

Facilitating access to information in post-Soviet countries

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There is a general trend in most post-Soviet countries of the assertion of an individual's right to seek and receive information. The constitutions of nine of the 15 countries – Azerbaijan (article 50), Armenia (article 24), Belarus (article 34), Kazakhstan (article 20), Lithuania (article 25), Moldova (article 34), Russia (article 29), Ukraine (article 34) and Uzbekistan (article 29) – guarantee to *everyone* the right to seek and receive information. Seven of these constitutions specifically indicate that information on issues regarding life and health and environmental protection should be open and accessible to all.¹ The constitutions of six of the countries in this study do not explicitly guarantee to everyone the right to seek information, but they do entitle to receive (gather) and disseminate it (or even just receive it) – Latvia (article 100), Estonia (article 34), Georgia (article 24), Kyrgyzstan (article 14), Tajikistan (article 30), and Turkmenistan (article 26). Depending on how one understands the word “receive”, these clauses taken in conjunction with the rights contained in national media statutes could be taken to mean that the right to seek information is to a certain extent lessened by the special rights accorded to the media.

The Model Statute “On the right of access to information” (17 April 2004) is of special significance for countries in the Commonwealth of Independent States. In particular, it establishes the right to request information without having to give justification; to require a response in writing; to use an appeals procedure if bodies and organisations and their officials breach the right of access to information and the procedure for exercising it. Action (or inaction) by bodies and organisations and their officials that obstructs freedom of information can be reported to a human rights ombudsman. An information request should bring a response as quickly as possible and no later than within thirty calendar days of receipt. A fee may be charged, but it should cover no more than the cost of provision.

A number of states – Azerbaijan, Armenia, Kyrgyzstan, Latvia, Moldova, Tajikistan, Uzbekistan, Ukraine and Estonia – have separate statutes guaranteeing freedom of access to information. We can also place in this group Georgia, where provisions on access to information are set out in a special section of the General Administrative Code, and Lithuania, where they are an integral part of the public information act.

But the enactment of freedom of information statutes in the above eleven countries often does not remove obstructions to the free flow of information. Some of these statutes give general principles for information policy rather than precisely formulating the right to information and the procedure for accessing it. Kyrgyzstan formally guarantees freedom of information but does not list the legitimate exclusions or give an appeals procedure. Uzbekistan's freedom of information statute contains exclusions to protect “the moral values of society and its spiritual, cultural and scholarly resource”. Some of these instruments are more about prohibition than permission.

Members of the public say they are unfamiliar with the FOI law and state officials that they lack the resources to handle requests promptly and efficiently. For example, the Moldovan parliament passed a freedom of information statute in 2000 but the first court cases came only in 2003. According to Vasile Spinei of the non-government organisation Acces-Info, nearly 40 lawsuits had been filed as of early 2006 despite the fact that many more instances of obstructing access to official information had been recorded. His belief is that the relatively low number of freedom of information lawsuits is due to “a shortage of time and ... courage” among the public.

¹ See constitutions of Azerbaijan (Art. 29), Belarus (Art. 34), Georgia (Art. 37), Kazakhstan (Art. 31), Moldova (Art. 37), Russia (Art. 42) and Ukraine (Art. 50).

Statistics show an actual compliance rate of 15-20 per cent for information requests in the post-Soviet states. Consequently, many regard the freedom of information statutes as “dead”.²

We should note that in most of these countries the legislation on freedom of information post-dates the media statutes, and while they are different (governing information and the media) they contain provisions that by and large overlap. Although the need to retain in media statutes special privileges for the journalists to access information with the adoption of general freedom of information statutes seems legally dubious, it is our view that these should remain during the transition period until mechanisms for all members of the public to access information are implemented in full measure.³

As regards special rules and procedures regulating access to information, some of the countries in this study have included them only in their media statutes⁴ alongside general provisions that recognise special rights for journalists to seek and receive information.

The media statutes of four post-Soviet states – Azerbaijan (article 8), Belarus (article 32), Kazakhstan (article 18) and Russia (article 39) – set out a particular procedure for responding to requests for information. In its absence, experts regard even journalists’ rights “to receive and disseminate information” as existing in name only.⁵

This path, of journalists *de-facto* enjoying greater rights of access to public information resources than ordinary individuals, for example, has been taken by Russian legislation. The Russian media statute (1991) says in article 38 (“The right to receive information”) that: “... citizens are entitled to timely receipt through the mass information media of accurate accounts of the activities of state bodies and organisations, public associations and their officials”. So the public is “entitled” - but via the media. Of course, and given the subject matter of this statute, one could argue that this indirect right to information stems from the nature of the activity that it regulates. That is, if another statute were to govern information rather than, as here, mass information, then it would have to directly comply with the constitutional freedom of information.⁶ But one way or another, in the absence of a statute on access to information for individuals, the media statute *de-facto* extends to journalists rights that others do not enjoy. The right is retained for members of the public to receive information of public interest, but there is no practical procedure for this.

It must be noted that this special right is bound to assume an obligation for the media: to provide the public with accurate coverage of state bodies and organisations, and public associations, and their officials.

It would appear that the most sensible way to tackle non-response to information requests would be a system of specific administrative sanctions, laid down in law and used to penalise

² *Пресса под прессом политики. Свобода СМИ: ситуация в Беларуси, Молдове и Украине.* Артикаль 19. Лондон, 2003. С. 70, 71. See also: Report of the Centre of Journalism in Extreme Situations of the Union of Journalists of Russia of 21.02.2006, and of 11.05.2006. (www.cjes.ru). Similar conclusion in relation to the situation in Georgia was made by the authors of report: *Media Sustainability Index 2004. The Development of Sustainable Independent Media in Europe and Eurasia.* Washington, 2005. P. 145.

³ Such privileges for the press have only been abolished in Georgia and partly in Armenia, as to Estonia it has no media statute and thus statutory privileges for the press.

⁴ In Kyrgyzstan and Uzbekistan, in separate statutes on protection of journalists’ professional activity.

⁵ *Средства массовой информации в переходном периоде // Законодательство и практика средств массовой информации (Кишинев), № 1, март 1996 г.*

⁶ This conclusion can be made if based on the fact that this norm of Russia’s media statute is followed by Article 39 which details the procedure of the receipt by the mass information media of information from state bodies and organisations, public associations and their officials.

specific breaches of the rules. Such a system, for example, was introduced in 2002 in the Russian Federation Administrative Offences Code and penalises failure to supply information when required by law or provision of incomplete or deliberately inaccurate information. The penalty is an administrative fine of from 500 to 1,000 roubles (article 5.39),⁷ but unfortunately we were unable to find any instance of this being put into practice.

Concealment or distortion of information is a punishable offence under the Russian Federation Criminal Code, of which article 237 stipulates a custodial sentence of up to five years for withholding information about a threat to human life and health or to the environment. This provision is in line with the duties of the Russian government, environmental authorities and regional and local authorities to ensure public availability of environmental information⁸, and other regulatory instruments. However, the definition is limited; it covers information on natural, man-made or other processes that could, if events take a turn for the worse or in the absence of proper control and regulation, have grievous consequences for people or the environment. For the purposes of punishment, firstly, there must be proof of direct intent that an official was aware of the duty to supply information without distorting it, and proof that the information was essential to subsequently influence events and their consequences, including to prevent and reduce harm to humans and the environment. This is generally very difficult to prove. And while a threat to life can be defined fairly clearly, it can be as hard to prove a danger to health as it is to prove intent.

Secondly, only persons whose duties *oblige* them to place the relevant information in the public domain can be charged with this offence. The maximum penalty applies only if the impact of the offence is apparent - if damage was done to health or there were other serious consequences (for example, fatalities). So although the article exists, the writer is unaware of it being used.

Article 140 of the Russian Federation Criminal Code imposes a fine of up to 50,000 roubles for failure to supply information to a member of the public. However, this article is not just about failure to supply information but failure to allow sight of documents and material that are directly relevant to the applicant's own rights and freedoms. If the applicant's rights and freedoms are not affected, then withholding the information is not a criminal offence.

These provisions are rarely used and the public are either unaware of their rights here or unable to exercise them properly. But in our opinion the main issue is the lack of any real liability for withholding information.

Kazakhstan's media statute sets a compulsory three-day deadline for providing open information, breach of which can lead to court action. But unlawful refusals and obstructions to supplying information of public importance continue, as before, to account for the bulk of offences. Four hundred and fifteen occurrences were recorded in 2003, 435 in 2004 and 426 in 2005, although the real number is many times greater. Most of these offences take place at regional level. Medical and health services withhold information about possible human and avian flu epidemics and about cancer and infectious disease rates; fire, rail and transport services and education authorities refuse to report emergencies, and so forth. Private-sector entities are even less helpful.

Only one victory against this was recorded in Kazakhstan in all of 2005. On 17 October the Shchuchinskiy district court in Aqmola Region upheld a complaint by Ye. Karimova, editor

⁷ This is also an administrative offence punished by a fine in Kazakhstan (para. 2 of Art. 352 of the Administrative Offences Code) and in Uzbekistan (Art. 43 of the Administrative Offences Code).

⁸ E.g., Art. 6-10 of the Russia's statute on environmental protection (1991); Art. 19 of the Fundamentals of legislation of the Russian Federation on health protection of citizens (1993); Art. 8 of the Russia's statute on the fundamentals of city planning (1992).

of *Stabilnaya gazeta*, of unlawful conduct by the district governor's office. She had made numerous requests to his press service for information of public interest and in particular about the work of the spring flood commission and about various actions and decisions taken by the district authorities. The court ruled that the information had been wrongfully withheld and ordered the respondent to provide it.⁹

A positive factor in ensuring freedom of information is simplified access to public information, a right that should be extended to all without exception. Some believe that the right to information is a clear example of the law being used to resolve opposing interests regarding information. In their opinion, the official naturally wishes to conceal information that might compromise him and the applicant, by contrast, wishes to obtain and circulate it as a way of protecting his/her interests. In our view, the existence of opposing interests between officials and public is not so clear-cut. Information possessed by an official in the performance of his duties will not necessarily compromise him, and public are by no means always seeking out information to compromise officials and the authorities. From this, it follows that their interests do not have to be mutually exclusive. This does not rule out situations, which can arise frequently, when the public experiences difficulties obtaining information from state sources. The important factor here seems to be shortcomings in legislation on information and the media.

⁹ *Калеева Т.* Ситуация со свободой слова в Казахстане в 2005 году / Аналитический доклад. Source: <http://www.adilsoz.kz/site.php?lan=russian&id=492>