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**ACCESS TO INFORMATION IN ALBANIA: THE CURRENT
LEGAL/INSTITUTIONAL FRAMEWORK AND RECOMMENDATIONS FOR
REFORM**

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INTRODUCTION/EXECUTIVE SUMMARY

This paper considers briefly the current Albanian legal and institutional framework in place for guaranteeing the right of citizens to information held by public authorities, and in particular recommendations by the Open Society Justice Initiative for amendments to the current Law on Access to Official Documents, formulated in 2007 (hereinafter, JI Opinion);. This opinion also takes into account the provisions of the Council of Europe Convention on Access to Official Documents, which opened for ratification in June 2009 and currently has five ratifications of the ten needed for it come into force. The Convention was at a drafting stage at the time the Justice Initiative recommendations were formulated.

During the drafting of the 2011-2013 Action Plan for the Implementation of the Government Strategy for Preventing and Fighting Corruption and for Transparent Governance, on PACA's recommendation measures were included whereby institutions subject to the Action Plan should define in writing by June 2011 what constitutes an official document for the purposes of implementation of the Law on Access to Official Documents, and take steps to ensure pro-active publication of such documents on their official websites. PACA is unaware of any implementation of these measures. Second, PACA has observed the process of monitoring the implementation of the 2010 Anti-corruption Action Plan, coordinated by the Open Society Foundation Albania, in which monitoring encountered significant and in some cases severe problems due to the failure of ministries to provide information. For these reasons PACA believes that reform of the current legal and institutional framework governing access to official information is needed.

DEFINITION OF 'OFFICIAL DOCUMENT'

The JI opinion recommends that the definition of 'official document' is altered to make it clearer and in line with the (then draft) CoE Convention, which opts for a very wide definition as 'all information recorded in any form, drawn up or received and held by public authorities' (Art. 2.b). The expert agrees with this recommendation, as it is necessary to ensure compliance with the Convention. The Albanian law is based on a traditional type of freedom of information law wording, as it establishes the right of access to official documents rather than to official information; the CoE Convention rightly reflects the fact that laws should ensure the right to information, and therefore defines 'official document' as widely as possible.

COVERAGE

The current Law establishes the obligation of 'every organ of state administration and public entities' to provide information, and as the JI opinion notes, this creates uncertainty as to which entities precisely are so obligated. The CoE Convention mandates that the obligation to provide information relates to public authorities, and defines these (in Art. 2.a.i) as:

- government and administration at national, regional and local level;

- legislative bodies and judicial authorities insofar as they perform administrative functions according to national law;
- natural or legal persons insofar as they exercise administrative authority.

Clearly, the Albanian law should establish the obligations of the entities listed above. These obligations are clearly minimum requirements of the Convention, which also states explicitly (Art. 2.a.ii) that state Parties may also include in the definition of 'public authorities one or more of the following:

- legislative bodies as regards their other activities;
- judicial authorities as regards their other activities;
- natural or legal persons insofar as they perform public functions or operate with public funds, according to national law.

The JI opinion recommends that the Albanian law establishes that information obligations apply to the third of these categories. The expert strongly agrees with this: such a provision would ensure that entities such as CEZ, whose operations are arguably of more importance for the average citizen than some ministries, are subject to obligations of full transparency.

LIMITATIONS/EXCEPTIONS TO ACCESS TO INFORMATION

The CoE Convention recognises that state Parties may limit the right of access to information, but states clearly that such limitations be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

- a. national security, defence and international relations;
- b. public safety;
- c. the prevention, investigation and prosecution of criminal activities;
- d. disciplinary investigations;
- e. inspection, control and supervision by public authorities;
- f. privacy and other legitimate private interests;
- g. commercial and other economic interests;
- h. the economic, monetary and exchange rate policies of the State;
- i. the equality of parties in court proceedings and the effective administration of justice;
- j. environment; or
- k. the deliberations within or between public authorities concerning the examination of a matter.

As the JI Opinion underlines, the Albanian Law on Access to Official Documents exhibits a major flaw in that it does not clearly define exception/limitation on the right of access to official documents, but merely states that a public authority shall be obliged to provide the requested information "unless otherwise provided for by law." The expert therefore agrees that the law should at a minimum be amended through the addition of an article that clearly lays out such exceptions, and that the other

principles listed in the JI Opinion should be followed when drafting that article. The expert also recommends that Article 10 of the law is amended such that institutions, when rejecting a request for information, must state the reasons for doing so in writing, specifically and referring to the relevant articles of the Law on Access to Official Documents (and other laws if the provisions of the former refer to the latter).

In addition, the expert also agrees with the comments of the JI Opinion regarding the need for access to information requests to be judged on a case-by-case basis, *even where* one of the criteria for access to be limited is met. That is to say, where the public interest outweighs the private damage flowing from granting an information request, the information should be provided. The expert therefore agrees that this increases the importance of establishing clear criteria for limiting access to information, and also recommends that the Law should include a 'public interest' provision to ensure that decisions on whether to provide information are made on a case-by-case basis.

OTHER OBLIGATIONS

The expert has the following comments regarding the other recommendations of the JI Opinion concerning the obligations of public authorities to provide information.

- Deadlines. The expert agrees that the Albanian law establishes an unnecessarily complicated two-stage set of deadlines, and that these deadlines - 15 days to decide whether to grant a request, and 40 days to provide the information, extendable by 10 days if necessary – are unjustifiably long. The expert also recommends that a simple deadline for satisfying (or denying) an information request is established, such as 10 or 15 days with the option of one extension of the deadline if necessary.
- Duty to assist a requester. The expert also agrees that the law should contain an explicit obligation of the authority from which information has been requested to assist the requester to identify the documents s/he is requesting, in the event that s/he is unable to explicitly identify them.
- Format of information provided. The expert would go further than the JI recommendation (which is to ensure in the law that the requester is given documents in his/her preferred form, including electronic, unless this presents considerable technical difficulties). In order to fully implement the provisions of the CoE Convention, the law should also i) ensure that the applicant can choose between inspecting the original of the document or a copy, or to receive a copy in any available form or format of his/her choice unless the preference expressed is unreasonable; ii) where a limitation applies to some of the information in an official document (see Section 4 above), the authority should grant access to the remainder of the information the document contains, with omissions clearly indicated (e.g. by blacking out).
- Costs of providing information. The expert agrees that the current wording of the law is ambiguous and risks allowing authorities to charge unreasonable fees for

providing documents, and agrees with the JI recommendation to amend Article 13 to allow charges that are no higher than the actual and reasonable costs of reproduction and mailing of documents.

STRUCTURES FOR IMPLEMENTATION OF THE LAW

The JI Opinion also forwards recommendations concerning the following issues:

- Institutionalisation of public information offices. Although the law requires in a general sense that public authorities “establish structural and practical facilities for the receipt by the public... of information on official documents”, it is not clear whether all authorities have done so. Moreover, the experience of NGOs in securing access to official documents is highly variable across different institutions, suggesting a lack of a unified approach to ensuring access. The expert therefore strongly supports JI’s recommendation to establish more clearly in the Law the obligation of every public authority to establish a public information office, and to also define the responsibilities of these offices.
- Complaints/appeals. Access to Information regimes usually establish one of two possible channels for appeals against the decisions of public authorities (for example to deny access to an official document), following appeal to the authority itself: standard appeals through the courts, or appeals to a specifically-defined authority. The latter may be an already-existing authority, such as the Ombudsman, or may be created especially for the purpose – such as a dedicated Information Ombudsman. The JI Opinion rightly notes that access to information regimes function better where first-instance appeals are dealt with by a non-judicial authority with specifically-defined duties to carry out this role. The expert therefore fully agrees with the recommendation to allocate the function of dealing with dispute to the Ombudsman (which already has a general duty to implement the Law on Access to Official Documents), including providing him/her with powers to issue binding decisions (i.e. giving the Ombudsman the powers of an appellate body). This is an explicit recommendation of Article 19, the most prominent and respected international NGO engaging on freedom of information issues. Where parties to a dispute disagree with the decision of the Ombudsman, they will still have the option of appealing his/her decision to an ordinary court, which may still result in protracted proceedings. The expert believes (also on the basis of the experience of other countries, such as Hungary) that if the Ombudsman is allocated this role, then the problem of extended judicial appeal processes will become much smaller, for two reasons. First, citizens refused access to information will be less unwilling to appeal against such decisions because the first instance will be the Ombudsman. Secondly, decisions of the Ombudsman typically create a wider understanding of the practical interpretation of the law (i.e. legal certainty), which should reduce the risk of both futile court appeals and lengthy court processes.
- Sanctions/compensation. Currently, it is clear that institutions or officials that refuse to provide information suffer no negative consequences, and it appears that there is not even a clear legal framework in place to define sanctions or compensation. The expert therefore agrees that the Law on Access to Official

Documents should be amended to include specifically defined sanctions, to raise awareness and create incentives for institutions to meet their obligations.

ADDITIONAL ISSUES

In addition to the issues raised and recommendations forwarded by the JI Opinion, the consultant also forwards the following points and recommendations.

Active dissemination of official documents

Articles 8 and 9 of the Law establish or purport to establish obligations of public authorities to provide certain information on a pro-active basis. Article 8 ('Official documents available without a public request') states the following:

Public authorities shall make available to the public in sufficient quantity and appropriate formats, official documents which facilitate the information of public on their activity, such as:

- information as where its central and local organs are situated, the employees from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

- rules and methods on how different forms can be obtained, and instructions as to the scope and contents of all papers and documents as well as instructions how this forms are filled;

- general legal rules based on which the subject operates as well as the adopted policies and the changes thereon;

- statements on methods and procedures by which its functions are channeled and determined.

Article 9 (Documents prepared in advance) states the following:

In compliance with the existing legislation, regulations and other publicly known rules, public authority shall make available for review and duplication, in anticipation of any request from the public, the following official documents:

- final decisions on a given case, including concurring and dissenting opinions as well as orders implementing them;

- administrative staff manuals and instructions to staff that affect a member of the public;

- copies of data that have been given priory to at least one member of the public, regardless of their format and which the public authority estimates that it will be important for other persons;

- indexes or registers of official documents.

While these articles are a good initial basis for encouraging pro-active provision of information, the expert believes that the passage of time has made them clearly insufficient. Specifically:

- The phrase ‘make available to the public in sufficient quantity and appropriate formats’ in Article 8 is not sufficiently specific, while the phrase ‘make available for review and duplication’ in Article 9 is also not specific. Neither of these provisions ensures that institutions are obliged to provide the information listed in a specific and widely available format. It is therefore recommended that the Law is amended to establish that institutions are obliged to provide all the information listed in Articles 8 and 9 on their websites. Such a provision will not remove the need for institutions to take special measures to ensure that information that is needed by citizens who are unlikely to have internet access (for example pension rights, or rights to social housing) is disseminated adequately.
- The information that is listed in the two articles is not sufficiently specific in a number of cases, in particular the phrases: ‘adopted policies and the changes thereon’; ‘final decisions on a given case, including concurring and dissenting opinions as well as orders implementing them’; ‘administrative staff manuals and instructions to staff that affect a member of the public’; ‘copies of data that have been given priority to at least one member of the public, regardless of their format and which the public authority estimates that it will be important for other persons’. It is recommended that these are altered to, respectively: define which types of decisions are to be available; ensure that staff manuals and instructions are available unless they fall under one of the exceptions that the Law should establish (see Section 4); and to remove the qualification ‘which the public authority estimates will be important for other persons’.
- Although Article 9 obliges authorities to provide access to ‘indexes and registers of official documents’, it is not clear how this is to be implemented - for example, to access the original copy of a Council of Minister’s decision.
- In addition to the information listed, the expert believes that it is extremely important for public authorities to be obliged to provide online up-to-date versions of all legal and sub-legal acts that relate specifically to them. In specific terms, for example in the case of the Border Police, this would *inter alia* include the legal framework governing the residency of foreigners in Albania, sub-legal acts defining the exact procedures for applying for residence (as well as template application forms), etc. More generally, this may require a more centralised/coordinated approach of the Ministry of Justice or Council of Minister, as there currently appears to be no procedure for ensuring that consolidated versions of laws are available in Albania at all.