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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT LAW**  
**ON FREE ACCESS TO INFORMATION**  
**OF MONTENEGRO**

**VERSION OF APRIL 2012**

## **I BASIC PROVISIONS**

### **Subject Article 1**

Right on access to information held by public authorities shall be exercised in manner and according to procedure prescribed by this Law.

### **Principles and standards Article 2**

Access to information held by public authorities (hereinafter referred to as “access to information”) shall be based on the principles of free access to information, transparency in work of public authorities, the right of the public to know and equality of requests, and it shall be carried out at the level of standards set out in ratified international agreements on human rights and freedoms and in generally recognised rules of international law.

### **Free access to information Article 3**

Any national or foreign legal and natural entity shall be entitled to access the information, without being obliged to state the reasons or explain the interests for seeking the information.

### **Transparency of work Article 4**

Access to information shall ensure the transparency of work, foster the efficiency, effectiveness, and accountability, and affirms their integrity and legitimacy of the public authority.

### **Right of the public to know Article 5**

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.

### **Equality of requests Article 6**

Public authorities shall provide any legal or physical entity with the access to information on an equal basis and under equal conditions, unless otherwise stipulated in this Law.

### **Public interest Article 7**

Access to information is of public interest.

Access to information may be restricted only in purpose of protecting the interests specified in this Law.

**Gender sensitivity**  
**Article 8**

The expressions used in this Law for natural persons in the masculine gender shall be considered as including the feminine gender.

**Definition of terms**  
**Article 9**

The terms and expressions used in this Law shall have the following meaning:

- 1) **public authority** shall mean a state authority (legislative, executive, judicial, administrative), local self-government authority, local administration authority, 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;
- 2) **information held by public authorities** shall mean factual possession of the requested information by the public authority (their own information, as well as information reported by other government agencies or third persons), regardless of the grounds and manner of acquisition;
- 3) **publication of information** shall mean making the contents of information available;
- 4) **disclosure of information** shall mean the applicant or another individual not employed at the public authority holding the information becoming privy to the contents of information
- 5) **submission date** shall be the day when a request or other written brief of a natural or a legal person is received by a public authority;
- 6) **delivery date** shall be the day when a decision or another act of a public authority is delivered to an applicant;
- 7) **public official** shall mean a person who has such a status under the law governing the prevention of conflict of interest.

**II ACCESS TO INFORMATION**

**Information and access to information**  
**Article 10**

Information shall be a document in written, print, video, audio, electronic or any other form, including its copy or part thereof, regardless to content, source (of author), date and time of composing or classification system.

The right on access to information shall encompass the right to ask for and receive information, regardless to purpose and data consisted of.

**Access to information guide**  
**Article 11**

The public authority shall develop, publish, and regularly update a guide for access to information held by it (hereinafter referred to as "the access to information guide").

The access to information guide shall contain a catalogue of all types of documents, including public registers and public records, the address and e-mail address for submission of request, contact telephone, information on responsible persons, information on costs of access to information, and other data that are of importance to the exercise of the right of access to information held by the public authority.

The public authority shall update "The access to information guide" at least once a year, or within 30 days following the change of type of information in its possession and data important for access to information.

Content of "The access to information guide" shall not exclude obligation of the public authority to provide access to information that holds and that is not covered by the Guide.

The public authority shall appoint and authorize a person responsible for access to information.

### **Proactive access to information Article 12**

The public authority shall publish on its website following information:

- 1) the access to information guide;
- 2) public registries and public records
- 3) programmes and work plans;
- 4) reports and other documents on work and state of play in areas within their competence;
- 5) drafts, proposals, and final texts of strategic documents, plans and programmes for their implementation;
- 6) draft and proposal of laws and other regulations, as well as opinions of experts delivered in relation to drafts and proposals for legislation;
- 7) single acts and contracts on use of financial resources originating from public revenues and of state-owned property;
- 8) list of civil servants and state employees with their titles;
- 9) list of public officials and pay lists for them, as well as list of other incomes related to exercise of public function;
- 10) Decisions and other single acts that are of importance to rights, duties, and interests of third parties;
- 11) Information to which the access was granted upon request for more than three times;

The public authority shall publish the information referred to in paragraph 1 of this Article, depending on the nature and type of information, within 15 days as of the day of which they are created or adopted.

The public authority may publish on its website other information not covered by paragraph 1 of this Article.

When publishing information, the public authority shall protect in an adequate manner such personal data that affect privacy and data that have been classified, in accordance with the law.

### **Access to information upon request Article 13**

The public authority shall grant the access to information or a part thereof to any physical or legal entity seeking the access to information (hereinafter referred to as "applicant"), that it holds at the time of dealing with the request, except in cases envisaged by this law.

### **Restriction of access to information Article 14**

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;
- 2) security, defence, foreign, monetary and economic policy of Montenegro, in accordance with the laws regulating the field of data secrecy, classified with certain level of confidentiality;
- 3) prevention of investigation and criminal prosecution, in order to protect from disclosure data referring to following:
  - to prevent committing the criminal act,
  - on reporting criminal act and perpetrator of it,
  - on content of actions undertaken in pre-trial and criminal procedure;
  - data collected through observation and investigation,
  - on secret surveillance measures;
  - on protected witness and collaborators of justice;
  - efficient conducting of procedure;
- 4) performing the official duty, in order to protect from disclosure data referring to following:
  - planning of inspection control and supervision by the public authority,
  - consultations within and between public authorities regarding defining the positions and development of official documents and proposals for resolution of a case,
  - work and decision making by collegial bodies;
  - bringing and conduct of disciplinary proceedings;
- 5) protection of private and commercial interest from disclosure of data relating to protection of competition and business secret in relation to intellectual property right

#### **Duration of restriction Article 15**

Restriction of access to information for the purpose of protecting privacy and data on protected witness and collaborator of justice shall last 70 years from the day of production, and at least 20 years following the demise of a person to whom the information relates, except in case that concerned person, or his/her spouse, children, or parents consent to earlier publication of information.

Restrictions of access to information for the purpose of protection of security, defence, foreign, monetary, and economic policies of Montenegro may last not later then until the expiry of the timeframes set by the law governing data secrecy.

Restrictions of access to information for the prevention of investigation and criminal prosecution shall last until the procedure is completed the latest.

Restrictions of access to information for the purpose of performing official duty shall last until the official document is prepared, or proposed solution for the case is defined, minutes of the meeting of collegial body is verified, and disciplinary procedure is completed.

Restrictions of access to information for the purpose of protecting private and commercial interests shall last until the expiry of the timeframes set by the law governing intellectual property rights.

#### **Harm test for disclosure of information Article 16**

Access to information shall be restricted if disclosure of information would significantly jeopardize interests referred to in Article 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.

The harm test referred to in paragraph 1 of this Article shall not be applied to the exemption defined by the Article 14, paragraph 1, point 1, items 1 and 2 of this Law.

The public authority shall decide upon a request for access to information containing classified data after obtaining a previous consent of the authority that proclaimed information as classified.

In the case referred to in paragraph 3 of this Article, the classifying authority shall, within eight working days as of receiving a request for consent, deliver a corresponding decision to the public authority deciding upon the request for information access.

The harm test shall not be applied to data contained in information that is proclaimed as classified by the foreign state or an international organisation.

### **Prevailing public interest Article 17**

Prevailing public interest for disclosure of information, or a part thereof, exists when the requested information contains data that evidently refer to following:

- 1) corruption, non-observance of regulations, unauthorised use of public funds, or abuse of authority in exercising public function;
- 2) the existence of grounds to believe that a criminal offence has been committed or existence of reasons to challenge a court decision;
- 3) illegal receiving or spending of funds originating from public revenues;
- 4) threats to public security;
- 5) threats to life;
- 6) threats to public health;
- 7) threats to the environment;

The public authority shall grant the access to information or part of information referred to in Article 14 herein in cases when there is prevailing public interest for disclosure of information, unless it proves the existence of other prevailing public interest.

## **III PROCEDURE FOR ACCESS TO INFORMATION**

### **Initiation of procedure Article 18**

Procedure for access to information shall be initiated upon a written or verbal request of an individual seeking access to information.

One request for information may refer to several pieces of information.

The written request for access to information shall be submitted directly to the responsible authority by hand, mail, or e-mail (via fax, e-mail, etc).

The verbal request shall be submitted to the responsible authority directly to the minutes/record.

If the applicant requests the public authority shall issue, or deliver, adequate proof confirming reception of the request for access to information.

### **Content of the request Article 19**

The request for access to information shall contain:

- 1) the name of the information or data that allow its identification;
- 2) the form in which the applicant wishes to access information;

- 3) Information on the applicant (name, family name and address of a natural person, or name and address of a legal person), and/or his or her attorney, representative or proxy);

The applicant may list in the request other data that are, in his/her opinion, of importance for exercise of the right of access to the requested information.

The public authority may issue or define form/pattern of the request for access to information, but it is obliged to proceed upon the request even if it is not submitted on the prescribed form.

### **Assisting the applicant Article 20**

The public authority shall assist the applicant, as far as reasonably possible, to access the requested information.

If the request for the information is incomplete or illegible and therefore it cannot be acted upon, the authority shall invite the applicant to correct the deficiencies in the request within 8 days from the date of submission, and give him/her instructions on how to remedy the deficiencies.

In the case of paragraph 2 of this Article, deadline for processing upon request shall begin on the day of submission the corrected request.

If the public authority is not in possession of the requested information, and if knows which authority is competent for processing upon request for access to information, it shall, with no delay, deliver the request to the competent public authority and inform the applicant on undertook actions.

### **Forms of access to information Article 21**

An applicant shall have the right to choose form of access to requested information by way of following:

- 1) Direct inspection of original or copy of information in premises of the public authority;
- 2) the applicant transcribing or scanning the information in the premises of a public authority;
- 3) delivery of a copy of the information to the applicant by hand, mail or e-mail

Public authority shall grant the access to information in such a form referred to in paragraph 1 herein as might be preferred by the applicant, unless the preference expressed is technically unfeasible.

In purpose of allowing access to information in the form preferred by the applicant, the public authority shall convert, where possible and appropriate, the existing format of information into electronic or analogue form (scanning, copying, etc).

### **Forms of access to public registries and public records Article 22**

Access to the public registry and public record shall be granted directly and upon the request, with no adopting decision, and by way of inspection of the registries or records in the premises of the public authority.

The public authority shall grant an applicant insight into the public registry or public record within three working days from the day when request is submitted, and it shall prepare official note about it.

**Access to information to persons with disabilities**  
**Article 23**

Disabled person shall be granted access to information in such a form and format as are fitting to his/her abilities and needs.

**Form of access to a part of information**  
**Article 24**

If a restriction applies to a part of information, pursuant to the provisions of the Article 14 of this Law, the public authority shall grant access to information by delivering a copy thereof to the applicant, after deleting the part of the information to which the restriction applies.

In the case referred in paragraph 1 of this Article, the part of the information to which the restriction applies shall be marked with a note "information deleted" and a notification of the extent to which the information was deleted (lines, paragraphs, and pages).

Information shall be deleted in a manner that shall not destroy or damage the text, or the content of the information.

**Competent public authority**  
**Article 25**

The public authority that holds requested information shall be competent for deciding upon the request on access to information.

The public authority, entrepreneur or physical entity that, pursuant to Article 9 point 9 herein, is considered to be public authority due to exercise of the public function or managing public fund is obliged to enable access to information in its possession that are related to the exercise of public function or public fund management.

**Access to published information**  
**Article 26**

The public authority shall not be obliged to grant access to information that hold via e-mail if that information is published in Montenegro and available on the Internet.

In case referred to in paragraph 1 herein, the public authority shall inform the applicant in writing where and when the requested information was published within three working days as of the day when the request is submitted.

**Application of rules of procedure**  
**Article 27**

The public authority shall decide upon request for access to information by applying the rules of general administrative procedure, without conducting the hearing, unless otherwise provided in this Law.

**Dismissal of request**  
**Article 28**

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.

**Denying of request  
Article 29**

The public authority shall deny the request for access to information if:

- 1) it requires that new information be generated;
- 2) the applicant was granted access to the identical information within period of the previous six months;
- 3) There is a reason referred to in Article 14 of this Law to restrict access to the requested information.

**Deciding upon request  
Article 30**

The public authority shall decide on the request for access to information by way of a decision, except in cases defined in Article 22 of this Law, granting access to information or a part thereof, or denying access.

The decision granting access to information or a part thereof shall specify:

- 1) the form in which the information may be accessed;
- 2) the time limit to access the information;
- 3) costs of procedure.

The decision denying the access to information shall contain detailed explanation of reasons for which access to the requested information has been denied.

**Deadline for deciding upon request  
Article 31**

The public authority shall make a decision on the request for access to information and deliver it to the applicant within 15 working days following the adequate request has been submitted

If access to information is requested for the purpose of protecting the life or freedom of an individual, the public authority shall make a decision and deliver it to the applicant within 48 hours as of the hour of submission of the request.

The time limit referred to in paragraph 1 of this Article may be extended for 8 days, provided that:

- 1) the request refers to exceptionally voluminous information;
- 2) the request for access to information refers to classified information;
- 3) tracking the requested information entails search through a large volume of information and therefore disturbs performance of regular activities of the public authority.

In the case referred to in paragraph 3 of this Article, the public authority shall, within three working days after the request has been submitted, inform the applicant in writing of an extension of the time limit in which a decision on the request will be made.

**Time limit for execution of decision  
Article 32**

The public authority shall execute the decision within three working days after the decision has been delivered to the applicant or within three working days after the day when the applicant has submitted a proof of payment of costs of procedure, if such costs have been specified in the decision.

### **Costs of procedure Article 33**

The fee shall not be paid for the submitting the request for access to information.

The applicant shall pay costs of procedure for access to information that relate to actual costs incurred by the public authority in relation to copying of documents and delivery of information to the applicant, in accordance with the regulation adopted by the Government of Montenegro..

The regulation referred to paragraph 2 herein shall specify special costs for access to information in archives, libraries, and museums that represent archive, library, or museum material.

In case when a disabled person is actual applicant, any public authority shall bear the related procedure costs.

Costs of procedure referred to in paragraph 2 herein shall be paid before the applicant is provided with access to information.

If the applicant fails to submit proof of payment of costs of procedure in the specified amount, the public authority shall not provide him/her with access to the requested information.

### **Right to a complaint Article 34**

The applicant, or another individual having an interest, may make a complaint against the decision of the public authority on the request for access to information to an independent supervisory authority responsible for protection of personal data and access to information (hereinafter referred to as "the Agency"), and through the authority that has decided upon request in first instance.

Notwithstanding paragraph 1 of this Article, complaint may not be filed against decision denying access to information containing data marked as classified, but it is possible to initiate administrative dispute against adopted decision.

### **Reasons for complaint Article 35**

A complaint may be lodged against the decision on request for access to information for the violation of rules of procedure, incompletely and incorrectly defined factual state, and misapplication of material law.

### **Effect of complaint Article 36**

The complaint against a decision granting access to information shall not postpone the execution of the decision.

### **Activities of the first-instance authority upon the complaint Article 37**

The first-instance authority shall carry out, within its competencies defined by the law regulating general administrative procedure, all activities upon the complaint within three working days following the day when the complaint has been submitted.

### **Agency proceeding upon the complaint Article 38**

The Agency shall make a decision upon the complaint against a decision on the request for access to information and to deliver it to the complainant within 15 working days as of the day on which the complaint is submitted.

The complaint against a decision to the request for access to information shall be decided upon by the governing body of the Agency (hereinafter referred to as "the Council of the Agency").

The Council of the Agency shall make a decision *in meritum* about the complaint.

### **Competencies of the Agency Article 39**

In addition to the competences set forth in the law governing personal data protection, the Agency shall:

- 1) perform supervision over the legality of administrative decisions deciding upon requests for access to information and take the measures set forth by the law;
- 2) manage an information system of access to information;
- 3) monitor the state of play in the area of access to information;
- 4) performs inspection surveillance over application of this Law in terms of developing and updating the Access to information Guide, proactive publishing of information, and delivery of acts and data necessary for keeping of information system for access to information;
- 5) submit requests for opening of misdemeanour proceedings for violations of this Law that relates to developing and updating the Access to information Guide, proactive publishing of information, and delivery of acts and data necessary for keeping of information system for access to information;
- 6) performs other duties prescribed by this Law.

### **Powers of the Agency Article 40**

For the purpose of resolving complaints and performing supervision over the legality of decisions made in relation to requests for access to information, the Council of the Agency shall have the right to request following:

- 1) that the public authority submit to it the complete information to which access is requested, or a part thereof and other information and data that are required for decision making;
- 2) that the inspection responsible for control of office operations establishes whether the public authority is in possession of the requested information;

The public authority and inspection referred to in paragraph 1, item 2 herein shall, within three working days as of the day on which the request is submitted, deliver the requested information and data to the Council of the Agency.

### **Information system of the information access Article 41**

For monitoring state of play in area of the access to information, the Agency shall keep an information system of access to information providing a database on following:

- 1) public authorities;
- 2) requests for access to information, categorized by applicants, public authorities, types of information and requested forms of access to information;
- 3) decisions of public authorities made in relation to requests for access to information;

- 4) complaints against decisions made in relation to requests for access to information, categorized by applicants and authorities;
- 5) legal suits against decisions made in relation to requests for access to information categorized by applicants/plaintiff and public authority/defendant;
- 6) court decisions upon legal suits on against decisions on requests for access to information;
- 7) measures taken against public authorities for failing to act in accordance with this Law;

The ministry competent for public administration affairs shall specify the content and manner of keeping the information system.

### **Obligation to deliver acts and data**

#### **Article 42**

Public authorities shall submit to the Agency data about petitions, acts and undertaken measures referred to in Article 41, paragraph 1 of this Law, within 8 working days as of the day when they are submitted, created, or undertaken.

### **Report on state of play in area of access to information**

#### **Article 43**

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.

### **Court protection**

#### **Article 44**

The applicant and third interested person shall be entitled to court protection, in accordance with the law governing administrative dispute proceedings.

A court shall assess if the public authority properly marked data in requested information as classified, in accordance with the law governing the area of data secrecy.

Procedure of adjudicating a legal action in relation to access to information shall be urgent.

### **Protection of employee**

#### **Article 45**

An employee of a public authority who, in bona fide performance of his/her duties, discloses information containing data on abuse of and irregularities in the performance of a public office or official powers may not be held responsible for a breach of a work duty.

## **IV SUPERVISION**

### **Inspection supervision**

#### **Article 46**

Inspection supervision over the implementation of this Law shall perform Ministry responsible for administrative affairs, except in relation to the affairs defined in the Article 39, paragraph 1, point 4 of this Law.

## V PENALTY PROVISIONS

### Misdemeanours Article 47

A fine ranging from 500 to 20.000 EUR shall be imposed upon the public authority that is legal entity, with exception of the state body, if:

- 1) it fails to develop, publish or regularly update, at least once a year the Access to information Guide (Article 11, para 1);
- 2) it fails to publish on its website an information it is under a duty to publish (Article 12 paragraph 1);
- 3) it fails to provide an applicant with access to information or a part thereof, except in cases provided for in this Law (Article 13);
- 4) it fails to provide access to information whose publishing is of prevailing public interest, except if the other more important public interest is proved to exist (Article 17, paragraph 2);
- 5) it fails to issue or deliver adequate proof confirming reception of the request for access to information if an applicant seeks it (Article 18, paragraph 5);
- 6) it fails to invite an applicant to correct the deficiencies in the request or fails to provide an applicant with the instructions for correcting the deficiencies (Article 20, para 2);
- 7) it fails to provide an applicant with access to information in a manner requested by him/her, except where the requested manner is not technically feasible, or if it fails to convert, where possible and appropriate, the existing format of information into electronic or analogue form (Article 21 paragraphs 2 and 3);
- 8) it fails to provide an applicant with an insight into public registry or public records within three days from day of submitting the request (Article 22, paragraph 2);
- 9) it fails to inform the applicant in written form, within three days as of the day on which the request is submitted as to where and when the requested information was published (Article 26 paragraph 2);
- 10) it fails to make a decision on a request for access to information or fails to submit the decision to the applicant within 15 working days as of the day on which the request is submitted (Article 31 paragraph 1);
- 11) in case of extension of the time limit for submission and delivery of a decision on a request for access to information, it fails to inform the applicant in writing, within three days as of the day on which the request is submitted about the extension of the time limit for resolution of the request (Article 31 paragraph 4);
- 12) it fails to execute a decision allowing access to information within three days as of the day on which the decision is delivered to the applicant, or of the day on which the applicant submits proof of payment of costs of procedure, if such costs have been specified by the decision (Article 32);
- 13) as a first-instance authority it fails to proceed upon a complaint against a decision on request for access to information within three working days as of the day on which the complaint is made (Article 37);
- 14) it fails to submit the requested information and data to the Council of the Agency within three working days as of the day on which the request is submitted (Article 40, paragraph 1, point 3);
- 15) it fails to submit data about petitions and acts referred to in Article 41 paragraph 1 of this Law to the Agency within eight days as of the day of on which they are submitted, created, or undertaken (Article 42);
- 16) it holds responsible an employee who, in bona fide performance of his/her duties, discloses information containing data on abuse of and irregularities in the performance of a public office or official powers (Article 45);

The responsible officer in the legal entity, state body, local self-government body, local government body or a natural person shall be imposed a fine ranging from Euro 200 to 2 000 for a misdemeanour referred to in paragraph 1 of this Article.

Where a misdemeanour referred to in paragraph 1 herein has been committed by an entrepreneur, he/she shall be imposed a fine ranging from Euro 150 to Euro 6 000.

### **Misdemeanours for the Agency Article 48**

A fine ranging from Euro 200 to 2 000 shall be imposed on the Agency as the legal entity, if the Agency fails to:

- 1) make a decision about a complaint and submit it to the applicant within 15 days of the day on which the complaint is submitted or fails to decide *in meritum* on complaint against a decision on access to information (Article 38 paragraphs 1 and 3);
- 2) submit a report to the Parliament on the state of play in the area of access to information (Article 43)

## **VI TRANSITIONAL AND FINAL PROVISIONS**

### **Deadline for developing access to information guide Article 49**

Access to information guides, as provided for in this Law, shall be developed and made public on websites of public authorities in an adequate form within 30 days after the entry into force of this Law.

### **Bylaws Article 50**

Bylaws, in accordance with this Law, shall be adopted within 90 days from the day when this Law enters into force.

### **Establishment of information system Article 51**

The information system of access to information shall be introduced within 90 days from the day of adoption of a bylaw referred to in Article 41, paragraph 2 of this Law.

### **Initiated procedures Article 52**

Procedures for access to information initiated prior to implementation of this Law shall be completed in accordance with provisions of the previously valid Law.

### **Cessation of validity of previous regulations Article 53**

The Law on Free Access to Information (Official Gazette of Republic of Montenegro, no 68/05) shall be cease to exist on the day when this Law starts to implement.

**Entry into force**  
**Article 54**

This Law shall enter into force on the eighth day as of its publication in the "Official Gazette of Montenegro," and it shall be implemented after the expiry of six months of the date of entry into force.

## REASONING

### I Constitutional basis for adoption of the Law

Constitutional basis for adoption of the Law on Free Access to information is consisted in Article 16, item 1 and 5 of the Constitution of Montenegro, which stipulates that the Law, in accordance with the Constitution, regulates manner of exercise of human rights and freedoms when it is necessary for implementation of those and other issues of interest for Montenegro.

### II Reasons for adoption of the Law

Analysis of need for amending the Law on Free Access to Information, the Law on Data Secrecy, and the Law on Protection of Data on Individual, which was adopted at the Government session held on 23 June 2011, showed that it is necessary to adopt new Law on Free Access to Information due to following reasons:

- a) Provisions of the Article 51 of the Constitution of Montenegro, which was adopted on 19 October 2007, established the right on access to information held by public authorities and organizations exercising public authorities. It also stipulates that access to information can be restricted if it is in the interest of: protecting the life, public health, ethics and privacy, conduct of criminal procedure/criminal prosecution, security and defence, foreign, monetary, and economic policy.
- b) The existing Law on Free Access to Information ("Official Gazette RMNE, no 68/05) has a wider scope of interests for protection of which access to information can be restricted, which is why it is necessary to harmonize this Law with the Constitution in this regard.
- c) CoE Convention on access to official documents, adopted on 18 June 2009, and ratified by the Parliament of Montenegro on 26 May 2011, defines minimal standards concerning access to official documents. Any country is obliged to respect these standards and to ensure, through its legislation, adequate implementation, and efficient application.
- d) Existing Law on free access to information contains majority of standards defined by the Convention, and even on the higher level than prescribed minimum. However, Convention contains also certain standards and requests that were not defined by the Recommendation of the Committee of Ministers of the CoE in 2002, which was actually the basis for developing the existing Law. It is the reason why it is necessary to ensure adequate implementation of the Convention in that respect.
- e) There is a certain inconsistency of the Law on free access to information with the laws that were adopted after it, and it is especially inconsistent with the Law on Data Secrecy and the Law on protection of data on individual. This discrepancy was found in the Analytical Report, accompanying document to the European Commission Opinion on Montenegro's application for membership of the European Union, through the following position: "A better balance needs to be struck between the Information Secrecy Act, the Law on protection of personal data and the Law on free access to information, in order to prevent undue restriction of access to information which needs to be made public and to consolidate the monitoring role of civil society".
- f) In addition, analysis of the existing Law on free access to information showed that important deficiencies in its implementation are result of the lack of unique institutional protection upon appeals on first-instance decisions and inspection supervision, and therefore lack of responsibilities for respect of the law.

Having in mind all abovementioned, the scope of the necessary amendments to the existing Law on Free Access to Information (in order to have it harmonized with the Constitution, CoE Convention on access to official documents, Law on protection of data on individual, and Law on data secrecy) exceeds 50% of the existing text, which is, according to Legal-Technical rules for law and other regulations development, reason for preparation of the integral text of the Law.

### **III Level of approximation with the European legislation and ratified international conventions**

Draft Law on free access to information is harmonized with following documents:

- *Universal Declaration of Human Rights* (Article 19) and the *International Covenant on Civil and Political Rights* (Article 19) which provides that everyone have the right to seek receive and impart information. This provision represents binding international legal standards. Interpretation of the term "search" leads to the corresponding obligations of the State to provide free access to information.
- *European Convention on Human Rights* (Article 10), which guarantees everyone the right to receive and impart information. This international standard of access to information held by government promotes as a human right that can be restricted by law, to protect the interests set forth in paragraph 2 of Article 10 of the Convention.
- *Council of Europe Convention on access to official documents* in regard to principles, standards, mandatory providing of information, definition of term "information", procedures, instruments for protection of exercise of right on access to information held by public authorities.
- *Recommendation no R (2000 13) of the Committee of Ministers on European policy on access to archives*, which fully refers to archiving and defines use of some basic terms in this field (archive, archive material, access and use, users, stored data, etc), in regard to duration of restriction in access to information containing personal data that can affect privacy.

### **IV Explanation of basic legal institutes**

#### **1. Basic provisions (Article 1- 9)**

Basic provisions defines subject of regulation, principles for access to information, public interest in regard to publishing the information held by public authorities, as well as definition of certain terms important for application of this Law.

Defining of principles on which the access to information is based, precise definition of its content, i.e. purpose, represents definition of substance and goal of subject regulation, especially concerning contribution to development of democratic relations in Montenegro, including the society in key decision-making processes, exercise of other human rights and freedoms, and ensuring the transparency in work of public authorities, as one of the basic instruments of democratic control of government, and promotion of legitimacy in government performance.

Definition of public interest in regard to access to information represents first, i.e. basic, harm test for disclosure of information, in respect to consequences that can be caused over certain private and public interests. This harm test of the access to information held by public authorities promotes the primacy of the principle of free access to information in relation to possible restrictions, since all restrictions on access to information must be provided in the form of exceptions, with clearly identified criteria in terms of content information and its harmful effects. In relation to the obligation of the state bodies and organizations exercising public authority to provide access to information that hold, the proposed law, in accordance with the Council of Europe Convention on Access to official documents, prescribes the general list of authorities, which includes all segments of the state and local governments and entities of any kind affecting the performance and activities of public interest, the use of funds from public funds and state property. Given definition of authorities identified the distinctive criteria for the identification of all institutions and other entities that are required to provide access to information in its possession, which is of great importance for the realization of the right of access to information, as well as the purpose and meaning of this law.

#### **2. Access to information (Article 10-17)**

This part of the Proposal law regulates following issues:

- The concept of information and content of the right of access to information held by public authorities;
- Obligation to prepare, publish, and update the information access guide, with precise definition of content, as instructive document for facilitating the access to information, especially in relation to enabling any individual to decide from which public authority to request access to information, procedure for realization of access to information, and manner of communication between the applicant and the public authority;
- Proactive access to information that promotes the public interest defined in terms of disclosure of information, and allows simultaneous access to information to unspecified number of people, which is, essentially, the meaning of the principle of free access and equality of conditions for access to information. In this sense, the proactive approach, or disclosure of information, encompasses the latest information of public interest and information which affirms the principle of transparency of government and the principle of the right of public to know the proceeding of the authorities upon current issues, as well as the information that are of importance for exercise of the right of an individual and protection of guaranteed rights.
- Proactive, i.e. obligatory publishing of information includes access to public records and registers, which is in accordance with their purpose to establish, maintain, and intention to, by its nature, direct toward wider availability. On the other hand, it significantly improve and simplify access to other information that are of importance for exercise of other human and civil rights.
- Restrictions on access to information represent exemption to rule of free access to information. However, prescribing of restrictions is result of the need to establish a balance between the rights of the public to know and the need to prevent over-recognized threat to legitimate private and public interest from disclosure of certain information. At the same time, this legal institute establishes harmonization of subject regulation with the issues defined and governed by the Law on protection data on individual and the Law on data protection. Restrictions of the access to information envisaged in the Draft Law are defined in framework of the Constitution and Conventions provided possibilities. Namely, the Constitutions and Conventions envisage possibility of restriction, but not the obligation to restrict the access to information in purpose of protection certain private and public interests, i.e. values. This circumstance makes it necessary that in each case of seeking the access to certain information test of harm will be realized of information disclosure in relation to these interests and proportionality in relation to possible damage to the public interest for non-disclosure of that information. Recognizing the established international standards in the Council of Europe Convention on Access to official documents, the Proposal law provides that the harm test is to be done on the principle of proportionality of possible damage upon the public interest due to non-disclosure of information and the potential damage or risk to the legitimate interests of disclosures of required information. Institute of exception means precise definition and application, which is why the Draft Law recognizes information to which the access may be restricted, with respect to their content, as determined in accordance with democratic standards in this area. In addition, limitations on the access to information are restrictively defined, because the need to restrict access to information in certain areas, which are as the possibility provided, by the Constitution and the Convention is not recognized. In this sense, the Proposal Law is an important democratic step, as given opportunities do not transform in rule, but it represents obligation to reasonable decision-making.
- Restrictions on access to information include outstanding commitment to realistic and fact-based assessment of the harmfulness of their publication, which is

provided through the mechanism of the second harm test. This harm test allows the restriction of access only to specific information in case of an excessive threat to the legitimate interests in case of disclosure of that information, or if the harm to this interest was greater than the public interest to know that information. Accordingly, the Draft Law, in addition to the basic harm test that is reported through the public interest, envisages test in regard to proportionality of possible harm in case of information disclosure in relation to harm caused to public interest due to restriction of the information access. As the factual realization of this harm test, Draft law envisages special harm test in regard to information whose disclosure may affect privacy of the information that are, according to the law, proclaimed as classified.

- The planned restriction of access to information for the protection of privacy established balance between the rights of access to information and rights to protection of personal data, as highly valued democratic rights and civilized values. On the other hand, specifying this exception removed the collision between the Law on Free Access to Information Act and the Protection of Personal Data, which is important for their application, as well as for legal security and privacy of every individual. Also, for the democratic control of government by the public, the proposed law exempts from the limitations certain information relating to public officials, and information relating to benefits from the public funds, which is in accordance with the international standard that public officials should endure certain risks upon their privacy, as public and individuals have the right and need to know certain data about them in order to adequately assess their work and formed critical opinion about their representatives in system and the government.
- Restrictions on access to information in order to protect vital state interests are defined on the level of standards of classified information, which means that access to information of interest to the security, defense, external, monetary and economic policies of the state may limit only if they contain information that, in accordance with the law, indicated some degree of confidentiality. Simultaneously, the prescribing of this exception provided harmonization of the Law on Free Access to Information and the Law on data confidentiality, so there is no possibility of their collision in the implementation phase.
- Restrictions on access to information that are important for the prevention of the investigation and prosecution of perpetrators of criminal acts, and for performing official duties are defined only for certain sensitive issues, which is why the Proposal law explicitly enumerated all of them.
- Having in mind that the protection of the economic policy of the state is provided through prescribed limits to classified information, the proposed law prescribes, in accordance with the Council of Europe Convention on Access to official documents, the statutory restrictions on possible trade and other economic interests to protect competition and trade secrets related to intellectual property rights.
- Restrictions on access to information include exceptional commitment to a realistic assessment of hazards and reasonable assessment of harm in publication of information, which is provided through prescribed mechanism of harm test. Therefore, the proposed law, in addition to the basic harm test that is reported in the public interest, prescribes the harm test in terms of proportionality of potential damage from the disclosure of specific information, or restriction of the access to that information. Also, the law prescribes information that are not subject to the harm test, which is very important to protect from disclosure certain personal data. Finally, the proposed law determines prevailing or primary public interest test for disclosure of information when it is in the interest of prevention, detection extremely harmful actions, and elimination of their consequences. The prevailing public interest implies the absoluteness of the obligation to publish

- information, regardless of harm on a legitimate interest. Proposal law is very concise in that sense, which is in accordance with the principle on precise and narrowly applied exemptions.
- The harm test for disclosure of personal data reflects constitutional right of the protection of personal data and international standards in that regard. However, access to information does not lose in its importance because there is institute of prevailing public interest, which, in defined cases, grants imperative right of public to know certain information in relation to their possible harmful affect on private or narrow public interests.
  - Determining the duration of the restrictions on access to information is intended to establish objective standards and a balance in terms of real risk of jeopardizing the legitimate interests and current disclosure of information relating to it.

### **3. Procedure for the access to information (Article 18-45)**

This chapter defines issues that are of importance for exercise of the right on access to information that are out of the regime of proactive publishing and for whose availability it is necessary, in each concrete case, to conduct harm test and to make reasonable solution. Proposed law provides that the procedure for access to information begin upon a written or verbal request, which considerably improved the existing solution from the current law, which prescribed only possibility of submitting a written request.

Council of Europe Convention provides for the obligation of authorities to provide maximum assistance to the applicant to gain access to requested documents. In order to implement this standard, the proposed law prescribes the cases and ways to help public authorities' claimants to access the information.

Ways of access to information are improved by establishing the obligations of public authorities to, when reasonably possible, converts the analogue information into electronic form and vice versa, to allow access to information on the required manner. It also specifies that the authority shall allow access to information in the manner in which the applicant wishes to, if it is technically feasible. In addition to the obligations to publish public records and public registers, the proposed law prescribes special ways to access this information upon request, because it is assumed that many citizens do not have the possibility to use internet. It is envisaged that access to these important information is provided with direct insight, without adopting decision on granting the access.

The proposal law specifies the reasons for dismissal and refusal of access to information and deadlines for the processing of applications and the execution of decision where access is granted. In accordance with the principle of urgency and determined public interest, the proposed law provides extremely short deadlines for action by the authorities in all phases of the procedure of access to information, except that, taking into account the requirements from the public hearing, proceeding upon request is defined within 15 working days which is a longer period of time in comparison to the one prescribed by current law. On the other hand, in relation to the existing solution from the current law, the term that the authority may extend for proceeding upon the application is shortened.

The proposal law provides a unique institutional protection upon appeals against decisions and conclusions, adopted by all authorities on requests for information, by an independent supervisory body, ie. Agency for the Protection of Personal Data and access to information. The exception to this rule is intended only for the decision of the authorities that decides on requests which refers to information containing data that are confidential. In fact, appeal is not allowed against these decision, but the administrative dispute can be immediately initiated. This exception is provided because the Agency has no authority to assess if the requested information is properly marked as secret, and it is whay it has no capacity for deciding in meritum on appeals lodged. In all other terms, the Agency and the Agency Council have accurate and sufficient authority to perform effectively tasks on the application of this law.

In order to monitor state of play in the area of access to information, and to undertake adequate measures in that sense, proposal law envisages establishment of information

system of access to information that will contain all necessary data for that, starting from the data on public authorities, submitted requests, adopted acts, complaints lodged, filed charges, decisions adopted, as well as data on measures undertaken against authorities for violation of the provisions of this law. In addition, precondition for update of the information system is ensured through defined obligation of all bodies to deliver data and acts needed for that to the Agency. Out of the same reason, it is envisaged for the Agency to deliver to the Parliament of Montenegro, upon the request and at least once a year, a Report on state of play in the area of the access to information.

Court protection is provided against all final decisions of authorities in access to information procedure, except that the court specifically is granted authority in respect of information containing data marked as confidential.

#### **4. Supervision (Article 46)**

Inspection supervision over the implementation of this law is divided between the ministries in charge of administrative affairs and the Agency. The ministry will perform supervision in terms of the rules of administrative procedure and the efficiency and effectiveness of administrative action by the requirements of the parties, and the Agency in relation to creating and updating access to information guide, disclosure and mandatory submission of data and documents required for maintenance of the information system.

#### **5. Penalty provisions (Article 47-48)**

For violations of certain provisions of this Law, misdemeanour responsibility is prescribed, within the minimum and maximum limits, which provides the competent authority, depending on the financial position of the authorities and other relevant circumstances, to define the amount of penalties which will achieve the purpose of punishment.

#### **6. Transitional and final provisions (Article 49-54)**

Transitional provisions regulate issues necessary for start of implementation of this Law, while final provisions define time when this Law shall enter into force and the application date.

### **V Assessment of financial means for law implementation**

In order to ensure implementation of this Law it is necessary to provide means for the Agency to employ at least seven persons. However, having in mind that the proceeding upon complaints is transferred from the ministries in the Agency, it means that additional financial means from the budget of Montenegro for engagement of new staff are not necessary, but those will be ensured through redirection from the ministries that employed staff for proceeding upon appeals on decisions on access to information to the Agency.