CENTRE FOR LAW AND DEMOCRACY

# *Montenegro*

# Recommendations for the Draft Law on Free Access to Information

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# *Introduction*

These Comments contain an analysis by the Centre for Law and Democracy (CLD) of Montenegro's draft Law on Free Access to Information (the draft Law). The draft Law is a proposed update to Montenegro's 2005 Law on Free Access to Information, which implements the strong guarantee of the right to information contained within Article 54 of Montenegro's Constitution.

The draft Law is currently being debated and discussed by several stakeholders, including representatives from government, NGOs and intergovernmental organisations such as the OSCE. These Comments were drafted at the request of some of the participants in this process.

These Comments are based on international standards regarding the right to information, as reflected in the *RTI Legislation Rating Methodology*, prepared by CLD and Access Info Europe (CLD/AIE Rating).[1] They also reflect better legislative practice from other democracies around the world.[2] We have prepared an assessment of both the draft Law and, as a comparator, an analysis of the 2005 Law on Free Access to Information, both of which are based on the RTI Methodology. The overall score of the draft Law is as follows:

**The Draft Law on Free Access to Information**

| Section | Max Points | Score |
|---|---|---|
| 1. Right of Access | 6 | 6 |
| 2. Scope | 30 | 29 |
| 3. Requesting Procedures | 30 | 23 |
| 4. Exceptions and Refusals | 30 | 13 |
| 5. Appeals | 30 | 11 |
| 6. Sanctions and Protections | 8 | 6 |
| 7. Promotional Measures | 16 | 7 |
| **Total Score** | **150** | **95** |

[1] This document, published in September 2010, reflects a comprehensive analysis of international standards adopted both by global human rights mechanisms, such as the UN Human Rights Committee and Special Rapporteur on Freedom of Opinion and Expression, and by regional courts and other mechanisms in Europe, Africa and Latin America. It is available at: http://www.law-democracy.org/wp-content/uploads/2010/09/Indicators.final_.pdf.

[2] See, for example, Toby Mendel, *Freedom of Information: A Comparative Legal Survey, 2nd Edition* (2008, Paris, UNESCO), available in English and several other languages at: http://portal.unesco.org/ci/en/ev.php-URL_ID=26159&URL_DO=DO_TOPIC&URL_SECTION=201.html.

By contrast, Montenegro's 2005 Law on Free Access to Information, currently in force, scored as follows:

**The Law on Free Access to Information (2005)**

| Section | Max Points | Score |
|---|---|---|
| 1. Right of Access | 6 | 5 |
| 2. Scope | 30 | 30 |
| 3. Requesting Procedures | 30 | 20 |
| 4. Exceptions and Refusals | 30 | 21 |
| 5. Appeals | 30 | 4 |
| 6. Sanctions and Protections | 8 | 6 |
| 7. Promotional Measures | 16 | 5 |
| **Total Score** | **150** | **91** |

As these results indicate, the draft Law scores marginally better than the 2005 Law, pushing Montenegro from 30th in the world overall up to 27th. Both versions of the law place Montenegro seventh out of the eight Balkan countries within its "peer group":

1. Serbia (135)
2. Slovenia (130)
3. Croatia (123)
4. Macedonia (108)
5. Kosovo (106)
6. Bosnia and Herzegovina (98)
7. Montenegro (91/95)
8. Albania (70)

One interpretation of these results is that the changes represent a lateral move for the right to information in Montenegro, since the new law scores only marginally better than the old one. However, the slight change in overall score masks some significant differences. The Law's designation of an independent oversight body bumps the score on "Appeals" from 4 points up to 11 points. But this improvement is nullified by the draft Law's changes to Article 15, which cause the score on "Exceptions" to drop from 21 down to 13.

These two major changes, which are currently under discussion by the working group, will be the focus of this analysis. The main recommendation here is that the law's exceptions regime should be reworked to remove the list of specific types of information and that the structure of the oversight body should be improved to ensure that the organisation has the requisite independence, resources and expertise to fulfil its function properly.

**Recommendations Summary:**

- The law's exceptions regime should be brought into line with international standards by deleting the specific instances listed under Articles 15 and 17 and replacing them with a general categorical harm test and a general public interest override.
- The role of the oversight body should be played by an independent Information Commission or Commissioner rather than the data protection agency. If this is not feasible, the existing agency which is assuming these responsibilities should be provided with adequate funding, resources and expertise to fulfil this dual role.

## *The Exceptions Regime (draft Law Article 15)*

According to Montenegro's Constitution, information can only be withheld, "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."[3] This list of exceptions is in line with international standards. Under Montenegro's 2005 Law on Free Access to Information, these categories are repeated, but the law also explicitly include several subcategories within each of these, such as "[information] from military intelligence services" and "[information] relating to the capital and financial markets."[4]

This approach is not in line with international standards. As a general rule, exceptions should not be subcategorised, as this type of structure almost always results in a formula that is overly broad. It is a violation of international standards of the right to information to refuse to disclose material simply because it relates to a certain category. Information can only be legitimately withheld if it would harm a protected interest. In other words, it is illegitimate to refuse to disclose information because it is "relating to the financial markets." The information should be withheld only if it would actually be harmful to the financial markets. The formula in the 2005 law is problematic because there is a large volume of information "relating" to the financial markets that would not be harmful to the financial interests of the state if released, but that would nonetheless be withheld.

This is a major problem with the 2005 law but, far from correcting it, the draft Law makes it even worse by expanding the formula of subcategories even further. Several of the new subcategories, such as "information about pre-trial or criminal procedures" and "management of international financial reserves" are overly broad.

[3] Adopted 19 October 2007, Article 51. Available at http://www.unhcr.org/refworld/docid/47e11b0c2.html.
[4] Article 9.

Others, such as "plans of prevention and management of emergencies" and "strategy and term plan for control of banks" are entirely illegitimate exclusions, since these types of safeguards fall squarely within the public's right to know, in order to ensure confidence in the government. Although these are some of the worst examples, they are far from the only problematic subcategories within Article 15. It should be reiterated that all of the subcategories within Article 15, and the entire system of using these types of subcategories, is a violation of international standards.

Instead, the exceptions provision in Article 15 should simply say:

> Access to Information may be restricted to the extent that the information under request would cause harm to the protection of life, public health, morality and privacy, carrying of criminal proceedings, security and defense of Montenegro, or foreign monetary and economic policy.

Based on this formula, a reiteration of Montenegro's strong constitutional protection of the right to information, public authorities can then make decisions on a case by case basis as to whether information should be withheld based on the harm it would do to the national interest and ensure that all information whose disclosure is not harmful to the national interest can be disclosed.

**Recommendations:**

- All of the subcategories of Article 15 should be replaced by a formula that is far simpler, and says merely that:
  "Access to Information may be restricted to the extent that the information under request would cause harm to the protection of life, public health, morality and privacy, carrying of criminal proceedings, security and defense of Montenegro, or foreign monetary and economic policy. These exceptions should be interpreted by according to international standards of the right to information."

## *The Public Interest Override (draft Law Article 17)*

The way that the draft Law deals with the public interest override is also problematic. According to international standards, information that would harm a protected interest should nonetheless be disclosed if the public interest in the disclosure outweighs the likely harm that will be caused.

For example, a document that shows that an official involved in financial regulation has been taking bribes may include information about how financial oversight is carried out, the release of which could make regulation more difficult in the future. However, because there is a strong public interest in rooting out corruption, which outweighs the short-term harm to the regulatory system, the document should be

released anyway. In the long run, the public benefit from finding and removing corrupt officials outweighs temporary harm to the regulatory system.

For these purposes, the concept of the public interest must be understood broadly and inclusively. It can include rooting out corruption and human rights abuses, but it can also include fostering public confidence in elected officials or democratic institutions, the advancement of academic or private research, facilitating broad participation in the process of governing, and many other concepts. As a result, a public interest override that contains an exclusive list of categories, such as is found in Article 17 of the draft Law, is problematic because any attempt to list the specific public interests exclusively will end up leaving out important interests. A preferable approach is to say:

> Information that is likely to cause harm to a protected interest should nevertheless be disclosed if the public interest in disclosure outweighs the likely harm that would result from the release.

The advantage of this is that, once again, the decisions will be made flexibly on a case by case basis rather than according to rigid rules. If the law does include a list of specific public interests, then it should state that the list is inclusive rather than exclusive.

**Recommendations:**

- Article 17 should be changed to read:
  Information that is likely to cause harm to a protected interest and is therefore subject to exception should nevertheless be disclosed if the public interest in disclosure outweighs the likely harm that would result from the release.

## *The Oversight and Appeals Body (draft Law Articles 40, 41, 42)*

The designation of an independent oversight body to hear appeals against information refusals is a major improvement over the 2005 law. This appeals process is a critical feature of a strong right to information law. However, while this provision is a step forward, there are several ways that the structure of oversight could be strengthened.

According to international standards, there are several elements of a strong mechanism for overseeing the right to information. First and foremost, the oversight body should have appropriate powers to fulfil its role. This means the power to review any document and inspect any official premises and, more importantly, the power to issue binding decisions with regards to the release of information. Although the draft Law grants inspection and review powers, it is not explicit as to

whether orders from the review officer are legally binding and enforceable. Ideally, these orders should be similar to court orders, whereby defiance of an order to disclose information would be treated as tantamount to contempt of court and subject to appropriate sanction. The oversight body should also be able to order structural solutions, such as training for deficient officials, in addition to financially sanctioning individuals or institutions that infringe on the right to information.

A second component of an effective oversight body is that it should have the resources to fulfil its mandate. This means that the body must have adequate expertise, budgeting and independence. Expertise means a specific understanding of the right to information, and the best laws will create an independent oversight body that deals specifically with the right to information (an Information Commission or Commissioner). The draft Law currently assigns oversight functions to the Data Protection Agency.

Although a better solution is to create a new institution which deals solely with information disclosure, if the government is set on handing this task over to the Data Protection Agency the framework should ensure that they have the requisite expertise to fulfil this role. This means providing more resources to the agency in order to hire specialised employees with training and experience in this field. International standards dictate that the law should require officers dealing with information disclosure appeals to have a certain level of training and expertise in this field. If the duties of oversight are handed over to the Data Protection Agency it is also essential that they be provided with addition funds in order to take on this new role. It is not practical to expect them to assume this new (and significant) workload without a concomitant increase in resources.

Third, the appeals process should be accessible and fair in accordance with international standards. This means that appeals against refusal should be free of charge and should not require a lawyer. There should be a clear process governing appeals, including a reasonable timeline. In addition, during any appeal the government should bear the burden of demonstrating that it acted appropriately.

As a final point, the law should stipulate that, in addition to hearing appeals against infringements of the right to information, the oversight body should play a promotional role to encourage awareness and use of the right to information law.

**Recommendations:**

- The oversight body should have the power to make legally binding orders on disclosure of information.
- The oversight body should have the power to issue fines to individuals and institutions under the right to information law.

- The oversight body should be a new organisation devoted entirely to the right to information.
- If the oversight role must be bundled into an existing agency, the law should require that the agency hire officers with training and expertise in the right to information, and should provide enough funding to ensure sufficient people can be hired. Additional funds should also be provided in order to ensure that the agency can properly carry out the new duties assigned to it.
- Appeals to the oversight body should be free of charge and should not require a lawyer.
- In an appeal, the government should bear the burden of demonstrating that it acted in accordance with its obligations
- The appeals process should be governed by clear rules, including timelines.
- The law should provide the oversight body with a mandate to promote the right to information.

## *Conclusion*

This analysis is not an exhaustive list of all that could be improved with regards to the draft Law. However, by focusing on the two main areas in need of improvement and which, fittingly, are the areas around which the current debate is focused, it is hoped that these Comments will provide substantive guidance to the people working to strengthen the draft Law. These recommendations, if followed, will turn Montenegro's framework for the right to information into one of the strongest in the world.

By pointing out the deficiencies in the draft Law, these Comments should not be construed as an attempt to discourage the attempt at reform. Indeed, there are several welcome components of the draft Law as it now stands, such as the inclusion of a system of proactive disclosure. However, reforming a right to information law is generally both a politically and technically difficult process. Most countries undertake these major overhauls very infrequently. Consequently, it is vital that, when a reform is carried out, the stakeholders take full advantage to push the law as close to international standards as possible, since it is uncertain when the next round of improvements will take place. Above all else, it is vital that reform processes push the law forward rather than stagnating or, as in the case of this law, backsliding with regard to certain fundamental elements of the right to information. Make no mistake, a step forward, when combined with a step backwards, is not progress.