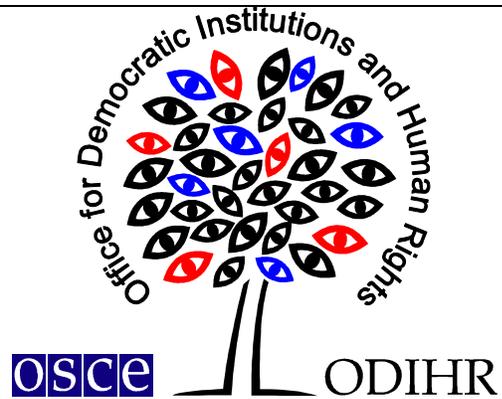


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OPINION

ON THE DRAFT LAW

OF THE REPUBLIC OF KAZAKHSTAN ON

ACCESS TO PUBLIC INFORMATION

Based on an unofficial English translation of the draft Law

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

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Annex 1: Draft Law of the Republic of Kazakhstan on Access to Public Information

1. INTRODUCTION

1. *In the first half of 2010, members of the Mazhilis of the Parliament of the Republic of Kazakhstan established a working group responsible for drafting a Law on Public Access to Information. This group also included civil society representatives.*
2. *On 14 July 2010, the Head of the above Working Group sent a letter to the Human Dimension Officer of the OSCE Centre in Astana and the OSCE/ODIHR Rule of Law Coordinator in Central Asia, asking them to arrange for international expert evaluation of the draft Law on Access to Public Information (hereinafter “the First Draft”). The text of the First Draft was attached. In the same letter, the Head of the Working Group also noted that public discussion of the draft was planned for August-September 2010. The OSCE Centre forwarded the request and attached draft Law to the OSCE/ODIHR. Further discussions on the draft Law followed between relevant stakeholders in Kazakhstan, among them a roundtable that took place in Astana on 23 September 2010.*
3. *In mid-October 2010, the OSCE Centre in Astana forwarded to OSCE/ODIHR the English translation of a revised draft Law on Access to Public Information of 16 September 2010 (hereinafter “the draft Law”).*
4. *This Opinion is provided as a response to the above request for expertise and is based on the draft Law of 16 September 2010.*

2. SCOPE OF REVIEW

5. The scope of the Opinion covers only the above-mentioned draft Law. 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.
6. 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. The recommendations are aimed at providing a framework for further discussion with key stakeholders on the issues raised.
7. This Opinion is based on an unofficial translation of the draft Law, which has been attached to this document as Annex 1. Errors from translation may result.
8. 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.

3. EXECUTIVE SUMMARY

9. At the outset, it should be noted that for the most part, the draft Law contains sound freedom of information guarantees and principles and detailed procedures on how members of the public may access information. In the interests of concision, this Opinion will focus on those areas which could benefit from improvement. In order to ensure the full compliance of the said legislation with international standards, it is recommended as follows:

3.1 Key Recommendations

- A. to ensure that the draft Law takes precedence over all other legislation in the field of access to information and include in the draft Law a list of specific provisions and laws that may exceptionally take precedence over it; [par 17]
- B. to make consistent the procedure for obtaining information in various laws of the Republic of Kazakhstan; [par 18]
- C. to include in the draft Law clear and specific limitations to the right of access to information, including cases where the public interest may override such limitations, and remove all references to the information with limited access; [pars 27, 30 and 31]
- D. to include in the draft Law the requirement for public bodies and officials to inform the public about its right of access to information and the contents of the draft Law, and ensure oversight over compliance with this requirement; [par 44]
- E. to introduce into the draft Law a provision specifying in detail the different hierarchical levels of appeals procedures; [par 59]
- F. to consider the creation of an independent administrative body (Information Commissioner) to handle administrative appeals, monitor implementation of the draft Law, and raise awareness regarding the right of access to information; [pars 60-62]
- G. to enhance Article 28 by specifying which types of behaviour will be in violation of the draft Law, which procedure will apply in which case, which body or organ will preside over these proceedings, and which sanctions will apply; [pars 66-67]

3.2 Additional Recommendations

- H. to expand the Preamble to reflect all aspects of the draft Law; [par 19]
- I. to delete pars 3 (1) and (2) from the wording of Article 3; [pars 20-22]
- J. to remove limitations to the scope of the draft Law under Article 1 (2); [par 23]
- K. to replace the definitions “public information” and “documented information” with one definition of information and to delete the requirement that information must be created/obtained “within the powers” of the information owner from Articles 1 (4) and (6); [par 25]
- L. to delete all references to “citizens” in the draft Law; [par 28]
- M. to include national security in the list of permissible limitations to the maximum disclosure principle; [par 31]

- N. to amend Article 5 par 4 as follows:
 - 1) re-include information on the situation of crimes under Article 4 par 4 (5); [par 32]
 - 2) extend the list of entities mentioned in Article 5 par 4 (10) so that it is similarly broad as in the First Draft; [par 33]
 - 3) re-introduce references to information in state archives under Article 5 par 4 (11) and clarify the term “mass repressions”; [par 34]
- O. to enhance Article 6 par 1 (9) to cover “access to and dissemination of public information”; [par 35]
- P. to amend Article 7 as follows:
 - 1) ensure that private bodies are only information owners if they carry out public/statutory functions or receive state funding; [par 37]
 - 2) exclude private persons from the definition of information owners; [par 37]
 - 3) clarify Article 7 par 2; [par 38]
- Q. to specify the time frame in which information owners should determine units/officials responsible for handling access requests under Article 9 par 2; [par 39]
- R. to amend Article 13 as follows:
 - 1) stipulate the time frame in which information will be made available on the internet; [par 40]
 - 2) specify how to enforce obligations hereunder; [par 40]
 - 3) amend par 1 (11) so that private individuals’ identities and aspects of their private lives will not be revealed; [par 41]
 - 4) re-introduce into this provision the publication of aspects of parliamentary voting and sessions; [par 42]
 - 5) amend par 6 so that public information is displayed in the State language and Russian; [par 43]
- S. to leave the approval of lists of information for publication to the Information Commissioner; [par 45]
- T. to outline in Article 17 par 3 exactly which types of meetings shall be closed to the public; [par 46]
- U. to include in Article 5 par 2 (1) the obligation for information owners to provide proper mechanisms for access to public information; [par 47]
- V. to include in the draft Law a special provision on the manner of processing oral requests; [par 48]
- W. to require information owners to inform information users if their requests have been forwarded to other administrative bodies/information owners; [par 49]
- X. to amend Article 24 as follows:
 - 1) specify that in cases where the content of a request cannot be determined, requests for clarification shall precede the rejection of the request; [par 50]
 - 2) amend par 1 (3) so that the refusal of a request is permitted only if the requested information does not exist, cannot be found or is not in the information owner’s possession; [par 51]

- 3) replace par 1 (4) with a provision outlining that requests for information will be refused if the information is exempt from disclosure under the draft Law; [par 52]
- Y. to re-introduce in the draft Law a provision outlining in detail the contents of a refusal notice; [par 53]
- Z. to re-introduce in the draft Law the conditions for suspending requests for information and the obligation to inform the information user about this; [par 54]
- AA. to require information owners to inform information users about expenses for copying/printing information sought before providing such information; [par 55]
- BB. to re-introduce in the draft Law the obligation for the information owner to remove inaccuracies in information provided free of charge; [par 56]
- CC. to encourage public bodies to adopt internal codes on access and openness, train their staff on the contents of the draft Law, and allocate sufficient funds to provide clear and transparent data and information processing systems; [par 57] and
- DD. to clarify why public prosecutors' offices should have oversight over compliance with the draft Law and delete par 4 of Article 27 in case of overlaps with prosecutors' usual functions. [par 63]

4. ANALYSIS AND RECOMMENDATIONS

4.1 International Definitions and Standards Related to Access to Information

- 10. 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.¹ 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").² Article 19 of the ICCPR provides that this right 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.³
- 11. The latest report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Information and Expression of April 2010 reiterated that Governments shall take the necessary legislative and

¹ 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.

² 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.

³ See the UN Human Rights Committee's General Comment 10 on Freedom of Expression (Article 19), adopted at its nineteenth session on 29 June 1983, par. 4.

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.⁴

12. Article 20 par 2 of the Constitution of the Republic of Kazakhstan⁵ (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.
13. Numerous OSCE Commitments document OSCE participating States’ support for relevant international commitments on seeking, receiving and imparting information of all kinds.⁶ The Istanbul Document reiterated these States’ reaffirmation of the importance of the public’s access to information.⁷

4.2 Relationship with Other Relevant Legislation

14. At the outset, it is noted that the draft Law contains numerous references to other legislation, without specifying which provisions in which legislation are being referred to. More specifically, Article 2 of the draft Law states that access to public information is based on the Constitution of Kazakhstan and international treaties, as well as “other legal regulatory acts of the Republic of Kazakhstan”. This implies that next to the draft Law, numerous other laws may regulate access to information, but Article 2 does not specify which laws it is referring to and how the different laws correlate.⁸ Similarly vague references may be found in Article 28, which mentions five different types of liability for breaches of the draft Law, without specifying which legislation regulates which liability, and the various consequences involved. Due to the fact that now, numerous Kazakhstani laws that deal with related fields are in existence and may at times overlap, it is essential that all of these laws include clear and precise references to one another, and that their relationship to one another is made clear.
15. In this specific context, the draft Law is limited by provisions of the Law on State Secrets⁹ (indeed, it does not even apply to “information with limited access”, in other words state secrets (Articles 1 par 3 and 3 par 2 (2)), while the following legislation and other documents may also touch on aspects

⁴ See the Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Information and Expression, par 32.

⁵ The Constitution of the Republic of Kazakhstan was approved by referendum on 30 August 1995 and last amended in 2007.

⁶ 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.

⁷ See the Istanbul Document, Istanbul, 19 November 1999, par 26.

⁸ See further examples of vague references to other legislation in Articles 1, par 2, 3 par 2, 6, par 2 (3), 10 par 7, and 28 of the draft Law.

⁹ Law of the Republic of Kazakhstan on State Secrets, No. 349 – I, adopted on 15 March 1999, last amended on 8 April 2010.

regulated in the draft Law: The Law on Informatization¹⁰, the Law on the Mass Media¹¹, the Law on the Procedure for Handling Applications of Physical and Legal Entities¹², the Law on Communications¹³, as well as advertising, copyright, civil and criminal legislation in Kazakhstan, and, finally, the Concept of Informational Security of the Republic of Kazakhstan, and the Program for the Reduction of Information Inequality in the Republic of Kazakhstan for 2007-2009.

16. As all of these laws and documents deal with related aspects, but do not focus on the right of access to information itself, the creation of the draft Law fills a gap in the legislative system of Kazakhstan. As such, it is much welcomed and supported. As a specialized law on access to information, the draft Law should take precedence over all other legislation touching on access to information matters.
17. Any exception to this general rule of precedence should be included in a special provision in the draft Law identifying the specific law and relevant articles containing the exception. A good example for such an approach is the Access to Information Act in Canada, which lists the statutory provisions restricting disclosure that are permitted to take precedence over the Access to Information Act by name.¹⁴
18. At the same time, it has been noted that some of the laws mentioned in par 15 *supra*, e.g. the Law on the Mass Media, and the Law on the Procedure for Handling Applications of Physical and Legal Entities, include procedures for obtaining information from administrative authorities. Currently, these procedures differ slightly.¹⁵ It is paramount that similar procedures in different laws (including appeals procedures) are made consistent, to avoid a situation where individuals are at an advantage or disadvantage depending on which law is applied to their requests for information.

4.3 Scope and Definitions

4.3.1 Scope of the draft Law

19. The Preamble of the draft Law defines its scope as regulating public relations in the field of obtaining and disseminating information. It is noted that the

¹⁰ Law of the Republic of Kazakhstan on Informatization, No. 178-IV, adopted on 10 July 2009, last amended on 15 July 2010.

¹¹ Law of the Republic of Kazakhstan on the Mass Media, No. 451-I, adopted on 23 June 1999, last amended on 19 March 2010.

¹² Law of the Republic of Kazakhstan on the Procedure for Handling Applications of Physical and Legal Entities, No. 221-III, adopted on 12 January 2007.

¹³ Law of the Republic of Kazakhstan on Communication, No. 567-II, adopted on 5 XX 2004, last amended on 19 March 2010.

¹⁴ See Section 24 (1) of the Access to Information Act of Canada, R.S.C., 1985, adopted in June 1982, Act current to 20 October 2010, and Schedule II to this Act.

¹⁵ While Article 22 par 2 of the draft Law provides that information shall be provided within 5 working days, Article 18 (2-1) of the Law on the Mass Media speaks of 3 days (or 1 month if it requires additional research), while Article 8 of the Law on the Procedure of Handling Applications of Physical and Legal Entities obliges public bodies to respond to requests for information within fifteen calendar days (or 30 days if information needs to be obtained from other administrative offices).

term “public relations” is quite vague and may not sufficiently reveal the actual focus of the draft Law. Instead, the draft Law appears to cover the right of the population of the Republic of Kazakhstan to access public information and public authorities’ obligation to publish public information.¹⁶ It further outlines the procedure by which individuals may access such information, as well as the limitations to the right to access information. Finally, the draft Law covers liability engendered by non-compliance with its provisions. In order to reflect the full scope of the draft Law in its Preamble¹⁷, it is recommended to expand the Preamble accordingly.¹⁸ In addition, the Preamble should refer to the purposes of the draft Law in terms of ensuring publicity and openness of the work of public bodies, as well as facilitating the exercise of the rights of individuals and legal entities to acquire information held by such bodies.¹⁹

20. The scope of the draft Law is further defined in Article 3. Par 3 of this provision outlines in which cases the draft Law is not applicable. Article 3 par 3 (1) excludes from the scope of the draft Law “[a]pplications, the procedure of their consideration stipulated by the law on the procedure of considering applications by natural and legal entities”. It is recommended to remove this part of Article 3. Any sensitivities associated with the disclosure of information related to the above type of applications can be considered in specific exemption provisions referred to in par 27 *infra*.
21. Information with limited access, i.e. state secrets and other secrets and information protected by law, is also excluded from the scope of the draft Law (Article 3 par 3 (2)). In this context, it is necessary to differentiate between legislation on classification of confidential documents, which aims at ensuring the safety of such documents and preventing the illegal disclosure of the documents, and legislation providing access to information, which determines whether and how to make information accessible in a legal way.²⁰ The mere act of classifying a document as confidential under the relevant legislation

¹⁶ See Section 2 of the Latvian Freedom of Information Law of 6 November 1998, last amended in 2006, according to which the purpose of the law is “to ensure that the public has access to information, which is at the disposal of institutions or which an institution in conformity with its competence has the duty to create”.

¹⁷ See also Article 3 par 1 of the draft Law, which speaks of the norms of the Law covering “public relations associated with access to public information.”

¹⁸ See Section 2 of ARTICLE 19’s Model Freedom of Information Law of 10 August 2001, which, *inter alia*, defines the purpose of freedom of information laws as providing “a right of access to information held by public bodies in accordance with the principles that such information should be available to the public, that necessary exceptions to the right of access should be limited and specific, and that decisions on the disclosure of such information should be reviewed independently of government”. In this context, see also Article 1, par 2 of the First Draft of the Law on Access to Information of July 2010, which states that the law “establishes ways and procedures for public information access and dissemination, defines rights and responsibilities of information users and holders, establishes guarantees of information user rights for free access to and dissemination of public information”.

¹⁹ See, for example, Article 2 of the Slovenian Act on the Access to Information of Public Character, No. 001-22-9/03, adopted on 5 March 2003, last amended in 2006 and the Hungarian Act on the Protection of Personal Data and Public Access to Data of Public Interest, Act LXIII of 1992.

²⁰ 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.

(here the Law on State Secrets) does not necessarily reveal whether or not the contents of this document are liable to harm national security, or public order.

22. It is thus recommended to treat the above laws separately. Article 3 par 3 (2), currently contains a blanket limitation to a certain type of document that is not necessarily related to the harmfulness of its content. It would be preferable to include all information, including such information with limited access, in the scope of the draft Law²¹ – requests for such 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 Article 5 par 3 of the draft Law (see pars 31 *infra*). For the above reasons, it is recommended to delete Article 3 par 3 (2).

4.3.2 Key Concepts in the draft Law

23. Article 1 contains definitions of key concepts used in the draft Law. Article 1 (2) defines public information as documented information, access to which is not prohibited by the laws of the Republic of Kazakhstan. The confining of the scope of the law to “information access to which is not prohibited by the laws of the Republic of Kazakhstan” should be removed on the same basis as is set out in par 16 above to the effect that the draft Law should generally take precedence over other laws.
24. Documented information is defined in Article 1 (4) as information obtained or created by an information owner within its powers, fixed on a tangible carrier or as a digital (electronic) document, with attributes that allow their identification. This definition may not be understandable to individuals applying the law. In particular, its application to all information in electronic form, e.g. in databases, may not be clear. Also, confining the scope of the definition to information obtained or created by an information owner *within its powers* would appear to limit this scope unnecessarily. It could very well be equally or even more important for the public’s access right to apply to information obtained or created by an information owner outside the scope of its powers.
25. Generally, approaches to defining what kind of information is covered by legislation providing access to information vary across the OSCE region. Some OSCE participating States provide detailed and specific definitions, together with examples of what kind of documents are covered by the scope of their legislation.²² Other States aim for a more all-encompassing scope of their

²¹ 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.

²² See the Croatian Act on the Right of Access to Information, which defines information as “data, photographs, drawings, film, reports, acts, tables, graphics, sketches or other articles possessed, disposed of or controlled by bodies of public authority, regardless of whether they are stored in a document or not, and regardless of the source, date of origin, place of storage, manner of discovery, by whose order, in whose name and on whose account the information is stored or any other characteristic

legislation though a short, but broadly worded provision.²³ More recent approaches have sought to make clear the inclusion of information in electronic form.²⁴ It is recommended that the definitions of “public information” and “documented information” be replaced with one single definition of the type of “information” covered by the draft Law. In order to include information in electronic form, e.g. databases, this definition should cover information recorded in any form including information contained in electronic storage, processing and retrieval systems (including external systems used for the institution's work) which can be “extracted in the form of one or more printouts or electronic-format copies using the reasonably available tools for the exploitation of the system”.²⁵ This definition should also cover information obtained or created by the information owner outside its powers (see par 24 *supra*).²⁶

26. Information with limited access is defined in Article 1 (3) as “state secrets and other secre[ts] and (or) information protected by the law, access to which is possessed by a limited scope of users or which is limited for certain categories of information users”. The terms “state secrets”, and other secrets and information protected by law are defined in Article 1 of the Law on State Secrets.²⁷

of the information.” See also the Canadian Law Access to Information Act which provides access to public records, defined as “any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof”. Under Section 7 of ARTICLE 19’s Model Freedom of Information Law, records are defined as “any recorded information, regardless of its form, source, date of creation, or official status, whether or not it was created by the body that holds it and whether or not it is classified.”

²³ See Section 84 of the UK Freedom of Information Act 2000 (c.36), enacted on 30 November 2000, last amended in 2009, which applies to “information recorded in any form”.

²⁴ In its 2008 report on “Public Access to EU Databases”, the European Ombudsman has, for example, recommended that the term “document” to which the right of access to information held by the EU institutions applies be amended to read as follows, in order to clarify its application to materials held in databases: “information contained in electronic storage, processing and retrieval systems (including external systems used for the institution's work) shall constitute a document or documents if it can be extracted in the form of one or more printouts or electronic-format copies using the reasonably available tools for the exploitation of the system”. (p. 19)

²⁵ Ibid. See also the definition for information in ARTICLE 19’s The Public’s Right to Know, Principles on Freedom of Information Legislation, of June 1999, stating that it includes “all records held by a public body, regardless of the form in which the information is stored (document, tape, electronic recording and so on), its source (whether it was produced by a public body or some other body) and the date of production” (Principle 1).

²⁶ The definition of information owner under Article 1 (6) should likewise be extended to cover information obtained or created outside an information owner’s powers. In this context, see also Article 4 par 1 of the Croatian Act on the Right to Access Information, 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”.

²⁷ According to Article 1 of the Law on State Secrets, “state secrets” are information protected by the State which consists of state or official secrets, the dissemination of which is limited by the state to maintain effective military, economic, scientific/technological, foreign economic, foreign political intelligence, counter-intelligence, operative/investigative and other activities, which do not conflict with generally accepted international law norms. State confidential information is information of military, economic, political or other character, the dissemination or loss of which inflicts or may inflict damage to the national security of the Republic of Kazakhstan. Official confidential information is information which has the nature of separate data, which may be part of state confidential information,

27. As stated above, laws on access to information should take precedence over other legislation (par 16 *supra*). For the sake of consistency, the draft Law should contain its own limitations and not refer to terms defined in other legislation, particularly where there is no clear reference to this other legislation. A better approach would thus be to remove references to “information with limited access” from the draft Law altogether and to replace it with clearly and specifically worded exemption provisions aimed at protecting sensitive information from being accessed by the public.²⁸ In line with international best practice, such exemption provisions should specify the legitimate interests sought to be protected.²⁹ Also, their wording should imply that these exemptions will only apply where the disclosure of protected information would be harmful to the interest concerned. These exemption provisions should also specify that the public interest may, in specific cases, override the exemption provision.³⁰
28. Article 1 (5) defines information users as natural persons,³¹ domestic or foreign legal entities and international organizations. According to this definition, all natural persons, including foreign individuals or individuals who are not residents of Kazakhstan, may be considered information users under the draft Law. This broad scope of the draft Law is much welcomed. In this context, it is recommended to delete all references to “citizens” in the draft Law, e.g. in Article 13 par 1 (11) and Article 27 par 2, to demonstrate that the draft Law provides rights to every individual, not only to citizens of Kazakhstan.

4.4 Access to Public Information

29. Article 5 of the draft Law specifies the guarantees of implementing the information users’ rights. According to Article 5 par 3, access to public information can only be limited by laws, and only to the extent required to

the dissemination or loss of which may damage national interests of the state, the interest of state bodies, and organisations of the Republic of Kazakhstan.

²⁸ While not applicable in the Republic of Kazakhstan, the Council of Europe’s Convention on Access to Official Documents of XX 2009, CETS No. 25, may provide guidance on the type of permissible exemptions in this case, e.g. matters relating to national security, defence and international relations; public safety; the prevention, investigation and prosecution of criminal activities; disciplinary investigations; inspection, control and supervision by public authorities; privacy and other legitimate private interests; commercial and other economic interests; the economic, monetary and exchange rate policies of the State; the equality of parties in court proceedings and the effective administration of justice; environment; the deliberations within or between public authorities concerning the examination of a matter.

²⁹ See Part I, A, par 10 of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, adopted at a conference on this topic on 30 April - 4 May 1984, which clarifies that a limitation is only necessary within the meaning of the ICCPR if it is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant, responds to a pressing public or social need, pursues a legitimate aim and is proportionate to that aim.

³⁰ See, for example, the exemption provisions in Part II of the UK Freedom of Information Act, Sections 5-8 of the Latvian Freedom of Information Law, Part III of the Irish Freedom of Information Act, adopted on 21 April 1997, last amended in 2003, Articles 6-9 of the Freedom of Access to Information Act for Bosnia and Herzegovina, adopted on 17 November 2000, and Article 8 par 3 of the Armenian Law on Freedom of Information, adopted on 23 September 2003.

³¹ In the English translation of the draft Law, Article 1 (5) and other relevant provisions speak of “natural entities”. For the purposes of this Opinion, the term “natural persons” was considered to be more appropriate.

protect the constitutional establishment, public order, human rights and freedoms, population health and morals. For the most part, this reflects the exceptions to freedom of information listed in Article 19 par 3 of the ICCPR. However, Article 5 par 3 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 all documents and materials related to national security are considered state secrets and thus outside the scope of the draft Law (Article 3 par 3 (2)).

30. Generally, international freedom of information standards are based on the principle of maximum disclosure,³² which presupposes that all information held by public bodies 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.³³ As discussed in par 27 *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.³⁴ Exceptions shall thus be based on the content of information material, not the type of document (see pars 21-22 *supra*).³⁵
31. In order to make it consistent with the above international standards, the current vague wording of Article 5(3) should be replaced with the list of clearly defined exemption provisions containing permissible limitations to the right to access public information already discussed under par 27 *supra*. Such limitations should be confined to situations where harm would ensue from the disclosure of public information and should always take into account the broader public interest (see par 22 *supra*). In order to demonstrate that national security is one of several permissible, but exceptional, limitations to the

³² 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.

³³ 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).

³⁴ 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”.

³⁵ See also the Written 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 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, 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.

maximum disclosure principle, it is recommended to include it in the above-mentioned specific list of exceptions to the right to access public information.

32. Article 5 par 4 lists which types of information shall not be covered by access limitations. Under Article 5 par 4 (5), information on the status of health care, education, social safety and economy shall be provided to the public. This provision of the draft Law is more limited than its previous version in the First Draft, as the previous version had also included information on the situation of crimes, a type of information which undoubtedly concerns the public. Possibly, references to information about crimes were deleted in order to not endanger pending criminal investigations. However, it is unlikely that in practice any information endangering such investigations could be disclosed, since this could potentially endanger the public order. Overall, general information and statistics on crimes should be provided to the population. It is recommended to re-introduce the reference to the crime situation in Kazakhstan to Article 5 par 4 (1).
33. Additionally, par 4 (10) of Article 5, which now lists information on illegal actions of information owners and their officials as a type of information that should not be limited, has also been restricted compared to the First Draft. In the First Draft, par 4 (10) included information on all unlawful actions of state agencies, local self-governments, territorial bodies, agencies, institutions subordinate to state agencies, and local self-governments, and their officials. This list appears to be broader than the list of information owners under Article 7 of the current draft Law. In the interests of transparency and good governance, it is recommended to extend the list of entities contained in Article 5 par 4 (10) so that it is similarly broad as the wording of the First Draft.
34. It is also noted that information on mass repressions, which shall be unlimited under Article 5 par 4 (11), now no longer covers data contained in archives, as it did in the First Draft. However, in his recent report of April 2010, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Information and Expression stressed that the access to historical information and archives is an important aspect of access to public information.³⁶ In order to comply with this requirement, it is recommended to (re-)introduce references to information in state archives, not only to par 4 (11), but also to other parts of Article 5 par 4. Moreover, it would be advisable to clarify the term “mass repressions”; since it is not evident what type of state behavior would fall under this term.
35. Article 6 outlines the rights and obligations of information users, which include, under par 1 (9), judicial protection for access to public information. Also in this case, the First Draft was wider in that it provided judicial protection for access to and dissemination of public information.³⁷ In order to ensure that all aspects of the right to information, including access to and

³⁶ 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.

³⁷ See also Article 20 par 2 of the Constitution, which grants everyone the right to freely receive and disseminate information.

dissemination of information, are protected by law, it is recommended to enhance Article 6 par 1 (9) accordingly.

36. Information owners are listed in Article 7 of the draft Law. This provision is a new and very welcome addition to the draft Law, as the First Draft did not sufficiently define information owners. However, it is noted that terms such as “governmental bodies and bodies of local self-management” and “subjects of quasi-governmental sector” are not defined and so their scope is unclear. It is recommended that these terms be clearly defined. The apparent exclusion from the scope of the law of bodies belonging to the legislative and to the judiciary appears to be quite restrictive and not in compliance with the international standards of transparency and good governance, which state that individuals should have access to information on all state activity.³⁸ No public bodies should be excluded completely from the ambit of legislation providing access to information. It is recommended to extend the scope of Article 7 accordingly to cover all public bodies³⁹ of the executive, legislative and judiciary.
37. It is a positive development that under the draft Law, businesses and similar legal entities are now obliged to provide the population with information on the use of budgetary funds, ecological matters and other matters that could potentially harm individuals, settlements and industrial facilities. However, extending this obligation to “other information of public interest” (Article 7 par 2 (3)) without specifying which type of information is being referred to, could potentially be in breach of the right to privacy, in particular with regard to natural persons. Private bodies should only be considered information owners within the meaning of Article 7 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.⁴⁰ Private persons should not be included in the draft Law as 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.
38. Article 7 par 3 states that subjects of the quasi-governmental sector, natural and legal entities and market subjects occupying dominating and monopoly positions shall only be obliged to publish public information, provide public information on request and appeal against decisions in court. The meaning of this provision remains ambiguous. If its aim is to reflect some or all of what was mentioned under par 37 above, then this should be made clearer in the text of the provision.
39. It is welcomed that Article 9 par 2 stipulates that information owners should determine appropriate units or authorized officials to handle access requests. However, it is recommended that this provision specify the time frame within which such units or officials should be appointed.

³⁸ 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.

³⁹ 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.

⁴⁰ 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”.

40. Article 13 of the draft Law specifies which types of information shall be placed on internet resources. While such an extensive list of material is commendable, Article 13 should stipulate a time frame within which the information in question should be made available to the public. At the same time, the draft Law should also clarify how the obligations imposed by this provision shall be enforced. The office of the Information Commissioner, discussed in greater detail below (par 60 *infra*), could be charged with ensuring that the obligations set out in Article 13 are met.
41. Article 13 par 1 (11) states that internet resources shall contain information on authorities' work with the population, including citizens'⁴¹ and organizations' applications addressed to the information owner, and summarized information on the results of considering such applications and on measures taken. It should be added here that publications of citizens' applications should not violate these persons' rights to private life. Article 13 par 1 (11) should be amended to specify that any such information should not reveal private individuals' identities or aspects of their private lives (e.g. homes, private correspondence, work places, etc).
42. In the First Draft, Article 13 par 2 had provided that the Parliament and *maslikhats* (local representative body of a region in Kazakhstan) of all levels shall publish the results of voting at sessions, minutes of open Parliament sessions, Parliament chambers and *maslikhats*, except for cases of secret voting. This provision was commendable for its level of transparency, but has now been deleted from Article 13 of the draft Law. In order to ensure transparency of parliamentary proceedings, it is recommended to re-include this provision in Article 13 of the draft Law.
43. Article 13 par 6 states that public information on internet resources shall be presented in the state language, which according to Article 7 par 1 of the Constitution is the Kazak language. However, Article 7 par 2 of the Constitution provides that in state institutions and local self-administrative bodies, the Russian language shall be officially used on equal grounds along with the Kazak language. In order to be compliant with the Constitution, public information should be displayed in the state language, and in the Russian language. It is recommended to amend Article 13 par 6 accordingly.
44. Additionally, it is recommended to include in the draft Law the requirement for public offices and officials to inform the public about each individual's and entity's right of access to information, and about the contents of this draft Law. Transparency of government and accountability towards a population can only work in practice if members of the population know their rights. Especially since this is the first comprehensive Law on Access to Information in Kazakhstan, competent public organs shall be required to inform the public, through various measures, including but not limited to the internet, of its right to access public information and authorities' obligation to provide such access, both automatically and upon request. Again, overseeing compliance with such a requirement could be one of the functions of the office of the Information Commissioner, the establishment of which is recommended under par 60 *infra*.

⁴¹ See par 28 *supra* on the use of the term "citizens" in the draft Law.

45. Article 14 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. Such a practice would provide individual decision-makers with the possibility of restricting the list of information to be published, which would not be in keeping with the contents of the draft Law. Instead, in order to maintain an independent supervision of the information published, the approval of such information lists could be left to the Information Commissioner (see par 60 *infra*).⁴²
46. Chapter 3 (Articles 17-20 of the draft Law) aims at facilitating public access to meetings of collegial bodies of information owners. For the most part, this chapter is to be commended for its clear and detailed provisions on providing such access. However, while Article 17 states that meetings of information owners shall be open, the same provision provides that meetings shall be closed if they involve discussions on information with limited access. This exception is so wide that it could be applied to a great number of meetings, even those where discussions on topics of “information with limited access” would only take up a small part of the meeting. As it has already been recommended that the concept of information with limited access be removed from the draft Law (par 27 *supra*), it is suggested that Article 17 par 3 be amended by outlining in detail which types of meetings shall be closed.⁴³ The institution of a right of appeal to the Information Commissioner against a decision to close a meeting is also recommended (see par 61 *infra*).

4.5 Procedural Issues

47. The procedure of requesting and obtaining public information in the draft Law is outlined in Chapter 4 (Articles 21 – 25). It is recommended to include, as was the case in the First Draft, in Article 5 par 2 (1) the obligation for information owners to provide a proper mechanism for the access to public information.
48. It is noted that while information may be requested orally and in writing (Article 1 (7) of the draft Law), the procedural provisions in the draft Law do not outline a special procedure for oral requests, but focus mainly on written requests. It is thus necessary to include a special provision in the draft Law to specify the manner of processing oral requests. This should include additional requirements to the registration of requests laid down in Article 22 par 1, e.g. the inclusion of the name, address and contact details of the information user, as well as a summary of his/her request and its addressee. This detailed manner of registration should also include the name, last name, and initials of the official receiving the request, who shall also bear responsibility for delivering a registration note to the competent information owner/official. All verbal responses to requests (Article 23 par 4) shall be documented and the

⁴² See Section 19 of the UK Freedom of Information Act.

⁴³ For a list of examples, 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”.

document confirming the provision of information shall be provided to the information user.⁴⁴

49. Article 22 of the draft Law deals with the consideration of requests for information. Par 4 of this Article states that in cases where a request is not associated with the addressed information owner's activities, it shall be referred to the actual information owner within three days of the registration date. In the First Draft, this provision (then Article 23 par 4) also specified that the information user shall be notified that his/her request had been forwarded. In the interests of transparency and good governance, it is essential that the information user is kept informed of the different procedural stages of the response to his/her request. It is therefore recommended to re-introduce this requirement to Article 22 par 4 of the draft Law.⁴⁵
50. Article 24 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 specify the information requested (Article 24 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 cases where the content of the request cannot be determined, the request shall only be rejected following requests for clarification by the information owner.⁴⁶ Additionally, it is noted that the reference to Article 22 in Article 24 par 1 (2) is most probably erroneous – it is Article 21 that deals with the formal requirements for a request, not Article 22. Further, both Article 21 and Article 24 par 1 (2) should specify that these requirements only refer to written requests. It is recommended to clarify Articles 21 and 24 par 1 (2) accordingly.
51. Par 1(3) of Article 24, which allows for the refusal of requests where the requested information goes beyond the information owner's competences, should be reformulated. The right of access should apply to all information held by an information owner, regardless of whether the information is, or is not, within the competences of the information owner. Instead, Article 24 par 1 (3) should stipulate that an information owner can refuse access where the requested information does not exist, cannot be found⁴⁷ or is not in its possession.
52. Further, it is recommended to amend par 1(4) of Article 24, which states that access to information with limited access shall be rejected. This provision should be replaced with a provision outlining that requests for access to information shall be refused if such information is exempt from disclosure (see par 27 *supra*).

⁴⁴ See also Section 8 (3) of ARTICLE 19's Model Freedom of Information Law, which provides that in cases of oral requests, the official receiving the request shall reduce it to writing, including their name and position within the body, and give a copy thereof to the person who made the request.

⁴⁵ See Article 13 par 1 of the Croatian Act on the Right to Access Information, which also includes the obligation to inform the information user.

⁴⁶ 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.

⁴⁷ See, for example, Section 10(1)(a) of the Irish Freedom of Information Act.

53. Article 24 par 4 provides that the refusal decision shall be communicated to the information user and that reasons for the refusal shall be provided. It is noted that the First Draft (then Article 26) outlined the contents of such a refusal notice in great detail, specifying that such a document shall include the name of the official refusing the request, the date, the motivation, and information on the appeals procedure against the decision.⁴⁸ In the interests of transparency and accountability of governance, it is recommended to re-introduce Article 26 of the First Draft into the current draft Law, either as part of Article 24 par 4, or as a separate provision.
54. The previous Article 26 also included conditions for suspending requests for information in case information cannot be provided within the statutory five calendar days. In order to take into consideration such cases, it is recommended to re-introduce this part of Article 26 of the First Draft into the current draft Law as well, including the obligation to inform the information user of any delays, and of the reasons for such delays.⁴⁹
55. Article 25 of the draft Law specifies that no payment shall be required for public information on request. However, in cases where this involves extensive copying or printing (over 50 pages), the information user shall cover copying or printing costs. This amount shall be determined by the information owner – in the absence of a determined sum, no fee will be charged to the information user. Since information users will not always be aware of the size and volume of the information requested, they should be informed of the copying costs or printing costs that their request may engender beforehand. In that case, they 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.⁵⁰
56. The First Draft also stated that in case the information owner delivers inaccurate data to the information user, the information owner shall remove inaccuracies free of charge, upon written request of the information user (Article 27 of the First Draft). This provision has been deleted in the current draft Law. Since this provision demonstrated good governance and accountability on the side of the public authorities, it is recommended to re-introduce this provision into the draft Law.
57. Finally, 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 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 62 *infra*).⁵¹

⁴⁸ 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.

⁴⁹ See the similar provision of Article 14 in the Croatian Act on the Right of Access to Information.

⁵⁰ See, for example, Section 47 (7) of the Irish Freedom of Information Act.

4.6 Remedies and Oversight

4.6.1 Appeals Procedures

58. According to Article 26 of the draft Law, decisions and actions/failure to act of information owners and their officials, which violate the rights of information users, can be appealed against to a superior body, and/or higher official, and/or court.
59. The appellate procedure mentioned in Article 26 is not very detailed and implies that appeals may be lodged with superior bodies, higher officials, and courts simultaneously. Such lack of hierarchical administrative procedure will most probably create confusion and lead to a situation where certain appeals could be pending before administrative bodies and courts simultaneously. This would have extremely negative effects on the situation of the judiciary – aside from creating an unnecessary backlog of court cases, situations would arise where courts are not aware of recent case developments on an administrative level. In some cases, court findings of violations may become obsolete if administrative bodies already remedied the situation. In order to prevent such negative consequences, it is recommended to introduce in 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.⁵² This provision should specify which bodies would receive first instance administrative appeals and, if applicable, which 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.
60. In addition to court procedures, competent stakeholders may consider the creation of the position of an Information Commissioner. 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.⁵³ Such a body would help reduce the burden on courts, 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.⁵⁴
61. The Information Commissioner should be an independent administrative body,⁵⁵ accountable only to the Parliament, but otherwise not attached to any

⁵² See, e.g. the procedure outlined in Article 17 of the Croatian Act on the Right of Access to Information.

⁵³ Such offices are to be found in a number of OSCE participating states e.g. UK, Slovenia, Serbia, Germany, Switzerland, Hungary, Scotland, Azerbaijan or 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.

⁵⁴ 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.

⁵⁵ 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

government or executive body. Such independence should be ensured by a separate budget line, 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 decision on the matter.⁵⁶ 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.⁵⁷ In the case of sensitive information, court hearings could be held *in camera*.

62. 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.⁵⁸ Further, such annual reports should be used to identify remaining constraints to the free flow of information and measures planned to improve the latter.⁵⁹

4.6.2. Public Control and Oversight

63. Article 27 specifies the modalities of supervision and public control over the application of the draft Law. Article 27 par 4 states that oversight over full compliance with legislation on access to public information shall be exercised by public prosecutor's offices. However, this provision is not very clear about the kind of oversight that Article 27 par 4 refers to, nor does it elucidate why such oversight should be exercised by public prosecution bodies. In case this provision refers to public prosecutors' general tasks of investigating potentially criminal cases, it would appear to be redundant, since this is already clearly stated in the relevant criminal procedure legislation. It is recommended to clarify the meaning of Article 27 par 4 and, in case of overlaps with criminal procedure legislation, delete it. In case an Information Commissioner would be established, then this Commissioner should have the primary oversight role over implementation of the draft Law by the relevant actors.

4.6.3. Individual Liability

64. Individual liability for violating provisions of the draft Law is mainly described in Article 28, which states that in such cases, the responsible persons shall bear liability in compliance with the Law of the Republic of Kazakhstan.

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".

⁵⁶ See also Principle 14 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, adopted on 1 October 1995.

⁵⁷ *Ibid.*

⁵⁸ 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.

⁵⁹ *Ibid.*

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65. 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 28 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.
66. While it is important to include sanctions for non-compliance in legislation such as the draft Law, such sanctions will only have practical effect if they are clear and detailed. Only then will both information users and information owners know which behaviour will lead to which legal consequences and what these consequences will look like. It is recommended to enhance Article 28 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 public information or records.⁶⁰
67. Further, Article 28 should contain information on which procedure will be applied in which case, how information users or information owners may initiate such procedures, 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 Law.⁶¹ 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.⁶² Such clarity is necessary in the interests of legality and foreseeability of the draft Law.

[END OF TEXT]

⁶⁰ 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.

⁶¹ Ibid.

⁶² See Principle 1 in “The Public’s Right to Know”, Principles on Freedom of Information Legislation, ARTICLE 19, 7 December 1999.

Annex 1:

Draft as of 16 September 2010

Law of the Republic of Kazakhstan

On Access to Public Information

This Law shall regulate public relations in the field of obtaining and disseminating of public information.

Chapter 1. General Provisions

Article 1. Key concepts used in this Law

1. The following key concepts shall be used in this Law:

1) Access to public information — a right of an information user to obtain and disseminate public information in a free way not prohibited by the law;

2) Public information — documented information, access to which is not restricted by the laws of the Republic of Kazakhstan;

3) Information with limited access – state secrets and other secrecy and (or) information protected by the law, access to which is possessed by a limited scope of users, or which is limited for certain categories of information users;

4) Documented information – information obtained or created by information owner within its powers, fixed on a tangible carrier or as a digital document with attributes that allow identifying them;

5) Information user — a natural or legal entity established under the laws of the Republic of Kazakhstan or a foreign country (a legal foreign entity), international organizations;

6) Information owner – a natural or legal entity obtaining or creating information within its powers;

7) Request — application submitted to information owner verbally or in writing including in the form of digital document to obtain public information in accordance with the procedure fixed by this Law.

Article 2. Law of the Republic of Kazakhstan in the field of access to public information

1. The Law of the Republic of Kazakhstan in the field of access to information is based on the Constitution of the Republic of Kazakhstan, international treaties of the Republic of Kazakhstan, thus comprising this Law as well as other legal regulatory acts of the Republic of Kazakhstan.

2. If an international treaty that has been ratified by the Republic of Kazakhstan stipulates other rules than those contained in this Law, the rules of the international treaty shall be applied.

Article 3. Scope of application of this Law

1. This Law shall be applied on the territory of the Republic of Kazakhstan and its norms shall cover public relations associated with access to public information.

If the laws of the Republic of Kazakhstan specify particularities of providing separate types of public information by information owners, the provisions of the present Law shall be applied taking into account the particularities specified by these laws of the Republic of Kazakhstan

The force of this Law shall not cover the following:

- 1) Applications, the procedure of their consideration stipulated by the law on the procedure of considering applications by natural and legal entities;
- 2) Information with limited access;

Article 4. Key principles of ensuring access to public information

Ensuring access to information shall be based on the following principles:

- 1) legality;
- 2) openness and accessibility of public information;
- 3) publicity of information owners' activities;
- 4) privacy right, personal and family secrecy;
- 5) information integrity and completeness;
- 6) timeliness of providing public information; and
- 7) liability for violating the right for obtaining and dissemination of public information.

Article 5. Guarantees of implementation of information users' rights

1. Information users have equal rights and equal opportunities in the field of public information.

2. Access to public information shall be ensured by:

- 1) obligation of information owner to provide public information;
- 2) required organizational-technical and other capacity of information owner to provide public information
- 3) direct presentation of public information;
- 4) familiarizing with public information;
- 5) giving answers to requests;

6) exercising governmental and public control over compliance with the law in the field of access to public information; and

7) setting liability for violating the law in the field of access to public information.

3. Access to public information can be limited only by laws and only to the extent required to protect constitutional establishment, public order, human rights and freedoms, and population health and morality.

4. Access to the following shall not be limited:

1) laws and other rules and regulations, except for by-laws containing state secrets;

2) information on the status of ensuring public security and personal security of citizens, their rights, freedoms and legitimate interests;

3) information on emergency situations, natural and manmade disasters, terrorist acts, their official projections and impact, methods and techniques to protect population against them;

4) information on environmental pollution, status of fire safety, weather conditions, sanitary-epidemiological and radiological conditions, food security and other factors that have negative effect on ensuring security of citizens, settlements and industrial facilities;

5) information on the status of health care, education, social safety, economy;

6) information on gold and foreign currency reserves of the National Bank of the Republic of Kazakhstan, assets of the National Fund of the Republic of Kazakhstan and government (budget) reserves of precious metals and stones;

7) information on privileges, compensations and benefits provided by the government to natural and legal entities;

8) information on socio-demographic indicators, migration processes and measures to regulate migration of population;

9) information on facts of violating human and citizen's rights, freedoms and legitimate interests;

10) information on illegal actions of information owners as well as their officials;

11) information on mass repressions for political, social and other reasons; and

12) information contained in open information systems of information owners, libraries, archives and other organizations.

Article 6. Rights and obligations of information user

1. Information user shall have the right to:

1) Have access to public information in a free way;

- 2) request an information owner to provide public information;
 - 3) refuse from obtaining public information;
 - 4) check integrity and completeness of information obtained;
 - 5) select any other form of request envisaged by his Law;
 - 6) withdraw a request;
 - 7) demand written answer for the request;
 - 8) not substantiate the necessity to obtain information;
 - 9) get judicial protection for access to public information;
 - 10) appeal against actions and (or) failure to act by information owners, their officials who violated the rights of information users in superior agency and (or) official and (or) in court; and
 - 11) claim, in an orderly manner, compensation of damage to it caused by violation of access to public information.
2. Information user shall be obliged to:
 - 1) observe the procedure and conditions of access to information envisaged by this Law;
 - 2) respect rights, freedoms and legitimate interests of other subjects of public relations in the field of access to public information; and
 - 3) perform other obligations in the field of access to public information entrusted thereon under the laws of the Republic of Kazakhstan.

Article 7. Information owner

1. The following shall be considered information owners:
 - 1) governmental bodies and bodies of local self-management;
 - 2) subjects of quasigovernmental sector ;
 - 3) natural and legal entities - in relation to use of budget funds;
 - 4) market subjects occupying dominating and monopoly position - in relation to terms and prices for supply of goods and services and prices for them.
2. Natural and legal entities shall be equally related to information owners possessing:
 - 1) ecological information;
 - 2) information on emergency situations, natural and manmade disasters, their projections and impacts, statues of fire safety, sanitary-epidemiological and radiological conditions, food security and other factors that have negative effect on ensuring security of citizens, settlements and industrial facilities;
 - 3) other information of public interest (information significant for the public).

3. The requirements of the present Law shall be applied to information owners specified in sub-points 2, 3, 4 of point one and point two of this Article only in relation to publishing of public information, providing public information on request, as well as appealing against decisions, actions (failure to act) in court.

Article 8. Information owner's obligations

Information owner shall be obliged to:

- 1) in all instances, immediately and by all available methods and tools, communicate information (reports, data materials) that has come to knowledge, pertaining to any facts and circumstances that might endanger public security, human life and health;
- 2) publish public information;
- 3) respect rights, freedoms and legitimate interests of information users;
- 4) ensure, within its competence, organizational, technical and other conditions required for implementing the right for access to public information;
- 5) ensure integrity and completeness of information provided;
- 6) within the information disseminated, provide data on the information owner in the form and amount sufficient to identify such person;
- 7) ensure compliance with the terms and procedure of information presentation established by the law;
- 8) comply with the publication procedure for public information stipulated by the law;
- 9) provide information upon request of information user; and
- 10) ensure withdrawal of data attributed to information with limited access from the information provided.

Chapter 2. Methods and Procedure of Obtaining and Dissemination of Public Information

Article 9. The basis of facilitating access to public information

1. Access to public information shall be facilitated by information owners.
2. Information owners, in order to facilitate access to public information, shall determine appropriate units or authorized officials. The rights and obligations of the above units and officials shall be stipulated by legal acts that regulate the activities of the information owner.

Article 10. Methods to facilitate access to public information

1. Access to public information can be facilitated by the

following methods:

- 1) publishing of public information in official and periodical press;
- 2) placing public information on internet-resources;
- 3) placing public information on a tangible carrier in the premises occupied by information owners and in other places designated for such purposes;
- 4) familiarizing information owners with public information in the premises occupied by information owners, as well as in library and archive holdings and other organizations;
- 5) ensuring access for information users at meetings of collegial bodies of information owners;
- 6) providing information upon request; and
- 7) other methods not prohibited by the law of the Republic of Kazakhstan.

Article 11. Methods of information dissemination

Public information can be disseminated by information users in verbal and (or) written form, including in the form of digital document, by the method not prohibited by the law.

Article 12. Publishing of public information in official and periodical press.

Official publishing of public information in official and periodical press shall be accomplished in compliance with the law of the Republic of Kazakhstan.

Article 13. Placing information on internet resources

1. Information owners shall place the following on internet resources:

- 1) state symbols of the Republic of Kazakhstan;
State Flag, National Emblem;
- 2) information on the information owners:
postal address, e-mail address, phone numbers of inquiry services, description of powers;
data on information owners' managers
laws and other rules and regulations that regulate the competences, powers, roles and functions of information owners;
symbols of the governmental authority (if available); and
background information on the establishment of the governmental authority;
- 3) information on the structure of information owner:

roles and functions of territorial bodies, institutions, subordinate organizations (if available);

a list of territorial bodies, institutions, subordinate organizations;

postal addresses, email addresses, phone numbers of inquiry services of territorial bodies, institutions, subordinate organizations (if available);

data on managers of territorial bodies, institutions, subordinate organizations (if available); and

information on taking a position or resignations of managers of information owners;

4) information on information resources and services:

data on mass media established by information owner (if available);

lists of common-use information systems, data bases, inventories, registers, cadastres run by the information owner;

lists of information resources and services provided to citizens and organizations;

information on regulations and standards of state services and those of local self-government bodies;

data on the procedure and conditions of providing governmental services and those of local self-government bodies; and

information on government procurements accomplished in accordance with the procedure stipulated by the Law on Government Procurements;

5) statistical information:

statistical data and indicators that characterize the condition and dynamics of industry (sector) development in the part related to the competence of information owner;

6) analytical information:

analytical reports and information reviews pertaining to the activities of information owner;

7) information of legislative activities of the information owner:

complete texts of legal and regulatory acts passed by the information owner;

texts of draft laws and by-laws, including clarification notes, opinions of expert examinations and comparative tables;

changes and amendments to legal and regulatory acts, recognizing them as ceased to be in force, recognizing them invalid by court decision, as well as information about state registration of legal and regulatory acts, acts passed by local self-government body in the instances stipulated by the law of the Republic of Kazakhstan;

8) information on the procedure of information owner's work:

procedure of permitting actions taken by the information owner (license issuing, accreditation, registration, etc.);

forms of applications accepted by the information owner for consideration under the laws and other regulatory acts;

9) information on the activities carried out by the information owner:

official news (press-releases) pertaining to the activities carried out by the information owner;

official calendars of forthcoming events in the activities of the information owner;

information statements about official visits;

changes and amendments to the above documents;

texts of official speeches and statements of managers and deputy managers of the information owner;

data on strategic plans, draft targeted programs and concepts;

information on disbursement of funds from the national and local budgets, the National Fund of the Republic of Kazakhstan;

information statements on information owner's participation in targeted and other programs, international cooperation, including official texts of relevant international treaties of the Republic of Kazakhstan;

information statements on results of audits performed by the governmental authority, its territorial bodies, local self-government bodies within their competences, subordinate organizations within their competences, as well as on the results of audits performed in the governmental authority, its territorial bodies, local self-government body, subordinate organizations; and

reports and statements on the work completed;

10) information on competitions and tenders held:

data on open competitions, auctions, tenders, expert examinations and other events and their terms and conditions;

procedure for participation of natural and legal entities therein;

11) information on working with population:

procedure of reception of citizens and considering their applications by the information owner;

full name of manager of unit or other official in charge of arranging reception of citizens and considering their applications to organizations;

names of units, full names of officials providing information on the activities carried out by the information owner verbally;

contact phones at which information owner provide a possibility to obtain information pertaining the issues of citizens' reception and considering applications thereof; address at which citizens are received, time of reception, as well as procedure of registering for reception;

reviews of citizens' and organizations' applications addressed to the information owner, summarized information on the results of considering such applications and on measures taken;

12) information on staffing of the information owner:

for governmental bodies and their territorial bodies:

procedure of employing citizens for civil service, data on in civil servant vacancies;

qualification requirements established for the candidates for taking a vacant civil servant position;

phone numbers, at which information can be obtained pertaining to occupying vacant positions;

for local self-government bodies, governmental institutions subordinate to governmental authorities, and organizations subordinate to local self-government bodies:

information on vacant positions;

qualification requirements established for the candidates for taking vacant positions;

phone numbers, at which information can be obtained pertaining to occupying vacant positions; and

13) other public information

2. Resolutions of courts shall be published for open access on internet resources of the Supreme Court and (or) regional courts and courts equal to them.

3. Information mandatory for publishing under item 1 of this Article should be published on the internet resource of the information owner. The information owner not having technical capacity for publishing information on its own internet resource shall place it on the internet resource of the local executive body.

4. Information placed on the internet resource of the information owner should bear a date and be updated on a regular basis. The frequency of updating public information on the internet resource shall be determined by the information owner, but at least once a week.

5. Legal and regulatory acts published by the information owner should be placed on its internet resource not later than two days of the day of their state registration with the Ministry of Justice.

6. Public information on the internet resource of the information owner should be presented in the state language. The internet resource of the information owner may have versions in other languages.

7. The list of information to be published on internet resources of information owners shall be determined in accordance with the procedure stipulated by Article 13 of this Law.

8. In order to ensure the right of unlimited group of people for access to public information, points of access to internet resources shall

be established in the places accessible for information users (in the premises of information owners, libraries, archives, other places accessible for visiting) (the term for this provision implementation TBD).

Article 14. List of public information to be published on internet resources by information owners

1. A list of public information to be published on internet resources by a governmental authority, directly subordinate and reporting to the President of the Republic of Kazakhstan, shall be approved by the President of the Republic of Kazakhstan or an official authorized by him;

2. A list of public information to be published on internet resources by a governmental authority within the Government of the Republic of Kazakhstan shall be approved by the Government of the Republic of Kazakhstan.

3. A list of public information to be published on internet resources by the Parliament of the Republic of Kazakhstan shall be approved in accordance with the procedure determined by the Parliament of the Republic of Kazakhstan.

4. A list of public information to be published on internet resources by the Supreme Court of the Republic of Kazakhstan, Constitutional Council of the Republic of Kazakhstan, and the Central Election Committee of the Republic of Kazakhstan shall be approved in accordance with the procedure determined accordingly by the Supreme Court of the Republic of Kazakhstan, Constitutional Council of the Republic of Kazakhstan, and the Central Election Committee of the Republic of Kazakhstan.

5. A list of public information to be published on internet resources by local executive bodies shall be approved in accordance with the procedure determined by the akim of the relevant administrative and territorial jurisdiction.

6. A list of public information to be published on internet resources by local representative bodies shall be approved in accordance with the procedure determined by the Maslikhat of the relevant administrative and territorial jurisdiction.

7. A list of public information to be published on internet resources by local self-government bodies shall be approved in accordance with the procedure determined by the local self-government bodies.

Article 15. Placing public information in the premises occupied by information owners and other places designated for that purpose

1. Information owners shall place information stands and (or) other technical aids of similar purpose in the premises occupied by them

or other places designated for such purposes in order to familiarize information users with the current information on their activities. Information owner shall ensure free access for information users to information stands and (or) other technical aids of similar purpose.

2. Information specified in item 1 of this Article should contain the following:

1) operation procedure of the information owner, including the procedure of citizens' reception;

2) standards of governmental services; and

3) conditions and procedure of obtaining public information.

3. Information owner is eligible to place other public information in the premises occupied by it and other places designated for such purposes,.

Article 16. Familiarizing information users with public information on the premises occupied by information owners, as well as in library and archive holdings

Information owners, in accordance with the procedure established by them, shall ensure a possibility for information owner to get familiarized with the information on the activities carried out by the information owners in the premises occupied by the information owner, as well as in library and archive holdings.

Chapter 3. Facilitating access to meetings of collegial bodies of information owners

Article 17. Openness of meetings

1. Meetings of collegial bodies of information owners shall be open for information users, except for closed meetings.

2. Openness of meetings of information owners' collegial bodies shall be guaranteed by a possibility to attend them for information users who have filed applications to attend certain meetings.

3. Closed meetings of information owners' collegial bodies shall be held if issues are discussed, information on them being attributed to information with limited access.

Article 18. Notifying information users about meetings of information owners' collegial bodies to be held

1. Information owners shall publish on internet resources and mass media the information, thus specifying the agenda of the meeting, as well as its date, time and venue not later than 10 calendar days prior to

the day of collegial bodies' meeting.

2. Information owners shall install an information stand in their locations, where, not later than 10 calendar days prior to the meeting of the collegial body, information on the agenda, date, time and venue is placed.

Article 19. Arranging attendance of meetings of information owners' collegial bodies

1. Information users are eligible to attend meetings of information owners' collegial bodies. Information users keep records on those who wish to attend relevant meeting beginning from the day the information on the meeting was published. Record of information on a visitor and availability of an identification document shall be grounds for the visitor's access to the meeting. The record should include full name of the citizen who wishes to attend the meeting and for a representative of a legal entity – full name and the name of a legal entity, as well as the position occupied.

2. Seats for visitors shall be provided in the meeting rooms of collegial bodies of information owners. The number of seats for visitors shall be calculated based on the number of the registered, but the total number of seats should not be less than five at the meetings of central and local executive bodies and local self-government bodies and at least ten for sessions of the Parliament of the Republic of Kazakhstan, Chambers of the Parliament of the Republic of Kazakhstan and representative local self-government bodies.

3. Information owners are eligible to additionally arrange access to meetings by direct broadcasting of the signal to TV-receivers located outside the premises, where the meeting is conducted.

Article 20. Procedure of visitors' attending meetings of information owner's collegial bodies

1. Procedure of information users' attending meetings of information owners' collegial bodies shall be established by regulations or other acts that regulate information owners' activities. When the established procedure of attending meetings of information owners' collegial bodies is violated, the chairperson has the right to admonish the violator, and at the second violation to make the violator leave the court room.

2. Information users present at the meeting have the right to take notes, as well as take pictures and make audio and video record if this does not interfere with the session.

Chapter 4. Request for Obtaining Public Information and Procedure of Its Consideration

Article 21. Requirements to request

1. A request shall be addressed to information owner, the competency of which comprises submission of the requested public information.

2. The request of a natural person should contain his/her name and last name, a postal address or e-mail address – other communication means, and the request of a legal entity should include its name, a postal address and if the request is submitted in writing it should contain its reference number and date for a legal entity. The request in writing including in the form of a digital document should be signed by the information user or notarized by a digital signature.

3. An information user who has sent a written request to the information owner shall receive a coupon, specifying the date and time, last name and initials of the person who accepted the request.

4. When a request is formulated, the state or Russian languages should be used.

Article 22. Consideration of requests

1. A request shall be registered on the day it is delivered to the information owner, thus specifying the date and time of delivery.

2. Information requested shall be provided within five business days since the day of request registration.

3. If citizen's life and security depend on the information to be provided, the information owner shall provide information on the day of the request registration.

4. If a request is not associated with the information owner's activities, within three days of the registration date it shall be referred to the information owner, the competence thereof comprising provision of the information requested.

5. Information owner has the right to ask the requester of information for clarification of the request content.

Article 23. Procedure of providing public information on request

1. Information on request can be provided at information user's will in verbal and (or) written form, including in the form of a digital document in the state language or in the language the request was submitted.

2. Information on request in the written form, including in the form of a digital document, shall contain postal address of information owner, position of the person who has signed the answer, as well as the

date and the number of request registration.

3. In case information is provided in the form of a digital document, its credibility should be supported by a digital signature or any other digital means in accordance with the procedure fixed by the law.

4. Information in a verbal form can be delivered to information users at their will in verbal and (or) written form, including in the form of a digital document.

5. When request pertains to the information published in official editions and periodical press, distributed over the territory of the Republic of Kazakhstan or placed on internet resources, the information owner, when answering to such request, can confine itself to specifying the name, issue date and number of mass media, where the requested information was published, and (or) digital address (of the internet resource), where the requested information was placed.

6. If the requested information is attributed to the category of information with limited access, the answer to the request should contain the type, name, and date of the act approval, according to which access to such information is limited. If certain part of the requested information is attributed to information with limited access, and the rest of the information is public, such information owner should provide the requested information, except for the information with limited access.

Article 24. Grounds that preclude a possibility to provide information on request

1. Information shall not be provided in case:

1) the content of the request does not allow to specify the information requested;

2) if the request does not meet the requirements specified in Article 22 of this Law;

3) the requested information is beyond the competence of the requested information owner;

4) the requested information is attributed to information with limited access;

5) the requested information was provided to the information user in the past;

6) the request contains a question pertaining to the legal examination of regulatory acts passed by the information owner, conducting analysis of the information owner, or bodies or organizations subordinate to them, or conducting any other analytical work.

2. The following shall not subject to mandatory providing on request: aid-memoirs, correspondence, instructions by officials and any other information intended for internal organizational use.

3. Information owner is eligible not to provide information on

request if such information has been published in mass media or placed on internet resources.

4. The decision of the information owner on refusal to provide information on request shall be communicated to information user providing the reasons.

Article 25. Payment for providing public information

1. No payment shall be required for public information on request.

2. If providing public information on request envisages copying or printing over 50 pages, information user shall cover actual costs for copying or printing.

3. The amount of actual costs for copying or printing shall be determined by information owner within the norms specified by the Government of the republic of Kazakhstan. If information owner has not determined the amount of payment for copying or printing, public information shall be provide free of charge.

4. If public information on oneself or information significant for the public is provided, no fee for copying or printing shall be charged.

Chapter 5. Protection of access to public information and responsibility for violating the procedure of access to public information

Article 26. Protection of access to public information

1. Decisions and actions (failure to act) of information owners, officials thereof, who violate the rights of information users, can be appealed against in a superior body and (or) higher official, and (or) in court.

2. If, as a result of unlawful refusal to provide access to information, or its untimely presentation, or presenting knowingly wrong information or the information that does not correspond to the request content, losses were inflicted to the information user, such losses should be compensated for in accordance with the Civil Law of the Republic of Kazakhstan.

Article 27. Supervision and oversight over providing access to public information

1. Control over providing access to public information shall be exercised by information owner managers.

2. Public control over providing access to public information shall be exercised by citizens, mass media, political parties, public associations and trade unions.

3. Public control shall be exercised through:

- 1) hearing of reports on the results of information owner activity by the population;
 - 2) organization of public hearings;
 - 3) organization of public expertise;
 - 4) participation of information users in sessions of collegial bodies of information owners;
4. The oversight over full compliance with the legislation on access to public information shall be exercised by public prosecutor's office bodies of the Republic of Kazakhstan

Article 28. Responsibility for violating the Law in the field of access to information

Persons who violate this Law shall bear liability in compliance with the Law of the Republic of Kazakhstan.

Нарушение законодательства Республики Казахстан о доступе к публичной информации влечет ответственность в соответствии с законами Республики Казахстан.

Chapter 6. Concluding provisions

Article 29. Enactment of this Law

This Law shall come into effect on ____ of the year 20____.

President
of the Republic of Kazakhstan
N. Nazarbayev