Annex 1

Twinning Project "Implementation of the best European practices with the aim of strengthening the institutional capacity of the Apparatus of the Ukrainian Parliament Commissioner for Human Rights to protect human rights and freedoms (Apparatus)"

No. EuropeAid/137673/DD/ACT/UA

Activity 2.2.5. Drafting Guidelines for the Public Authorities on the Provisions of Information to the Society and News Media

Title of Document	Guidelines for the Public Authorities on the Provisions of Information to the Society and News Media
Short description of document	Guidelines for state and municipal institutions on the fundamental principles for the provision of information aims to encourage authorities to be open for the society and involve the public in decision-making processes. Furthermore, the elaborated principles overview the rules for weighing competing values to make the information as accessible as possible for the society. The guidelines will explain how to consider competing values to strike a balance between core ideals protected by national and international human rights standards.
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Communication strategy

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1 Introduction

1. In democratic societies the media plays a particularly important role not only by informing the public about domestic or global events but also by providing an opportunity for people to implement their civil rights – to participate in the relevant decision-making process. Various news in the media have both a direct and indirect influence on democratic processes in society;
2. On numerous occasions, the European Court of Human Rights (ECtHR) has stated that freedom of expression and discussions constitute one of the essential foundations of a democratic society. The ECtHR has recognised that the public has the right to be provided with information of a general interest; therefore, in such cases where the dissemination of information of a public interest is addressed, the ECtHR is particularly careful to consider the measures applied by national institutions that potentially deter the media from participation in the public discussion on any matters that are of concern to the public[1].
3. The ECtHR has clarified that the exemptions from the right protected under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[2] must be defined narrowly and any need for such restriction must be convincing. Furthermore, the ECtHR has stated that the restriction must be proportionate to the legitimate aim pursued – the State must apply the least intrusive measure to achieve that objective. Besides, the restriction must be based on "relevant and sufficient" grounds[3].
4. The Law of Ukraine on Access to Public Information in Article 6 § 1 lists categories of information with restricted access (confidential information, secret information, information for internal use only). This provision, however, does not provide for an absolute exemption from disclosure and, when the grounds for restricting access indicated in Article 6 § 2 (restriction should serve one of the legitimate interests, disclosure should cause harm to those interests, the harm from disclosure should exceed the interest in receiving information) cease to exist, Article 6 § 4 requires that restricted

[1] Human Rights Monitoring Institute, The Right of Access to Information in Lithuania: Challenges and Opportunities (2014), available at: http://hrmi.lt.wp-content/uploads/2016/08/Teise_gauti_informacija_ZTSI_2014.pdf
[2] European Council. Convention for the Protection of Human Rights and Fundamental Freedoms (1950). Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf.
[3] Ibid.

information shall be provided by the information processor. The above law also (1) provides for a list of categories of information access to which cannot be restricted except in very limited cases (Article 6 § 5) and (2) indicates the type of information access to which does not belong to the category of restricted information because it serves the interests of preventing corruption (Article 6 § 6 where a reference is made to the rules and exceptions provided in the Law on Prevention of Corruption).

5. The principles of good governance stipulate that each public institution should be accountable, open and transparent, uphold the rule of law; therefore, the public institutions must follow the principle that all information is public, unless otherwise provided by law. Under the ECHR, in order to be justified, an interference with the right to freedom of expression must be "prescribed by law", pursue one or more of the legitimate aims mentioned in Article 10 § 2, and be "necessary in a democratic society."[4]
6. The most recent definition of the public interest provided by the ECtHR is as follows: "[t]he public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about."[5]

2 The evaluation of requests to access public information

7. In evaluating a request of information form the public authorities, it is necessary to find out the status of the person asking for public information, which, according to the ECtHR ruling, might be decisive element in deciding whether the information should be provided.
8. Attention should be paid to the criteria used by the ECHR to define the scope of the right to access information in the absence of the clear textual basis for this right in the ECHR. In particular, in *Magyar Helsinki Bizottság v. Hungary*[6] the ECtHR identified the purpose of the information request (information sought has to be necessary for the exercise of freedom of expression), the nature of the information sought (information sought must

[4] ECHR, *Magyar Helsinki Bizottság* v. *Hungary*, Grand Chamber judgment of 08/11/2016, § 181.
[5] ECHR, Magyar Helsinki Grand Chamber judgment, § 162.
[6] Ibid., §§ 157-170.

generally meet a public-interest test, e.g. provide transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allow participation in public governance by the public at large), the role of the applicant (whether the person seeking access to the information in question does so with a view to informing the public in the capacity of a public "watchdog") and the readiness and availability of information (involving an assessment of the burden for authorities in gathering information) as such criteria.

Law on the Right to Obtain Information from State and Municipal Institutions and Agencies of the Republic of Lithuania[7] guarantees the right of persons to obtain information from state and municipal institutions and agencies; however, the Law on the Provision of Information to the Public of the Republic of Lithuania[8] (Article 6(5)) entrenches the rights of the journalist as a special legal entity to obtain information in an expeditious manner because the public information producer has not only the right of access to information but also a professional duty to inform the public about any events or matters of public concern.

2.1 Principles of information provision

9. Furthermore, in evaluating a request of information form the public authorities, it is necessary to consider all legal possibilities for providing requested information and, if this information cannot be provided, to find and clearly state the legal basis on which the data cannot be provided for an applicant. All in all, the denial of access to information should be substantiated and justified.
10. For national regulation of access to information and practices of public authorities to comply with the best standards for the protection of this right, they should be based on the fundamental principles of the right to information. These principles evolved from the norms of international and regional law, the principles of good practice in various countries and the general principles of law.
11. The most important of these is the principle of maximum disclosure, which means that the maximum amount of information available to public authorities should be open to the public. Access to information should be a rule, and failure to provide it – an exception.

[7] Law on the Right to Obtain Information from State and Municipal Institutions and Agencies, available at https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.440732?jfwid=rivwzvpvg
[8] Law on The Provision of Information to The Public, available at https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/2865241206f511e687e0fbad81d55a7c?jfwid=1clcwosx33

Furthermore, the right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions.[9]

12. Other principles of the right to receive information establish the following duties of the state:
    a. **Proactively publicize information –** Institutions should have a duty not only to provide information on persons 'complaints, but also proactively publicize information related to the performance of their functions that is in the public interest, for example, the content of institutions' decisions having an impact on the public.
    b. **To promote Open Governance –** The state must cultivate a culture of openness in state institutions as a basic premise for efficient and accountable governance.
    c. **Apply narrowly defined exceptions to the non-disclosure of information –** Exceptions should be narrow and, as far as possible, defined in detail, and appropriately balanced between different interests - the right of the public to know the information with public or private interest in protecting information.
    d. Establish such information provision procedures t**o respond to requests for information quickly and comprehensively –** It is not obligatory to indicate the purpose for which the information is requested unless there are sound reasons; otherwise, access to information would be unduly burdened by the creation of an additional barrier for applicants.
    e. Ensure effective appeals procedures for decisions to provide / refuse to provide information – The applicant should know where and how to appeal the decision of authorities denying access to information. Furthermore, such decisions should be justified and provided with information on appeals procedures.
13. The exception to the provision of information is the extreme form of limiting the right to information, but the application of exemptions does not mean that the person, in general, loses the right to such information. Paragraph (1) of Article 3 of the Council of Europe

[9] UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression (2004), Joint Declaration on International Mechanisms for Promoting Freedom of Expression, available at https://www.osce.org/fom/38632?download=true

Convention on Access to Official Documents provides that the application of limitations must be "necessary in a democratic society" and "proportionate" to the aim to be pursued.[10]

14. These standards derive from Article 10 (2) of the ECHR and the case law of the ECtHR on freedom of information where the ECtHR conducts the so-called three-tier test and checks whether, in a specific case, the restriction of the freedom of information imposed by public authorities:
    a. was foreseen by law;
    b. it sought at least one of the objectives set out in Article 10 (2) of the ECHR;
    c. the limitation was necessary and proportionate for this purpose to reach.[11]

Although the practice of the Lithuanian courts in the field of access to information is not sufficient, the Supreme Administrative Court of Lithuania has advocated the limits of the discretion of state institutions without providing specific information. The Supreme Administrative Court examined the applicant's weekly "Veidas" complaint against the Ministry of Finance. The petitioner disputed that the ministry illegally refused to provide information related to loans received by the Ministry on behalf of the state. The Ministry reasoned its refusal to provide information by indicating it was a commercial secret. Both the Law on the Right to Obtain Information from State and Municipal Institutions and Agencies and the Law on The Provision of Information to the Public provide for commercial secrecy as one of the exceptions to the provision of information.

Thus, the Court clarified that it is not enough merely to indicate that the information is not accessible implying the commercial secret as a ground for the exception to the provision of information. The non-disclosing entity must substantiate that the information is, in fact, a commercial secret, and the court's duty in such a case is to verify whether the information meets the characteristics of commercial secrets established by legal provisions. For instance, whether the subject of the secret legitimately and reasonably recognized this information as a commercial secret thus limiting the constitutional right of individuals to this information.[12]

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[10] Council of Europe (2009) Council of Europe Convention on Access to Official Documents, available at https://rm.coe.int/1680084826

[11] For more detailed information on "balancing test" consult the Guidelines for Civil Servants on Balancing Privacy and Access to Public Information, available at http://www.twinning-ombudsman.org/wp-content/uploads/2017/03/EN_Annex-9_Guidelines-on-balancing-privacy-and-access-to-public-info.pdf

[12] Lietuvos vyriausiojo administracinio teismo sprendimas administracinėje byloje Nr. A756–485/2010 (2010).

15. The state and municipal institutions seek to provide the widest practical and appropriate dissemination of information concerning its activities, decisions and programs. News media and journalist requests, including blogger requests, for public information concerning state and municipal institutions, their activities and the decisions should be addressed promptly, factually, and as completely as possible, in accordance with applicable laws and regulations.
16. To ensure timely responses for requests for information, the state and municipal authorities will strive to ensure cooperation and coordination among the departments and units.
17. In keeping with the desire for a culture of openness employees may, consistent with this policy, speak to members of the press about their work. However, employees of state and municipal institutions are not required to speak to the media in order to avoid miscommunication and other challenges.
18. The state and municipal authorities strive to ensure that the media are effectively served within needed deadlines. In order to make certain we provide the media the best possible service and information in a timely fashion, it is important that the relevant agency public affairs office be notified of all media calls/contacts / requests that employees receive.
19. Reporters should be informed that the agency's public affairs office coordinates media requests to ensure they receive requested information within their deadline. The primary objective for routing reporter calls to the agency public affairs office is to ensure an effective, timely and coordinated agency response.
20. Additionally, depending on the context for the interview and the subject matter, the caller may be referred to another department or unit of a state or municipal institution that has primary expertise in the area. In some instances, the caller may need to be referred to another state institution, if the matter lies within its jurisdiction. Finally, in certain circumstances, the state or municipal institution must decline to comment. These instances include, but are not limited to, pending legal matters; pending investigations, procurement-sensitive information; and issues not under certain state or municipal jurisdiction.

3.1 Procedures Regarding Provision of Information to the News Media

21. Major news media-related activities and efforts shall be coordinated with involved departments, units, offices, or programs including review by the appropriate policy, subject matter and technical experts to ensure technical, and overall accuracy.
22. In response to media interview requests, a public affairs office should identify the most knowledgeable spokesperson(s) who can provide the requested information.
23. In general, reporters, including bloggers, should not have access to employees they seek to interview. While speaking to the media is not a requirement, there may be occasions when employees are encouraged to speak to reporters with an assistance of the spokesperson of the public affairs office.
24. When approached by a reporter, employees should work with their immediate supervisor and coordinate with the public affairs office.
25. Public affairs officers should facilitate interviews and work to meet reporters' deadlines.
26. Meetings that are open to the public are, by definition, open to the media. Employees who are presenters at public events, such as conferences or meetings, are encouraged to accommodate requests from media present regarding their presentation while on site. Interviews or media questions that are beyond the scope of the study or specific work should be referred to the public affairs office for appropriate follow up.
27. As a matter of routine, media interviews should be on the record and attributable to the person speaking to the media representative, unless an alternate attribution arrangement is mutually agreed upon in advance.

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28. All requests to provide information should be carefully analysed within the time framework set in laws and internal regulations of the state and municipal institutions.
29. The information provided should be clear and to the point. The vague and abstract answers should be in all instances avoided.
30. In response to requests from citizens, public servants must follow the principles of good public administration and openness to the public. All questions within the request should be replied. In instances when some questions cannot be answered since they fall out of the scope of jurisdiction of an institution, should not be ignored. An authority which is in capacity to provide an answer to the applicant should be indicated in a reply.

31. In those case when information is available on a website of an institution, a civil servant should specify the exact path concerning access to the requested information and, if necessary, provide assistance in understanding the content of the material.
32. If some of requested information cannot be provided to an applicant, then a part thereof shall be provided, indicating the legal basis and reasons for the applicant, why the part of the requested information cannot be submitted to the applicant.
33. Information containing personal data should be anonymised and, if the meaning is not lost, submitted to an applicant. The information provided must include information concerning anonymised data, with a statement of the legal basis and reasoning of the decision.

According to the Ombudsman of Lithuania, every person has the right to receive public information from state and municipal institutions. In the decision, in which the media complained about actions of the municipality, which allegedly provided incomplete information to the newsrooms or did not provide information related to the penalties of civil servants, the Seimas Ombudsman noted that municipalities must provide information about official misconduct found in the institution and the existing service sanctions imposed on them. Moreover, information about incentives and awards received by civil servants of the institution should be given, but such data must be anonymised. The Seimas Ombudsman's conclusion allows us to assume that, if information cannot be disclosed regarding the protection of personal data, such information should be available to the media or society by providing statistical data.

34. All decisions to provide less information than requested should be substantiated by law. In instances of competing rights, a three-tier test ("balancing test") should be applied to weigh the competing values protected by ECHR.
35. The conflict of the right of access to information and another right protected by ECHR cannot be decided in the abstract by relying on the greater importance of one of the rights. The two rights have to be balanced against each other in a concrete conflict in order to make decision which right should be protected the most. According to the European Court of Human Rights (ECtHR), "[b]earing in mind the need to protect the values underlying the Convention and considering that the rights under Article 10 and 8

of the Convention deserve equal respect, a balance must be struck that retains the essence of both rights."[13]

36. In assessing the proportionality of the restriction on the right to freedom of information, in some instances, the ECtHR applies "damage and public interest test". In this way, the court is seeking a fair balance between conflicting interests: the right of a person to disseminate information and the public's need to know this information and the interest of state institutions or the public in protecting such information. By making decisions concerning provision of information to the society civil servants should bear in mind that states have a very narrow margin of discretion by restricting public access to information related to allegedly unlawful acts of state officials, or information that helps the public to form opinions on public figures, political or other issues of national significance.[14]

Therefore, it would inevitably be necessary to apply a "damage and public interest" test to the authorities in deciding whether to disclose information in a particular case because of the public interest. This test should be applied taking into account the circumstances of a specific case: the nature of information, its relevance, the public interest in knowing it and the legitimacy of the purpose for which the information should be protected. Unable to disclose all information, the disclosure of part of the information should be considered on a case-by-case basis.

37. Finally, the principle of overriding public interest also means that situation of having two conflicting interests of protecting information and disclosing information, should be dealt with in the benefit of the disclosure of information unless its exposure would cause much more damage than the decision to withhold information.[15]

[13] ECtHR, Delfi AS v. Estonia, Grand Chamber judgment of 16/06/2015, § 110.
[14] ECtHR, *Guja vs. Moldova*, Application No.14277/04 (2008), available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85016
[15] Global Principles on National Security and The Right To Information (2013), available at: https://www.right2info.org/national-security/Tshwane_Principles