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ANALYSIS

LAW ON FREE ACCESS TO INFORMATION OF MONTENEGRO

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LAW ON FREE ACCESS TO INFORMATION OF MONTENEGRO

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Summary

Access Info Europe (AIE) has conducted an analysis of the Law on Free Access to Information in Montenegro, evaluating its alignment with the international standards that the country is bound to uphold, including the Council of Europe Convention on Access to Official Documents, General Comment Number 34 of the United National Human Rights Committee, rulings of the European Court of Human Rights, EU's Regulation 1049/2001 and the jurisprudence of the Court of Justice of the European Union.

The Montenegrin Law on Free Access to Information is undermined by some serious limitations on the right to request information, limitations which have a particularly negative impact on the ability of civic actors to fulfil their role as public watchdogs, and hence limitations that run directly counter to international human rights standards and to the jurisprudence of the European Court of Human Rights.

A huge problem with the Montenegrin Law on Free Access to Information is the newly added Article 1, which contains a series of class exclusions which are out of line with and unacceptable under international standards, as well as going against the Constitution. In the first paragraph, Article 1 simply establishes that the right of access and reuse shall be under this Law. Then, very bizarrely, Article 1 contradicts itself by saying that certain information shall not fall under the scope of the law, and defers immediately to other norms.

Broad discretion given to public authorities to determine secrecy (Article 16) and the lack of a sufficiently broad public interest test (Article 17) are contrary to the practices well established by the Court of Justice of the European Union. According to the Court, a refusal for access must "explain how access to that document could specifically and actually undermine the interest protected by the exception" and such harm must be "reasonably foreseeable and not purely hypothetical". The Court has further stressed that the "mere fact that a document concerns an interest protected by an exception is not of itself sufficient to justify application of that exception".

The public interest test in Montenegro is much more limited than that is established by international standards and practice from the European Union and countries around Europe and globally.

Another concern in the 2017 version of the Law on Free Access to Information, is the introduction of exclusions related to business secrets and intellectual property. According to international standards, protection of commercial and business interests is a legitimate exception but it must be subject to the harm and public interest test. Finally, tracking the activities of public bodies and their relationships (financial and other) with private bodies is clearly in the public interest. Also, intellectual property is not, per se, a ground for refusing access, even if it may limit use/reuse of certain information.

Having in mind all above, we strongly recommend changes of the Law on Free Access to Information, in order to harmonize the Law with international standards.

Legal Analysis

Montenegro: Law on Free Access to Information 2017

Montenegro has had an access to information law in force since 2005, with the current law being based on a version adopted in 2012, and amended on 9 May 2017. This analysis is based on the consolidated text of the current version of the law as translated into English.

The analysis has been conducted in line with international standards that Montenegro is bound to uphold.

These international standards include in particularly the Council of Europe Convention on Access to Official Documents, which it signed on 18 June 2019 and ratified on 23 January 2012 (Treaty 205, Tromsø) and General Comment Number 34 of the United National Human Rights Committee (July 2011).

These standards also include the rulings of the European Court of Human Rights, in particular jurisprudence in the case *Youth Initiative for Human Rights v. Serbia* (June 2013) which concerned the refusal of the Serbian intelligence agency to provide the appellant civil society organisation with information about electronic surveillance, even after it had been ordered to do so by the Serbian Information Commissioner.

Importantly, in this case, the Court confirmed the existence of a right of access to information and cited General Comment No. 34 of the UN Human Rights Committee as well as declarations by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression, and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression, which also confirm the existence and scope of the right of access to information. Hence all of these references are standards to which Montenegro must aspire in its access to information law as well as in complying with the right of access to information in practice.

A further ruling of the European Court of Human Rights that is relevant for Montenegro is the ruling of 8 November 2016 in the case of *Magyar Helsinki Bizottság v. Hungary.* In this landmark judgment, the Grand Chamber of the European Court of Human Rights found that the Hungarian authorities' refusal to provide the Hungarian Helsinki Committee (Magyar Helsinki Bizottság) with information relating to the work of ex officio defence counsels was in breach of Article 10 of the European Convention on Human Rights (ECHR), which guarantees the right to freedom of expression.

The Court noted that the refusal impeded the Hungarian Helsinki Committee's capacity to contribute to discussion on an issue of obvious public interest (the functioning of the judicial system). The Grand judgment is of particular relevance in terms of the obligations of countries to ensure that civil society (including journalists, bloggers, academics, and NGOs) can make full use of the right of access to public information in order to conduct investigations as part of their role as "public watchdogs".

The European Union transparency standards are also relevant, including the EU's own access to documents regulation (Regulation 1049/2001) and the jurisprudence of the Court of Justice of the European Union, which we have referenced in this analysis where relevant. The EU treaties make clear the importance of openness in decision making as part of ensuring good governance and participation in democratic life.

1. Overview: A strong law with some serious restrictions

The Montenegrin Law on Free Access to Information is, overall, a very strong access to information law with many positive features that comply with international standards. It is however undermined by some serious limitations on the right to request information, limitations which have a particularly negative impact on the ability of civic actors to fulfil their role as public watchdogs, and hence limitations that run directly counter to international human rights standards and to the jurisprudence of the European Court of Human Rights.

Thanks to the drafting history and the previous versions of the law, which were approved as parts of processes also involving civil society, international experts, and in-

ternational organisations, and which aspired to EU standards, the Montenegrin Law on Free Access to Information is, overall, a strong instrument with plenty of positive provisions meeting standards such as those set in the Convention on Access to Official Documents.

The law opens with some articles that establish the principles, setting out the standards to be adhered to in the law (including international standards, Article 2) and noting the benefits of transparency, which results in the efficiency, effectiveness, accountability, integrity, and legitimacy of public bodies (Article 4). It is positive to have these reminders of the benefits of the right of access to information in the law.

The scope of the law both is comprehensive in terms of to which bodies it applies, being a comprehensive list of public authorities, as well as in terms of who may request information (all legal and natural persons).

The request mechanisms are generally clear and strong, although some improvements could be made in terms of the time frames for various procedures as well as defining procedures for consultations with third parties (See Section 4 on Procedural Considerations).

The law is good on access to data in open formats, with specific sections on that, although we are aware of problems with providing access in the requested format.

The provisions on reuse are integrated into the law to bring it into line with European Union standards. There are concerns from experts on the right of access to information about the way in the EU's reuse rule can interfere negatively with the right of access to information, including causing confusion as to whether the use of information constitutes reuse. This is something to which great attentions should be paid, to ensure that the reuse provisions never interfere with the right to obtain and make use of information based on the right of access to information. We note these concerns in relation to the limitations regime (Section 4) along with a recommendation that comparative law and jurisprudence be collected and studies.

The oversight mechanisms in the form of the Agency is reasonably well established, although here also we have recommended some strengthening and/or clarity of the role of the Agency in Section 6 below. [Note: this draft still pending review of the relevant law for the Data Protection Agency to confirm some questions on appointment, independence, and budget of the Agency].

There is also a strong sanctions regime, something essential to ensure that a law works well in practice. There could also be more measures requiring promotion of the right of access to information and creation of incentives as well as sanctions.

What is completely unacceptable and reviewed in more detail below is that a series of general, broad, and vague, exclusions are added in Article 1. These are out of out of line with international standards and seriously limit the scope of the law, including potentially in areas of importance such as following judicial procedures, which could include investigations into corruption, and in obtaining information about relations with other states and international organisations. The rather remarkable concept of "information that must be kept secret" risks undermining the whole Law on Free Access to Information and makes a mockery of other provisions of the law, of the Montenegrin Constitutional provision on access to information, and of the international standards that Montenegro is bound to uphold.

2. Scope: A comprehensive law … with concerning exclusions

The Constitution of Montenegro at Article 51 makes clear that "Everyone shall have the right to access information held by the state authorities and organizations exercising public authority".

The only limitations on this right are those that can be justified on grounds of "protection of life; public health; morality and privacy; carrying of criminal proceedings; security and defense of Montenegro; foreign, monetary and economic policy".

To be consistent with the Constitution as well as international standards, the Law on Free Access to Information has to establish a presumption that all information held by all public can be the subject of an information request.

The Scope of the Law on Free Access to Information, as defined in Article 9, does this, being wide in terms of the public bodies to which it applies, complying with international standards. Specifically, the legislative, executive, judicial, and administrative bodies, as well as to local self-governing bodies, local government and to private bodies co-founded or majority owned by the state or a local self-government. This is understood to include constitutional bodies, bringing all relevant public powers under the scope of the law. In addition, the law applies to legal entities whose work is mostly funded from public revenues, as well as a natural person, entrepreneur or legal entity that exercise public authority or manage public funds.

Such a broad definition is consistent with the UN Human Rights Committee requirement that all public bodies as well as relevant private bodies have to respect the right of access to information, given that it is linked to and an inherent part of the fundamental rights to freedom of opinion and expression.

A huge problem with the Montenegrin Law on Free Access to Information is the newly added Article 1, which contains a series of class exclusions which are out of line with and unacceptable under international standards, as well as going against the Constitution.

In the first paragraph, Article 1 simply establishes that the right of access and reuse shall be under this Law. Then, very bizarrely, Article 1 contradicts itself by saying that certain information shall not fall under the scope of the law, and defers immediately to other norms.

The first of these exclusions is for information about judicial proceedings which, the exclusion states, shall exempt information about parties in judicial, administrative, and other procedures where access to information about ("from" in the translation of the law) is prescribed by regulation. There is no mention which regulation this is referring to, so it opens to the door to any existing or future regulation – not even a law – protecting information about judicial and other proceedings.

Montenegro Law on Free Access to Information – Article 1

Right to access and reuse information held by public authority bodies shall be exercised in a manner and in accordance with a procedure specified by this Law.

The provisions of this law shall not apply to:

1. parties in judicial, administrative and other procedures prescribed by the law, to whom access to information from these proceedings is prescribed by regulation;
2. information that must be kept secret, in accordance with the law regulating the field of classified information;
3. information representing classified information held by international organizations or other states, as well as classified information by the authorities which originate or are exchanged in cooperation with international organizations or other states.

There is absolutely no basis in international and European standards nor derived from the Montenegrin Constitution for this exclusion from the right of access to information. The Council of Europe Convention on Access to Official Documents permits exceptions for protecting "the prevention, investigation and prosecution of criminal activities" and for "disciplinary investigations" and for "the equality of parties in court proceedings and the effective administration of justice". All of these legitimate exceptions must be incorporated into the section on limitations (Article 14 in the case of the current Law on Free Access to Information) and must but subject to both harm and public interest tests. A request can always be made for such information and then there should be a case-by-case evaluation as to whether the requested information / documents can be released.

The same concern applies to the next exclusion, which state that no request can be made for "information that must be kept secret, in accordance with the law regulating the field of classified information". This is a nonsensical provision as the Montenegrin Constitution, international standards, and even this and other provisions of the Law on Free Access to Information do not admit the concept of "information that must be kept secret". It is acceptable to classify information but such classification must always be reviewed pursuant to a request for the information, with the harm and public interest being evaluated. Comparative jurisprudence (including the jurisprudence of the Court of Justice of the European Union) also limits the use of general presumptions of non-disclosure.

The third exclusion is likewise out of line with international standards, to exclude wholesale requests for information emanating from international organizations or other states, whether or not it is classified. What should be done is to have a protocol for consultation with other states when a request comes in, in just the same way that strengthened mechanisms for consultation with third parties inside Montenegro should be established by this law. This should be done in the mechanisms for processing requests, with timelines defined (See Section 3 below). Clearly if information has been well classified by other states, it may well be determined that the information cannot be disclosed in Montenegro either, but to be in line with international standards, this simply has to be a case-by-case decision-making process.

Summary of recommendations:

- Delete all but the first paragraph of Article 1, so that the Article simply and clearly establishes that this law prevails on access to information issues;

- Ensure that the Law on Free Access to Information makes clear that every request for information, be it information previously classified or not, previously refused or not, must be taken on a case-by-case basis and there must be an evaluation done at the time that the request is received;
- Ensure that the Law on Free Access to Information includes clear provisions on consultations with third parties and also establishes that the body holding the information bears the burden of carrying out the balancing test (harm and public interest) and deciding on release or not of all or parts of the requested information.

3. Requesters, requests and procedural considerations

The Law on Free Access to Information meets international standards in that it establishes clearly (Article 3) that any natural or legal person, shall be able to access information and that there shall be no discrimination in the way that applicants are treated (Article 6). It is important to have this no-discrimination clause explicitly in the law so that those who are discriminated against can later bring complaints.

The request process in Article 19 is clear and it is also positive that the law provides that public officials shall provide assistance to requesters (Article 20) and that they shall clarify the requests if needs be (Article 20).

Nevertheless, the provisions on processing requests are a bit disjointed and fail to capture some important steps. There is no requirement to issue acknowledgements. This is something that a law or regulation or guidance from the Agency should provide for as it's clearly a best practice internationally and is incorporated in many access to information laws (including the EU rules on access to documents). The acknowledgement should provide information on what do to if there is no further communication about the request (administrative silence) and how to appeal.

There should be a time limit for the acknowledgement of receipt of the request (Access Info recommends 24 or 48 hours, being 1 or 2 working days). If a request is not clear, the request for clarification should come in this initial period: it's not acceptable to wait until 14 working days have elapsed and then attempt to clarify the request.

In this context, there seems no point to have Article 28, which provides that a public body shall reject the request for access to information by a conclusion if the applicant does not act in accordance with Article 20, Paragraph 2 of this Law. This article could be merged with the other articles on refusing requests and there should be a requirement to inform the requester of his or her rights, given that sometimes requests that are clear are rejected supposedly for lack of clarity. In any case, it must be clarified that there is a right to appeal such denials to the Agency.

There should also be specific language on what a body should do if it neither holds the information nor knows who does. Essentially it should inform the requester that the information is not held and in that notice inform about the appeals process.

The provisions on timeframes need to be better clarified, for example, the time frames for consulting with third parties.

A series of timeframes and procedures should be established for other things that might need to be done when a request comes in. In particular, there needs to be a procedure for consulting with third parties (other public authorities, private bodies, and private individuals, as well as other states, the EU, and international organisations) when information is requested that affects those actors and their legitimate interests and/or when the information might harm international relations. It should be clear in the law that such consultation does not give the third parties a right of veto over the release of the information, but they can present considerations which can be taken into account, and should have access to an appeals procedure (to the Agency and/or the Courts) to challenge the proposed disclosure, with clear time frames established for that process.

Last but not least with respect to timeframes, the law should expressly stipulate that requests should be answered as soon as possible, and that the 15 working day time frame is an absolute maximum.

Summary of recommendations:

- Require acknowledgements to be issued immediately upon receipt of a request and that the acknowledgment include details on how to appeal;
- For every decision or action that the public body makes there should be clear requirement to inform the requester within a specific timeframe and to notify the requester of his or her rights;
- Establish procedures for consulting with third parties which might be affected by the release of information, making clear that the final decision rests with the entity that holds the information;
- The law should state that the 15 working day timeframe is the absolute maximum, and that requests should be answered as soon as possible.

4. Exceptions: problem of classified information

As noted above, even if the Montenegrin Law on Free Access to Information is overall very strong, it is seriously undermined by the provisions on limitations, both in the exclusion of certain classes of information and in the way the section on exceptions are structured.

It is noted that the Constitution provides that "The right to access to information may be limited if this is in the interest of: the protection of life; public health; morality and privacy; carrying of criminal proceedings; security and defense of Montenegro; foreign, monetary and economic policy."

Montenegro has also signed and ratified the Council of Europe Convention on Access to Official Documents which establishes a finite set of limitations. So the Law on Free Access to Information must be consistent with the Constitution and the international treaty commitments and cannot limit the right beyond them. To do otherwise would also risk a violation of Article 10 of the European Convention on Human Rights, on freedom of expression, which has been held by the European Court of Human Rights also to protect the right of access to information.

To evaluate the limitations in the Law on Free Access to Information it is necessary to review the interplay between several articles of the law. Again, here, the devil is in the detail, as what appears at first sight to be acceptable, is actually, upon analysis, out of line with the exceptions permitted by the Constitution and international standards.

So, whilst the provisions in Article 14 of the Law are in in line with international standards (see comments below), the bigger problem is then the broad discretion given to public authorities to determine secrecy (Article 16) and the lack of a sufficiently broad public interest test (Article 17).

The main problem with Article 16 is that it fails to establish clear guidelines for the public interest test. Rather it confuses the test, referring on the one hand to who determines the "secrecy" of a document – not the same thing at all as a harm test – and also adding an absolute exclusion with no harm test for information "specified as classified by another state or international organization".

This Article is wrongheaded at a number of levels. First of all, the international standards make clear that the public authority that is refusing access has to demonstrate that harm would or would be likely to cause a specified harm to an interest that it is legitimate to protect. Such harm cannot be merely to the concept of secrecy, but to one of the interests established by international standards.

Limitations in Council of Europe Convention on Access to Official Documents

Article 3 – Possible limitations to access to official documents

1. Each Party may limit the right of access to official documents. Limitations shall be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:
   a. national security, defence and international relations;
   b. public safety;
   c. the prevention, investigation and prosecution of criminal activities;
   d. disciplinary investigations;
   e. inspection, control and supervision by public authorities;
   f. privacy and other legitimate private interests;
   g. commercial and other economic interests;
   h. the economic, monetary and exchange rate policies of the State;
   i. the equality of parties in court proceedings and the effective administration of justice;
   j. environment; or
   k. the deliberations within or between public authorities concerning the examination of a matter.

All of these must be subject to harm and public interest tests.

Next Article 16 fails to give guidance on the high standard that must be met for demonstrating harm. As has been well established by the Court of Justice of the European Union, a refusal for access must, in "explain how access to that document could specifically and actually undermine the interest protected by the exception" and that such harm must be "reasonably foreseeable and not purely hypothetical". The Court has further stressed that the "mere fact that a document concerns an interest protected by an exception is not of itself sufficient to justify application of that exception".

(Key judgments here include those of *Sweden v MyTravel and Commission*, C 506/08 P, EU:C:2011:496, paragraph 76; and *Council v Access Info Europe. being Verein fürKonsumenteninformation v Commission*, T 2/03, EU:T:2005:125, paragraph 69; *Toland v Parliament*, T 471/08, EU:T:2011:252, paragraph 29, and *Herbert Smith Freehills v Council*, T 710/14, EU:T:2016:494, paragraph 32).

What Article 16 should do is make clear that public bodies have to demonstrate that harm is foreseeable and probable. Indeed, comparative standards and jurisprudence require that in most cases there be "serious" or "considerable" harm to the protected interest, not just some kind of minimal damage or inconvenience.

This situation is further compounded by Article 15, which speaks about the time duration of limitations with absolutely no reference to the harm test in Article 16. Given that Article 15 precedes Article 16, it appears that the consideration of harm should only apply after the application of a series of time limits, many of which appear to be long and definitive. These time limits include for privacy, with regard to the law on confidentiality of data for the sake of security, defence, foreign, monetary and economic policy of Montenegro, protection of criminal of investigations, and even the creation of "official documents", a term not established in the definitions section of the law and only slipped in surreptitiously in Article 14, along with the protection of trade and other economic interests, as well as intellectual property rights.

These time limits are not necessary in the context of harm and public interest tests given that the only consideration should be whether the information would cause harm to a protected interest if disclosed at the moment in time when the request is made, and whether, even if harm would or would be highly likely to occur, there is not any overriding public interest in knowing the information. As such the refusal might be temporal, for example, a refusal to provide access to the questions for an upcoming exam now, would no longer apply once students have sat the exam. Public authorities should be required to indicate to the requester when circumstances might change.

With a highly inadequate harm test in the balance, the law then refers to the public interest test. At first sight Article 17 appears to establish a strong public interest test, establishing a series of conditions under which the public interest is deemed always to prevail.

These conditions are when the information would reveal:

1. corruption, non-compliance with regulations, unlawful use of public funds or abuse of authority in the exercise of public office;
2. suspicion that a criminal offense has been committed or there is a reason for revoking the court decision;
3. unlawfully obtaining or spending funds from public revenues;
4. threat to public security;
5. threat to life;
6. threat to public health;
7. threat to the environment.

The problem with this public interest test is that it in fact reduces what should be a broad presumption of openness to only more extreme cases in which the publication of the information requested would serve a specific goal, albeit some very important goals in a democratic society.

What is entirely absent from this list are broad considerations of the role of information in public debate, in permitting participation in decision making, and in delivering accountability for the actions of elected politicians and public officials.

The Court of Justice of the European Union has made clear that the role of transparency in a democratic society goes far beyond oversight of illegal activity. There must be general considerations related to participation and accountability: "If citizens are to be able to exercise their democratic rights they must be in a position to follow in detail the decision-making process" in line with the requirement in the EU Treaties (Article 10(3) TEU) that every citizen is to have the right to participate in the democratic life of the Union and that decisions are to be taken as openly and as closely as possible to the citizen.

When it comes to ongoing processes, the Court of Justice of the European Union is clear that a process does not have to be finished, nor documents made "official" before the public interest kicks in. Indeed, even if documents may change during the course of a process, the Court has confirmed on more than one occasion that "Public opinion is perfectly capable of understanding that the author of a proposal is likely to amend its content subsequently" (*Access Info Europe v Council,* T 233/09, EU:T:2011:105, paragraph 69, and *De Capitani v European Parliament,* Case T 540/15, ECLI:EU:T:2018:167).

What is clear here is that the public interest test in Montenegro is much more limited than that established by international standards and practice from the European Union and countries around Europe and globally.

Furthermore, Article 29 on rejection of requests, adds a series of further conditions that may justify denial of access. Whilst most of these refer to information destined for reuse, given that the Law on Free Access to Information blurs the lines between general access to information and access for reuse, these are also of concern.

Provisions which are insufficiently clearly defined include rejection on grounds of drafting new information (without being clear if extraction from existing information sources, such as pulling some data from a data base, is covered here), rejection of information that "was not drafted within the framework of activities of the authorities from which this information is sought" (which undermines the principle that the information merely has to be held by the public authority). There is also, suddenly, a referral to "statistically confidential information, in accordance with the law governing official statistics" and the criterion of when "to access this information, the applicant must prove the existence of a special legal interest" with no further reference as to the legal basis for such a justification.

There is further a rather arbitrary exclusion of access when "the applicant was granted access to the same information during last six months," without any clarity as to what such an exclusion serves to achieve or why it is necessary. Presumably in this case the information would not have changed during that period, although this is not clearly stated, and is not something the applicant can know unless and until he or she is provided with the information. While there can be, under international standards, provisions on vexatious requests, this language neither meets that standard nor serves a clear purpose.

Any grounds for refusal should not appear in Article 29 but in previous articles on the limitations. What Article 29 should do is establish the procedure for issuing decisions, ensuring that when access is denied, the denial clearly states which limitation is the basis for such a refusal, how it is justified, as well as demonstrating that the harm and public interest tests have been carried out. Furthermore, the refusal notice should inform the requester of his or her rights, and the appeal options, along with timeframes and other relevant information.

Another concern in the 2017 version of the Law on Free Access to Information, is the introduction of exclusions related to business secrets and intellectual property.

With relation to business secrets, it needs to be made clear that these are only limited secrets really necessary to protect the interests of private commercial actors. The EU has a definition of "trade secrets" in the Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, which has to be information that meets all of the following requirements:

a. it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
b. it has commercial value because it is secret;
c. it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

Even then, there may be some information which public bodies hold about private bodies and which they should disclose because of an overriding public interest.

What is clear from comparative law and practice is that public bodies may not claim business or commercial secrets to protect their supposed commercial interests. Public bodies are, by definition, acting in the public interest and do not have commercial interests to protect.

With respect to intellectual property, this is not a legitimate exception to access to information per se, and hence it is not included as an exception in the Council of Europe Convention on Access to Official Documents.

What is clear is that the current standards on access to information have a finite set of limitations. Hence, while intellectual property may place some limits on reuse of information, they cannot be grounds for not providing information. For example, Access Info has been provided with documents submitted by lobbyists to the European Commission even though those documents are the intellectual property of the private company that produced them. The relevance of the intellectual property consideration is that there should be limits on how Access Info might use that information (for example, we could not just copy it into a report that we then claim is ours), but our right to know what is contained in information that was part of a decision-making process is unaffected by the copyright. Hence the only grounds for refusing information should be if it would harm a commercial (business) or other legitimate interest and there is no public interest in disclosure of the information. Tracking the activities of public bodies and their relationships (financial and other) with private bodies is clearly in the public interest.

Summary of recommendations:

- Revise Article 14 so that the only limitations in the Montenegrin Law on Free Access to Information are those permitted by international standards;
- Replace the reference to time limits in Article 15 with a clear requirement that when public authorities refuse access they should base this only on

a consideration of harm and public interest and, when the balance tips in favour of non-disclosure, should be required to indicate to the requester when that situation might change;
- Replace Article 16 with a clear requirement that there has to be a foreseeable and probable harm to the protected interest;
- Revise Article 17 so that it is clear that the public interest test is broader than a series of rather more extreme justifications for publication (which maintaining these absolute public interest overrides);
- Revise Article 29 to remove any extraneous limitations and to add clear requirements to motive and justify refusals and in all cases to inform requesters of their rights to appeal and how to go about doing this;
- Revise Article 14 to make clear that protection of commercial and business interests is a legitimate exception but that it must be subject to the harm and public interest test. Intellectual property is not, per se, a ground for refusing access, even if it may limit use/reuse of certain information;
- It is recommended that work be done in Montenegro to gather comparative jurisprudence (Court of Justice of the European Union, European Court of Human Rights, and national courts around Europe), as well as decisions of information commissioners and other relevant comparative information on law and practice and that this be compiled by the Agency and used in trainings of public officials and judges.

5. Proactive Publication and Reuse

The proactive provisions of the Law on Free Access to Information in Article 12 are positive in that they require each public authority to have a website with all basic information that they produce and information about how they work.

In particular, it is positive there is a requirement for publication for information about the production of strategic documents, plans and programs, as well as law proposals. There should also be a guide as to which documents are held.

Documents have to be published within 15 days of their creation / adoption.

There is also an obligation to publish information to which access is granted following information requests.

Where there could be more specificity is to ensure even greater openness of the decision-making process, by requiring additional documents to be published. In particular, there are some classes of documents that it is known are essential to get a full understanding of decision making, and these include: the agendas of senior public officials, minutes of all meetings held related to a particular decision-making process, and copies of contact with and documents received from lobbyists.

More guidance on transparency to ensure that lobbying is fully reported can be found in the International Lobby Regulation Standards (available here: http://lobbyingtransparency.net/).

There could also be stronger requirements to publish key documents that are anti-corruption instruments, such as assets and conflict of interest declarations, on a regular basis.

Another shortcoming of the law, given how it is focused also on reuse, is to establish a comprehensive list of datasets that should be published. There are increasing international standards on which documents, registers, and datasets should be published.

Indeed, in a 2013 decision in a case against Austria (case of Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria) the Court noted that when it came to documents of "considerable public interest" such as, in this case, land records "it [is] striking that none of the Commission's decisions was published, whether in an electronic database or in any other form".

We recommend that Montenegro, either the Agency and/or the Legislator, review the current proactive publication and open data policy and produce a list of documents and datasets that should be available proactively. Clearly for all of these datasets, there should be no restrictions on nor charges for reuse.

When it comes to charging for reuse of public information, Access Info takes a principled position that no information created in the course of the public duties of a public body should ever be charged for, and that there should be no distinction between reuse for commercial or non-commercial purposes. We have serious concerns that rules on the reuse of information risk resulting in cost limitations for access to what should be public information.

We do however recognise the context in which, across the European Union, public bodies do charge for some information, particularly where they have been structured with an economic model which means that they are dependent on the sale of this information. The European Union's rules on reuse are designed to ensure that there are not monopolistic positions in terms of access. Given that the EU does not have specific competence on access to information, it has never had to try to resolve the tension here. This may well change in the future.

In this context, for the present, what we recommend is that the Agency has the power to review the application of charges for the reuse of any information, and to order disclosure without charge when the use / reuse is deemed to be in the public interest. This is particularly true when datasets are being used to permit engagement and participation in public decision making and to hold public bodies to account. In line with the jurisprudence of the European Court of Human Rights, special consideration should be given to the use by CSO and journalists of such information.

In this context we also note that Montenegro is currently an "inactive" member of the Open Government Partnership due to serious and repeated delays in developing an Action Plan. This is most unfortunate. We note that the Open Government Partnership now has 22 members among European Union countries, with others considering membership. Not to be an active member of the OGP is a step away from Brussels and European values. There has been discussion with the OGP at the EU level, with an exploration of how Brussels might engage in a more structured way. The future The benefits of engagement with the Open Government Partnership include exchange of best practices and support in developing a structured open data policy. We believe that this is something that would benefit Montenegro and help it to develop a genuine open government policy, based on transparency, participation, accountability and including structured access to information and open data strategies. We therefore recommend that Montenegro consider reinitiating its full engagement with OGP and making a true commitment to open government.

Summary of recommendations:

- Strengthen obligations to publish information that permits full insight into decision-making processes, including by requiring publication of documents such as the agendas of senior public officials, minutes of all meetings held related to a particular decision-making process, and copies of contact with and documents received from lobbyists;
- Strengthen the requirement to publish information needed to ensure accountability and to guard against corruption, including documents such as such as assets and conflict of interest declarations, which should be updated on a regular basis;
- Establish requirements that key registers and datasets be in the public domain and available free of charge and without licences or other restrictions on use / reuse;
- Establish that requesters can appeal to the Agency (and then the courts) to challenge the charges for reuse of information, and empower the Agency to be able to order the disclosure, free of charge, of any datasets publication of which the Agency finds to be in the public interest;
- Rejoin the Open Government Partnership and as part of that process develop a comprehensive open government policy, with strong pillars of transparency, participation, accountability and open data.

6. Oversight body: independence and classified information

The oversight body for the Law on Free Access to Information is the Agency for the protection of personal data and access to information.

A first concern about the Agency is that it should be more strongly protected from political bias. The Law on Free Access to Information does not provide for this, but we understand that the law setting up the agency stipulates that the agency cannot be directed by political party members. That said, this does not mean that their political history prohibits them from appointing. Indeed, the current president of the Agency Council was member of ruling party (Democratic Party of Socialists) at the moment of his candidature and only left the party to begin his mandate. This is not a sufficiently strong standard to ensure independence.

There are many features of the Agency that are in line with international standards. For example, receiving and deciding on appeals, running an information system for accessing information, maintaining a list of public bodies, checking that each body updates its "guide" (index) of information, checking for compliance with proactive publication provisions, and so forth.

It is also understood that the Agency engages in promotional measures and conducts training, although the responsibilities for activities designed to promote awareness of the law, to contribute to a change of culture, and to ensure that public officials understand both the spirit as well as the letter of the law are not sufficiently strong.

Furthermore, the law could be strengthened to ensure that all public bodies have an obligation to report statistics on the right of access to information to the Agency, so that it has comprehensive data when compiling its reports, including the annual Report to parliament.

The Agency has powers to carry out inspections of requested documents, which is positive. We understand that this includes having insight into classified information. There is however a serious concern in that the Agency does not have the power to hear complaints when a refusal is based on refusal of information that is classified as secret (Article 34). This provision has absolutely no sense and is out of line with standards and practice across Europe.

Indeed, Article 34 seems designed to dissuade requesters from appealing the invocation of classified information (which is already the most serious problem with the Montenegrin Law on Free Access to Information) and to put obstacles in their way which mean a costlier, more cumbersome, and time-consuming process.

Such a provision is out of line with the requirement of international standards and the jurisprudence of the European Court of Human Rights on accessing documents in order to hold power to account, including when the object of a request is classified information.

Summary of recommendations:

- Strengthen criteria for appointments to the Agency to ensure political independence of senior staff;
- Permit appeals against all refusals, including on grounds of classified information;
- Ensure that the Agency has the power to declassify documents which have been wrongly classified.

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