ARTICLE 19

Kazakhstan: Draft Law on Access to Information

July 2012

Legal analysis

Executive Summary

In this analysis, ARTICLE 19 reviews the April 2012 version of Kazakhstan's Draft Law on Access to Information ("Draft Law"). Access to information legislation has been a topic of discussion in Kazakhstan since 2010, with several draft proposals being produced by various groups. The Draft Law has been prepared by a working group established within Mazhilis (the lower chamber) of the Parliament of the Republic of Kazakhstan.

ARTICLE 19's analysis notes a number of positive aspects of the proposed legal regulation, such as the large pool of those who may make disclosure requests, the lists of information which ought to be publicly available without request, and the right of access to public meetings. Nevertheless, a number of features of the Draft Law are of concern to ARTICLE 19. These include the vague legal language used, the regime of exceptions which are not compliant with international standards, the lack of monitoring and enforcement procedures, and the specific powers of the Ombusdman, which will allow him/her to play a key role in the implementation of the access to information law. This analysis makes recommendations for improving the draft Law based on international legal standards.

ARTICLE 19 calls on the working group to examine this analysis carefully and to implement these recommendations. We stand ready to provide further assistance in the drafting of this important piece of legislation.

Summary of recommendations:

- References to other laws should be avoided in the Draft Law if possible. If included, the laws to which the references are made should be specified;
- Articles 6, Article 11 (1) and Article 32 of the Draft Law should be deleted as they are redundant and relate to obvious facts;
- Article 8, para 1, item 3 of the Draft Law - recognising the right of information users "to refuse to receive information" – should be deleted as illogical;
- The criterion for the exception relating to the justification of the legality of the restriction should be removed from Article 7(1) item 4._as it contradicts access to information standards;
- The judicial and legislative branches of the government should provide access to information and should be included among bodies that are obliged to respond to requests for information in Article 9 of the Draft Law;;
- The Ombudsman should be given further responsibility to educate the public about the Access to Information Law and ensure its proper implementation;
- The Ombudsman's powers should be provided in the Draft Law in detail, including the procedures for filing complaints to the Ombudsman and the investigations he/she can carry out;
- The Draft Law should establish a complaint review procedure and ensure that the review bodies are publicly accountable for the failure to respect the Law.

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About the ARTICLE 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year and comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at http://www.article19.org/resources.php/legal/.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org.

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Introduction

In this analysis, ARTICLE 19 reviews the April 2012[1] version of Kazakhstan's Draft Law on Access to Information ("Draft Law"). Access to information legislation has been a topic of discussion in Kazakhstan since 2010, with several draft proposals being produced by various groups. The Draft Law has been prepared by a working group established within Mazhilis -the a lower chamber of the Parliament of the Republic of Kazakhstan - and is supported by the UNDP in the framework of the Access to Information Project.[2]

ARTICLE 19 is an international, non-governmental organisation with a specific mandate to promote the right to freedom of expression and the right of access to information. We have been involved in the adoption and implementation of access to information legislation in a variety of countries across four continents through the provision of legal expertise and training. In Kazakhstan, we commented on a previous version of the Draft Law in October 2010.[3] Since then, we have closely followed the drafting process and urged the authorities to give priority to the adoption of a law on access to information.[4]

ARTICLE 19 welcomes the efforts of the government of, and civil society in, Kazakhstan to adopt a dedicated freedom of information law. Access to information is a fundamental human right, crucial to the functioning of democracy and key to the enforcement of other rights. The right of access to information has been codified both in international human rights law and in anti-corruption conventions.

Our overall assessment of the Draft Law is positive. It includes a broad definition of the right to access information, good process and procedural guarantees, very broad obligations for proactive disclosure and direct access, and includes the right of access to public meetings.

Nevertheless, the Draft Law continues to suffer from some weaknesses, the most serious relating to the enforcement of the law. This analysis sets out ARTICLE 19's principal concerns with the Draft Law and provides recommendations for its improvement.

Our analysis of the draft Law is based on international law and best practice in the field of access to information, as summarised in two key ARTICLE 19 documents: *The Public's Right to Know: Principles on Freedom of Information Legislation*,[5] and *A Model Freedom of*

[1] This analysis is carried out on the basis of the Russian version of the Draft Law, dated 26 April 2012.

[2] The working group is headed by Mr Zhakyp Asanov, Parliamentarian of the Upper Chamber of Parliament (Mazhilis).

[3] ARTICLE 19, Memorandum on the Draft Law of the Republic of Kazakhstan on Access to Public Information, October 2010; available at http://www.article19.org/resources.php/resource/1635/en/memorandum-on-the-draft-law-of-the-republic-of-kazakhstan-on-access-to-public-information.

[4] ARTICLE 19, Kazakhstan: Two Decades of Independence have not benefited freedom of expression, December 2011; available at http://www.article19.org/resources.php/resource/2907/en/kazakhstan:-two-decades-of-independence-has-not-benefited-free-speech.

[5] ARTICLE 19, London: June 1999; available at http://www.article19.org/pdfs/standards/foi-the-right-to-know-russian.pdf.

Information Law (ARTICLE 19 Model Law).[6] Both publications represent broad international consensus on best practice for access to information. We are pleased to note that it appears that these documents have been consulted in the preparation of the Draft Law.

ARTICLE 19 calls on the working group to examine this analysis carefully and to incorporate the recommendations into the final version of the law. We stand ready to provide further assistance in the drafting of this important piece of legislation.

[6] ARTICLE 19, London: July 2001; available at http://www.article19.org/pdfs/standards/foi-model-law-russian-.pdf.

International standards on freedom of expression and freedom of information

This analysis is premised on international and comparative legal standards regarding the right of access to information. These standards were comprehensively summarised in ARTICLE 19's 2010 Memorandum on the Draft Law of the Republic of Kazakhstan on Access to Public Information and do not bear repetition. However, this section briefly highlights the relevant international- and comparative-law developments since the Memorandum's publication.

The Human Rights Committee's General Comment No. 34 – released in September 2011 – clarifies that Article 19 ICCPR embraces a right of access to information held by public bodies.[7] The General Comment's important interpretative principles are:

- 'public bodies' include all branches of the government (legislative, executive and judicial) whether local, regional or national as well as semi-state entities and others exercising a public function[8]
- Every individual has the right to access in intelligible form any personal data stored about them in automatic data files and the reasons for storage
- All incorrect information or information collected incorrectly is subject to the individual's right of rectification
- States must ensure easy, prompt, effective and practical access to information
- Fees levied for accessing information should not unreasonably impede such access
- Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failure to respond to requests

For a comparative perspective, ARTICLE 19 notes that the Office of the Special Rapporteur on Freedom of Expression for the Inter-American Commission of Human Rights released its annual report in December 2011.[9] The report provides significant guidance on the interpretation and application of access to information laws in the Americas.

In 2011 the General Assembly of the Organisation of American States (OAS) adopted a resolution and Model Law on Access to Public Information and Protection of Personal Data.[10] The Model Law establishes the principle of 'maximum disclosure', extensively lists key information items that should be subject to proactive disclosure by the State and provides for internal and external appeals against refusals of requests to access information. The Model Law draws on best practice, as follows:

- Disclosure is the norm and secrecy is the exception;

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[7] CCPR/C/GC/34 at para 18.

[8] *Ibid*, paras 7 and 18.

[9] The annual report of the Office of the Special Rapporteur of the OAS, see http://www.oas.org/en/iachr/expression/reports/annual.asp.

[10] AG/RES.2607 (XL-0/10) Accessible at http://www.oas.org/DIL/AG-RES_2661_XLI-O-11_eng.pdf and the model law itself is available at http://www.oas.org/dil/CP-CAJP-2840-10_Corr1_eng.pdf.

- The State bears the burden of proof to justify restrictions on the right to access information;
- In the event on conflicting laws, the right of access to information must prevail;
- The right of access to information must be interpreted in good faith by all.

The report of the special rapporteur and the Model Law identify State obligations, as follows:

- To respond to requests for information in a timely, complete and accessible manner;
- To provide an administrative remedy that satisfies the right of access to information;
- To provide an appropriate and effective judicial remedy for reviewing denials of requests to access information;
- To provide the maximum amount of disclosure on a proactive (rather than reactive) basis;
- To produce or gather information in order to fulfil international legal obligations;
- To create a culture of transparency;
- To implement access to information laws adequately;
- To make all restrictions on the right to access information compatible with international standards (principally, the 'three-part test' provided for in Article 19(3) ICCPR).

Moreover, on 19 September 2011, the participants at the Pan African Conference on Access to Information[11] adopted the African Platform on Access to Information Declaration (APAI).[12] The APAI was released at the inaugural Pan African Conference on Access to Information, held between 17 - 19th September 2011 in Cape Town, South Africa. The landmark declaration was drafted by nine African groups working on freedom of expression, access to information, and the media, including ARTICLE 19.

The Declaration sets out 14 principles focusing on African-related issues which elaborate the right of access to information and which includes access to information by disadvantaged communities and which covers issues related to health, education, aid transparency, and corruption. The APAI provides guidance to countries for the enactment and implementation of access to information laws and makes requests to governments, international bodies and others on promoting the right of access to information, including formal recognition of 28 September at International Right to Information Day. The Declaration is also being submitted to UNESCO and the African Union (AU) and other international bodies for adoption.

In January 2011 the Ukrainian Parliament adopted a law on Access to Information, which ARTICLE 19 applauded as a progressive and welcome development.[13] The text of the law is available for comparative purposes.[14]

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[11] The conference was organised by the Windhoek+20 Campaign on Access to Information in Africa in partnership with the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the African Union Commission (AUC) and the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples' Rights.

[12] The full text of the APAI is available at http://www.article19.org/data/files/medialibrary/2740/APAI-FINAL.pdf.

[13] ARTICLE 19, Ukraine: Access to Information Law Adopted, 14 January 2011; available at at http://www.article19.org/resources.php/resource/1693/en/ukraine:-access-to-information-law-adopted

[14] http://www.article19.org/data/files/pdfs/laws/ukraine-the-law-on-access-to-public-information.pdf

Finally, in April 2012, ARTICLE 19 published a thematic policy brief of international standards on the right to information, which collates the relevant international and regional legal principles.[15]

[15] ARTICLE 19, International standards: Right to information, April 2012; available at http://www.article19.org/resources.php/resource/3024/en/international-standards:-right-to-information

Analysis of the Draft Law

The Draft Law consists of five chapters and thirty three articles. It establishes the principle of the right of access to information, the rights and duties of information users and information holders, and regulates the methods and procedures for obtaining and disseminating information, and for accessing meetings. The draft Law also sets out a mechanism for control and oversight and for the protection of whistleblowers.

Positive aspects of the Draft Law

ARTICLE 19 finds that the following aspects of the Draft Law are commendable and should be retained in the final version:

- The broad scope of the right to access information, which includes not only the right to obtain information but also the right to disseminate information;
- The broad interpretation of information users who have a right to request information, which includes individuals and legal entities regardless of nationality, as well as foreign states and international organisations;
- The broad interpretation of the group of information holders: governmental bodies and local self-governments, entities of the quasi-governmental sector, individuals and legal entities who use public budget funding, "entities holding a dominant position of monopoly in relation to terms and prices for supply of goods and services and prices for them" are governed by the Draft Law;
- The extensive list of information that must not be subject to restrictions, including information concerning the personal security of individuals, about their rights, freedoms and legitimate interests, about emergency situations, natural and manmade disasters, acts of terrorism, and environmental pollution, etc.;
- The duty of individuals and private legal entities who possess environmental information or information about emergency situations to provide access to the information;
- The duty of information holders to establish special units and appoint officials to respond to information requests;
- The broad scope of key information, which public bodies are obliged to publish on the internet without request;
- The provision for the right to access meetings of information holders;
- The guarantee of the right to access minutes of open meetings of collective bodies and information holders;

- Provisions on the protection of whistleblowers.

Problematic aspects of the Draft Law

Despite the positive features of the Draft Law, ARTICLE 19 finds the following provisions problematic and recommends their revision.

The vague language of the draft Law
The legal regime on access to information is unclear for the following reasons:

- Many provisions of the Draft Law refer to other unspecified laws: For example, Article 13 states that "information can be disseminated by information users in verbal and/or written form, also in the form of electronic documents, *by any means that are not prohibited in law.*". Article 14 provides that "information shall be published in official printed editions or periodicals as *established by laws of the republic of Kazakhstan*" (emphasis added) We are concerned that these non-specific references to other laws do not fulfil the obligation of the state to ensure easy and effective access to information. It will be difficult for ordinary information requesters to effectively use the access to information regime.
- The purpose and content of some provisions of the Draft Law is unclear: For example, Article 6 states that "access to information shall be exercised by the obligation of information holders or provision of governmental and public oversight over *compliance with the access to information* legislation or compliance with the terms and procedure of access to information law." Likewise, Article 11(1) provides that *"access to information shall be ensure*d by the information holder" (emphasis added). It is also unclear what is meant by Article 32(1) which states that "the government guarantees the protection of whistleblowers."

- Some provisions are unusual for freedom of information legislation: For example Article 8(1), item 3 recognises the right of information users "to refuse to receive information." ARTICLE 19 points out that this "right" is illogical and does not exist in other access to information laws.

Recommendations:
- References to other laws should be avoided, if possible, in the Draft Law. If included, the laws to which reference is made should be specified.
- Articles 6, Article 11 (1) and Article 32 should be deleted as they are redundant and relate to obvious facts
- Article 8 (1) item 3, recognising the right of information users "to refuse to receive information," is illogical and should be deleted.

The overbroad regime of exceptions to the right to freedom of information
Although the exception regime in the earlier version of the Draft Law (October 2010) has been significantly improved, ARTICLE 19 still finds it problematic because it contains an additional, unusual and vague requirement..

We note that under international law on freedom of expression, restrictions of the right to freedom of information are acceptable only if the exceptions protect a legitimate interest

recognised by law, the release of information would cause significant harm to that interest, and that the need to avoid harm to the interest outweighs the public benefits of disclosure. Article 7(1) item 4 of the Draft Law adds another requirement – that the legality of the restriction must be justified. This requirement is unclear and does not comply with international standards.

Recommendations:

- The requirement for justifying the legality of a restriction to the principle of freedom of information should be removed from Article 7(1) item 4.

Exclusion of the judicial and legislative branches of government

ARTICLE 19 observes that Article 9 of the Draft Law, which lists public and private bodies that are obliged to respond to requests for information, does not include the judiciary and the legislature. The Human Rights Committee has made it clear that 'public bodies' include all three branches of the State (legislative, executive and judiciary) at all levels (local, regional and national). In line with these international standards and best practice regarding freedom of information, we recommend that all branches and levels of government are obliged to provide access to information.

Recommendations:

- The judicial, legislative and executive branches of the government (at all levels) should provide access to information and should be included among bodies that are obliged to respond to requests for information in Article 9 of the Draft Law.

Weak Enforcement Mechanisms

ARTICLE 19 notes that the Draft Law fails to specify the enforcement mechanism, including the monitoring and appeal procedures, to the level of required particularity. We are concerned that without sufficient detail and precision, provisions for the enforcement of the legal regime on access to information will be impeded.

Chapter 5 of the Draft Law deals with the mechanisms and procedures for its enforcement. Article 31(1) provides that decisions and actions of information owners can be appealed before a superior body, or higher official, the Ombudsman, or in court. Information owners shall be responsible for exerting control over the provision of access to public information, while citizens, mass media, political parties and trade unions shall exert public control (Article 30(1) and (2) of the Draft Law). Finally, oversight of compliance with the legislation on access to information shall be exercised by the public prosecutor's office (Article 30(5) of the Draft Law).

Compared with previous versions of the Draft Law, ARTICLE 19 considers that the mechanism for enforcement has improved. In particular, we value the powers given to the Ombudsman to examine complaints of violations of the law. Other ombudsman institutions in the world have similar powers relating to human rights and access to information, for example, in Ireland and the Scandinavian countries.

Nevertheless, in our view, the enforcement mechanism should be further strengthened. International guidance provides that States should produce information to fulfil its freedom of information obligations, adequately implement access to information laws and create a

culture of transparency.[16] In particular, we recommend that the Ombudsman should be granted the following special and additional powers:

- not only to handle complaints but also to play a role in educating public officials and members of the public about the existence and implications of the access to information law, and in advising public bodies on ways to improve implementation. The Ombudsman should organise and run training programmes for public officials, or advise public bodies on generating their own programmes.[17] By issuing annual reports with statistics about the number of requests, the processing time, the number of refusals and the grounds for refusals, the Ombudsman can raise concerns regarding the implementation of the Draft Law and provide a focus point for periodic debate. In the United Kingdom, for example, the Information Commissioner's Office (ICO) publishes online toolkits for organisations to assist them in recognising information requests and responding appropriately (so called ACCESS AWARE toolkits).[18] The Department for Justice in the Unites States regularly publishes reports on the number of requests for information received, the exemptions applied and the processing times;[19]

- In addition to the ability of the courts, the Ombudsman should be able to inspect information in a confidential manner in order to verify a public body's claim that releasing information will harm the public interest. The Ombudsman should have the power to order the immediate release of an information record or even seize it at the offices of the body in question, if necessary.

Finally, it is unlikely that the supervision and control over information owners will be effective given the brevity in which the Draft Law deals with the matter. The scarcity of provisions implies that control and supervision of the access to information regime will be carried out solely at the will of the designated bodies. This is problematic in view of the fact that the Draft Law contains no mechanism for the public accountability of these bodies.

We also note that the Draft Law does not establish a procedure for the examination of appeals before superior bodies or higher officials with specific safeguards for fair and prompt review. As a result, the outcome of any complaint depends entirely on the will of the reviewing body/official.

Recommendations:

- The Ombudsman should be given further responsibility to educate the public about the access to information law and to ensure its proper implementation;
- The Ombudsman's powers should be clearly specified in the Draft Law, including the procedures for filing complaints to the Ombudsman and the investigations he/she can undertake;

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[16] UN Human Rights Committee, General Comment No. 34, paras 18 - 20

[17] See, for example, section 38 of the ARTICLE 19 model law, accessible at http://www.article19.org/data/files/pdfs/standards/modelfoilaw.pdf.

[18] For Access Aware Kits, see the website of the Information Commissioner's Office; available at http://www.ico.gov.uk/tools_and_resources/access_aware_toolkit.aspx.

[19] For FOIA website, see http://www.foia.gov/reports.html.

- The Draft Law should establish a complaint review procedure and ensure that the reviewing bodies are publicly accountable for their activities.