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## Reforming Georgia's Access to Information Law

### POLICY BRIEF

### Executive Summary

The adoption of a new Freedom of Information law is one of the Georgian Government's commitments under its annual national action plan for the implementation of the Association Agreement between the EU and Georgia. The commitment is significant, given the importance of access to information in terms of ensuring transparency and accountability in public administration and reducing opportunities for corruption. It is therefore also in line with Georgia's commitment under the Association Agenda to combat high-level corruption.

Georgia already has a number of sound legal provisions on access information, including the obligation of public institutions to provide to citizens any information that is not explicitly declared secret by law. There are, however, a number of significant gaps in the legal framework. There is no designated central body with the power to oversee the compliance of public institutions with the access to information regulations and neither does the law provide for any sanctions for noncompliance. The provisions on exemptions from access to information are ambiguous and the law does not cover state-owned enterprises, while also not requiring public agencies to provide information electronically and in an open data format where possible.

The shortcomings of the law have resulted in an uneven application of the access to information provisions in practice, as some public agencies have been significantly less responsive to requests for information than others in recent years, while the judiciary has not proven to be an effective means of challenging their refusals to provide information.

In order to improve Georgia's performance in terms of access to information, the new Freedom of Information law must establish an independent oversight body that will review complaints concerning access to information and will have the power to impose sanctions where necessary. The new law must also reduce the scope of abusing exemptions to deny citizens access to information and aim to establish a uniform practice throughout the public sector.

## Introduction

Since transparency and accountability are widely considered the key principles to be applied in public administration in order to promote integrity and reduce opportunities for corruption, ensuring citizens' access to various types of information about the government's operations is an important element of any effective anti-corruption policy. Consequently, the United Nations Convention Against Corruption requires the signatories to 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.<sup>1</sup>

Additionally, the Convention calls on states to promote the active participation of society in their anti-corruption efforts, inter alia, by 'ensuring that the public has effective access to information.'<sup>2</sup>

The Association Agenda adopted by the Georgian Government and the European Union following the signing of the Association Agreement in 2014 highlights Georgia's commitment to 'take adequate measures at all levels of society to prevent, detect and address corruption especially high level corruption.'<sup>3</sup> The Georgian Government's subsequent action plans for the implementation of the Association Agreement in 2014, 2015 and 2016 have included drafting and adoption of a new Freedom of Information (FOI) law as one of the activities to be taken in the area of anti-corruption reforms. This is logical since (a) transparency of government is an important prerequisite for preventing corruption and (b) it has been widely recognised that the existing legal framework has failed to ensure sufficient transparency of the government in practice.

While this commitment is commendable, the official draft of the law is yet to be submitted to Parliament, so the specific contents of the future legislation remain unknown. At this stage, it is important to answer the following questions:

- ▶ What are the key shortcomings of the current law that prevent the effective application of the access to information provisions in practice?
- ▶ What are the key changes that the new law must introduce in order to ensure effective citizen access to information?

## Principles, Standards and International Best Practices

While there is no universal standard for a good access to information law, the relevant international agreements as well as the available body of research provide some pointers as to the main issues that such a law should address.<sup>4</sup>

<sup>1</sup> United Nations Convention Against Corruption, Article 10.

<sup>2</sup> United Nations Convention Against Corruption, Article 13.

<sup>3</sup> Association Agenda between the European Union and Georgia, [http://eeas.europa.eu/delegations/georgia/documents/eap\\_aa/associationagenda\\_2014\\_en.pdf](http://eeas.europa.eu/delegations/georgia/documents/eap_aa/associationagenda_2014_en.pdf) (accessed on 15 June 2016).

<sup>4</sup> The summary of the principles, standards and best practices was prepared based on the following sources: Council of Europe Convention on Access to Official Documents, Tromsø, 18.VI.2009, Council of Europe Treaty Series - No. 25; Transparency International, Anti-Corruption Helpdesk, Good Practice in Access to Information Law, 29 November 2012; Laura Neuman, Enforcement Models: Content and Context, World Bank Institute, Access to Information Working Paper Series, Washington DC, 2009; Toby Mendel, Amending Access to Information Legislation: Legal and Political Issues, World Bank Institute Governance Working Paper Series, Washington DC, 2011; Transparency International, Chr. Michelsen Institute, Anti-Corruption Resource Center, Right to Information Laws: Impact and Implementation, 9 May 2014; The World Bank, PREM notes public sector, Legislation on Freedom of Information: Trends and Standards, October 2004; Article 19, The Public's Right to Know: Principles on Freedom of Information Legislation, London, June 1999.

## Scope of Application

The scope of application of an access to information law refers to two important issues: The types of information that should be open to the public and the institutions that the law should apply to. As far as the types of information are concerned, the right to access information should ideally apply to all records held by public bodies regardless of the format, source or date of creation. In terms of the institutions covered by the law, the best practice is for the regulations to apply to all branches and levels of government, state-owned enterprises, as well as private entities insofar as they perform public functions or operate with public funds.

## Procedures for requesting and providing information

The law should establish clear procedures and timeframes for access to public information. There should be a variety of options for requesting the information (orally, in writing or electronically), while the applicants must be able to choose the format in which they want to receive the information and should not be required to state a reason for their request.

Public bodies must be required to provide the information either immediately or at the earliest possible date. Information should be provided free of charge or at the lowest possible fee required to cover the costs of collecting, reproducing and sending the data.

## Exceptions

The law should establish an exhaustive list of the types of information that public bodies are allowed to withhold from the public despite requests. The law must contain a list of legitimate aims that would justify denying access to information (e.g. national security, public safety, privacy, commercial interests) and allow public bodies to refuse to provide information only in cases where (a) providing it would clearly cause harm to one of those legitimate aims and (b) that harm would be greater than the benefit of public disclosure of information.

## Review, Enforcement and Oversight

If a public body refuses to disclose information upon request, the law should require it provide a detailed reasoning/explanation for the decision. The applicant should then have the possibility to challenge this decision either through an internal appeals mechanism within the same body, through a court, or through an independent commission responsible for enforcing the right of access to information (if there is such commission in the country) or an ombudsman.

Providing an additional/alternative channel for appeals (beyond the judiciary) through the establishment of a specialised commission or by assigning this responsibility to the ombudsman is advisable because judicial proceedings are of-

ten costly and it could take an overloaded court several months to decide on an appeal, discouraging citizens from filing appeals. Specialised commissions often have the power to adopt mandatory decisions and to impose sanctions/penalties on the public bodies that refuse to provide information in violation of the law, while an ombudsman usually can only issue recommendations.

An additional benefit of establishing an independent commission responsible for enforcing the access to information law is that it can perform further roles in this field, including provision of training to the relevant officials within the public bodies to which the law applies.

Parliaments can also play a significant role in the enforcement of the citizens' right to access information by overseeing the compliance of executive branch agencies with the relevant regulations.

## What the Law Says

Access to information in Georgia is regulated by Chapter 3 of the General Administrative Code titled 'Freedom of Information'. The law establishes a number of important rules on public access to information:<sup>5</sup>

► **Scope of application:** The law defines a 'public institution' as an administrative body or a private entity receiving funding from the state or local budget insofar as such funding is concerned. The law states that all public information is open except for the cases established by the law and the information declared personal data or a state or commercial secret through appropriate procedure.

► **Rules for requesting public information:** Anyone is entitled to request public information and the applicants are not required to provide reasons for their requests. An applicant can request to be allowed to view the original of the information or ask for a copy. Requests for public information are to be submitted in writing, although citizens can also file electronic applications and ask for information in an electronic format.

► **Rules for providing public information:** Public institutions are required to provide the requested information immediately or no later than within 10 days of application if additional time is required to obtain and process the information.

► **Refusal to provide public information:** An applicant must be notified of the refusal to provide public information immediately and must also be given, within three days of such decision, a written explanation of his/her rights and the appeals procedures.

► **Appeals:** An applicant can challenge a public institution's refusal to provide public information in a court and the burden of proof during the adjudication lies with the public institution.

► **Fees:** The law expressly prohibits public bodies from charging any fees for the provision of public information except for what is required to cover the costs of producing copies.

<sup>5</sup> The General Administrative Code of Georgia, 25 June 1999, Articles 27-50.

▶ **Proactive publication:** The law requires public institutions to proactively publish information according to the rules established by the relevant secondary legislation.

▶ **Classified information:** Information can be classified if a law directly requires preventing its disclosure, establishes specific criteria for refusing disclosure, and contains a complete list of the types of information to be classified. Professional and commercial information is to be classified indefinitely, although the latter is to be declassified if it no longer has commercial value. The types of information considered state secret are established by a special law. If a document containing classified information also contains non-classified information that can be separated from it, the latter parts must be made public.

▶ **Responsible officers:** Public institutions are required to identify officers responsible for ensuring access to information and proactive publication of information.

▶ **Reporting:** Public institutions must report annually to parliament, the president, and the prime minister on their compliance with the access to information law and provide relevant statistics.

The above provisions are generally sound and establish a strong legal foundation for ensuring citizens' access to public information. There are, however, several notable gaps in the law:

▶ **Lack of an independent oversight body:** As noted earlier, the existence of a centralised and independent oversight body tends to improve the enforcement of access to information rules in practice and has other benefits too. However the Georgian law does not provide for the establishment of such body.

▶ **Application to state-owned enterprises:** The law does not explicitly require state-owned enterprises (SOEs) to disclose information to the public. This is a significant gap since the country's largest SOEs are managing important public assets.

▶ **Limited rules on proactive publication in primary legislation:** While the law requires public bodies to publish information proactively, it does not establish any additional rules, leaving it up to secondary legislation to introduce further regulations. While multiple public institutions have now adopted decrees on proactive publication, it would be preferable to at least have a list of minimum information that every institution must publish proactively in order to ensure uniformity of practice.

▶ **Exemptions:** The law does not require public agencies to weigh the possible damage resulting from the disclosure of information that is exempt from publication against the benefits of such disclosure (the public interest test).

▶ **Lack of possibility of oral requests:** Contrary to international best practices, the Georgian law does not allow citizens to request public information orally and requires them to file written applications.

► **Lack of sanctions:** The law does not establish any sanctions for civil servants/public officials who fail to provide public information as required by the law.

► **Access to personal data:** The Public Defender has criticised the legal provision that prohibits public institutions from disclosing information containing personal data unless the applicant presents a proof of consent from the person in question. According to the Public Defender, the provision makes it impossible for public institutions to apply the public interest test in each individual case and to weigh the potential harm of disclosure against its benefits. Moreover, while there are no sanctions for failure to disclose public information in Georgia, the country does have penalties for unlawfully publicising personal data, creating a strong bias against disclosure among civil servants.<sup>6</sup>

As demonstrated in the next section, the shortcomings of the legal framework have resulted in the uneven application of the access to information provisions in practice.

## How the Law is Applied in Practice

The application of the access to information provisions in practice remains a problem in Georgia. The OECD Anti-Corruption Network concluded upon the completion of its third round of monitoring of Georgia in 2013 that 'access to information right has been poorly enforced in Georgia'.<sup>7</sup>

A local nongovernmental organisation, the Institute for Development of Freedom of Information (IDFI), has carried out the most comprehensive assessment of the compliance of public institutions with the access to information law, implementing a series of large-scale FOI tests between 2010-2015.

Overall, almost a quarter (24%) of all requests for public information that IDFI filed in 2010-2015 remained unanswered. A complete answer was received in 64% of cases and an incomplete one in 10% of cases, while public institutions refused to provide the information in 2% of the cases. In terms of a year-by-year breakdown, the overall response rate was the worst in 2010-2011, improved notably in 2012-2013 (after the 2012 parliamentary elections), and started to deteriorate again in 2014. The rate of provision of the requested information within the legal deadline ranged from 22% in 2010 to 75% in 2015. IDFI highlighted the fact that, although the organisation had explicitly stated that it would prefer to receive the requested information in electronic format, public institutions often provided printed documents instead. The study also revealed great variations between public agencies in terms of their compliance with the access to information requirements (even within the same government branch): While a number of ministries had a 100% response rates, several of them provided a complete answer in less than 50% of the cases and the lowest-ranked ministry (the Ministry of Economy and Sustainable Development) scored a mere 10% in the rating.<sup>8</sup> IDFI also noted that the judiciary did not prove to be an effective channel for challenging the decisions of public institutions regarding access to information, further highlighting the need for a dedicated oversight agency.<sup>9</sup>

<sup>6</sup> The Public Defender of Georgia, The Report of the Public Defender of Georgia on the Situation of Protection of Human Rights and Freedoms in Georgia 2015 (short version), <http://www.ombudsman.ge/uploads/other/3/3652.pdf> (accessed on 15 June 2016).

<sup>7</sup> The Organisation for Economic Co-operation and Development (OECD), Anti-Corruption Network for Eastern Europe and Central Asia (ACN), Istanbul Anti-Corruption Action Plan, Third Round of Monitoring, Georgia, Monitoring Report, Paris, 2013, 80.

<sup>8</sup> IDFI, Access to Public Information in Georgia: Report Summarizing 2010-2015, <https://idfi.ge/en/access-to-public-information-in-georgia-report-summarizing-2010-2015>

<sup>9</sup> Ibid.



According to the Public Defender, the legal provision prohibiting disclosure of personal data has created significant problems in terms of access to public information in practice. Specifically, because of inflexible regulations, civil servants who should theoretically attempt to find the right balance between the requirements of privacy and freedom of information in every particular case tend to simply try to avoid disclosing the information whenever personal data is involved. The Public Defender has emphasised that, in some cases, public institutions do not understand the requirements of transparency and democracy or their responsibility to ensure access to information.<sup>10</sup>

The Public Defender has also noted that public institutions often do not fully comply with the legal provision requiring them to submit annual reports to parliament, the president, and the prime minister. The Public Defender has identified the lack of sanctions for noncompliance, as well as the lack of obligation on the part of the recipients of these reports to examine their accuracy, as the main reasons for their poor quality.<sup>11</sup>

There are also problems in practice in terms of proactive publication of information. A 2014 assessment of 98 public institutions found that only three of them had published 100% of the information required by the law, while 20 institutions had published less than 50%.<sup>12</sup> No similar assessment has been carried out recently, so it is possible that the situation has improved to some extent, although it is worth noting that at least one major government agency (the State Security Service) currently has no working website. In a commendable move, the government has launched a special website where public agencies are to publish open data proactively. However, the usefulness of this website is reduced by the fact that government institutions have no formal obligation to publish information in an open data format.<sup>13</sup>

The OECD Anti-Corruption Network has highlighted a number of further problems in terms of access to information in Georgia, notably the protracted adjudication of the relevant disputes in courts and the high court fees that dissuade citizens from seeking a judicial remedy.<sup>14</sup>

## Conclusions

The OECD Anti-Corruption Network noted in its 2013 monitoring report that Georgia's access to information provisions 'would benefit from comprehensive and broad revision'.<sup>15</sup> The analysis of the law and the practice above shows that, despite the progress that the country has made in recent years in terms of making information available to its citizens, a number of important changes in the legal framework are required to address the significant problems that remain in the field.

Certain aspects of access to information have improved in Georgia over the last few years both in law and in practice. Proactive publication of information was made mandatory through legal amendments and the responsiveness of public institutions to requests for information increased after the 2012 parliamentary

<sup>10</sup> The Public Defender of Georgia, The Report of the Public Defender of Georgia on the Situation of Protection of Human Rights and Freedoms in Georgia 2015, (in Georgian), <http://www.ombudsman.ge/uploads/other/3/3512.pdf> (accessed on 15 June 2016).

<sup>11</sup> The Public Defender of Georgia, Annual Report of the Public Defender of Georgia, The Situation of Human Rights and Freedoms in Georgia, 2014, <http://www.ombudsman.ge/uploads/other/3/3510.pdf> (accessed on 15 June 2015).

<sup>12</sup> Institute for Development of Freedom of Information, Practice of Pro-Active Release of Public Information in Georgia's Public Agencies, 2014 (in Georgian), <https://idfi.ge/public/upload/IDFI/proactive.disclosure.georgian.practice.pdf> (accessed on 15 June 2015).

<sup>13</sup> Open Government Partnership, Independent Reporting Mechanism (IRM) Progress Report 2014-2015: Georgia, 32.

<sup>14</sup> OECD ACN, 2013, 74.

<sup>15</sup> OECD ACN, 2013, 80.

elections (although it has declined to some degree since 2014). Yet, the uneven compliance with the relevant legal requirements throughout the public sector points to the need for further reforms: First and foremost, the establishment of a dedicated body that would monitor the application of the law in practice and ensure compliance through sanctions where necessary.

## Recommendations

Since there is now a consensus that Georgia needs a new access to information law and the government has committed to adopting one in the near future, it is important to ensure that the new law will:

- ▶ Establish an independent oversight body equipped with the power of monitoring the compliance of public institutions with the access to information regulations and reviewing complaints
- ▶ Introduce sanctions for noncompliance with access to information provisions
- ▶ Expand the scope of the law to cover state-owned enterprises
- ▶ Include more detailed provisions on proactive publication of information, establishing common standards and provisions for all public institutions
- ▶ Require public institutions to proactively publish information in an open data format
- ▶ Improve the provisions on exemptions, further clarify the definition of state and commercial secrets, and require public institutions to apply a public interest test when dealing with exemptions
- ▶ Allow for the disclosure of personal data of public officials wherever there is an overriding public interest, as recommended by the Public Defender
- ▶ Allow for oral requests
- ▶ Require public institutions to provide information in electronic format wherever requested and possible and establish the relevant rules
- ▶ Improve provisions on annual reporting, clarifying the responsibilities of both the institutions that submit these reports and those that receive them.