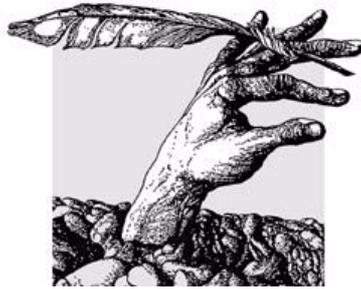


OSCE



The Representative  
on Freedom of the Media

## Comments on the Kyrgyz Republic Draft Law on the Freedom and Guarantees of Access to Information<sup>1</sup>

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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.<sup>3</sup> In Central Asia, recognition of this right is only starting to emerge with limited efforts in the Kyrgyz Republic, Tajikistan and Uzbekistan.

The draft bill represents a significant step forward and its adoption and successful implementation would represent a major achievement. There are a few recommended changes to the law to limit some potentially conflicting areas and to improve processing.

### The Benefits of Freedom of Information

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

- **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

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<sup>1</sup> This analysis is based on translations of the draft law on information provided to the author in August 2005.

<sup>2</sup> Homepage: <http://www.privacyinternational.org/foi>

<sup>3</sup> See David Banisar, Freedominfo Global Survey 2004. <http://www.freedominfo.org/survey.htm>

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].”<sup>4</sup>
- **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 for Access to Information**

The Kyrgyz Constitution currently gives a qualified right of access to information by an individual to information relating to him or herself. Article 16(6) states that, “everyone has the right to read records about himself/herself, other than state or other secret protection by law in the bodies of state government, local self-governance, institutions and organizations.

Amendments to the Constitution approved by the Constitutional Council on 9 June 2005 weaken access rights by eliminating the Article 16(6) provisions on access to personal information. The proposed revisions do improve access in other areas by giving citizens the right to access information on financial support to state authority bodies under Article 11(3)

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

which states that “The financial support to state authority bodies from the state budget is to be realized transparently; each citizen has the access to such information.”<sup>5</sup>

Currently, the right of access to information is regulated by the 1997 Law of the Kyrgyz Republic on Guarantees and Free Access to Information which sets general standards on access to information and free expression.<sup>6</sup>

The law states everyone is guaranteed to have access to information and sets principles of “accessibility, objectivity, timeliness, openness, and authenticity.” Applications for request can be submitted in written form. Departments are required to provide a possibility to review information regarding a persons legal rights and interests without costs. However the law does not set any other procedures or timeframes for response. Under the Law on the Procedure for Examining Citizens’ Proposals, Applications and Complaints, requests for information should be completed in one month.

Under Article 138 of the Criminal Code, officials who incorrectly refuse access or deliberately provide incorrect or incomplete information to information can be punished up to fifty monthly wages.

The 1997 law also contains restrictions on speech. The mass media is prohibited by divulging state and commercial secrets, insulting the religious feelings, spreading pornography, and wittingly presenting false information. Mass media are required to check the authenticity of published information and is responsible for its publication if incorrect.

The application of the 1997 law has been of limited effect. As noted in the December 2004 Anti-corruption Network for Transition Economies’ Review of Legal and Institutional Framework for Fighting Corruption:

The Kyrgyz Republic has a Law on Guarantees and Freedom of Information Access, which contains essential provisions for access to information. In principle the state has a duty to provide information on request (except information not subject to public disclosure). However, as far as can be seen from the Status Report, the law does not delineate concretely what information is not subject to disclosure. The filing of an application or complaint for purposes of slander entails responsibility according to the law. This appears to be an overly deterring and potentially abusive norm as it may deter people from making real complaints particularly when it is difficult to prove the relevant fact to a sufficient degree.<sup>7</sup>

The report acknowledged the pending bill and recommended that exemptions be more expressly delineated and official discretion to withhold information be limited.

In its report on implementation on the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus

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<sup>5</sup> Venice Commission, Draft Amendments to the Constitution of Kyrgyzstan Approved by the Constitutional Council on 9 June 2005, CDL(2005)055. 12 July 2005. [http://www.venice.coe.int/docs/2005/CDL\(2005\)055-e.asp](http://www.venice.coe.int/docs/2005/CDL(2005)055-e.asp)

<sup>6</sup> Law of the Kyrgyz Republic on Guarantees and Free Access to Information. № 89. December 5, 1997. [http://www.monitoring.kg/eng/pravo/pravo\\_09.html](http://www.monitoring.kg/eng/pravo/pravo_09.html)

<sup>7</sup> Anti-corruption Network for Transition Economies December 2004 Review of Legal and Institutional Framework for Fighting Corruption, Summary of Assessment and Recommendations, 14 December 2004.

Convention), the Government reported that there were continuing problems with access to information:

The problem is not so much access to information on request as keeping the public informed in order to facilitate considered decision-making (active information). Lack of funds, the absence of clear-cut procedures and ignorance of rights make it difficult to ensure that the public is kept properly informed.<sup>8</sup>

Civil society organizations also report problems demanding information under the law because of a low level of knowledge about the law by government officials. One recent survey found less than half of the officials were familiar with the law.<sup>9</sup>

## **International Obligations**

As a member of the international community, Kyrgyzstan has committed to implementing measures to ensure open government in a number of both aspirational and binding instruments. 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 following are just some of the specific agreements that Kyrgyzstan has agreed to that impose a greater access to information:

### *OSCE*

The OSCE has been active in promoting citizen and civil society access to government information as means to improve good governance to improve democracy and free media. In 2001, the Parliamentary Assembly recommended that:

Urges the OSCE participating States and OSCE institutions to strengthen their efforts to promote transparency and accountability through support for independent and pluralistic media; promoting financial disclosure by public officials, political parties, and candidates for public office; opening budgeting processes with effective internal control systems and suitable financial management systems, and financial and compliance reporting;

In 2003, the Parliamentary Assembly issued a resolution in Rotterdam 2003 stating:

Urges participating States to work with civil society in advancing and supporting ideas of accountability and transparency in government, and the promotion of good governance practices;

The OSCE Representative on Freedom of the Media has joined the UN Special Rapporteur on Freedom of Opinion and Expression and the OAS Special Rapporteur on Freedom of

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<sup>8</sup> Implementation Report, ECE/MP.PP/2005/18/Add.13, 8 April 2005

<sup>9</sup> See Alexander Kulinskyi, Access to Information in Kyrgyzstan: Society Expects Transparency from the Authorities in 21st Century Challenges for the Media in Central Asia: Dealing with Libel and Freedom of Information (OSCE 2005). Also see Almaz Kalet, Access to Information in Kyrgyzstan in Central Asia – In Defence of the Future: Media in Multi-Cultural and Multi-Lingual Societies (OSCE 2003).

Expression in expressing the need for governments to adopt FOI laws as an essential part of freedom of expression.<sup>10</sup> These include minimum standards for access laws.

In September 2004, the OSCE Representative on Freedom of the Media called on the governments of Central Asia nations to take the following measures to improve freedom of information:

- Comprehensive laws on Free Access to Information based on international standards should be adopted and their proper implementation ensured.
- Multilateral oversight over the observation of these laws and standards should be ensured and carried out by parliaments, parliamentary commissions open to the public, commissions of public hearings and independent ombudsmen.<sup>11</sup>

*UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*

Kyrgyzstan acceded to the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) on 1 May 2001. The Convention requires member countries to adopt legislation on public access to environmental information.

*UN Convention Against Corruption*

Kyrgyzstan signed the UN Convention Against Corruption on 10 December 2003. 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;

Article 13 requires that countries improve societal participation in the fight against corruption. It recommends a number of transparency measures including:

- (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;
- (b) Ensuring that the public has effective access to information;

*Anti-Corruption Action Plan for Asia and the Pacific.*

In November 2001, Kyrgyzstan formally endorsed the Asian Development Bank/Organisation for Economic Cooperation and Development Anti-Corruption Action Plan for Asia and the Pacific.<sup>12</sup> Pillar 3 of the Action Plan states that governments commit to:

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<sup>10</sup> <http://www.cidh.org/Relatoria/showarticle.asp?artID=319&IID=1>

<sup>11</sup> OSCE, Dushanbe Declaration on Libel and Freedom of Information, 24 September 2004. [http://www.osce.org/documents/rfm/2004/09/3645\\_en.pdf](http://www.osce.org/documents/rfm/2004/09/3645_en.pdf)

<sup>12</sup> ADB OECD Anti-Corruption Initiative, Anti-Corruption Action Plan for Asia and the Pacific. <http://www1.oecd.org/daf/asiacom/ActionPlan.htm>

Ensure that the general public and the media have freedom to receive and impart public information and in particular information on corruption matters in accordance with domestic law and in a manner that would not compromise the operational effectiveness of the administration or, in any other way, be detrimental to the interest of governmental agencies and individuals, through:

- Establishment of public reporting requirements for justice and other governmental agencies that include disclosure about efforts to promote integrity and accountability and combat corruption;
- Implementation of measures providing for a meaningful public right of access to appropriate information.

### *Istanbul Anti-Corruption Action Plan*

In November 2003, the Kyrgyz Republic as part of the Anti Corruption Network for Transition Economies (ACN) joined the Anti-Corruption Action Plan for Armenia, Azerbaijan, Georgia, the Kyrgyz Republic, the Russian Federation, Tajikistan and Ukraine (Istanbul Anti-Corruption Action Plan). Pillar 3 of the agreement states that governments commit to:

Ensure public access to information, in particular information on corruption matters through the development and implementation of:

- Requirements to give the public information that includes statements on government efforts to ensure lawfulness, honesty, public scrutiny and corruption prevention in its activities, as well as the results of concrete cases, materials and other reports concerning corruption.
- Measures which ensure that the general public and the media have freedom to request and receive relevant information in relation to prevention and enforcement measures.
- Information systems and data bases concerning corruption, the factors and circumstances that enable it to occur, and measures provided for in governmental and other state programmes/plans for the prevention of corruption, so that such information is available to the public, non-governmental organisations and other civil society institutions.

## **Comments on the Substance of the Draft Law on the Freedom and Guarantees of Access to Information**

### **General Comments on the Structure of the Draft**

Generally, the draft law is consistent with international standards and if successfully implemented will greatly improve access to information in the Kyrgyz Republic and set a standard for the rest of Central Asia. In particular, the far reaching provisions on access to information held by private parties where the information is of interest to the person are only currently found in the South Africa Promotion of Access to Information Act.

There are a few areas where revisions would greatly improve access. These relate to clarifying the rights of users, limiting exemptions, shortening response times, modifying the request procedures, and improving oversight.

## **Limits on Users – citizenship and legal interest**

The draft has several inconsistencies on who has the right of access that need to be clarified. At the outset, the draft positively states that it is intended to give the right of access to information to all persons. Article 1(1) states that one of the purposes of the law is to “guarantee every person the right to obtain information and provide for an effective mechanism to protect that right.” However, there are several inconsistencies in the draft on who has the right of access and the requirement of a legal or personal interest.

Article 2 defines the “right of access to information” as every *citizen’s* right to seek information freely and obtain it from government bodies...” and the draft is inconsistent sometime referring to every person and other times to citizens, rather than a broader right of access to all persons and entities.

Users in most countries include citizens, non-citizen residents, informal and legal entities (including media organizations and civil society groups) and non-residents such as researchers and foreign media. The better approach, which has been nearly universally adopted in FOI laws around the world, is to allow any person to make requests, no matter their citizenship or place of residence.

The draft is also inconsistent on whether it requires that the person show a legal interest before they can make a request. While, as noted above, the purpose states that the draft is intended to give the right of access to all persons, Article 5(1) of the draft states, “the right of access shall be guaranteed to all *interested* persons” which typically means that a legal interest must be shown. In contrast, the next line states, “*Every person* shall have the right to freedom of information, including the right of access to information under the control of government agencies. Finally, Article 5(2) further confuses the situation by stating that “Any person *concerned* who applies to a government agency for information shall have the right to...” (emphasis added).

If Article 5 does require a legal interest, this seriously undermines the effectiveness of the act in promoting government accountability and makes the law weaker than international standards. It would prevent individuals and organizations in many cases from demanding information and seriously hinder access in many important areas (i.e. anti-corruption issues).

This approach has been rejected in the approximately sixty national freedom of information laws and thousands of local and provincial laws that have been adopted in nations around the world. All uniformly reject that requestors must show an interest to be able to demand information. It also goes against the longstanding policy of the Council of Europe. The Committee of Ministers in 1981 recommended that, “access to information shall not be refused on the ground that the requesting person has not a specific interest in the matter”<sup>13</sup>

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<sup>13</sup> Recommendation No. R (81) 19 of the Committee of Ministers to Member States on the Access to Information Held by Public Authorities. [http://www.coe.int/T/e/legal\\_affairs/Legal\\_co-](http://www.coe.int/T/e/legal_affairs/Legal_co-)

and reiterated this in its 2002 guidelines stating “An applicant for an official document should not be obliged to give reasons for having access to the official document.”<sup>14</sup>

In addition, this provision is also inconsistent with international obligations such as the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). Article 4 states:

Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information: (a) Without an interest having to be stated (underline added)

If this is not the purpose of the section, then it should be clarified, otherwise it is likely to cause confusion among officials who may not be fully familiar with the law and cause them to impose these requirements even if it is against the stated policy of the government.

#### *Recommendations*

- *The draft should be amended so that it is available to all persons and entities, not just citizens.*
- *Article 5 of the draft should be clarified to ensure that the right of access is available to all persons, not just those with a legal interest.*

## **Exemptions**

Articles 8 through 13 set out exemptions for access to information. These include protecting personal privacy, business information, privileged information, law enforcement and justice, defence and security, and economic interests of the state.

As a general matter, most of the exemptions are in line with international standards such as those developed by the Council of Europe Recommendation 2002(2) on access to official documents.<sup>15</sup> However, some of the exemptions should be revised to ensure that they are not overbroadly applied. In addition, the exemptions should be subject to a public interest test to allow the release of information that is of crucial importance to the public even if a harm can be shown.

#### *Privilege – Article 10*

The most problematic of the exemptions is Article 10 on “statutory privileges”. It states that:

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[operation/Administrative law and justice/Texts & Documents/Recommendation\(81\)19.asp](http://www.coe.int/operation/Administrative_law_and_justice/Texts_& Documents/Recommendation(81)19.asp)

<sup>14</sup> 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](http://cm.coe.int/stat/E/Public/2002/adopted_texts/recommendations/2002r2.htm)

<sup>15</sup> 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.

A government agency may refuse to tell whether it possesses the document requested or deny information if the information is legally privileged not to be used in legal procedures (such as operational search information, information about secret informers etc.), unless the privileges are waived by the privileged entity.

This section is problematic because it allows the vague concept of privilege which is not otherwise defined in the law to trump access even in areas where other exemptions are found to apply and still allow release.

A better approach would be to replace this section with a new one that specifically lists categories of information not already contained in other Articles that need to be exempted from release including a harm test.

#### *Classified Information – Article 31*

While not included with the rest of the exemptions, Article 31(1)(1) allows for the denial of requests when “information requested is contained in the portions of documents that have been classified in accordance with the laws and regulations of the Kyrgyz Republic and this Law as secret or confidential”.

This exemption is redundant and counterproductive. The information covered by this exemption should already be subject to other exemptions such as Article 12 on defence or national security. Article 12 also has the safeguard of requiring that the information must be shown to cause prejudice to the defence or national security and is subject to appeal and oversight. In comparison, the Law on State Secrets is widely considered to be a vague and overly broad law from a far more secret era which places substantial limits on freedom of information and should be repealed or substantially redrafted.

The better approach is to ensure that all information denied is subject to exemptions under the access law. This is the approach adopted in many countries including the United States, the United Kingdom, Canada, Australia and New Zealand. If other categories of information need to be protected as secrets, Article 12 and other exemptions should be extended to include those areas.

#### *Privacy – Article 8*

Another section that should be further clarified is Article 8 on privacy. Article 8 states that a document can be exempted from released if it contains personal data. Personal data is defined in Article 2 as “data about a living person who can be identified by such data.” There are exemptions if the person has given consent, has been dead for 20 years, access is to their legal representative, or most importantly, it is about a current or former government official relating to his function.

The current definition is overly broad and would cover many areas of public interest such as the names of corporate officials meeting with government official to ask for special dispensation in cases, the amount of agriculture or other subsidies to businesses owned by single individuals or families, and court and administrative decisions of public interest.

More generally, the exemption does not require that some harm to the individual’s personal or family life is shown before the information can be withheld. 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. This is clearly recognized in the other exemptions in the draft and should be included in this exemption also. The Indian Right to Information Act states that the privacy exemption can only be applied to :

information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information

The Irish Freedom of Information Act defines personal information as that which “be known only to the individual or members of the family, or friends, of the individual” or is confidential.<sup>16</sup> It provides twelve paragraphs of examples of personal information including “educational, medical, psychiatric or psychological history”, financial affairs, religion, tax and identification numbers. Three extensive paragraphs set out examples of what is not personal information including the activities of an office holder of a public body, those providing public services under contract, and views of the individual regarding the public body.

#### *The Need for a Public Interest Test*

For all of the exemptions, the bill should include a public interest test that requires the release of the information even when there is harm in cases where it is more important for the public to know the information. This includes cases of environmental harm and risk (only currently recognized in Article 13), abuse, corruption, and improving good governance and public participation. For example, the Moldovan Law on Access to Information requires that exemptions can only be applied when “the damage to those interests would be larger than the public interest for that kind of information.”

The Irish Freedom of Information Act 1998 requires that a public interest be evaluated in all cases of release. The Irish Information Commissioner, in a series of cases, has set out criteria that must be followed in determining the public interest in a case:

- the public interest in individuals being able to exercise their rights under the FOI Act in order to enhance their understanding of the reasons for courses of action taken by a public body;
- the public interest in members of the public knowing how a public body ensures that its decisions are predicated on ensuring value for money;
- the public interest in members of the public knowing how a public body performs its functions particularly in a context where a decision has consequences for existing employees and their families and,
- the public interest in ensuring openness, transparency and accountability in relation to the expenditure of public money.<sup>17</sup>

#### *Recommendations*

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<sup>16</sup> Freedom of Information Act 1998, S. 2

<sup>17</sup> Case 031109 - Ms Madeleine Mulrennan and the Department of Education and Science

- *Eliminate Article 10 exemption for privilege and replace with exemption that specifically states areas to be protected.*
- *Eliminate Article 31(1)(1) exemption.*
- *Limit privacy exemption in cases where not related to invasion of personal privacy such as commercial interests or the spending of public money.*
- *Require that all exemptions are subject to harm and public interest tests.*

## **Delays in Providing Information**

Another area where the draft legislation should be improved is by shortening the time that government bodies are given before they must respond to requests. Under Article 26, a government body or private organisation has 30 days to respond to a request. This can be extended another calendar month. This time frame is far longer than international standards.

Other CIS and CEE countries have much shorter time frames. For example, under the Moldovan Law on Access to Information, public institutions must respond in 15 days, with an additional five days if the requested information is substantial or additional consultations are required. In Armenia, authorities only have 5 days. In Bulgaria, they have 14 days with the possibility of a 10 day extension. In Romania, authorities have 10 days to respond which can be extended to a maximum of 30 days. And in Hungary, authorities have 15 days maximum. The Council of Europe recommends that requests for information “should be dealt with promptly”.

This extension of time will unnecessarily delay the provision of information. It is not explained why it is necessary for the Government of Kyrgyzstan to be that much slower than 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.<sup>18</sup>

### *Recommendation*

- *Reduce response time to 10 days.*

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<sup>18</sup> 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](http://www.justiceinitiative.org/db/resource2/fs/?file_id=14972)

## Forms of Request

Chapter 4 of the draft sets out the procedures for submitting requests. Article 22(1) allows for requests to be made orally, via a call centre, by submitting a written request, or by submitting an electronic request in the form of an email or fax. This is recognized as one of the best practices in international standards.

However, Article 22(2) states “the reply to a request shall be provided in the same form in which the request is submitted.” Article 30(2) states that any request made via email requires a new procedure to be conducted if the documents are not available in electronic form and Article 30(3) where a response to a request made by fax is limited to a reasonable number of pages. This is a highly unusual formulation not found in any other FOI law in the world. It appears to set up unnecessary barriers on how requests are to be received and processed and undermine the utility of the information to be obtained.

A better approach which is widely used worldwide is to allow the requestor to submit the request in any form and allow them to specify the form in which they would like the response made, if it is available.

Another unusual provision is found in Article 25 which sets out the requirements for written requests. Article 25(2) requires that an individual give their data of birth, employer and position in the request. Since there is apparently no requirement to show a legal or personal interest to ask for information, this information would appear to be unnecessary. It should only be required in cases where the person is asking for their own personal information or for information about an organization as a representative of that organization.

### *Recommendations*

- *Allow users to make request in any format and request the information in any format back.*
- *Eliminate requirement for unnecessary personal information to be collected in Article 25.*

## Oversight

Article 40(2) states that complaints against actions or decisions of officials can be lodged with the Ombudsman. Ombudsmen play an important role in over two dozen countries in investigating complaints on denial of access to information. However, the role of the ombudsman can be somewhat limited due to lack of jurisdiction and resources.

Recognising this, many FOI laws either specifically assign additional duties and powers to the ombudsman to investigate not just individual cases but more generally act as an advocate and oversight body for access to information. Most importantly is the ability of the ombudsman to issue decisions that are binding on government bodies.

A growing number of countries have created a new body called an Information Commission to take on these duties. This is the approach adopted in Slovenia, Serbia, Estonia, Latvia, Switzerland, Hungary, Belgium, France, Ireland, Canada, India, Mexico, Germany, the United Kingdom, and Thailand. In some jurisdictions, such as Ireland, the Ombudsman is also the Information Commissioner. In Hungary, Switzerland, Estonia, Latvia, Germany, Mexico, and the UK, the Information Commissioner is also in charge of oversight of personal data protection.

The Ombudsman or Information Commission can also play an important support role to both government bodies and to the public on the FOI act. The body typically has many roles: as a promoter of good practice, an advocate for the citizen, and a mediator of disputes. Some typical functions include:

- *Public Interface.* The body usually plays an intermediary role between the public and the government bodies. The body can also conduct public seminars and trainings on the Act for officials and produce brochures, guides and other materials to educate the public on how to use the act. In Mexico, the Federal Institute for Access to Public Information (IFAI) has set up an electronic system for requests on the Internet (SISI) for the Executive agencies.<sup>19</sup>
- *Codes and Regulations.* In some jurisdictions, the body is given the power either singly or jointly to develop codes of practice and other regulations on the use of the act.
- *Recommended application of exemptions.* The body can develop guidelines or codes on how it believes each of the exemptions should be applied. This gives the agencies guidance on how their decisions will be reviewed and encourages consistent application of the law across government.
- *Reports on Implementation.* The body can monitor either formally or informally the progress of each government unit as it implements the act and provide advice on best practices. Once an act is in place, it can require the production of status reports and statistics and conduct audits and investigations. In Canada, the Information Commission began issuing “report cards” in 1999 on the performance of selected federal departments that had substantial problems with delays. This has resulted in dramatic improvements in the performance of some of the bodies.<sup>20</sup>

*Recommendation:*

- *The powers of the Ombudsman or another body should be more detailed in the legislation. This should include the power to issue binding decisions and conduct independent oversight of government bodies.*

## **Conclusion and Recommendations**

The draft legislation is a highly positive development. It is generally consistent with international standards. Its adoption will allow Kyrgyzstan to fulfil its international

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<sup>19</sup> SISI. <http://www.informacionpublica.gob.mx/>

<sup>20</sup> See <http://www.infocom.gc.ca/publications/cards-e.asp>

obligations and to make government more accountable while promoting democratic society. It should be adopted and implemented as soon as possible.

### ***Summary of Recommendations***

- *The draft should be amended so that it is available to all persons, not just citizens.*
- *Article 5 of the draft should be clarified to ensure that the right of access is available to all persons, not just those with a legal interest.*
- *Eliminate exemption for privilege and replace with exemption that states areas to be protected.*
- *Eliminate Article 31(1)(1) exemption.*
- *Limit privacy exemption in cases where not related to invasion of personal privacy such as commercial interests or the spending of public money.*
- *Require that all exemptions are subject to harm and public interest tests.*
- *Allow users to make request in any format and request the information in any format back.*
- *Eliminate requirement for unnecessary personal information to be collected in Article 25.*
- *The powers of the Ombudsman or another body should be more detailed in the legislation This should include the power to issue binding decisions and conduct independent oversight of government bodies.*