



## ACCESS TO INFORMATION PROGRAMME

A registered non-profit organization in Sofia, Bulgaria,  
Reg. #13 849/97, Sofia City Court  
9 Slavianska St. 3 Floor, 1000 Sofia  
tel./fax 980 54 84; tel. 989 49 44; E-mail: aip@omega.bg;

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# **PRELIMINARY COMMENTS AND RECOMMENDATIONS BY A GROUP OF LEGAL EXPERTS OF ACCESS TO INFORMATION PROGRAMME AND BULGARIAN HELSINKI COMMITTEE RELATED TO THE ACCESS TO PUBLIC INFORMATION DRAFT ACT**

The elaboration of Access to Public Information Bill by a group attached to the Minister of State Administration is a step towards the statutory establishment of citizens' right to information that also includes the state bodies' obligation to provide for information.

We express satisfaction that the draft is presented to public before it becomes a Council of Ministers bill. The fact that public discussion was organised reveals gov-



ernment understanding of the importance of dialogue on this issue.

On December 1998 the group of Access to Information Programme legal experts presented a Concept paper on access to information legislation in Bulgaria. The Concept paper was complied with the international standards and national practices in the field.

We appreciate the government intention to determine precisely the right to access information and its restrictions passing a packet of statutes.


On other hand we insist as we already did that Access to Information should concern only the right to access information held by government bodies in accordance with the respective Constitutional provision. The right to receive and impart information should be left aside. The same way regulates the Constitutional Court in Decision No 7 of from 1996.

We hereby present these preliminary comments and recommendations on the draft and declare our will to add further comments on questions related to the Bill.

## 1. Concerning the subject of legal regulation

In accordance with Art. 1 of the draft its subject is “relationships in connection with access to information”. The Minister of state administration who was responsible for the draft preparation reasons (motives) that accompany the draft base it primarily on the provision of Art. 41 par. 1 of the Constitution. On the other hand, the provision of Art. 4 of the draft entitles every citizen to access public information, which corresponds to the right set forth in Art. 41 par.2 of the Constitution.

The provisions of Art.41 par.1 and par.2 protect respectively two distinct rights differentiated by scope and type. The relevant state obligation under par. 1 is to refrain from any activities that restrict the right to freedom of seeking and imparting information whereas the relevant state obligation under par. 2 is to give citizens access to



information kept with state bodies. The exercise of the freedom to seek and impart information is not dependent on any state activities and the state is obliged for not passing any further legislation on this matter to the extent that it could prove to be a limitation. Restriction on the part of state is allowed only for the legitimate aim of the protection of “the rights and good name of others, national security, public order, public health and morals” (Art.41 par.1 sentence 2 of the Constitution).

The above distinction has been made by the Constitutional Court in its Decision No 7 of 1996 on case No1 of 1996 (State gazette 55/96):


“In Art.41 par.2 it is protected the individuals right, which also enshrines the correspondent obligation of the state bodies and agencies, to access information of lawful interest to them. This right has some separate meaning whereas the right under Art. 41 par.2 should be viewed within the context of the right, enshrined in the Constitution, of the individual as well as the public to be informed.”

Consequently no legislation is needed on the ground of Art. 41 par.1. Moreover an attempt to the contrary will restrict without legal basis and social need the exercise of the freedom set forth by Art. 41 par.1 and other Constitutional rights and freedoms such as freedom of expression, private life etc.

Art.41 par.2 guarantees a separate right of citizens it is the right to access information kept with the state bodies. It presupposes the correspondent duty of the state bodies to provide such access. The effectiveness of this right could only be provided by enacting law to provision:

- \* the concrete obligations imposed on state bodies
- \* exemptions of the right precisely enumerated and determined by scope
- \* the relevant procedure of access
- \* judicial review procedure to guarantee the protection in cases of access to information denial

In our opinion the subject of Access to Information Act ought to be determined as follows:



“This Act regulates the everyone’s right to obtain information from bodies of state power of the Republic of Bulgaria (hereinafter “state bodies”), their administration and local self-governance bodies as well as from legal persons financed by state budget; the obligation of state bodies to provide for access to information kept with them; the exemptions of free access; the procedure for requesting and obtaining access and judicial review on access denial.”

## 2. Right to access information

The draft invokes the expression “public information” in order to determine the subject of the right to access information. Its definition is given by the provision of Art.2 of the draft as follows:

“any information of public importance, connected with public life in the Republic of Bulgaria and giving citizens the possibility to form own opinion on the activities of the institutions on which the Act imposes obligations”. The definition does not clarify the expression, but poses three unanswered in the draft questions instead. They are as follows:

- \* What does “information of public importance” mean?
- \* Which information is “connected with public life in the Republic of Bulgaria”
- \* Which information is “giving citizens the possibility to form own opinion on the activities of the institutions on which the Act imposes obligations”?

A possible interpretation of the expression “public information” could be that this information concerns large number of individuals. In that case it would be an unjustifiable restriction of the right under Art.41 par.2 of the Constitution. According to this provision information is accessible when few persons or even the applicant only is interested as well.

Furthermore if we accept that the Act should have as legal base the provision of only Art.41 par.2 of the Constitution it is not necessary to determine what public informa-

tion is since state bodies perform public duties and the information they save is per definitione public.

In this respect we suggest that the provision of Art.2 par.1 of the draft should be abolished.

In the same course of consideration Art.12 and 13 of the draft do not give any new regulation of publishing and providing access than the existing one. The obligation to publish normative acts set forth in Art.12 of the draft is currently provided for. Giving to administration a discretion to classify some types of so called official information that are out of the scope of exemptions as Art.13 par.2 says, is not acceptable.

For these reasons we suggest that the provisions of Art.12 and 13 of the draft should be abolished.

We suggest a definition of the right to access information as follows:


Par.1: “Everyone is entitled to access to records that are kept with the state power and local self-governance bodies bodies and the administration of these, as well as legal persons financed by the state budget to the extend of their competence save in cases prescribed by this Act.”

Par.2: “Within the meaning of this Act record is any paper, film, electronic or magnetic matter (record), which saves text, graphic, photo, map, picture, imagination etc.”

### 3. Obligated institutions

The essence and scope of the subject of legal regulation reflects on the determination of institutions obliged under this Act. The presented draft does not oblige state bodies and their administration only to provide for information. The provision of Art.3 of the draft enlarges the number of institutions obliged under the Act.

Art. 3 par.2 of the draft establishes that subjects of public law are obliged under the



Act. Bulgarian law does not give any definition of public subject. Nor does the draft. If the term is used in the draft, such a definition is more than necessary.

Art.3 says the Act will be applied towards subjects of private law as well (natural and legal persons) when they perform public service and are financed by state budget and off-budget funds. Access to Information Programme emphasizes again that the bodies of state power and local self-governance bodies should be the only obliged institutions.

Furthermore Bulgarian legislation does not give any definition of public service. If it is considered necessary to include subjects of private law within the scope of the Act, the latter should set forth a definition of public service. In this respect we suggest the following:


- \* To determine precisely the term for the purposes of the Act as services financed by the state

- \* To add a definition in the Public Services Bill as follows: “public service is purchasing goods and contracting for services by state bodies, local self-governance bodies and companies that are financed by the budget, given subsidies or are endowed with exclusive rights to implement certain activities by the state”.

- \* To add a definition in the Act as follows: “public service is such ordered or contracted by state bodies, local self-governance bodies or trade companies that are financed by the budget, given subsidies or are endowed with the exclusive rights to implement certain activities by the state”.

The information citizens will be entitled to obtain from institutions as described in Art.3 par.2 and 3 of the draft is currently accessible. The commercial bodies (legal and physical persons) are enlisted in respective registers, which are public and the information concerning them is accessible unless it falls under the commercial secret exemption.

On the other hand information concerning enterprises using budget funds is collected and kept with the state bodies and could be requested once FOIA is enacted. When



the problem with lack of definition of public service is resolved as suggested above it won't be necessary anymore to use the unclear expression “financed by off-budget funds” (in relation with legal or physical persons in Art.3 par.3 of the draft). It is unnecessary to create a definition of off-budget funds for the purposes of the Act in particular and to make it consistent with the state and local self-governance budget laws.

Furthermore legal relationships of access to information as regards commercial bodies in the meaning of the Public Services Bill are completely regulated under the latter. The bodies shall be enlisted in respective public register.

With respect to extending the scope of the Act to media imposing on them some duties to provide for information: media do impart information exercising the general right to impart information under Art.41 par.1 of the Constitution. We consider senseless to include media in the number of bodies obliged to disclose information as the Act purpose is to guarantee transparency of the state bodies and their administrations. Most of the information described in Art.18 of the draft is of economic character and therefore the regulations providing commercial bodies registers' accessibility are generally applicable. As a rule media in Bulgaria are joint-stock companies and therefore are obliged under the Commercial Act to publish their annual financial account.

Completely unreasonable and unacceptable is the requirement for media to give information about “the announced statements on their public goals and political attitude” (Art.18 point 4 of the draft). Logically such statements are public.

Consequently a question arises whether citizens could ask for such information when there are not announced statements. The more meaningful however is that in our view it is completely inconsistent with the standards in a democratic society to request this way from media such information and this may cause unnecessary interference with freedom of expression. An additional problem in respect to this provision is that media are legal entities but the latter do not have political attitude like

natural persons do.

Taking into account the above we suggest to completely abolish chapter 2 section 2 of the draft.

Subsequently we suggest to abolish the provisions of Art.3 par.2, 3 and 4 of the draft and to change par.1 as follows:

“obliged institutions for the purposes of this Act shall be all the bodies of state power or local self-governance and their administration as well as legal persons financed by the state budget”.

#### 4. Concerning the exemptions

It is well known that general principle in access to public information law is that all information is available except such falling under exemptions prescribed by law. Exemptions are entailed for the protection of other rights and legitimate interests that are not of less importance than the right to access information. For example the exemption of state secret is provisioned for the protection of the interest of national security. The exemption of personal data protection is designed to guarantee the right to be left alone, or in other words privacy.

The draft does neither describe the scope of exemptions nor even enumerate them but leaves this to further legislation.

With regard to protected interests the draft does only repeat the text of the Constitutional provision of Art.41 par.1. There is also a reference to further legislation saying that “Where so provided in an act of Parliament, certain official or state office information may be declared a state or a state-office secret, and the access thereto - restricted” (Art.9 par.2) and “Within the meaning of this act, the citizens’ personal data shall not be deemed public information”.

As we have stated in the AIP Concept paper not all FOIA legislation of other states regulate completely the exemptions of the right to access information but all do pre-

cisely enumerate them<sup>1</sup>.

Art.7 of the draft provisions state secret, official secret and other exemption provided by law. Further legislation could enlarge both the number of protected interests and their scope flows from this provision. There is not a guarantee against empowering the administration to determine the protected interests in future. If this happen no effective judicial review will be admissible due to a constitutional prohibition for courts to decide on administrative acts' matters on questions other than lawfulness. The regulation we suggest is to regulate the exemptions in a separate chapter in the Act and to enlist precisely and completely all the protected interests. These interests should be given protection to the extent that they overweight the interest of the public to obtain information. A prohibition to extend the exemptions by further legislation is needed.

Furthermore we suggest we suggest a precise description of the categories of information subject to classification and the relevant procedure by an act of Parliament. The positive results will be as follows:

- \* The scope of available information will be rightly determined as such not falling under the exemptions;
- \* There will be a guarantee against adding new exemptions by further legislation;
- \* There will be a guarantee against giving the administration a discretion to determine the protected interests;
- \* An effective judicial control will exist.

We are on opinion that further legislation may only enumerate the types of information falling under the exemptions and regulate the procedure of classification. This should be applied to all the exemptions.

We see the place of this new chapter in the Act as follows:

- \* Chapter 1: Right to access information
- \* Chapter 2: Obligated institutions
- \* Chapter 3: Exemptions of the right to access information



\* Chapter 4: Procedure for Granting Access to Public Information

\* Chapter 5: Judicial review

<sup>1</sup> Here we suggest adding a provision in the Act that the three-part test of “prescribed by law”, “for the protection of legitimate interests” and “necessary in a democratic society” shall be applied to the exemptions.