ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

UPDATED BRIEFING NOTE

on the

Serbian draft Law on Free Access to Information of Public Importance (as amended)

by

ARTICLE 19
Global Campaign for Free Expression
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Introduction

This Updated Briefing Note analyses the amendments to the Serbian "Draft Law on Free Access to Information of Public Importance" (the new draft Law), currently being discussed by the Serbian Parliament.

Our analysis of July 2003 noted a number of positive elements within the original draft Law, including an obligation to publish, a procedure for accessing information and an appeals process. However, we also identified a number of shortcomings. Unfortunately, the majority of our recommendations to address these shortcomings have not been addressed by the recent amendments. In fact, some of the positive features we initially identified have been removed from the new version of the Law.

Key problems with the new draft Law are as follows:

- despite some amendments, the provisions defining the scope of the new draft Law remain confusing and contradictory;
- the regime of exceptions still allows for additional exceptions to be imposed by other laws; and

- the provision which had provided some measure of whistleblower protection has been removed.

This Updated Briefing Note follows the format of the original Memorandum, looking, in turn, at the scope of the new draft Law, the provision for open meetings, the regime of exceptions, the appeals and complaints procedure, whistleblower protection and the imposition of fines and damages. Since no significant changes were made to the draft Law's "Access Procedure", the comments contained in our first Memorandum remain applicable.

The Scope of the new draft Law

Article 5 of the previous version of the draft Law is now Article 4. The amended article no longer creates two distinct and contradictory categories of information, and the reference to information more than 20 years old has been removed.

The approach adopted is to start by limiting the right of access to information of 'public importance' and then to define this broadly. In our view, this is the wrong approach. The right should apply to all information held by a public body, without regard to whether or not it is of public importance. Conditioning the right in this way unduly limits it and adds a serious complicating factor to the request process, which is likely to create unnecessary obstacles to access.

Recommendation:
- Article 4 should clearly state the presumption that all information held by a public authority is subject to disclosure, subject only to the regime of exceptions.

Open Meetings

Article 9 of the previous draft Law, which granted journalists the right to "directly follow the work of a public authority" by attending public meetings, has been removed from the new draft Law. The new draft Law is silent regarding the right to attend the meetings of public authorities.

In our previous Memorandum, we argued in favour of a more comprehensive regime for open meetings. This is still our preferred option, but we recognise that this is a complex matter and that it may be preferable to leave it for full treatment in a separate law.

Recommendation:
- Consideration should be given to developing a full regime for open meetings to be included in the access to information law.

Exceptions

The new draft Law contains some changes to the regime of exceptions. For instance, Article 17, which was criticized in our first Memorandum for being wholly inconsistent with international standards, has been removed. In addition, the last bullet point of Article 16 – Article 14 in the new draft Law – has been removed, thus making the article less ambiguous.

Nonetheless, the other shortcomings that we identified in our first analysis have been carried forward in the new draft Law. For instance, there is still no exhaustive list of aims in pursuit of which access may be refused, there is no public interest override provision, and Article 13 (formerly Article 15) allows the possibility of extending the exception regime through other laws and regulations.

Recommendations:

- The draft Law should contain an exhaustive list of aims in pursuit of which access may be refused.
- The draft Law should contain a public interest override provision.
- The last bullet-point of Article 13 should be removed and replaced by a provision making it clear that the regime of exceptions in the draft Law cannot be extended by other laws.

Appeal procedure and supervision

The provisions contained Chapter VII of the old version of the draft Law are now found in Chapter V.

The Ombudsman is no longer nominated by the High Judiciary Council and appointed by the National Assembly. Article 30 now states that MP's will vote for a candidate, "at the proposal of the National Assembly's Committee in charge of information", and the person who receives the majority of votes will be formally appointed by the National Assembly.

Although the nominating body has changed, the appointment process has not been made any more transparent by the amendments and there is still no provision for civil society involvement. There are no other notable changes to this Chapter of the draft Law, and thus the recommendations made in our first Memorandum continue to apply.

Complaints Process and Enforcement Mechanisms

Chapter IV of the draft law sets out the Ombudsman's complaints procedure. Article 22 states that applicants have a right to complain with the Ombudsman within 15 days of receiving a response to a request from a public authority on various grounds. Article 23 provides that Ombudsman has 30 days to reach a decision on a complaint, during which time the public authority and, if necessary, the applicant will have had an opportunity to respond. The Ombudsman may dismiss inadmissible complaints, those that are filed late or those that are submitted by an unauthorized person.

The complaints procedure on the whole is consistent with international law, but some of the terms that are key to the operation of the complaints procedure are undefined. Specifically, in Article 23, there is no indication of what will render a complaint "inadmissible" or who will be considered an "unauthorized" complainant.

Recommendation:

- Terms such as "inadmissible" and "unauthorized" contained in Article 23 should be defined.

Miscellaneous

Whistleblowers

Article 18 of the previous draft Law granted whistleblowers protection against legal liability. This provision has been removed from the new draft Law. ARTICLE 19 recommends that this provision be replaced, and extended to ensure that whistleblowers do not suffer administrative or employment related sanctions, as discussed in our first Memorandum.

Recommendation:

- The draft Law should contain a provision that protects whistleblowers against any legal, administrative or employment-related sanction.

Fines and Damages

Chapter X of the previous draft Law – now Chapter IX – imposed fines ranging from 30,000 – 300,000 dinars (USD500 – 5,000) on any public authority spokesperson, or other senior person within the public authority, who violates any of the Law's provisions. The new draft Law significantly reduces the quantum of the fines to between 5,000 – 50,000 dinars (USD83 – 833).

While this reduction does partly address our concerns with these provisions, we still think that, for many of these failures, it is not appropriate to impose personal responsibility in the form of fine. We would distinguish between failures which may be caused by negligence or some other cause, and those which are a result of a wilful desire to block the disclosure of information. Personal responsibility is appropriate for the latter, but not necessarily the former.

Recommendation:

- Personal responsibility in the form of fines or other quasi-criminal sanctions should either be conditioned upon wilful obstruction of access, or some related mental element, or removed from the draft Law.