedily.
- Cost of the complaint procedure: Costs are not regulated in the law. Probably this issue is regulated in the regulation foreseen in Art. 35. However, Art. 35 only regulates, according to its wording and placing in the draft law, only the fees of the first-instance proceeding including the actual costs of access).
-

Conclusion:

If the Agency can authoritatively mandate access to the requested information, and if the complaint procedure is not costly for the complainants, the international standards are satisfied.

D. Deadlines

- Short deadlines are a common feature of Freedom of Information laws (in the following: 'FOI laws'). However, in comparison to other FOI laws, the deadlines of the Montenegrin law are **overly short**.[6] The first instance authority has to decide within eight working days (Art. 32) and shall execute its decision within another three days (Art. 34). Requests on access to a public register have to be answered within only three days (Art. 14). In case of a complaint the agency shall decide within 15 days (Art. 40). It seems doubtful whether these short deadlines can be complied with in practice. If they will as a rule not be complied with, the law will tend to defeat itself and lose its normative value.

[5] Explanatory report (note 3), para. 64.

[6] In Germany: Delay for processing the request by the first instance authority: One month; the federal officer for access to information is under no delay (§ 7(5) *Gesetz zur Regelung des Zugangs zu Informationen des Bundes (Informationsfreiheitsgesetz-IFG)* of 5 September 2005, BGBl. I 2722). Switzerland: 20 days (Art. 12(1) *Öffentlichkeitsgesetz* of 17 December 2004, SR 152.3); federal officer: 30 days (Art. 13(2) *Öffentlichkeitsgesetz* of 17 December 2004, SR 152.3). UK: The authority must act within 20 days (section 10(1) Freedom of Information Act 2000 of 1 January 2005). Generally, the delays for processing requests for the first instance authority vary between 15 and 30 days.

- Art. 29 grants **an applicant eight days deadline** in order to correct or complete his request. This provision is especially problematic since the short deadline is to the disadvantage of the applicant. For example, in Switzerland, the delay for the applicant to correct or complete his or her request is 10 days. In other legal orders, no such delay is foreseen at all.

E. Further Questions and Remarks

1) **Art. 12 No. 8**: 'Decisions and other single acts that are of importance to rights, duties, and interests of third parties' is very **vague**.

2) Art. 13 (and Art. 3): Do the terms 'any physical or legal entity' **include public authorities and moral persons under domestic public law** such as territorial communities?

I am aware of the fact that other FOI laws use similar terms: In Switzerland: 'Jede Person';[7] in Germany: 'Jeder',[8] in France 'toute personne',[9] in the UK 'any person'.[10] The reasoning of the German law explicitly mentions that authorities and legal persons under public law cannot rely on the Law on Freedom of Information (*Informationsfreiheitsgesetz, IFG*).

3) The **relation between access to documents and access to public registers and records** is confusing. Art. 14 (access to public registers and records) states, in exception to the general rule, that requests have to be submitted in writing. Are the general exemptions (in substance, Art. 15) also applicable to requests on access to registers and records? Is the Agency also competent for complaints against decisions denying access to registries and records? The Reasoning just states: 'Access to public records and registers, which, by its nature, must be publicly available, is provided directly to the verbal request, without formal decision-making, because in view of their contents, there is no need to conduct harm test of their disclosure.'

4) The regulation of **anonymous requests** is confusing. Art. 20 provides that a request must contain the applicant's name, whereas Art. 21 contains a rule how to process anonymous requests.

The ECAOD does not oblige state parties to admit anonymous requests. However, it is a common feature of most European FOI laws to admit anonymous requests. An obligation to disclose one's name might have a chilling effect on a potential applicant. In order to ensure the effectiveness of the freedom of information regime, I recommend to admit anonymous requests and to clarify this in the law.

5) Art. 23: An applicant shall obtain access in the form he prefers, unless his preference is 'objectively unfeasible'. It might be asked what is meant by 'objectively unfeasible'. An example might be that an applicant requests a photocopy, but the document would be damages by copying it. (This case is regulated in Switzerland).
Normally the FOIA laws allow the applicants to choose whether they desire physical insight or whether they desire an (electronic) copy. In Germany, the rule is that the applicant's choice cannot be honoured 'for important reasons', especially if the requested access would cause

[7] Art. 6(1) *Öffentlichkeitsgesetz* of 17 December 2004, SR 152.3.

[8] § 1(1) *Gesetz zur Regelung des Zugangs zu Informationen des Bundes (Informationsfreiheitsgesetz-IFG)* of 5 September 2005, BGBl. I 2722.

[9] Art. 3(2) *Loi n°78-17 du 6 janvier 1978 relative à l'informat ique, aux fichiers et aux libertés.*

[10] Section 1(1) Freedom of Information Act 2000 of 1 January 2005.

clealry higher administrative effort ('insbesondere ein deutlich höherer Verwaltungsaufwand'[11]). In France the applicant has the choice 'dans la limite des possibilités techniques', and the French law also mentions the situation that copying might damage the document.[12] The UK law mentions as an additional option a 'digest or summary of the information'.[13] The applicant's choice must be respected 'so far as reasonably practicable'.

Art. 23: The term 'etc.' should probably not be used in a law.

6) Art. 19 und 35: The regulation of fees seems confusing. Art. 19 provides that there are no fees for the request, whereas Art. 35 provides that an applicant 'shall pay costs of procedure for access to information'. 'Costs of procedure' is then explained as including 'actual costs' for 'copying of documents and delivery of information'. Would it maybe be better to regulate all issues of costs in one provision only?

7) Penalty provisions
It seems unusual that a law foresees penalties for public authorities. What is the benefit of imposing a penalty on a governmental authority which will be paid to the state itself? Such penalties are not foreseen in other FIA laws I am aware of.

[11] § 1(2) *Gesetz zur Regelung des Zugangs zu Informationen des Bundes (Informationsfreiheitsgesetz-IFG)* of 5 September 2005, BGBl. I 2722.

[12] Art. 4 *Loi n°78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal.*

[13] Section 11(1) Freedom of Information Act 2000 of 1 January 2005.