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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# OPINION

# ON THE DRAFT LAW ON FREE ACCESS TO INFORMATION

# OF MONTENEGRO

**Adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012)**

**on the basis of comments by**

**Mr Iain CAMERON (Member, Sweden)**
**Ms Anne PETERS (Substitute Member, Germany)**
**Ms Herdis THORGEIRSDOTTIR (Member, Iceland)**

## I. INTRODUCTION

1. By a letter of 23 January 2012 of the Permanent Representative of Montenegro at the Council of Europe, the Montenegrin authorities sought the Venice Commission's opinion on the draft Law on Free Access to Information (CDL-REF(2012)004) .

2. The following rapporteurs were invited by the Venice Commission to provide their comments on this draft Law: Mr Ian Cameron, Ms Anne Peters and Ms Herdis Thorgeirsdottir who prepared comments on the draft Law (CDL(2012)017, 016 and 018 respectively).

3. On 5-6 March, Ms Thorgeirsdottir, accompanied by Ms de Broutelles from the Secretariat of the Venice Commission, visited Podgorica for meetings on the draft Law with the Governmental Working Group, which had prepared the draft and with NGOs. At the meeting, the Montenegrin authorities stated that they wished to review the draft Law in the light of the discussions held and that they would therefore prefer to receive an opinion on a revised draft Law that they would send to the Venice Commission. The Commission transmitted the rapporteurs' comments to the Montenegrin authorities. On 16 March 2012, Ms Thorgeirsdottir reported to the plenary session of the Commission on the results of the meetings.

4. On 9 May 2012, the Montenegrin authorities sent a revised draft Law on Free Access to Information (CDL-REF(2012)004rev) for opinion.

5. The present opinion, which concerns the revised draft law (CDL-REF(2012)004rev), was adopted by the Commission at its 91st Plenary Session (Venice, 15-16 June 2012).

## II. GENERAL REMARKS

6. The European Convention on Human Rights (hereinafter the ECHR) entered into force in respect of Montenegro on 6 June 2006. It guarantees, in its Article 10, the right to impart and receive information, which States Parties undertake to secure.

7. Montenegro was one of the 12 Member States of the Council of Europe that signed the Convention on Access to Official Documents (hereinafter CECAOD - CETS No. 205) on 18 June 2009, the first international binding legal instrument that recognises a general right of access to official documents held by public authorities. On 23 January 2012, Montenegro ratified this Convention.[1]

8. Article 47 of the Constitution of Montenegro protects freedom of expression but does not include the right to receive information as is done in the relevant provisions of the ECHR and the International Covenant on Civil and Political Rights (ICCPR). Access to information is however explicitly provided for in Article 51 of the Constitution of Montenegro, which states that:

> "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."

[1] 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)

9. It is to be welcomed that Montenegro explicitly provides for access to information in its Constitution. Free access to information is crucial to a modern democracy and a *Rechtsstaat* and freedom of information acts are regarded as essential for transparency and good governance as an important element in the fight against corruption.

10. The revised draft Law (submitted in May 2012, CDL-REF(2012)004rev) which is commented below has been widely amended and improved as compared to the first draft (CDL-REF(2012)004). This Opinion underlines certain of these improvements and modifications and this is why comments on Articles sometimes contain references to the previous draft.

## III. COMMENTS ON THE DRAFT LAW - ARTICLE BY ARTICLE

11. **Article 3** of the draft Law lays down the principle of free access to information in a wording that corresponds to the requirements of Article 4 CECAOD.

12. The wording of **Article 4,** entitled "Transparency of work", has been revised and now emphasises the positive impact for public authorities of ensuring access to information. The previous ambiguous wording that seemed to give a limited definition of information, which may be provided by authorities, has been deleted and this is to be welcomed.

13. **Article 5** defines the right of the public to be informed: "Access to information shall ensure for the public to be informed and to know information held by the public authority, *which are of importance to* forming of opinions on the state of society and functioning of authorities, as well as for exercise of democratic control over authorities, and exercise of human rights and freedoms."[2]

14. The clause "which are of importance" seems to limit the information that the public authority has to provide to applicants. This wording may grant authorities discretion to delimit or exclude information as not being "of importance", on its own.

15. According to European standards, an applicant need not to give any reasons or degree of importance for his or her interest in an information. The right to access information relates to all official documents, held by public authorities, unless the authority can show that the information which it wishes to withhold falls within the scope of the limited regime of exceptions.

16. **Article 6** which deals with the equality of requests corresponds to the requirements of Article 5.3 CECAOD.

17. **Article 9** appears to correspond with the terms set out in Article 1 CECAOD. The definition of "public authority" (Article 9.1 of the draft Law) includes "institution, company and any other legal person founded or co-founded by the state or in majority ownership of the state or local self-government, legal person mainly financed from public resources, as well as well as a natural person, entrepreneur or legal person having public responsibilities or managing public funds". This large definition of public authority is to be welcomed as it is important that all bodies, controlled by the state, or carrying out delegated public functions, are covered by the right of access to information.

18. **Article 10** defines the terms "information" and "access to information". In its current wording, the definition of "information" does not seem to be limited. The previous wording of this Article had referred to documents, which the public authority is "obliged to register or

[2] Emphasis added.

keep… in accordance with the law or other relevant regulations". This reference had been criticised in the rapporteur's comments inasmuch as there was no clear obligation to *register or keep all* documents and consequently the previous definition had been confusing and restrictive.

19. The definition of access to information has also been amended and now provides that: "The right on access to information shall encompass the right to ask for and receive information, regardless to purpose and data consisted of." The reference to the right to "use, disseminate and publish" the information received has been deleted. As this reference was not necessary and its deletion does not amount to a prohibition to use, disseminate or publish the information received, this amendment is acceptable.

20. The "access to information guide" (**Article 11**) is an essential tool in practice to make access to information a reality. This clause is welcomed as an effective step in ensuring that the public has a practical tool on how to request information. Such a guide should be user-friendly for the public.

21. **Article 12** sets out a proactive duty to publish certain types of information deemed to be of particular value to the public. In the revised version of this Article, the list of documents covered has been expanded and the deadline for posting new information has been extended from 8 to 15 days, which seems more realistic.

22. The proactive duty to publish has to be read in conjunction with **Article 27**, which provides that there is no duty of providing access where the information is already available in Montenegro and published on the Internet.

23. The law allows for exceptions to access to information (denial or restriction of access) only on the basis of the law itself (**Article 13**). This satisfies the requirement of a legal basis.

24. **Article 14** provides for restrictions to access to information. All grounds for restriction of access to information in the draft Law are, somehow, covered by the grounds enumerated in Article 3.1 CECAOD, entitled "list of possible limitations to access to official documents".

25. The drafting of this Article has been much improved as it now enumerates an exhaustive list of exceptions and links some of these exceptions - protection of privacy (Article 14.1[3]) and the protection of security, defence, foreign, monetary and economic policy of Montenegro (Article 14.2) - to the respective laws protecting this information, i.e. the Data Protection Law and the Law on Classified Information.

26. Concerning privacy, the Law provides that the public authority may restrict access to information or a part thereof of personal data envisaged in the Law regulating Protection of Individual Data. The draft Law also provides that data concerning persons exercising public functions (data relating to the exercise of public functions, as well as to incomes, property and

[3] **Article 14 Restriction of access to information**
The public authority may restrict access to information or a part thereof if it is in the interest of following:
**1)** protection of privacy from disclosure of personal data envisaged in the law regulating protection of data on individual, except for data relating to following:
- persons exercising public function, data relating to the public function exercise, as well as to incomes, property and conflict of interest of those persons and their relatives covered by the law regulating preventing of conflict of interest;
- resources allocated from the public funds, except those for social security benefits, health care, and protection against unemployment;

conflict of interest of those persons and their relatives covered by the Law regulating Prevention of Conflicts of Interest) does not fall within this regime of exceptions, and therefore their access may not be restricted. Access to the following information may not be restricted either: resources allocated from the public funds, except those for social security benefits, health care, and protection against unemployment. This clear statement is a true improvement.

27. However, some exceptions provided in paragraphs 3 and 4 of Article 14 seem to be unclear or widely defined. This runs counter to Article 3.1 CECAOD which requires that "limitations shall be set down *precisely* in law"[4]. For example, paragraph 3 provides for an exception for "reporting criminal act and perpetrator", paragraph 4 provides for an exception concerning "*bringing* and conduct of disciplinary procedure". This does not seem to correspond to Article 3.1 CECAOD, which mentions "disciplinary *investigations"*[5].

28. Article 14.4 contains an exception for "work and decisions making by collegial bodies". Providing for an exception for working documents is in line with international practice, however, experience shows that this exception in practice can easily be interpreted too widely by a public administration reluctant to release information. The bureaucracy's setting of the point in time when a document ceases to be a working document and becomes subject to access must be kept under supervision by the Agency (the independent supervisory authority responsible for protection of personal data and access to information defined in Article 34).

29. **Article 15** deals with the duration of restrictions and partly refers to deadlines/time limits provided in other Laws (data secrecy and intellectual property rights) and partly seems to create new deadlines/time limits. Article 15 should make clear that it only regulates the duration of restrictions *when the conditions for restrictions under Article 14 are fulfilled.* This could be done, for example, with references to Article 14 as follows: "restrictions of access to information for the purpose of protecting privacy *(Article 14.1.)* ... ", and so on.

30. According to the kind of information protected, the Article provides that the duration of restrictions "shall" or "may" last a certain time. Taken together, the rules laid down in this Article seem too restrictive.

31. Thus "Restrictions of access to information for the purpose of protection of security, defence, foreign, monetary, and economic policies of Montenegro *may*[6] last not later than until the expiry of the timeframes set by the law governing data secrecy". Unless there is a misunderstanding due to the translation, this means that although a decision has been made to declassify a document, a public authority can still keep the information out of the public's reach.

32. Article 15.3 reads "Restrictions of access to information for the prevention of investigation and criminal prosecution *shall*[7] last until the procedure is completed the latest." This seems to create a compulsory restriction and does not allow for a case-by-case examination (see moreover remarks under Article 14 concerning "reporting criminal act").

33. Throughout Article 15, the phrase "shall last" is used for all cases of Article 14 except for the protection of security, etc. (Article 14.2.), to which Article 15 refers with the phrase "may last". The phrase in Montenegrin should be identical throughout. The equivalent to "may last" seems best in order to make clear that restriction is *not compulsory.*

34. **Article 16,** which concerns the harm test, states that "Access to information shall be restricted if disclosure of information would significantly jeopardize interests referred to in Article

[4] Emphasis added.
[5] Emphasis added.
[6] Emphasis added.
[7] Emphasis added.

14 herein, or if there is a possibility that disclosure of information would cause harm to interest that is greater than the interest of the public to know that information, unless there is prevailing public interest prescribed by the Article 17 of this Law".

35. Article 16.2 expressly excludes from the harm test Article 14.1.1.1 and 14.1.1.2 of this Law, which mainly concerns certain data of persons exercising public functions and certain resources allocated from the public funds. Such data remain accessible.

36. The harm test neither applies to information that has been classified by a foreign state nor by an international organisation: such information remains inaccessible.

37. These two exceptions are in line with European standards.

38. Paragraphs 3 and 4 endeavour to organise the procedure when a request for information concerns classified data. It states that "The public authority shall *decide*[8] upon a request for access to information containing classified data after obtaining a previous consent of the authority that proclaimed information as classified. " According to this wording, it seems that, as a first step, the authority that proclaimed information as classified must have given its consent for giving access to that information. Then, as a second step, the public authority which received the request for information, *decides* upon this request and hence may either give or not give access to said information. There seems to be a "conflict of competence" between these two authorities. This paragraph gives too large a power to the public authority which received the request for information.

39. Under the scheme of Article 14, the public authority - which receives the request - has discretion (balancing; harm test) to restrict access if the conditions of Articles 14 and 16 are fulfilled. This technique allows to satisfy the CECAOD and ECHR's requirement of imposing limits only when they are "necessary in a democratic society and proportionate" (Article 3.1 CECAOD). In the case of classified data, this balancing decision must be made by the classifying authority. If that authority has de-classified data, there seems to be no need for additional discretion of the requested authority in the decision to withhold the information.

40. Moreover, the deadline of eight days given to the classifying authority to decide on declassification in this particular case - i. e. upon request from the public authority who received a request for access to information - appears to be quite short for the classifying authority having to decide on whether or not to declassify what could be quite lengthy and complex documents.

41. **Article 17** defines what a "prevailing public interest" is, i.e. the reasons which would allow for disclosure of information even though this disclosure may cause harm.

42. The former Article 17 concluded that "The public authority shall grant the access to information or part of information … when there is prevailing public interest for disclosure of information". The current draft adds: "The public authority shall grant the access to information or part of information … when there is prevailing public interest for disclosure of information *unless it proves the existence of other prevailing public interest.*" [9]

43. Before this last amendment ("unless it proves the existence of other prevailing public interest"), the harm test for access to information was coherent and in line with European standards.

[8] Emphasis added.
[9] Emphasis added.

44. However, this last amendment creates another exception from the exception which is confusing, and unnecessary. Although there might be various and sometimes conflicting public interests, there is, in any case, only one *prevailing public interest.* The assessment of the different and possible conflicting public interests must be made at the same time in order to determine what *the prevailing public interest* is*.* It is therefore recommended to delete this last part of the sentence.

45. **Article 18** deals with the initiation of the procedure for access to information: a reference to verbal requests has been added in the provisions – as compared to the former Article, which dealt with the same issue – and this is to be welcomed.

46. **Article 20** details the manner in which the public authority shall assist the applicant in requesting information and this is a positive development. However, the deadline of eight days which seems to be given to the applicant in order to correct the deficiencies of his/her request when incomplete is too short in view of the fact that Article 28 provides for dismissal of the request if the applicant fails to act within this deadline.

47. The former **Article 21,** which dealt with anonymous requests, has been deleted.

48. The CECAOD does not oblige state parties to admit anonymous requests. However, it is a common feature of most European freedom of information laws to admit anonymous requests. An obligation to disclose one's name might have a chilling effect on a potential applicant.

49. During the visit of Venice Commission' delegation, the authorities explained that anonymous requests were technically difficult to handle. Nevertheless, it is regrettable that the provision concerning anonymous requests has been merely deleted. Moreover, Article 19.3 requires "information on the applicant". This effectively prevents anonymous requests.

50. **Article 22** , which deals with the "forms of access to public registries and public records", is an important provision, as without a right of access to the register the right of access to information will often be an illusion.

51. However, it is unclear whether the wording of this Article means that an applicant is entitled to an on-site visit only without the right to copy documents. If this is the case, it is too restrictive.

52. **Article 24** provides for access to part of the information, where other parts of it are kept secret. This complies with Article 6.2 CECAOD

53. **Article 28** deals with "dismissal of request": "The public authority shall dismiss by way of conclusion a request for access to information in following cases:

1) it does not hold the requested information, and does not know which public authority holds it;
2) the applicant fails to act in accordance with Article 20, paragraph 2 of this Law."

54. As regards paragraph 2, and as already mentioned above (see Article 20) the eight days deadline given in Article 20 to the applicant for completing his or her request is too short. Given that the applicant or any other individual could ask for the same information as a main request without a delay, it is hard to understand the logic of such a rapid and radical solution.

55. **Article 31** sets out the deadlines for deciding upon request.The public authority shall make a decision on the request for access to information and deliver it to the applicant within fifteen working days following the adequate request has been submitted and the deadline can be extended for eight days in certain cases. These deadlines have been modified as compared to

the first draft and are now closer to the European deadlines in other European countries.[10] They are more likely to be complied with in practice.

56. **Article 33** regulates in a merged provision the issue of fees. It provides inter alia that no fee shall be paid for submitting a request for access to information (former Article 19, modified). It also states that the applicant shall pay the costs of the procedure for access to information that relate to actual costs incurred by the public authority in relation to the copying of documents and delivery of information to the applicant (former Article 35, modified).

57. This Article seems to be in conformity with Article 7 CECAOD[11] and gives a framework for the regulation to be adopted by the Government, as specified in the Article itself.

58. The procedure for making a complaint against a decision to give, or not, access to information is set out in **Articles 34 to 38 and in Article 44.** Complaints "against the decision of the public authority on the request for access to information have to be lodged with an independent supervisory authority responsible for protection of personal data and access to information (referred to as "the Agency"), and through the authority that has decided upon request in first instance" (Article 34.1).

59. When the complaint concerns an information containing classified data, courts are competent (Article 34. 2 and Article 44).

60. When there is a complaint, "the first-instance authority shall carry out all activities upon the complaint within three working days following the day when the complaint has been submitted" (Article 37) and the Agency shall make a decision "within fifteen days as of the day on which the complaint is submitted" (Article 38).

61. This procedure seems to be, in general, in conformity with the CECAOD, but nonetheless calls for several remarks.

62. While it is understandable that the legislature wishes to minimise the scope for stalling on the part of the authorities, these time limits are unrealistically short. The necessary information for the Agency to decide upon the complaint may be voluminous. The time available for the Agency to make a decision is only twelve days. It seems doubtful whether these short deadlines can be complied with in practice.

63. Article 38 of the Law does not state what kind of decision is made by the Agency, i.e. whether the Agency can mandate access to the requested information in its decision. No other Article clarifies this issue.

64. The Law does not regulate the costs of the complaint procedure either. According to Article 8.2 CECAOD, an applicant should always have access to an (…) inexpensive review procedure. The absence of a regulation on costs could of course mean that the procedure is free of charge, but this should then be stated expressly.

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[10] 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.

[11] Article 7.1 CECAOD states: "A fee may be charged to the applicant for a copy of the official document, which should be reasonable and not exceed the actual costs of reproduction and delivery of the document. Tariffs of charges shall be published"

65. **Article 43** provides that "The Agency shall submit, upon request, and at least once a year, to the Parliament of Montenegro a report on the state of play in the area of access to information." This is to be welcomed.

66. **Article 45** provides for the protection of employees "who have in good faith disclosed information containing data on abuse of and irregularities in the performance of a public office or official powers pursuant to a freedom of information request". Such provisions are important and appreciated.

67. **Article 47 and Article 48** deal with penalties. According to **Article 47,** these penalties are mainly imposed in case of non-respect of deadlines mentioned in the Law. The level of fines depends on whom they are applied: "public authority, that is legal entity but not state body" (from 500 to 20.000 Euros), "responsible officer in the legal entity, state body, local self-government body, local government body or a natural person" (from 200 to 2 000 Euros) or "entrepreneur" (from 200 to 2 000 Euros).

68. These are unusual provisions, especially inasmuch as they foresee penalties for public officials to be paid to the state. Usually disciplinary measures are applicable in case of wilful violation of the law by public officials. Moreover, it is not explicitly regulated according to which procedure these fines are applied and who imposes them.

69. According to Article 48, the Agency itself may have to pay penalties in the following two cases :

1- if it fails to make a decision about a complaint and to submit it to the applicant within 15 days of the day on which the complaint is submitted or fails to decide *in meritum* on a complaint against a decision on access to information.

The draft Law does not set out the role of the applicant in these proceedings and whether this fine is entirely or partly to the benefit of to the State or to the applicant ;

2- if it fails to submit a report to the Parliament on the state of play in the area of access to information.

70. The appropriateness of these penalties is questionable, in particular as levying money from a public agency in charge of a mission of public interest may not be the best way of helping it perform its mission correctly.

## IV. CONCLUSION

71. The draft Law on Free Access to information complies in many points with the Convention on Access to Official Documents and international standards. Many provisions have been improved and are now in line with European standards following the visit of a delegation of the Venice Commission and the transmission of the comments by the Commission's rapporteurs.

72. However, the present Opinion makes the following recommendations to further improve the draft Law:

- the most important recommendation is to amend Article 17 on *prevailing public interest*
- Article 16.3 should be clarified: the role of the public authority receiving a request for information should be limited when it comes to access to declassified information;
- certain deadlines should be extended;
- finally, reintroducing the anonymous request would be most welcome. This would require an amendment to Article 19.3.

73. Finally, these improved standards could be usefully accompanied by the training of civil servants to foster a climate of openness, and the improvement of administrative resources in order to cope with requests made by the public and NGOs.

74. The Venice Commission remains at the disposal of the Montenegrin authorities for further co-operation.