CENTRE FOR LAW AND DEMOCRACY

Kazakhstan

Comments on the Draft Law of Kazakhstan on Information Access

August 2011

Centre for Law and Democracy
info@law-democracy.org
+1 902 431-3688
www.law-democracy.org

Introduction

These Comments contain an analysis by the Centre for Law and Democracy (CLD) of the Draft Law of the Republic of Kazakhstan on Information Access (draft Law).[1] Work on the draft Law began in 2010, when members of the Mazhilis of the Parliament of Kazakhstan (Kazakhstan's legislature) set up a working group to develop a law to enable public access to information. An initial version, based on similar legislation from Russia and Kyrgyzstan, was subsequently amended to take into account feedback. At the moment, work on the draft Law has been suspended pending a government review currently scheduled for 2012. This interval is being used to work on improving the draft Law, as well as to coordinate how the legislative framework will impact other legislation.

Any effort to promote greater transparency is a positive step, and CLD very much welcomes the initiative by the government of the Republic of Kazakhstan to adopt a right to information law. There have been efforts in this direction for many years in Kazakhstan, and we hope that this one will finally result in the adoption of a strong right to information law.

The draft Law has many positive aspects, including extremely ambitious proactive publication requirements that, if implemented, would place a duty on public authorities to ensure that large amounts of information are made public. The law also includes well-written and effective requesting procedures, and deserves credit for its broad applicability.

At the same time, there are some major weaknesses with the draft Law that could largely undermine the right to information. The most serious problem is the lack of any centralised agency with responsibility for overseeing implementation of the law and hearing complaints regarding claims of public authorities failing to live up to their disclosure obligations. Without a meaningful system of oversight, there is a risk that strong aspects of the law will not deliver the openness they otherwise might. The draft Law's proposed solution to this, namely to allow individual users to sue in court for damages for denials of access to information, is not a replacement for a proper system of administrative oversight.

The regime of exceptions in the draft Law is also problematical inasmuch as it is very overbroad and allows secrecy provisions in other laws, and even classification of information, to override the right of access. The draft Law also fails to create a clear presumption in favour of access to all information held by public authorities.

[1] These Comments are based on an unofficial translation of the draft Law into English. CLD regrets any errors based on translation.

These Comments by CLD highlight the ways in which the draft Law fails to conform to international standards and better international practice. We hope that it will be useful for the government of Kazakhstan and other local stakeholders in amending the draft Law to bring it more closely into line with international standards. In this way, the adoption of this legislation could help promote real and substantial accountability among public authorities.

1. Right of Access

An important indicator of a strong right to information law is the way in which it defines the right to access information. Access to all information held by public bodies, subject only to a limited regime of exceptions, is a right, and a right to information law should recognise that it is facilitating this right rather than merely granting a privilege.

Article 1(1)(1) of the draft Law defines the right to information as "the right of a user of information to receive and distribute information freely." This idea is restated in Article 5(1), which states: "The state guarantees to everyone the right to obtain and distribute freely information by any means not prohibited by law." These are positive statements, but they fail to make it clear that everyone has a right to access all information held by public authorities, subject only to legitimately exempted information.

Article 4 enumerates a number of principles which underlie Kazakhstan's right to information law, including transparency, publicity, the reliability and timeliness of access, and ensuring responsibility for any breaches of the right to information. These are supplemented by the statement in Article 6(1) of the rights of information users. Once again, these are positive statements. At the same time, they could be improved by calling for a broad interpretation of the right to information. Furthermore, Article 6(2) sets out various obligations of information users, such as to respect the rights of others and to "follow duties in the sphere of information access: according to other laws." This is unnecessary, inasmuch as these laws are already legally binding, and it might exert a chilling effect on the making of requests for information.

Recommendations:

- The law should create a presumption that all information held by public authorities should be subject to disclosure, unless it falls within the scope of a narrow regime of exceptions, as set out in the law.
- The law should include a statement calling for a broad interpretation of the right to information.
- Article 6(2) should be deleted.

2. Scope

In order to be effective as a tool of government accountability, the right to information should apply broadly to all public authorities. This should include all branches of central, regional and local government, as well as the judiciary, the legislature, state-owned enterprises, and any other constitutional or statutory bodies. Private companies should also be subject to information disclosure rules if they perform a public function or are a recipient of public funds, to the extent of the function or funding.

The Law is somewhat ambiguous in defining which organs of government are or are not subject to its provisions. Article 7(1)(1) includes "state bodies and institutions of local governing". Read broadly, this could include the entire executive, legislative and judicial branches in addition to local and regional governments, but it is possible that this will be understood more narrowly, for instance to exclude the legislative and judicial branches of government. Article 7(1)(2) refers to "quasi-public" bodies. It is unclear what this constitutes and, in particular, whether or not this covers state-owned enterprises and other constitutional or statutory bodies.

It may also be noted that the draft Law goes further than many right to information laws inasmuch as it also applies to market players that hold a dominant or monopolistic position, as well as bodies that hold ecological information or information on "extraordinary situations", such as disasters (Articles 7(1)(4) and (2)).

Better international practice also mandates that a right to information law should apply to all forms of stored information. Article 1(1)(2) defines information as any physical or electronic documentary material created or held by an applicable body. Although this definition appears to be sufficiently broad, the wording of Article 26(2) – which allows officials to refuse to disclose staff reports, memos and other types of information "that do not belong to documentary information" – is troubling since it implies that "documentary information" excludes certain categories of documents or information. If so, this is not in line with international standards. Whole categories of information cannot justifiably be excluded from the ambit of right to information legislation; they should be covered subject to the regime of exceptions. Article 1(1)(2) is also problematical inasmuch as it defines information as material which the laws of Kazakhstan do not restrict access. Such limitations should be dealt with through the regime of exceptions rather than at the definitional stage of the law, as this will result in more appropriately limited withholding of information.

A right to information law should apply to everyone, including foreign nationals and legal persons, rather than just citizens. The draft Law establishes this through Article 1(1)(4).

Recommendations:

- The ambiguities in Article 7 should be resolved by specifically listing all organs and branches of government, state-owned enterprises, statutory and constitutional bodies, and private bodies that perform a public function as subjects of the law.
- Article 26(2) should be deleted.
- The definition of "Information" under Article 1(1)(2) should be amended to make it clear that it covers all recorded forms of information, regardless of the form in which they are recorded.
- The words "access to which is not restricted by laws of the Republic of Kazakhstan" should be deleted from Article 1(1)(2).

3. Proactive Publication

The draft Law contains fairly extensive proactive publication requirements. Article 13 requires all public authorities to publish certain information online, including descriptions of their structure, physical contact info, organisational purpose and history, and details of laws, regulations and procedural rules which govern their conduct. Article 13 also requires them to publish descriptions of whatever information and access services they provide, along with copies of statistical and analytical reports relating to their activities. There is also a requirement to publish details of any tenders or bids the organisation has offered or received, including recruitment procedures. Article 13 requires all of this information to be published online in both Russian and Kazakh and to be updated regularly.

There is a danger that if information is only published online, it might not reach segments of the population which do not have Internet access. However, the draft Law addresses this problem by requiring all public bodies to set up centres where members of the public can access published information free of charge. Article 14 further provides that various State bodies are free to expand the range of information that is to be proactively published.

This is a broad approach to proactive publication, and one of the more positive aspects of the draft Law. However, by the same token, these obligations will presumably be quite onerous for many public authorities in Kazakhstan. To try to limit the pressure on these authorities, consideration should be given to building into the law a system which allows them to reach the full proactive publication goals over a period of time, such as five years.

Articles 19-22 require some meetings of public authorities to be open to the public, and sets out procedures for members of the public who wish to attend. This type of provision is not normally found within information disclosure legislation, but is a welcome provision.

Recommendation:

- Consideration should be given to building into the draft Law a system so that public authorities are given a period of time to meet their full proactive publication requirements.

4. Requesting Procedures

To ensure proper and efficient implementation, international standards require that right to information legislation include comprehensive rules that structure and streamline the requesting process. First and foremost, this means that the law should establish clear and simple procedures relating to how requests are to be filed.

The draft Law addresses this in several different provisions. Article 23 requires that requests be directed to an individual who is competent to disclose the relevant information, and that requests must include the name of the requester as well as a means of contacting them. Article 6(1)(8) explicitly protects requesters from having to state the reason underlying their request. Both of these provisions meet international best practices, though the requirement to submit requests to a designated officer necessitates the effective implementation of Article 9(2), which requires that such officers be appointed, and Article 13(1)(3), which requires public authorities to adequately publicise information regarding their structure. Article 1(1)(7), which allows requests to be filed in writing, orally, electronically or through any other method of communication is also admirably flexible.

However, there is a danger that these effective procedural safeguards could be undermined by Article 3(2), which allows alternate procedures to be followed if such different procedures are foreseen by the laws of Kazakhstan. This touches upon a recurring problem in the draft Law, which is its failure to trump other legislation dealing with secrecy and information disclosure. The right to information law should establish minimum standards regarding access to information, which should not be permitted to be lowered through other laws.

Another important procedural rule concerns the responsibilities of staff who receive information requests. These officers should be under a duty to assist requesters to

formulate requests, including by contacting them in case their requests are found to be unduly vague, broad or confusing. The only mention of anything along these lines in the draft Law is in Article 24(5), which grants public authorities the right to contact requesters in order to clarify requests. This is problematic because it structures the clarification process as a right of the information holder when it should properly be understood as a right of the requester and a duty upon the information holder. The legislation should also emphasise the duty to provide assistance in cases where the requester is disabled, illiterate or otherwise has special needs.

Otherwise, the draft Law sets out clear and effective rules for how officials should respond to information requests, including the need to provide an immediate written receipt (Article 23(3)), the requirement to comply with requesters preferences regarding the form in which access to information is to be provided (Article 25(1)) and the need to transfer requests promptly to an appropriate agency in the event that the initial recipient is not in possession of the requested information (Article 24(4)).

One particularly striking aspect of the draft Law is the quick turnaround time for processing requests. Article 24(2) requires authorities to respond to requests within five working days, which may be extended once by a maximum of five more working days upon notification being provided to the requester. This is an extremely short maximum time for processing requests. While the intention behind this is laudable, a response period of five working days runs the risk of being impractically short and could lead to a situation where public authorities, out of necessity, regularly breach the time limit established by the law. Consideration should be given to whether or not this timeframe is workable. However, it should be clear that the timeframe stated in the law is a maximum and that public authorities should responds to requests as soon as possible. In line with international best practices, Article 24(4) allows for an expedited processing time for 48 hours where an individual's life or safety depends on the information.

Another positive aspect of the draft law is Article 27, which contains clear rules on fees, including the rule that it is free to file requests, and that state institutions must provide information free of charge. For private or "quasi-public" institutions, the first 50 pages must be provided free and the remainder can be charged to the requester at cost. These standards are progressive and in line with international best practices.

The draft Law requires public authorities to provide reasons when refusing requests (Article 25(5)). Better practice is also to require them to notify requesters of their options for launching an appeal against the refusal.

Recommendations:

- Article 3(2) should be deleted.
- Article 24(5) should be rephrased so that it clear that public authorities have a duty to assist requesters, rather than a right to do so. Specific mention should be made here of the duty to assist requesters with special needs.
- Consideration should be given to providing for longer maximum timeframes for responding to information requests, for example of ten days. It should be made clear that this is a maximum and that requests should be processed as soon as possible.
- Consideration should be given to requiring public authorities to notify requesters of their right to appeal when a request is refused.

5. Exceptions and Refusals

One of the main weaknesses of the draft Law is that it establishes an unduly broad regime of exceptions to the right to access information. International standards require that all exceptions be narrow, based on legitimate interests and harm tested.

Almost none of the exceptions in the draft Law meet these international standards. Article 5(3) sets out the rules for exceptions. It is not clear whether these are intended to be cumulative, so that all four of the conditions must apply before access to information may be limited, or individual, so that access may be refused when only one of these conditions apply. For purposes of this analysis, we assume that the rules are cumulative. We note, however, that if they are not, then the regime of exceptions is extremely problematical.

Article 5(3) states that access may be refused based on other laws (see also Article 1(1)(2)). Article 5(3)(1) sets out the grounds upon which access may be refused, which are "to protect constitutional structure, public order, human rights and freedoms, public health and morals, as well as to avert disclosure of information with limited access". Article 5(3)(2) appears to be a form of harm test, stating that access to information may be refused "to exclude conditions for serious damages of interests protected by laws". Article 5(3)(3) appears to set out a public interest override, allowing for access to be refused only where the damage to the protected interest from disclosure is greater than the benefits in terms of the public interest (presumably of disclosure). Finally, Article 5(3)(4) requires restrictions to be "valid and reasoned".

The main problem with this approach is that rather than defining the exceptions in a comprehensive manner in the right to information law, it relies on other laws to define the exceptions. As we understand this approach, the rules in Article 5(3) of

the draft Law represent an attempt to place conditions on the exceptions in these other laws.

This approach is laudable, but there are a number of problems with it. First, secrecy rules in other laws can be expected to be vastly overbroad. This is because many of these laws will have been passed some time ago and they are not based on the presumption of openness found in the draft Law. While the conditions found in Article 5(3) of the draft Law will help to moderate some of these problems, it is unlikely they will be able to address all of them.

Second, we are not sure that this approach is legally effective. It is normal for right to information laws to override other laws, to the extent of any inconsistency (indeed, this is common in other laws too). But attempting to retrofit general amendments to other laws as appears to be the aim of Article 5(3) is rather different. This would not work effectively in many legal systems, although we cannot say specifically whether it might work in Kazakhstan. At a minimum, it will create an enormous burden of interpretation on those seeking to apply the law, as they would need to attempt to apply the Article 5(3) conditions to rules found in other laws.

Instead, we recommend that the draft Law include a proper regime of exceptions, whereby it defines all of the interests to be protected, along with the harm to be avoided. This is the approach taken in the vast majority of the approximately 90 national right to information laws found in countries around the world, and it has proven to be an effective and workable approach.

There are also some problems with the rules set out in Article 5(3). It is not valid to refuse to disclose information in order to protect the constitutional structure, human rights and freedoms, and public morals (see Article 5(3)(1)). There is an important difference between the reasons which may legitimately form the basis for a restriction on freedom of expression, and those which may legitimately serve as a limitation on the right to information. An important consideration here is that the right to information relates to information held by public bodies. While incitement to revolt against the constitutional order may legitimately be banned, there is no analogous risk relating to information held by public authorities. In other words, it is simply not possible that disclosing information held by public authorities will pose a risk to the constitutional order (or at least this should not be the case if public authorities are doing their jobs properly). The same applies to human rights and public morals.

Better practice is also to include a sunset clause in the regime of exceptions, whereby exempt information must be released after a particular period of time (usually 15 or 20 years), although of course it should always be released earlier if an exception ceases to apply.

Article 26(1)(6) allows public authorities to refuse requests which involve "conducting other analytical work". It is not clear what this refers to. It is legitimate to refuse requests for information which a public authority would have to create (i.e. for information which it does not yet hold). But automated extraction of information, for example from a database, should be done where necessary to answer a request.

Recommendations:

- Serious consideration should be given to fundamentally revising the whole approach of the draft Law to the regime of exceptions, specifically by including a fully-developed regime of exceptions, which would override secrecy laws to the extent of any inconsistency, rather trying to modify existing secrecy laws.
- The grounds for refusing requests based on protecting the constitutional structure, human rights and freedoms and public morals should be removed from Article 5(3)(1).
- Article 26(1)(6) should be revised to make it clear that it only applies to the idea of creating new information, and not to extracting information from databases.
- A "sunset clause" should be added to the law, so that exempt information must be released after 15 or 20 years.

6. Appeals

The draft Law only provides for limited appeal options. Pursuant to Article 29(1), requesters may appeal against actions or inaction of public authorities which harm their right to information to superior officers and/or the courts. It is good practice to provide for an internal appeal as a mechanism of first recourse. This can help resolve appeals internally, with a minimum of fuss. However, it would be preferable to set out clear procedures in the law to guide this process, including strict timelines.

It is also useful for appeals to go, ultimately, to the courts. However, court appeals are by their nature difficult, time consuming and expensive. As a result, they should be considered an avenue of last resort to compel information disclosure. Experience in other countries has clearly demonstrated that effective implementation of the right to information requires a right of appeal to a specialised independent administrative body. To be able to discharge its oversight role effectively, this body needs to be independent and have the power to issue binding decisions. The

operations of this body should be guided by clear procedural rules, and appeals should be free and should not require a lawyer.

Recommendations:

- Clear procedures for internal appeals under Article 29(1) should be included in the law.
- An independent administrative body should be created or designated with the power to hear appeals of claims that public authorities have not discharged their right to information obligations.

7. Sanctions and Protections

Effective implementation of right to information legislation requires the availability of sanctions for officials who act in ways that undermine the right. These sanctions may be administrative or criminal or both in nature. This ability to impose remedial measures on public authorities that regularly fail to live up to their disclosure obligations is also a very useful implementation tool. Ideally, the independent administrative body that hears appeals should have the power to impose administrative sanctions on individual officials and remedial measures on public authorities.

Article 31 of the draft Law provides very generally that violation of the law entails responsibility. It is not clear what this really means in terms of imposing sanctions on officials. A better approach would be to include a specific and dedicated regime of sanctions in the text of the right to information law, in line with most such national laws around the world.

Article 29(2) of the draft Law enables requesters to obtain damages for the illegal refusal of information. This is an interesting approach. However, its effectiveness may be undermined by the fact that in most cases of information refusal, the harm is difficult to quantify. Indeed, in most cases the harm of refusal is not to any one individual but to society as a whole, since the absence of transparency undermines effective government accountability.

The draft Law also fails to protect officials who, in good faith, release information pursuant to its provisions. Such protection is important so as to give officials the confidence to release information, something they have been taught for many years not to do.

Article 30 of the draft Law protects sources of information and informers where their disclosures create more public benefit than the harm caused by their

disclosures. This is a form of whistleblower protection, albeit a very limited one. Better practice whistleblower protection applies whenever a disclosure in made in the public interest. It is not reasonable to expect whistleblowers to be able to weigh up the relative benefits and disadvantages of their disclosures. It is enough for them to be acting in the public interest. Furthermore, this article only provides protection against liability, whereas whistleblowers should also be protected against other forms of retaliation, such as administrative or professional sanctions.

Recommendations:

- The draft Law should be amended to provide for specific administrative and criminal sanctions for individuals who undermine the right to information.
- Where public authorities regularly fail to discharge their openness obligations, they should be subject to being required to undertake remedial measures to redress this problem.
- The law should provide protection for good faith disclosures pursuant to its provisions, as well as comprehensive protection for anyone who releases information on wrongdoing (whistleblowers).

8. Promotional Measures

A major problem with the draft Law is that it includes almost no promotional measures. Such measures are extremely important to ensure effective implementation of a right to information law.

The draft Law does not designate a central body to take responsibility for overseeing and promoting its implementation. In many countries, this task is given to the independent administrative oversight body. In other countries, this task may be undertaken by a government body, although this is generally considered less than optimum.

A number of other promotional measures which are found in better practice right to information laws are also missing from the draft Law. It does not require public authorities to provide training to their staff on information management or their newly established disclosure obligations. There is no provision for outreach efforts designed to raise public awareness about the law. There is also no requirement for public authorities to create and maintain registries of the information they hold, in order to better facilitate information requests. Public authorities are not under any obligation to report on the actions they have taken to implement the law, and there is no provision for central reporting to parliament on such actions across the public service. And there are no systems to promote better record management, so as to improve record keeping in the public sector.

Recommendations:

- The draft Law should designate a central body to oversee implementation and promotion of the right to information, including through presenting a consolidated annual report to parliament on overall implementation of the law and through undertaking public awareness-raising efforts.
- The draft Law should require public authorities to report annually on the actions they have taken to implement their disclosure obligations, along with statistics regarding their performance in response to information requests over the past year.
- The draft Law should require public authorities to provide training for officials in their responsibilities under the right to information.
- The draft Law should require public authorities to create and update registers of the information in their possession and to make these public.
- Systems for improving record management should be built into the law.