The Representative on Freedom of the Media

Comments on the Moldovan Draft Law on Information[1]

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Introduction

Promoting citizen access to government information is widely recognized as an important human right and administrative tool to improve governance. It promotes public participation, democratic accountability and public trust in decision-making. Over sixty countries around the world have adopted laws on access to information including nearly all countries in Western and Central Europe.[3] In the region, this includes Romania, Bulgaria, Hungary, Georgia, Turkey, Slovakia, and Poland.

Moldova rightly recognized the importance of access to information when it adopted the Law on Access to Information in 2000. While there have been ongoing problems with public authorities compliance with the law, the draft Law on Information that is proposed to replace it represents a significant step backwards from a progressive, modern legislation to a one of limited access and use to citizens and the media. It is likely that this legislation is not adequate under the international obligations undertaken by Moldova.

The Benefits of Freedom of Information

Access to government records and information provides for numerous benefits for both governments and citizens:

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[1] This analysis is based on translations of the draft law on information provided to the author in August 2005.
[2] Homepage: http://www.privacyinternational.org/foi
[3] See David Banisar, Freedominfo Global Survey 2004. http://www.freedominfo.org/survey.htm

- **Democratic Participation and Understanding**. Citizens are better able to participate in the democratic process when they have information about the activities and policies of the government. Public awareness of the reasons behind decisions can improve support and reduce misunderstandings and dissatisfaction. Individual members of Parliament are also better able to conduct oversight.

- **Improved government decision-making.** Decisions that will eventually be made public are more likely to be based on objective and justifiable reasons and confidence in the government is improved if it is known that the decisions will be predictable. The World Bank has found that "more transparent governments govern better for a wide variety of governance indicators such as government effectiveness, regulatory burden, corruption, voice and accountability, the rule of law, bureaucratic efficiency, contract repudiation, expropriation risk and [a combined transparency corruption index]."[4]

- **Diminished Opportunity for Corrupt Practices.** FOI legislation is a key tool in anticorruption measures. Citizen and media use of FOI in many countries have revealed corrupt practices previously unknown or ignored by authorities. The UN Convention on Corruption and other regional anti-corruption efforts require governments to make more information public as part of their efforts.

- **Redressing Past Harms**. In countries that have recently made the transition to democracy, FOI laws allow governments to break with the past and allow society, victims of abuse and their families to better understand what happened. In Central Europe, most countries have adopted laws allowing for access by citizens and others to the files of the former secret police.

- **Improved Government Efficiency and Recordkeeping.** FOI can also improve the internal flow of information within governments. Excessive secrecy reduces the ability of government departments to share information, and thus impinges upon efficiency. Many countries have reported that enacting FOI laws actually improved coordination and policy development. In many countries, the adoption of FOI laws has resulted in a measurable improvement in recordkeeping practices as government agencies are prompted to revise their record-keeping to meet the new legal requirements. Moreover, the right of access to government files ensures that records are accurate and that decisions are not based on outdated information.

Current Legal Structure

The Moldovan Constitution provides one of the strongest commitments for access to information of any in the world. Article 34 states:

[4] Roumeen Islam, Do more transparent governments govern better? (World Bank 2003). http://econ.worldbank.org/files/27369_wps3077.pdf

(1) Having access to any information of public interest is everybody's right that may not be curtailed.
(2) According with their established level of competence, public authorities shall ensure that citizens are correctly informed both on public affairs and matters of personal interest.
(3) The right of access to information may not prejudice either the measures taken to protect citizens or national security.
(4) The State and private media are obliged to ensure that correct information reaches the public.[5]

This commitment is implemented through the Law on Access to Information, adopted in 2000.[6] The law sets out a detailed procedure for allowing citizen access to information. On its face, it is well designed and is generally consistent with international norms and obligations.

However, its effectiveness has been limited by a poor leadership by the government in implementing it which has resulted in lack of awareness by the government officials about its provisions. A better approach rather than eliminating this law would be to place proper resources into fully implementing it.

International Obligations

As a member of the international community, Moldova has committed to implementing measures to ensure open government in a number of both aspirational and binding instruments, some as recently as just a few months ago. These instruments recognize the importance of access to information as a means of reducing corruption, protecting the environment and human rights and most importantly improving governance and democracy. The draft Law on Information would appear to undermine those agreements and commitments. The following are just some of the specific agreements that Moldova has agreed to that impose a greater access to information:

- Moldova signed to the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) in June 1998 and ratified it in August 1999. The Convention requires member countries to adopt legislation on public access to environmental information. As noted in Moldova's April 2005 *Implementation Report to the UN Economic and Social Committee*, the current Law on Access to Information is the primary legislation used to implement that obligation and its substantive requirements closely follow the obligations of the Convention.[7] The report notes that other legislation such as the

[5] Constitution of the Republic of Moldova, Adopted on July 29, 1994. http://oncampus.richmond.edu/~jjones//confinder/moldova3.htm
[6] Access to Information Law, No 982-XIV, 5.11.2000. http://ijc.iatp.md/en/mlu/docs/access_info_law.html
[7] Implementation Report: Republic of Moldova, Document ECE/MP.PP/2005/18/Add.19, 8 April 2005.

Submission of Petitions Act does not contain substantive requirements such as grounds for refusal such as required in the treaty.

- Moldova signed the UN Convention Against Corruption on 28 September 2004. When the Convention goes into effect, (likely quite soon), Article 10 of the Convention requires that countries adopt measures to improve public transparency. It recommends that countries:

> [Adopt] procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;

- Moldova agreed to join the in Stability Pact Anti-Corruption Initiative in 2002.[8] As a member of the SPAI Compact and Action Plan, the government is committed to improve information access. Action 6 of the Plan states:

> Announce plans to implement measures to provide meaningful public access to government information, to the media, in order to expose effectively corrupt activity.

In May 2005, the Ministers of the members of the Stability Pact including Snjezana Bagic, the State Secretary of the Ministry of Justice, further extended that commitment by signing an agreement for ten additional measures to be taken in the next year.[9] This commitment included further agreement on access to information:

> 5. Enhance the free access to public information and ensure regular cooperation, coordination and consultation among public authorities, the business community and the civil society by establishing an accountable and transparent institutional framework;

- As a member of the Council of Europe, Moldova has also committed to following the standards of the COE and implementing the European Convention on Human Rights. The COE Parliamentary Assembly first issued a resolution in 1979 recognizing the importance of FOI and calling on the Council of Ministers to recommend that member countries adopt FOI laws.[10] In 1981, the Committee of Ministers set out general principles implementing a right of access that member countries were recommended to adopt.[11] Since then, the Ministers have reiterated that recommendation several times and the COE Secretariat has assisted numerous member countries in developing and implementing laws. In 2002, the Council of Ministers issued detailed

[8] Stability Pact Anti-corruption Initiative (SPAI) Compact and Action Plan, February 2000.
[9] SPAI Ministerial Conference on Joint Measures to Curb Corruption in South Eastern Europe, Declaration on 10 joint measures to curb corruption in South Eastern Europe, May 12, 2005.
[10] Council of Europe, Recommendation 854 (1979) on the disclosure of government documents and on freedom of information.
[11] Recommendation No. R (81) 19 on the access to information held by public authorities.

guidelines for member countries on developing access laws and is currently discussing developing the first international treaty on access to information.[12]

- The European Convention on Human Rights (ECHR) also provides for the right to access. While the Court has not ruled that Article 10 on freedom of expression provides for the right of access to information, it has found numerous times that the right of access to information can be found in other provisions. For example, Article 8, which provides for the right of privacy to individuals, also includes the right to obtain records about yourself and furthermore provides for a positive obligation on the part of governments to make information about other important issues such as environmental hazards available to communities.

- Moldova has also signed the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108). Article 8 requires that individuals have a right to access personal information in an understandable form and information on its purpose and uses. Ratification of this convention will require the adoption of a comprehensive data protection act that allows for access by individuals to records held by the public and private sectors.

As noted above, existing Law on Access to Information is the primacy mechanism for implementing these requirements of transparency. Moldova's commitment in these instruments appears to be significantly undermined by the current process to replace the existing Law with the draft Law on Information, which does not contain the same level of guarantees for access to information.

Comments on the Substance of the Draft Law on Information

General Comments on the Structure of the Draft

Overall, the draft Law on Information is overly complex and poorly written. Many of its definitions are excessively broad and there are numerous overlapping and repetitive provisions. It does not provide for a clear right for citizens to access information held by public bodies at the same level as the current Law on Access to Information does.

The draft appears to be based on older CIS legislation such as is found in Russia, Ukraine, and Azerbaijan rather than the modern laws found in nearly all other members of the European Union, OSCE and Council of Europe. The experience in those countries with legislation such as is being proposed has been that it does not provide for adequate access to information to citizens due to its complex structure and lack of definitive rights. In Russia and Azerbaijan, the governments have committed

[12] Council of Europe, Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents, 2002.
http://cm.coe.int/stat/E/Public/2002/adopted_texts/recommendations/2002r2.htm

to phasing out those laws and replacing them with newer laws based on COE standards. Thus, the adoption of this style legislation is a step backwards and is likely to limit public access to information rather than enhance it.

The government has been reported as saying that the reason for the legislation is to create a comprehensive law for the regulation of information. However, this reason does not seem to be supported by an analysis of the legislation. While it does cover other areas of information law such as placing broad restrictions on the use of information in Article 20(5) and privacy protections in Article 14, the draft only repeals the Act on Access to Information and is not at all comprehensive. It still overlaps with other existing legislation such as the law on Information Processing and State Information Resources (N 467-XV of 21.11.2003), Law on Petitions, Law on State Secrets, and the draft legislation on personal data protection.

The Right of Access is Unclear

The confusing complexity of the draft shows in defining exactly what is covered by the law and who, if anyone, has a practicable right of access to information held by government authorities. The current Law on Access to Information clearly states that information providers are local and central public bodies and public institutions, and those individuals and legal entities that under contract are authorized to provide a public service and collect public information. Any citizen or resident of Moldova has a right to access information.

In comparison, the draft Law on Information creates a series of ambiguous definitions that blur lines between citizens, private businesses, and government bodies and allow for multiple interpretations of the sections that use these definitions. These include "subject of informational relations" which is defined in Article 6(1) as applying to individuals, public and private legal entities, public bodies, international bodies, and interstate unions and under which Article 20(1), all of these are entitled to the right of information, which broadly covers both access and use. Another is the definition for "information user" which is defined as "any individual or legal entity that performs actions of receiving, keeping, and other forms of using information." This would seem to be more limited than just a citizen or resident because they are required to "perform actions" as part of their role.

In Article 22, state bodies and bodies of local public administration are required to grant access to individuals and legal entities and also curiously to each other. However, this requirement appears to be narrower than existing rights under the Law on Access to Information as it does not appear to apply to other institution and private bodies that are providing public services on a contractual bases.

But in Chapter V, the draft returns to a broader definition. Article 28 refers to the right of the "information user" to receive (and curiously also to refuse) information but their rights are not protected by the draft but rather by the Law on Consumers' Rights, which seems inconsistent if the information user is a legal entity which may not be eligible for consumer protection. And rather than government bodies, Article 29 refers to "information holders" which are defined as "an individual, legal entity or state that has the right to possess, use and have information at their disposal."

Most problematic, even following the requirements in Article 22 on the right to access information held by public bodies, is Article 30(5) which appears to remove requests to public bodies completely from the law by stating that "requests for information on the activities of state bodies and bodies of local public administration fall under the incidence of the legislation on petitions." If access to information held by these bodies is not to be covered at all in the law, then why is the existing Law on Access to Information being nullified? This would appear to completely undermine the state purpose of the legislation to clarify existing rights. If there is a perceived conflict between the Law on Access to Information and the Law on Petitions, it is clear from the text of the Law on Access to Information that it is intended to be the primary mechanism for citizen access and officials should be better trained to recognize this.

Compounding this problem of unclear definitions and limited access is the blurring of the right to access information and limits on free expression. Article 20(5) sets broad limits on the right to information (which covers both access and use of information) in those cases where it would "violate public, political, economic, social, spiritual, environmental, and other rights, legal rights and interests of other subjects to information law relations." This would appear to give broad rights to public authorities to not have their "rights" by abused other users, an extremely troublesome concept given the legal protections afforded free expression under Article 10 of the European Convention on Human Rights.

Exemptions

The poor drafting of the bill extends into the exemptions. The draft legislation sets out broad exemptions to access to information in both Article 13 and Article 22. As an initial comment, it is unclear why it is necessary to have two different and apparently overlapping sets of exemptions to access in the legislation. While they appear to have slightly different focuses - Article 13 appears to place limits on both the access and use of certain categories of information while Article 22 is limited to just access – they both apply to the right of access and have different harm and public interest tests and are likely to cause unnecessary confusion.

Article 13 creates the category of "Limited Access Official Information" which is designed to "ensure observance of the rights and freedoms of individuals and legal entities, as well as to protect the national security, public order, health protection, and the protection of morals in the society." The information protected under this category are state secrets, trade secrets, personal information, work information, professional secrets, information on operative and investigative activities of competent bodies, and information on creative activities, and technical, scientific, and innovative investigations."

Of particular concern is the creation of a new broad category of "work information" first mentioned in Article 13(2)(d). Article 15 defines work information as for "internal use" and includes information gathered for "investigative processes", "performing state control", foreign relations, non-state secret military information, cultural and historical monuments, protected species, security measures, "technological solutions" and information recognized by contracts. The head of a

public or private organization can designate information as "work information". Access is limited to "persons in responsible positions and workers of legal entities". In all other cases for "third parties" (include presumably the media and public), access is limited to where the head authorizes. Access can be limited for five years and extended for another five years.

In contrast, Article 22(4), access to documented information is limited when it is for the purpose of protecting national security, defence, and international relations, public security, investigation of crimes, private life and other private interests, commercial interests, equity of parties in the court process, the environment, inspection and control functions, state economic, financial and credit policy, and confidentiality of mutual cooperation of public bodies.

This section is more in line with the Council of Europe Rec 2002(2) on access to official documents that lists the following exemptions that member states should apply:

i. national security, defence and international relations;
ii. public safety;
iii. the prevention, investigation and prosecution of criminal activities;
iv. privacy and other legitimate private interests;
v. commercial and other economic interests, be they private or public;
vi. the equality of parties concerning court proceedings;
vii. nature;
viii. inspection, control and supervision by public authorities;
ix. the economic, monetary and exchange rate policies of the state;
x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.[13]

Both of these sections are significantly more restrictive than the exemptions in Article 7 of the current law on Access to Information where each of the exemptions is subject to a harm test such as the release would, "endanger the security of the state" (Article 7(2)a). None of the categories in Article 22 include a requirement of showing harm while only a few of areas in Articles 13 and 15 include this requirement. A harm test is essential to ensure that information that does not prejudice the interest such as that which is not sensitive is not withheld from release and is a strongly recommended by the Council of Europe.

In addition, all exemptions in the current law are subject in Article 7(4) to a public interest test. This is a three part test adopted from case law of the European Court of Human Rights that requires that:

> No restrictions may be imposed on the freedom of information, unless the information provider can successfully prove that such a restriction is regulated by an organic law and is necessary in a democratic society for the protection of rights and legitimate interests of the person or national security, and that the

[13] Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents, Adopted by the Committee of Ministers on 21 February 2002.

damage to those interests would be larger than the public interest for that kind of information.

In the draft law, this important provision is only included in Article 13(4) while the exemptions set out in Article 22 are not subject to this.

In summary, the exemptions set out in the draft law are both more poorly developed and significantly more restrictive than those found in the existing law.

Delays in Providing Information

Another area where the draft legislation is significantly weaker than the existing law is the time frame for bodies to providing information. Under the current Law on Access to Information, Article 16 requires that public institutions respond in 15 days, with an additional five days if the requested information is substantial or additional consultations are required.

Other countries also have similar time scales - Romania (10 days/maximum 30 days), Armenia (5 days), Bulgaria (14 days/10 day extension), Turkey (15 days/30 days maximum), and Hungary (15 days maximum).

Under the draft law on information, the time frame is 30 days which can be extended another 15 days for a total of 45 days. The limits on reasons for delay have also been removed so now it appears to be purely discretionary and only a notice giving the discretionary reason is necessary.

This extension of time will unnecessarily delay the provision of information. It is not in compliance with the Council of Europe recommendations that requests for information "should be dealt with promptly" and is far beyond the current practice in Moldova and that of other neighboring countries. It is not explained why it is necessary for the Government of Moldova to be that much slower than other countries in the region and international practices.

The best practice is for the response to be made immediately or as soon as possible. Excessive delays can frustrate the intent of FOI by preventing the information from being available when it is useful to the requestor, for example, in responding to some other consultation or decision-making process. In addition, recent research has found that government departments are less likely to delay when there is a shorter deadline than a longer deadline because they prioritize the request.[14]

Publication of Information

One area where the draft represents an improvement over the existing Law on Access to Information is Article 23 on the list of compulsory information to be published.

[14] Open Society Justice Initiative, Access to Information Monitoring Tool: report from a five-country pilot study. September 2004. http://www.justiceinitiative.org/db/resource2/fs/?file_id=14972

This is a growing international practice based on the concept of encouraging the provision of information without the necessity of requiring individuals to demand information from bodies. It can benefit both the public authority and the public by expanding access while reducing demands for resources. The Council of the EU noted in its 2003 annual report that as, "the number of documents directly accessible to the public increases, the number of documents requested decreases."[15] The US Justice Department reported in their 2002 review of agencies that many had substantially reduced the number of requests by putting documents of public interest on their web sites.[16]

While this is an extensive list, some other areas should be considered for inclusion including the a list of contracts entered into by each department, their terms and value and completion dates, any conflict of information for financial disclosure forms, disclosure logs of previous access to information requests, and draft programmes that the government is planning to undertake before the final programme has been developed so that citizens may better participate in the decision.

There should also be consideration on how to ensure access to all citizens. The section appears to be unduly limited to placing the information in information systems." This should be extended to physical locations also. Access to electronic resources will practically restrict access to a significant proportion of the population. As noted by the Government in their submission to the United Nations Economic and Social Council in April 2005 on the Implementation of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), there are major obstacles with Internet-based information:

> A significant proportion of the population does not and will not have regular access to the Internet and needs to be provided with information in writing or by radio or television.
>
> Accessing electronic databases via the public telecommunications network is expensive.
>
> At present, there is no real possibility of posting all the information on the Internet.[17]

This problem is compounded by the likelihood that even with the provision that Internet access is made available through public libraries and other facilities, a significant number of people, especially the older generations, are going to be unable to use the systems because of a lack of training or unwillingness to use the systems.

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[15] See Annual report of the Council on the implementation of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 7 March 2003.

[16] US Department of Justice, Summary of Annual FOIA Reports for Fiscal Year 2002. http://www.usdoj.gov/oip/foiapost/2003foiapost31.htm

[17] Implementation Report: Republic of Moldova, Document ECE/MP.PP/2005/18/Add.19, 8 April 2005.

Thus, any public publishing of information needs to also be made available in other forms. Some materials such as annual reports can be made available at libraries but it is clear that special facilities will also be necessary. In many countries, ministries are required to great "reading rooms" with these types of documents. Other information of public information should be conveyed through other means designed to reach the maximum population such as radio and television, local media and through public meetings.

Recommendations

The Government of Moldova should withdraw the draft Law on Information. If it is serious about improving access to information, it should engage in discussion with experts, civil society and media organisations about areas where there are currently difficulties and best measures to remedy them. This would mostly be in the areas of government commitments to improve implementation and provide adequate resources. It should also go forward with systems to automatically make more information publicly available through information systems and in public facilities.