Comments

on the draft

Macedonian Law on Free Access to Information of a Public Character

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ARTICLE 19 · 6-8 Amwell Street · London EC1R 1UQ · United Kingdom
Tel +44 20 7278 9292 · Fax +44 20 7278 7660 · info@article19.org · http://www.article19.org

The following is a concise overview of ARTICLE 19's 12 main concerns in respect of the December 2005 proposal for a Law on Free Access to Information of a Public Character, which currently lies before the Parliament of Macedonia. We have previously commented on three successive versions of the draft, in November 2003, [1] October 2004[2] and April 2005.[3] These earlier Memoranda extensively discuss the scope of Macedonia's international and constitutional obligations in the area of freedom of information and analyse the consistency of the draft therewith. Readers with an interest in these backgrounds are referred to those reports, which can be found on ARTICLE 19's website.[4]

1. The law should contain a clear statement that in the event of a conflict with another law, the Law on Free Access to Information will prevail.

Currently, Article 1(2) states that right to free access to information "shall be exercised in accordance with the present Law and other laws." As we have stressed previously in our 2003, 2004 and 2005 Memoranda, it is a matter of crucial importance that the Law on Free Access to Information takes precedence over any other law in the area of freedom of information. Under the current formulation, secrecy laws such as the Law on Classified Information are bound to override the access law and eventually render it ineffective. The Law on Free Access to Information already has in-built protection against harmful disclosures of information through the exceptions regime of Article 6; this regime is comprehensive and does not need to be supplemented by additional laws. We accordingly recommend amending Article 1(2) to state that in the event of a conflict with such laws, the Law on Free Access to Information shall prevail. We also recommend a review, in the short term, of all laws that conflict with the principle of freedom of information in order to ensure unity in the Macedonian legal system.

2. Urgent consideration should be given to reviving the idea of a 'National Commission for the Protection of the Right to Free Access to Information of a Public Character' ('the Commission'), whose creation was envisaged under previous versions of the law.

Previous drafts of the law envisaged the establishment of an information commission, part of whose powers and responsibilities was to consider complaints from individuals. Such a mechanism would have provided a low-cost and easily accessible avenue of redress for individuals who complain that their right of access to information has been violated. The present draft requires complaints against the non-disclosure of documents to be directed at a 'competent court' (Article 28). This is a lengthy and potentially costly process which not many people are likely to avail themselves of. Possibly the idea of establishing an information commission has been abandoned as a result of the long-standing debate about whether its membership should include civil society representatives. The decision to drop the commission is, however, highly regrettable.

[1] Memorandum on the Macedonian Law on Free Access to Public Information, London, November 2003.
[2] Memorandum on the Proposal for the Adoption of the Law on Free Access to Information of the Former Yugoslav Republic of Macedonia, London, October 2004, available at http://www.article19.org/pdfs/analysis/macedonia-freedom-of-information-oct-2004.pdf.
[3] 16 Recommendations on the Law on Free Access to Information of the Former Yugoslav Republic of Macedonia, London, April 2005.
[4] At http://www.article19.org/publications/law/legal-analyses.html.

Experience across those countries which have adopted a freedom of information law shows that the establishment of a dedicated commission to monitor and supervise implementation tends to greatly improve implementation of the law. Because of their specialised mandate and smaller workload, information commissions can handle complaints far more quickly than the courts, an important advantage given that information is a 'perishable commodity' and delay may make the requested information irrelevant. If needed they can examine files in closed sessions to verify whether the information-holder's concerns about their disclosure are justified, and directly issue an order for disclosure in appropriate cases. The law should specify that plaintiffs before the Commission need not be represented by a lawyer, further reducing the costs of an appeal.

As importantly, an information commission can play a significant role in educating public officials and members of the public about the existence and implications of the Law on Free Access to Information, and advising the government on ways to improve implementation. It can organise and run training programmes for public officials, or advise public bodies in putting together their own programmes, and by issuing annual reports raise concerns regarding the implementation of the law and providing a focus point for periodic debate.

We therefore recommended that the law should require the establishment of an information commission(er) or an information 'ombudsman', with powers to consider complaints, issue binding decisions and make general recommendations for best practice on freedom of information.

3. The definition of "information of a public character" in Article 3 should be simplified.

The definition should make it clear that any document (as defined in the same Article) held by a public body, whether or not that document was created by that body, is subject to the law. We note that the choice of terms here is unfortunate: the words "… of a public character" appear to imply that there also exists information of a 'non-public character', outside the reach of the law. The whole purpose of the Law on Free Access to Information is, of course, to decide whether information can be made public or not, and this question should not appear to be answered by the terminology used in Article 3. For the same reason, we recommend that consideration be given to removing the phrase "of a public character" from the title of the law.

4. Article 4 should not create a distinction between foreign and domestic persons.

Under international law, the right to access information should be accorded to any person, without regard to frontiers and without discrimination on the basis of nationality. Recent freedom of information laws adopted in other European countries, such as the United Kingdom and Montenegro, respect this principle. Other countries with long-established freedom of information laws, such as the United States, also respect this principle.

5. Article 5 should make it clear that the annually published list of information-holders is only indicative.

Public bodies which do not appear on the list should nevertheless be subject to the Law on Free Access to Information if they fall within the definition of "information-holder" given in Article 3.

6. The exceptions regime in Article 6 should be urgently revised.

Article 6(3) contains the fundamental 'public interest test', which is arguably the most important provision in any freedom of information law. The test holds that request for information should always be granted*, unless* disclosure of the information would cause more harm to the public interest than non-disclosure. Given that this test governs application of the exceptions recognised by the Law on Free Access to Information, it should logically precede rather than follow the list of exceptions, which is currently found in paragraph 1 of Article 6. In the current formulation, the public interest test appears as an 'afterthought' which may easily be overlooked.

Article 6(1) is problematic in a number of respects. In the first place, it permits information-holders to refuse access to information "…in accordance with the law…" While perhaps not intended as such, this phrase could easily be read as a reference to extraneous laws, such as the Law on Classified Information, and should therefore be amended, perhaps as follows: '…in accordance with the present law'.

Second, Article 6 fails to incorporate a functioning 'harm test' in relation to material whose disclosure may be refused. Rather than providing that disclosure may be refused in cases when it would actually harm a protected interest, such as privacy or national security, it exempts entire *categories* of information from disclosure, regardless of the actual risk posed. For example, items (1) and (3) exempt "information that, under the law, represents classified information of appropriate degree of secrecy" and "information on archive working having been identified as confidential." The fact that no reference is made to any danger to the public interest opens the possibility that information-holders will be able to avoid the operation of the Law on Free Access to Information simply by reclassifying information at a higher level of secrecy or defining it as a confidential archive. We accordingly strongly recommend that items (1) and (3) be deleted. We also recommend that the opening line of paragraph 1 be reworded to something along the following lines: "Information holders may reject a request to access information if granting the request would seriously endanger one of the following interests: …"

7. Two new items should be added to Article 10.

In addition to the items listed in Article 10, information-holders should be required to publish information on their international organisation and structure, and on how citizens can complain or appeal against decisions taken by the body, including decisions to refuse access to information. In addition, agencies should be required to progressively make materials available through the Internet. This is a low-cost method of publication which, particularly in the longer run, will greatly enhance transparency and openness in public life. As a start, public bodies should be required to provide on-line registers of information, indicating the kind of information held by the body concerned. The information on Article 10 should also be provided on-line, and, over time, the on-line register could grow to provide live links to documents whose disclosure poses no harm to a protected interest under Article 6.

8. Article 13(1) should not refer back to Article 6(1), but to Article 6 as a whole.

In its current formulation, Article 13(1) appears to suggest that public officials can refuse access to information without applying the public interest test defined in Article 6(3).

9. Article 17(1) should specify a clear timeframe.

Currently, Article 17(1) does not specify how much time information-holders may allow themselves to request clarification from an information-requester when his or her request is incomplete. This omission should be corrected; a timeframe of between 5 – 7 working days seems appropriate.

10. The time windows within which an appeal can be lodged against a decision to refuse access to information should be extended.

Under Article 28(1), an information-requester may only appeal against a denial of access to information within 15 days of receipt of the decision. This period is unreasonably short and will minimise the possibility of citizens to challenge unfounded refusals. Given the complexity of the decision whether to institute legal proceedings, a period of between 4 and 8 months would seem more reasonable. The eight-day window mentioned in Article 22(3) for lodging an appeal with the courts is likewise too short and should be extended.

11. The criminal provision of Article 33 poses an unreasonable risk to civil servants and should be softened.

Article 33 appears to be unduly threatening towards public officials: they risk criminal sanctions for each and every failure to apply the Law on Free Access to Information correctly. We suggest to qualify this provision somewhat; fines should only be imposed if the official's decision was manifestly unfounded or taken in bad faith.

In addition, like Article 13(1), Article 33 refers back to Article 6(1) and thereby appears to suggest that the public interest test of Article 6(3) is not relevant to the assessment whether a public official is punishable for releasing or withholding information in contravention of the law. This oversight should be corrected.

12. A provision protecting whistleblowers should be added to the law.

Whistleblowers are civil servants who, in good faith, release information that reveals official wrongdoing or serious threats to the health and safety of the public or the natural environment. Protection of whistleblowers is an important part of any effective freedom of information regime. ARTICLE 19 has repeatedly recommended the inclusion of such a provision. Article 47 of the ARTICLE 19 Model Freedom of Information Law provides an example of how protection of whistleblowers might be formulated:

1. No one may be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment obligation, for releasing information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment.
2. For purposes of sub-section (1), wrongdoing includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body.