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MEMORANDUM

on the

draft Law of Montenegro on Archives

London
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1. INTRODUCTION

This Memorandum analyses the draft Law of Montenegro on Archives (the draft Law), as received by ARTICLE 19 in March 2005.¹ The draft Law aims to regulate the acquisition, collection and safe-keeping of material that is important to Montenegrin culture or science, or that otherwise has social value, with the aim of preserving it and making it accessible to all. It sets standards for the protection and preservation of material, the transfer of private material to the State archives, access to and use of archival material and the organization and management of archives. The draft Law will apply to both public and private archives.

This Memorandum analyses the draft Law against international standards and best practice on archives, with particular attention to the question of access. It draws on international law as elaborated in the main international human rights treaties to which Serbia and Montenegro is a party, and the standards on access to information set by the Council of Europe, in particular Recommendation R(2000)13 of the Committee of Ministers on a European policy on access to archives² and Recommendation R(2002)2 of the Committee of Ministers on access to official documents.³ Our comments take account of the current situation in Montenegro with regard to the preservation of archives.⁴ Montenegro's largest archive is the State Archive, established in 1951 from the merger of the archive departments of the State Museum and the Historical Institute. In addition, Montenegro's municipalities maintain their own archives, although nearly half of them lack the resources to attain even the most elementary standards of preservation and care. Professional training and education for archival staff also remains a problem for these municipal archives.

Overall, we believe that the draft Law provides a solid framework for the preservation of archives but that it needs to be improved in relation to the crucial question of access. Most importantly, the draft Law should state clearly that access to documents held by or on behalf of public bodies will fall under the draft Law on Access to Information currently under discussion in Montenegro. Insofar as the final text of that draft law will probably not regulate access to information in private hands, and given that there is a public interest in accessing archival material of cultural interest even if it is kept in private hands, it may be appropriate to lay down procedures for access to private archival material. As currently drafted, the draft Law on Archives envisages an autonomous access regime for all archives, public and private, that fails in significant respects to meet international standards on access to information. The thirty and fifty year limitation periods for all archival material are of

¹ We received a translation of the draft Law provided by the Council of Europe. Our comments are based on the translation, not the original, and it may be that certain nuances of the draft Law got lost in translation.

² Adopted on 13 July 2000.

³ Adopted on 21 February 2002.

⁴ As set out in the Government of Montenegro's February 2004 National Report on Cultural Policy to the Council of Europe's Steering Committee for Culture, CDCULT-BU(2004)7A, 6 February 2004.

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particular concern. These would allow public bodies simply to ‘hide’ documents in the archives, should they wish to prevent their disclosure, where they would remain under lock and key for the duration of the closure period. The draft Law allows for even more stringent restrictions on access to documents that contain personal information, setting a 70-year closure period subject only to limited exceptions. These measures contravene international standards on access to information which require that information held by a public body be openly accessible unless it can be shown that disclosure would harm a legitimate protected interest and that the harm done would outweigh the public interest in disclosure.

Our other main concern is with the regime for private archives. The draft Law defines ‘archives’ very broadly, as a result of which a large number of private bodies will be deemed to hold archival material. While it is appropriate to prescribe standards of care to private bodies that are specifically contracted by a public body to maintain their archives on their behalf, many of the requirements are simply not appropriate for purely private archives.⁵ It would be better if the draft Law applied only to those private archives judged to be of significant cultural or scientific value to Montenegro and then only prescribed minimum standards for these archives. Consideration should be given to providing for some sort of assistance for these archives. Other private archives - those judged to have no or only limited value to the country - should remain unregulated.

Our concerns are elaborated in detail in the following sections, with recommendations throughout. Section 2 of this Memorandum provides an overview of the applicable international standards on access to archives; Section 3 provides an overview of the draft Law; and Section 4 provides a detailed commentary on the draft Law.

⁵ Subsequent References to private archives in this Memorandum may be understood as referring to ‘purely private archives’, as defined here.

2. INTERNATIONAL STANDARDS ON ACCESS TO ARCHIVES

2.1. International Law and Standards

Archives constitute an irreplaceable and valuable element of a country's cultural heritage. As factual and tangible records documenting the past, they are a country's memory. This is true in any country but takes on particular importance in transitional democracies, particularly those which have had a recent history of upheaval. In light of this, the Committee of Ministers of the Council of Europe has noted:

A country does not become fully democratic until each one of its inhabitants has the possibility of knowing in an objective manner the elements of their history.⁶

This means that it is not only important that there are archives documenting a country's past but, crucially, that these archives should be openly accessible to anyone who wishes to inspect them. Closed archives are of limited value to the people of a country.

There is no single, all-encompassing definition of the kind of material that should be classified as 'archival'. The Council of Europe recommends that 'archives' be defined broadly, as "the totality of documents regardless of date, form or medium, produced or received by any individual or corporate body during the course of their business and transmitted to [the public institutions charged with the preservation of archives]".⁷ We note that this is circular in that the definition essentially defines archives as those documents that have been sent to a public archive. As such, it provides little insight into what sorts of material should be archived. We also note that the requirement that a document be produced 'during the course of their business' for it to be considered as archival material represents an unnecessary limitation and should, at a minimum, be read broadly. A diary kept by a prominent politician may be of important socio-political and historical interest, even if it is not strictly something produced 'during the course of business'. It must also be noted that archives can exist in any form, including audiovisual material.⁸

Archives can be held by private persons and institutions as well as by public bodies. International law focuses on archives controlled by public bodies, although the Council of Europe Recommendation states that with regard to the important question of access, attempts should be made to bring arrangements for access to private archives into line with those for public archives.⁹

⁶ Recommendation R(2000)13, note 2, preamble.

⁷ Note 2, under I.

⁸ On 8 November 2001, the *European Convention for the Protection of the Audiovisual Heritage* was signed in Strasbourg. This convention, which aims to safeguard the preservation of audiovisual material, has not yet entered into force. It has not been signed by Serbia and Montenegro.

⁹ Note 2, under IV.

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International standards stress that any regulation dealing with archives should be guided by two general principles:

1. Archives are crucial to the cultural and socio-political heritage of a country and should be preserved.
2. Any person should have the opportunity to access archives.

Under the European Cultural Convention,¹⁰ which Serbia and Montenegro succeeded to in February 2001, archives are classed as objects of European cultural heritage, and Montenegro is under a legal obligation to “take appropriate measures to safeguard them and shall ensure reasonable access [to them]”.¹¹ The Convention does not elaborate any specific standards of care or preservation and there are no recommendations of the Committee of Ministers of the Council of Europe on the subject.

2.2. Access to Archives

Archives held by, on behalf of or under the control of public bodies qualify as information or documents to which ‘general’ international law principles concerning access to information apply.

Legally binding obligations concerning access to information arise from Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR), to which Serbia and Montenegro succeeded in 2001.¹² Paragraph 2 of Article 19 provides:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The ICCPR is a legally binding treaty; State Parties must refrain from taking steps that interfere with the rights guaranteed under it but, crucially, they must also take steps to implement the rights guaranteed.¹³ The right to access information, or ‘freedom of information’ as it is often called, has been recognised as a core element of Article 19. The United Nations Special Rapporteur on Freedom of Opinion and Expression has provided extensive commentary on this right in his Annual Reports to the UN Commission on Human Rights. In his 1998 Annual Report, the Special Rapporteur affirmed that Article 19 of the ICCPR included the right to access information held by the State:

[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems....”¹⁴

¹⁰ Signed 19 December 1954, entered into force 5 May 1955.

¹¹ *Ibid.*, Article 5.

¹² UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976. Serbia and Montenegro succeeded to the Convention as the successors of the Republic of Yugoslavia on 12 March 2001.

¹³ See Article 2.

¹⁴ Report of the Special Rapporteur, 28 January 1998, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, para. 14.

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In 2000, the Special Rapporteur provided extensive commentary on the content of the right to information, of which the following excerpts are particularly relevant to the question of access to archives:

- Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; “information” includes all records held by a public body, regardless of the form in which it is stored;
- ...
- A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;
- All public bodies should be required to establish open, accessible internal systems for ensuring the public’s right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
- ...
- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it...¹⁵

In November 1999, the three special mandates on freedom of expression - the UN Special Rapporteur on Freedom of Opinion and Expression, the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe and the Special Rapporteur on Freedom of Expression of the Organisation of American States - came together for the first time in November 1999 under the auspices of ARTICLE 19. They adopted a Joint Declaration which included the following statement:

Implicit in freedom of expression is the public’s right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people’s participation in government would remain fragmented.¹⁶

They supplemented this in 2004 with a Joint Declaration specifically recognising access to information held by public bodies as a fundamental human right.¹⁷

¹⁵ Report of the Special Rapporteur, 18 January 2000, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, para. 44.

¹⁶ Adopted 26 November 1999.

¹⁷ Adopted 6 December 2004.

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The right to access information held by public bodies is also recognised under the three regional human rights treaties, the *African Charter on Human and Peoples' Rights*,¹⁸ the *American Convention on Human Rights*¹⁹ and the *European Convention on Human Rights* (ECHR).²⁰

The ECHR, to which Serbia and Montenegro is a party,²¹ guarantees freedom of information through a number of its provisions, including Article 6, guaranteeing the right to a fair trial,²² Article 8, guaranteeing the right to respect for private and family life and the home,²³ and Article 10, guaranteeing the right to freedom of expression.²⁴

The Committee of Ministers of the Council of Europe has adopted two recommendations that elaborate on the content of the right of access to information and set specific standards on questions such as procedures, fees and the circumstances under which access may be refused. The first, Recommendation (2000)13, concerns the specific question of access to archives. It stresses the important function of archives as a nation's memory and recommends a number of general principles that should guide access:

1. Access to public archives is a right that belongs to all, regardless of nationality, status or function.²⁵
2. Access to archives should be regulated by law.²⁶
3. There should be no fees for access to archives.²⁷
4. Access to archives should be open, with limited exceptions provided by law for the protection of "significant public interests worthy of protection" such as national defence, foreign policy, public order and privacy.²⁸
5. There may be a general closure period as provided by law for the protection of interests such as the defence of the country, although a country may decide to dispense with this.
6. There should be a registry and other aids to finding information that cover the totality of the archives.

¹⁸ Adopted at Nairobi, Kenya, 26 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

¹⁹ Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978.

²⁰ Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953.

²¹ Serbia and Montenegro ratified the ECHR on 3 March 2004.

²² See *McGinley and Egan v. the United Kingdom*, 9 June 1998, Application Nos. 21825/93 and 23414/94 (European Court of Human Rights).

²³ See *Guerra and others v. Italy*, 19 February 1998, Application No. 14967/89 (European Court of Human Rights).

²⁴ The European Court has refused to recognise a general right to freedom of information under Article 10 (see, for example, *Sirbu and others v. Moldova*, 15 June 2004, Application Nos. 73562/01, 73565/01 and 73712/01). At the same time, it has not ruled out a right of access to information necessary to enforce the Article 10 right of freedom of expression.

²⁵ Note 2, Appendix, paragraph 5.

²⁶ Note 2, Appendix, paragraph 2.

²⁷ Note 2, Appendix, paragraph 6.

²⁸ Note 2, Appendix, paragraph 7.

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Crucially, this Recommendation has to be read together with the later Recommendation (2002)2, on access to official documents, which sets far more stringent standards for access. First, it requires a presumption of openness:

Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities.²⁹

It goes on to state that while States may limit access to information, any limitations must be set down precisely in law, be “necessary in a democratic society” and be proportionate to the aim of protecting one of the following interests:

- 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.³⁰

The Recommendation requires the disclosure of information, even if this will harm a protected interest, if the public interest in disclosure outweighs that harm:

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.³¹

This Recommendation thus establishes a presumption of openness for any document held by a public authority, including archives, unless that authority can show that:

- 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 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 this would result in harm to a protected interest. An example of this is where archival material impacts on the privacy of a person but is nevertheless of great public

²⁹ Note 3, under III.

³⁰ Note 3, under IV.

³¹ Note 3, under IV.

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interest as it helps understand a crucial moment in a country's history. If the latter interest outweighs the harm of intrusion into private life, the material should be disclosed.

Recommendation (2002)2 does not allow for a blanket closure period, at least for publicly held archival material. Reading Recommendation (2000)13 together with the later Recommendation (2002)2, it must be concluded that a closure period for archival material is of questionable legitimacy and could only be imposed, if ever, in highly exceptional cases. Even then, requests for access should be considered on their merits at the time they are made, with the aim of assessing whether there is a public interest in disclosure that overrides the interest in secrecy.

Finally, Council of Europe Recommendation (2000)13 recognises that many archives are held in private collections. Given the public interest in access to archives, it recommends that States take steps to ensure that arrangements for access to private archives be brought into line with those for public archives.³² At the same time, it must be understood that private archives, and in particular those that are owned by private individuals and that receive no public funding, should be allowed to impose certain constraints on access for practical reasons, for example allowing access only at set times or on appointment. However, such restrictions should not be so stringent as to negate the right of access altogether.

³² Note 2, Appendix, under IV.

3. OVERVIEW OF THE DRAFT LAW

The draft Law consists of ten separate chapters, regulating all procedures related to archives from acquisition to preservation and access. Chapter 1 contains a number of generic provisions setting out the objectives, defining what an ‘archive’ is and appointing the existing Council for Cultural Heritage as the central body with responsibility for providing general advisory recommendations on archive issues.

Chapter 2 of the draft Law sets out the distinction between ‘registry material’ and ‘archival material’ and lays down principles for distinguishing archival and registry material. It sets standards for the protection and safeguarding of archival material and includes a number of provisions dealing with the transfer of material from private hands to the State Archive. Chapter 3 lays down a number of rules regarding the various rights and responsibilities borne by archive holders and Chapter 4 details the rules applicable to the State Archive. Chapter 5 of the draft Law deals with the important issue of access to archival material and the use that may be made of it.

Chapter 6 of the draft Law lays down a set of rules applicable to archival and registry material in private hands. Chapter 7 deals with standards for ‘expert staff’ and lays down certain other rules in regard to them, while Chapter 8 details issues regarding organisation and management of archives.

Chapter 9 of the draft Law appoints the Ministry of Culture as the body responsible for management supervision over the operations of the State Archives. Supervision of other archives is to be done by the State Archives. Chapter 10, finally, lays down a number of penalty provisions.

4. ANALYSIS OF THE DRAFT LAW

4.1. Overall Concerns

We are concerned that while the Law provides an appropriate framework for the preservation and care of archival and registry material, its access provisions are deficient. This is a crucial shortcoming; if the people of Montenegro are not able properly to access archival material, then the functioning of Montenegro's archives as the nation's memory is seriously impaired.

Our primary recommendation is that there needs to be one overarching access to public information system in Montenegro, to ensure both consistency across the public sector in this crucial matter and that access meets international standards in this area. We recommend that the draft Law on Access to Information, currently under consideration, apply to access to all information held by or on behalf of public bodies, including archival material. The draft Law on Archives should state that the Law on Access to Information governs the matter of access. Given that the draft Law on Access to Information as currently envisaged applies only to material held by public bodies, a separate regime for access should be provided for material that is in private hands.

Regardless of which law governs access, the regime should clearly reflect the three-part international law test, set out above, establishing a strong presumption in favour of access that can be overcome only in certain, narrow, circumstances when harm done to a protected interest outweighs the public interest in disclosure. The system should provide for clear, quick and accessible procedures for access, and individuals who are denied access should have the opportunity to appeal such denial.³³ The standard closure period for broad categories of documents, currently found in the draft Archives Law, should be abolished in favour of a presumption of openness, a system that has been implemented in other countries which have recently introduced access to information laws.³⁴ If retained, the closure period would allow public bodies to abuse the archival system and effectively 'hide' documents whose disclosure they might wish to prevent by placing them in the archives and hence bringing them within the closure period.

A second concern is with the regime provided for in the draft Law for archival material that is in private hands. Except insofar as these private bodies are specifically contracted by a public body to run archives on their behalf, imposing onerous conditions and requirements on them may not be justifiable and is, in any event, probably not realistic. Ultimately, overly strict regulation may have the effect of hindering rather than furthering the preservation of cultural

³³ In March 2005, we issued a detailed statement commenting on the draft Law on Access to Information and providing recommendations for improvement. Our statement is available at: <http://www.ifex.org/en/content/view/full/65563/>.

³⁴ See, for example, the system in place in the United Kingdom. It should be noted that in the UK a thirty-year limitation was maintained for certain narrowly defined documents, such as Cabinet documents, for which release is mandatory after thirty years.

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heritage by deterring individuals and organizations from collecting material of public interest and establishing archives.

We recommend a system for private archives in accordance with the following:

- The classification of privately-held material as archival should be subject to clear and high standards, for example, where the material is of significant cultural or scientific value.³⁵ Other private archives should remain unregulated.
- The primary means for recognising privately-held material as archival should be voluntary application for such recognition by the holders of the material.
- Far more limited rules should apply to privately-held archival material than those which apply to public archives. In general, these should be limited to protection and preservation of the material, and to public access thereto.
- Consideration should be given to providing support to private holders of archival material in order to ensure that it is maintained in accordance with minimum standards of protection and preservation.

Recommendations:

- There should be a single access regime for material held by or on behalf of public bodies, whether or not the material in question is archival in nature.
- The draft Law should set out a separate regime for access to privately-held archives in accordance with the standards detailed above.

4.2. General Provisions of the Draft Law

4.2.1. Concept and objectives of archive activity

Article 1 - Contents of the Law

This Law shall govern principles of obtaining and selecting, protection and conditions for using, keeping under custody, utilizing and processing archival material as well as the organization, competencies and tasks of an archive and archive department.

Article 2 - The concept of archive activity

The archive activity under this Law shall be considered to be: recording, collecting, taking over, arranging, processing, discarding, protecting, using and publishing of archival material as well as other tasks anticipated by this Law.

Article 3 - Objectives of Archive Activities and Quality Standards

Archives shall be founded with the objective of:

- achieving economic, political, social and cultural development of Montenegro;
- obtaining archival material, its preservation, development and transfer to future generations,
- promoting equal opportunities to all citizens for their personal education, literary

³⁵ See Section 4.3.1.

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and cultural enhancement,

- having continuous development of knowledge, personal and civil skills and life-time learning,
- getting virtual interactive service network,
- enabling free access to archival material and information services offered by the archive;
- promoting cultural activities and improvement of overall community cultural life.

Archives shall be obliged to achieve these objectives by observing quality standards, comprehensiveness and staying up-date with regard to material selection.

The standards shall be recommended by the Council for Cultural Heritage, and shall be prescribed by the State Archive of Montenegro (hereinafter: the Archive).

Expert instructions for implementation of standards for operations in archive activity shall be adopted by the State Archive of Montenegro.

Article 10 - Standards and methodology

Processing of archival material and production of information means on archival material shall be performed through implementation of the prescribed uniform standards and methodology.

We have no comments on Article 1.

With regard to Article 2, we consider that 'facilitating access' should be named specifically as an archive activity. As discussed in Section 2.2, access is a crucial issue and it should be highlighted in this provision.

Article 3 provides an apparently exhaustive list of the objectives of an archive and Article 10 prescribes uniform ways for the processing of archival material. While this may be appropriate for archives held by or on behalf of a public body, it is hard to understand the justification for applying such standards to privately-held archives. Similarly, consideration should be given to whether or not the second paragraph of Article 3, requiring archives to remain 'up-to-date', should not be applied to private archives. We note that it may be appropriate to consider putting in place a fund to assist private archives to meet their obligations under the law. There is, obviously, a relationship between the level of obligation which may legitimately be imposed on private archives and the question of who is responsible for funding the measures necessary to fulfil those obligations.³⁶

Recommendations:

- 'Facilitating access' should be named as a separate archive activity.
- The first two paragraphs of Article 3 and the whole of Article 10 should not apply to private bodies.
- Consideration should be given to providing for a fund to assist private archives meet their obligations.

³⁶ This idea of funding private archives will be referred to at other points in the analysis.

4.2.2. *Archive activity*

Article 4 - Who May Perform Archive Activity

Archive service shall be performed as public service on the entire territory of the Republic of Montenegro.

Archive service shall be performed by the Archive, archives of local self-administration and administration units as public institutions, while regional state archives can also be founded.

Certain tasks of archive service, as institutions, shall be performed by specialized archives and private archives in a manner stipulated by this Law and other regulations.

Article 5 - Performing of Archive Activity

The Archive, as the central and competent state archive, shall perform the archive service with regard to the archive and registry material of state bodies, state and public institutions and enterprises, legal entities, families and individuals, whose activity was extended or is extended to the entire or major part of the Republic of Montenegro and/or that has the significance for the Republic of Montenegro.

The Archive shall also perform tasks with regard to the material from all periods of Montenegro history that is located on its territory or refers to it.

Regional state archives shall perform the archive service with regard to archive and registry material of state bodies, legal entities with public authorities and public services that perform the activity on the area of one or more local self-administration or administration units and with regard to the material that is created on the territory of the archive activities.

Archives of local self-administration and administration units shall safeguard, protect, process and use the public archival material of local self-administration and administration bodies and their public services.

Article 4 provides that only public bodies may perform ‘archive service’ while ‘certain tasks of archive service’ may be performed by private bodies. The draft Law does not define ‘archive service’. Bearing in mind that Chapter 6 of the draft Law clearly provides for the carrying out of ‘archive activity’ by private bodies, we assume that ‘archive service’ is some sort of supervisory or perhaps maintenance activity. In the absence of a clear definition, we cannot comment on this provision.³⁷

Under Article 5, ‘archive service’ is automatically performed on a variety of archival and registry material (definitions of which are discussed later), including that belonging to private individuals and families. Depending on the definition of ‘archive service’, this may pose an interference with those individuals’ and

³⁷ Note that this provision is headed ‘archive activity’.

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families' privacy and property rights as protected under Article 8 ECHR and Article 1 of Protocol 1 of the ECHR.

Recommendations:

- The draft Law should provide a clear definition of 'archive service'.
- Depending on the precise meaning of performing an 'archive service', consideration should be given to whether or not it is appropriate to impose this on private archives.

4.2.3. Archive system

Article 6 - Archive system

Archives shall get connected into the system according to needs of users on a particular area based on the following principles:

- reconciliation of operating plans and programs and archive development,
- standardization of procedures in processing and flow of material and information,
- building of databases,
- common development.

Archives may get connected into comprehensive (general) association of archives, professional associations, community, consortiums or societies where they will accomplish their interests, development programs and improvement of operations, establish cooperation, exchange and mutual allocation of technical, information and stag resources.

Archives shall connect and found common bodies with purpose of signing collective agreements for obtaining the material.

Article 9 - Archive information system

Archives founded on the territory of the Republic of Montenegro shall make a network of archive institutions.

Production of information means and systems shall enable the archives to get connected to the uniform archive information system and included into uniform information system of the Republic of Montenegro, as well as into international archive information system.

Data contained into information system shall be public unless they represent military, state, official or business secret.

Archives shall be obliged to submit to the competent central archive institution the data that are recorded into information system within the prescribed deadline.

The Ministry of Culture shall adopt a regulation determining the manner of keeping in custody and contents of archive information system.

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Our only comment on Article 6 is, once again, to consider whether or not it is appropriate to apply this duty to privately-held archives.

The third paragraph of Article 9 fails to implement the principle that all information held by public bodies should be accessible to everyone unless its disclosure would harm a protected interest and the harm done to that interest outweighs the public interest in publication,³⁸ in accordance with the standards noted above. As elaborated in further detail below,³⁹ information held by or on behalf of a public body should be accessible through the draft Law on Access to Information.

We note that although the concept of networking the various different archives is a good one, in reality this is a significant task the difficulty of which should not be underestimated.

None of these provisions should be applied to private archives unless they hold material of significant cultural or scientific value.

Recommendations:

- The third paragraph of Article 9 should be deleted.
- Consideration should be given to whether or not it is appropriate to apply these provisions to private archives unless they hold material of significant cultural or scientific value.

4.2.4. Integrity and protection of archives

Article 7 - Special Protection of Archival Material

Archival material shall be the property of common interest for the Republic of Montenegro and as such shall enjoy special protection.

Archival material and registry material shall be protected by provisions of this Law regardless of the property or holdings and/or where they are located and whether they are registered and recorded.

Protection of archival material shall be subject to regulations on protection of cultural property.

Article 8 - Archive Fund Integrity

Archival material produced in the course of activities and operations of an individual legal entity or private individual shall make an entirety (archive fund) and in principle cannot be singled out.

Registry material can be divided or combined due to change in internal organization of the producer, transfer of a part or all of its activities to the producer, due to taking over of a part or all tasks of another producer, upon obtaining the opinion of the competent

³⁸ As set out in Section 2.2.

³⁹ See section 4.6.

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state archive.

The body or a person that makes the decision on dividing or combining registry material shall be obliged to determine the holder of each piece of such divided or combined material.

If there are any doubts whether a material is of archive, museum or library type, the Ministry of Culture shall make a decision.

Article 16 - Safeguarding of Archival Material and Registry Material

Archival material shall be safeguarded from damages, destruction and disappearing by implementation of prescribed measures that refer to storing and technical-technological and safety security.

Archival material shall be permanently and professionally safeguarded in special premises and under specially provided climate conditions, protected from humidity, fire, waters, biological, chemical, physical and other harmful effects (material protection).

Ministry of Culture shall fully prescribe the manner for performing material protection of archival material and documents.

Registry material shall be safeguarded from damages, misuse and destruction and cannot be alienated until archival material is selected out of it.

Article 17 - Safeguarding of Public Archival Material out of the Archive

The administration body competent for internal affairs shall be in charge of safeguarding the archival material created in its operations in an archive department specially designed for the purpose and shall submit it to the competent archive under conditions it determines on its own.

Deadline for submission of this archival material cannot be longer than 50 years as of the day of its creation.

Article 18 - Providing of space and equipment for operations

Work and storing space, space for archival material of state archives and necessary technical-information equipment shall be provided by the Republic of Montenegro.

Work and storing space for archival material of regional archives and necessary technical-information equipment shall be provided by the local self-administration units.

Workspace, storing of archival material and equipment of specialized and private archives shall be provided by their founders in accordance with conditions prescribed by the Ministry of Culture.

Local self-administration or administration units and other legal entities that have not

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founded their own archive and that are submitting their archival material to the state archive shall cover the costs of taking over, storing, safeguarding, processing and protection of its archival material.

Mutual obligations under previous paragraph shall be established by an agreement between the state archive and local self-administration and administration units and /or legal entity and the state archive that takes over the competence.

Article 22 - Special Protection of Registry Material and Archival Material

Holders of registry material and archival material shall provide and implement special protection of registry material and archival material in case of an immediate war danger and war.

Producers and holders of public archival material and registry material shall implement their special protection in case of state of war, state of immediate war danger and state of emergency as well as huge natural disasters in the prescribed manner.

Producers and holders of public archival material and registry material shall be obliged to determine measures for timely preparation and protection of the material and data in case of state of war, state of immediate war danger and state of emergency or huge natural disasters, in compliance with the obligations from the plan.

Holders of registry material and archival material shall be obliged to setup by their plan measures for timely preparation and protection of registry material and archival material in case of immediate war danger and war.

The Government shall prescribe special protection measures for registry material and archival material that should be undertaken by holders of registry material and archival material in case of immediate danger of war and war.

Article 30 - Implementation of Measures upon Order

If the holder of the public archival material and registry material protects the material in a careless or unprofessional manner, and if there is a danger that it could be damaged or destroyed, the competent state archive shall order, by way of a decision, the implementation of measures for their arranging, listing or real protection within the given deadline.

If the holder fails to implement the ordered measures within the specified deadline, the decision shall be implemented by the competent state archive at the expense of the holder.

The appeal against the decision shall be submitted to the Ministry of Culture.

The appeal shall not delay the execution of the decision.

Although placed in separate chapters, Articles 7, 8, 16, 17, 22 and 30 all deal with the integrity and protection of archives.

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Under Articles 7, 16 and 18, regulations will be issued for the protection and safe keeping of all archival material, including that in private ownership. Although it is legitimate to prescribe in detail regulations for material that is publicly held, in the absence of financial support, private archives may not be able to comply with stringent rules and regulations on protection.

We have no comments on Article 8.

As regards Article 17, we suggest that the provision limiting submission of archival material to 50 years be reworded so as to place an obligation on public bodies to submit relevant material to the archives within 50 years, rather than prohibiting submission of material after this date. We also wonder whether such a lengthy submission period is appropriate and recommend that consideration be given to providing for a much shorter period, but allowing for exceptions as necessary.

With regard to Article 22, we would point out that this provision does provide different levels of responsibility for publicly held archives and archives in private hands and that this model ought to be mirrored in Articles 8 and 17.

We have no comments on Article 30.

Recommendations:

- Consideration should be given to applying Articles 7, 16 and 18 to public archival material only, or to make support measures available to help private archives implement the stringent rules provided for under these provisions.
- Consideration should be given to amending the 50-year submission period in Article 17, as recommended above.

4.2.5. Council for Cultural Heritage

Article 11 - Council for Cultural Heritage

The Council for Cultural Heritage shall:

- discuss general issues on archive activity,
- provide recommendations and opinion on the activity improvement,
- review mid-term and long-term archive activity development programs,
- review operating programs and annual reports of state archives,
- give opinion on the need for founding an archive,
- give opinion on accomplishment of scientific and cultural function of an archive,
- provide opinion on use of archival material before the expiry of the anticipated deadline,
- encourage adoption and amendments to laws and other regulations that govern the archive activity and operations of archives and provide opinion on enabling acts adopted by the Ministry of Culture,
- provide opinion on international cooperation in the area of archive activity,
- provide opinion on operations and financing of archives of local self-

administration and administration units, special and private archives.

Article 11 prescribes a number of functions for the Council for Cultural Heritage. We are not familiar with its functions or structure and cannot comment on whether or not it is the appropriate body to be carrying out these tasks. We note, however, that although its functions are advisory in nature, they are also of some significance.

4.3. Archival and Registry Material

4.3.1. Concept

Article 12 - Concept

Registry material shall be deemed to be the entire documents or notes produced in the activities or operations of some legal entities or private individuals of significance to their current operations and/or out of which the selection of archival material has not been performed.

Registry material shall be considered to be the archival material in creation and with regard to its protection the provisions of this Law and other regulations referring to archival material shall be applicable.

Archival material shall be deemed to be the source, and in lack of the source, each reproduced form of a document or notes that were produced in activities of legal entities or private individuals in performance of their activity, and that are of permanent importance to the culture, science and other social needs regardless of the time and place of their creation and whether they are placed in institutions of protection or out of them, and regardless of the type and form of a carrier where they are preserved.

Public archival material and registry material shall be deemed to be documentation material created by activities and operations of state bodies and organizations of the Republic, bodies of local self-administration or administration units, public institutions and companies, trading societies of companies that were created out of former public enterprises, public legal entities that perform public service or have public authorities and that are selected and kept under conditions and in a manner stipulated by this Law and regulations brought pursuant to it.

Archival material shall be produced based on the registry material selection.

A document shall be deemed to be any note of any type, form and technique of production (manuscript, print note, drawing, picture, photograph, sound track, film or video, electronic copy and other copies made either in analogue or digital format etc) that by its contents and structure makes recognizable and complete entirety.

Article 12 provides very broad definitions of registry and archival material. Archival material is defined as any material, regardless of the producer, that is

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of importance to “social needs”. This casts a very wide net and will include much information that is held in private hands. Registry material is defined even more broadly as documents or notes produced by individuals that is of significance to their operations. Article 12 also defines public archival material as material produced by public bodies, enterprises and institutions.

We recognise the importance of casting a wide net when it comes to preserving material for future generations but we doubt that the extremely wide definition of archival material in private hands is workable or appropriate. In particular, the reference to “other social needs” is problematic; practically any material may be considered to be important to one social need or another. Furthermore, the draft Law does not indicate who will determine whether or not particular material is of the requisite level of importance to be considered archive material.

It would be preferable for the law to state that its provisions apply primarily to material held by or on behalf of a public body and that it applies to private material only if that material is judged to be of significant cultural or scientific value.⁴⁰ A procedure should be established whereby private individuals or bodies who believe that their collections qualify as archives could voluntarily notify the State Archive or the Council for Cultural Heritage of their holdings, following which an inspection would take place. Once again, the issue of funding may be relevant here.

Recommendation:

- The draft Law should provide for a clear standard for determining whether or not material held by a private body or individual qualifies as archival in nature. The standard for this should be higher than for publicly-held material, for example, if the material is of significant cultural or scientific value. Other privately-held material should remain unregulated.

4.3.2. Selection and acquisition of archive material

Article 13 - Acquiring of archival material

Archival material shall be acquired by purchase, donation, bequest, research and recording in the country and abroad.

The Archive shall collect and it shall be obliged to take over archival material created in operations of cultural, scientific, public and other personalities whose work is of significance to the Republic and/or municipality, if that material is offered to it as a donation, bequest and deposit.

The responsibility of competent state bodies and institutions of the Republic of Montenegro shall be to promote, support and finance the return of documents of historic heritage of Montenegro that are placed out of territory of the Republic of

⁴⁰ We use this phrase throughout the analysis while recognising that the authorities may wish to include certain other key categories of information in the definition of private archives.

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Article 14 - Selection of Archival Material

Selection of archival material shall be the procedure where archival material is selected out of registry material according to set regulations and List of categories of registry material with deadlines for keeping it in custody.

The procedure of selecting archival material as well as criteria and parameters for evaluating and composing inventory lists and list of categories of registry material with deadlines for keeping it in custody shall be determined by producers and holders of registry material pursuant to the Decree on Office Activities and under the approval of the competent archive.

Producers and holders of public archival material and registry material shall be obliged to regularly, following the expiry of deadlines for keeping certain type of registry material in custody, select the archival material out of it, according to instructions and under the approval of the competent archive.

The selection shall be conducted according to regulations that shall be mutually established by the competent archive and the producer and/or the holder of the registry material.

Article 15 - Submission of Archival Material

Arranged and listed public material shall be submitted for keeping to the competent archive 30 years following its creation.

The competent archive may bring a decision according to which public archival material, in some cases, is submitted every fifth year.

Notwithstanding the previous provision, the deadline under paragraph 1 of this Article may be reduced or extended by an agreement between the competent archive and the producer and/or the holder of the public archival material.

The producer and/or the holder that submits the public archival material shall also give an opinion to the competent archive on conditions for its use.

Article 19 - Pre-emptive Right Related to Archival Material

State archive shall have the pre-emptive right related to private archival material.

The holder and/or the owner of the private archival material shall be obliged to offer it first to the competent archive that within 30 days as of the receipt of the offer, shall inform the main archive on the offer and its decision whether to purchase the offered material or not.

The main archive shall be obliged to make a decision on the proposal of the competent archive within 30 days as of the day of receipt of the proposal.

If the offer of the holder or the owner of the private archival material is not accepted within 60 days, the owner and/or the holder of the private archival material may sell it

to another legal entity or private individual at price that cannot be lower than the first offered.

If the holder or the owner of the private archival material acts opposite to provisions of this Article, the competent archive shall have the right to require the court to annul the transfer and to renounce the material to him under the same conditions.

Article 20 - Tax exemptions

Persons who sell their archival material to the competent archive shall be exempted from paying turnover tax.

We have no comments on Articles 13, 14, 15, 19 or 20, although we note that the 30-year period set out in Article 15 appears to be at odds with the 50-year period provided for in Article 17, noted above.

4.3.3. Import of foreign archival material

Article 21 - Prohibition on Private Archival Material Import Without Certificate

Import of private archival material of foreign origin, without expert certificate issued by the state institution of the country from which the archival material is imported, shall be prohibited.

While the intentions behind Article 21 are clearly positive, we note that it may not be realistic to implement it in practice. It would be preferable for this rule to refer back to the archive rules in the country of origin, prohibiting importation of archival material in breach of such rules.

Recommendation:

- Article 21 should be amended to prohibit the importation of foreign archival material in breach of the applicable laws in the country of origin of the material.

4.3.4. Determining of new material holder

Article 23 - Determining of New Material Holder

The body that brings a decision on termination of operations of the producer and/or holder of the public archival material shall be obliged to determine a new legal entity as the holder of the material or bring a decision on hand over of the material to the competent archive.

The body shall also be obliged to inform the competent state archive on the new place of the storage of the material.

We have no comments on Article 23.

4.4. Rights and Responsibilities

4.4.1. Rights and responsibilities of producers and holders of archival material and registry material

Article 24 - Producer and Holder of Archival Material

Producers of archive and registry material shall be deemed to be legal entities and private individuals that produce the material in the course of their activities and operations.

Holders of archive and registry material shall be deemed to be legal entities and private individuals who are owners or holders of material, who manage it or hold it based on any grounds.

Article 25 - Informing the Competent Archive on Founding

Producers and holders of public archival material and registry material shall be obliged to inform the competent archive on its foundation within 30 days, as well as on all changes of the status and organization, for purpose of providing an opinion on dealing with archival material and registry material and/ or for initiating procedure for their protection.

These producers and holders shall be obliged to, in compliance with this Law and standards for operations of public administration, organize archive office, archive department and/or inter-archive.

Article 26 - Responsibilities of Producers and Holders of Material

Producers and holders of public archival material and registry material regardless of the fact whether they are under state or private property, shall be obliged in compliance with regulations and instructions of the competent archive to:

- mark and date the registry material and keep basic records of them;
- keep archive book and submit the transcript of the archive book to the competent archive;
- conscientiously keep the registry material in orderly and safe condition and ensure it from damages or destruction;
- classify and archive registry material;
- obtain the opinion of the competent archive before undertaking measures that refer to their registry material and archival material;
- submit inventory of archival material and registry material and inform the competent archive on all changes related to the material and the data;
- pick out archival material and discard worthless registry material within a year as of the day of the expiry of determined preservation deadline. The discarded worthless registry material may be destroyed only pursuant to a written approval of the competent body;
- act in compliance with deadlines and findings ordered by the competent archive by minutes and decision.

Article 27 - Special conditions that need to be met

Producers and holders of public archival material and registry material shall be obliged to provide adequate facilities and equipment for storage and protection of the material.

Producers and holders of the public archival material and registry material shall be obliged to appoint the responsible person for work in the archive and, if required, an employee in the archive.

Employees in the archive shall have to have minimum high school education and passed expert examination for an employee in the archive.

The Ministry of Culture shall adopt at the proposal of the Archive the Regulation on Protection and Preservation of Archival Material and Registry Material out of the Archive and the Regulation on Professional Development and Examination of Expert Capacity of Employees in Archives.

Article 28 - Special Duties of Producers and Holders of the Material

Producers and holders of the public archival material and registry material, in compliance with regulations and instructions of the competent archive, shall determine:

- the manner of recording registry material, its keeping, classifying and archiving;
- the lists of categories of registry material with deadline for keeping it;
- the manner of protection and use of data and documents created in the process of automatic data processing.

Lists of categories of the registry material with deadlines specified for keeping it shall be determined upon obtaining the approval of the competent archive.

The Government of the Republic of Montenegro, at the proposal of the Ministry of Culture, shall adopt a Decree on office operations prescribing the manner of recording, classifying, keeping and archiving the archival material and registry material that is found with producers and holders.

Article 29 - Responsibilities for damage

A person who is allowed to use the material shall be hold responsible for any damage and breach of someone's right made by the use of the archival material.

We have no comments on Articles 24, 26, 28 and 29.

We note that it is unduly onerous to require, as Article 25 does, producers and holders to inform the archives of all changes to their structure and organisation. This obligation should be limited to any changes that affect the keeping or transfer of archival material.

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With regard to Article 27, we question whether it is necessary or appropriate to set out in law the minimum educational needs of staff; at a minimum, these rules should be restricted in scope to professional staff. We also note that the provisions relating to rules on protection and preservation of archival material, central to the question of archives, are somehow buried in this provision and that other provisions scattered throughout the draft Law (such as the last paragraph of Article 28) appear to bear on this issue.

Recommendations:

- Article 25 should be restricted in scope to changes that affect archives.
- Consideration should be given to removing the educational and training requirements in Article 27; at a minimum, they should only apply to professional staff.
- Consideration should be given to providing for a separate article governing regulations on protection and preservation of archival material, and ensuring that all provisions relating to this are brought together in one place.

4.4.2. Discarding of material

Article 31 - Discard of Registry Material

Producers and holders of public archival material and registry material shall be obliged, following the performed selection process to discard and destroy registry material whose deadline for keeping it has expired.

Minutes shall be prepared on discarded parts of the registry material.

Discarded parts of the registry material cannot be alienated or destroyed until the competent archive through appropriate examination determines whether the registry material contains documents that represent archival material.

When destroying registry material, the producers and holders of the material shall be obliged to undertake necessary measures for protection of data confidentiality that could do harm to public interest or interest of person's integrity.

Registry material whose deadline for keeping it has expired (worthless registry material) shall not be destroyed without written approval of the competent archive.

Original archival material shall not be destroyed even in cases when it is kept on microfilms or reproduced in another way.

We have no comments on Article 31.

4.4.3. Transfer of archives

Article 32 - Duties on the Occasion of Archival Material Hand Over

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Producers and holders of the archival material shall be obliged to hand it over in the original, arranged, marked, listed, technically equipped within complete organic entities, to the place determined by the competent archive in compliance with the Regulation on Hand Over of the Public Archival Material to Archives.

The Regulation on Hand Over of the Public Archival Material to Archives shall also govern the transfer of electronic documents.

The Regulation on Hand Over of the Public Archival Material to Archives shall be adopted by the Ministry of Culture at the proposal of the Archive.

The competent archive shall, in exceptional case, take over the public archival material even if the conditions under paragraph 1 of this Article have not been met, if that is necessary for the protection and rescue of public archival material from damage or destruction.

Hand over cost, including the arrangement and production of inventory, if that has not been done previously, shall be covered by the producer and or the holder of the archival material.

Article 33 - Take Over of the Material Following the Termination of Operations

Selected, arranged and listed public archival material and registry material, created in the work of a producer or a holder that has been revoked or ceased its operations shall be considered to be due for take over by the competent archive if a legal successor has not taken over its rights and responsibilities.

A legal successor of a producer or a holder of public archival material and registry material shall be obliged to take over and keep, in compliance with provisions of this Law, public archival material and registry material generated in the course of operations of its predecessor.

A legal successor and/or bankruptcy administrator shall be obliged to conduct hand over of the selected, arranged and listed public archival material under paragraph 2 of this Article, in compliance with the agreement with the competent archive, but no later than one year from the day of revoke and/or cessation of operations of a producer and/or a holder under paragraph 1 of this Article.

Article 34 - Decision of the Competent Archive due to Breach of Responsibilities

If a producer and/or a holder of the public archival material failed to meet obligations under Articles ____ and ____ of this Law on the occasion of hand over, the competent archive shall bring a decision on selecting, arranging, listing and hand over of the public archival material and shall conduct it at the expense of the producer and /or the holder.

An appeal may be put forward against the decision brought by the competent archive.

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An appeal may be put forward to the Ministry of Culture against the decision under paragraph 1 of this Article adopted by the Archive.

The appeal under paragraphs 2 and 3 of this Article shall not delay the execution of the decision.

Article 35 - Hand Over of Film Material

All produced film, video and television original material that is of interest to the Republic of Montenegro shall be handed over for keeping to the Film library after the expiry of 10 years deadline from the day of the production.

With the written approval of the Film library, a part of the video and/or television material produced in video technique may be kept with the producer and /or the owner following the expiry of the deadline under paragraph 1 of this Article.

The Film library shall keep the register of films produced in the Republic of Montenegro in compliance with a regulation adopted by the Ministry of Culture.

Article 36 - Hand Over of an Unused Film Copy and Documentation

Producers of films meant for public presentation - a feature, animated and documentary feature-length and short films, regardless of the type of carrier of picture on which they are recorded, shall be obliged to hand over one unused copy of each produced film with adequate documentation to the Film library in the first year of the film presentation.

The same responsibility applies to the producer that makes a film in cooperation with a producer whose main office and/or residence is not on the territory of the Republic of Montenegro.

Article 32 discusses the *Regulation on Hand Over of the Public Archival Material*, which is to be adopted by the Ministry of Culture following a proposal by the State Archive. The draft Law fails to set any parameters or guidance for the content of this Regulation, leaving the Ministry with total discretion in this matter. Bearing in mind the Council of Europe's recommendation that regulation of archives⁴¹ should be based on clear laws supported by implementing regulations, we recommend that Article 32 provide some guiding principles on handing over public archival material. To the extent that this provision envisages mandatory handing over of private archival material, we refer to our comments in Section 4.7 of this Memorandum.

We also note that the final paragraph of Article 32 leaves it open whether the cost of handing over the material should be borne by the producer (who, in the case of old documents, may no longer exist) or the holder of the material. Where the current holder is a private archive, we recommend for reasons of fairness and practicality that the cost should be borne by the State Archives.

⁴¹ Recommendation (2000)13, note 2, paragraph 2.

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Article 35 is very broadly phrased and requires any original film, video and television material “that is of interest to the Republic of Montenegro” to be handed over to the Film Library of the State Archives. There are at least four fundamental problems with this provision:

1. there is no guidance with regard to the crucial question of what is of interest to Montenegro, which appears to be a rather low standard for such a draconian provision, or who will decide on this important matter;
2. it appears to require the hand-over of all original material, effectively depriving the owners of their rights to it;
3. the provision applies to all visual material, whether or not published and whether or not produced in Montenegro; and
4. the provision assumes that film production companies will remain in existence for at least ten years.

A far more appropriate approach would be simply to require producers of film and television material to provide the State Archive with a copy of work produced by them, analogous to the requirement in Article 36. We can see no justification for requiring producers to hand over originals after a ten-year period. The State Archive can then make a selection of the material submitted and decide what to preserve for posterity.

We have no comments with regard to Articles 33 and 36.

Recommendations:

- Article 32 should provide guiding principles for the hand over of public archival material.
- The cost of transferring private archival material to the State Archives should be borne by the State Archives.
- Article 35 should be removed and Article 36 expanded to require all producers of film and video material to provide copies of their work to the State Archive.

4.5. Archival Bodies

4.5.1. Regulations regarding archives

Article 37 - The Archive and Inter-archive

An archive shall be the institution for protection of archival material and registry material that keeps records, takes over, safeguards, protects, arranges, processes, researches, classifies, publishes and in another manner presents and provides archival material for use.

An inter-archive shall be the place meant for specific purpose with a department for take in and storing of registry material from the current archive collections, reference collection and other documentation collections that organizes protection, use, evaluation and discard of worthless documentation, keeps records and takes care on entirety and organization of the entire documentation that is no longer needed for

every day operations, supervises keeping of documentation in reference collections and performs tasks related to hand over of archival material to the competent archive.

We have no comments on Article 37.

4.5.2. Founding archives

Article 38 - Specialized and Private Archives

Other than state public archives, specialized and private archives may also be founded.

Specialized archives and private archives (university archives, commercial archives, religious community archives, bank archives etc) may collect and keep archive and registry material generated in activities of their founders and other domestic legal entities and private individuals.

These archives may be founded only upon obtaining the approval and decision on separation of competencies with the state archives issued by the Ministry of Culture following previously obtained opinion of the Archive.

Article 39 - Archive founders

Archive founders can be: the Republic of Montenegro, local self-administration and administration units.

Several units of local self-administration and administration may found a common archive, and organize their mutual relations by way of a contract.

If a unit of local self-administration and administration does not found its archive, the tasks under Article ___ of the Law shall be performed at its expense by the regional state archive competent for the area of the local self-administration unit or the archive of the closest local self-administration unit.

Specialized and private archives may also be founded by domestic legal entities and private individuals.

Article 40 - Conditions for archive foundation

An archive may be founded if there is:

- provided required and appropriate work and storage space as well as adequate equipment,
- provided required number of expert archive staff,
- provided funds for foundation and start of archive operations as well as the funds for its work.

Decision on existence of conditions for archive foundation of local self-administration and administration units as well as specialized and private archives shall be brought by the Ministry of Culture.

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Should the Ministry fail to bring a decision within 30 days as of the day of receipt of the request it shall be considered that the founder met the conditions for archive foundation.

The Ministry of Culture shall adopt, at the proposal of the Archive, the regulation that shall determine conditions for storing, equipment, protection and processing of archival material and the number and structure of the expert archive staff.

Articles 38 and 40 restrict the founding of a private archive unless written permission has been obtained from the Ministry of Culture. Bearing in mind the very broad definition of archival material, we see no justification for the imposition of a rule prohibiting a private body even to keep an archive of its own material unless formal permission has been obtained.

The same concern applies to the question of archival standards, as established in Article 40. In particular, the application of these standards to private archives, as well as the question of who is responsible for bearing the costs associated with maintaining archival material in accordance with them, needs to be clarified.

Recommendations:

- Private individuals or bodies should not require the permission of the Ministry of Culture to set up archives.
- The application of preservation and protection standards to privately-held archival material needs further clarification.

4.5.3. Funding

Article 41 - Providing of Funds

Funds for operations of state archives shall be provided in the budget.

Funds for operations of other archives shall be provided by their founders.

If the archive acquires additional funds (profit) in the course of performing its activity, the funds may be used only for performing and development of archive activity.

In line with our recommendations in Section 4.1, consideration should be given to making funds available to private archives that hold material of significant cultural or scientific value.

4.5.4. Rights and responsibilities of the State Archive

Article 42 - Rights and Responsibilities of the Archive

Within the scope of its activity, the Archive shall perform the following tasks:

- keep evidence on the registry material and archival material that is placed with the

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holder;

- arrange archival material and produce information means on archival material;
- publish archival material and other publications that improve protection and use of archival material;
- determine uniform standards and methodology for processing archival material and providing of information on archival material;
- engage in scientific-research work and publish the results of the work;
- keep central catalog of funds and collections of the Archive and bodies under Article ___ of this Law;
- monitor general condition of the registry material and archival material and propose measures for their protection;
- keep records on collected and recorded archival material from foreign archives;
- form library of closed type that collects official publications, domestic and foreign expert literature from the field of archiving, information, historiography, daily press and periodicals as well as publications published based on the research of the archival material that is placed in its funds.
- Permanently or temporarily publishes professional magazines or professional publications, implements expert and technical measures for protection of archival material in the archive and cares for its safety and with that objective performs safety and protection recording of archival material and/or performs its recording on micro films and does scanning of microfilms for their use within the information system,
- Take over public archival material and store it into archive depots,
- Keep records and collect private archival material through buy out, donation or contract on deposit, arranges it, processes and produces information means about it in compliance with the prescribed methodology and publishes archival material,
- Conduct immediate supervision over operations of archives and other holders of archival material out of the state archive system,
- Perform safety and protection recording of archival material and restoration and conservation tasks with regard to archival material,
- Provide conditions for use of public archival material, perform declassification of archival material with a confidentiality degree in order to make it available, with the approval of the producer unless stipulated otherwise by another law,
- Provide data, transcripts and certificates of documents (alternative: and certified transcripts).
- Produce and publish information tools for certain archive funds and collections,
- Take care of constant professional education of expert archive staff and constantly follow development of archive theory and practice as well as world experiences with regard to development of state administration and registry operations for additional professional education and achieving balance between the organization and work methods,
- Take care that the expert archival staff, in their operations, apply provisions of Codex of Archivists' Ethics, adopted by the International Archival Council.
- Organize exhibitions, lectures, expert and scientific gatherings and implement other types of cultural and educational activity in order to inspire interest and bring to people's mind the importance of archival material as a cultural property and importance of archive activity,
- Cooperate with other cultural institutions, scientific and related institutions, information and documentation centers for improving archive activity and scientific work in archives, archive science, complementary historic and other scientific

- disciplines,
- Perform other tasks stipulated by this Law and other regulations.

It is not clear from this provision what is meant by a ‘library of a closed type’ but this would appear to be a limited access library. We question why the State Archive should maintain a closed collection of expert material. As a matter of principle, any material held by the State Archive, a public body, should be open.⁴²

The provisions above relating to declassification should refer to the standards set out in the law on access to information (still being developed) as a basis for declassification.

Recommendations:

- The State Archive should not run any closed libraries.
- Declassification standards should be consistent with the standards set out in the law on access to information.

4.5.5. Other provisions regarding the State Archive

Article 43 - Implementation of Scientific Methods

In order to accomplish their tasks, state archives shall use the expert and scientific methods to research and study issues of protection of cultural property, archive science, complementary historical and information science, contemporary forms of electronic data processing and related disciplines.

State archives may publish material and issue other expert publications under their competence, generate and publish scientific studies, organize scientific and expert gatherings, be in charge of scientific and expert projects or participate in accomplishment of scientific and expert projects of other institutions.

Article 44 - Records

The state archive shall be obliged to keep the following records:

- Book of received archival material;
- Registers of certain funds and collections;
- General inventory (alternative: registry) of archival material and registry of funds and collections (registry of archival material as cultural property, according to classification);
- A book of archival material placed in the archive with topography inventory;
- A book of recorded (alternative: microfilmed) archival material;
- A book of restored and conserved archival material;
- Records on producers and holders of public archival material;
- Records on holders of private archival material;
- Records on users and used archival material.

⁴² See Section 2.2.

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The Ministry of Culture, at the proposal of the Archive, shall adopt the Regulation determining the form, contents and the manner of keeping evidence under paragraph 1 of this Article.

State archives may found collection centers (inter-archives) as their branch offices with purpose of collecting, selecting, keeping and arranging registry and archival material.

We have no comments on Article 43.

We welcome the various registries that the State Archive is required to keep pursuant to Article 44. We recommend that the draft Law should stipulate that these registries will be easily accessible to the public, including through publication on the State Archive's website.

We do not consider that the State Archive should keep records on the names and details of people who access material other than as necessary to facilitate the running of the Archive. The collection of material that indicates what kind of material has been accessed by a particular user may have an inhibiting effect on users' right to access material.

Recommendations:

- The State Archive should publish its registry and other indexing materials, including on the Internet.
- The State Archive should not collect information on its users other than as necessary to enable the running of the institution.

4.5.6. Inspection of operations of archive holders

Article 45 - Examination of Operations of Archival Material Holders

The competent archive shall conduct the examination of operations of holders of archival material with regard to performing of tasks under Article____, point ____ of this Law.

Should the archive in the course of performing examination determine that holders of registry material and archival material do not act in accordance with Article ____ of this Law, they shall be warned of the observed irregularities and ordered to undertake measures for removal of the irregularities.

Article 46 - Minutes on Conducted Examination

Minutes shall be prepared on performed examination under Article ____ of this Law.

The minutes shall include data on the found condition of the registry material and archival material, irregularities shall be stated and deadlines for removal of the irregularities determined.

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The minutes shall be submitted to the holder whose registry material and/or archival material was subject to the examination.

Article 47 - Undertaking of Measures for Removal of Irregularities

A holder of registry material and archival material that underwent the examination under Article ____ of this Law shall be obliged within deadlines set in the minutes to undertake measures for removal of the observed irregularities as well as to inform the competent archive on the measures taken on.

Article 48 - Passing Information to the Competent Body

Should a state body, a body of local self-administration unit or another body and/or an organization, as the holder of the registry material and archival material fail to act according to provisions of Article ____ of this Law, the archive shall pass the information about it to the Government of the Republic of Montenegro or the Archive, and in case of other entities under Article ____ of this Law, their management bodies and/or other competent bodies.

Article 49 - Denunciation

If in the course of performing examination the Archive determines that, with regard to protection of registry material and archival material, there is suspicion that a criminal act or an offence has been committed, it shall be obliged to bring charges for the opening of criminal and/or offence proceedings against the responsible person in the state body and/or local administration body, and in case of other entities under Article ____ of this Law, against legal entity and responsible person.

Article 50 - Cooperation with Examiners

Holders of registry material and archival material shall be obliged to enable the person authorized to perform the examination to conduct the examination without being disturbed and to provide him with necessary data that are of significance for performing the stated examination.

In line with our recommendations in Sections 4.1 and 4.3.1, we recommend that these provisions be applied only to archives held by or on behalf of a public body and those private archives judged to be of significant cultural or scientific value. Once again, the issue of funding for private archives is relevant here.

It would be preferable if the examination provided for in Article 45 referred to the specific standards against which archival performance is to be measured, presumably the regulations on protection and preservation of archival material provided for in Article 27.

Recommendations:

- Articles 45-50 should apply only to those private archives judged to be of significant cultural or scientific value.
- The standards to be applied in the examination under Article 45 should be set out clearly, preferably by reference to the regulation provided for in Article 27.

4.6. Access to Archival Material

Article 51 - General rule

All users shall have the right to equally use public archival material that is kept in archives.

Conditions and manner of use of public archival material shall be determined by archives in compliance with the Regulation on Use of Public Archival Material.

Public archival material can be used out of the archive for exhibiting purposes, under condition that it is secured and mandatory protection copy produced at the expense of the exhibition organizer.

The manner, conditions and procedure for use of public archival material as well as production of copies and certified transcripts shall be determined by the Regulation on Use of Archival Material adopted by the Ministry of Culture at the proposal of the Archive.

Article 52 - Purpose of Archival Material Use

Public archival material in archives shall be given for use for official purposes, scientific researches and publication needs, teaching, exhibitions, for accomplishment or protection of personal rights and other justified purposes.

Article 53 - When Archival Material is Available for Use

Public archival material, as a rule, shall be available for use following the expiry of 30 years term as of the day it was generated.

Public archival material shall be available for use even before the expiry of the deadline of 30 years as of the day it was generated if that is allowed by its producer or holder.

Public archival material and registry material containing data referring to defense of country, foreign affairs and national security as well as to economic interests of the Republic, whose publication could do harm to national safety and state interests of the Republic of Montenegro, shall be available for use following the expiry of the 50 years term as of the day of its generation unless stipulated otherwise by special regulations.

Article 54 - Availability of Archival Material Including Personal Data

Public archival material containing personal data and data on a personality (birth register, personal files, court files, tax and financial documents, history of diseases and medical documentation, census etc) shall be available for use following the expiry of 70 years term as of the day it was generated and/or 100 years after birth of a person it refers to.

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Public archival material under paragraph 1 of this Article may be used even before the expiry of the specified deadline if a person to whom it refers or his successors and/or legal representative gives his consent, following death of the person or a person that has legally protected interest, following death of the person.

On the occasion of hand over of public archival material under Articles ___ and ___ of this Law, deadline for availability of its use shall be determined in the minutes.

Public archival material can be used without any limitations by their producers that generated the material in the course of their operations and activities for purpose it was generated for and/or it served to.

Article 55 - Use of Archival Material before the Deadline Expiry

Should the scientific-research needs require use of public archival material before the expiry of the deadline when the material will be available for use, the user shall be obliged to submit a request to the competent archive for issue of special permit to use such material.

The competent archive may allow the use of the material although the conditions under Articles ___ and ___ of this Law have not been met in manner and under conditions that will ensure protection of public interests and/or privacy, rights and interests of third persons, upon obtaining the opinion of the Archive.

Article 56 - Use of archival material copies

As a rule, copies of archival material are given for use.

Notwithstanding the provision of this Article, the original public archival material can be given for use if there are no copies of the material and if that is requested by the scientific method of work.

Archives, as a rule, provide certified copies of documents that are necessary to state bodies for official purposes.

Notwithstanding provisions of this Article, original documents may be given for use but to a limited period of time and under conditions that protection copies are made at the expense of the state body that requires the material.

The Ministry of Culture shall bring a decision on temporary take out of public archival material abroad for exhibiting purposes, providing of an expert opinion or implementation of measures of technical protection.

The decision shall stipulate the deadline for return of the public archival material to the country.

Prior to public archival material take out from the country it shall be necessary to produce protective recording.

Public archival material may, in exceptional cases, permanently be taken out abroad under condition that there are justified reasons to do so.

The permit for permanent take out of archival material out of the country shall be issued by the Ministry of Culture.

Article 57 - Cost- free Use of Archival Material

Use of public archival material and information means in archives shall be cost free.

The user shall have the right to ask for production of copies or transcripts of public archival material at a certain fee, in compliance with the Regulation on Use of Public Archival Material under Article ____ of this Law.

Use of public archival material for marketing purposes, gaining profit, copying or publishing documents shall require special permit of the competent archive at a certain fee in accordance with the Regulation under paragraph 2 of this Article.

Article 58 - Permit to Use Archival Material before the Deadline Expiry

The permit and special permit under Article ____ of this Law for use of the public as well as private archival material that is placed in archives shall be issued by the archive that keeps it and/ or that is in charge of its protection and use.

An appeal may be submitted against the decision and/or permit under paragraph 1 of this Article issued by the competent Archive.

An appeal may be submitted to the Ministry of Culture against the decision and/or the permit under paragraph 1 of this Article adopted by the Archive.

This chapter is of crucial importance. It regulates access to the archives and sets out the conditions under which such access may be refused.

As elaborated in Section 4.1 of this Memorandum, our overarching recommendation is that, as a matter of principle, access to archival material held by or on behalf of a public body should be governed by the general rules relating to access to information to be established in the Access to Information Law under discussion. Drafting a parallel access regime in the draft Law on Archives will lead to a confused and potentially inconsistent legal regime, and possible undermining of the right to access information held by public bodies. Unified access regimes for archives and other material held by public bodies are provided in other countries that have recently implemented access to information laws, such as the United Kingdom, and this has resulted in increased access to archival material.⁴³

Since the draft Law on Access to Information will probably not extend to access to material from private bodies,⁴⁴ consideration should be given to drafting an appropriate access regime for those private archives that are judged to form part of Montenegro's cultural or scientific heritage, where there is a public interest in

⁴³ For more information, see <http://www.nationalarchives.gov.uk/foi/>.

⁴⁴ Except for those contracted to hold material for public bodies.

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access. Such a regime should take into account that private archives may not be able, in practical terms, to provide the kind of access that public archives are legally obliged to.

If it is considered that a parallel access regime for material held by public bodies should nevertheless be set up, which we strongly recommend against, we are concerned that the standard of access envisaged under the current draft Law fails to reach that required under Council of Europe Recommendation (2002)2.⁴⁵ Specifically, the regime does not provide for a general presumption of immediate access, subject only to exceptions incorporating the harm test and the public interest override, as required under Recommendation (2002)2. These are crucial elements of a proper access to information regime.

Instead, the access regime under the draft Archives Law revolves around a series of extremely long - thirty, fifty, seventy and even 100-year - blanket prohibitions on disclosure unless exceptional circumstances apply. These are fundamentally at odds with the standards set out in Recommendation (2002)2, which requires the disclosure of any information held by a public body unless non-disclosure can be justified at the time of the request. Moreover, retention of these blanket closure periods for archival material would create a huge loophole in the draft Access to Information Law by allowing public authorities to avoid their obligations under that law, by simply transferring material to the archives, where it would effectively remain under lock and key for at least thirty years.

Our specific concerns with regard to the individual provisions are as follows:

Article 51:

- The public should have access to any documents held by or on behalf of a public body, subject to clearly defined limitations based on Principle IV of Council of Europe Recommendation (2002)2.
- There should be no conditions or limitations on the use of archival material other than those limitations on the use of original material that are necessary to ensure its safekeeping.

Article 52:

- The limitation on use of public archival material for “justified purposes” is unclear, open-ended and likely to lead to confusion. The right to access information held by public bodies should not be subjected to such conditions; indeed, no one should be required to provide any reason for requesting information.

Article 53:

- The thirty-year, fifty-year and other limitation rules should be abolished in favour of a case-by-case consideration, at the time of a request for information, as to whether disclosure would harm a protected interest and that harm outweighs the public interest in disclosure.

⁴⁵ Discussed in Section 2 of this Memorandum.

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Article 54:

- Documents containing private information should be withheld only if their release would cause harm to privacy interests and that harm outweighs the public interest in disclosure of the document. The timelines for protecting private information should, if retained, be used as overall limits beyond which non-disclosure of the information can no longer be justified.

Article 55:

- As elaborated above, there should be a presumption of openness for all material subject to narrow exceptions.

Article 57:

- Fees charged for providing copies should never exceed the actual cost of the copies. Consideration should be given to providing a minimum amount of material for free (for example, up to 100 pages). In any case, the system of fees for access needs to be coordinated with the related provisions in the access to information law to avoid a patchwork of differential fee systems.
- There should be no restrictions on the use of copies obtained, subject only to rules in other laws of general application, for example relating to copyright.

Article 58:

- Insofar as this relates to the use of material before the expiry of the thirty-year deadline elaborated in Article 55, we refer to our earlier comments recommending abolition of the closure period.
- Everyone should have the right to appeal any refusal to disclose information to an independent body, preferably first to an independent administrative and from there to the courts.

Recommendations:

- The draft Law on Access to Information should govern access to archives in accordance with the requirements of Council of Europe Recommendation (2002)2. If an autonomous regime is nevertheless retained, the following recommendations should, at a minimum, be implemented:
 - The thirty, fifty seventy and 100-year closure periods should be abolished in favour of a general presumption of openness subject to narrow exceptions based on Guideline IV of Council of Europe Recommendation (2002)2.
 - The Archives Law should not set out limitations or conditions on the use of copies of archival material.
 - Fees for providing copies should never exceed the actual cost and the fee structure for access under the Archives Law should be consistent with its counterpart under the access to information law.
- If the draft Law on Access to Information does not extend to information held in private archives, as seems likely, a separate access regime should be established to allow access to those archives judged to form part of Montenegro's cultural and scientific heritage. Such a regime should take into account the special nature of private archives.

4.7. Private Archival and Registry Material

Article 59 - Concept

Private archival material and registry material shall be documentation material generated in activities and operations of political and non-government organizations and associations of citizens and their bodies and institutions, religious communities, private companies and other private legal entities, individuals and families of the interest to the Republic.

Article 60 - List of Holders of Archival Material in Private Property

The Archive shall determine the list of holders of archival material in private property that are, according to its expert assessment, determined to be of interest to the state.

Article 61 - Entry into Private Archival Material Register

Private archival material shall be entered into the Register of owners of private archival material.

The Register shall be kept by the Archive and it shall include the following data:

- Name, surname and residence of the owner and JMB (unique personal identification number),
- Basic data on the archival material producer,
- Short description of the contents, time frame and material quantity,
- Date of entry, number and date of decision on proclaiming the material the part of cultural heritage.

Article 62 - Application of Rules on Public Archival Material

Producers and holders of the private archival material and registry material shall be subject to provisions of this Law referring to public archival material unless stipulated otherwise by provisions of another Law.

Article 63 - Responsibilities of Private Archival Material Holders

Holders of private archival material that keep archival material at any grounds shall be responsible to:

- Inform the competent archive on possessing the archival material,
- Undertake necessary measures for safe keeping and protection of archival material,
- Arrange archival material and produce list of the material,
- Allow authorized person of the competent archive to review the archival material and carry out protective recording.

When a holder of the private archival material is not able to arrange the material and produce the list, the competent archive shall perform it at the expense of the holder.

Article 64 - Order for Undertaking Certain Protection Measures

If a holder of the private archival material keeps the archival material in unprofessional, careless and poor manner, due to which there is a danger for the material to be destroyed or damaged, the competent archive shall order in writing the instructions for undertaking of certain measures for protection, keeping and

professional maintenance of the archival material.

Should a holder of the private archival material fail to act upon the ordered instructions of the competent archive within the prescribed deadline, the archive shall determine the hand over of the material to the archive by way of a decision until the conditions contained in the ordered measures are not met.

A holder of the private archival material shall be entitled to submit an appeal against the decision to the Ministry of Culture.

The appeal shall not delay the execution of the decision.

Article 65 - Hand Over to the State Archive on Multiple Bases

The owner of the private archival material may store it, donate or sell it to the state archive.

Private archival material, handed over, donated or sold to the archive shall be available for use under conditions and in a manner prescribed for public archival material unless stipulated otherwise in the agreement between the holder and the competent archive.

The owner that stored the material in the state archive shall reserve all rights to the material unless stipulated otherwise by the agreement on storage.

As should be clear from previous comments, these provisions are fundamentally problematical inasmuch as they purport to impose extremely onerous obligations on a potentially vast range of privately held information. A system such as this risks seriously undermining the preservation of material of historical importance to Montenegro as private actors will understandably seek to avoid these obligations in various ways, including potentially by destroying their private information.

We recommend instead a system for private archives in accordance with what has been suggested above, as well as the following:

- In exceptional cases, the relevant authorities should have the power to declare privately-held material to be archival in nature. The law should set out clear procedures for this, along with a clear right to appeal any such declaration to the courts.
- Where absolutely necessary, the authorities may take over privately-held archival material to ensure its ongoing preservation and availability to the people of Montenegro. In such cases, compensation should be provided and the holder of the material should have the right to appeal to the courts against such action.

4.8. Expert Staff

Article 66 - Expert Staff Titles

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Expert archiving tasks shall be performed by expert staff of the following titles: archiving technician, senior archiving technician, archivist, senior archivist and archivist advisor as well as appropriate staff in conservation and restoration profession, reprography and micrography and protection of audio-visual and film archival material.

An archive technician may be a person with high school education and passed expert examination for archive technician.

Senior archive technician may be a person with college education and passed expert examination for senior archive technician.

An archivist may be a person with University education and passed expert examination for archivist.

Senior archivist may be a person with passed expert examination for archivist, minimum five years of work experience in performing expert tasks at the position of archivist (and/or conservator in archive activity) following the passed expert examination.

An archive advisor may be a person who passed expert examination for archivist, recognized title of senior archivist and minimum ten years of work in the archive profession and who according to their professional qualifications may perform the most complex tasks of archive profession.

Article 67 - Interns

In order to acquire necessary expert knowledge for independent performing of tasks of archive technician, senior technician and archivist, interns shall undergo the one-year internship practice.

No later than one-year following the expiry of internship practice, the interns shall be obliged to enter expert examination.

Interns who fail to pass the expert examination, shall have their employment in the archive terminated following the expiry of the deadline set for passing the expert examination.

Article 68 - Expert Examination

Interns and expert archive staff without passed expert examination shall enter the expert examination according to the program and rules on entering expert examination adopted by the Ministry of Culture at the proposal of the Archive.

Expert examination shall be organized by the Archive.

Expert examination shall be carried out before a commission appointed by the Archive Management body out of prominent experts of appropriate profession following the obtaining of the opinion of the Ministry of Culture.

Alternative to paragraph 3: Commission members conducting expert examinations of

archive staff shall be appointed by the Ministry of Culture.

The amount of fee for entering the expert examination and/or a part of expert examination shall be determined by the decision of the Ministry of Culture at the proposal of the Archive.

Article 69 - Entering a Part of Expert Examination

Persons who acquired higher qualifications while performing tasks and jobs in the archive activity may perform the tasks requiring those qualifications if they pass a part of appropriate expert examination.

Persons who passed the expert examination while performing jobs and tasks out of archive activity may perform jobs and tasks of the archive activity under condition that within two years from the day of their employment they pass a part of the expert examination.

Persons under paragraph 2 of this Article who fail to pass a part of the expert examination within two years shall have their employment terminated

Article 70 - Persons Who Are Not Entering the Expert Examination

Persons who acquired Master's or Doctoral degree in the archival activity shall not enter the expert examination.

Persons who are found on jobs and tasks of the archive activity on the effective date of this Law and have more than 15 years of experience in the activity shall not enter the expert examination.

Article 71 - Expert Examination for Staff of Other Professions

The same regulations that govern expert examination in their professions shall apply to expert staff of other professions and titles employed in the archive on tasks of protection of the archival material with regard to passing of expert examinations.

Until the adoption of regulations under paragraph 1 of this Article, such staff shall pass special part of archive expert examination before a commission for archival expert examinations.

In accordance with our previous comments, we are of the view that these stringent provisions should not be applied to privately-held archival material.

We also note that these provisions are extremely prescriptive and would, if implemented, apply a far more controlling regime to archival experts than most countries apply to even the medical or legal professions. In some cases, the prescriptions verge on the ridiculous. For example, the requirement to take an expert examination is waived only for those with 15 years of experience whereas Article 73 provides that the Director need only have 10 years of experience. The provisions relating to termination of employment are likely to breach employment laws.

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Recommendations:

- The articles outlined above should only apply to public archives.
- They should, even in relation to public archives, be replaced by a simple system of accreditation for an 'archivist', based on one central examination. Promotion to different levels of employment within that specialisation should be left to the discretion of archive directors and management.

4.9. Organisation and Management

Article 72 - General Provision

Organization and management of archives shall be closely governed by the By-law and other general acts of archives in compliance with the Law and the Foundation Charter.

Article 73 - Director

A person with university degree, passed expert examination for an archivist and meeting other conditions stipulated by the By-law or the Foundation Charter may be appointed to the position of Archive Director.

Notwithstanding provisions of this Article, a person who has not passed an expert examination for an archivist but is a well-known and recognized expert in the field of culture and science and has minimum ten years of work experience may be appointed Director.

A Director of an archive shall be appointed by the founder and/or the Government of the Republic of Montenegro in case of the Archive.

A Director shall be appointed to the 4 years term and can be re-elected one more time

Article 75 - Approval to By-law

The Government of the Republic of Montenegro shall give approval to provisions of the Archive By-law referring to the archive operations as well as to the conditions and manner of appointment and removal of Director.

Approval to provisions of By-laws of other archives referring to organization of operations and conditions and manner of appointment and removal of Director shall be given by the Parliament of the municipality on the territory of which the headquarters of the archive are located.

Article 76 - Expert Council

Archives shall have the Expert Council.

The Expert Council shall discuss expert issues of archive operations, give an opinion to the Director and proposals with regard to organization of work and conditions for development of archive activity and perform other expert tasks in accordance with the archive By-law.

The structure of the Expert Council shall be established by the archive By-law.

In the archive that employees up to five expert staff, all of them shall constitute the Expert Council.

Article 72 provides very open-ended authorisation for the adoption of regulations concerning the organisation and management of archives. The draft Law should instead set out broad rules which these regulations can elaborate upon.

Articles 73-76 set out very stringent organisational rules which should not be imposed on private archives. Consideration should be given to providing for more flexibility regarding the director; it is to be assumed that those responsible will hire an appropriately qualified person even in the absence of rigid legal rules.

Recommendations:

- Articles 73-76 should not apply to privately-held archival material.
- Consideration should be given to removing the rigid rules relating to the qualifications of the Director.

4.10. Supervision

Article 77 - General provision

Management supervision over operations of state archives shall be performed by the Ministry of Culture.

The Archive shall perform expert supervision of operations of regional state archives and expert supervision over the Archive shall be performed by the Ministry of Culture.

Management supervision over operations of other archives shall be performed by the Archive.

In line with our recommendations in Sections 4.1 and 4.3.1, Article 77 should state that only archives held by or on behalf of a public body, as well as those private archives judged to be of significant cultural or scientific value, fall under the supervision of the State Archive.

4.11. Penalty Provisions

Article 78

A fine ranging from EUR___ to EUR ___ shall be imposed for an offence against a legal entity:

- If it fails to mark and date registry material or fails to keep archive book,
- If it fails to protect registry material in the organized and safe conditions based on

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measures prescribed by the competent archive or if it fails to classify and archive registry material;

- If in accordance with the Decree on office operations and instructions by the competent archive it fails to determine the list of categories of registry material with deadlines for keeping it within 30 days as of the day of receipt of the instruction by the competent archive or if it fails to determine the manner of protection and use of data and documents created in the process of automatic data processing;
- If it fails to keep the archival material as the entirety and/or as the archival fund and /or if it divides it;
- If it does not allow authorized person conducting supervision and/or archival inspector to have an insight into condition of the registry material and archival material in order to determine facts and circumstances of interest for performing supervision as well as to take statements from responsible and official persons in charge of the archival material and registry material;
- If it fails to inform the competent archive on any change of the condition of the registry material or if it fails to act in accordance with deadlines and findings ordered by the competent archive by minutes or decision.
- If as a legal successor of another legal entity fails to take over or keep in accordance with provisions of this Law its archival material and registry material;
- If as a legal successor and/or bankruptcy administrator fails to perform transfer of selected, arranged and listed archival material in accordance with the agreement with the competent archive, but no later than within a year as of the day of repeal and /or cessation of operations of the legal entity;
- If as a producer, independently or in cooperation with the producer whose head office and /or residence is not on the territory of the Republic of Montenegro, of the film meant for public presentation, feature, animated or documentary, long feature film or short film, regardless of the type of carrier on which it is recorded, fails to submit one unused copy of the produced film with appropriate documentation to the Film library in the first year of the film presentation;
- If as a company and/or another legal entity that imports film for public presentation within 30 days following the expiry of the film license fails to submit the best copy of the film to the Film library;
- If a film producer fails to submit the original negative and tone-negative to the Film library no later than a year following the expiry of the film production, if it does not meet technical conditions for keeping film material under custody in accordance with this Law and regulations brought pursuant to it;
- If as a producer following the expiry of deadline of 10 years as of the day of the film production fails to submit film, video and television original material produced by himself to the Film library for keeping and has no written approval of the Film library to keep that material,
- If it issues photo-printed (fax) copy of an old archival material without decision on the approval of the competent archive;
- If the owner of archival material in case of immediate danger of damage or destruction fails to perform protection in compliance with the decision of the competent archive.

Article 79

A fine ranging from EUR___ to EUR ___ shall be imposed for an offence against the state archive:

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- If it fails to perform commission audit of the condition of archive funds under its competence minimum once in ten years in compliance with the regulation adopted by the Ministry of Culture;
- If it fails to keep prescribed records, registers and central registers under Article _____;
- If it allows a domestic or foreign citizen to use and/or copy archive and film material from their funds without permit.

Articles 78 and 79 provide for penalties of undefined amounts for some very broadly phrased contraventions of the draft Law. The offences detailed in Article 78 are applicable to any legal entity that contravenes the law while the provisions in Article 79 apply only to the State Archive. In accordance with our recommendations throughout, we suggest that careful consideration be given to the application of penalties to the holders of private archival material.

We are concerned that these provisions represent an overly heavy-handed approach to enforcing the law. Many of the contraventions listed are minor and are probably better addressed informally through positive promotion of professional archiving standards, or through the regular process of supervision by the State Archive.

In some cases, the prohibitions appear to be unnecessary. For example, a failure for any archive to mark and date registry material or to keep an archive book will be punishable with a fine. Bearing in mind the broad definition of ‘archives’, we do not consider that this can be justified. A further category of offences contradicts the principle of openness. Under Article 78, anyone who issues a photocopy of “old archival material” without the authorisation of “the competent archive” will be punished with a fine. Such provisions actively discourage archive employees from releasing even a photocopy of information. This is not in the public interest and cannot be justified. In other cases, these sanctions apply to provisions which we have already criticised, such as the rule requiring original film and video material to be provided to the authorities.

We recommend that all penalty provisions in these two Articles be reconsidered. Penalties should be imposed only for serious contraventions of the law. Examples of more appropriately phrased legislation can be found in other countries. For example, the Netherlands Archives Law only criminalises a refusal of a private body to let the State Archive make a photocopy of public archival material that is in the possession of the private body.⁴⁶ Another legitimate offence would be the offence of altering or destroying public archival material, specifically if done following an access request.⁴⁷

Recommendations:

- The penalty provisions should be reconsidered in their entirety, in accordance with the above.
- Special consideration should be given to the question of applying penalties to

⁴⁶ Article 42, Archiefwet 1995.

⁴⁷ See Article 77 of the United Kingdom’s Freedom of Information Act 2000.

- the holders of private archival material.
- Penalties should be imposed only for serious violations of the law, for example the wilful destruction of archival material.

4.12. Transitional and Final Provisions

Article 80 - Reconciliation of Archive Acts

The existing archives shall reconcile their By-laws, other general acts and their operations with provisions of this Law within six months as of its effective date.

Article 81

- - missing - -

Article 82 - Enabling Acts

Regulations for implementation of this Law shall be brought within 6 months as of the effective date of this Law.

Article 83 - Deadline for Passing the Expert Examination

Persons who have not passed the expert examination prior to the effective date of this Law shall be obliged to pass it within two years as of the effective date of this Law.

Persons who fail to pass the expert examination within the deadline under paragraph 1 of this Article shall have their employment terminated.

Article 84 - Cease of Effect of Previous Regulations

The Law on Archive Activity (Official Gazette of the RM, No. 25/92 and 6/94) shall cease to be valid as of the effective date of this Law.

Article 85 - Effective date

This Law shall come into effect eight days after its publication in the “Official Gazette of RM”.

Article 81 was missing from the electronic copy provided to us. This is probably a drafting error.

We have no comments on the Articles 82, 84 and 85.

The provisions relating to termination of employment in Article 83 are extremely harsh and probably breach generally rules relating to employment standards.