

Further Memorandum
on the
Moldovan Draft Law on Access to Information

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Introduction

The Moldovan Parliament is currently considering a revised version of the draft Law on Access to Information. In May 1999, ARTICLE 19 issued a Memorandum on an earlier version of the Law, in which it outlined Moldova's international obligations to protect and guarantee freedom of expression and information and described serious problems with the first draft of the law.

In this latest draft of the Law on Access to Information, some of these problems have been overcome and many of the positive provisions in the first draft have been maintained. Three serious problems, however, remain:

- the exemption provisions are too broad and vague and allow too much scope for illegitimate withholding of official information;
- the structure of draft law is confusing and unclear and does not follow a logical pattern which makes it difficult to determine the scope and application of the legislation and may lead to unnecessary problems in implementation; and
- the revised draft does not include a number of important safeguards which were recommended in ARTICLE 19's previous Memorandum.

Restatement of Moldova's Obligations to Protect Freedom of Expression and Access to Information

Moldova acceded to the International Covenant on Civil and Political Rights (ICCPR) on 27 January 1993 and became a signatory to the European Convention on Human Rights and Fundamental Freedoms (ECHR) on 12 September 1997. Both Article 10 of the European Convention and Article 19 of the International Covenant protect freedom of expression in broadly similar terms. Article 10 of the European Convention states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and

regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

Article 32 of the 1994 Moldova Constitution also guarantees freedom of expression and opinion, while Articles 34(1) and (2) state:

1. Everyone has the right to access any information of public interest and this right may not be curtailed.
2. Public authorities shall, in accordance with their established levels of competence, ensure that citizens are correctly informed both on public affairs and on matters of personal interest.

Freedom of information is an important element of the international guarantee of freedom of expression, which includes the right to receive, as well as to impart, information and ideas. There can be little doubt as to the importance of freedom of information. At its very first session in 1946 the United Nations General Assembly adopted Resolution 59(I) which stated

Freedom of information is a fundamental human right and...the touchstone of all the freedoms to which the UN is consecrated.

Its importance has also been stressed in a number of reports of the UN Special Rapporteur on Freedom of Opinion and Expression,¹ while Freedom of Information Acts have been adopted in almost all mature democracies and many newly democratic countries, such as Hungary and the Czech Republic.

A proper freedom of information regime is a vital aspect of open government and a fundamental underpinning of democracy. It is only where there is a free flow of information that accountability can be ensured, corruption avoided and citizens' right to know satisfied. Freedom of information is also a crucial prerequisite for sustainable development. Resource management, social initiatives and economic strategies can only be effective if the public is informed and has confidence in its government.

As an aspect of the international guarantee of freedom of expression, freedom of information is commonly understood as comprising a number of different elements. One such element, and an important one in the present context, refers to the right of citizens to access information held by public authorities, both through routine government publication of information and through provision for direct access requests.

To comport fully with the right to freedom of information, the state must establish cheap and efficient procedures for the public to access official information, ensure that its record keeping procedures make this possible and ensure that the access regime facilitates the maximum disclosure of information.

¹ See his 1997 and 1998 reports. UN Doc. E/CN.4/1997/31 and UN Doc. E/CN.4/1998/40.

The Exemption Provisions

A fundamental principle relating to access to information legislation is that all information, in whatever form, held by a public body for any reason must be subject to disclosure. Exemptions to this rule should be narrowly drawn, clearly spelt out in as much detail as possible in one part of the law and should cover the field as far as refusal of access to official information is concerned. Other laws should not be permitted to redefine or extend these exemption provisions. The exemptions should also be subject to a serious harm test and a public interest override. These should ensure that, even if it falls within the scope of the exemption provision, information will be released unless to do so would cause substantial harm to the interest protected by the exemption and there is no overriding public interest in disclosure which could outweigh the harm.

The draft law as it stands does not satisfy these fundamental objectives.

- Many provisions scattered throughout the law deal either directly or indirectly with the question of exemptions from disclosure. This is confusing, as it is necessary to read through different sections of the law in an attempt to determine the full scope of exempted information.

The law should set out all the exemption provisions clearly in one place. Articles 3(1), 4(2) and (3), 6(1), 7, 9, 10, 12(1)(c), 14(5) and 21 all deal in some way with exemptions from disclosure and should be grouped together.

- A significant drawback in the draft law is that it does not establish itself as the final word in relation to access to official information. Article 3(1) establishes that other laws may also deal with such access and this raises the possibility that such laws will be permitted to exempt further categories of information from disclosure. This is unacceptable.

The law on access to information should cover the field in relation to access to all official information, spelling out all possible categories of exempt information and specifying that, in cases of conflict with other laws, the access to information law will prevail.

- The draft law also contains a restrictive definition of official information which could, in effect, lead to the illegitimate withholding of such information. Article 6(1) states:

Under the present law, the official information of public interest is defined as documents, information in final form held and wielded by public authorities/institutions...such documents and information having been developed, selected, processed, systematised and/or adopted by official bodies or persons and registered in accordance with legislation.

All information in whatever form, produced for whatever purpose by any person or body, or received from anywhere, which is under the control of a public body, must be subject to disclosure. This is fundamental to the principles of public openness and accountability, which underlie the whole philosophy of freedom of

information. To define public information in a restrictive sense, as this section does, is to defeat the purpose of the legislation at the first hurdle.

The provision should be redrafted to widen the scope of official information to include all information a public body could conceivably hold.

- Articles 4(2) and (3) make general statements about categories of information whose release may be restricted without referring to the specific exemption provisions set out later in the draft law. This is inappropriate. Legislation on access to information must give detailed effect to international and constitutional provisions which protect freedom of expression and access to information. Merely repeating the language of such international and constitutional provisions does not achieve this and can be detrimental.

The legislation must set out in detail all categories of exempted information and should not use broad language granting discretion to public officers to withhold release of other types of information.

- Articles 7, 9, 10, 12(1)(c) and 14(5) of the draft law deal with specific categories of information, which are to be exempted from disclosure. These provisions suffer from two fundamental defects. First, none of them is expressed to be subject to a threshold harm test. If public bodies are truly to be opened up to public scrutiny, there must be a presumption that all information, even where it falls within the ambit of an exemption provision, is subject to disclosure unless the harm to the competing public interest which could mandate withholding the information is overwhelming.

If the regime for access to official information is to strike a proper balance between the rights of the public to access information and other legitimate public interests which might justify withholding information, all exemptions should be subject to the following three-part test. Information should only be withheld from disclosure where:

- 1. It clearly relates to a specific legitimate interest listed in the law;**
 - 2. Disclosure of the information would cause substantial harm to the legitimate interest; and**
 - 3. The harm to the interest would be greater than the public interest in having the information.**
- Equally worrying, many of the provisions themselves are vague and overbroad. For example, Articles 7(2)(a) and (3), dealing with state secrets and national security, fail adequately to define the scope of legitimate state secrets or national security interests. Article 7(2)(f) prevents the disclosure of information which may affect the environment, but this could relate to a vast array of information which the public has a right to receive. Article 9(1) exempts disclosure of “personal data”. While it is legitimate to restrict disclosure of such information in certain circumstances, the term “personal data” should be clearly defined. Article 14(5) appears to suggest that analytical, compiled or new information is exempt unless

special procedures have been followed. This is an extremely vague provision which could cover virtually all information held by public authorities.

These and other exemption provisions provide insufficient guidance to public authorities as to the specific types of information which may be legitimately withheld. Such guidance is vital if the culture of secrecy within government is to be overcome. Broad and vague exemptions defeat the presumption of openness at the heart of the access to information regime and are an invitation to continued secrecy. Experience in other countries suggests that recalcitrant civil servants may use such provisions to withhold disclosure of a vast array of information which ought to be released.

The exemption provisions should be clearly and narrowly redefined to provide clear guidance to those seeking to use the law.

Structure and Layout

The draft law is confused, difficult to follow and frustrating to interpret. It does not follow any clearly logical sequence and often repeats itself or states the irrelevant or obvious. Definitions are either lacking altogether or are unclear, and relatively simple concepts are expressed in unnecessarily complicated language (although this may be a result of translation into English). Such concerns are not merely stylistic or superficial. They affect the ability of civil servants, lawyers and members of the public to understand and make use of the legislation. If the very law intended to open up Moldovan government is itself opaque and obscure, this cannot bode well for the future of the free flow of official information.

For example, Articles 1 and 2 deal with essentially the same subject matter and could be amalgamated. The same is true of Articles 4, 5 and 11, whose obscure language is particularly unfortunate given that it is in these sections that the right to access information is asserted. Both alternative Articles 23, dealing with appeal rights are similarly opaque. Difficulties with the arrangement of the exemption sections have already been referred to but similar problems apply in relation to the articles dealing with the substantive rights of applicants and the procedure for access. Also, a number of procedures, such as the right of those whose personal information is subject to an access request to object to disclosure, are alluded to but not spelt out in the law.

For clarity and certainty in the law ARTICLE 19 recommends a complete overhaul of its structure and a simplification of its language. Uncertain terms should be avoided or clearly defined and the various sections of the law should, as much as possible, follow a logical sequence. The following specific suggestions would greatly simplify the law and assist all parties in making effective use of its provisions.

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| <ul style="list-style-type: none">• The definition section should come first and should define such terms as “public body”, “document”, “public information” and “personal information”.• The next section should detail the types of information which public bodies must routinely publish without waiting for access requests. |
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- **In the third section the rights of all those within the jurisdiction of Moldova (not merely citizens) to access all information under the control of a public body, subject only to the exemption provisions spelt out later in the law, should be asserted and the procedures for gaining such access spelt out. This section should also establish the supremacy of the access to information law in relation to all other legislation.**
- **Since access to and correction of personal information is contemplated by the draft law, the following section should set out the procedures for doing this but should not contain exemption provisions. These must all be contained in the dedicated exemption section to follow.**
- **The exemption section itself should begin by establishing that all exemptions are subject to the three-part test detailed above and should then spell out in as much detail as possible all of the categories of exempt information. Broad terms granting wide discretion to public bodies to exempt information should not be used.**
- **Procedures to allow third parties to whom requested information relate to object to its release should be included in detail in this section.**
- **The remaining sections should set out the rights to appeal against adverse decisions, including both internal appeals within the public body, appeals to an independent administrative body and appeals to the courts, establishing the power of the administrative body and the courts to examine all information within the ambit of the law and to make any order they regard as just.**
- **Other matters such as open meetings and “whistleblower” protection (see below) should be included after the appeals sections, any further miscellaneous matters coming in the final section.**

Omissions

In order to be fully comprehensive, there are a number of other matters which ought to be included in the draft law.

- Firstly, the procedures to appeal against refusal of access to information are inadequate.

In addition to the internal appeal within the public body and the full appeal to the courts, an intermediate appeal should be provided to an independent administrative body such as an ombudsman, a human rights commission or a body set up specifically for this purpose.

Such a procedure avoids the problems of cost and delay inevitably associated with appeals through the courts and provides an easily accessible and comprehensible means for individuals to challenge the decisions of public bodies, without recourse to lawyers and complicated legal arguments.

- Experience in other countries demonstrates that even a progressive access to information law may be undermined by a recalcitrant civil service whose “culture

of secrecy” is entrenched. Some commentators suggest that only a generational change can succeed in opening the beauracracy to public scrutiny.

In order to combat this serious difficulty for the regime of access to information, the law should provide for promotional activities both within the civil service itself and throughout the public at large. These should explain the need for freedom of information and the acceptable restraints upon it and provide training to civil servants who will be required to come to grips with the new legislation. Incentives should also be provided to government departments such as annual reports to parliament, possibly with rewards to those departments whose response to access requests is most in keeping with the letter and spirit of the law.

- In order to entrench the principle of openness, the law should also provide that all decision-making meetings of public, governing bodies should be open to the public. This includes formal meetings of national and local government bodies, planning committees, educational authorities, public industrial development agencies and other similar public bodies.
- Finally, the law should establish a procedure for the protection of “whistleblowers”; those who release information on public wrongdoing such as corruption, dishonesty, the commission of a criminal offence, public maladministration or a miscarriage of justice.

Whistleblowers should be protected from all legal, administrative and employment-related sanctions as long as they act in good faith in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing. Such protection should apply even where disclosure would otherwise be in breach of a legal or employment-related requirement. In some countries, protection for whistleblowers is conditional upon a requirement to release the information to certain individuals or oversight bodies. While this is generally acceptable, protection should also be available, where the public interest demands, when disclosure is made to other individuals or even to the media.

Response to Alternative Proposals in the Draft Law

At a number of places in the draft law, alternative articles are proposed for discussion.

- Since it has already been suggested that Articles 1 and 2 be amalgamated and simplified, the addition of a further paragraph in article 1 would be unfortunate. There is also no need to spell out the matters contained in the proposed paragraph since a properly worded definition section (see below) would clearly define the scope of the access to information law.
- The proposed Article 8, dealing with information which has already been published elsewhere, would be a useful addition.
- The suggestion that all information of whatever kind relating to candidates for elected or appointed office should be subject to disclosure, while it certainly pursues a legitimate aim, goes too far. Even public figures have legitimate privacy

interests and they should not be required to open every aspect of their lives to public scrutiny. If such a provision is to be included, ARTICLE 19 suggests it be restricted to information relating to financial and business affairs, in which the public certainly would have a legitimate interest.

- The possibility of making an anonymous access request, contemplated in the proposed Article 14(3), is acceptable, although anonymity could not continue if the access request were refused and the applicant wished to challenge the decision in the courts. This should be spelt out in the provision.
- The appeal procedure set out in the alternative Articles 23-25 is to be greatly preferred to the current version. While the procedure in neither version is clear, the alternative is better and follows a more logical approach.
- In relation to the offences spelt out in the proposed Article 26(2), it is legitimate to provide sanctions for those who deliberately block access or falsify or destroy records, provided that no one should be punished if acting in good faith under the access to information law. The other offences are unnecessary and should be removed.

Summary of Recommendations:

- **Bring all of the exemption provisions into one part of the law.**
- **Ensure that this law covers the field in relation to access to official information.**
- **Widen the scope of the definition of official information.**
- **Clearly, exhaustively and narrowly define all categories of information, which are to be exempted from disclosure and ensure that these categories cannot be extended or widened.**
- **Subject all exemptions to a strict “harm” and “public interest” test.**
- **Completely overhaul the structure, layout and language of the draft law to make it simple, clear and easy to interpret and use.**
- **Provide for an intermediate, administrative appeal procedure between the internal appeal within the public body and the appeal to the courts.**
- **Establish promotional activities to fight the “culture of secrecy” within the civil service.**
- **Include a provision to require open meetings of all governing, public bodies.**
- **Establish procedures to protect “whistleblowers”.**