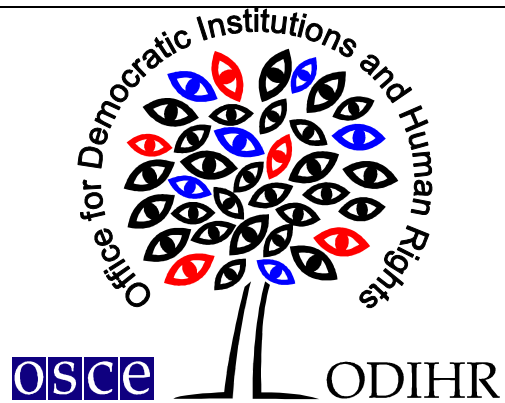


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OPINION

ON DRAFT LAWS

OF THE REPUBLIC OF KAZAKHSTAN ON

ACCESS TO INFORMATION

Based on unofficial English translations of the draft Laws

This Opinion has benefited from contributions made by Prof. Maeve McDonagh, University College Cork, Ireland, and has also been the subject of consultations with the Office of the OSCE Representative on Freedom of Media

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I. INTRODUCTION

1. *Since 2010, a working group constituted within the Mazhilis of the Parliament of the Republic of Kazakhstan has been in the process of drafting a Law on Access to Information. In November 2010, upon request of the Head of the Working Group, the OSCE/ODIHR issued an Opinion on the draft Law on Access to Public Information¹ (hereinafter “ODIHR’s 2010 Opinion”). This Opinion was discussed during a roundtable that took place in Astana in December 2010 on Good Practices in Legislation on Access to Information.*
2. *On 15 March 2012, the Head of the Working Group, who is at the same time a Member of the Mazhilis of the Parliament, sent a letter to the Head of the OSCE Centre in Astana, asking them to arrange for expert evaluation of the draft Law on Access to Information (hereinafter “the draft Law”) and the draft Law on Changes and Additions to Some Legal Acts Related to Access to Information (hereinafter “Draft Changes and Additions to Legal Acts”). Said evaluation should aim to assess these draft Laws’ compliance with international standards, given that access to information was a priority issue in the OSCE human dimension. Texts of both draft Laws were attached.*
3. *This Opinion is provided as a response to the above request for expertise.*

II. SCOPE OF REVIEW

4. The scope of the Opinion covers only the above-mentioned draft Laws. Thus limited, the Opinion does not constitute a full and comprehensive review of all available framework legislation governing the issue of freedom of and access to information in Kazakhstan.
5. The Opinion raises key issues and provides indications of areas of concern. The ensuing recommendations are based on international standards and good practices related to freedom of information, as found in the international agreements and commitments ratified and entered into by the Republic of Kazakhstan. Considerable parts of the Opinion will also be based on ODIHR’s 2010 Opinion.
6. This Opinion is based on unofficial translations of the draft Laws, which have been attached to this document as Annexes 1 and 2. Errors from translation may result.
7. In view of the above, the OSCE/ODIHR and the Office of the OSCE Representative on Freedom of Media would like to make mention that this Opinion is without prejudice to any written or oral recommendations and comments to this or other legislation related to access to information, classification of information and data protection that the OSCE/ODIHR and the Office of the OSCE Representative on Freedom of Media, may make in the future, whether jointly or separately.

¹ OSCE/ODIHR Opinion on the Draft Law of the Republic of Kazakhstan on Access to Public Information, Opinion-No.: FOI – KAZ/164/2010, issued on 16 November 2010.

III. EXECUTIVE SUMMARY

8. At the outset, it should be noted that this version of the draft Law has improved a number of issues raised in ODIHR's 2010 Opinion. At the same time, certain fundamental concerns remain. In the interests of concision, this Opinion will focus on those areas which could still benefit from improvement. In order to ensure the full compliance of the draft Law with international standards and commitments, it is recommended as follows:

1. Key Recommendations

- A. to consider adopting a new approach to access to information in the draft Law, which, instead of differentiating between accessible and classified information, would rather follow the general principle that all information is accessible, except for such cases where, following a balance of interests, a legitimate interest is found to outweigh the public interest in disclosure of information; [pars 18-21; 27-28; 31-32 and 60]
- B. to clarify the appellate proceedings laid down in Article 31 of the draft Law by, *inter alia*, establishing a clear hierarchy of appeals; [pars 73-74]
- C. to consider establishing an Information Commissioner; [pars 77-79]
- D. to enhance the protection of informants provided by Article 32 of the draft Law; [pars 83-85]
- E. to re-formulate individual liability under Article 33 of the draft Law in a clearer and more foreseeable manner; [pars 87-89]

2. Additional Recommendations

- F. to indicate in a preamble or first provision of the draft Law that the right of individuals to access information is a fundamental right derived from the constitutional right to freedom of expression; [par 14]
- G. to specify in Article 2 of the draft Law the names or types of laws that regulate access to information in addition to the draft Law; [par 16]
- H. to delete Article 3 par 3 (2) of the draft Law in line with a proposed policy shift in relation to the draft Law ; [par 20]
- I. to amend the definition of information under Article 1 of the draft Law to reflect only what material or data shall constitute information within the meaning of the draft Law; [par 21]
- J. to clarify the purpose and relevance of Article 6 of the draft Law, and specify the meaning of par 3 [pars 22 and 23] and
- K. to amend Article 7 par 1 of the draft Law as follows:
 - 1) merge par 1 with Article 28 and retain par 2 as a stand-alone provision; [par 24]
 - 2) include national security in the list of protected interests under par 1 (after moving it to Article 28); [pars 20 and 28]

- 3) delete the “prevention of disclosure of classified information” from the list of protected interests under par 1/Article 28; [par 29]
 - 4) clarify the meaning of “the justification of the legality of restriction”, currently under par 1 (4); [par 30]
- L. to take into consideration concerns about the value and applicability of Article 7 par 2 of the draft Law, in addition to including data retained in archives as accessible information on mass reprisals under item 14 of this provision, and Article 5 of the Draft Changes and Additions to Legal Acts amending Article 17 of the Law on State Secrets; [par 33]
- M. to delete the procedural aspects from Article 8 par 1 of the draft Law and subsume them under Chapter 4 of the draft Law, while retaining the right to access information under Article 8 par 1 (1) and the right to not be required to justify the need for information under Article 8 par 1 (8) as general principles under Article 8; [par 34]
- N. to amend Article 9 of the draft Law as follows:
- 1) clarify the nature of quasi-governmental entities and reiterate that information holders shall include all public bodies of the executive, legislative and judiciary; [par 35]
 - 2) explicitly extend the scope of the draft Law to private bodies if they carry out statutory or public functions, hold information necessary to protect a right or receive state funding; [par 36]
 - 3) exclude individuals from the list of information holders; [par 37]
 - 4) replace the term “citizens”, as protected by par 2 (2), with the term “individuals”; [par 37]
- O. to delete Article 10 par 2 of the draft Law; [par 39]
- P. to enhance provisions of the draft Law on publishing info by specifying the time frame and regularity of updates (except for Article 15, where this is already specified), as well as monitoring and enforcement of such updates; [par 42]
- Q. to include in Article 15 par 1 (14) of the draft Law the obligation to publish voting results of federal government and parliament; [par 44]
- R. to leave the approval of lists of public information to be published on the internet to the Information Commissioner; [par 45]
- S. to delete as redundant Articles 19 and 20 of the draft Law; [par 46]
- T. to amend Article 21 par 3 by outlining in detail which types of meetings shall be closed; [par 47]
- U. to include in the published information on meetings of collegial bodies in the internet information on whether these meetings will be open or closed; [par 48]
- V. to amend Article 23 as follows:
- 1) clarify the order of priority for certain people in par 1; [par 49]

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- 2) move information on the number of visitor seats to the beginning of par 1; [par 50]
- W. to insert in Articles 25-27 information on how to process and respond to oral requests, including specific registration procedures; [pars 52 and 55]
- X. to change the wording of Articles 26 par 4 and 28 par 1 (3) to the effect that requests for access to information may only be rejected where information does not exist, cannot be found or is not in the information holder's possession; [pars 53 and 59]
- Y. to create special web pages allowing information users to submit and trace requests and see the history of previous requests; [par 54]
- Z. to amend Article 28 as follows:
- 1) requests for information should only be rejected under pars 1 (1) and 2 after prior requests for clarification have failed; [pars 56-57]
 - 2) specify in par 1 (2) that it only relates to written requests; [par 58]
 - 3) remove par 1 (4) rejecting requests due to the classified nature of the information; [par 60]
 - 4) review the accuracy of the references to other provisions under par 1 (7) and, if necessary, amend them; [par 61]
 - 5) outline in par 3 that the reasoned decision to reject a request shall be submitted in writing, and should include the name of the responsible official, the date and information on legal remedies; [par 62]
- AA. to modify Article 29 as follows:
- 1) add quasi-governmental bodies to the list of information holders under par 1; [par 63]
 - 2) enhance the list of information holders to include all bodies of the executive, legislative and judiciary; [par 64]
 - 3) clarify under par 2 that in case a request requires copying/printing of over 50 pages, the information users shall pay the excess amount once the 50-page limit has been exceeded; [par 64]
 - 4) oblige information holders to inform information users beforehand about the extent of potential costs for obtaining certain information; [par 65]
 - 5) specify the meaning of "personal life" under par 4 and expand this provision to cover all highly relevant information of public importance; [par 66]
- BB. to add a provision to the draft Law stating that in case an information holder provides inaccurate data, the inaccuracies shall be removed by the information holder free of charge; [par 67]

- CC. to encourage public bodies to adopt internal codes on access and openness, allocate sufficient funds to implement the law once adopted, and appropriate information processing systems, and provide/undergo pertinent training on the contents and procedures of the law; [par 68]
- DD. to delete Article 30 par 5 of the draft Law on the oversight role of the prosecution; [par 71]
- EE. to ensure that complaints submitted to the Ombudsman will specify whether an appeal was lodged simultaneously with an administrative body or court; [par 75]
- FF. to make sure that appeals procedures under Article 31 of the draft Law are consistent with the appeals procedures in Article 17 par 3 of the Law on State Secrets, as amended by Article 5 of the Draft Changes and Additions to Legal Acts, and other laws; [par 76]
- GG. to clarify the meaning of certain terms used in the new Article 155-1 of the Criminal Code, as amended by Article 1 of the Draft Changes and Additions to Legal Acts; [pars 91-92 and 94] and
- HH. to enhance clarity of Article 84 of the Code of Administrative Offences, as amended by Article 2 of the Draft Changes and Additions to Legal Acts. [par 93]

IV. ANALYSIS AND RECOMMENDATIONS

1. International and National Definitions and Standards Related to Access to Information

9. In democratic states, the right of individuals to be informed of activities of public administration is fundamental to their participation in public affairs and in ensuring transparency of government.² The right to seek, receive and impart information is part of the right to freedom of expression, a right which is expressly protected in numerous international human rights instruments, *inter alia* in Article 19 of the International Covenant on Civil and Political Rights (hereinafter “the ICCPR”).³ In 2011, the UN Human Rights Committee published General Comment No. 34 on Freedoms of Opinion and Expression which explicitly states that Article 19 ICCPR embraces a general right of access to information held by public bodies.⁴ It further states that in order to give effect to that right, State parties should enact the necessary procedures by means of freedom of information legislation.⁵

² See the Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Information and Expression, submitted to the UN Human Rights Council at its 14th session on 20 April 2010, par 31.

³ United Nations International Covenant on Civil and Political Rights (adopted by General Assembly resolution 2200A (XXI) on 16 December 1966. The Republic of Kazakhstan ratified this Covenant on 24 January 2006.

⁴ UN Human Rights Committee General Comment No. 34, Freedom of Opinion and Expression (Article 19), CCPR/C/GC/34, July 21, 2011, par 18.

⁵ UN Human Rights Committee General Comment No. 34, Freedom of Opinion and Expression (Article 19), CCPR/C/GC/34, July 21, 2011. par 19.

10. Article 19 of the ICCPR also provides that the right to freedom of expression may only be subject to such limitations as are provided by law and are necessary for the respect of rights and reputations of others and for the protection of national security, public order or public health or morals. This means that state restrictions of the right to freedom of expression may not jeopardize the right itself.⁶
11. In 2010, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression reiterated that Governments shall take the necessary legislative and administrative measures to improve access to public information for everyone. Any access to information policy must have specific legislative and procedural characteristics, including observance of the maximum disclosure principle, the presumption of the public nature of meetings and key documents, broad definitions of the type of information that is accessible, reasonable fees and time limits, independent review of refusals to disclose information, and sanctions for non-compliance.⁷ The 2011 UN Human Rights Committee General Comment No. 34 on Freedoms of Opinion and Expression provides further guidance on the shaping of Freedom of Information laws⁸, stressing that such laws should provide for the timely processing of requests for information according to clear rules that are compatible with the ICCPR, and that fees for requests for information should not be such as to constitute an unreasonable impediment to access to information. Further, authorities should provide reasons for any refusal to provide access to information, while arrangements should be put in place for appeals against refusals to provide access to information, as well as in cases of failure to respond to requests.
12. Numerous OSCE Commitments document OSCE participating States' support for relevant international commitments on seeking, receiving and imparting information of all kinds.⁹ The Istanbul Document reiterated these States' reaffirmation of the importance of the public's access to information.¹⁰
13. At a domestic level, Article 20 par 2 of the Constitution of the Republic of Kazakhstan¹¹ (hereinafter "the Constitution") states that everyone shall have the right to freely receive and disseminate information by any means not prohibited by law. A list of items constituting state secrets shall be determined by law.

⁶ See the UN Human Rights Committee General Comment No. 34, Freedom of Opinion and Expression, par. 21.

⁷ See the Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Information and Expression, *op cit* note 2, par 32.

⁸ UN Human Rights Committee General Comment No.34, Freedom of Opinion and Expression, par. 19.

⁹ See the Concluding Document of Vienna – the Third Follow-up Meeting, Vienna, 15 January 1989, par 34 and the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, par 9.1.

¹⁰ See the Istanbul Document, Istanbul, 19 November 1999, par 26.

¹¹ The Constitution of the Republic of Kazakhstan was approved by referendum on 30 August 1995 and last amended in 2011.

2. Legislation on Access to Information in Kazakhstan and Scope of the Draft Law

14. The draft Law mainly outlines how individuals may access information which is in the possession of public authorities and aims to replace the Law on Access to Information of 2000, currently in force. It would be welcome if the draft Law indicated in a preamble or first provision that the right of individuals to access information held by public bodies is a fundamental right derived from the constitutional right of freedom of expression under Article 20 of the Constitution.
15. At the same time, the Draft Changes and Additions to Legal Acts aim to ensure consistency of the draft Law and other relevant legislation in the field of access to information. This legislation includes the Criminal Code, the Code of Administrative Offences, the Environmental Code, the Law on Emergency Situations of Natural and Manmade Character, the Law on State Secrets, the Law on Mass Media, the Law on Administrative Procedures, the Law on Local Government and Self-Government, the Law on Informatization, and the Law on the Procedure for Considering Applications of Individuals and Legal Entities.
16. In this context, it is noted that Article 2 of the draft Law states that access to information is based on the Constitution of Kazakhstan and international treaties, as well as “other legal regulatory acts of the Republic of Kazakhstan”. While this provision presumably refers to the laws that the Draft Changes and Additions to Legal Acts aim to amend, the nature of such legislation regulating access to information remains unclear to users who may not be familiar with the contents of the Draft Changes and Additions to Legal Acts.¹² As already stated in ODIHR’s 2010 Opinion¹³, and in a number of previous opinions on legislation in Kazakhstan¹⁴, users of the law should know which laws, or which types of laws, aside from the Law on Access to Information, regulate a given topic. It is thus recommended to specify in Article 2 the names of laws, or at least the types of laws that regulate the area of access to information in addition to the draft Law.
17. The scope of the draft Law is regulated specifically in Article 3. Under Article 3 par 3, the provision of classified information subjected to restricted access is excluded from the scope of the draft Law.
18. At this point, it is important to reiterate the different aims of legislation on the classification of confidential documents on the one hand, and of legislation on access to information on the other. While the former aims at ensuring the safety of confidential and classified documents and preventing their illegal disclosure, the latter determines whether and how to make information

¹² See further examples of vague references to other legislation in the draft Law, namely Article 1, pars 1-3, Article 3 par 2, Article 7 par 1, Article 8 par 1, Article 12 par 7, Article 13, Article 14, Article 27 par 3, Article 30 par 4, and Article 33.

¹³ See ODIHR’s 2010 Opinion, par 14.

¹⁴ See, for example, OSCE/ODIHR Opinion on the draft Law of the Republic of Kazakhstan on the Regulation of Migration Processes (Opinion No. MIG – KAZ/183/2011) of 11 April 2011, par 25, and OSCE/ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Administrative Procedures (Opinion No. GEN – KAZ/170/2010) of 29 December 2010, pars 15-16.

accessible in a legal way.¹⁵ As noted in ODIHR's 2010 Opinion, the mere act of classifying a document as confidential under the relevant legislation (in this case, the Law on State Secrets) does not necessarily reveal whether or not the contents of this document carry the risk of harming national security, or public order¹⁶.

19. For this important reason, these laws should be treated separately. Article 3 par 3 (2) currently excludes all classified documents from the scope of the draft Law, regardless of whether this classification is related to the harmfulness of the contents of each individual document. This would not appear to be the best solution in this situation, as such blanket exclusion of certain documents from the draft Law of specific types of information would not provide a reliable indication of whether such information may be accessed in a given situation. Additionally, this approach does not take into account that blanket exclusion would automatically also ban access to such information or documents where only parts of the information are classified (which would normally be subjected to partial release). This would also not appear to be in line with Article 27 par 5 of the draft Law, which does permit access to partly classified information (excluding the classified parts).
20. It would therefore be preferable to include all information, including documents classified under the Law on State Secrets, in the scope of the draft Law¹⁷. Requests for classified information could, if the classification is justified and based on actual overriding security interests, still be rejected. This would, of course, require that national security is included as a permissible reason for refusing access to information under the draft Law (see par 28 *infra*). For the above reasons, it is recommended to delete Article 3 par 3 (2).
21. As a consequence, relevant parts of Article 1 of the draft Law on definitions of terms should be amended¹⁸. While it is welcomed that Article 1 now contains a more general definition of "information", this provision still differentiates between "information" and "classified information". The former includes all documented information "access to which is not restricted by laws of the Republic of Kazakhstan". The latter is state or other secrets and/or information protected by law, accessible to a restricted group of users. As indicated above in par 18, information should not be categorized into accessible and classified/not accessible. Rather, the definition under Article 1 should merely outline what type of material or data constitutes information within the meaning of the draft Law. The question of whether information may be

¹⁵ See, in this context, the [w]ritten analysis of two alternative Azerbaijani draft laws on Freedom of Information by Jan van Schagen, Legal Adviser at the Ministry of the Interior and Kingdom Relations of the Netherlands, ATCM(2004)025, issued jointly on 6 September 2004 by the OSCE Representative on Freedom of the Media and the Council of Europe, Section 3.4.

¹⁶ See ODIHR's 2010 Opinion, par 21.

¹⁷ See Article 4 par 1 of the Croatian Act on the Right to Access Information, adopted on 15 October 2003 and promulgated on 21 October 2003, which states that "all information possessed, disposed of or controlled by bodies of public authority shall be available to interested beneficiaries of the right to information". See also Article 2 par 3 of the Latvian Freedom of Information Law, adopted on 6 November 1998 and last amended in 2006, which states that information shall be accessible to the public in all cases, unless the law specifies otherwise.

¹⁸ Likewise, other articles supporting a differentiation between information and classified information should be amended, e.g. Article 6 par 10, Article 7 par 1 (1), Article 10 par 1 (11)

accessed at a given time should be determined on a case by case basis, taking into consideration the principles of the right to access information under Article 19 of the ICCPR (for more discussion in this topic, see par 27 *infra*).

3. Access to Information and its Limitations

3.1 General Principles and Main Requirements

22. While Article 4 outlines key principles of ensuring access to information, Article 6 focuses on “main requirements for providing access to information”. At the outset, it should be noted that the purpose of this article is not quite clear, as many of the obligations, e.g. to provide access to information and meetings, liability, and the exclusion of classified from accessible information are also laid down in other provisions of the draft Law. It is thus recommended to reconsider the purpose and relevance of this provision.
23. Article 6 par 3 speaks of “familiarizing with the information” – it is unclear what this principle means. If it involves the obligation of information holders to familiarize themselves with the contents and types of information that they are in possession of, then this should be clarified.
24. Article 7 is titled “[t]ypes of information that may be classified”, but is in fact not limited to this; while par 1 outlines in which cases information may be restricted (not only when it is classified), par 2 also specifies which types of information may not be classified. This provision thereby appears to deal with two quite separate issues – par 1 concerns the grounds for rejecting requests for information, while par 2 specifies which types of information should always be accessible. The grounds for rejecting requests for information should more appropriately be laid down in Chapter 4 outlining the procedure for obtaining information, more specifically in Article 28 on grounds for rejecting requests for information. Since par 2 on accessible information is of a more general nature, it should remain part of the Chapter 1 (general provisions), but as a stand-alone provision.
25. As for the contents of Article 7, par 1 states that access to information may only be restricted following the laws of Kazakhstan, and only in compliance with a set of cumulative requirements: protection of state or individuals’ legitimate interests, prevention of significant damage to such interests, if the damage to such interests outweighs the public interest in disclosure, and if the legality of the restriction is justified.
26. The above-mentioned interests include the constitutional establishment, public order, human rights and freedoms, population health and morals, and also the prevention of disclosure of classified information (Article 7 par 1(1)). For the most part, this reflects the interests that may justify limitations to the freedom of information under Article 19 par 3 of the ICCPR. However, Article 7 par 1 (1) does not include in its list “national security”, which under the ICCPR is also considered a ground for restricting access to information. This absence of national security as a permissible limitation to accessing information is presumably due to the fact that most documents and materials related to national security are considered state secrets and thus classified information which currently lies outside the scope of the draft Law (Article 3 par 3 (2)).

27. Generally, international freedom of information standards are based on the principle of maximum disclosure,¹⁹ which presupposes that all information held by all public bodies, including legislative and judicial branches of power, should be subject to disclosure. No public bodies shall be exempted from the obligation to disclose information to the public, and no information shall automatically be deemed non-disclosable.²⁰ As discussed in par 21 *supra*, exceptions to this rule shall be clearly and narrowly drawn and shall only be permissible on a case by case basis if the respective information relates to a legitimate aim listed in the law, disclosure of the information would threaten to cause substantial harm to that aim, and the harm to the aim outweighs the public interest in the disclosure of the information.²¹ Exceptions shall thus be based on the content of information material, not the type of document (see pars 18-19 *supra*).²²
28. In line with the shift in policy discussed above and under pars 18-20 *supra*, and instead of a blanket restriction of access to classified information, it is thus recommended to include national security in the list of protected interests under Article 7 par 1 (1) (or, more appropriately, under Article 28 (see par 24 *supra*)) that could potentially justify a limitation to the right to access information.
29. At the same time, the prevention of disclosure of classified information is currently listed as a protected interest on the same level with the protection of human rights and freedoms and public order. It would appear, however, that the non-disclosure of certain information is a means to protect legitimate interests such as national security, the public order, or the rights of others, rather than a legitimate interest itself. It would thus be more appropriate to delete the prevention of disclosure of classified information from the list of protected interests and replace it with national security (see par 28 *supra*).
30. Following the significant harm test under par 2 and the balance of interests, the fourth and last requirement under Article 7 par 1 (4) is the justification of

¹⁹ See the Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Information and Expression, submitted to the UN Human Rights Council at its 14th session on 20 April 2010, par 31.

²⁰ See, e.g., Section 11 of the Latvian Freedom of Information Law, which implies that restricted access information may be requested if the request includes the purpose for which the information shall be used, and that the recipient of the information has the duty to use the information only for the requested purposes. Illegal disclosure of restricted access information will lead to disciplinary or criminal liability, and action for damages may be initiated against the person committing such act if harm has been caused to the information owner or other persons, or if his/her legal interests have been materially infringed (Section 16 of the Latvian Freedom of Information Law).

²¹ See also the Memorandum of ARTICLE 19 on the draft Law of the Republic of Kazakhstan on Access to Public Information of September 2010, II “Exceptions”.

²² See also the [w]ritten analysis of two alternative Azerbaijani draft laws on Freedom of Information by Jan van Schagen, Legal Adviser at the Ministry of the Interior and Kingdom Relations of the Netherlands, ATCM(2004)025, issued jointly on 6 September 2004 by the OSCE Representative on Freedom of the Media and the Council of Europe, Section 3.4. See also, in particular, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, adopted on 1 October 1995 by a group of experts in international law, national security and human rights convened by ARTICLE 19 and the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg, which specify in Principle 11 that the right to information also includes the right to obtain information related to national security. Principle 12 states that an automatic and categorical denial of access to all information related to national security is not permissible.

the legality of the restriction. The meaning of this provision is not evident. If it relates to the proportionality of the restriction of the right with the intended aim of protecting a legitimate interest, then this should be clearly stated.

31. Under the second paragraph of Article 7, the enumeration of which types of information shall not be restricted is quite extensive. While it is welcomed that certain information is considered so important or relevant that it shall not be kept from the population, this provision again demonstrates the difficulties posed by differentiating between types of information that are accessible to the public and types of information which are not. For example, it is noted that information on public security, emergency situations, and terrorist acts shall not be restricted. In this context, it is, however, conceivable that in order to protect lives, national security or the public order, a balance of interests could lead to the conclusion that certain information should be restricted. Such restrictions would then, however, violate Article 7 par 2.
32. Similarly, the ban on restricting information “relating to the personal security of individuals, their rights, freedoms and legitimate interests” has the potential to unjustifiably violate the privacy of personal information. For this reason, it would be preferable if as a general principle, all information would be considered accessible to the public, unless, based on the grounds listed in Art 7, par 1 (1) or, more appropriately Art 28, (see par 24 *supra*), it would be necessary and proportionate to restrict access. The relevant stakeholders in Kazakhstan are again urged to consider such shift in legal policy.
33. Aside from these basic concerns as to the value and applicability of Article 7 par 2, it is noted that the revised list of accessible information under this provision is more extensive than that contained in the 2010 draft Law under Article 5 par 4. At the same time, Article 7 par 2 (14) on information on mass repressions still does not cover data contained in archives, as did an earlier version of the draft Law from August 2010. Given the importance of having access to historical information and archives²³, this type of information should also be open to the population, within the limitations listed under par 27 *supra*. The same applies to Article 5 of the Draft Changes and Additions to Legal Acts amending Article 17 of the Law on State Secrets, which contains a list of non-classified information identical to that found in Article 7 par 2 of the draft Law.
34. Article 8 par 1 concerning rights and responsibilities of information users consists of a mix of important general principles and procedural matters relating to the exercise of access rights. The latter would be more appropriately dealt with under Chapter 4 which concerns the exercise of access rights. The deletion of these procedural matters from Article 8 would also help prevent overlap and confusion. For example, while Article 8 par 1(10) and Article 31 both deal with appeals rights, these provisions express them in different terms: Article 31 provides for appeals to, amongst others, the Human Rights Commissioner, which Article 8 par 1 (10) does not mention the Human Rights Commissioner as an appeals body. It is thus recommended to delete the procedural aspects of Article 8 par 1 and subsume them under Chapter 4. At

²³ See the Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Information and Expression, submitted to the UN Human Rights Council at its 14th session on 20 April 2010, par 34.

the same time, it is important to retain the right of access to information (Article 8 par 1 (1)) and the right “not to [have to] justify the need for the information” (Art 8 par 1(8)) as general principles under Article 8.

35. Information holders are described under Article 9 of the draft Law. Under par 1 (2) of this provision, they also include “entities of the quasi-governmental sector”. As already stated in ODIHR’s 2010 Opinion, the nature of such entities remains unclear²⁴. In particular, it is not apparent whether such entities also include bodies of the legislative and the judiciary. In this context, the UN Human Rights Committee has made it clear that the right of access to information arising under Article 19 ICCPR applies in respect of all branches of the State (executive, legislative, and judicial) and other public or governmental authorities.²⁵ Individuals should therefore have access to information on all state activity²⁶, and it is recommended to expressly state that information holders include all public bodies²⁷ of the executive, legislative and judiciary.
36. It is welcomed that Article 9 par 2 is now more limited in relation to the types of information that private legal entities are held to disclose. It is reiterated that private bodies should only be considered information owners within the meaning of Article 9 if they carry out statutory or public functions, hold information necessary to protect or exercise a right, or if they are recipients of state funding.²⁸ For the sake of clarity, it would however be advisable to amend Article 9 by explicitly extending the scope of the draft Law to private bodies meeting these conditions. In this case, Article 9, pars 1(3), 1(4) and 1(5) would become redundant.
37. At the same time, as noted in ODIHR’s 2010 Opinion, it is still recommended to exclude individuals from the list of information holders – any information held by them that could be relevant for the public interest or the exercise of other persons’ rights should be obtained through the appropriate court procedures. Finally, Article 9 par 2 (2) speaks of a potentially negative impact on the security of citizens, which would appear to be quite restrictive language as it would exclude non-citizens from the scope of this provision. It is recommended to adapt this provision to the remainder of the draft Law, which now speaks of “individuals” rather than “citizens”.
38. Article 10 outlines the rights and responsibilities of information holders. While the responsibilities outlined under par 1 mostly relate to due diligence, par 2 contains what the law drafters presumably considered to be rights of the information holders. These relate to instances when requests for information may be rejected, namely when an application is unclear, the information

²⁴ See ODIHR’s 2010 Opinion, par 37.

²⁵ UN Human Rights Committee General Comment No.34, Freedom of Opinion and Expression, paras 7 and 18.

²⁶ In this context, see the Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Information and Expression, par 31.

²⁷ See ARTICLE 19’s Model Freedom of Information Law, which speaks of public bodies, as defined by Section 6 (1) of the Model Law as any body established by or under the Constitution, established by statute, forming part of any level or branch of Government, owned controlled or substantially financed by funds provided by Government or the State, or carrying out a statutory or public function.

²⁸ See also the Memorandum of ARTICLE 19 on the draft Law of the Republic of Kazakhstan on Access to Public Information of September 2010, II “Subjects of the draft Law”.

requested is not within the mandate of the information holder, or the information is classified.

39. Generally, it would appear inappropriate to see the rejection of a request for information as the right of a public entity. Instead, such rejection would rather appear to qualify as an exception from such entity's basic obligations, which does not automatically make it a right. The list of cases when information holders are not obliged to provide information would thus appear to be misplaced in Article 10 par 2. The grounds on which requests for information may be rejected are rightly listed under Article 28, which contains a more expansive list that also includes the grounds listed in Article 10 par 2, in addition to several others such as formal errors, the fact of information having already been provided previously, and analyses of information. As Article 10 par 2 thus seems redundant, it is recommended to delete it.

3.2 Dissemination of Information and Access to Meetings of Collegial Bodies

40. Chapter 2 of the draft Law is titled "Methods and Procedures for Obtaining and Dissemination of Information". It basically focuses on information holders' obligation to disseminate information, and to allow access to meetings of administrative collegial bodies.
41. Article 11 par 1 is much welcomed in that it provides an obligation for information holders to ensure access to public information, which shall be done in various ways described in greater detail under Article 12. The types of information to be placed on internet resources are listed under Article 15 of the draft Law.
42. The impact of Articles 11 and 12 could be enhanced by stipulating within the draft Law the time frame within which such information should be made available to the public following adoption of the draft Law and the regularity with which it should be updated (this last requirement is already included in Article 15 par 4 for information published on the internet). Also, Article 12 should clarify how the obligation to publish this information shall be monitored and enforced. Preferably, this should be done by an independent body (see the discussions on an independent Information Commissioner discussed under pars 77-79 *infra*).
43. As stated in ODIHR's 2010 Opinion, the extensive list of materials to be published online by the Kazakhstani authorities under Article 15 is positive²⁹. Other parts of Article 15 have also benefited from positive amendments since the 2010 draft Law, namely the reference to the protection of individuals' private lives in Article 15 par 1 (11) and the specification that information shall be published in the national and in the Russian language (Article 15 par 6).
44. It is noted that Article 15 par 1 (14) specifies that voting results within authorities of local self-government should be published, but does not state the same for voting results of other levels of government, or the federal Parliament. In order to ensure maximum transparency in voting procedures, it

²⁹ See ODIHR's 2010 Opinion, par 40.

is recommended to expand this provision to include voting results of responsible authorities at all levels of government, including the Parliament, which should include minute of open Parliament sessions, chambers and *maslikhats* (local representative body of a region in Kazakhstan), except for cases of secret voting.

45. Article 16 foresees that supervisory organs such as the President, the Government, the Parliament and other public bodies shall approve lists of public information to be published on the internet, depending on the level of governance. As already indicated in ODIHR's 2010 Opinion, this practice would not ensure fully independent supervision of the information published. Instead, it would be more appropriate to leave the approval of such information lists to an independent body such as an Information Commissioner (see par 77 *infra*).³⁰
46. Article 19 on access to collegial body meetings of information holders and Article 20 on the provision of information on request appear to have been inserted after the issuance of ODIHR's 2010 Opinion. They reiterate the general rights of information users to access collegial body meetings and obtain information upon request, without going into detail. Given that access to collegial bodies and the provision of information are dealt with in Chapters 3 and 4 of the draft Law respectively, the purpose of these provisions is doubtful, as they merely repeat what the adopted law's table of contents will already reveal. As they do not appear to have much added value, it is recommended to delete both Article 19 and 20.
47. Chapter 3 of the draft Law aims at facilitating public access to meetings of collegial bodies of information holders. Under Article 21, such meetings shall be open, unless they are closed in order to discuss issues requiring disclosure of classified information. As already noted in ODIHR's 2010 Opinion, this exception is so wide that it could be applied to a great number of meetings, even those where discussions on topics involving disclosure of classified information would only take up a small part of the meeting³¹. As it has already been recommended that the concept of differentiating between accessible information and classified information be removed from the draft Law (pars 18-20 and 28 *supra*), it is suggested to amend Article 21 par 3 by outlining in detail which types of meetings shall be closed; for example, these could be the meetings related to the protection of public health and safety, law enforcement/investigation, employee or personal matters, privacy, commercial interests and national security.³² The institution of a right of appeal to the Information Commissioner against a decision to close a meeting is also recommended (see par 77 *infra*).
48. Article 22, par 1 states that information holders shall publish information on meetings of collegial bodies in the internet and mass media by specifying the agenda, date, time and venue. It is recommended to include in this provision the requirement to publish information on whether the meeting will be open or closed.

³⁰ See Section 19 of the UK Freedom of Information Act.

³¹ See ODIHR's 2010 Opinion, par 46.

³² See the Memorandum of ARTICLE 19 on the draft Law of the Republic of Kazakhstan on Access to Public Information of September 2010, II "Access to Meeting of Public Bodies".

49. Article 23 par 1 outlines how information users may attend such collegial meetings. This provision specifies that if a limited number of attendees is exceeded, and persons who signed up fail to attend, then priority shall be given to certain groups of persons, namely individuals affected by the matters to be discussed, who did not attend earlier meetings of the same nature, or who enrolled earlier than others. From this list, it is not clear which group shall have priority over others – if the categories referred to in Article 23 par 1 are listed in order or priority, then this should be specified.
50. Article 23 par 2 sets out the number of visitor seats to be provided at various meetings. It would improve the clarity of this provision if such information were included at an earlier stage in this provision, preferably in Art 23, par 1 prior to the paragraph concerning the giving of priority to certain categories of attendees.
51. At the same time, the ability for journalists to take part in such meetings without prior registration, and the possibility for information users to write extracts and make copies of minutes and other meeting documents are both much welcomed additions to the draft Law.

4. Requests for Information and Ensuing Procedure

52. The procedure for requesting and obtaining public information is described in Chapter 4. Within this chapter, Article 25 outlines what requests for information should look like. It is noted that Article 25 par 3 also speaks of the possibility of submitting requests for information orally. While Article 26 par 1 specifies that all requests, oral and written, shall be registered on the date of receipt, with indication of the time and date of receipt, neither Article 26 nor Article 25 contain additional requirements for registering oral requests. Given the informal manner of oral requests, it would be preferable for the draft Law to contain additional requirements on how to process such requests, to ensure that relevant information relating to the information user and the request itself is not lost. To this end, Article 26 par 1 should specify that in case of oral requests, information holders should take care to register the name, address and contact details of the information user, as well as a brief summary of the request and its addressee. At the same time, the notification to information users requesting information orally is a welcome addition to Article 25 par 3.
53. In general, Article 26 of the draft Law deals with the consideration of requests for information. Par 4 of this provision states that in cases where a request is “irrelevant to the competence of an information holder”, it shall be forwarded to the relevant information holder within three days. This approach may be overly formalistic, as it is conceivable that an information holder may possess information that is not strictly speaking in its competence. If in possession of such information, there is no reason why the respective information holder shall not provide it to the information user. Article 26 par 4 should be amended to the effect that a request for access may only be rejected where the requested information does not exist, cannot be found³³ or is not in its

³³ See, for example, Section 10(1)(a) of the Irish Freedom of Information Act.

- possession³⁴. At the same time, it is welcomed that par 4 requires the information user to be informed of any transfer of requests to another, more competent information holder.
54. In this context, to enhance the transparency of such procedures, it may be helpful to create special web pages which would allow information users to submit their requests, trace the status of their requests, and view all previously submitted requests and data released.
 55. The procedure for providing information upon request is laid down in Article 27. This article's par 1 also allows for the provision of information orally. As specified with regard to oral requests for information (par 52 *supra*), there should be a more detailed procedure with regard to oral responses to requests as well. In particular, the provision of oral information by information holders should be documented in writing and registered accordingly.
 56. Article 28 lists grounds that preclude the possibility to provide information on request. These include the situation where the content of the request does not allow the information owner to identify what kind of information is being requested (Article 28 par 1 (1)). Since individuals will not always be familiar with the proper terminology of public affairs and public administration, it is recommended to specify that in case the content of the request cannot be determined, the request shall only be rejected following a demand for clarification by the information holder, which would be permissible under Article 26 par 5.³⁵
 57. For the same reasons, a request which does not follow the formal specifications of Article 25 (Article 28 par 1 (2)) should not be immediately rejected. Instead, the information holder should respond to the information user by pointing out which formal requirements were not fulfilled, and should ask for re-submission of the request. If the information user does not respond to these directions, then the information holder may reject the request.
 58. Further, Article 28 par 1 (2) should specify that these requirements only refer to written requests. It is recommended to clarify this provision accordingly.
 59. Par 1(3) of Article 28 permits the refusal of requests where the provision of the required information goes beyond the information holder's competences. As discussed in par 53 *supra*, this provision should be reformulated to the effect that an information holder may refuse access where the requested information does not exist, cannot be found³⁶ or is not in its possession.
 60. Further, it is recommended to amend par 1(4) of Article 28, which states that access to classified information may be rejected. As stated in par 27 *supra*, all information should generally be accessible to the public, unless a balance of

³⁴ In this context, see Article 40 par 1 (2) of the Law of Kazakhstan on Informatization, which provides that a request for access to an electronic resource will be rejected if the respective owner or possessor does not hold the requested electronic information resource, and does not know in whose possession it is.

³⁵ See also the Commentary on the Ukrainian Law on Information by Helena Jäderblom, Director, Swedish Ministry of Justice, issued jointly by the OSCE Representative on Freedom of Media and the Council of Europe in December 2001, Section 4.3.

³⁶ See, for example, Section 10(1)(a) of the Irish Freedom of Information Act.

interests suggests that in a specific case, certain protected interests outweigh the individual's and public's right to disclosure.

61. Article 28 par 1 (7) also states that requests for information shall be rejected if they fail to comply with the requirements specified under Articles 27 par 2 and 4. It is assumed that this reference may well refer not to these provisions, which constitute obligations of information holders, but instead to other provisions of the draft Law. This should be checked and, if necessary, corrected.
62. Article 28 par 3 provides that a reasoned decision to reject a request for access to information shall be sent to the information user within three days of the request registration date. As specified in ODIHR's 2010 Opinion, it would be preferable to specify that such decision should be in writing, and should, next to the motivation, include the name of the official refusing the request, the date, and information on the appeals procedure against the decision.³⁷
63. Article 29 of the draft Law specifies that requested information shall be provided by government bodies and local self-governments free of charge; in case of other types of information holders, Art 29 par 2 provides that the information user shall pay the costs for extensive copying or printing (over 50 pages). In this context, it is advised to amend Article 29 par 1 to include quasigovernmental entities in the categories of information holders required to provide information free of charge.
64. At the same time, Article 29 par 2 should be amended to bring it into line with the recommendation concerning the categories of information holders to be covered by the draft Law (see par 35 *supra*). Article 29 par 2 should also be amended to make it clear that where meeting a request requires copying or printing of over 50 pages, requesters need only pay for the amount exceeding 50 pages. The current wording is ambiguous and could be read as requiring payment in respect of all information once the 50 page limit is exceeded (that is, including the 50 pages); instead it should be clear that the first 50 pages are for free.
65. While Article 29 par 3 sets out that the rates for copying and printing shall be published, it is still recommended to include in this provision the requirement for the information holder to inform the information user beforehand about the size and volume of the information required, as these may not always be apparent to individuals. In that case, information users will still have the option of withdrawing their request in cases where they cannot afford the copying or printing costs or where these costs are disproportionately high compared to their interest in the information.³⁸
66. In addition, it is noted that under Article 29 par 4, personal and environmental information shall never be charged with a fee, except in cases where this information is held by an individual "funded from the budget or an individual that holds personal and environmental information". In this context, the meaning of personal information is unclear – if this concerns personal

³⁷ See similar requirements in Article 11 par 3 of the Armenian Law on Freedom of Information and Article 23 par 4 of the Law of Ukraine on Access to Public Information.

³⁸ See ODIHR's 2010 Opinion, par 53. See also, as an example, Section 47 (7) of the Irish Freedom of Information Act.

information related to the information user, then such information should never be charged with a fee. Also, it is not apparent why environmental information is specifically exempted from fees under this provision, but other important information relevant to the public, e.g. on human rights violations or public safety, shall not be. This part of Article 29 should be reviewed and possibly extended to all types of highly relevant information of public importance.

67. One of the previous versions of the draft Law from August 2010 also stated that in case the information holder delivers inaccurate data to the information user, the information holder shall remove inaccuracies free of charge, upon written request of the information user. As stated in ODIHR's 2010 Opinion, this provision demonstrated good governance and accountability on the side of the public authorities, and should thus be re-introduced into the draft Law³⁹.
68. Finally, it is worthy to reiterate in this Opinion, that in order to ensure the proper implementation of the law in practice, relevant public bodies should be encouraged to adopt internal codes on access and openness. Also, it is recommended that sufficient funds be allocated to the implementation of the law by providing clear and transparent data and information processing systems. Further, all administrative personnel receiving requests for information need to be aware of the contents of the draft Law and properly trained to apply the procedure laid down therein. Such training could be offered by the Information Commissioner as part of his/her mandate to raise awareness of the right to information and of access to public information (see par 77 *infra*).

5. Protection of Access to Information and Liability Provisions

5.1 Control and Oversight Mechanisms

69. Article 30 specifies the modalities of supervision and control over access to information. Primarily, such control shall be exercised by managers of information holders, the public (which includes mass media, political parties, non-governmental organizations and trade unions) and prosecutors' offices.
70. Presumably, "managers of information holders" refers to the hierarchical supervisors of information holders. The extensive control over access to information that the public is invited to exercise is welcomed. However, as already indicated in ODIHR's 2010 Opinion, the oversight role played by the prosecution in relation to "precise and uniform compliance with information access" is not very clear⁴⁰. In case this provision refers to public prosecutors' general tasks of investigating potentially criminal cases, then this would be a mere reiteration of what is already clearly stated in the relevant criminal procedure legislation.
71. However, if the prosecution is hereby required to play a general monitoring and supervisory role, then this would greatly expand (and perhaps exceed) the competences of a body which is generally tasked to investigate crimes and bring to justice perpetrators. In this case, it would be highly questionable

³⁹ See ODIHR's 2010 Opinion, par 56.

⁴⁰ *Ibid*, par 63

whether prosecutors' offices would have the knowledge and proper background or independence to adequately monitor implementation of the law. Generally, it is recommended to delete Article 30 par 4 – if it is a mere reference to the competences of the prosecution under criminal law, then it is redundant, and if it intends to provide the prosecution with supervisory and monitoring powers under the draft Law, then this would be inappropriate. Overall, the main oversight and monitoring function over implementation of the law should be exercised by an independent oversight body such as an Information Commissioner, given that this draft Law embodies and outlines the rights of individuals to access information, which are much better monitored by a body which is not part of the very authorities which are under supervision.

5.2 Appeals Procedures

72. The UN Human Rights Committee has emphasised that the right of access to information arising under Article 19 ICCPR must be supported by a system of appeals.⁴¹ According to Article 31 of the draft Law, decisions and action/inaction of information holders (including government bodies, bodies of local self-government, organizations, officials and public officials), which violate the rights of information users, may be appealed against to a superior body or official, the Human Rights Commissioner and/or a court (par 1). Any damages resulting from unlawful denial of access to information, its untimely provision or the provision of unreliable or inadequate information shall be compensated following the pertinent civil procedures (par 2).
73. As already mentioned in ODIHR's 2010 Opinion⁴², the appellate procedure mentioned in Article 31 par 1 is not very detailed and implies that theoretically, appeals may be lodged with superior bodies, higher officials, the Human Rights Commissioner and courts simultaneously. Such lack of hierarchy in the appeals procedure could lead to confusion, as certain appeals could be pending before administrative bodies and courts simultaneously. If the respective bodies are not aware that appeals have been lodged with other bodies as well, then this could have the undesirable effect of multiple, possibly conflicting decisions being taken on the same matter.
74. In order to prevent such negative consequences, it is recommended to introduce to the draft Law a provision specifying the different levels of appeals procedures, in line with the relevant domestic legislation on administrative appeals and court procedure.⁴³ This provision should specify which bodies would receive first instance administrative appeals and, if applicable, which bodies would be competent to hear second instance administrative appeals. The draft Law should also specify, in line with relevant legislation on the hierarchy and competence of courts, which courts would be competent to hear appeals against first or second instance administrative decisions and what kind of procedure they would follow. The same applies to

⁴¹ UN Human Rights Committee General Comment No.34, Freedom of Opinion and Expression, par 19.

⁴² See ODIHR's 2010 Opinion, par 59.

⁴³ See, e.g. the procedure outlined in Article 17 of the Croatian Act on the Right of Access to Information.

Article 18 par 3 of the Law on Mass Media, which based on Article 6 of the draft Changes and Additions to Legal Acts shall be amended to be fully consistent with Article 31 par 1 of the draft Law.

75. Proceedings before the Human Rights Commissioner could proceed simultaneously with the administrative and court procedures, but it would enhance transparency and good governance if complaints submitted to the Commissioner would specify whether an appeal has already been lodged with an administrative body or court.
76. At the same time, it is noted that Article 5 of the Draft Changes and Additions to Legal Acts on amending Article 17 of the Law on State Secrets differs slightly with regard to appeals mechanisms open to information users. Under par 3 of the new Article 17, information users may appeal only to courts in cases where non-classified information was withheld, or where a decision was taken to classify such information, or to include it in carriers of state secret information. The appeals options under the Law on State Secrets would thus appear to be inconsistent with the appeals options under Article 31 of the draft Law. When reviewing the contents of Article 31, as proposed in par 74 *supra*, it should also be ensured that appeals procedures against violations involving rights of access to information of individuals are consistent in all relevant laws.
77. As already stated in ODIHR's 2010 Opinion, competent stakeholders could also consider the creation of the position of an Information Commissioner⁴⁴. As in other OSCE participating States, the mandate of the Information Commissioner would involve the handling of administrative appeals against decisions of information owners made under the draft Law.⁴⁵ Such a body would help reduce the burden on courts and other bodies, e.g. the Human Rights Commissioner, and would have the additional asset of being specialized in all issues related to access to information. Next to his/her mandate as a complaints body, the Information Commissioner could fulfill other monitoring and awareness-raising tasks related to the right of access to information.⁴⁶
78. The Information Commissioner should be an independent administrative body,⁴⁷ accountable only to the Parliament, but otherwise not attached to any government or executive body. Such independence should be ensured by a separate budget line in the State budget, and a transparent and pluralist appointment procedure. In order to examine appeals made to him/her properly, the Information Commissioner must be permitted to access all information materials and documents relevant to the case in order to take an informed

⁴⁴ See ODIHR's 2010 Opinion, pars 60-62.

⁴⁵ Such offices are to be found in a number of OSCE participating states e.g. Canada, UK, Slovenia, Serbia, Estonia, Germany, Switzerland, Hungary, Scotland, Azerbaijan and Ireland. See also Part V on the Information Commissioner of ARTICLE 19's Model Freedom of Information Law, which specifies the appointment, mandate, tasks, salary and reporting obligations of the Information Commissioner.

⁴⁶ See Sections 47-49 of the UK Freedom of Information Act. For the complaints procedure before the UK Information Commissioner, see Sections 50-55 of the Freedom of Information Act.

⁴⁷ On the mandate and role of the "authorized agency of information matters" of Azerbaijan, see Articles 42 – 55 of the Law of Azerbaijan on the Right to Obtain Information, adopted in 2008. See also the Memorandum of ARTICLE 19 on the draft Law of the Republic of Kazakhstan on Access to Public Information of September 2010, II "Enforcement of the draft Law".

decision on the matter.⁴⁸ The decisions of the Information Commissioner shall be binding on all administrative bodies, and at the same time appealable to the competent courts. The courts will also need to have full access to all relevant information to assess the decision taken by the Information Commissioner.⁴⁹ In the case of sensitive information, court hearings could be held *in camera*.

79. Next to his/her role as an appeals body, the Information Commissioner could supervise the implementation of the draft Law on a regular basis and could be responsible for awareness-raising activities in this respect. The Commissioner should be obliged to produce an annual report which would include, *inter alia*, statistics relating to the number of requests made, the number of requests that were responded to/refused, as well as the number of appeals.⁵⁰ Further, such annual reports should be used to identify remaining constraints to the free flow of information and measures planned to improve the latter.⁵¹

5.3 Protection of Informants

80. Article 32 constitutes a new provision which was not included in the previously reviewed versions of the draft Laws from 2010. It basically protects informants (sometimes also referred to as “whistleblowers”) in cases where these persons’ actions promote the protection of public interests, and if the protection of these interests is more significant than the damage inflicted on protected interests. Under par 2 of Article 32, such persons shall be exempt from legal liability for the disclosure of classified information.
81. Over recent years, there has been a general increase of protection for whistleblowers in various jurisdictions; for the most part, whistleblowers are seen as a necessary support mechanism against corruption and abuse of power in both public and private entities⁵². Protecting such persons from legal liability and other negative consequences and retaliation is thus very much in line with evolving international standards⁵³.
82. The protection for whistleblowers included in Article 32 of the draft Law is much welcomed. Protection for such persons could, however, be enhanced by clarifying and strengthening this provision.
83. First of all, the protection afforded to informants is quite vague, and does not specify which acts of disclosure would be protected. Article 32 par 1 contains no information on whether this refers to disclosure of a certain wrongdoing of

⁴⁸ See also Principle 14 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, adopted on 1 October 1995.

⁴⁹ *Ibid.*

⁵⁰ See Principle 3 in “The Public’s Right to Know”, Principles on Freedom of Information Legislation, ARTICLE 19, 7 December 1999, which also suggests that such annual reports may include measures taken to improve public access to information.

⁵¹ *Ibid.*

⁵² See the G20 Anti-Corruption Action Plan, Action Point 7: Protection of Whistleblowers, adopted in November 2010, par 1.

⁵³ Some countries have also decided to adopt separate laws on whistleblowers, to heighten awareness of the issue (*ibid*, par 13). See, as an example, the United Kingdom’s Public Interest Disclosure Act, adopted in 1998 and last amended in 2004, which provides comprehensive protection for whistleblowers in both the public and the private sector.

others, or whether it refers to certain types of information, e.g. information on threats to health, public safety or the environment. This should be clarified⁵⁴.

84. Further, the basis for the informant's actions, namely the "promoted protection of public interests, with the benefit of protecting the interests being more significant than the damage inflicted to the interests protected by law" under Article 32 par 2, are also quite inexplicit. In particular, this provision does not indicate who decides whether a certain action has in fact promoted the public interest or not. It would be preferable to clarify in this provision that informants will be protected if they reasonably believed that their action was in the public interest.⁵⁵
85. Article 32 par 2 also does not specify which type of legal liability the informants shall be exempted from. The exemption from criminal liability appears to be already included in the draft Changes and Additions to Legal Acts under Article 1 amending Article 172 of the Criminal Code on Illegal Divulging of State Secrets. However, Article 32 par 2 of the draft Law should specify that this extends to other liability and sanctions as well, notably administrative or employment-related sanctions. It should also clarify that such protection shall apply regardless of any breach of a legal or employment obligation.

5.4 Individual Liability

86. Individual liability for violating provisions of the draft Law is mainly described in Article 33 of the draft Law, which states that where such provisions have been breached, the responsible persons shall bear liability as envisaged by the laws of the Republic of Kazakhstan.
87. Neither this provision, nor any other provision in the draft Law, provides adequate information on the consequences of individual non-compliance with the draft Law. First of all, the wording of Article 33 does not specify exactly which actions will be considered violations of the draft Law. Further, there is no information on which type of violations will lead to which type of liability, e.g. it is not clear whether the failure to provide access to information will result in disciplinary proceedings, or administrative proceedings, or even criminal proceedings. The same applies to Article 5 of the Draft Changes and Additions to Legal Acts on amendments to Article 17 par 3 of the Law on State Secrets. This provision also outlines liability for failing to provide unclassified information, or wrongly deciding to classify such information or include it in carriers of classified information.

⁵⁴ In this context, Section 47 of ARTICLE 19's Model Freedom of Information Law (*op cit* note 27), may provide useful guidance:

"(1) No one may be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment obligation, for releasing information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment.

(2) For purposes of sub-section (1), wrongdoing includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body".

⁵⁵ *Ibid.*, see also Section 43B, par 1 of the UK Public Disclosure Act.

88. While it is important to include sanctions for non-compliance in legislation such as the draft Law and other legislation, such sanctions will only have practical effect if they are clear and detailed. Only then will both information users and information holders know which behaviour will lead to which legal consequences. It is recommended to enhance Article 33 of the draft Law by listing the types of behaviour that would be in violation of the draft Law, e.g. delays in provision information, or refusal to provide or other obstruction to information, or the act of destroying, altering, concealing, erasing or defacing public information or records.⁵⁶ Alternatively, Article 33 should contain references to the relevant legislation where such liability is laid down.
89. Further, Article 33 should contain information on which procedure will be applied in which case, how such procedures are initiated, and which body or organ will preside over such proceedings. Finally, the draft Law should contain a list of possible sanctions for each violation of the draft Law⁵⁷, or references to relevant other legislation, either by name or by specifying the type of other legislation where this may be found. Such information is necessary in the interests of legality and foreseeability of the draft Law, so that individuals and authorities applying the adopted law will know with sufficient clarity how the proper and lawful implementation of the law will be ensured, and what the consequences of non-fulfillment and violations of the law will be.
90. While it is strongly recommended that the issue of liability for violating provisions of the draft Law be dealt with in the draft Law, the following comments address the Draft Changes and Additions to Legal Acts that relate to the question of liability. In the latter, Article 1 foresees changes to the Criminal Code of Kazakhstan, notably the inclusion of new Article 155-1 on “hindrance to the right [of] access to information”. Based on this provision, “illegal hindrance” to the provision of documents, decisions and information sources directly affecting rights and legitimate interests of information users is a criminal offence. The same applies in the case of failure to provide information within legally established terms, the provision of incomplete or deliberately untrue information, and the unlawful classification of information as being subject to restricted access. If any of the above actions result in significant damages to the rights and legitimate interests of information users, the perpetrators will be punished with either a fine (50-100 estimated monthly salaries), public (120-180 hrs) or correctional work (up to 1 year).
91. As stated in ODIHR’s 2010 Opinion, serious offences that prevent access to public information, such as the obstruction of access to, or the destruction of records, should be treated as criminal offences.⁵⁸ Due to the fact that they lead to criminal sanctions, criminal provisions need to be clear and state specifically which type of behaviour will lead to which type of sanction. When applying this principle to Article 155-1, it is not really apparent what type of behaviour would constitute an “illegal hindrance” to the provision of documents, decisions and information sources. The specific actions or

⁵⁶ See Article 26 of the Croatian Act on the Right of Access to Information, which outlines the types of behaviour engendering liability, and the types of sanctions that may follow from such conduct.

⁵⁷ Ibid.

⁵⁸ See ODIHR’s 2010 Opinion, par 67. Also see Principle 1 in “The Public’s Right to Know”, Principles on Freedom of Information Legislation, ARTICLE 19, 7 December 1999.

omissions constituting such an offence should be listed in greater detail, so that information holders will know which type of behaviour will entail criminal liability and which will not. The destruction of records mentioned above would appear to fulfill the requirements of Article 324 par 2 of the Criminal Code on stealing or damaging documents, stamps and seals, but could also be included in Article 155-1 as an act of obstructing access to information.

92. In relation to the other acts listed under Article 155-1 (providing delayed, incomplete or deliberately untrue information, or unlawful classification of information as being restricted), it is presumed that these will require a voluntary action on the side of the perpetrator with the express intent to hinder a person's right to obtain information directly affecting one's rights and legitimate interests. The additional requirement of such action needing to result in significant damages to the rights and legitimate interests of information users is not quite clear – first of all, it is not apparent which damages would be considered “significant”, and secondly, what type of damages this would encompass. It is recommended to either clarify the term “significant damages”, or to delete the word “significant” and apply Article 155-1 in all cases where an information user suffered damages due to the illegal behaviour listed in Article 155-1.
93. In this context, it is noted that Article 2 of the Draft Changes and Additions to Legal Acts amending Article 84 of the Code of Administrative Offences adds to this lack of clarity by specifying that certain actions (incidentally the same actions that are criminalized under Article 155-1 of the Criminal Code (see par 90 *supra*)) shall be punished as administrative offences, provided that they show “no signs of a criminal offence”. This, along with the vague terminology in Article 155-1 discussed under pars 90-91 *supra*, makes it quite difficult to differentiate between Article 84 of the Code of Administrative Offences and Article 155-1 of the Criminal Code. Next to Article 155-1, Article 84 should also be changed accordingly to make this distinction more apparent.
94. Par 2 of the new Article 155-1 of the Criminal Code specifies that the same crime, committed by a person abusing his/her official capacity or office, and also applying the use of violence or threats of violence, shall be punished more severely. In this context, it is not clear how hindering the right of access to information may be done with violence or the threat of violence, unless this is meant to involve cases where persons shall be prevented from even asking for information, or from complaining about actions listed under par 1 of Article 155-1. This should be made clearer in Article 155-1 par 2.

[END OF TEXT]