

# NOTE

on

## the draft Law on Free Access to Information of Montenegro

Organisation for Security and Cooperation in Europe



March 2005

### I. Introduction

This Note analyses an unofficial translation<sup>1</sup> of the latest version of Montenegro's draft Law on Free Access to Information, dated December 2004. This draft is the last in a series of draft laws dating back to 2002. This Note focuses on changes introduced since the previous draft, dated September 2004.

We welcome the continuing efforts in Montenegro to adopt an access to information law. The free flow of information and the public's right of access to information are important OSCE commitments, as expressed, for example, in the Charter for European Security adopted at the Istanbul Summit<sup>2</sup> and in a recent statement by the Representative on Freedom of the Media.<sup>3</sup> Freedom of information laws have been adopted in the vast majority of OSCE Member States and have been recommended as integral to democracy and the securing of human rights by other organisations, such as the Council of Europe and the United Nations.<sup>4</sup>

However, we are concerned that the current draft represents a significant step backward from the previous drafts. In particular, we are concerned about the following:

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<sup>1</sup> We can take no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.

<sup>2</sup> 19 November 1999, OSCE Doc. No. SUM.DOC/2/99.

<sup>3</sup> Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 6 December 2004: [http://www.osce.org/documents/rfm/2004/12/3945\\_en.pdf](http://www.osce.org/documents/rfm/2004/12/3945_en.pdf). For context on this statement, see the text preceding footnote 5.

<sup>4</sup> See Council of Europe Recommendation 2002(2) on access to official documents, adopted 21 February 2002; Report of the UN Special Rapporteur on Freedom of Expression, 1995, UN Doc. E/CN.4/1995/32, para. 35.

- the draft Law fails to make its provisions subject to internationally recognised principles and standards on access to information;
- the draft Law fails to provide for a narrow and well-defined regime of exceptions; and
- the draft Law fails to protect individuals who act in good faith to release information on wrongdoing.

We are additionally concerned about the interaction between this law and provisions relating to information and secrecy in other laws, the procedures governing access, and the extensions provided for time limits, which have been drafted in vague and open-ended terms.

We elaborate on these concerns in the following paragraphs. We recommend that these shortcomings be remedied by implementing the following amendments:

#### Basic Provisions

1. The provision guaranteeing access to information at the level of principles and standards contained in international instruments should be reinstated.
2. 'Freedom of information' should be reinstated as an underlying value of the access law.

#### The Regime of Exceptions

3. The list of protected interests should be narrowed to bring it in line with international standards.
4. The draft Law should allow for access to be refused only if disclosure of the information would result in substantial harm to a protected interest.
5. The draft Law should provide for access where this is in the overall public interest.

#### Whistleblowers

6. The draft Law should provide protection for individuals who release information on wrongdoing in good faith.

#### Miscellaneous

7. A commitment should be made to bring information provisions in other laws, including secrecy provisions, into line with the draft Law as soon as possible. In any event, a provision should be inserted in the draft Law specifying that its provisions take precedence over other laws.
8. The grounds upon which the deadline for responding to an information request may be extended should be clearly set out in the draft Law and should include only cases where large amounts of information is requested or where finding the requested information would require a search through a large number of documents which would unreasonably interfere with the activities of the body.
9. The draft Law should make it clear that providing additional data that might facilitate the search for information is optional for requesters.

## **II. Basic Provisions**

Article 2 of the draft Law specifies a number of principles that underlie the right of access to information:

- equality of requesting parties;

- equal conditions for exercising a right;
- openness, transparency and responsibility of public authorities; and
- ‘urgency of procedure’.

While these are important and valid principles, we note that the September 2004 draft contained a number of even stronger statements. First, the September draft guaranteed that access to information would be implemented “at the level of principles and standards contained in international documents on human rights and freedoms”. For reasons unknown to us, this has been removed from the present draft. Inclusion of this phrase could play an important role in the interpretation of the law by courts and public authorities, making it clear that whenever international standards provide a higher level of protection for access to information, the Montenegrin law should be interpreted consistently with those international standards.

Second, the September draft named ‘freedom of access to information’ itself as an underlying principle, along with ‘constitutionality and legality’. Both have been dropped in the present draft. Inclusion of ‘freedom of information’ as an underlying principle would send an additional statement to public authorities and courts regarding interpretation of the law, making it clear that in cases of doubt, they should err on the side of granting access.

**Recommendations:**

- The provision guaranteeing access to information at the level of principles and standards contained in international instruments should be reinstated.
- ‘Freedom of information’ should be reinstated as an underlying value of the access law.

### III. The Regime of Exceptions

The regime of exceptions is the backbone of any freedom of information law. A good freedom of information law should operate on the principle that all information held, controlled or owned by or on behalf of a public authority is accessible to the public unless disclosure will result in substantial harm to a protected interest and the resulting harm is greater than the public interest in disclosure. The freedom of information law should clearly list all protected interests.

Both the Council of Europe and the OSCE have laid down standards outlining the elements of a legitimate exceptions regime. The OSCE Representative on Freedom of the Media, acting together with his counterparts at the United Nations and the Organisation of American States, issued a Joint Declaration in 2004 which states:

The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions.<sup>5</sup>

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<sup>5</sup> Note 3.

Recommendation 2002(2) of the Committee of Ministers of the Council of Europe elaborates on the conditions pursuant to which a request for information might be refused, stating:

#### **IV. Possible limitations to access to official documents**

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

- i. national security, defence and international relations;
- ii. public safety;
- iii. the prevention, investigation and prosecution of criminal activities;
- iv. privacy and other legitimate private interests;
- v. commercial and other economic interests, be they private or public;
- vi. the equality of parties concerning court proceedings;
- vii. nature;
- viii. inspection, control and supervision by public authorities;
- ix. the economic, monetary and exchange rate policies of the state;
- x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.<sup>6</sup>

The Council of Europe Recommendation also lays down a clear ‘harm test’ and requires that where the public interest so requires, information should be disclosed:

Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.<sup>7</sup>

In brief, these recommendations can be distilled into a three-part test providing that a refusal to disclose information is not justified unless the public authority can show the following:

- the information requested relates to a legitimate interest listed in the law for the protection of which access may be restricted;
- disclosure of the information would cause substantial harm to that protected interest; and
- the harm to the protected interest would be greater than the public interest in disclosure.

The last element, known as the ‘public interest override’, is particularly crucial as it ensures that the exceptions cannot be used to hide corruption or other wrongdoing. It requires that information be disclosed in cases where the public interest in disclosure outweighs the interest in confidentiality even if that would result in harm to a protected interest. A classic example of this is in relation to financial information that would show significant corruption within a government ministry. Disclosure of such information may cause substantial harm to protected interests such as privacy, business confidentiality or the protection of internal deliberations. However, because the public interest in disclosing evidence of corruption outweighs the interest in confidentiality, the information must nevertheless be disclosed.

The regime of exceptions envisaged in the draft Law clearly fails to comply with these standards. Article 9 provides that access to information may be refused to

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<sup>6</sup> Note 4.

<sup>7</sup> *Ibid.*, under IV.2.

protect a number of interests falling under the headings of defence and security of the country, the ‘international protection of the state and its organs’, diplomatic relations, financial and monetary policy, public healthcare, intellectual property rights, the protection of internal deliberations, and privacy and confidentiality. However, the harm test sets a very low threshold, requiring that access may be refused if disclosure simply ‘jeopardises’ a protected interest. This falls below the standard of substantial harm, or even of harm, that we advocate. Furthermore, there is no public interest override.

As a result, the regime of exceptions fails at every step of the three-part test.

First, some of the interests listed in the draft Law fall outside the scope of the legitimate interests recognised by the Council of Europe. For example, under Article 9(5), authorities may refuse to disclose details of criminal court procedure. This clearly falls outside the legitimate scope of protecting the prosecution of crime<sup>8</sup> and, insofar as it might lead to opacity of criminal proceedings, may also conflict with the right to a fair trial.<sup>9</sup>

Second, under Article 9 access to information may be refused if it merely “leads to jeopardising” a protected interest. This sets a far lower threshold than is recommended by the Council of Europe or OSCE standards. The OSCE has required that access to information may be refused only where it would cause “substantial harm” to a protected interest;<sup>10</sup> while the Council of Europe recommends that access may be refused only if this is “necessary in a democratic society and proportionate to” a legitimate aim, and would cause harm to that aim.<sup>11</sup> These higher standards are reflected in the national laws of many countries. The recently adopted Serbian Law on Free Access to Information of Public Importance, for example, provides that access may be refused only where “necessary in a democratic society in order to prevent a serious violation of an overriding interest based on the Constitution or law”.<sup>12</sup>

Third, the draft Law fails to provide for the ‘public interest override’ recommended by both the OSCE<sup>13</sup> and by the Council of Europe.<sup>14</sup> This means that access to any information that falls within one of the many protected categories will be refused, regardless of any overriding public interest in disclosure. As explained above, this is likely to undermine significantly the effectiveness of the access law, and will fail to promote the required level of transparency in public authorities. We note that one of the previous versions of the draft Law, dated September 2004, included a provision that stated:

If the public interest for the disclosure of the information referred to in article 9 of this Law clearly overrides the damage that can be expected as a consequence, the disclosure of information shall be granted...

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<sup>8</sup> *Ibid.*, under IV.1.iii.

<sup>9</sup> Protected under Article 6 of the European Convention on Human Rights.

<sup>10</sup> Note 3.

<sup>11</sup> Note 4, under IV.1.

<sup>12</sup> Law on Free Access to Information of Public Importance, Article 8.

<sup>13</sup> Note 3.

<sup>14</sup> Note 4, under IV.2.

We cannot think of any legitimate reason why this should have been dropped from the present draft and we strongly recommend that it be reinstated.

**Recommendations:**

- The list of protected interests should be narrowed to bring it in line with international standards.
- The draft Law should allow for access to be refused only if disclosure of the information would result in substantial harm to a protected interest.
- The draft Law should provide for access where this is in the overall public interest.

#### **IV. Protection of ‘Whistleblowers’**

Article 25 of the September 2004 version of the draft Law granted protection for ‘whistleblowers’, individuals who release information in good faith that discloses wrongdoing. Protecting whistleblowers can make a significant contribution to enhancing openness in public life and raising standards generally. Employees who come across information in the course of their employment that discloses serious wrongdoing should be able to report this information to their superiors, the competent authorities or, where the public interest so demands, in good faith to other individuals or to the media. The law should recognise that the actions of whistleblowers are legitimate and protect such individuals from any legal, administrative or employment-related sanctions.

The importance of whistleblowers within an FOI regime has been recognised internationally. The OSCE Representative on Freedom of the Media, acting together with his counterparts at the UN and at the OAS, has recommended:

“Whistleblowers” are individuals releasing confidential or secret information although they are under an official or other obligation to maintain confidentiality or secrecy. “Whistleblowers” releasing information on violations of the law, on wrongdoing by public bodies, on a serious threat to health, safety or the environment, or on a breach of human rights or humanitarian law should be protected against legal, administrative or employment-related sanctions if they act in “good faith”.<sup>15</sup>

Following these recommendations, legislation protecting ‘whistleblowers’ has been introduced in countries around the world, including Japan, South Africa, the United States, Italy, Portugal and the United Kingdom.

For reasons unknown to us, in the present version of the draft Law this protection has been removed. We strongly urge that it be reintroduced.

**Recommendation:**

- The draft Law should provide protection for individuals who release information on wrongdoing in good faith.

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<sup>15</sup> Note 3.

## V. Miscellaneous

### Information Provisions in Other Laws

The draft Law does not specify how it relates to other laws that touch on the right of access to information, such as the Law on State Administration, the Law on General Administrative Procedure, the Law on Criminal Procedure, the Law on Litigation Procedure and the Law on the Public Prosecutor, or how it relates to secrecy laws, such as the secrecy provisions contained in the Criminal Code. Some of these laws directly contradict the provisions of the draft Law. For example, under the Law on State Administration, citizens must prove a legal interest when requesting information whereas, consistent with international standards, this is not required in the draft Law on access to information. This is likely to lead to confusion as to the applicable standard. We recommend, therefore, that the laws mentioned above be brought into line with the draft Law, or that a provision be included in the draft Law that specifies that this Law will take precedence over other laws to the extent of any conflict.

### Deadlines for Requesting Information

Article 15 of the draft Law provides that the deadline for providing information may be extended if the amount of information requested is very large or if “other objective reasons” prevent the information being provided within the deadline. This is an open-ended formulation that is open to abuse. The grounds for justifying an extension of the deadline should be limited to cases where the amount of information requested is extremely large or where supplying the information would require a trawl through an extremely large number of documents, so that responding within the time limit would unreasonably interfere with the activities of the body. These reasons should be clearly stated in the draft Law.

### Procedure for Information Requests

Under Article 11 of the draft Law, a person requesting information is required to supply various details, including their own name and contact details, basic details concerning the information requested and “other data that facilitate the search for the requested information.” This is a vaguely worded formulation that may be abused since an information request could be denied on procedural grounds for not containing the required “other data”. While we appreciate that the supply of sufficient data can often facilitate the search for information, the draft Law should make it clear that this is an optional component of an information request.

### **Recommendations:**

- A commitment should be made to bring information provisions in other laws, including secrecy provisions, into line with the draft Law as soon as possible. In any event, a provision should be inserted in the draft Law specifying that its provisions take precedence over other laws.
- The grounds upon which the deadline for responding to an information request may be extended should be clearly set out in the draft Law and should include only cases where large amounts of information is requested or where finding the requested information would require a search through a large number of documents which would unreasonably interfere with the activities of the body.
- The draft Law should make it clear that providing additional data that might facilitate the search for information is optional for requesters.

