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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW

ON FREE ACCESS TO INFORMATION

OF MONTENEGRO

by

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**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

1. My remarks below are of a preliminary nature. I examine the law principally on the extent to which it complies with the applicable European standards, in particular the Council of Europe Convention on Access to Official Documents, 2009 (Council of Europe Convention), ratified by Montenegro but not yet in force. I have had the benefit of reading Professor Peters' comments and I agree with them. I would add the following comments.

2. It is to be welcomed that Montenegro has acted to improve access to information. Free access to information is crucial to a modern democracy and a Rechtsstaat (see, eg the preamble in the explanatory report to the Council of Europe Convention). Improved standards must obviously be accompanied by training of bureaucrats, to foster a climate of openness, and improved administrative resources to cope with requests from the public and NGOs.

3. Basic provisions. This can be seen as a reminder, of Article 9 in the Montenegro Constitution which provides that "The ratified and published international agreements and generally accepted rules of international law shall make an integral part of the internal legal order, shall have the supremacy over the national legislation and shall be directly applicable when they regulate the relations differently from the internal legislation." In the draft law it would appear that the reference to the "level of standards set out in ratified international agreements on human rights" is meant to enable the interpretative authorities and the courts, when applying the law to refer to these standards. Presumably, applying the principle of treaty conform construction, they are being encouraged to interpret the law in a way to correspond with the international standards, should these be higher. If so, then this is to be welcomed. However, as is well known, this will not be sufficient: administrative measures must be taken actively to encourage bureaucrats and judges to have recourse to international standards. Moreover, while several of the most relevant treaties, eg the Aarhus Convention and the Council of Europe Convention, have a clear human rights dimension, they can only be described with difficulty as "human rights" treaties. It would seem more in accordance with Article 9 of the Constitution to use the same wording in the law, if it is felt necessary to recollect this rule at all.

4. **Article 3** (free access of information) is an important principle, and the wording of it corresponds with the requirements of Article 4 Council of Europe Convention.

5. **Article 6** (equality of requests) corresponds with the requirements of Article 5(3) Council of Europe Convention

6. The definition of terms in **Article 9** appears to correspond with the terms set out in Article 1 Council of Europe Convention. The right of access to public information can be circumvented or reduced in practice by transferring documents to private bodies, such as foundations or corporations. It is thus important that even such bodies, when the state controls them, or where they carry out delegated public functions, are covered by the right of access to information.

7. **Article 10** refers to "documents in any form" - this presumably covers digital information – which are "composed or received by public authority, on any basis". This again seems to cover all the ways in which a document can come into being. The Article however also limits this, as it is only documents which the public authority is "obliged to register or keep… in accordance with the law or other relevant regulations". However, it is not clear where such an obligation – to *register or keep all* documents - is expressed in the present law. The "access to information guide" under Article 11 – an essential tool in practice to make access to information a reality – does not appear to be a registration requirement of all documents, but rather a guide to classes of document. Article 14 presupposes that there are such registers, but again, does not specify clearly that there is a duty to register all documents. Without clear rules on when information becomes a "document" and a clear duty to register all documents, including classified documents, the right of access can be undermined in practice (see also paragraph 10 below regarding working documents).

8. **Article 12** sets out a proactive duty to publish certain types of information deemed to be of particular value to the public. The eight day publication limit is admirable, but bearing in mind recurrent problems with internet servers combined with holidays etc. it may be more practicable to specify a longer maximum period. The proactive duty to publish can be read in conjunction with Article 27, which provides that there is no duty of access where the information is already available in Montenegro and published on the internet (although there appears to be a translation error or omission in Article 27, "information that hold").

9. **Article 14** is an important provision, as without a right of access to the register the right of access to information will often be illusory. The provision should be read in conjunction with Article 22. It is to be welcomed that it allows a degree of flexibility in that oral requests are permissible. Having said this, there seems to be a contradiction with Article 19 which refers to initiation of the access procedure by hand, mail, fax or email.

10. **Article 15** contains the restrictions to access of information. Restrictions must exist, but these should be set out as clearly as possible, and exhaustively, in the law. It should be stressed that *all* the exceptions on access should be found in the *present* law. It will undermine the law if there are other exceptions, spread out in other laws or regulations. Points 1 and 3 appear to be exhaustive, but points 2 and 4 are not (point 2 "especially information…", point 4 "particularly information…"). While it may be difficult to specify exhaustively all categories of secret information, other states have shown that they are capable of doing so. Even if specifying exhaustively involves framing a small number of points in rather more general terms than is desirable, this is nonetheless preferable to an open-ended clause.

Article 15 point 1: the state holds considerable information on private actors' personal and economic circumstances (tax returns etc.). There may be other personal information which it is necessary to deny access to, under the Data Protection Convention, also binding on Montenegro. I will not go further into this point beyond recommending that this issue be considered closely.

The state also has information that should be kept secret for business/competition reasons (information on bids in public procurement which could be of interest to competitors etc.). The purpose here is the protection of *private* interests. Point 1 only appears to protect private personal information, not information on economic circumstances. It may be that some of the grounds listed in point 4 (eg the state of deposits and transactions in individual bank accounts) cover this information, or sections of it. But the purpose of point 4 is to protect the *state*. If certain information relating to private actors' economic spheres is to be protected, and it should be, then it would be better to have a separate point on this. The grounds obviously have to be framed with care: the public can have a legitimate right to know certain things in this sphere, but not others. A similar point can be made regarding specific grounds under other exceptions to access permitted by the Council of Europe Convention (Article 3) which do not appear to be provided for directly by the present law, namely certain environmental information and the equality of parties in court proceedings and the effective administration of justice.

Article 15 point 3 contains an exception for "working documents". This is in line with international practice, however, experience shows that this exception in particular can be interpreted widely in practice by a bureaucracy reluctant to release information. The bureaucracy's setting of the point in time when a document ceases to be a working document and becomes subject to access must be kept under supervision by the Agency.

Article 15 point 4 contains an exception for "operative and intelligence work of the police". This is not "security" in its proper sense, but preparatory criminal intelligence work, and as such would appear to belong better under point 2.

The final paragraph of Article 15 is the harm test. This seems better to be placed as the first paragraph of Article 16, but this may be a translation problem.

The harm test is framed in terms of the "significant undermining" of protected interests. This is acceptable. However, the balancing of interests test is not framed in terms of an *exception* to the harm test – meaning that, even if the disclosure of the information would lead to harm, there could still be an overriding public interest in receiving it. Instead, the balancing of interests test in the final paragraph of Article 15 appears to be a further ground for refusing access to the information ("or if there is possibility that disclosure of the information would cause damage to the interest that is higher than the interest of the public to know such information, unless otherwise provided by this Law"). This provides a potential for a very wide exception: the bureaucracy can either claim "significant undermining" *or* that it considers that the balance of interests is in favour of secrecy (see also paragraph 12, below).

That the harm test is fulfilled is not seen as a ground for denying the request (Article 32) but this may be implied.

11. **Article 16 paragraph 1** provides for an automatic precedence of secrecy for data listed in Article 15 point 1. As indicated already (paragraph 10 above), the list of protected data may not be complete. If other information is to be listed, the question arises whether the harm test should apply to it, or whether this too shall be subject to a automatic secrecy. The requirements of the Data Protection Convention should be borne in mind. Otherwise, from the perspective only of access of information, while the application of the harm test may almost invariably mean that this type of information should not be released to the public, it is not clear that it always will be the case.

The assumption is anyway that the harm test only applies to points 2-4, subject to a further exception for information which a foreign state or international organisation has classified, and which it transfers to Montenegro (this further exception is in line with international standards).

12. **Article 17** provides for a prevailing public interest test. I agree with Professor Peters that the relationship between this test and Articles 15 and 16 is unclear. The sequence would appear to be that

1. All information is subject to access

2. Unless an exception applies *and* the harm test (or balancing of interests test, above) is satisfied

3. Even where an exception applies and the harm test (or balancing of interests test, above) is satisfied, the information is subject to access *if* there is a prevailing public interest. If this is the intention, then this is acceptable. The problem however still exists that the balancing of interests test is not seen as a mechanism for weighing in a prevailing public interest, despite the harm to the state that disclosure would cause, but as a separate ground for refusing access. It would be much better to remove the balancing of interest test from Article 15 and list the prevailing public interest points as an explicit *part* – not necessarily exhaustive – of a balancing of interest test in Article 17, which is specifically stated to be an exception to the harm test.

13. **Article 19 paragraph 5** provides that no fee is to be charged for a request. This complies with Article 7 Council of Europe Convention.

14. **Article 22** provides that the public authority is to assist the applicant, as far as is reasonably possible. This complies with Article 5 Council of Europe Convention. However, Article 29

provides for denial of the request if it is "incomplete or indistinct". If the intention is to assist the applicant, then it would be better to phrase this part of Article 29 to provide that a request shall be denied if it is "so incomplete or indistinct that it cannot be acted upon without disproportionate expenditure of effort by the public authority" (or wording to a similar effect).

15. **Article 25** provides for access to part of the information, where other parts of it are kept secret. This complies with Article 6 Council of Eurpooe Convention.

16**. Article 33** provides for deadlines. I share Professor Peters' concern that these may be unrealistically short, with the risk that a very damaging practice develops of not complying with the law.

17. The mandate and powers of the Agency are important. If improved access to information is to exist in practice in Montenegro, it is crucial actively to encourage the necessary climate of openness in the bureaucracy. There are some question-marks regarding the mandate and powers of the Agency. **Article 37** refers to the general law on administrative procedure. I do not have access to this law, but I assume that it does not restrict the grounds on which an administrative decision can be challenged, eg by specifying that only "manifestly unreasonable" decisions may be challenged. There is a question-mark here: **Article 40** indicates that the Agency shall make a decision in meritum, but adds a qualification "unless in the case of silence of administration".

While it is understandable that the legislature wishes to minimize the room for stalling on the part of the bureaucracy, the time limits set out in **Article 42** (three working days) are unrealistically short. The necessary information for the Agency to decide upon the complaint may be voluminous.

The Agency combines a general supervision power with a complaints function. However, there is, as Professor Peters points out, a lack of clarity surrounding accountability. Under **Article 42**, paragraph 4 the Council of the Agency is not to determine whether information to which access is requested has been properly classified. Instead, under **Article 46**, a court has the power to do this.

In a system providing for a principle of free access to information, classification is an administrative measure, indicating the level of internal access which should apply to the document in question, and the care (safeguards etc.) which should be taken with it. In other words, classification does not mean that the document *is* confidential, secret etc., and that the public should not have access to it, but simply that the classifying body considers this to be so.
However, for the bureaucracy, keeping documents from the public gaze can make their lives much easier (at least in the short term). Thus, in many states, including states with a long tradition of free access to information, there is a practice of over-classification and access to classified documents may be routinely denied (especially where time limits are short, see paragraph 16 above). It is important that the Agency is able to try to discourage this where, as a result of complaints or its general supervisory powers, it sees a pattern of over-classification. The Agency should thus have the power to make recommendations to this effect, and recommendations on training and other measures necessary to encourage openness.