



STATEMENT AND RECOMMENDATIONS

on

The Azerbaijani official draft Law “On Obtaining Information”

By

ARTICLE 19, the Global Campaign for Free Expression

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ARTICLE 19 welcomes some positive developments with regard to The Azerbaijani official draft Law “On Obtaining Information”, in particular that the draft now includes:

- A guarantee for an independent review mechanism (a provision on Information Ombudsman);
- A protection for ‘whistleblowers’ (individuals who release information on wrong-doing in the public interest and on good faith);
- An extension of its coverage to some private entities that conduct public duties, including healthcare, education, social services and others; and
- A detailed procedure for requesting and releasing information in Chapters II and III of the present draft.

However, ARTICLE 19 remains very concerned about the slow pace of progress in relation to the adoption of a comprehensive freedom of information law. Despite the initiation of an open and inclusive process for drafting the bill in autumn 2003, followed by a number of consultations with international and inter-governmental organisations (including Council of Europe and ARTICLE 19), a number of recent trends give reason for serious concern:

- Not all of the key recommendations made by international experts between March 2004 and now have been incorporated in the current draft law on freedom of information;
- The current draft law “On Obtaining Information” has been redrafted, based on the Estonian Public Information Act, by MP Rizvan Jabiyev, head of the working group that drafted the law, without participation of the other members of the working group;
- The authorities have been generally reluctant to schedule the second reading of the bill nor have they engaged in a public awareness campaign to emphasise the importance of the adoption of a progressive freedom of information law for Azerbaijani society; and

- To date, the authorities have not engaged in any consultation process with civil society groups to discuss and start drafting a comprehensive implementation strategy for the draft law once it is adopted.

International law requires Azerbaijan to make freedom of information a reality for all. As a member State of the United Nations, the Council of Europe and the Organisation for Security and Cooperation in Europe and a signatory to major international and regional human rights treaties, including the *International Covenant on Civil and Political Rights*,¹ the Republic of Azerbaijan has binding obligations under international law to respect freedom of expression and freedom of information. As long ago as 1994, the UN Human Rights Committee, commenting on its obligations under the ICCPR recommended that Azerbaijan “should introduce legislation guaranteeing freedom of information.”²

As a member state of the OSCE, Azerbaijan “[reaffirmed] the importance of ... the free flow of information as well as the public’s access to information.”³

Azerbaijan undertook further binding obligations to introduce freedom of information legislation upon acceding to the *Aarhus Convention* in March 2000, by which it promised to “guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters”.⁴ And by signing the *UN Convention against Corruption* in February 2004, Azerbaijan committed itself to “ensuring that the public has effective access to information” and “enhancing the transparency of and promoting the contribution of the public to decision-making processes”.⁵

Upon joining the Council of Europe in 2001, the Republic of Azerbaijan assumed a responsibility to “accept the principles of the rule of law and of the enjoyment by all people within [their] jurisdiction of human rights and fundamental freedoms”⁶ and undertook an obligation to “guarantee freedom of expression and the independence of the media and journalists and to “exclude the use of administrative measures to restrict the freedom of the media.”⁷

On 26 October 2004, the participants of the First South Caucasus Media Conference adopted the Tbilisi Declaration on Libel and Freedom of Information, calling for “the adoption [in Azerbaijan] of a comprehensive law on Free Access to Information based on international standards.”⁸

Most recently, on 6 December 2004, the UN Special Representative on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression on 6 December 2004 urged all States to implement comprehensive freedom of information legislation. In a Joint Declaration, they stress that “the right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example, Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.”

ARTICLE 19 urges the Azerbaijani authorities to take immediate action to implement its international obligations. We are ready to work with a joint working group, once it is established, to share our expertise in designing and facilitating the realisation of the implementation strategy for the freedom of information law in Azerbaijan.

¹ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, ratified by Azerbaijan 13 August 1992.

² UN Doc. CCPR A/49/40 (1994), para. 308.

³ The OSCE Charter for European Security, November 1999, para.26

⁴ Article 1, UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, UN Doc. ECE/CEP/43, adopted 25 June 1998, entry into force 30 October 2001, accession by Azerbaijan 23 March 2000.

⁵ Article 13.1 (b) and (a) of the UN Convention against Corruption, adopted by the UN General Assembly by Resolution 58/4 of 31 October 2003, signed by Azerbaijan 27 February 2004.

⁶ Statute of the Council of Europe, London, 5 May 1949, Article 3.

⁷ Azerbaijan’s Application for Membership of the Council of Europe, Opinion No. 222 (2000), Parliamentary Assembly, iv.d.

⁸ http://www.osce.org/press_rel/2004/pdf_documents/10-4478.rfm1.pdf

In the following paragraphs, we outline a number of specific recommendations to the government, civil society, the media and the international community.

To the Government of the Republic of Azerbaijan:

a) Adoption of the Law:

The Government of Azerbaijan should -

1. Immediately make the new draft law “On Obtaining Information” available for public consultations;
2. Hold a meeting of the working group by the end of April 2005;
3. Schedule the second reading of the official draft law “On Obtaining Information” no later than 1 June 2005;
4. Bring the draft law on freedom of information in line with established international standards and best practice, in particular in regard to the following:
 - The freedom of information law should be based on the principle of *maximum disclosure* and guarantee freedom of information as a right for *everyone* and not just citizens of the country;
 - The exceptions regime should be narrowed in line with international standards and best international practices. All limitations on the right of access to official documents should be “set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting [a legitimate interest]”.⁹ Restrictions should include both a ‘harm test’ and a ‘public interest override’, requiring public authorities to release information unless it can show that disclosure would do substantial harm to a legitimate interest protected under the law, and that this harm is greater than the public interest in disclosure.¹⁰ There should be no blanket exceptions: every request for information must be treated on its own merits. There should be a provision stating that information can only be refused if disclosure would or would be likely to cause ‘substantial harm’ to a protected interest. It should be made clear that the public interest override applies to all exceptions;
 - The definition of “information” should be expanded to include electronic sources, such as official computer databases as well as information existing on a physical medium;
 - There should be a requirement for all public bodies to provide freedom of information training to all civil servants and other officials at all levels, and to conduct public education about the right to access information;
 - There should be a requirement for all public bodies to proactively release all information in their possession that is of key public interest, including policy papers and proposals, procurement documents, investment and other public contracts, information regarding proposed projects and schemes and related documents on matters of public interest;
 - The duty to publish information regarding natural disasters, environmental threats and related information should be extended to all ‘authorized bodies’;

⁹ Recommendation 2002 (2) of the Committee of Ministers to Member States on access to official documents, adopted 21 February 2002, at IV.1. ‘Prescribed by law’ means that any restrictions should be formulated in a clear way and be accessible for review by the local public.

¹⁰ *Ibid.*, at IV.2.

- The requirement to “refute false information disseminated in the society” should be limited to factual information of public interest, for example concerning an environmental or health threat;
- There should be a clear explanation that private bodies such as non-governmental organisations, religious organisations and trade unions can be required to release information only if this is necessary to enforce a right of the requesting person, or if they hold information on behalf of a public body;
- A corresponding law article should specify a time frame for providing information by a ‘third’ public body;
- Clear rules for a transparent and democratic appointment procedure of the Information Ombudsman should be developed. They should include the following elements:
 - A nominations committee should be appointed by the Milli Mejlis or another democratically elected, multi-party body (not by the “corresponding executive body” as currently stated).
 - We recommend that the nominations committee should consist of at least 12 members, representing various interest groups, including a senior journalist from the state-owned media, a senior journalist from the non-state media, at least two human rights NGO representatives, a senior official from the Ministry of Environment (as Azerbaijan has adopted a Law on access to environmental information), the chairman of the Parliamentary working group in charge of the information law, a representative of the unofficial government-NGO FOI working group, a senior official from the Presidential administration, the Ombudsman, a lawyer from an association of lawyers, the Dean of the Law Faculty of Baku State University, and a representative from an association of entrepreneurs.
 - The President of Azerbaijan can be among the persons who can put forward nominations for the Information Ombudsman but he should not be the only person. The role of civil society in nominating candidates should be strengthened.
 - The nominations committee reviews all nominations and produces a long-list of qualified candidates.
 - From the long-list of nominees, the President then short-lists three candidates.
 - These three candidates should undergo public scrutiny and present their agendas at a public hearing organised by Milli Mejlis.
 - The Milli Mejlis elects one of the three candidates by majority vote.
 - The President appoints the candidate selected by Milli Mejlis.
- A corresponding law article should be amended to make it clear that a physical disability cannot bar a person from being appointed as an Information Ombudsman.
- Wilful destruction of documents or interference with the work of the Information Ombudsman should be made a criminal offence; and
- The law “On Obtaining Information” should either amend other laws and by-laws that are relevant to information disclosure or clearly state that its provisions prevail over information provisions in other legislation. In particular, action should be taken in regard to the following:
 - the 1998 Law on “Freedom of Information” which consists of declarations and is not an effective access law;
 - the 2002 Decree on State Secrets, which should be repealed;
 - the 2004 State Secrets Act, which should be brought in line with the exceptions regime we propose for the freedom of information law;

- the Criminal Code, whose provisions criminalising disclosure of state secrets should be brought in line with the exceptions regime we propose for the freedom of information law; and
 - the restrictions in Article 10 of the Mass Media Law, which should be repealed or amended to be brought in line with the exceptions regime we propose for the freedom of information law.
5. Adopt the Freedom of Information law as quickly as possible and at the latest by the end of 2005, and start its implementation without delay.
 6. Ensure that the legislative process, including the process leading up to the tabling of the law in parliament, is transparent and involves key stakeholders such as the media, NGOs and independent experts. In particular:

There should be public consultation and broad public debate around the adoption of the law. We recommend that work takes place through joint working groups and advisory bodies within the appropriate parliamentary and/or ministerial committees, centrally as well as at a regional and local level.

7. Take active steps to combat the culture of secrecy that still pervades many public authorities. In particular:

The management of public institutions must be made responsible for introducing training and awareness raising; for ensuring the institution's and staff's compliance with their information duties; and for promoting a general culture of open government. The management of public institutions and government departments that fail to comply with freedom of information duties should be reprimanded.

b) *Implementation of the Law:*

1. It is crucial that planning for implementation of the law begin as soon as possible, if it hasn't started already. Immediately after the adoption of the law, Milli Mejlis should recommend the President to issue a Decree on forming a working group, consisting of government officials, MPs and civil society organisations, to start developing an implementation strategy for the law "On Obtaining Information". There must be broad public consultation to design a strategy and action plan for implementation. This should include a joint working group involving NGOs, members of parliament, government representatives, media representatives and other experts.
2. An early strategy must be devised encompassing all components necessary for the successful implementation of the law. At a minimum, this strategy must include the following:
 - A public awareness campaign including social radio and television advertisements as well as newspaper ads and brochures covering themes such as the purpose of freedom of information, the principle that everybody can get access to publicly held information and the procedure for applying and appealing refusals to the Commissioner and in court; and providing the same in school courses;
 - The design and implementation, jointly with public administration academies, of regular on-the-job training programmes for public officials and civil servants at all levels. Measures must be taken to change the culture of secrecy prevailing in public institutions. Civil servants need to be instructed that openness is the presumption, and secrecy constitutes an exception;
 - Beginning practical preparations to set up the Office of the Information Commissioner. Funds and sufficient technical and administrative support must be available to ensure that the Commissioner can take up his or her duties as soon as he or she is elected;

- Design a detailed plan of action and carry out e-governance reform.¹¹ Each public body should have its own website and regularly update it. The website should, at a minimum, contain contact details for information officials, information request forms, describe the procedure for requesting information, and contain all documents made public by the institution previously, e.g. regulations, laws and by-laws, procurement documents, public contracts and related policy papers.
- The development of all necessary mechanisms and procedures to facilitate the law, such as forms for submitting a request/releasing information, the appointment of information officers, setting up information management and record-keeping systems that meet public needs and the creation of official web sites. As a cost-saving measure, the functions of the officials who will be responsible for handling information requests can be delegated to already existing staff.

To the Azerbaijani NGOs:

1. Civil society should actively participate in the development of the draft freedom of information law, all relevant regulations and a strategy for the implementation of the law;
2. Civil society should be involved in the process of nominating the candidates for the position of Information Ombudsman;
3. Civil society should support the implementation of freedom of information legislation by providing know-how, training and advice to help public institutions build their capacity, including in relation to the use of information and communication technology to increase transparency and involve the public in decision-making processes;
4. Civil society should monitor the implementation of freedom of information legislation and publicise their finding on a regular basis;
5. Civil society should actively use the law, once adopted, and challenge unlawful denials in court so as to establish positive judicial precedents;
6. Civil society should conduct education and awareness raising campaigns aimed at the media as well as the wider public on how to exercise the right to access information;
7. Civil society should foster cross-border cooperation, especially within the South Caucasus region, to transfer know-how and share best practices.

To the Azerbaijani Media:

Information is the lifeblood of the media and good access to information laws are crucial to their ability to inform the public on matters of public interest. The media should therefore play a full role in the adoption and implementation process of the law, and, once implemented, they should be among the primary users of the law. In particular, we recommend that the media should be involved in the following ways:

1. The media should ensure that they are fully aware of the law and use it to the fullest extent possible, challenging any unlawful denials of access;
2. The media should give wide coverage to freedom of information issues so as to increase public awareness of the right to access information. This includes writing about requests lodged by others and publicly challenging apparently unlawful denials of access to information;

¹¹ E-governance is the use of information and communication technology to make official information more accessible. It includes: providing greater access to government information; promoting civic participation; making government more accountable through greater transparency of its operations, and delivering services online, saving time and financial resources.

3. When researching and writing stories, seek to use the access law as much as possible.
4. Make reference to the corresponding access laws when making information requests.
5. The media and journalists organisations should actively participate in the development and subsequent implementation of the freedom of information law, commenting on the draft law and regulations and engaging with civil society organisations;

To International Governmental and non-Governmental Organisations:

International governmental and non-governmental NGOs can play an important role in the adoption and implementation of the Azerbaijani freedom of information law. They should fully share expertise gained in other countries and regions with the Azerbaijani government and civil society, including in the following ways:

1. The international community should provide assistance - both financial and technical - to Azerbaijani NGOs to design monitoring tools to ensure accountability of officials and transparency of their decision-making processes and train media and professional NGOs in strategic litigation.
2. Assist the government of Azerbaijan to develop mechanisms and procedures to promote freedom of information.
3. The international community should help initiate and widen discussion around access to official information and the rights of the general public and the rights of the media.

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