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Comments
on
the proposed amendments to the
Law of Ukraine "on Information"

by

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The proposed revisions to the law of Ukraine "on Information" (1992) clearly aim to bring the law up to date with international law and comparative standards on the right of access to information, as well as the right to privacy and the right to freedom of opinion and expression. In doing so, however, the draft law fails to eliminate provisions of the earlier law that do not fit in a modern political, democratic and human rights framework. As a result the proposed law has an unusual and complex structure that will make it unworkable in practice and which may even open the door to restriction of these freedoms and to the imposition of censorship.

We recognize that in 1992 Ukraine was just emerging from the Soviet Union and it was necessary to begin redefining the relations between citizens and the state, including the relations based in the exchange of information. In addition, the Ukrainian law "On Information" was drafted in 1992 at a time when only one other country in Eastern Europe (Hungary) had an Access to Information law and even a number of Western European countries did not have such laws (UK, Germany, Switzerland). As such, the law was a valiant attempt to redefine public information rights.

A lot has happened since 1992, however, with all the countries of Eastern Europe and most of Western Europe now having dedicated Access to Information laws. In addition, in 2002, the Council of Europe adopted its Recommendation 2002(2) on Access to Official Documents and it is now turning that recommendation into a treaty which Ukraine will likely sign. Furthermore, international tribunals such as the Inter-American Court of Human Rights have recognized a fundamental human right of access to government-held information, a concept which is also referred to in the decisions of the European Court of Human Rights. It is therefore appropriate and timely that Ukraine update its Law "On Information" and it is necessary that this law comply with the European and international standards that have emerged over the past 15 years.

1. The aim and structure of this Narrative Analysis

The comments contained in this Narrative Analysis and in the annotated version of the law are designed to assist the Ukrainian legislators in the task of drafting a law that fits with 2007 standards on access to information. The comments are frank and direct, with the intention that it should be clear which provisions of the draft law do and which do not meet with European and international standards on the right of access to information. The comments are guided by international law and jurisprudence as well as comparative law and practice and suggest how the draft law may be revised in order that Ukraine fully protects the right of access to information and freedom of expression in line with the standards required by the Council of Europe.

The structure of this Narrative Analysis is first to identify the provisions of the draft law that need to be removed because they are problematic and then to focus on the re-structuring of the remaining provisions to ensure adoption of a complete access to information law that will work in practice.

It is recommended that in revising the law, the drafters are guided by the established international standards, notably by the Recommendation 2002(2) of the Council of Europe on Access to Official Documents, as well as the Open Society Justice Initiative's 10 Principles

on the Right to Information and Article 19's Principles on the Right to Know. We have also referred to one or two other access to information laws, such as the Hungarian e-FOIA law, which might help the drafters in the re-drafting process.

2. Outdated Provisions of the Law

The annotated version of the draft identifies a number of concepts which are so uncommon in modern access to information laws that this law would be the only one known to us to contain them.

- The concept of "**information relations**" is a highly unusual notion not present in other European access to information laws. Human rights apply to all individuals and should be upheld by the state. Normally the right to information is simply defined as a "right of access by all persons to all information held by public bodies". This is the right that international tribunals have upheld. The law should define this right (which is indeed a relationship between individuals and the state, but the law does need to analyse the right from a sociological perspective) as is proposed in the redrafting of Article 2. We have recommended the deletion of the concept of information relations at all instances where it occurs (including Articles 4,5,6,7,8, 9, 30, 32, 33, 35, 43, and 47).

- Concepts such as **accuracy, reliability and completeness of information** have no place in an access to information law: the right of access is a right to all information held by a public authority regardless of its quality. The principle of openness between government and citizens requires the government to be open and to share all the information that it holds, even that which is out-of-date or inaccurate. We have recommended the deletion of such terminology including in Articles 3 and 20.

- The concept of "**information sovereignty**" (introduced in Article 8) should be removed from the law. Information sovereignty is not a principle established in any of the human rights treaties. It may form part of the Ukraine's Constitution, but this is not sufficient for the Council of Europe to sanction a law that gives preference to such concept rather than recognizing the rights established by the European Convention on Human Rights, and the Council of Europe's numerous recommendations on freedom of expression and access to information, including the right of access to information (Committee of Ministers Recommendation 2002(2)) and the forthcoming treaty on access to information to which Ukraine will likely become a party.

- The information held by any public body is **"owned" by the public**, the taxpayers who paid for its creation, processing and retention. All other notions of "ownership" of information held by public bodies should be eliminated from the law. Ownership of information created by private bodies is a more nuanced area that is dealt with separately; if information has been handed to public bodies it automatically falls within the scope of the right of access to information, subject to legitimate exemptions such as to protect commercial secrets.

- Another highly problematic concept is that of the "**national information space of Ukraine**" (Article 8). International law clearly establishes that the right to freedom of expression and information is a right that operates "regardless of frontiers" as established by Article 19 of the International Covenant on Civil and Political Rights, to

which Ukraine has been a party since 1976. The rights established under this law should recognize the trans-frontier and universal nature of the right of access to information.

- The concept of "**information security**" (Articles 3, 7, 8, 12) is presented in the law in a way that does not make clear exactly what is intended. International law does permit governments to restrict from the public domain certain limited information that would harm interests that it is legitimate for the state to protect. These interests include national security and require keeping certain information "secure" (ie: available to only a few members of government or the military) for short periods of time. However, the limits must always be as necessary in a democratic society and subject to a public interest test, which means that they will always be temporal in nature (will apply for a limited period of time only) and the information will eventually enter the public domain. It should be stressed here that the concept of protecting national security (protecting the nation from attack, from overthrow of the constitutional order, etc) is well defined in international law and cannot be reconciled with the concept of "information security" as presented by this law. It is therefore recommended to eliminate the concept of information security from the law and to introduce a clearly drafted Section on Exemptions.

- Ensuring the **security of the communications infrastructure** (from, for example, being taken over by insurgents or from a terrorist attack) is a legitimate concern of government, but requires other types of legislation whose aim would be protecting the physical infrastructure of Ukraine. This law introduces the concepts of "information security" and "information sovereignty" but fails to elaborate on them in ways that provide the basis for the necessary, separate legislation. For these reasons a separate legislative drafting exercise is needed.

- A variety of provisions, particularly in Section II of the law, refer to the **type of information** (official information, statistical information, legal information, sociological information, information by mode of access, by mode of recording, by degree of reliability, by currency or non-currency, encyclopaedic information, information on goods (works and services), scientific and technical information). It is highly unusual for an access to information law to contain such provisions, which are completely redundant if the right of access is deemed by the law to apply to "all information held by public bodies". As indicated in the annotated text, all these definitions should be deleted from the law.

In addition to the outdated provisions, the law contains some **references to the mass media** (notably Section VI on "Protection Of Information. Liability For Contravention Of Information Legislation". While very laudable, the purpose of this Section is not clear! This law is an access to information law and the provisions relating to mass media and freedom of expression rights should be moved to other legislation. If such other legislation does not exist, then it may be considered here, but we assume that such legislation exists as it has been referred to elsewhere in this law.

With respect to the right of access to information it would be sufficient to say that when a requestor receives information from a public body, the requestor enjoys full freedom of opinion and expression rights, that include dissemination of the information received, citing from part of it, criticizing it, and using it as reference in whatever way the requestor chooses. We also underline that material released under an access to information law may still retain its original copyright (if it was created by a third party, not that created with the tax-payers

money), but that it should be the law of copyright that regulates future use of the material, not the access to information law.

3. Definitions Section

This law is likely to function well if the definitions of core concepts are brought into line with the Council of Europe Recommendation 2002(2) and comparative international standards.

We recommend the following items for the definitions section:

- *public body*: all government and administrative bodies at the national, regional and local levels, all judicial and legislative bodies (including local self-government), as well as all private bodies performing public functions and/or operating with public funds.

- *information*: all information recorded in any form, drawn up or received and held by public bodies, except for any information being at a stage of drafting.

- *request*: an 'information request' means an application for any information that is in possession, use and disposal of the information administrator.

- *requestor*: any person (legal or natural person) who makes an information request.

- *access* to information includes access to any form in which the information is held, including but not limited to: viewing original copies, taking notes, receiving a paper copy, an electronic copy, or a copy of other storage formats if available (eg: CD ROMs, DVDs, audio tapes, video tapes, brail text, etc.)

- *private body*: a private body that holds information that is subject to the scope of this law, even though the private body is not obliged by the entirety of the law.

- *information officer*: a public official appointed by the public bodies to oversee implementation of the law and to receive and manage information requests.

- *environmental information*: information that affects the environment as defined by the Aarhus convention [see Point 10 below]

- *personal data*: information that relates directly to and affects the privacy of a living individual (the data subject).

- *record*: any storage format that contains information.

The advantage of these revised provisions is their simplicity and therefore the ease of applying the law and ensuring that public officials do not have any problems interpreting it correctly.

4. Bodies Obliged by the Law

The right to information is a right to information held by all public bodies, subject to legitimate exemptions. In line with international standards, the definition of a public body [*or "public authority" depending on what works in Ukrainian language*] includes all government

and administrative bodies at the national, regional and local levels, all judicial and legislative bodies (including local self-government), as well as all private bodies performing public functions and/or operating with public funds.

The right may be extended to other private bodies to the extent that they hold information that is necessary for immediate protection of the life, health or fundamental rights of a person.

Article 37.2 is the closest the law gets to a specific section in which bodies are obliged by the law, but it is a confusing provision and needs substantial redrafting. First the definition of the public bodies obliged by the law needs to be simplified and should be all-inclusive.

Next, the law need to define very clearly which private bodies are obliged and to what extent. We have identified three groups out of Article 37:

1. Economic agents in a dominant position in the market or those vested with special or exclusive rights, or those which are natural monopolies, where the information concerns the terms and price of delivery of goods or services and the prices for same.

2. Non-commercial companies financed from the state or local budgets, to the extent that the information concerns the use of budgetary funds.

3. Bodies that hold the following classes of information:

   i) information on the state of environment
   ii) information on the quality of foodstuff and household items
   iii) information on accidents, disasters, natural calamities and other events of extreme character which have occurred or may occur and jeopardise the safety of citizens.

There is clearly a very positive intention here with 37.2.3. There are however some practical problems. The first is to note that the Aarhus Convention on access to environmental information is a detailed document and that consideration should be given to having a special Section of this law on the Aarhus provisions as they apply to government and private bodies.

Second, with respect to information on the quality of foodstuff and household items, we are concerned that it might be impractical. The private bodies that hold such information range from huge multinational corporations present in Kiev (e.g.: Nestle, Danone, Unilever, Ikea) to the local corner store, restaurant or market stall in a remote village. It does not seem realistic to expect a small local restaurant or market stall to answer requests about the quality of the food they are selling. Normally, government inspections of food hygiene under other laws result in the collection of such information which is then made available to the public by the relevant government bodies. We therefore propose that consideration be given to removing this provision.

With respect to information on accidents, natural disasters, etc. we presume that the information in these cases is likely to be held by large private bodies and so it may be reasonable to require them to release it in emergency situations. Consideration should be given to how realistic this is in practice: in an emergency the government is quite likely to collect such information and should then release it.

Finally we note that the mass media (apart from publicly-funded media) should not be under any obligations to release information that they hold under this law even if it relates to the environment or natural disasters: the media's job is to take its own decision as to what it publishes as part of the right to freedom of expression.

5. Requestors and Requests

The provisions on requestors and requests are generally good but could do with some simplification. We have proposed amendments to Article 1 on Definitions and Article 2 on The Purpose and Objectives of the Law to clarify that everyone may file a request for information.

As noted at Point 1 above, we strongly recommend removing from the law all the references to "information relations". Quite simply, all persons have the right to request any information from any public body. That is the nature of the right as defined by international law.

The Council of Europe Recommendation 2002(2) states at Principle V that "*Formalities for requests should be kept to a minimum.*". For this reason we have recommended that Article 38 be simplified to ensure that the requesting process is as simple as possible, including that the requestor be required to give only their name, a description of the information sought and either an e-mail or a mailing address. A telephone number for getting in contact to clarify any points should be encouraged but optional.

It is excellent that the law establishes that requests can be in free format (Article38), and that the requestor does not need to give reasons. It is also acceptable that the law establishes that public authorities may develop forms to facilitate access but that these are not obligatory. We also note that it is positive that the law has no requirement to mention the law itself when requesting information (such a requirement would be a violation of the right to information).

It is very positive and in line with international comparative standards that the request may be made in any way, including orally (presumably by telephone as well as in person), by post, by fax ("telecopier"), by hand delivery, and by e-mail. We note that given that oral requests and e-mails are options, a signature should not be obligatory.

It is reasonable to limit requests filed orally to small amount of current information or to information which is necessary for the prevention of illicit actions or emergencies. An example could be a telephone call to a local authority asking them to post a copy of the annual report. We recommend that where a request cannot be answered almost immediately, the duty should be on the public official to inform the requestor of their right to file a written request and to help them in doing so (see also notes below on the Duty to Assist). There is a particular duty on the public official to set the request in writing when the requestor cannot do so because of blindness or other disability or because they have a low level of literacy.

We propose addition of a **Duty to Assist** requestors. This duty, which is a common feature of access to information laws, provides that public officials should help in formulating the request and making it narrow and clear enough to ensure that the information can be identified. After a request has been submitted, the public official may contact any requestor by phone, letter or e-mail to clarify the request. Such clarifications should be made within 5 days and the 15 day period will begin once the clarification has been made. If the requestor

believes that the request is sufficiently clear, the public authority is under an obligation to accept this and to process the request.

In order to ensure that requests are processed, that necessary information management systems are in place, and that the duty to assist is provided, every public body should be required to nominate at least one **Information Officer**. This person shall have their name and contact information posted in public places and on the website of the entity in order that the public knows who to contact about information requests.

6. Time Frames

The time frames expressed by the law are basically very good but the way in which they are presented is unnecessarily complicated and will cause problems during the implementation phase.

At present the law establishes three timeframes: 5 calendar days for informing the requestor about fees, 15 calendar days for providing the information or for informing the requestor about the application of an extension, and an extension of up to one month in the event that the request involves the provision of a large volume of information or requires search of a significant amount of data.

As noted in the comments in Article 39, there is a serious practical problem with the first proposed timeframe about fees because it will only be possible to know the total value of the fees when the information is ready, ie: after up to 15 days. (As noted at Point 7 on Fees below, fees may only be charged for copying of information). It will therefore be hard to know how much information is to be copied until it is ready for delivery and so impossible to calculate the costs after just 5 days. We therefore recommend that this timeframe be removed from the law.

The time frame of 15 calendar days for responding to the request (a positive or negative response) or for informing the requestor of the application of an exemption is a very reasonable timeframe, falling in the mid range of the timeframes established under European laws. Examples of the timeframes in the region include Bulgaria (14 calendar days), Romania (10 working days), Slovakia (10 working days), Georgia (10 working days) and Estonia (5 working days). In Sweden public officials aim to answer requests within 24 hours.

The extension of up to one month is also acceptable, but it needs to be clarified whether the extension is for a whole month from the time of notification or if it is one month total from the date of filing of the request. The reasons for extensions should be defined: voluminous requests is one acceptable reason; consultation with third parties over confidential information is also acceptable but note that the right to consult with third parties is limited (see Point 8 below).

We recommend some additional timeframes which will be necessary for proper application of the law:

- We recommend introduction of a short timeframe for initial review of the request: if the authority determines that the holder of the information requested is another public body, it should be obliged to transfer the request to that body within 5 days [calendar or working] and should inform the requestor that this has been done.

- Similarly, the public authority may contact the requestor within the first 5 days after submission of the request to clarify any part of it. The 15 day period will begin once the clarification has been made. If the requestor believes that the request is sufficiently clear, the public authority is under an obligation to accept this and to process the request.

- We also recommend that timeframes for appeals (internal appeals) and for appeals to the Information Commissioner be introduced. A reasonable period would be one month from the date of receipt of a refusal for filing an internal appeal and one month from the second refusal for filing an appeal with the Information Commissioner.

- Similarly if a requestor is not satisfied with the quality of information received they may appeal to the internal appeal within one month and if they are still not satisfied with that response, it may be appealed within another month from receipt of the public body's final answer to the Information Commissioner.

- If there is no response to a request within 15 days from the date when it was filed, the requestor may appeal this immediately or within one month.

We also note that the provision at 38(4) that requestors may petition for an urgent granting of the request is acceptable and it is quite reasonable that such a must be grounded. We do however recommend that the Information Commissioner verifies that such requests are infrequent and that this provision is not being overused. If necessary, supplementary regulations could be introduced once more experience has been accumulated as to how this is working in practice.

We strongly recommend that, once defined, the timeframes be applied across the entire Ukrainian administration and that other laws that provide any access rights (such as to environmental or other information, and to archives) be harmonized with this law. This law should make clear that in case of conflict, the Information law prevails.

7. Fees

As noted in the annotated version of the law, there are a number of problems with the fees structures as proposed. The first is that the draft law seems to leave room for discretion on the part of the authorities as to what fees they charge and for which services. The second is that the law does not make clear that the only charges maybe for copies. On the positive side, the proposed law establishes in Article 39 that "Granting of information for inspection at the place of its storage is free of charge." which is good and should be put in one consolidated Fees provision (currently this is Article 41).

The draft law needs to be amended to fit with the Council of Europe Recommendation 2002(2) which establishes the principle of gratuity at Principle VIII:

> ***VIII. Charges for access to official documents***
>
> *1. Consultation of original official documents on the premises should, in principle, be free of charge.*

2. A fee may be charged to the applicant for a copy of the official document, which should be reasonable and not exceed the actual costs incurred by the public authority.

Consultation of originals and receipt of electronic (email) information should always be free of charge. In no case may there be a fee for filing a request for information.

We recommend that the law establish clearly that all information that by law must be published proactively be free of charge.

We also recommend that the first 50 pages of photocopying are provided free of charge (we note that the cost of collecting small payments is often more than the monies recuperated and this should be calculated for the Ukrainian administration).

We recommend that the Information Commissioner (or Ombudsman) be charged with developing a clear fee structure, which includes the cost of other formats such as CDs.

We recommend that law clarify the provisions on fee waivers for indigent and other requestors and that the Information Commissioner be charged with developing the fee structure and for monitoring it to ensure that authorities never charge unreasonable costs as these could become an obstacle to the right of access to information.

8. Exemptions and Refusals

International law permits the right to government-held information to be limited in order to protect substantial harm to legitimate interests established by international law such as by Article 10 of the European Convention on Human Rights as elaborated in the Council of Europe Recommendation 2002(2). All these exemptions must be subject to a public interest test. The Information Law should prevail over other laws that establish secrets.

Principle IV of the Council of Europe Recommendation 2002(2) establishes an exhaustive list of reasons for restricting information:

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

i. national security, defence and international relations;
ii. public safety;
iii. the prevention, investigation and prosecution of criminal activities;
iv. privacy and other legitimate private interests;
v. commercial and other economic interests, be they private or public;
vi. the equality of parties concerning court proceedings;
vii. nature;
viii. inspection, control and supervision by public authorities;
ix. the economic, monetary and exchange rate policies of the state;
x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.

3. Member states should consider setting time limits beyond which the limitations mentioned in paragraph 1 would no longer apply.

It is therefore important that all restrictions mentioned in the draft law fall within this list.

It is positive that Article 32.1 states that: "*Any information that has not been lawfully classified as restricted access information is deemed open*" but the law has too many scattered provisions relating to restrictions. We have identified the following restrictions in the law:

- Article 10.4 cites Article 10 of the European Convention on Human Rights: 4. *Access to information may be restricted only as prescribed by law in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*. This is fine but then contradicted or altered by other provisions.

- Article 10 also refers to "*free access of subjects of information relations to the statistical data, to the archival, library and museum funds and other information banks and data bases; any restriction of such access is stipulated in view only of the specific character of values and special conditions prescribed by law to ensure their safe custody"* – this restriction is not clear and should be deleted. To the extent that this refers to documents in fragile physical condition, it should state this more clearly.

- Article 19.2 refers to *official secret, state secret and other secrets as provided by the laws of Ukraine* – this provision is unnecessary and should be deleted: either information will be restricted according to the Council of Europe criteria or it will not. Information previously classified by other laws must have that classification reviewed when an information request is received.

- Article 22.2 on personal data fits within the Council of Europe list.

- Article 33.1 states that: *Any information access to which is lawfully limited by its owner or user and disclosure of which may inflict damage on subjects of information relations is recognised restricted information*. This is problematic as it does not fit with a legitimate interest as defined in the Council of Europe list, and so should be deleted.

- Article 40.6 refers to *the information requested is unofficial information of public authorities and bodies of local self-government or constitutes part of the interdepartmental service correspondence (reports, service correspondence, exchange of letter between divisions etc.), where it related to the decision-making process and precedes adoption of decisions*. This should be deleted because it is not an acceptable category of information. The decision-making exemption is included in the Council of Europe list.

- Article 40.7 refers to *information requested concerns field and investigative operations of the prosecutor's office, the Ministry of Internal Affairs, Security Service of Ukraine, operations of police investigators and courts, where its disclosure may jeopardise antiterrorist activities, operational measures, investigation or inquest, violate the rights*

of a person to fair and impartial trial of his cases, or pose a threat to the life or health of any person. The Council of Europe list covers these exemptions.

Partial Access: It is very positive that the law establishes at Article 33.3 that: *Access may restricted to information, but not a record. Where a record holds restricted information, such parts of the record that do not contain restricted information may be released for inspection.* This is excellent language that should be maintained in the Section on Exemptions.

Limits on the Exemptions: It is positive that the law establishes that certain information may never be restricted. These provisions include information on the environment (Article 24.1) and information that affects the life, health or safety of a person (Article 24.3). These provisions could be clearly grouped together to ensure correct application of the law by public officials. Definitions of the type of information by its content-matter should is only necessary for these provisions.

We note that other laws also prohibit restrictions on any information that relates to previous, current or potential future violations of human rights as well as any information that does or may reveal corruption. We recommend that these classes of information be added to the list of information that may never be restricted.

Time limits on Exemptions: As required by the Council of Europe Recommendation 2002(2), when refusing to release information, an indication should be given of when it might be available.

Consultations with third parties: It has been proposed to eliminate from the law the provisions relating to private bodies and their obligations apart from in certain limited circumstances. It has also been proposed to eliminate the concept of "owner" of information where information is held by a public body. If, however, information originated from a private body there may be limited circumstances in which the public body receiving the request may need to consult with that body to make a determination of whether the information requested could damage interests such as protection of commercial secrets. Such circumstances should be extremely rare as in the majority of cases the public body should make clear when receiving the information that it will be subject to information requests. Comparative jurisprudence in cases from the UK, Irish and Slovenian Information Commissioners that private bodies may not dictate what is to be kept secret, especially if there is a public interest in knowing the information.

9. Proactive Release of Information

The provisions on proactive publication of information in this law are good. Article 14 is the main provision and we have proposed adding language from other provisions (Articles 29, 30, and 31). We suggest a thorough revision of the provision and propose as a model the Hungarian E-FOIA in order to set the highest standards of transparency and easy access to routine information in Ukraine.

In addition to the classes of information that may be made public, each public body should be required to publish information about the contact details of its Information Officer and how to file a request for information and how to appeal. Information about where and how to consult the Index of Records held should be included on public notice boards and on its website.

10. Environmental Information

It is positive that the law includes a right of access to environmental information (notably at Article 24). It is not clear from this draft the status of the Aarhus Convention (full title: UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters) in Ukraine. In the case that the Aarhus Convention has been incorporated into Ukrainian law, this special reference can be kept short and should refer to that legislation. If it has not, a special Section of this law need to be drafted in greater detail (further advice can be provided should that legislative drafting exercise take place). In any case, the definition of environmental information in this law should fit with the Aarhus Convention as follows:

> 3. "Environmental information" means any information in written, visual, aural, electronic or any other material form on:
>
> (a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
>
> (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;
>
> (c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above.

Also, in either case, there should be a thorough review of the relationship between this Access to Information law and any other legislation in Ukraine that refers to environmental information. To this end, we refer the drafters also to the European Union's Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, which incorporates the principles of the Aarhus Convention. We note that the European Union signed the Aarhus Convention on 25 June 1998 as a result of which, provisions of Community law must be consistent with that Convention.

11. Relation with the Archives Law

A number of provisions of this law refer to the information that may be held in archives and/or may be subject to the archives law (including Articles 12, 21, 37, 42).

In some cases, the provisions do not seem necessary as the archives law presumably address the procedures for transferring files to the archives, the criteria for doing so, and so forth.

There is certainly a need to clarify whether or not the Access to Information Law will apply to information held in the archives. We strongly recommend that the right to information does apply to all information held by all parts of government, with necessary exemptions for access

to historic documents that are in a delicate physical condition. The right of access as established by international law applies not only to current documents but to all documents held by public bodies, irrespective of their date of creation.

Once this Access to Information law has been adopted, we recommend a revision of all Ukrainian legislation relating to information management inside the administration as well as to the storage of information in archives to ensure full harmonization of this legislation.

12. Sanctions

This law does not sufficiently define the Sanctions to be applied for violation of the law.

Article 47 refers to the "*Compensation of pecuniary and moral damage by a subject of information relations is governed by the legislation of Ukraine*" but it is not clear if this provision might relate to the failure to respond to an information request. Any reference to other legislation needs to be more specific.

We recommend that sanctions be introduced for failure to comply with the provision of the law (such as failure to respond to an information request within the timeframe specified by law, failure to ensure that information is published proactively, failure to provide information that may not be withheld according to this law, etc). These lighter offences may be sanctioned by fines to be levied on the public body. It may be appropriate for the Information Commissioner to impose such fines (or the Ombudsman if no Information Commissioner is established).

The object of the lighter sanctions should be to encourage the release of information and not to create any fear amongst public officials that they will be penalized if they release information. As such, they should be imposed with care and particularly for repeated violations of the law.

More serious offences such as willful destruction of documents should be dealt with by this law and should also be established as criminal offences.

13. Personal Data Protection.

The law does not make detailed references to protection of personal data (Article 22 is only a very brief reference). Requestors should be given the right not only to obtain a copy of information about them, but also to request that it be corrected or to have a note appended to it.

If Ukraine does not have a Personal Data Protection law, then a full section of this law should be developed dedicated to protecting the right. If it does have one, then the relevant provisions of this law should be harmonized that law.

14. Information Commission or Information Commissioner

We note that countries that have an Information Commissioner generally have a much more successful implementation of the Access to Information law. This is a more effective mechanism than the Ombudsman because the Ombudsman has many other duties and cannot dedicate sufficient resources to the right to information.

Good models to be considered include the Slovenian and Hungarian Information Commissioners (who also have responsibility for data protection), the Serbian Commissioner and the Macedonian 5-person Commission. Further afield, the UK has a well-structured Information Commissioner which publishes important guidance for public officials, Ireland and Scotland have Information Commissioners who have an excellent reputation for strong and fair decisions, Portugal has an well functioning commission, and Mexico has become famous for it's incredibly effective Federal Access to Information Institute (the IFAI). Further information can be supplied on these should there be an openness to including such a body in the law.

* * *

Appendix

Draft

LAW OF UKRAINE
Amending the Law of Ukraine 'On information'

The Verkhovna Rada of Ukraine hereby RESOLVES-

To amend the Law of Ukraine 'On Information' (the *Vidomosti Verkhovnoi Rady Ukrainy,* 1992, No. 48, p. 650; 2000, No. 27, p. 213; 2002, No. 29, p. 194; 2003, No. 28, p. 214; 2004, No. 11, p. 141; 2004, No. 32, p. 394; 2005, No. 33, p. 429), which shall henceforth read as follows:

LAW OF UKRAINE
'ON INFORMATION'

This Law shall lay down the mechanism by which everyone shall be able to exercise his right freely to generate, receive, collect, store, use, protect and disseminate information, and lay the legal basis of information activity.

Section I
GENERAL

Article 1. Definitions

1. The terms used in this Law shall have the following meaning:
'information' means recorded or published material or data as respects persons, objects, facts, events, phenomena or processes that have occurred or occurring in the society, in the nation or in the nature; **→ The normal definition of information is that it is any data or knowledge recorded on any medium. Suggest redrafting.**
'information relations' mean the relations pertaining to the generation, acquisition, collection, use, protection, and dissemination of information; ☒ **→ the definition of information relations is not necessary. Suggest deleting entire definition.**
'record' means information recorded in a material object, the primary function of which is its retention and distribution in time and space; **→ this is a slightly odd definition but generally fits with the idea that any means of recording the information falls under the definition of the this law. Suggest redrafting (may not be necessary if the term "information" is used throughout the law).**
'information source' means records or media communications, public statements, interviews of individuals etc.; ☒ **→ this additional information is not necessary with respect to access to information, as noted, the right of access to information applies to all information held by public bodies regardless of the source and hence it should not be necessary to define the source. Suggest deleting entire definition.**
'access to information' means any such acts seeking to obtain information with a view to its subsequent utilisation as preclude the possibility of its alteration; ☒ **→ this is a highly problematic definition: the right of access to information is the right of an individual to obtain information held by a public body. The future use of that information, including make an extract of it, for example in order to quote it or to summarize it in a report may not be precluded by law without automatically violating the right to information.**
'information request' means an application ~~of an individual, corporation, citizens' association or the state~~ for any information that is in possession, use and disposal of the information administrator; **→ this is an acceptable definition of a request except for the comment below about the state as a requestor.**
'requester of information' means an individual, corporation, citizens' association or the state submitting an information request; ☒ **→ the right of access to information is a fundamental human right, therefore it may be exercised by an individual or groups of individuals (an association,**

legal person, etc) only. Access Info Europe is not aware of one other law where the state is defined as a requestor of information.

'official record' means a document created or received by a public authority or body of local self-government, ~~properly executed and certified~~, related to its performance of its functions, except for any document being at a stage of drafting; ☒ **→ the revised definition of information includes this definition which then becomes redundant. The right to information does not only apply to "properly executed and certified" information but to all information held by a public body.**

'official journal' means a printed medium published by any central executive authority, legislative or judicial body (gazette, bulletin, digest, reporter, etc.), which is not a mass communication medium, used for the publication of legal acts and regulations passed by such body, decisions as respects its activity and other information of such body which the law prescribes to publish without fail; any printed medium in which the legal acts and regulations included in the Uniform State Register of legal acts and regulations are published; **→ this seems to be an acceptable definition if it fits with Ukraine's legal system.**

'index of records' means the system of accounting and storage of information on records kept by an information administrator, which contains the main descriptions of records and is subject to approval by such administrator with the purpose of proper storage and access to information; **→ this seems to be an acceptable definition of an index of records held.**

'information access mode' means a procedure defined by the subjects of information relations for reception, acquisition, storage, use, protection and distribution of information; ☒ **→ this is part of the rather complex approach taken by this law and should be redrafted because it wrongly confuses the means of storing or sharing information with the means of use and distribution of the information. The law should define that users have the right to request access information my any means, including be reviewing original copies, in hard copy, electronically on in other storage formats if available (eg: CD Roms, DVDs, tapes, brail text, etc.)**

'information administrators' means public authorities, bodies of local self-government and other subjects defined herein; **→ this is a key provision of the law and needs to be expanded upon to define the scope of the law precisely. The language proposes is:**

public body: all government and administrative bodies at the national, regional and local levels, all judicial and legislative bodies, as well as all private bodies performing public functions and/or operating with public funds.

2. Other concepts and terms are used in this Law with the legally prescribed meaning.

Article 2. Purpose and objectives of the Law

This Law establishes the general legal framework for the generation, reception, acquisition, storage, use, protection and distribution of information, vests the person with the right to information in all spheres of social and public life of Ukraine, and also defines the system of information, its sources, status of participants of information relations, regulates access to information and safeguards its integrity, and protects the person and the society from unreliable information.

→ There is a major problem with the purposes of the law which means that the law is overly ambitious and attempts to regulate too many things. Consistent with the comments in other parts of this law and in the Narrative Analysis, we propose a revision of Article 2 along the following lines:

- *This law establishes the right of access to information in the Ukraine. This is the right of access by all persons to all information held by all public bodies.*
- *The aim of this law is to ensure the open and transparent operation of public bodies in Ukraine, to facilitate public participation in government decision-making through the guarantee of access to information, and to ensure that the public is able to hold public bodies accountable for how they exercise public power and spend public funds.*
- *This law establishes the principle of publicity, namely that all information shall be considered to be open [in the public domain] unless it is necessary to restrict it in order to protect from serious harm the specific legitimate interests established by this law; all such restrictions shall be subject to a public interest test.*

- *This law also aims to protect the right to privacy and family life by ensuring that all persons have a right of access to information about them held by public bodies;*
- *This law also establishes a right of access to information held by private bodies to the extent that that information directly affects and/or is necessary for immediate protection of the life, health or fundamental rights of a person.*
- *This provisions of this law must not be interpreted in any way that would restrict the rights to freedom of opinion, information and expression, including media freedom, beyond what is strictly necessary in a democratic society.*
- *The provisions of this law shall be applied without discrimination on any grounds to all persons seeking to exercise their right of access to information.*

Article 3. Main principles of information relations

Main principles of information relations are:
security of the right to information;
openness, availability of information and freedom of its exchange;
reliability, completeness and accuracy of information;
legality of acquisition, storage, use and distribution of information;
timeliness of granting information on request;
security of the right to protection of information;
freedom of the person from intrusion on his private and family life.
→ this entire paragraph needs to be rephrased and framed within a modern human rights context. This law relates to a series of recognized human rights and should be designed to provide a mechanism for the protection and exercise of these rights.
The rights to be taken into consideration are:
- **the right of access to information held by government**
- **the right to privacy / personal data protection**
- **freedom of expression (= including freedom to seek, receive and impart information)**

The right of access to information includes the right of all persons to seek and receive information from government subject to very narrow limitations. The government should endeavour to deliver information in a timely fashion and should guarantee the accuracy and completeness of the information it provides, but even absent this accuracy and completeness, the government has the obligation to provide to the public copies of the information it holds.

As these are already covered in Article 2 above, the provision is not needed here.

As discussed elsewhere, the concept of information security is a meaningless concept in a modern human rights framework and should be removed from the entire law.

Article 4. Language of information

The language of information is defined by the subjects of information relations according to the legislation of Ukraine.
→ this is acceptable provided information may be available in all official languages. Consideration should be given to making information available in minority languages and in forms that can be used by those with disabilities (brail for the blind for example) where resources are available for this.

Article 5. Subjects of information relations

Subjects of information relations are:
individuals;
corporations;
citizens' associations;
the state.

→ The concept of information relations is not a helpful or meaningful concept. Under international human rights law, natural persons have a right of access to information. Comparative law and jurisprudence extends this to groups of persons (an association or a legal person such as a business) but this is not entirely necessary as in any case every person may apply for access to information.

Data protection applies to the rights of natural persons.

The obligation to provide information is on a range of public bodies, and this can be included in the definitions at Article 1 and in the purpose of the law at Article 2. Then this article should be deleted in its entirety as it does not serve any useful purpose.

Article 6. Objects of information relations

Objects of information relations are recorded or published material or data that reflect the condition, properties, attributes of objects, facts, phenomena and processes in the society, the state and the nature.

→ This article should be redrafted to remove the reference to information relations and to confirm that the purpose of the law is to guarantee the right of access to all information held by government and to ensure protection of the right to privacy (personal data protection).

Article 7. The state information policy

1. The public information policy is a system of basic principles of information relations, areas and methods of work of the state as respects the generation, reception, acquisition, storage, use, protection and distribution of information.
2. The main areas of the public information policy are:
   - guaranteeing freedom of speech; Φ
   - guaranteeing access of everyone to open access the information; Φ
   - guaranteeing special safeguards to the interests of certain categories of the population (minors, the disabled, ethnic minorities, etc.) in the domain of information; Φ **(needs rephrasing, see Article 2)**
   - guaranteeing open and transparent operation of public authorities and bodies of local self-government; Φ
   - promoting mass media competition;
   - creating national information systems and networks;
   - strengthening material, financial, organisational, legal and scientific bases of information activities;
   - promoting regular updating, enrichment and preservation of national information resources;
   - guaranteeing protection of the state or other prescribed secrecy, and also confidential information;
   guaranteeing information security; ☒
   - guaranteeing protection of restricted access information; Φ
   - guaranteeing the right of the person to privacy and family life; Φ
   - promoting international cooperation in the domain of information;
   - facilitating satisfaction of the information needs of Ukrainian national staying or residing abroad, and also of foreign Ukrainians;
   - building a positive image of the state. ☒
3. The state makes provisions as respects observance of the information legislation by all subjects of information which access information and prohibits unreasonable classification of any material as restricted access information by subjects of information relations.
4. The public information policy is designed and carried out by appropriate public authorities.

A policy is something which is held by governments (and other entities) for the purposes of defining their actions and priorities. It is not for law to define what the policies of the state are. Hence this Article is, in effect, meaningless. A few of the lines on the purpose of the law marked with a Φ have been included in the definition of the purpose of the law at Article 2 and need not be repeated here.

Furthermore, the article contains some dubious and even dangerous concepts (marked with ☒), such as "building a positive image of the state". Whist this may be the policy of any particular government (others may chose an alternative such as building a true picture of the state, irrespective as to whether it is positive or not!), this is not something that can be prescribed by law. Indeed, it is particularly dangerous in the context of this law as it open the door to censorship of information that is does not present a positive picture of the state, as noted in subsequent articles. Hence, it is strongly recommended that, after moving part of Article 7 to Article 2, the remainder of Article 7 be deleted.

Article 8. Information sovereignty and information security of Ukraine

1. Information sovereignty of Ukraine is the inalienable right of the person, society and the state to self-determination and participation in the formation, development and implementation of the public information policy according to the Constitution, the effective legislation of Ukraine and international law in the national information space of Ukraine. ☒
2. The object of information sovereignty of Ukraine are the national information resources ('national information space of Ukraine'). ☒
3. The national information space of Ukraine is a domain (three-dimensional space) in which information processes are carried out and to which the jurisdiction of Ukraine extends.
4. Guaranteeing information sovereignty of Ukraine includes:
   - the legislative definition and provision of strategic areas of development and protection of the national information space;
   - the setting up of national information systems;
   - the definition of norms, principles and limits of activity of foreign and international subjects in the national information space of Ukraine (establishing of the mode of access of other states to the information resources of Ukraine); ☒
   - the formation and protection of the interests of Ukraine in the global information space, international information relations, and the use of global information resources on the basis of equitable cooperation with other states;
   - the participation in the measures promoting constant development of the national information space of Ukraine and strengthening of its sovereignty; ☒
   - the protection of the exclusive interest of Ukraine in the information resources built at the cost of the state budget; ☒
   - guaranteeing information security of Ukraine; ☒
   - the protection of human rights to information and freedom of speech.
5. Information sovereignty of Ukraine is provided by implementing a consistent public information policy according to the Constitution, effective legislation of Ukraine and standards of international law through the instrumentality of appropriate doctrines, strategies, concepts and programmes related to the national information policy of Ukraine. ☒
6. Information security of Ukraine is a state of security of the components of the national information space, such as information, information and telecommunications infrastructure, and information resources, in which they possess immunity as respects any incidental or intentional influence exerted by external and internal threats capable of being detrimental to vital interests of the person, the society and the state. ☒
7. The legal framework of the national information policy, information sovereignty and information security of Ukraine is defined by the laws of Ukraine. ☒

→ Information sovereignty is not a principle established in any of the human rights treaties. It may form part of the Ukraine's Constitution, but this is not sufficient for the Council of Europe

to sanction a law that gives preference to such concept rather than recognizing the rights established by the European Convention on Human Rights, and the Council of Europe's numerous recommendations on freedom of expression and access to information, including the right of access to information (Committee of Ministers Recommendation 2002(2)) and the forthcoming treaty on access to information to which Ukraine will likely become a party.

A second highly problematic aspect of the concept presented here is that of "the national information space of Ukraine". International law clearly establishes that the right to freedom of expression and information is a right that operates "regardless of frontiers" as established by Article 19 of the International Covenant on Civil and Political Rights, to which Ukraine has been a party since 1976. The rights established under this law should recognize the trans-frontier and universal nature of the right of access to information.

International law does permit governments to restrict from the public domain certain limited information that would harm interests that it is legitimate for the state to protect. These interests include national security and will require keeping certain information "secure" (ie: available to only a few members of government or the military) for short periods of time. However, the limits must always be as necessary in a democratic society and subject to a public interest test, which means that they will always be temporal in nature (will apply for a limited period of time only) and the information will eventually enter the public domain. It should be stressed here that the concept of protecting national security (protecting the nation from attack, from overthrow of the constitutional order, etc) is well defined in international law and cannot be reconciled with the concept of "information security" as presented by this law.

Ensuring the security of the communications infrastructure (from, for example, being taken over by insurgents or from a terrorist attack) is a legitimate concern of government, but the necessary legislation to achieve that belong in other types of legislation that refer to protecting the physical infrastructure of Ukraine. This law introduces the concepts of "information security" and "information sovereignty" but fails to elaborate on them in ways that provide the basis for the necessary, separate legislation. For these reasons a separate legislative drafting exercise is needed.

For the above reasons this article should be deleted as should all references to information sovereignty and information security contained in this law.

Article 9. The rights of subjects of information relations

1. All ~~subjects of information relations~~ persons are guaranteed the right to freedom of thought and speech, free expression of their views and beliefs, which implies the possibility freely to generate, receive, gather, store, use, protect and distribute information, orally, in writing or otherwise, at their discretion. → **This provision should be included in the general statement of purpose at the beginning of the law, such as at Article 2.**

→ **We note that the right to information and to freedom of expression is a right of individuals (and legal persons) but not of the state. The current definition of "subjects of information relations" includes the state, and in any case we have recommended that this concept be removed from the law.**

2. All ~~subjects of information relations~~ persons have the right to access open access information. → **This provision should be included in the general statement of purpose at the beginning of the law, such as at Article 2.**

3. All ~~subjects of information relations~~ persons have the right to information which is necessary for the exercise of their rights, freedoms and legitimate interests or the discharge of their objectives and functions. → **This is an important point which underscores a particularly strong right where a legitimate interest is affected. It too should be included higher up in the law, suggest move to Article 2.**

Everyone is guaranteed free access to information that concerns them personally, except as the law may provide otherwise. → **This is an important point which merits a separate provision of the law.**

4. Access to information may be restricted only as prescribed by law in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection

of health, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. **→ This section should be moved to the dedicated Section on Exemptions that is proposed by the Narrative Analysis .**

5. The parliamentary control as respects the observance of the constitutional right of the person and citizen in information relations is exercised by the Commissioner for human rights of the Verkhovna Rada of Ukraine. **→ This is important and should be mentioned at the beginning of the law and then moved to a dedicated section on the role of the Human Rights Commissioner in overseeing the law.**

If there is to be a redrafting of the law we strongly recommend consideration being given to appointment of either an Information Commission (eg: France, Macedonia, Mexico) or an Information Commissioner (eg: UK, Slovenia, Hungary), whose role in both cases could include Personal Data Protection. More information on models for these can be provided as required.

Article 10. Guarantees of the right to information

The right to information is provided by–

- the duty of public authorities and bodies of local self-government to inform of their activities and decisions adopted; **→ This obligation could be mentioned in the opening of the law and then included in the Articles related to the proactive obligations, particularly Article 14.**
- free access of subjects of information relations to the statistical data, to the archival, library and museum funds and other information banks and data bases; any restriction of such access is stipulated in view only of the specific character of values and special conditions prescribed by law to ensure their safe custody; **→ This does not add anything to the right which should be to all information. With respect to the restrictions this is already covered by the Section on Exemptions, which could mention the need to preserve documents such as old and fragile documents. If something else is meant by this provision, then it's not clear what that is.**
- setting up of a mechanism whereby the right to information is exercised; **→ This law does that and so this sentence is redundant and should be deleted.**
- public control of observance of the requirements to access to and protection of information, and prescribed protection procedures; **→ This is the role for civil society on a voluntary basis and whilst the right to do that could be recognized in the principles section at the top of the law, it is not necessary to mention it here.**
- provision of responsibility for contravention of the legislation on information. **→ This is definitional and redundant. It should nevertheless be included in the section on Sanctions.**

Article 11. Definition of information activity

1. Information activity is the totality of actions aimed at the satisfaction of information needs of individuals, corporations, citizens' associations and the state. **→ This is redundant and does not fit with the concept of the right to information and should be deleted.**

2. With a view to the satisfaction of such needs public authorities and bodies of local self-government create information services, systems, networks, data collections, databases and databanks. **→ It is not clear why this provision is necessary, but if it is deemed to be necessary, it should be moved to a dedicated section related to the rights and obligations of the public authorities.**

The procedure for the their creation, their organisation, rights and responsibilities are defined by the Cabinet of Ministers of Ukraine, other public authorities and bodies of local self-government. **→ This also simply refers to other laws and should be included in a section on the rights and obligations of public authorities and other obliged bodies or should be deleted.**

Article 12. Main areas of information activity

1. The main areas of information activity are as follows: political, economic, legal, social, spiritual, environmental, scientific and technical, international, etc. ☒ **→ This is a completely redundant provision which simply repeats the definitions in Article 1. It should be deleted.**

The state is obliged to take constant care to provide for information security, timely creation, appropriate functioning and development of information services, systems, networks, collections, data

bases and data banks in all areas of information activity. ☒ → **As analysed elsewhere, the concept of information security should be removed from the law. The need to protect the physical information infrastructure of Ukraine should be subject to a separate law. The duties of state bodies to take care of their database and to back them up should be part of legislation relating to administrative procedures and archives, and not part of the access to information law.**
2. The state guarantees freedom of information activity in these areas to all individuals, corporations, and citizens' associations within the limits of their rights and freedoms, functions and powers. → **This is another redundant provision that should be deleted.**

Article 13. Main types of information activity

The main types of information activity are–
generation of information, i.e., any actions as respects the production, fabrication, creation, formation or formulation on one's own of information in any form and by any means;
reception of information, i.e. any actions as respects the obtaining, purchase or retrieval of information;
acquisition of information, i.e. any actions as respects the search for, accumulation of information, etc.;
storage of information, i.e. nondisclosure of information and any actions aimed at constantly maintaining information in some state, without loss of its attributes, properties, qualities; release of information only to a specified group of persons; implementation of measures aimed at the prevention of distortion, destruction or contamination of information and its material carriers;
use of information, i.e. any actions (application, utilisation, use) aimed at the extraction of data from information with a view to the satisfaction of information needs;
protection of information, i.e. the totality of legal, administrative, organisational, engineering and other actions to prevent loss, unauthorised access, distribution (leak), destruction, violation of integrity or alteration of information;
distribution of information, i.e. any actions as respects dissemination, publication, disposal or transfer of information in space and time, orally, in writing or otherwise, at their discretion.

→ **This entire Article is more definitional than actually establishing any statutory rights or procedures. As such it does not belong in the law at this point. As discussed in the Narrative Analysis accompanying this annotated text, it should be sufficient to assert in Article 2 that there is a right of access to information held by public bodies and that there is freedom of information and expression in the widest sense. For these reasons this Article is redundant and should be deleted.**

Article 14. Duty to publish information

1. Legislative acts and subordinate legislation, and international treaties are subject to promulgation in the official language in official journals. No law or regulations that define rights and duties of citizens commence earlier than the date of their publication in official journals.
2. Information administrators are obliged to publish information on:
1) organisational, functions, powers, primary objectives, areas of activity and financial resources (structure and volume of budgetary funds, procedure and mechanism of their spending, etc.);
2) legal and regulatory framework of their activity, and regulations adopted by the information administrator;
3) the list and terms of services provided by such bodies, their forms and sample documents, and the rules for filling out same;
4) the procedure of drawing up and submission information requests, that of appeal against decisions, actions or omission of information administrators;
5) general information on the system of registration, types of information kept by the information administrator;
6) the mechanisms or procedures whereby the public may represent their interests or otherwise to influence the policy making of the information administrator or his exercise of other of its powers;

7) reports, including reports on granting information requests, etc.
3. Any information on the facts that pose a threat to the life, health and/or property of persons, and also on the measures undertaken in connection therewith, and also information denouncing any earlier unreliable information is subject to immediate publication.

→ This is an excellent provision. We note that the Council of Europe Recommendation 2002(2) at Principle XI encourages the proactive release of information and many national Access to Information laws include such provisions. It is recommended that the Ukraine Government give serious consideration to elaborating this section further and we append the Hungarian e-FOIA law as an example of how this can be done.

→ We propose inclusion in this provision of references to proactive publication contained in other areas of the law, including for example that presently contained in Articles 28 and 29.

Article 15. Property rights to information products and information services

1. According to the legislation of Ukraine, information products and information services are objects of the property right.
Information product is a materialised result of the information activity that is intended for the satisfaction of information needs of citizens, public authorities, enterprises, establishments and organisations.
Information service is the undertaking in a form prescribed by law of information activity of furnishing information products to consumers with the purpose of satisfying their information needs.
The information products and information services of individuals and corporations engaged in information activity may be objects of commodity relations that are governed by civil and other legislation in effect.
The prices and pricing of information products and information services are negotiated, except as otherwise provided for by law.
2. Title to information obtained in consequence of such activity may be based upon the fact that such information has been obtained as a result of research, or created without outside assistance and on one's own account, or upon any contract stipulating transfer of the title to such information to another person.
3. The property right to the information obtained in consequence of such activity is regulated by this Law, the Laws of Ukraine 'On scientific and technical information', 'On copyright and neighbouring rights' and other legislative acts of Ukraine.
4. The property right to information obtained or generated by more than one individual or corporation is governed by the contract entered between them.

→ The aim of this provision is to confirm that the right to intellectual property continues to hold even when information is released by the government in response to an access to information request. For example, parents could request plans to a new school to be built in their neighbourhood that has been designed by an architect commissioned by the local authority. They should receive these plans but the architect's copyright will still protect the plans against any violations of his or her intellectual property rights in designing the new school. This could be made clear explicitly with a full redrafting of the language of this Article.
→ It should also be made clear that information produced by government and other public bodies that operate with public funds (with the tax payer's money) cannot be subject to copyright and should be freely available to all members of the public.

Section II
CATEGORISATION AND SOURCES OF INFORMATION

Article 16. Categorisation of information

Information in this Law is categorised according to the following principal attributes:

content;
method of recording;
mode of access;
reliability (objectivity);
currency or non-currency.

→ This Article provides definitions that do not add any value whatsoever to the law and will become redundant if other recommended amendments are included. For this, they can be deleted.

Article 17. Categorisation of information by content

In terms of content, information is arranged into–
information on a person (personal data);
reference and encyclopaedic information;
information on the state of environment (environmental information);
information on goods (works, services);
mass information;
scientific and technical information;
official information;
legal information;
statistical information;
sociological information, and so forth

→ This Article provides definitions that do not add any value whatsoever to the law and will become redundant if other recommended amendments are included. For this, they can be deleted.

Article 18. Categorisation of information by method of recording

The basic ways of recording information are:
handwritten, e.g., information is entered on record by hand on a material carrier;
printed, e.g., information is recorded on paper by means of polygraphy or in another way (using a type-setting machine, copying machine, printer device, etc.);
mechanical, e.g., information is recorded by means of a mechanical system of sound-recording (photographic, shorinophonic, phonographic) on phonographic cylinders, photographic film, metal disks;
magnetic, e.g., information is recorded by means of magnetic system of sound recording on magnetic tape, flexible disk, videocassette, etc.;
photographic, e.g., information is recorded by means of cinematographic or photographic equipment on film, glass or paper base;
optical, e.g., information is recorded on compact discs, optical photodocuments, permanent memory (ROM);
laser-beam, e.g., writing and reading of information on optical disks, CD-ROMs, compact discs or holograms is done by means of a laser beam;
electronic, e.g., the information is recorded in the form of electronic data (including mandatory data), which are displayed by electronic means or on paper in the form susceptible
of being perceived by a person (electronic book, electronic magazine, disk, etc.).

→ This definition of the various forms of recording information can be summarized in Article 1 in the definition of what is information and then will not be needed again after that.

Article 19. Categorisation of information by mode of access

1. By mode of access, information is arranged into open information and restricted access information.
→ This is another definition that does not add any value to the law and can be removed. It will become clear from the new articles on access and on restrictions which information is which. Furthermore, information does not fall neatly into one or other category: information that is restricted on one day to protect a legitimate interest may be made available one day, one week, or one year later. Such release may be determined either because the legitimate reason ceases to be valid or because it is still valid but subject to a public interest override. For this reason, the definition in this article is more likely to cause problems than help with the right of access to information and for this should be deleted.

2. The following types of information comes under restricted access information:
confidential information;
official secret;
state secret;
other secrets as provided by the laws of Ukraine.
→ This Article is not necessary as it is recommended to create a dedicated Section on Exemptions. For this reason it should be moved to the relevant article/ deleted.

3. The state makes provisions for observance of the requirements of the information legislation by all subjects of information relations in the process of access to information and prohibition of unreasonable classification of data by subjects of information relations.
→ This Article seems to require the government to ensure that public bodies respect appropriate classification of information and avoid unreasonable classification. As it stands, the provision is simply as statement of fact and does not below as a provision of the law. It is therefore recommended that this provision be amended to give responsibility for the Ombudsman or the Information Commissioner to observe such compliance with the law.

Article 20. Categorisation of information by degree of reliability (objectivity)

1. Valid information is the information that objectively (adequately) reflects a state, properties, qualities, attributes of subjects and objects (items, technologies, means, resources, etc.), facts, events, actions, phenomena and processes in the society, the state and the nature.
2. Inadequate information is the information which for some reason or reasons inadequately reflects a state, properties, qualities, attributes of subjects and objects (items, processes, technologies, resources, etc.), facts, events, phenomena and so forth.
3. Misinformation is intentional dissemination of inadequate information.

☒ **→ This is a highly problematic and dangerous provision. The concepts underlying this provision hark back to a soviet-style thinking about the validity, accuracy and completeness of information. As noted elsewhere, the government has an obligation to release information even when it is not complete or up-to-date or its accuracy cannot be verified: it is the right of the public to know what the government knows and that can form the basis for a debate about the quality of the information. To deny information on the grounds that it was not complete or up-to-date would be a serious violation of the right to information.**

We also note that the provision here on misinformation does not sit comfortably with the Section VI provisions on freedom of expression. Given that the latter are much more in line with the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights, we recommend that this provision here simply be deleted.

Article 21. Classification of information by currency or non-currency

1. Current information is the information on a current state, properties, qualities, attributes of subjects and objects (items, technologies, means, resources, etc.), facts, events, actions, phenomena and processes in the society, the state and the nature.
2. Retrospective information is the information on a past state, properties, qualities, attributes of subjects and objects (items, technologies, means, resources, etc.), facts, events, actions, phenomena and processes in the society, the state and the nature.
3. The legal regime of retrospective information is regulated by the Laws of Ukraine 'On libraries and the library science, 'On the National Archives and record offices' and other legal acts and regulations in this area.

→ This Article contains definitions that are more relevant to questions of whether and when information should be included in the Archives. There is a need to clarify if the Access to Information Law will apply to information held in the archives and then to amend this provision accordingly. We strongly recommend that the right to information does apply to all information held by all parts of government, with necessary provisos for access to historic documents that are in a delicate physical condition. The right of access as established by international law applies not only to current documents but to all documents held by public bodies, irrespective of their date of creation.

Article 22. Information on a person

1. Information on a person (personal data) is any information on a private individual enabling his identification. **→ This belongs in definitions but can be repeated here for clarity**.
2. Personal data, save for depersonalized personal data, is confidential information by mode of access unless otherwise provided by law. **→ This belong in the Section on Exemptions**.
3. Any relations pertaining to personal data are defined by the laws of Ukraine. **→ It is recommended that this law contain a specific Personal Data Protection section.**

Article 23. Reference and encyclopaedic information

1. Information of reference and encyclopaedic character are systematised, documented, publicly disseminated or otherwise distributed information as respects the life of the society, state and the nature.
2. The principal sources of such information are encyclopaedias, dictionaries, directories, advertisements and announcements, guidebooks, maps and charts, etc., and also the information released by authorised representatives of public authorities and bodies of local self-government, citizens' associations, organisations, their staff and information (automated) systems.
3. The system of such information and access thereto is governed by the library, archival and other branch legislation.

→ This Article does not add any value to the right to information. It refers mainly to information held by private bodies and so is not relevant to this law. Local self-government bodies should be included in the initial definition of bodies obliged by this law.
→ If there is concern that information requests may ask for information held in, for example, encyclopaedias held by public bodies, this can be resolved by a provision that information requests may be denied where the information sought is widely available from other sources. Care needs to be taken with such a provision to make clear that it does not apply to information created by the public body and/or directly related to its functions.

Article 24. Information on the state of environment (environmental information)

1. Information on the state of environment (environmental information) is the information on–
the condition of water, air, flora, fauna, soil and specific aspects of the nature;

any activity as respects harmful influence on such objects;
any activities or measures aimed at their protection.
→ This definition belongs in Article 1. It should be repeated for clarity in the Section on Exemptions of the law along with paragraph 3 below.
2. The legal regime of information on the state of environment (environmental information) is determined by the legal acts and regulations in this area. **→ If Ukraine has specific legislation under the Aarhus convention, there should be an exercise undertaken to ensure the harmonization of the Access to Information law and the access to environmental regulations law. See the Narrative Analysis for more detail on this.**
3. Environmental information may not be classified. **→ Excellent! This should be included in the Section on Exemptions in the redrafted law.**

Article 25. Information on goods (works, services)

1. Information on goods (works, services) is the information which describes quantitative, qualitative and other characteristics of goods (works, services). **→ Given that this is private information, it cannot be subject to this law and this provision should be deleted. The definition will be replaced by a general definition of information held by private bodies in Article 1 and by a new provision on access to information held by private bodies.**
2. The legal regime of this information is determined by the Laws of Ukraine 'On protection of consumer rights', 'On advertising' and other legal acts and regulations in this area. **→ This provision should be deleted.**
3. By mode of access, such information is open unless otherwise provided by law. **→ Given that this is private information, it cannot be subject to this law and this provision of general openness should be deleted.**
4. Any information as respects the influence of any goods (works, service) on the life and health of the person may not be classified. **→ There is an important concept here: all information held by private bodies that can affect the life or health of an individual should be provided to that person. See the recommendation on exceptional access to information held by private bodies in the Narrative Analysis .**

Article 26. Mass information and its media

1. Mass information is any publicly distributed printed or audiovisual information or the information distributed by mass media and means of mass communication. **→ This law is not the mass media law and does not need to deal with the mass media separately from any other private bodies (businesses, NGOs, etc). This provision should be deleted.**
2. The procedures of setting up (establishment) and organisation of work of mass media are determined by the laws on such media. **→ Exactly! This provision can be deleted.**
3. By mode of access, such information is open unless otherwise provided by law. **→ Given that this is private information, it cannot be subject to this law and this provision of general openness should be deleted. If the information affects the life, health or fundamental rights of a person, it will be subject to the general provision on that.**

Article 27. Scientific and technical information

1. Scientific and technical information are the documented or disseminated data on achievements of domestic and foreign science, engineering and manufacture obtained in the course of research and development, production and engineering, production and public activities.
2. The legal regime of scientific and technical information is determined by the Law of Ukraine 'On the scientific and technical information' and other legal acts and regulations in this area.
3. By mode of access, such information is open unless otherwise provided by law.
→ To the extent that this is private information, it cannot be subject to this law and this provision of general openness should be deleted. If the information affects the life, health or fundamental rights of a person, it will be subject to the general provision on that.

Article 28. Official information

1. Official information is the information resulting from the discharge of tasks and objectives by public authorities and bodies of local self-government and containing data on the decisions adopted by these bodies.
Unofficial information of public authorities and bodies of local self-government is deemed any matter pertaining thereto, which is not documented according to the existing forms and not entered upon registers (lists), produced or circulated in the course of their daily activities.
→ This is problem as it introduces new definitions that do not fit with other sections of this law nor with the definition of the Council of Europe which states: *"official documents" shall mean all information recorded in any form, drawn up or received and held by public authorities and linked to any public or administrative function, with the exception of documents under preparation.* (Recommendation 2002(2) Principle I on definitions)
2. The sources of official information are the legislative acts of Ukraine, other acts adopted by the Verkhovna Rada or its bodies, acts of the President of Ukraine, subordinate legislation and regulations, acts of bodies of local self-government, and other official documented information. **→ This provision also complicates the law. We refer to the recommended amendments of earlier sections of this law where we propose including the legislative bodies in the scope of the law. We recommend deleting this provision.**
The sources of and the procedure for creation, reception, acquisition, storage, use, protection and distribution of the information of public authorities and bodies of local self-government are defined by this Law and the laws on such bodies.
3. By mode of access, such information is open unless otherwise provided by law.
→ This law is about access to information held by public bodies, so this provision is simply a repetition of earlier articles and can be deleted without affecting the law.

Article 29. Legal information

1. Legal information is the totality of documented or publicly disseminated material as respects law, its system, sources, implementation, legal facts, legal relations, legal order, transgressions of law, crime reduction and prevention, etc.
2. The sources of legal information are the Constitution, others legislative acts and subordinate legislation and regulations, international treaties, mass media communications, public statements, other sources of information on legal issues.
3. By mode of access, such information is open unless otherwise provided by law. With the view to providing access to legislative and other statutory acts to individuals and corporations the state makes provisions for official publication of such acts for general circulation as soon as practicable after their adoption.
→ The sources of legal information as defined here, including the judiciary and information relating to public legal processes (not that held by private bodies) is now included in the earlier provisions of the law, so this provision can be safely deleted. The Article 14 provisions on proactive publication should include the active dissemination of such information.

Article 30. Statistical information

1. Statistical information is documented information that gives quantitative characteristic of mass-scale phenomena and processes occurring in the economic, social, cultural and other spheres of life of the society.
2. The official government statistical information is subject to regular dissemination.
3. The state guarantees open access of subjects of information relations to the official government statistical information, except for the information with lawfully restricted access.
4. The legal regime of the government statistical information is defined by the Law of Ukraine 'On government statistics' and other legal acts and regulations in this area.

→ This provision is unnecessary as the definition of information in Article 1 should include statistical information. It is recommended that the law on statistics be amended to fit with this access to information law. Article 14 provisions on proactive publication should include the active dissemination of statistical information.

Article 31. Sociological information

1. Sociological information is any documented, publicly disseminated or otherwise distributed information as respects the attitude of individual persons and social groups to social events and phenomena, processes, and facts.
2. The principal sources of sociological information are documented or publicly disseminated data showing the results of polls, sociological surveys and other sociological research.
3. Sociological research is carried out by public authorities and bodies of local self-government, and duly registered corporations, citizens' associations.
4. By mode of access, such information is open unless otherwise provided by law.

→ This provision is unnecessary as the definition of information in Article 1 should include such information held by government. Such sociological information held by private bodies cannot be included in the scope of the Access to Information law. It is recommended that information such as poll results and that of other surveys conducted by government (paragraph 2 above) be included in the Article 14 provisions on proactive publication.

Section III
MODE OF ACCESS TO INFORMATION

→ General note on this section: this is one of the important sections of the law because it regulates the mechanisms for access, along with Section IV. We have therefore made a number of comments in the text and the Narrative Analysis gives a better perspective on how the document should be restructured.

Article 32. Access to open information

1. Any information that has not been lawfully classified as restricted access information is deemed open. **→ Yes, this repeats the principles section and should be included in the Section on Exemptions.**
2. Access to open information is provided by:
- its promulgation in official journals;
- its distribution by mass media and means of mass communication;
- placement of information in information telecommunication systems, including the Internet, other networks and systems;
- its direct release to subjects of information relations on their request and distribution suo moto;
- dissemination by any another way not forbidden by law.

→ This provision confuses a number of concepts. First, it applies to proactive release of information not access to information in response to information requests. Second it focuses on the medium and not the right. It further confuses the dissemination of information by government and that by private bodies. As such, it does not add value to the section of the law dealing with the right of access to information.

To the extent that it refers to the right to disseminate information by any means, it is already established in the proposed revisions to Article 2.

3. The procedure and terms of providing information to subjects of information relations of their request are established by this Law or by contract (agreement) if the provision of information is carried out on the contractual basis. **→ This provision is not clear because contractual exchange of information between private parties is a different matter from the right of access to information and would be covered by contract law, or law regulating bodies such as telecommunications service providers (telephone companies, ISPs), etc. This provision should be deleted.**

4. Limitation of the right to receive open information is forbidden by law. → **This provision is not clear. It may refer to limiting information already in the public domain, which is fine, but not necessary here. Or it may be inaccurate because the right to information is limited by the exemptions established by this law, and by other laws. It should be deleted.**

Article 33. Access to restricted information

1. Any information access to which is lawfully limited by its owner or user and disclosure of which may inflict damage on subjects of information relations is recognised restricted information. → **The section on limitations is an important one that needs to be carefully drafted. This provision does not fit with any of the permissible exemptions established by the Council of Europe and by comparative international law. It should be deleted.**
2. It will be prohibited to classify as restricted any information as respects:
- the state of environment, quality of foodstuff and household items;
- accidents, disasters, natural calamities and other events of extreme character which have occurred or may occur and jeopardise the safety of citizens;
- the state of health of the population and their living standards, including nutrition, clothing, housing, health services and social security, and also the demographic indicators, state of legal order, education and culture of the population;
- situation with human and civic rights and freedoms, and also the facts of violation of such;
- unlawful actions of public authorities, bodies of local self-government, their officials and officers;
- other information access to which may not be restricted under the laws of Ukraine and international treaties ratified by the Verkhovna Rada of Ukraine.
→ **This is a good provision which should be included in the Section on Exemptions.**
3. Access may restricted to information, but not a record. Where a record holds restricted information, such parts of the record that do not contain restricted information may be released for inspection. → **Partial access is another important provision for the Section on Exemptions.**
4. Restricted information may be published without the consent of its owner under a court decision if such information is of public importance, i.e. if it is a matter of public interest and the right of the public to know the same overweighs the right of its owner to its protection. → **This is an interesting provision but contains a misconception: if the law refers to information held by public bodies, then the owner of the information is the public. If the information is that provided to public bodies by third parties, that must be made clear. It is recommended that this be moved to the section on third party information as well, possibly, as the Section on Exemptions. It is also recommended that there be a general provision on cases in which requestors or others can turn to the courts to request an order to release information, because as it is, this provision is sitting in a rather isolated position.**

Article 34. Access to confidential information

1. Confidential information is any matter in possession, use or at the disposal of private individuals, corporations or citizens' associations and is subject to dissemination on such conditions as they may stipulate.
2. Information in possession of individuals, corporations or citizens' associations which is of professional, business, production, banking, commercial and other nature or such as constitutes the matter of their professional, business, production, banking, commercial and other interest, where prescribed limitations do not apply to it, may be classified confidential.
3. Individuals, corporations, or citizens' associations that own confidential information which is not subject to lawful limitations define independently the mode of access to same, including whether or not it belongs to confidential information, and establish a system and methods of its protection.
4. The relations and terms of possession, use or disposal of the confidential information between corporations, individuals, or citizens' associations are defined by relevant contracts (agreements).
5. Where the state uses or disposes of the confidential information submitted by physical and legal persons, citizens' associations to public authorities, bodies of local self-government, enterprises,

establishments or organisations lawfully authorised to acquire, store or use such information, it ensures compliance with the established mode of access to such information.
6. Public authorities, bodies of local self-government, enterprises, establishments or organisations authorised by law to acquisition, storage or use of confidential information may not change its class to opened access information.
7. Public authorities, bodies of local self-government, enterprises, establishments or organisations authorised by law to acquire, store or use confidential information may not disclose such on request of any third parties without the written consent of the person who has submitted such information, except as provided by the laws of Ukraine.

→ On the one hand, this seems like quite a reasonable provision, establishing as it does the right of private persons (legal and natural) to define the confidentiality of their information. On the other hand, it is problematic because it fails to establish clear procedures whereby public bodies should consult with the originators of the information. It also fails to establish the criteria for deciding what information may be released by government without consultation. As such, it leave overly wide margin of discretion to the private bodies to determine which information should be defined as confidential.

It is therefore recommended that this provision be revised along the lines suggested in the Narrative Analysis on access to information from Private Bodies.

Article 35. Access to official secrets

1. Official secret is any information access to which is restricted by public authorities and bodies of local self-government. **→ As detailed in the Narrative Analysis , the future Ukrainian Access to Information law should establish a regime by which, upon a request, there is revision of the classification of any document or information. For this end we have proposed a number of changes to this current draft. These include consolidating the provisions on secrets into one section (Section on Exemptions) and redrafting that section. When this has been done, the provision here at 35(1) will not be needed and can be deleted.**
2. Any information which is included in the lists of official secrets must satisfy the following criteria:
- be used with a view to safeguarding the interests of the state;
- not to be a state secret or any other lawful secret;
- disclosure of such information may lead to a breach of constitutional rights and freedoms of the person and citizen, result in negative consequences in the domestic or foreign policy, economic, military, social, humanitarian, technological, environmental, and information spheres, those of national security border protection, obstruct work of public authorities and bodies of local self-government.

→ As noted at 1 above, this provision should be moved to the Section on Exemptions and redrafted. We note here, however, that it contains the basic elements of the exemptions, but that the interest to be protected always needs to be stated and needs to be in line with international standards as recognized by the Council of Europe, for example, national security, fair and effective administration of justice, commercial secrets, privacy.
3. The procedure of registration, storage and use of records and other data carriers containing aforementioned information, and also that of categorising official secret as opened access information is defined by the Law. **→ It is not clear here which law or laws is referred to. We recommend one provision in the Section on Exemptions referring to the state secrets law and no more. See Narrative Analysis for more details.**
4. Public authorities, bodies of local self-government, state enterprises, establishments and organisations may disseminate any matter constituting official secret on conditions stipulated by them.
☒ → This is a highly problematic provision and should be deleted. It implies that in addition to the law on official secrets, the listed bodies (local self-government, state enterprise, etc) may release classified information subject to conditions they establish on an ad hoc basis. This is a violation of the right to legal certainty and cannot be included in this or another law. The provisions should be clear for all, for those applying the law and for those receiving the information: either information is public or it is restricted. If it is restricted, that has to be for

protection of a specific interest, such as national security. It would be entirely unacceptable for, for example, a local government to release to a member of the public some information that is an "official secret" on the condition that it not be shared with, say, journalists, members of the opposition political party, or anyone else. As established clearly in the jurisprudence of the European Court of Human Rights, once information is in the public domain, its further circulation cannot be restricted.

5. Provisional transfer of official secret to the disposal of other public authorities or bodies of local self-government may be carried out only on lawful grounds**. → Exchange of classified information within government is a different matter from release to the public and, as noted in this provision, should be carried out in accordance with the relevant legislation. This should be moved to the new, consolidated article that refers to classification of information.**

6. Public authorities, bodies of local self-government, enterprises, establishments and organisations, irrespective of their pattern of ownership, may use official secrets of other subjects of information relations only within the limits of their powers, in compliance with the prescribed procedure and on the consent of the owners of such information. → **This paragraph is not clear, most likely because of the erroneous concept of the owners of the information. A clear distinction must be drawn between information that is generated by government and is classified in order to protect a legitimate interest (as defined in the Section on Exemptions) and information that is received by government from private third parties and is restricted either because it contains commercial secrets or personal data protection. For the latter, we are proposing new provisions on consultation with third parties in limited cases where it is necessary. For the former, this provision only repeats provision 5 above and is not needed. The provision should be delete.**

Article 36. Access to classified information

1. Classified information is any information which includes the matter constituting state or other lawful secret and the disclosure of which is damaging to the person, the society and the state is confidential. → **This provision will form part of the new Section on Exemptions and will be redrafted. As noted above, only information that is restricted with the goal of protecting a legitimate interest may be classified and this will be for a limited period of time while the exemption remains necessary in a democratic society. Such grounds for exemptions are established in the international standards as recognized by the Council of Europe, for example, national security, fair and effective administration of justice, commercial secrets, privacy.**

2. The social relations involved in categorising information as a state secret, classifying, declassifying of its material carriers, protection of the state secret and access thereto are defined by the Law of Ukraine 'On state secret'. → **It is likely that the Law of Ukraine "On state secret" will need to be modified in order to ensure that when there is a request for information, there is review of the appropriateness of the classification.**

3. Categorising of information as another lawful secret and restricting of access to it is done exclusively on the grounds of the law. → **This is a redundant provision as it repeats what has already been said.**

4. Provisions of this Article do not apply to official secrecy. → **This is a redundant provision as the redrafting of the law will clarify what may be kept secret and remove the distinction between official secrets and classified information, in line with the international standards established by the Council of Europe Recommendation 2002(2) and the future treaty on Access to Official Documents.**

Section IV
INFORMATION REQUEST

Article 37. An information request

1. An information request is a demand or a request to disclose ~~official~~ information available to the information administrators~~, an official record or its copy~~. → **This is fine although it repeats the**

definitions in Article 1. Suggest deleting as no added value and it's best to focus on the next sentences which is terribly important:

Everyone has the right to submit to an information administrator an information request as respects disclosing information whether or nor such information concerns him personally, without providing reasons for such request unless otherwise provided by law. ☑ → **This is a good and important provision in two respects, one is that it states "Everyone" may file and information request, and two is that it makes clear that no reasons need be given. This is exactly in line with the Council of Europe recommendation.**

→ This section below which is highlighted needs to be moved to a separate section on the bodies obliged by the law: see also the Narrative Analysis for more comment:

2. Information administrators for the purposes of this Law are–

1) public authorities, bodies of local self-government and also the executive authorities subordinated to same; ☑ → **Good but there needs to be a specific section on the bodies obliged by this law.**

2) economic agents in a dominant position in the market or those vested with special or exclusive rights, or those which are natural monopolies, where the information concerns the terms and price of delivery of goods or services and the prices for same; ☑ → **Good but there needs to be a specific section on the bodies obliged by this law.**

3) non-commercial companies financed from the state or local budgets, where the information concerns the use of budgetary funds. ☑ → **Good but there needs to be a specific section on the bodies obliged by this law.**

Also deemed information administrators under the obligation to publish and release information on information requests as provided hereunder are those economic agents which possess information as respects–

1) the state of environment; ☑ → **This should fit with the environmental access regulations and be guided by the standards established by the Aarhus Convention. For this reason a more careful redrafting of this will be needed and the Narrative Analysis suggests a reworking of the provisions of this law relating to the Environment.**

2) quality of foodstuff and household items; → **This is in principle a good provision in terms of the nature of the information, but has practical problems that are discussed in Narrative Analysis where other solutions are proposed as to how to define the bodies obliged by this law.**

3) accidents, disasters, natural calamities and other events of extreme character which have occurred or may occur and jeopardise the safety of citizens. → **Again, a positive provision but see comments in the Narrative Analysis .**

3. An information request may be an individual or a joint one. Such requests may be presented at the discretion of the requester orally or in writing, by mail, telecopier or electronic mail. ☑ → **This is a good provision which can me moved next to the paragraph 1 above. We presume that orally can be by telephone as well as in person.**

4. An oral information request is submitted as respects the release of a small amount of current information, or the release, where warranted by law, of information which is necessary for the prevention of illicit actions or emergencies. ☑ → **This is a reasonable provision. It should however state that if the public body is not able to answer an oral request immediately, it should set down the request and consider it as a written request. Furthermore, where requestors are unable to write a request for reasons of disability or limited literacy, they may file oral requests which should be set down by the public officials.**

5. On demand of a requester, who may not for good reason (physical inability, illness, limited literacy etc.) submit a request in writing, a person authorised by the body to which the request is made must execute such in writing, indicating without fail his full name, position, contact phone number, and provided a copy of such request to the requester. ☑ → **Yes, excellent, where requestors are unable to write a request for reasons of disability or limited literacy, they may file oral requests which should be set down by the public officials.**

6. The information administrator, except as otherwise provided by law, is obliged to advise the requester whether it is in possession of the information requested, irrespective of whether or not access to the information requested is restricted. ☑ → **This is a good and important provision but it needs to be clarified what the time limits are (see notes in Narrative Analysis on timeframes). If the**

body does not hold the information but knows who does, it should be under an obligation to transfer the request.

7. The specific requirements as respects the submission of information requests to public authorities, bodies of local self-government, and state establishments (including archives, etc.) and provision of replies to such requests are regulated by special laws. → **This might cause problems and confusion. We strongly recommend that the same basic right apply to all bodies with respect to the criteria for submitting a request and the timeframes for answering.**

8. Access to indexes of records, information banks and databases as respects the information which is in possession of information administrators is open, except as otherwise provided by law. ☑ → **Yes, this is excellent except that it is not clear what laws will provide for them to be closed. We recommend separating indexes of records (which should always be public) from other databases (which may or may not be public).**

Article 38. Requirements to an information request

1. A written information request may be submitted in a free format. ☑ → **Yes, this is very good and respects the right to request information.**

2. With a view to facilitate review of written information requests, requesters may submit their information requests by way of filling appropriate information request forms which are available at the information administrator and on the official web-page of the body concerned. The aforementioned forms must contain a brief instruction concerning the procedure of filing information request, etc. ☑ → **This is fine. In future the Information Commissioner might give guidance on these forms and review them to make sure they respect paragraph 1 of this Article.**

3. A request must have an indication of–

1) the full name (designation) of the requester, his postal address, and also a telecommunications number and an electronic mail address, if available; ☑ → **This is fine, although in other countries it is often only necessary to supply either a postal address or an e-mail address, so we recommend this option here as well. If the requestor is living abroad, the postal address will not be of much value anyway.**

2) the type of request, e.g. individual or joint; ☒ → **No, this is not really necessary. They can state it voluntary, but it should not be a legal requirement. As the Council of Europe Recommendation states at Principle V: *Formalities for requests should be kept to a minimum.***

3) general description of the information requested; ☑ → **Yes, this is perfect.**

4) signature and date. → **This is fine but there needs to be consideration that e-mail requests will not have a signature and should be accepted as such. It is too early to require electronic signatures, so we strongly recommend that this be deleted. The date will be the date of sending (by e-mail) or the postal stamp (or even recorded delivery mark) and requests delivered in person should be given a receipt with a registration number and date.**

We strongly recommend an additional provision requiring that immediately on receipt of a request, a public body much give a registration number to the requestor (in person, by post or by e-mail).

4. A petition for an urgent granting of the request must be grounded. ☑ → **This is fine.**

Proposed addition: . → The duty of public officials to assist requestors should be added to this provision. This duty includes help in formulating the request and making it narrow and clear enough to ensure that the information can be identified. After a request has been submitted, the public official may contact any requestor by phone, letter or e-mail to clarify the request. Such clarifications should be made within 5 days and the 15 day period will begin once the clarification has been made. If the requestor believes that the request is sufficiently clear, the public authority is under an obligation to accept this and to process the request.

Article 39. Term of review of information requests

1. Within five calendar days of the date of receipt of a request the information administrator advises the requester on the fee payable for the granting of the information or copies of the records requested, if the information is granted for a fee, on the possible grounds for waiving the fee for granting of the

information, and on the contact person responsible for granting of the information, or gives a reasoned refusal to grant the information. ☒ → **This is fine in theory but in practice will cause problems. As discussed in the Narrative Analysis , the fees may only be charged for the copying of information. It will be hard to know how much information is to be copied until it is ready for delivery. In which case, the time frame for informing the requestor of the fee should be the same as that for releasing the information. As noted in the Narrative Analysis , we also recommend that certain classes of information and the first 50 pages in any case are not charged for.**

2. Granting of a request may not exceed fifteen calendar days from the date of receipt of the request ~~unless otherwise provided by law or the contract (agreement) where the information is granted on the contractual basis~~. → **This is a complicated provision that should be drastically simplified. This law, as noted elsewhere, applies only to access to information held by bodies obliged under the law. It is not at all clear what kind of contractual relations are envisaged, but we note that such a provision is highly unusual for an access to information law.**

If a decision is made to extend such time, a written notice thereof must be served on the requester, specifying the procedure of appealing such decision within 15 days. → **This is a reasonable provision but should be moved to paragraph 3 below. The term of releasing a copy of an official record on request may not exceed five calendar days.** ☒ → **This provision is not at all clear and should be deleted – as noted above we are proposing to simplify so that the law applies to all "information held by public bodies", doing away with other distinctions as to the type of record.**

3. A decision to extend must be set forth in writing. Such a decision must specify:

1) the authorized person of the information administrator, responsible for reviewing of the information request;

2) the date of mailing or delivery of the notice of extension;

3) the reasons for which the record requested may not be provided within the term established herein;

4) the term within which the requested is to be granted.

4. The specified term of granting the request may be extended for up to one month, provided the reasons for such extension, in the event that the request involves the provision of a large volume of information or requires search of a significant amount of data.

5. The term specified in paragraph 2 above may be reduced where provided by law. → **This is not at all clear as it doesn't indicate what these cases may be. We strongly recommend harmonizing the timeframes across all of government and across all laws to give clarity and legal certainty. There would then be two timeframes: one for urgent requests and one for normal requests (including access to environmental information).**

Granting of information for inspection at the place of its storage is free of charge. ☑ → **This is fine, but it should be moved to the fees section!**

Article 40. Refusal to grant an information request

1. An information administrator may refuse to grant a request if–

1) the information requested is restricted information and the requester has no right of access to such information; ☑

2) the information administrator does not and should not own the information as respects which the request has been made; ☑

3) granting of the information request is impossible insofar as it is unclear from the content of the request which information sought by the requester; → **Yes, but in this case there is a duty to assist which need to be elaborated by the law. The Council of Europe Recommendation requires this.**

4) the requester has not paid the fee involved in the granting of the information request if a fee is prescribed, and has not requested waiver of the fee; → **This is reasonable provided that the section on fees is clarified and simplified.**

5) the necessary information has already been released to the requester, and the requester does not explain the reasons of a repeated request for information; → **This may seem to be reasonable but the problem is that the information may change over time. For example, if the requestor asks for copies of the expenditure budget of the local authority one month, and then two months later asks again for a copy of the expenditure budget, it should be clear that this is the same request but that the information will have changed. Another example maybe where the requestor**

resubmits a request because the first answer was not complete or satisfactory. There will be very few occasions on which requestors ask for the same information more than once, and even some of these may be legitimate (the author of this report has had cause to ask a local authority in the UK for a second copy of its budget because the first was given to an NGO for training purposes!) For this reasons we do not believe that this provision is necessary.

6) the information requested is unofficial information of public authorities and bodies of local self-government or constitutes part of the interdepartmental service correspondence (reports, service correspondence, exchange of letter between divisions etc.), where it related to the decision-making process and precedes adoption of decisions; ☒ → **This should be deleted because it is not an acceptable category of information. The decision-making exemption should be included in the Section on Exemptions.**

7) the information requested concerns field and investigative operations of the prosecutor's office, the Ministry of Internal Affairs, Security Service of Ukraine, operations of police investigators and courts, where its disclosure may jeopardise antiterrorist activities, operational measures, investigation or inquest, violate the rights of a person to fair and impartial trial of his cases, or pose a threat to the life or health of any person. → **This should be moved to the consolidated Section on Exemptions.**

2. A refusal must be set forth in writing.

A refusal must specify:

1) the authorized person of the information administrator, responsible for reviewing of the information request;

2) the date of refusal;

3) the reasons for such refusal.

☑ → **This is fine. The drafters of the law should add that every refusal should inform the requestor of their rights of appeal and of the mechanisms for doing so.**

3. A body to which a request is made is not under the obligation to give access to records at the place of their storage. ☒ → **This contradicts the right to inspect documents in situ and goes against the Recommendation 2002(2) of the Council of Europe which clearly states at Principle VII that "*When access to an official document is granted, the public authority should allow inspection of the original or provide a copy of it, taking into account, as far as possible, the preference expressed by the applicant.*" and also that on-site inspections should be free of charge (Principle VIII).**

Article 41. Fee for granting of information on request

1. Any information the disclosure of which does not involve any additional processing of the sources is provided free of charge. Where granting of information is subject to payment of a fee, review of a request for information does not commence before the fee is paid or the right to exemption from the payment of such is substantiated. ☒ → **This is an impossible provision because the fees should be for copies and it is not possible to determine the level of the fee until after the request has been processed.**

2. Where the disclosure of information involves additional processing of the sources, a fee is collected the amount of which is defined by the Cabinet of Ministers of Ukraine. ☒ → **This provision is not clear but in any case does not fit with the normal provisions of an access to information law.**

3. A fee for disclosure of information may not exceed the actual cost involved in the granting of the request**.** → **This is fine but should refer to copies, following the language of the Council of Europe Recommendation 2002(2) which states at Principle VIII that:**

A fee may be charged to the applicant for a copy of the official document, which should be reasonable and not exceed the actual costs incurred by the public authority.

We recommend that the law establish that information which must be published proactively and the first 50 pages of copying are provided free of charge (we note that the cost of collecting small payments is often more than the monies recuperated and this should be calculated for the Ukrainian administration).

4. In the event that a requester has a lawful right to be exempted from the payment of fees for disclosure of information, he should submit copies of the documents that confirm such right together with the request. ☒ → **This law completely fails to establish what the criteria might be. Either this law makes a specific reference to other laws, or – better - it should mandated the**

Ombudsman or Information Commissioner to define the criteria for exempting indigent and other requestors from having to pay a fee.

5. A requester of information may seek waiver of the fee from the information administrator. The information administrator may decide to provide the information free of charge inter alia where the information is necessary for the requester to exercise his rights and freedoms or to discharge his duties or if requester is difficult circumstances. ☒ → **As noted above, this law needs to clarify the criteria because "difficult circumstances" is not a clear legal term and there is no reference to what proofs might be needed to demonstrate this. It is recommended that the Ombudsman or Information Commissioner be mandated to define the criteria for exempting indigent and other requestors from having to pay a fee.**

Article 42. Index of records held by the information administrator

1. With a view to ensuring security and access to information the records held by the information administrator are subject to obligatory registration in the index of records.
2. The index is created by order of the head of the information administrator.
3. An index must contain the following data:
1) the title of the record;
2) the date of creation of the record;
3) the date of receipt of the record;
4) the source of information;
5) the category of information by mode of access;
6) the grounds and reasons for categorising of information as restricted information;
7) the period of restriction of access to information;
8) branch;
9) keywords;
10) type (legal act, treaty, decision, record of minutes, report, press release, draft decision, memorandum, petition, application, submittal, proposal, letter, etc.);
11) the form and place of storage of the record etc.

☑ → **This seems fine, except that point 5 can be deleted as it is not relevant, and point 6 should be in line with other provisions of this law and the law on state secrets, etc. Point 7 is positive but nevertheless as the Section on Exemptions notes, the classification should always be reviewed on receipt of a request.**

4. An index does not include accounting records and service correspondence. → **Why not?.**
5. Access to indexes of records may not be restricted. ☑ → **Good.**
6. Historic records are filed in conformity with the prescribed procedure. → **This is fine and as noted elsewhere there should be a review to harmonize the archives law and this law.**

Section V
APPEAL OF DECISIONS, ACTS OR OMMISSION OF INFORMATION ADMINISTRATORS

Article 43. The right to appeal decisions, acts or omission of information administrators

1. An appeal against a decision, act or omission of any information administrator as respects access to information may be lodged with a superior body, an office of public prosecutor or a court of law.
2. Appeal lies with–
1) refusal to grant an information request;
2) failure to disclose information;
3) release of inadequate or incomplete information;
4) late disclosure of information;
5) other decisions, acts or omission of an information administrator which have infringed on the legitimate rights or interests of the requester as respects access to information.

3. Everyone has the right to address the Commissioner of the Verkhovna Rada of Ukraine for human rights, as provided for by the special law, with a complaint on violation of his information relations rights.
☑ → **This is a good provision. The failure to answer a request at all should be added to the list. The appeal mechanism is good unless an Information Commissioner is established.**

Section VI
PROTECTION OF INFORMATION. LIABILITY FOR CONTRAVENTION OF INFORMATION LEGISLATION

→ **While very laudable, the purpose of this Section is not clear! This law is an access to information law and the provisions relating to mass media and freedom of expression rights should be moved to other legislation. If such other legislation does not exist, then it may be considered here, but we assume that such legislation exists as it has been referred to elsewhere in this law.**

With respect to the right of access to information it would be sufficient to say that when a requestor receives information from a public body, the requestor enjoys full freedom of opinion and expression rights, that include dissemination of the information received, citing from part of it, criticizing it, and using it as reference in whatever way the requestor chooses.

Article 44. Prohibition of censorship and of interference in the professional activities of journalists and mass media by public authorities or bodies of local self-government and their officials

1. Censorship and interference with the professional activities of journalists and mass media by the founders (co-founders) of mass media, public authorities or bodies of local self-government and their officials is prohibited.
2. Freedom of activity of journalists and mass media is regulated by the Constitution of Ukraine and laws of Ukraine.

Article 45. The responsibility for contravention of the information legislation

An offender of the legislation of Ukraine on information is subject to disciplinary, civil, administrative or criminal liability as provided for by law.

Article 46. Exemption from liability

1. Nobody may be subject to liability for a value judgment.
2. Value judgements, save for insulting or slanderous remarks, are the statements that do not contain facts, e.g., criticism, judgement of actions, and also statements which are not susceptible of being construed as a fact in view of their characteristic use of language, such as hyperboles, allegories or satire. Value judgements are not subject to retraction and proof.

Article 47. Compensation of pecuniary and moral damage

Compensation of pecuniary and moral damage by a subject of information relations is governed by the legislation of Ukraine. → **It is not clear if this provision might relate to the failure to respond to an information request. In any case, as we note in the Narrative Analysis , a Section on Sanctions is needed.**

Section VII
INTERNATIONAL INFORMATION ACTIVITY. COOPERATION WITH GOVERNMENT, FOREIGN AND INTERNATIONAL ORGANISATIONS IN INFORMATION DOMAIN

Article 48. International information activities

1. International information activity is the provision of individuals, corporations, citizens' associations, public authorities and bodies of local self-government with official information on the foreign policy activity of Ukraine, on events and developments in other countries, and also purposeful distribution of all-round information on Ukraine outside Ukraine by public authorities and citizens' associations, mass media and citizens. ☒ → **As noted earlier, the concept of "international information activity" is an alien concept in European human rights law. International law clearly establishes that the free flow of information should be "regardless of frontiers" and the right to information may be excercised by any citizen globally. This provision should be deleted.**
2. Everyone has the right to free and unimpeded access to information through foreign mass media, including direct television broadcasts, radio and the press. → **This is fine and fits with the laudable provisions on the previous section but the purpose inside this law is not clear.**
3. The legal status and professional activities of foreign correspondents accredited in Ukraine and other representatives of foreign mass media is regulated by the laws of Ukraine, relevant international treaties of Ukraine ratified by the Verkhovna Rada of Ukraine. → **This is also very good but not clear why it is here.**
4. Creation and operation of joint information organisations by domestic and foreign physical and legal persons is regulated by the laws of Ukraine**.** → **This is also fine but presumably other laws regulate this in detail and so this is not necessary here!**

Section VII.
TERMINAL PROVISIONS

This Law commences on the date of its publication. ☑ → **Good.**