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**(VENICE COMMISSION)**

# COMMENTS

# ON THE DRAFT LAW

# ON AMENDMENTS TO THE

# LAW ON CLASSIFIED INFORMATION

# OF MONTENEGRO

# by


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## I. Introduction

These comments provide an analysis on the Act to Amend the Law on Classified Information (Official Gazette of Montenegro 14/08 and 41/10, hereinafter LCI). The below analysis, which addresses the degree of consistency of the LCI with international standards relating to the right of freedom of information, is based on an unofficial translation of the LCI and the Act to Amend the LCI.

## II. International statutory obligations of Montenegro

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 Rights (hereinafter ICCPR),[1] and as such is bound by these commitments as well to respect and protect rights such as freedom of expression and information.[2]
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.[3] On 23 January 2012 Montenegro ratified the Convention on Access to Official Documents (hereinafter ECAOD).[4]

## III. Situation in Montenegro

Montenegro is working to draw closer to European democratic standards with the aim of joining the EU and NATO. As a precondition for joining both Montenegro needs to fight corruption and organized crime by introducing transparency in governance and to ensure that Montenegrin security agencies and defence sector meet NATO requirements.[5]

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.

Montenegro was ranked 69 out of 178 countries surveyed in Transparency International's 2010 Corruption Perceptions Index.[6] 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.[7]

One of the principal human rights problems in Montenegro, however, has been considered the denial of public access to information.[8] Freedom of information acts are regarded as

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[1] Montenegro ratified the ICCPR in 2006.
[2] http://ap.ohchr.org/documents/dpage_e.aspx?c=163&su=163
[3] http://www.freedominfo.org/2009/06/12-european-countries-sign-first-international-convention-on-access-to-official-documents/
[4] Montegreo 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)
[5] http://www.nato.int/cps/en/natolive/topics_49736.htm
[6] http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/692 (accessed 17 February 20122). 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.
[7] http://www.unodc.org/documents/data-and-analysis/statistics/corruption/Montenegro_corruption_report_web.pdf (accessed 20 February 2012).
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).
[8] US Department of State, 2010 Human Rights Reports: Montenegro.

essential for transparency and good governance opposed to corruption. 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] Protection for whistle-blowers who reported on corruption is inadequate.[10]

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.[11]

## IV. Standards relating to freedom of information and laws on classified information

### *A. Principles of transparency*

Freedom of information is the lifeblood of human rights. Access to information is a tool of accountability but also of empowerment. Maximum disclosure of officially held public information is essential to democratic government; to upholding human rights, to ensuring fair competence in the business environment and for maintaining stability as transparency is a question of trust in those who hold public office and who need to maintain legitimacy. Secrecy breads corruption, extortion and tax evasion. In contrast greater transparency enhances economic performance.[12]

It is now widely recognized that the culture of secrecy that has been the modus operandi of governments for centuries is no longer feasible in a global age of information. Governments in the information age must provide information to succeed.[13]

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* good reasons exist for withholding it.[14]

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

[10] US Department of State, 2010 Human Rights Report Montenegro (Bureau of Democracy, Human Rights and Labour)

[11] 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.

[12] See discussion at 7th International Conference of Information Commissioners, Ottawa, Canada, 3-5 October 2011 (Huguette Labelle, Transparency International and Chancellor of the University of Ottawa).

[13] https://www.privacyinternational.org/article/pifreedominfoorg-global-survey-2004-freedom-information-and-access-government-record-laws-ar

[14] http://www.justice.govt.nz/publications/global-publications/o/official-information-your-right-to-know

### *B. Secrecy*

"Secrecy," said Cardinal Richelieu in 1641 "is the first essential in the affairs of State. Constraints on information disclosure are motivated by objectives as national security. As the well-known Second World War admonishment warned "loose lips sink ships".[15] For these reasons the objective of national security is seen as depending on the need to classify sensitive information to which access is restricted by law to a particular group of persons. A formal security clearance is required to handle classified documents or access classified data. Such restrictions on access to information are permissible when disclosure will result in substantial harm to a protected interest *and* the resulting harm is greater than the public interest in disclosure.

Secrecy bills are today, however by many viewed with scepticism as for example the Protection of State Information Bill in South Africa (adopted in November 2011) which is criticized for threatening the public's right to know in an era were the culture of self-enrichment among the ruling elites and incorrect privatisation is seen as threatening the foundations of democracy and human rights.

Danger is that if authorities engage in human rights violations and declare those activities state secrets and thus avoid any judicial oversight and accountability. Giving bureaucrats new powers to classify even more information will have a chilling effect on freedom of information – the touchstone freedom for all other human rights – and it may also hinder the strive towards transparent governance.

The basic fear is that secrecy bills will be abused by authorities and that they lead to wide classification of information which ought to be publicly accessible for the sake of democratic accountability. Unreasonable secrecy is thus seen as acting against national security as "it shields incompetence and inaction, at a time that competence and action are both badly needed".[16]

Authorities must provide reasons for any refusal to provide access to information. The ways the laws are crafted and applied must be in a manner that conforms to the strict requirements provided for in the restriction clauses of the freedom of information provisions in the ECHR and the ICCPR.

## V. Analysis of the suggested amendments to the Law on Classified Information

The Law on Classified Information (Official Gazette of Montenegro 14/08, 76/09 and 41/10) is divided into 13 chapters (hereinafter the Law).

Despite the relations with the Draft Law on Free Access to Information (FOI hereinafter in this paper/the Draft Law in the other comments) due to the subject matters there is no reference to the FOI. The FOI in Article 15 which entails the regime of exceptions refers to classified information along with several other categories and this has been criticized as being far too wide in scope instead of being exhaustive. As it is not clear which law prevails in case of inconsistencies it is recommended that in accordance with the principle of transparency and maximum disclosure that it will be stated that in case of inconsistencies the FOI prevails.

[15] Cf., Craig Forcese, Canada's National Security Complex: Assessing the Rules of Secrecy in IRPP Choices, Vol. 15 No. 5, 3 June 2009.

[16] Standing Senate Committee Report on National Security and Defence: The Myth of Security at Canada's Airports (2003), quoted in Craig Forcese, Canada's National Security Complex: Assessing the Rules of Secrecy in IRPP Choices, Vol. 15 No. 5, 3 June 2009.

### *A. Definition of classified information*

Classified information provided for in Article 3 § 1 is to be amended to state: "*Classified information shall be any information whose disclosure to an unauthorized person has or might have harmful consequences onto security and defence, foreign affairs, monetary and economic policy of Montenegro*". Under this paragraph are seven sub-categories that remain unchanged.

The categories of information that can be classified as state secrets are broadly formulated, material definitions. As the Venice Commission has pointed out providing too broad a definition may lead to protecting too much information.[17]

The categories of classified information are open to a wide interpretation by the implementing public bodies. Such definition therefore envisages restricting access to a much wider range of information than could, even on a broad interpretation, be compatible with the public's right to know under Article 10 of the ECHR and Article 19 of the ICCPR. As already mentioned the list of exceptions in the FOI under Article 15 § 4 is not exhaustive, while it also refers to "data marked as classified". If the regime of exceptions is comprehensive, it should not be permitted to be extended by other laws.[18] The inconsistencies between the two laws need to be clarified and in accordance with the principle of maximum disclosure and transparency it should also be made clear that the FOI prevails in case of inconsistencies.

While it is certainly an improvement from the previous Article 3 § 1 to leave out categories as data relating to "political interests" it is still a cause of concern to include a category like "economic policy". It is only in very limited circumstances that information f. ex. regarding economic policy should be withheld.[19] The modern practice of open government in which government conducts its business must be in a transparent fashion in order to allow for public participation and public scrutiny over matters concerning for example corruption and privatization.

The UN Human Rights Committee in its new General Comment on Article 19 states regarding classified information laws that it is generally not appropriate "to include in the remit of such laws such categories of information as those relating to the commercial sector, banking and scientific process".[20] One of the sub-categories in Article 3 includes as basis for classified information scientific research (point 5).

Classifying information relating to economic policy due to potential harmful consequences touches upon the matter of privatisation which is relevant to the economic policy in many states and raises particular issues with respect to transparency.[21] Matters regarding private contractors may be subjected as classified information (economic policy) under both Article 3 of the Law as well as under the exception in the FOIA in Article 15 § 4 (last two items on the

[17] CDL-AD(2008)008
[18] Cf., Article 19 principle 8 on disclosure taking precedence.
[19] As the Inter-American Court of Human Rights held in Claude Reyes and Others v. Chile "access to public information is an essential requisite for the exercise of democracy, greater transparency and responsible public administration and that, in a representative and participative democratic system, the citizenry exercises its constitutional rights through a broad freedom of expression and free access to information. (…) In this regard, the State's actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately". 19 September 2006, Series C no.151, §§ 84 and 86.
[20] CCPR/GC/34, p. 7.
[21] US State Department Human Rights Report on Montenegro published April 2011 reports complaints from NGOs regarding denial of access to information in this area.

list). The process of privatisation as part of the economic policy has in many countries contributed to corruption where corporate elites have gained access to the elected authorities and acquired power through such ties to do the governing.[22] According to Article 17 of the FOI prevailing public interest for disclosure of information or part thereof, exists when the requested information contains data that "evidently refer" to corruption.

The processes and functions of the State and its bodies must be open and transparent in order for sovereign people to exercise their inherent constitutional authority over the government.

With the suggested amendments the formulation of secrecy policy is still far outside the strict, objective criteria. It is hence recommended that this clause is revised with regard to categories subject to classification and that the list is distinct, clear and exhaustive.

The amendment in Article 4 appears to serve the public interest aim of excluding from classification information "endangering the environment, limiting competition, exceeding or abuse of authority". These are new emphasis from what the provision stated previously. The above condition "limiting competition" is probably linked to the aforementioned "economic policy"- category. This provision is open to wide discretion as it is very broad and vague. Ensuring, for example, which information "limits competition" will be problematic to evaluate. The previous provision included yardsticks that were objectively clear such as "illegal act" or "administrative error". While it is good to have benchmarks in interpreting the law this provision places enormous responsibility on for example bureaucrats as the margin of what could potentially be relevant is wide open to a very subjective evaluation. It must furthermore be pointed out that penalty envisaged by Article 82 § 2 where the responsible person within a body shall be fined may have the effect of a deterrent on the same person to exclude from classification information on such subjective grounds.

It is recommended that Article 4 also entails the wording: Information shall not be classified where the public interest clearly outweighs national security.

### *B. The classification scheme*

Part II of the Law sets forth the procedure for security classification and determination of classification levels. Article 10 provides what kind of information shall be classified "if such is necessary in a democratic society".

**Article 10 is subject to change** (Art. 4 Amendment Act) with the insertion of a new paragraph delegating the authority of the person authorized to determine classification and its level - by permitting a person authorized to determine classification level within a body where the same type of classified information may by special act designate that information as classified and determine its classification level.

This amendment raises obvious dangers as this delegation of authority regards provides a potent weapon to the heads of the relevant public bodies to shield themselves from taking responsibility, from criticism or from the punishment provided for in the Law (Article 82). If this amendment is read in context with Article 21 § 4 of the LCI it becomes evident that the persons appointed to determine classification levels by their superiors may not reclassify information. Hence it appears the authority/discretion is not authentic.

[22] Cf., http://www.indianexpress.com/news/post1991-economic-policies-privatisation-r/783774/

It is recommended that this amendment will not be adopted. Giving bureaucrats new powers to classify even more information will compromise the accountability of those who are originally responsible and blur the transparency governance.

The next amendment concerns the classification levels. Classification formalises what constitutes a "state secret" and accords different levels of protection based on the expected damage the information might cause in the wrong hands. There are typically several levels (classes) of sensitivity, with differing clearance requirements.

**Article 11** § 1 provides that the classified information referred to in Article 3 of the Law shall be given one of the following security classification levels: (1) Top Secret (2) Secret (3) Confidential (4) Restricted. After this paragraph a new one is inserted:

*"The Government of Montenegro shall define more detailed criteria of information for determining the "Top Secret", "Secret", and "Confidential" levels of classification.*

The above amendment is confusing and appears to give increased discretion to authorities in classifying information.

There is proposed amendment to the first paragraph of Article 12 which shall read:

"*The base for security classification of information shall be the content of classified information and its importance for the security and defence, foreign affairs, monetary and economic policy of Montenegro".*

Previously classified information could be based also on political and economic interests.

Subsequently the classification levels remain unchanged providing:

**Top Secret;** applied to classified information whose unauthorized disclosure could endanger or make unrecoverable harm to the security and interests of Montenegro.

**Secret**; applied to classified information whose unauthorized disclosure could seriously harm the security or interests of Montenegro.

**Confidential;** applied to classified information whose unauthorized disclosure could harm the security of Montenegro.

**Restricted** applied to classified information whose authorized disclosure could harm the body function.

It is appreciated that all the classification levels are conditioned by harm tests. Only information whose disclosure *would* cause harm, varying in degrees as between the different classification levels may be classified and hence withheld from the public. There is requirement of a causal link between the unauthorized disclosure and the high degree of harm "unrecoverable" harm, "serious" harm in the first two cases.

The harm test is directed at the "security and interests of Montenegro" – which is a wide and ambiguous term. As it is now the classification scheme and its basis are not based on detailed criteria. Classified information is a restriction which cannot be allowed on grounds other than those permissible in international law and these must be specified in details.

Read together the whole basis of what constitutes classified information and subsequently the classes of sensitivity is in disarray. In Article 3 the causal link to harmful consequences is based on very wide categories such as the "economic policy of Montenegro" with sub-categories which give authorities immense discretion. Article 10 (which is unchanged) broadens the scope of definition by stating that "information shall be designated as classified if such is necessary in the democratic society and if the interest referred to in Article 3 § 1 of

this law prevails over the interest for free access". Article 11 adds a new paragraph to the first one granting the authorities even further discretion for determining levels of classification without stating the reasons or designating the legal source.

Restrictions such as classified information and different levels of sensitivity are only permissible if they serve the legitimate interests specified in Article 10 § 2 ECHR and Article 19 § 3 of the ICCPR. In contrast by referring to broad categories – covering almost every area of government conduct and subsequently when assessing the level of sensitivity leaving it up to the discretion of those who make classification decisions to determine for themselves "potential harmful effects to the security of the State and its interests" (cf., Article17). The list of persons authorized for determining classification level "TOP SECRET" is set forth in Article 14 of the Law such as President of Montenegro, members of government, director of police and so forth. Persons authorized for determining the classification levels "SECRET", "CONFIDENTIAL" and "RESTRICTED" (cf., Article 15) are the heads of the bodies of this Law (referred to in Article 2 – state bodies, state administrative bodies etc.) or the persons appointed by them.

Read in context it is to be feared that the Law is open to abuse. Heads of state bodies can appoint subordinates to take on the task of classifying all sorts of information and much more information than would meet the test of necessity and proportionality. The above mentioned provisions confer unfettered discretion for the restriction of freedom of information on those charged with the implementation.

It is recommended that the criteria for classifying information and the different levels is set in context with the specific conditions which restrictions must be subject to under Articles 10 § 2 of the ECHR and Article 19 § 3 of the ICCPR.

It is further recommended that strict limits should be placed on who may classify information. The ability of the heads of state bodies and other public bodies to delegate the authority to classify information to subordinates or others should be obliterated. A new paragraph might instead be inserted, where appropriate, restricting the authority to classify information to a limited category of persons who are not only highly qualified but also independent from any outside pressure or financial or political interests.

### *C. Duration of secrets*

A new Article 19 a provides for the duration of classified information (1) information marked as TOP SECRET shall have classified status for 30 year; (2) SECRET information shall have classified status for 15 years; (3) CONFIDENTIAL information shall be classified for years; (4) RESTRICTED information shall be classified for 2 years.

Privacy International has recommended that no information be classified for more than 15 years unless compelling reasons can be shown form withholding it.[23] It is recommended that the maximum period of classification should be shortened, for example to 15 years.

This provision further provides that the authorized person may prolong the term of the classified status. This clause is problematical as it grants unlimited discretion in contrast to the principle that keeping information classified is an exception to the rule of open government and maximum disclosure. It is incompatible with the restriction clauses in the freedom of information provisions of the ICCPR and the ECHR to withhold from the public information unless it conforms to the strict requirements set forth in these clauses. This provision is hence wide open to abuse.

[23] Privacy International, Legal Protections and Barriers on the Right to Information, State Secrets and Protection of Sources in OSCE Participating States, London, May 2007.

A new Article 19 b provides that the person authorized to determine the level of security classification shall perform periodical assessment based on which the level of secrecy can be changed. Article 21 of the LCI also states that reclassification may be performed solely by the person authorised to determine classification levels. Here regards must be had to the likelihood of a tendency of the one who originally found reason to restrict access to defend that decision by maintaining the situation.

It is therefore recommended that the review of classified information for de- or reclassification should be done by qualified persons other than the ones categorized in Articles 14 and 15 of the LCI. This is also imperative when read in context with Article 18a of the LCI which provides that public bodies need not confirm or deny the existence of classified information. As there is no possibility to argue against this, authorities must establish clear rules about archives and have the filing and document classification system in order.[24]

### *D. Overriding public interest in disclosure*

Article 17 of the Draft Law on Free Access to Information of Montenegro provides that prevailing public interest for disclosure of information exists when the information contains data that refer to corruption; unauthorized use of public funds, abuse of authority etc. This is in line with Article 3 § 2 of the ECAOD on possible restrictions to official documents where disclosure would likely harm national security etc., unless there is an overriding public interest.

The amended Article 4 submitting that certain information shall not be determined classified may be regarded as a step annulling classified information (already discussed under section A above) although the text says “information shall not be determined” and appears hence to refer to the process of classification rather than a “sudden” decision on disclosure for the sake of overriding public interest.

The protection of whistle blowers is of paramount interest in relation to classified information and the public interest, although not mentioned in the LCI or the act to amend it. Article 4 as amended may be taken to refer to those who chose to blow the whistle on for example torture (as is often the case)[25] as it stipulates clearly that “information shall not be determined classified in order to conceal a crime . . . “There is, however, no clause in the law that provides for protection if Article 4 is invoked to justify disclosure of information as it is concealing crime or revealing abuse of authority.

The penalty provided for in Article 369 of the Criminal Code of Montenegro for revealing state secrets is imprisonment for a term of one to eight years; and if it is top secret data the punishment is imprisonment for a term of three to fifteen years. The chilling effect on potential whistle-blowers is obvious although the public interest override were obvious. While there is no protection offered for whistle blowers the public interest value of Article 4 of the amended LCI is of little value.

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[24] Cf., Alejandro Ferreiro, Conselour, Consejo para la Transparencia, Chile at the 7th International Conference of Information Commissioners, Ottawa, Canada, 3-5 October 2011 (Huguette Labelle, Transparency International and Chancellor of the University of Ottawa).

[25] http://security.blogs.cnn.com/2012/01/23/former-cia-officer-accused-of-disclosing-i-d-of-a-fellow-agent/; http://loyalopposition.blogs.nytimes.com/2012/01/26/get-the-whistleblowers/

## VI. Final remarks with regard to the LCI in general

It is strongly recommended that the LCI and the proposed amendments are crafted in a manner consistent with the principle of maximum disclosure which holds that all information held by public bodies should presumptively be accessible, and that this presumption may be overcome only in very limited circumstances.

The offences provisions should focus on the harm caused by disclosure of classified information and not the disclosure per se.

It is imperative that the legal framework provides protection for whistle-blowers and it appears more relevant to include such a provision in the LCI rather than the penal code or in the law on public servants. Article 4 is bereft of any public value if those who disclose information, concealing crime or revealing abuse of authority, if there is no protection for so doing.

The LCI with the proposed amendments is too broad in scope and not transparent enough in its mechanisms or penalties.