



ACCESS TO INFORMATION PROGRAMME

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OBSERVATIONS OF THE COVINGTON & BURLING

Regarding : the Access to Public Information Bill

Our review was based upon a consideration of the provisions of the Act as they relate to one another as well as in comparison to similar statutes from Hungary (Act LXIII of 1992 on the Protection of Personal Data and the Publicity of Data of Public Interest, (the “Hungarian Act”)), Canada (Access to Information Act, R.S.C. 1985, c. A-1, (the “Canadian Act”)) and the United States (Freedom of Information Act, 5 U.S.C. 552, (the “American Act”)). Comparisons were also made to the Russian Federation Information Act, RF Federal Act No. 24-FZ and the Public Records Act of 1958 (England) (all these laws together, the “Similar Acts”).



Overall, the Act is quite similar to information laws that have been passed in many nations. This Act is a significant step forward in the process of increasing public access to information in Bulgaria. We applaud Parliament for moving forward in a positive and constructive manner. We do have several comments, which follow.

CHAPTER ONE: BASIC PRINCIPLES

Section I: Subject and Scope

Definition of Public Information: The definition of public information in Article 2 is broad, as it should be. It includes “any information of public significance, which relates to the public life in the Republic of Bulgaria, and gives the citizens the opportunity to form an opinion of their own on the activities carried out by the persons obliged under this act.” Further, Article 3 extends the Act to information created by or kept with the state. This is a positive and forward-looking definition, which we would hope will remain in the law.

Limitations: Article 5 provides some limitations on the grant of access that could be interpreted quite broadly. Those limitations also do not appear to be entirely consistent with the remainder of the Act, and some of them are beyond exceptions that tend to be permitted in the Similar Acts. For example, protection of “other persons’ rights and reputations” and “recognized moral standards” may be relevant to the publication of information but should not be grounds to withhold information from disclosure. We would suggest that this paragraph be changed to simply read as follows: “The right to access to public information may not be exercised when it conflicts with exceptions clearly stated in this Act.”

Section II: Official and State-Office Public Information

State Secret. Article 9(2) appears to allow Parliament unrestricted discretion to



determine that any class of information is a state secret. We would recommend that this authority be restricted so that Parliament would not have the power to restrict access to any type of information in the name of state security. For example, the Act could provide that Parliament could so designate information if there is substantial factual evidence of a real and immediate threat to state security by disclosure of the information, or some similar standard.

CHAPTER TWO: ACCESS TO PUBLIC INFORMATION

Section I: Access to Official and State-Service Public Information

Required Announcements: Article 14 provides for the obligatory disclosure of certain types of information such as information that can prevent a threat to a citizen's security or information that corrects previously disseminated incorrect information. Sub-article 2, Item 3 includes in this category information that "is, or could be, of interest to the public." This description is quite vague and could be difficult to administer. It may be advisable to remove the provision and leave the disclosure of such information subject to request under the provisions of the Act.

Section II: Access to Other Public Information

Exceptions: Article 17, sub-article (2) provides an exception to disclosure for trade secrets. See Chapter Three, Section IV for a discussion of exceptions.

Mass Media: We assume that the lengthy provisions for mass media would apply to only state-owned media (Bulgarian National Television and Bulgarian National Radio) and to material filed with the State by private broadcasters. Otherwise, the provisions of the Act would apply to privately held information, which appears to be prohibited by other provisions of the Act itself.

Section III: Conditions and Procedure for Determination of the Expenses Incurred for Granting Access to Public Information

Calculation of Fees: Article 20, Sub-Articles (1) and (2) do not provide much guidance for the calculation of reasonable fees nor the factors to be considered in the calculation. They leave the determination of fees to the Minister of Finance “not [to] exceed the actual cost of granting [access to the information.]” The Act could specify factors to be considered in the calculation such as the number of documents requested, the time required to locate and obtain the documents, the need to translate the information from machine-readable to human-readable form. Considerations such as these are written into §11 of the Canadian Act. The Hungarian Act (§20) and the English Act (§2) confer discretion on a third party, as does the draft of the Act.

Appeal of Fees: While Article 20, Sub-Article (3) provides for a justification of the fees charged, it does not provide for an appeal of the amount or waiver by the information providing agency. We generally would support the inclusion of an appeal right. Such provisions may be unnecessary if the fees as determined by the Minister of Finance remove all discretion from such agencies. The Canadian Act provides for such an appeal as well as a waiver (§11). The American Act also provides for a waiver in limited circumstances (§552(a)(4)(A)(iii)).

CHAPTER THREE: PROCEDURE FOR GRANTING ACCESS TO PUBLIC INFORMATION

Section I: Request for Access to Public Information

Form of Disclosure: Article 28 allows the agency providing the information to deviate from the requested form in certain cases, giving the agency great discretion in making the determination of format. The section could include a provision requiring



the agency to state the reasons why the request falls under one of the exceptions listed in Article 28 as well as provide for an appeal of that determination. This would prevent the agency from arbitrarily substituting its chosen format over the one requested.

Section II: Consideration of Applications and Granting Access to Public Information

Constructive Refusal: This Section does not include a provision indicating that a failure of the agency to meet the deadlines for notification or access to the information would constitute a refusal and allow the applicant to begin the formal appeals process. The Canadian Act (§10) and the American Act (§552(a)(6)(C) include such a provision.

Appeal of Time Extension: Articles 31-33 provide for an extension of the time available for the agency to make a decision on the application. This section could also include a provision allowing the applicant to complain about or appeal an extension. Such a provision is contained in the Canadian Act (§9). The other Similar Acts do not explicitly provide for an appeal of this nature.

Section III: Refusal to Grant Access to Public Information

Organization of Exceptions: Article 38 lists the potential grounds for refusal to grant access. However, other possible exceptions are scattered throughout the Act. These exceptions include: Article 2, personal data; Article 5, persons' rights and reputations, the national security, public order, peoples' health and the recognized moral standards; Articles 7 and 9, state or state-office secret; Article 8, information obtainable in the course of provision of administrative services and information in the archives collection of the government; Article 13, certain state-office information; Article 17, trade secrets; Article 18, certain information regarding the mass media;



Article 38, information that affects a third party's interest and information disclosed within the past 6 months. These exceptions should be clearly indicated in a separate section of the Act to allow for a clearer definition of the information to which they apply. Separate sections clearly identifying the exceptions are included in the Hungarian Act (§19(3)), the Canadian Act (§§ 13-24) and the American Act (§552(b)).

Extent of Exceptions: Some of the above exceptions are quite broad and give the agency from which information is requested broad discretion. The exceptions for public order, peoples' health and the recognized moral standards are especially susceptible to abuse. The Similar Acts generally do not include these exceptions. We suggest that the exceptions be narrowed to limit the possible abuse of exceptions to avoid disclosure of information that should be made open by the Act. Further, the exceptions should be narrowly tailored, and agencies refusing to grant access to information should be required to state in a public document precisely how the requested information falls within an exception.

Section IV: Appeals of Refusals to Grant Access to Public Information

Internal References: Article 41, sub-Article (2) refers to refusals under Articles 3 and 4. These articles do not appear to provide grounds for refusal.

Agency Appeal: In order to reduce the burden on the Administrative Courts, this section could provide for an appeal at the agency level before resorting to the court system. Such an intermediate appeal is available under the Canadian Act (§30).

Burden of Proof: This section does not explicitly place the burden of proof on the agency rather than the applicant. Other codes have such an explicit allocation (Canadian Act (§48), Hungarian Act (§21)).



Standard of Review: This section does not explicitly prescribe the standard of review for the Administrative Court. Other codes provide for de novo review by the Court (American Act §552(a)(4)(B)).

Section V: Administrative Penalty Provisions

Monetary Penalties: Article 43 provides for specific monetary penalties to be assessed against civil servants and/or agencies who violate provisions of the Act. This is a good and positive development because it should result in increasing the likelihood that agency employees will obey the terms and spirit of the Act. Monetary penalties assessed against individual civil servants may have the effect of encouraging them to grant access where it should otherwise be denied.

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