

Podgorica, 6 March 2012

HRA COMMENTS  
ON THE DRAFT LAW ON FREE ACCESS TO INFORMATION AND  
ON AMENDMENTS TO THE LAW ON CLASSIFIED DATA

HRA general comments in relation to the three laws currently on debate<sup>1</sup> are:

1. Harmonize the meaning of terms used in all three laws, primarily the terms "information" and "data", as the meanings currently offered are confusing:

*Draft Law on Free Access to Information, Article 10: Information* shall be a document in any form, composed or received by public authority, on any basis, for which the public authority is obliged to register or keep it, in accordance with the law or other relevant regulations.

*Draft Law on Amendments to the Law on Classified Data, Article 8: Data*: document, its content and supplements, objects, measures or procedures, as much as an oral communication or information with classified content originated from the work of bodies referred to in Article 2 or other legal or physical entities, irrespective of the source, time of origin, place of storage and way of cognizance;

*Draft law on Amendments to the Law on Personal Data Protection, Article 9: Personal data* are all information related to an individual whose identity is established or can be determined.

2. Harmonize the laws regarding restrictions of access to information (for example, access to documents marked as "RESTRICTED" is provided differently under the Law on Free Access to Information and Law on Classified Data).

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<sup>1</sup> Third law is Draft Law on Amendments to the Law on Personal Data Protection.

3. Clearly indicate what kind of data could be marked as “confidential” especially for the purposes of protection of economic and monetary policy in Montenegro (a positive example of good practice is provided by the State Secrets Act of Estonia<sup>2</sup>).

Comments in relation to particular laws:

### **Draft Law on Free Access to Information**

1. The proportionality principle including harm test has not been clearly and comprehensively stated in the Draft law. HRA suggests redrafting the relevant provisions, and in particular to:
  - a) (Art. 4) delete the following text: “that ensure the transparency of work, foster the efficiency, effectiveness, and accountability, and affirms their integrity and legitimacy”. All information (except those prescribed by this law) should be available to the public without the possibility of authorities to interpret and subsume it under the prescribed categories. Also Art. 4 is not harmonized with Art. 3: “Any national or foreign legal and natural entity shall be entitled to access the information, without being obliged to state the reasons or explain the interests for seeking the information.”
  - b) (Art. 5) delete: „that is of importance to forming of opinions on the state of society and functioning of authorities, exercise of democratic control over authorities, and exercise of human rights and freedoms“, for the same reasons.
  - c) (Art. 16) Clearly prescribe the obligation of harm test application for all restrictions to access to information which would not allow automatic implementation of restrictions, and leaves space for additional review of interests due to which confidentiality has been determined by the special laws (this does not concern only the information proclaimed as classified by the foreign state or an international organisation).
  - d) (Art. 17) In Art. 17, para. 1: “Prevailing public interest for disclosure of information, or a part thereof, exists when the requested information

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<sup>2</sup> Available at: <http://legislationline.org/topics/country/33/topic/3>

contains data that evidently refer to following”, amend: “Prevailing public interest for disclosure of information, or a part thereof, exists **especially** when the requested information contains data that evidently refer to the following”, so as to leave the possibility for some other interests to also be categorized as prevailing in a concrete situation.

2. (Art. 12) Add words in italic letters: Authority shall publish on its website: drafts and proposals of laws and regulations, *as well as opinions of experts which policymaker received in connection with these proposals or other regulations; all information for which access, in compliance with this law, was made more than three times.*
3. (Art. 15, para. 1) Delete the list of information to which access is restricted for the reasons of protection and instead of it refer to the implementation of the Law of personal data protection. Delete list of particular information to which accesses is restricted for the reasons of security, defence, security, monetary and economic policy of Montenegro and instead of it refer to the implementation of Law on classified data (classified data are determined by this law which leaves no space for all public authorities, who decide upon a request, to assess by themselves whether to decline access to information based on these interests).
4. (Art. 30) Add the following paragraph: "in the case that an authority which received the request, does not hold the requested information, it must immediately, within three working days as of the day when the request is submitted, forward the request to a competent authority and notify applicant." The same was applied in the laws in the region in order to facilitate access to information.
5. (Art. 41) Add to the competencies of the Agency: "monitors and makes reports on the situation in the area of access to information with recommendations on how to improve the protection of the right to access to information, particularly in relation to the implementation of laws restricting the right to access to information".
6. (Art. 48) Inspection supervision over the implementation of this Law in relation to the efficiency of resolution of requests for information and appeals to decisions on requests for access to information (due to the already proved inefficiency) delegate from Ministry responsible for administrative affairs to the Agency.

### **Draft Law on Amendments to the Law on Classified Data**

1. (Art. 8) Reduce the period within which one should periodically review the need for marking data confidential (for TOP SECRET reduce from 10 to 5 yrs, for SECRET from 5 to 4 yrs);
2. (Art. 10) Provide access to classified information to Ombudsman and his deputies as well as to a defendant and his/ her lawyer (for good practice example, see the Slovenian Classified Information Act, Art. 3, para. 1, point 7).
3. (Art. 14) Delete the provision that proposes unlimited duration of a vetting procedure. Current provision prescribes deadlines within vetting procedure must be carried out.
4. (Art. 18) The Draft amendments propose deleting of a provision stipulating an obligation for the Directorate to inform a person about expiration of permit for access to information, and propose only introducing a possibility of permit prolongation. HRA proposed that the law should retain both provisions.
5. (Art. 17) Clearly specify the following: “In classifying information the authorised person shall give the lowest level of classification ensuring such a degree of protection as necessary to safeguard the interests and security of the country.“

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