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COMMENTS
ON THE DRAFT LAW
ON FREE ACCESS TO INFORMATION
OF MONTENEGRO

by

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I. Introduction

These comments analyse the Draft Law on Free Access to Information of Montenegro (hereinafter the Draft Law), dated December 2011 and its compatibility with international standards.¹

The following analysis is based on the English translation of the Draft Law (CDL-REF (2012)004), which may not accurately reflect the original version on all points. Some of the issues raised in this opinion may thus find their cause in the quality of the translation rather than the substance of the provisions concerned.

II. Background

A. *International statutory obligations of Montenegro*

Since joining the Council of Europe in 2007, Montenegro has made substantial progress in implementing its post-accession commitments and statutory obligations. To date, it has signed and ratified 67 Council of Europe conventions, thus completing a great number, although not all, of its formal commitments. The European Convention on Human Rights (hereinafter ECHR) entered into force in Montenegro on 6 June 2006. It guarantees in its Article 10 the right to impart and receive information, which States Parties undertake to secure. Montenegro is furthermore party to all the main United Nations human rights treaties, among them the International Covenant on Civil and Political Rights² and as such is bound by these commitments as well to respect and protect rights such as freedom of expression and information.³

Montenegro was one of the 12 Member-States of the Council of Europe that on June 18, 2009 signed the Convention on Access to Official Documents (CETS No. 205), making history as the first international binding legal instrument that recognizes a general right of access to official documents held by public authorities.⁴ On 23 January 2012 Montenegro ratified the Convention on Access to Official Documents (hereinafter ECAOD).⁵

B. *Montenegro: a situation of corruption and lack of transparency*

One of the principal human rights problems in Montenegro, however, has been considered the denial of public access to information.⁶ Freedom of information acts are regarded as essential for transparency and good governance opposed to corruption. Montenegro was ranked 69 out of 178 countries surveyed in Transparency International's 2010 Corruption Perceptions Index.⁷ A UN report co-financed by the EU Commission published in 2011 shows that Montenegrin citizens rank corruption as the second most important problem facing their country, after poverty and low standard of living.⁸

¹ CDL-REF(2012)004

² Montenegro ratified the ICCPR in 2006.

³ http://ap.ohchr.org/documents/dpage_e.aspx?c=163&su=163

⁴ <http://www.freedominfo.org/2009/06/12-european-countries-sign-first-international-convention-on-access-to-official-documents/>

⁵ Montenegro ratified that treaty on 23 January 2012 (<http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=205&CM=1&DF=15/02/2012&CL=ENG>)

⁶ US Department of State, 2010 Human Rights Reports: Montenegro.

⁷ <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/692> (accessed 17 February 2012). The press release further states that the corruption problem is partly a legacy of the struggle against the Milosevic regime in the 1990s, when the small republic turned to various forms of smuggling to finance government operations. Prime Minister Milo Dukanovic has been accused of involvement in cigarette smuggling, and a number of Montenegrin officials and business people have been indicted in Italy for such activities.

⁸ http://www.unodc.org/documents/data-and-analysis/statistics/corruption/Montenegro_corruption_report_web.pdf (accessed 20 February 2012).

The United States Department of State in its 2010 Human Rights Report on Montenegro stated that although the Constitution and law provide for public access to government information; implementation of the law was weak and inconsistent, in particular in relation to some privatization agreements.⁹ NGOs reported that their requests for government-held information frequently went unanswered. Public awareness to right to access government information remained at low level, and citizens themselves seldom turned to state institutions for information. Anticorruption NGO MANS reported that the competent authorities provided timely responses to approximately 38 per cent of its requests for information. MANS noted that agencies usually refused to give information that could reveal corruption or law breaking, particularly involving the privatization process. MANS reported that citizens preferred to submit requests through NGOs rather than to do so themselves. Authorities usually provided reasons for denials (such as threats to state interests or to the business interests of the contracting parties) and these could be appealed to the higher level state bodies or courts. While the courts usually supported access to information, their orders to the ministries to comply with specific requests were often ambiguous and consequently sometimes ignored.¹⁰

In December 2010, Montenegro was officially granted candidate status in its bid to join the European Union. The European Commission reported in 2010 that recent reforms have largely established the necessary legal and institutional framework for dealing with organized crime and corruption, but that anticorruption legislation is not consistently implemented, and political will to deal with the problem is lacking.

The key findings of the 2011 Progress Report on Montenegro (part of the Enlargement Package adopted by the European Commission on 12 October) were that Montenegro has made good progress, but reforms projects need to continue, particular in combating corruption.¹¹

C. Reasoning behind new information act

The mains reasons given for the adoption of a new law on free access to information by the Government of Montenegro are:

- (a) The right on access to information held by public authorities is established by Article 51 of the Constitution of Montenegro
- (b) There is too much scope for restrictions in the existing laws no. 68/05.
- (c) Montenegro's obligation to respect definition of minimal standards in the Council of Europe Convention on Access to Official Documents (hereinafter the ECAOD) through legislation, adequate implementation and efficient application.
- (d) To accommodate to standards and requests in ECAOD necessary for the adequate implementation of the ECAOD.
- (e) Discrepancy between the existing access to information laws adopted after it, especially the Law on Data Secrecy and the Law on protection of data on individual "in order to prevent undue restriction of access to information which needs to be made public and to consolidate the role of civil society".
- (f) Lack of respect for the Law at present due to deficiencies in its implementation.

In relation to corruption Montenegro has ratified two Council of Europe conventions – the Criminal Law Convention against Corruption (2002) and the Civil Law Convention against Corruption (2008). In 2006, Montenegro also became party to the United Nations Convention against Corruption (UNCAC).

⁹ US Department of State Human Rights Report on Montenegro 2010 (Bureau of Democracy, Human Rights and Labour).

¹⁰ US Department of State Human Rights Report on Montenegro 2010 (Bureau of Democracy, Human Rights and Labour). Section 4 on official corruption and government transparency.

¹¹ <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/692>

The Draft Law is according to the Government of Montenegro harmonized with the ECAOD and the EU Parliament Council Directive on the protection of individuals with regard to the processing of personal data and on the free movement of data from 1995, in regard to limiting access to information held by public authorities.

The freedom of expression clause in Article 47 of the Constitution of Montenegro does not entail the right to receive information as do the relevant provisions in the European Convention on Human Rights and the ICCPR. There is however an explicit provision granting access to information in Article 51 stating:

Everyone shall have the right to access information held by the state authorities and organisations exercising public authority. The right to access to information may be limited if this is in the interest of: the protection of life; public health; morality and privacy; carrying of criminal proceedings; security and defence of Montenegro; foreign, monetary and economic policy.

III. Principles on Freedom of Information Legislation

Freedom of information is a touchstone freedom of all other rights as evident from the fact that this freedom entered the UN agenda in 1946, long before the adoption of the International Covenant on Civil and Political Rights (hereinafter the ICCPR). Guaranteeing the public the right to seek information as does Article 19 of the ICCPR is recognition of the positive obligation on states to facilitate that process. If democracy is to survive, its livelihood depends on informed citizenry, as phrased by James Madison in 1822:¹²

*A popular government without popular information, or the means of acquiring it, is but a Prologue to Farce or a Tragedy, or perhaps both. Knowledge will forever govern ignorance: And people who mean to be their own governors must arm themselves with the power that knowledge gives.*¹³

The overreaching purpose of access to information legislation is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.¹⁴

Sweden has the world's oldest government openness statute, the Freedom of the Press Act which dates back to 1766 and is integral part of the Swedish Constitution.¹⁵ Specific rules guaranteeing the right of access to official documents are in Article 1 and according to Article 2, any restriction shall be scrupulously specified in the provisions of a special act of law. Any documents in the custody of the authorities are considered official. Each authority is required to keep a register of all official documents. A large majority of the 47 CofE Member States now recognize a statutory right of access to state-held information.¹⁶ Many of these states have incorporated this right into their constitutions.¹⁷ In France, the *Conseil d'État* has stated that the right of access to administrative documents is a "fundamental guarantee".¹⁸

Article 10 of the European Convention on Human Rights does not include the word "to seek" information like its counterpart in Article 19 of the ICCPR. On the basis of the term "seek" the new Human Rights Committee General Comment no. 34 (12 September 2011) embraces the

¹² Herdís Thorgeirsdóttir, *Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the ECHR* (Brill 2005), p. 84.

¹³ Quoted in Herdís Thorgeirsdóttir *supra*, p. 84 [letter to W.T. Barry, August 4, 1822]

¹⁴ Justice La Forest writing in dissent in *Dagg v. Canada*, [1997] 2 S.C.R. 403 at § 61, 148 D.L.R. (4th) 385.

¹⁵ The current version of the Freedom of the Press Act was adopted in 1949 and amended in 1976.

¹⁶ Fsbj

¹⁷ See discussion of Wouter Hinz and Dirk Voohoof in *European Constitutional Law Review*, 2: 114-126, 2007.

¹⁸ *Conseil d'État* 29 April 2002, no.228830.

right of access to information held by public bodies as well as others carrying out public functions.¹⁹ The word “seek” was omitted from the text in the beginning to stop discussions as to whether or not the state would be under obligation to provide information.²⁰

The European Court of Human Rights was for a long time been reluctant to explicitly recognize that access to state-held information is part of the *public’s right to know*, a principle that it had recognized in its landmark Sunday Times against the United Kingdom judgment in 1979. The Court has held that “it is difficult to derive from the Convention a general right of access to administrative data and documents”.²¹ In its more recent case law the Court has recognized that a refusal by authorities to grant access to public documents is interference with the right to receive as protected by Article 10.²² In 2009, the Court delivered an important judgement in which it recognised the right of access to official document. The Court made it clear that when authorities withhold information that is needed for the public debate, the refusal to provide documents to those who are requesting access, is a violation of Article 10.²³

The Committee of Ministers in a 1981 recommendation on access to information held by public authorities urged that the “utmost endeavour should be made to ensure the fullest possible availability to the public of information held by public authorities”.²⁴

The Committee of Ministers of the Council of Europe adopted Recommendation Rec (2002)2 on access to public documents where transparency is clearly the rule and confidentiality the exception as information is essential for citizens in a democracy. This became the principal source of information for the Convention on Access to Official Documents, the ECAOD, which is the first binding international legal instrument to recognise a general right of access to official documents held by public authorities.

The ECAOD, which Montenegro ratified in 2009, is based on the premises that: Transparency of public authorities is key feature of good governance and an indicator of whether or not society is genuinely democratic and opposed to all forms of corruption, capable of criticising those who govern it, and open to enlightened participation of citizens in matters of public interest.

Article 1 of the ECAOD is a general provision stating that the Convention is intended to set minimum standards stating that “no provision of the Convention may be interpreted as restricting access to documents which must be made available under other international obligations”.

The term “public authorities” is defined wide. It covers national, regional and local level; legislative bodies, judicial authorities insofar as they perform administrative functions, as defined by national law. National or legal persons are also covered insofar as they exercise administrative authority.

The term “official documents” is also defined wide. Official documents transferred to archives remain under the ECAOD and so do documents containing personal data

Article 2 grants rights of access to official documents to “everyone” irrespective of their motives or intentions.

¹⁹ CCPR/C/GC/34 12 September 2011.

²⁰ For further reading see: Herdís Thorgeirsdóttir, supra, p. 114 and G.Malinverni, “Freedom of Information in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights” in 4 HRLJ, No. 4, 1983, p. 449.

²¹ Guerra v. Italy, judgment 19 February 1998.

²² Admissibility decision ECtHR 10 July 2006, 19101/03, Sdruzeni Jihočeské Matky v. Czech Republic.

²³ Társaság v. Hungary, judgment 14 April 2009.

²⁴ Council of Europe Committee of Minister

Article 3 states the possible limitations, which “must be specifically prescribed by law, necessary in a democratic society and proportionate to the aim of protecting other legitimate rights and interests. The list is exhaustive: (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) 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.

The notion of national security should be used with restraint. It should not be misused in order to protect information that might reveal the breach of human rights and corruption within public authorities.²⁵

Article 4 states that those requesting information shall not be obliged to state the reasons for their requests. It is encouraged that Parties to the ECAOD grant applicants a right to submit requests anonymously, except when closure of identity is essential for process of request.²⁶

Article 5 applies to the processing of requests; providing that public officials must make reasonable efforts to be helpful as it is the public authority which is responsible for keeping documents in good order and indexed; and shall when refer the applicant to the competent public authority when necessary. Requests shall be dealt with on equal basis, promptly and within reasonable time limit, which has been specified beforehand. A public authority refusing access to an official document wholly or in part shall give the reasons for the refusal. The applicant has the right to receive on request a written justification from this public authority for the refusal.

Article 6 states it is for the applicant to indicate which type of access he/she prefers and that public authorities should accommodate such preferences.

Article 7 states that in principle, on-site consultation should be free of charge yet in the case of copies, the cost of access may be charged to the applicant but also in accordance with the self-cost principle and be reasonable. The public authorities should not make any profit.

Article 8 provides that an applicant whose request has been refused, in part or in full, shall have access to a review procedure before a court of law or another independent and impartial body established by law.

Article 9 regards complementary measures and provides *inter alia* that the Parties shall inform the public about its rights regarding access to official documents.

Article 10 provides that a public authority shall take proactive measures in publishing documents which it holds in the interest of promoting transparency and efficiency of public administration and to encourage informed participation by the public in matters of general interest.

Article 19, the Free Word Centre in London issued nine principles on freedom of information legislation (in 1999), worth mentioning here. These are based on international and regional law and standards, which give effect to the right to freedom of information:

1. Maximum disclosure (freedom of information acts should be guided by this principle)

²⁵ Explanatory report to CETS No. 205

²⁶ Explanatory report to CETS No. 205, p. 42.

2. Obligation to publish (public bodies should be under an obligation to publish key information)
3. Promotion of open government (public bodies must actively promote open government)
4. Limited scope of exceptions (exceptions should be clearly and narrowly drawn and subject to strict “harm” and “public interest” tests)
5. Processes to facilitate access
6. Costs (Individuals should not be deterred from making requests for information by excessive costs)
7. Open meetings (Meetings of public bodies should be open to the public)
8. Disclosure takes precedence (Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed)
9. Protection for whistle-blowers (Individuals who release information on wrongdoing must be protected).²⁷

IV. Compatibility of the Draft Law with international standards

A. Basic provisions in chapter 1

Article 2 of the Draft law specifies a number of principles that underlie the right of access to information:

- Free access to information
- Transparency in work of public authorities
- The right of the public to know
- Equality of requests
- Procedure of granting access in conformity with ratified international agreements.

These are important and valid principles. The inclusion of “free access to information” makes it clear-cut that this is the rule, should public authorities or courts interpreting the law be in doubt.

It is recommended that **Article 3** in conformity with Article 2 of the ECAOD guarantee the right of “everyone, without discrimination” so as not to provide scope for excluding someone.

Article 3 furthermore provides that those requesting access need not “state reasons or explain the interests for seeking the information”, in conformity with the maximum disclosure principle as well as in accordance with Article 4 § 1 of the ECAOD. This right belongs to everyone, irrespective of motives and intentions.

Upholding the principle of transparency in the work of public authorities **Article 4** entails an instrumental definition of information, stating “all of the information that ensure . . .” This wording may be open to abuse to the effect that certain information might be excluded as not necessary to serve the purpose stated in the provision. It must be kept in mind that free access to *all* information held by public authorities is a tool to increase transparency – and it cannot be determined beforehand what information is necessary to achieve that end.

²⁷ <http://www.article19.org/pages/en/freedom-of-information-more.html>

It is therefore recommended that the wording in **Article 4** is changed to avoid the possibility of giving leeway to the authorities to define which information falls into this category. The principle of maximum disclosure requires that “information” is “all information recorded in any form, drawn up or received and held by public authorities,”²⁸ independent of how it relates to the work of authorities. This must hence also include emails, personal notebooks, CCTV footage, miscellaneous collections of papers, as well as the registered paper and electronic files.²⁹

In the same manner, the principle of the public right to know provided for in **Article 5** is also defined as the right on access to information that “is of importance”. This wording may also grant authorities scope to delimit or exclude information as not being of public interest.

The wording in Articles 4, 5 and 7 should not delimit the right to access to information with “public interest” as the applicant need not give any reasons for his interest for seeking the information. The right to access information is to all official documents, held by public authorities unless the authority can show that the information which it wishes to withhold comes within the scope of the limited regime of exceptions (see below).

It is thus recommend that in Articles 4, 5 and 7 the term information is defined more broadly (cf., Article 1 § 2 (b) of the CAOD).

Article 9 § 2 where the **term information is defined** is not clear enough. It is recommended that the wording is more explicit to include all information held by a public body in question, regardless of who created it, the form of the information or how it is stored and the date of production. The legislation should also apply to records which have been classified, subjecting them to the same test as all other records. In addition, to prevent any attempt to doctor or otherwise change records, the obligation to disclose should also apply to the records themselves and not just the information they contain.

B. Access to information and processes to facilitate access

The Draft Law deals with access to information and restrictions in chapter II and the procedure for access to information in chapter III.

It must be pointed out in regard to this section that the overriding goal of the legislation is to implement maximum disclosure in practice. This means that the authorities have the duty to facilitate that process and make sure that all information is available.

Article 10 is confusing in its wording. It is not clear whether it is stipulating what kind of information authorities must register or (and) keep. It is recommended that in light of the principle of maximum disclosure that this provision will be rewritten to provide that *“information” includes all records held by a public body, regardless of the form in which the information is stored, its source and the date of production, also classified information subjecting them to the same test as all other records.*

Secondly, it is recommended that Article 10 will also include a paragraph explicitly stating that all public bodies (and private bodies if they hold information whose disclosure is likely to diminish the risk of harm to key public interests) shall protect the integrity and availability of records and that obstruction of access to, or the wilful destruction of records is a criminal offence (cf., Article 9 (c and d) of the ECAOD, which stipulates that authorities shall manage their documents efficiently so that they are easily accessible, and apply clear and established rules for the preservation and destruction of their documents).

²⁸ Cf., Article 1, § 2 b defining official documents in CETS 205.

²⁹ Cf., FoIA UK, Denmark etc.

Thirdly, it is recommended that the provision will state that public authorities must keep a good record maintenance in the form of a reliable register. All records are public records and must be registered accordingly.

Inserting the above into the law is of major importance as one of the biggest obstacles to accessing information is often the poor state in which records are kept. Public officials may not be aware of what information they hold or where to locate records. Good record maintenance is an essential precondition for the handling of information.

Freedom of information implies not only that public bodies should accede to requests for information but also that they should publish and disseminate widely documents of significant public interest.

Article 11 of the Draft Law provides that the public authority shall develop “an access to information guide” to facilitate access. This clause is welcomed as an effective step in ensuring that the public has a practical tool on how to request information, where to look and that such a guide is user friendly for the public.

Article 12 in accordance with the principle of the promotion of open government stipulates what pro-active measures the public authority shall publish on its website along with the access to information guide.

The above provisions serve the principles of promotion of open government; it is more economical publishing information than responding to multiple requests for the same information.

Article 13 provides that a public authority shall grant access to information or a part thereof that it holds at the time of dealing with the request. This wording is open to abuse and is not in conformity with the principle that public bodies must actively promote an open government. (Article 22 of this Draft Law does, however stipulate that authorities assist applicants and it is recommended that to that provision is added that authorities must direct requests to the competent authority in case they do not hold the requested information – see under Article 22 below).

Article 14 of the Draft Law stipulates that the public authority shall allow the applicant to inspect public registries and public records held by it. It furthermore provides that a request to inspect may be made verbally. This formulation may be open to abuse as it is hard to contest a verbal refusal if there is no written application.

C. Regime of exceptions

The regime of exceptions is the backbone of any information act. The guiding principle of freedom of information law is that everyone shall have access to all information held, controlled or owned by or on behalf of a public authority *unless* disclosure will result in substantial harm to a protected interest *and* the resulting harm is greater than the public interest in disclosure.

Exceptions to the right to access information must be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting numerated interests listed in Article 3 of the ECAOD.

Article 15 states that the public authority may restrict access to information or part thereof [if it is in the interest of the following . . .]

It is important that when a requested document contains some information which falls under one of the exemptions that all non-exempt portions of the record must still be released after the

redaction of the part that falls under the exemption. By securing this as does **Article 25** of the Draft Law a public body is prohibited from withholding an entire document merely because one line, one page or one piece of information falls under the below exemptions. (This is provided for in Article 6 § 2 of the ECAOD).

Article 15 § 1 of the Draft Law sets forth a list of qualified exemptions under the heading of protection of privacy from disclosure of personal data. Personal data is protected under the Personal Data Protection law and some exemptions are absolute, which means there is no additional public interest. Such requests should be dealt with as access requests under the Personal Data Protection Law.

It is recommended that the heading of this provision is “privacy and other legitimate private interest” which generally means balancing the legitimate interests of the public in having access to the information against the interests of the individual if it is unfair to release the information. It is furthermore recommended that this provision stipulates that it only applies to individuals not legal persons.

Article 15 § 4 lists over twenty sub-categories where information may be exempt from disclosure as disclosure may threaten security, defence, foreign and economic policy of Montenegro.

It is recommended that this long list is revised. The notion of national security should be used with restraint (special national security secrets should be carefully and narrowly defined under the official secrets act). The concept of national security should not be misused in order to protect information that might reveal the breach of human rights and corruption within public authorities.³⁰ National security is not about insulating governments from embarrassment. It must be emphasized in this respect that national security is not the same as the interests of the government of the day. Official information that would be embarrassing or inconvenient to authorities if exposed is not itself a matter of national security. Excessive secrecy may undermine the credibility of the government. The last exemption provided for under Article 15 § 4, i.e. the state of deposits and transactions in individual bank accounts of physical and legal persons that are not public authorities raises alarm in relation to complaints by NGOs in Montenegro to gain access to information that could reveal corruption or law breaking, particularly involving the privatisation process.³¹

The dilemma of any government information regime lies in balancing the strong public interest in disclosure in all areas, including national security, against legitimate exemptions.³² The legitimate exemptions might be defined as disclosure of information that might potentially undermine the security of the state or society or undermine the state's contribution to international security.³³ It is hence recommended that the long list of sub-categories is replaced with a short list with exemptions that are precisely defined such as: information concerning national defence; information supplied by, or related to, bodies dealing with security matters, information relevant to the safety of the nation and its economic well-being. A wide range of matters may be seen as capable of constituting a threat to national security and therefore each piece of information may be considered individually under the harm and public interest test provided for in the subsequent articles.

Article 16 of the Draft Law is under the heading “Harm test for disclosure of information” and provides which information is not subject to the harm test, such as personal data mentioned in the preceding provision. Paragraph 2 lists how to deal with classified data and paragraph 3

³⁰ Explanatory report to CETS No. 205

³¹ Cf., US Department of State 2010 Human Rights Report: Montenegro (April 8, 2011).

³² IRRP Choices, Craig Forcese, Canada's National Security Complex: Assessing the Secrecy Rules, Vol. 15. No. 5 June 2009 ISSN 0711-0677, p. 4.

³³ See discussion supra, Crag Forcese.

provides the time scope to respond to such requests and finally paragraph 4 provides that the harm test shall not apply in the case of information proclaimed as classified by a foreign state or international organisation. It is recommended that the text of Article 16 of the Draft Law will state explicitly that refusal to disclose information is not justified unless the public authority can show that the information relates to a legitimate aim; that disclosure must threaten to cause substantial harm to that aim; and that the harm must be greater than the public interest in having the information.

The harm test is a balancing test where access may be refused on the ground that some harm will be caused by release or may reasonably be expected to be caused by release.

Article 17 provides a list of scenarios where the public interest for disclosure is prevailing. It is questioned how this provision coincides with the “purpose blind” presumption of information legislation. This provision gives the impression that the applicant must disclose the nature of his/her interest as a precondition to exercise his/her right.

One of the motives for requesting information by journalists and researchers is to check the existence or level of corruption. The reasons underlying information acts is to promote accountability and transparency by public authorities for decisions taken by them, not least in the spending of public money.

As most of the exemptions in this information act have a public interest balancing test (cf., the last paragraph of Article 15) which require some harm to be established before the information fits into the exemption – a fair balancing measure either results in the conclusion that it is in the public interest not to disclose the information or the opposite that it is in the public interest to disclose the information. It is hence questioned whether it is not enough to include the harm test in relation to the overriding public interest test.

Article 17 appears to serve as guidance for public authorities as to when the public interest is prevailing. What must be avoided is that applicants are pressed to revoke one of the reasons in this provision when filing their request for disputed information. Such a request goes against the core principle of “purpose blind” information acts. Furthermore defining a list of prevailing public interest categories is also restricting as all information in principle belongs to the public and may only be exempt from disclosure in exceptional circumstances.

Article 18 deals with the duration of restriction on the permissible exemption

D. Procedure for access to information

Part III of the Draft Law sets forth the procedural requirements. Here it is recommended that notice is taken of Article 4 § 3 of the ECAOD so that: Formalities for requests shall not exceed what is essential to process a request. The last paragraph of **Article 20** seems redundant and may be open to abuse.

Article 19 § 3 provides that the request to information shall be submitted to the responsible authority. This requirement goes beyond the principle of promoting open government. It is important to provide that public authorities receiving a request must decide which information access regime (or regimes) a request should be considered under and refer wherever possible the application or the applicant to the competent authority.

Under **Article 20** of the Draft Law, a person requesting information is required to supply various details, including their own name and contact details, basic details concerning the requested information. While supplying enough data may facilitate the search for information, these requirements may be abused since an information request could be denied on procedural grounds for not containing all the basic details concerning the

requested information and the guiding principle should be to facilitate access. It is hence recommended that the wording in Article 20 is modified in accordance with the above principle.

Anonymous requests, provided for in **Article 21** must be dealt with in such a manner that they are not traceable to the applicant.

Article 22 provides that the public authority shall assist the applicant, as far as reasonably possible, to access the requested information. It is recommended that to this provision is added: *If the public authority does not hold the requested official document or if it is not authorised to process the request, it shall wherever possible, refer the application or the applicant to the competent public authority.* (cf., Article 5 § 2 ECAOD)

Article 23 concerns forms of access to information. It is recommended that this provision is rewritten to state simply that *when access to an official document is granted, the applicant has the right to choose whether to inspect the original copy, or to receive a copy of it in any available form or format of his or her choice unless the preference expressed is unreasonable.* (Cf., Article 6 § 1 of the ECAOD).

Article 30 provides that request may be dismissed (a) if the authority does not hold the information. It is recommended that this clause is abolished as a public body is under the obligation to assist applicants (Article 22) and should subsequently assist the applicant to seek the information elsewhere as suggested above. Public authorities may only refuse access to an official document as provided in Article 5 § 5 of the ECAOD: (i) *if despite the assistance from the public authority, the request remains too vague to allow the official document to be identified;* or (ii) if the request is manifestly unreasonable.

Article 31 provides on how to decide upon request; either granting access or denying access. It is recommended that the last paragraph is more explicit providing that a statement of a reason of denial must be written with a citation to the exemption applied in making the denial; an estimate of the number of pages or records withheld; a statement to inform the applicant of the right to appeal the denial.

Article 32 provides (additional³⁴) reasons for denying a request. These provisions seem superfluous as there is a specific limitation clause; a clause providing that access to parts of information may be granted etc.

Deadline for deciding upon request are spelled out in Article 33 and time limit for execution of decision in Article 34. The public authority must decide within eight working days after “an adequate” request has been submitted and the time limit for execution is three working days (Article 40). This timeframe is unrealistic if regard is had to law and practice where information acts have been in force for decades.³⁵ The time limit may also be questioned (apart from the penalty that may be imposed – on the public body by the authorities cf., Article 49). The deadline provision does not strengthen the incentive of authorities to comply as the obligation is to respond to an “adequate request”, a term most likely open to abuse.

E. Costs

When authorities decide upon request they are to inform the applicant on the cost of the procedure (Article 31 § 3). Article 35 of the Draft Law provides that costs of procedure include actual costs incurred by the public authority in relation to copying of document and delivery to individual. The applicant must pay beforehand.

³⁴ Article 30 provides justifications for dismissing a request.

³⁵ Twenty days in the United States to take an example – where the FOIA has been in force since 1966.

As the rationale behind freedom of information laws is to promote open access to information the principle regarding costs is that they may not be excessive as that might deter individuals from making requests. It is therefore recommended that Article 35 is adjusted to the text in Article 7 of the ECAOD on charges for access to official documents which explicitly states that a fee for copy must be reasonable and not exceed the actual cost of reproduction and delivery of the document.

F. Right to complaint

The right to complain is provided for in Article 36. An applicant who is dissatisfied with the response of a public authority to his/her request may turn to an “independent, supervisory authority responsible for the protection of personal data and access to information”, referred to as the Agency. The procedure and competencies and powers of the Agency are further provided for in the subsequent provisions.

Effective access to information requires that the law stipulate clear processes for deciding upon requests by public bodies, as well as a system for independent review of their decisions. It is important that individuals can appeal first to an independent, administrative body. The internal review complaints process provided for by the Draft Law appears cumbersome and may provide scope for abuse. If public bodies can hide behind a complex web of rules and procedures an effective access to information, for example information intended to reveal corruption or incompetence, may be hindered and such means to the end can hardly be justified.

It is therefore recommended that this section of the law is revised with regard to the principle of facilitating access to information. The system for independent review should be made simpler and the right to appeal from the administrative body to the courts. Only the courts have the authority to set standards of disclosure in controversial areas and to ensure the option of a thorough and reasoned approach to difficult disclosure issues.

G. Protection of public officials

According to the principle of disclosure taking precedence³⁶ officials should be protected from sanctions where they have in good faith disclosed information pursuant to a freedom of information request, even if it later turns out that the information is not subject to disclosure. Article 47 warrants such protection to employees of public authority and that is appreciated.

V. Conclusion

Montenegro as party to the European Convention on Human Rights and to the UN International Covenant on Civil and Political Rights has a positive obligation to secure the public's right to know with the objective of fighting corruption and paving the way for a healthy democratic society. The Draft Law analysed above is a step in that direction but the recommended changes need, however, to be taken into serious consideration.

Transparency of public authorities is a key feature of good governance and indicator of whether or not a society is genuinely democratic, opposed to all forms of corruption, capable of criticising those who govern it, and open to enlightened participation of citizens in matters of public interest.

Maximum disclosure is one of the key principles of freedom of information legislation. As there is a prevailing perception of widespread corruption in the public sector it is very important that

³⁶ The Public's Right to Know, Principles on Freedom of Information Legislation, published by Article 19 (London 1999).

journalists, citizens, NGOs and other bodies requesting information get timely responses. The process of privatisation is one of the areas which may not be exempted from public scrutiny by refusing to grant access to information in relation to contracts or other transactions with public property changing hands; not only does the information belong to the public but also the properties that are being privatised.

As public awareness of a right to access government information is reported to be on a low level, public bodies are under an obligation to publish key information and to actively promote an open government. It is recommended that the parts of the law on the procedure for deciding upon a request by public bodies as well as the internal review processes are simplified so that the law is serving the objective of facilitating access to honour the fundamental right of the public to know. Citizens must always be able to ask and get an answer and they must have a venue to appeal.

Freedom of information legislation is a crucial tool for the public in democracy. When effectively used it may threaten political and economic interests. For these reasons it is crucial that amendments strengthen the law and the public interest test - making the law impossible to work around.