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 2.3.5. Developing guidelines for effective monitoring by the Office of the Ombudsperson of the state of compliance by relevant stakeholders with the legislation in the field of access to public information

Document	Suggested Areas of Improvements for the Law of Ukraine on Access to Public Information and its Implementation
Short description of the document	In this document, the experts list the shortcomings of the Law of Ukraine on Access to Public Information that were identified during this and earlier expert missions conducted within the framework of the Twinning Project. In addition, the experts give examples from national laws of their countries that could serve as an example when planning legislative changes.
Author	Kristina Brazevič, Agne Limante, Waltraut Kotschy
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Suggested Areas for Improvements of the Law of Ukraine on Access to Public Information and its Implementation

1. Introduction

During project expert missions, dedicated to improvement of the legal framework of the activities of the Commissioner and the Secretariat, the experts have identified a number of areas in the Ukrainian Law on Access to Public Information that would benefit from improvement. The existing shortcomings not only prevent the citizens from enjoyment of their right to access public information, but also overburdens the Secretariat with the load of cases and duties (such as drawing up administrative protocols for violations of the access to public information), which do not fall under the mandate of an Ombudsman.

Among the issues discussed, is the clarification of the mandate of the Ombudsperson in the area of the access to information, structure of the Ukrainian Law on Access to Public Information, principles of proportionality and transparency in the area of access to public information., re-use of public information, means of providing access to information and time-limits, as well as preventing and responding to abuse of the right to access public information.

Below, these issues within the ambit of the Ukrainian Law on Access to Public Information are discussed in more detail, specific recommendations for possible improvements, including examples from provisions of Austrian and Lithuanian laws, are offered.

Please note that draft of minimum amendments to the Law of Ukraine on Access to Public Information, necessary for the purpose of harmonization with the (draft) Law on Personal Data Protection are presented in another document prepared within the framework of this mission.

2. Parliamentary control over the observance of the right to access public information

The analysis of current legal regulation revealed, that it is rather difficult to describe, how the Commissioner's powers in the field of access to public information relate to the competence of other state institutions. According to the Article 17 ("Control over the access to public information") of the Ukrainian Law on Access to Public Information, three sorts of control over the access to public information exist:

- parliamentary control,
- public control, and
- State control.

Parliamentary control over the observance of the right to access to information is exercised by the Commissioner, temporary investigative commission of the Verkhovna Rada and National deputies of Ukraine. Public control is carried out by deputies of local councils, civil

organizations, community councils, and citizens individually through appropriate public hearings, public examinations etc. State control over the observance of provisions on access to public information is exercised as provided for by the law.

There are no specific provisions on control procedure, however, on the possible results of parliamentary, public or State control. Competences and powers of bodies participating in control over the observance of the right to access to public information are not delimited. It is unclear when each of the control forms should be exercised.

During the meetings, the representatives of the Commissioner have also noted that this delimitation of powers remains problematic. Therefore, it is worth to review the current regulation (Article 17 ("Control over the access to public information")) seeking clarity in this regard.

It should be noted that several European countries have established special information commissioners. An example of such Information Commissioner could be Ireland (https://www.oic.ie). The Irish Information Commissioner has a mandate to review decisions which public bodies make under the Freedom of Information Act. See the website of the Irish Information Commissioner for listed functions she/he has and types of decisions she/he can review: https://www.oic.ie/apply-for-a-review/what-we-can-review/. Irish freedom of Information Act might be accessed here: https://data.oireachtas.ie/ie/oireachtas/act/2014/30/eng/enacted/a3014.pdf.

Sometimes the mandate to monitor access to public information is linked to the functions of a data protection commissioner – such as Great Britain, Germany (several states), Slovenia or Estonia. The activity of Information Commissioner of the Republic of Slovenia can be found here: https://www.ip-rs.si/en/, Estonian Data Protection Inspectorate – here: http://www.aki.ee/en/inspectorate.

3. Commissioner's function of issuing administrative protocols

Furthermore, it should be mentioned that the Commissioner cannot him/herself enforce the right to access to public information, but can only draw up a protocol (*Протокол об административном правонарушении*) for bringing the case to administrative responsibility when someone's right to access to public information is violated. Later, this protocol might result in administrative sanctions (Article 188-40 of the Code of Administrative Offenses of Ukraine, establishing that failure to comply with legal requirements of the Ukrainian Parliament Commissioner for Human Rights entails a penalty for officials and entrepreneurs in the amount from 100 to 200 untaxed minimum incomes of citizens; and Article 212-3 of the Code, which specifies fines for the violation of the right to information).

The experts have raised the question why this task is assigned to body exercising parliamentary control over the observance of the right to access to public information. The right to draw up a protocol is typically an attribute of executive power and should be

delegated to a body exercising the state control in the field of access to public information. It is thus suggested that this task of drawing up protocols for further actions by the administrative courts should better be removed from the mandate of the Commissioner.

In addition, it is necessary to note that the recent amendment of the Article 254[1] of the Code on Administrative offences foresees an obligation to write the protocols in 24 hours' period. Considering the type of offences (breach of the right to access public information) and the working style of the Commissioner, the time limit for drawing protocols is hardly manageable in practice. Initial acts of the Commissioner are typically of a non-binding (recommending) character, as usually advise (recommendation) to improve the situation is given in the beginning. There is no logics in a rush to draw protocols in such a short time, moreover, such rush would contrast with the concept of recommendation and its intention to allow the institution (official) to improve the situation.

The experts, therefore, suggest that the following approach should be taken. The Commissioner should, firstly, have the power to issue recommendations on the improvement of a situation (*падання*) in the area of access to public information and, secondly, in case there is no reflection or feedback regarding its implementation, the Commissioner should have the power to issue administrative acts with administrative sanctions in it. This would give more power to the recommendation of the Commissioner and would be more in line with the mandate of the Ombudsman institution.

In particular, the law should set a special obligation for the institution (official) to react to the issuance of a recommendation by the Commissioner. In every case, an institution, agency or official, to whom this recommendation is addressed, should take steps and to investigate the recommendation of the Commissioner and proposals given in it. Later on, it should inform the Commissioner about the results of the investigation in appropriate time-limit but not later than in 1–2 months after receiving the recommendation of the Commissioner.

As an example, the Law on Seimas Ombudsmen of the Republic of Lithuania, Article 20 ("Binding Character of the Seimas Ombudsmen's Requests"), para.3, provides:

> *"A proposal (recommendation) of the Seimas Ombudsman must be considered by the institution or agency, or official to whom this proposal (recommendation) is addressed, informing the Seimas Ombudsman about the results of such consideration. The Seimas Ombudsman shall be informed forthwith upon the adoption of the decisions on measures to be taken in the light of the proposal (recommendation) of*

[1] Code of Ukraine on Administrative Offenses. Article 254. *Drawing up of a protocol on an administrative offense.*
"In case of administrative offense, a protocol shall be drawn up by an authorized official or a representative of a public organization or public self-government body. The protocol on an administrative offense, in case of issuing, shall be drawn up not later than twenty-four hours from the moment of detection of the person who committed the offense, in two copies, one of which shall be handed over, upon receipt of the signature, to the person who is being brought to administrative liability. Protocol is not drawn up in cases stipulated by Article 258 of this Code."
Article 254 as amended by Laws No. 2342-III of April 5, 2001, No. 586-VI of September 24, 2008, No. 721-VII dated January 16, 2014 - expired on the basis of the Law No. 732-VII of January 28, 2014; as amended in accordance with the Laws No. 767-VII of 02/23/2014, No. 2293-VIII dated February 27, 2018).

the Seimas Ombudsman, but not later than within 30 days from the receipt of the proposal (recommendation).”

Furthermore, the duty of competent authorities to consult the Commissioner on ways of how to implement recommendations could also be established.

The Law on Seimas Ombudsmen of the Republic of Lithuania, Article 19¹ (“National Preventive Mechanism”), para.6, provides:

“The competent authorities must examine the proposals/recommendations of the Seimas Ombudsmen and enter into a dialogue with them on possible implementation measures of the proposals/recommendations as well as inform the Seimas Ombudsmen about the results of the implementation of their proposals/recommendations.”

In Austria, the Ombudspersons (“Volksanwaltschaft”) are mandated also to deal with questions of access to public information as part of lawful and good governance. If an infringement was found, the infringing body receives a recommendation how to mend the situation in a defined timeframe. The cases and their outcome are also referred to in the yearly report of the Ombudspersons to Parliament. There is, however, also a separate legal procedure for enforcing a right of access to public information. According to the laws[2] on the obligation to grant access to public information, the public body approached by a citizen has either to grant access within a maximum of 8 weeks or to decide formally why access is not granted.[3] The latter decision is appealable to the administrative courts.

It is necessary to remind here that in the earlier reports, the experts have pointed out that the special situation and the scope of the mandate of the Commissioner concerning the violations of human rights in the area of data protection, access to public information or equal opportunities shall also be taken into consideration. According to the rules of *lex specialis* and having regard to the executive powers given to the Commissioner in special areas of law, it was recommended to foresee in the Law on Data Protection, the Law on Access to Public Information and the Law on Equal Opportunities the second type of final acts of the Commissioner following the investigation of individual complaints – legally binding administrative acts imposing legal sanctions. It is only these special areas where strengthening the power of the request issued by the Commissioner in the indicated manner is appropriate. While bringing to the attention the facts of negligence in office, non-compliance with laws or other legal acts, violations of human rights and recommending to apply measures to eliminate the violations of laws are important, efficient implementation of the legal rules set out in the above-mentioned laws requires the Commissioner to play an active role and, if necessary, to impose sanctions or obligations for the public authority. In such cases, the request of the Commissioner would have a legally binding characteristic of

[2] There is one federal law and 9 state laws.
[3] This is laid down in the federal and the state laws on the obligation to provide access to public information, see for instance the federal Law, Off. Gazette Nr. 287/1987.

administrative act imposing economic sanctions, which subsequently could be appealed directly to the court.

Summarising proposals provided, firstly, it is suggested that the power of the Commissioner to issue an administrative protocol (when someone's right to access to public information is violated) should be abolished. Secondly, competent authorities must have an obligation to examine recommendation issued by the Commissioner, enter into a dialogue on possible implementation measures and inform the Commissioner about the results of the implementation. Failure to meet those obligations could lead to administrative act with administrative sanctions in it.

4. Recommendations for improving the structure and content of the Ukrainian Law on Access to Public Information

4.1 Structure of the Law

Having analysed the Law, the experts came to the conclusion that the structure of the Ukrainian Law on Access to Public Information could be improved. At present, it starts with general provisions (Section I), then regulates the 'procedure of access to (public) information' (Section II), while several definitions, e.g. of beneficiaries, of the bodies obliged, and the scope of the law are dealt with only later in Section III, whereas actually Sections IV and V deal with the procedure of gaining access and legal remedies if access is refused. This makes it hard to use and understand the law.

For example, the Law on the Right to Obtain Information from State and Municipal Institutions and Bodies of the Republic of Lithuania is divided into 7 Chapters. Chapter I lists "General Provisions" (such as purpose of the Law, definitions, basic principles, etc.), Chapter II is dedicated to "Condition of Provision of Documents" (reuse, payment, etc.), Chapter III sets rules for "Submission of Requests and their Processing" (how the requests should be submitted, processed, forwarding to competent institution, deadlines, etc.). Chapter IV is "Provision of Documents" (rights and duties of institutions when providing documents, requirements to documents), Chapter V then regulates "Sets of Documents and Processing of them" (how and when sets of documents are prepared, use of websites) and Chapter VI sets the right to file complaint in case the institution does not provide information as required by law. Finally, Chapter VII lists concluding provisions.

It should also be noted that in the Ukrainian Law on Access to Public Information the definition of 'public information' (in the available translation[4]) and the provisions on "access"[5] are not entirely clear concerning the question of whether the right to "access"

[4] Article 1 ("Public information") provides that: "Public information is the reflected and recorded by any means and through any media information that was obtained or created during the execution by public authorities of their duties stipulated by law, or that is in the possession of the public authorities, other processors of public information specified by this law."

[5] Article 5 ("Providing access to information") provides: "Access to information is ensured by: 1) systematic and prompt publication of information: in official publications; on official web-sites in the internet; on the

includes a right to look into (or get copies of) "documents". This should be stated explicitly and clearly. Moreover, the excluded from a right to access or shall be accessible only under special conditions[6], should be regulated outside of procedural questions. Section II ("Procedure of access to Information") should therefore not be denominated as procedure of access to information as it does not really deal with 'procedure' but rather with defining different types of 'public information' and the conditions for gaining access to these different sorts of public information.

Summarising the experts' views regarding the structure of the Ukrainian Law on Access to Public Information, further suggestions are made to restructure the law:

- First, it is recommended that the Ukrainian Law on Access to Public Information started by defining its purpose, principles, defining beneficiaries and scope of its application (listing institutions/bodies, to whom this law applies). Article 5 should be added to Section I, thus establishing as a further general principle that access can be given either by publication (open data) or on request of citizens. Then the definitions should be presented (document, applicant, publication of document, etc.);
- Second, definition of access to information must clearly state that it also includes a right to look into (or get copies of) documents;
- Third, heading of Section II, establishing exceptions to the access to public information (when institutions may refuse access to a document – information with restricted access, confidential, secret information, etc.) and treatment of sensitive documents, should be changed;
- Fourth, a new section should be introduced about 'open data', which are now dealt with in Art. 10^1 and 11;
- Fifth, the law should continue with rules on submitting and processing applications to access to public documents and appeal procedure.

4.2. Proportionality and transparency

A general principle of law states that in case of "opposing rights" (which are not of an absolute character but may be restricted), a fair balance between these rights based on the principle of proportionality should be found. In case of restriction of certain rights, such restrictions must be prescribed by law and must be necessary in a democratic society for the protection of certain public interests or for the protection of the freedoms, rights and interests of others.

The principle of proportionality is of particular relevance in the area of access to public information. Requests for access to documents or information held by public authorities will need balancing with the right to data protection of persons whose data are contained in the

unified state web-portal of open data; at the information stands; in any other way; 2) provision of information on the requests for information."

[6] Article 6 ("Public information with restricted access"), Article 7 ("Confidential information"), Article 8 ("Secret information"), Article 9 ("Information for internal use only").

requested documents or with public interests, such as, for instance, maintenance of public order.

On the other hand, there is a growing understanding of the importance of government transparency for the functioning of a democratic society and the rule of law. Open-decision making, citizen participation go hand in hand with transparency and good administration.

Open decision-making is to a large extent made effective through the right of the general public to access documents held by public bodies. In EU, Regulation No 1049/2001 on public access to documents builds on the principle of 'widest possible access'. In the EU context, it is required that all documents held by the EU institutions are public, as the main principle, but certain public and private interests are protected through specific exceptions. However, as exceptions derogate from the principle of the widest possible public access to documents, they must be interpreted and applied narrowly. Similar approaches are seen in national contexts of European states.

In this regard, the Ukrainian Law on Access to Public Information should be very precise when listing exceptions to the access to information. Such exceptions should be clearly stated in the law and interpreted narrowly. At present, as it was expressed by the members of the staff of the Commissioner, in Ukraine there is an evident abuse of reference to such exceptions often resulting in refusing access to information.

A legislative method to ensure that there is little space for speculation, is to clearly define to what types of information the right to access public information extends and then to expressly list derogations from such right.

Lithuanian law could be given as an example here. Law of the Republic of Lithuania on the Right to Obtain Information from State and Municipal Institutions and Bodies in its Article 2 clearly defines to what institutions and bodies and to what documents the law applies (as well as documents to which it does not apply).

> *"Article 2. Application of the law*
>
> *1. This Law applies to state and municipal institutions and bodies, enterprises and public institutions financed from state or municipal budgets and state monetary funds and authorized by the Law on public administration of the Republic of Lithuania to perform public administration or provide public or administrative services or perform other public functions, including libraries, museums and state archives (hereinafter referred to as "authorities"). Article 5 (2)(6) of this Law also applies to companies and public enterprises whose owner or at least one of the shareholders is a state or a municipality, public limited companies and private limited liability companies, in which the state or municipality owns more than 50 percent of the votes in the general meeting, when they publish information on the remuneration of their employees in accordance with the procedure established by this Law.*
>
> *2. This law does not apply to:*

1) documents the handling of which is not a public function established by law or other regulatory legal acts, with the exception of information on employees' remuneration;

2) documents to which third parties hold the rights of industrial property, copyright, neighbouring or database (sui generis) (hereinafter referred to as "intellectual property rights");

3) documents the revealing of which is prohibited by laws or other normative legal acts adopted on the basis thereof, including documents which are not available due to national or public security, defence interests of the country, statistical confidentiality, commercial confidentiality, or which form part of the state, service, bank, commercial, professional secrecy;

4) documents which are restricted by laws or other normative legal acts adopted on the basis thereof, as well as when applicants have to justify the purpose of using the documents requested;

5) documents consisting only of logos, ornaments and / or emblems;

6) the part of documents the provision of which is not prohibited, which consists of personal data the reuse of which is not compatible with the regulatory legal acts related to the processing of personal data;

7) documents held by the National Radio and Television of Lithuania and other broadcasters of radio or television broadcasting from the state or municipal budget;

8) documents which are at the disposal of state and municipal educational institutions, state schools of higher education (hereinafter - higher education institution), with the exception of high school libraries, and state research institutes;

9) documents held by theatres, concert institutions, other institutions which operate under the laws governing the activities of cultural institutions, except libraries, museums."

All such explicit exemptions must, however, be justified by 'legitimate interests' either of the state or of those natural or legal persons who are concerned by the information requested.

It is true that many other European countries have rather general provisions on the lawful exemptions from access to public information, relying on jurisprudence to decide specific cases and the fact that from such decisions rules can be deducted. This is, for instance, the case in Germany and also the present situation in Austria, where there is

- a constitutional obligation for administrative public bodies to grant access to information held by them, unless there is a special legal obligation to secrecy (as for instance for the sake of data protection, criminal investigations, international cooperation in matters of public security etc.)

- supplemented by rather short implementing access laws on federal and state level and by specific access rules in several other laws, such as the Law on environmental information, the Law on the Residents' Register, archive laws etc.

A recent decision of the Administrative Court[7] ("Verwaltungsgerichtshof") can be cited as example for how the right to access public information is broadened by jurisprudence: Although the text of the relevant legal provisions only mention access to "information", the Court decided recently that in case of an explicit request by certain categories of requestors, like journalists (who are pursuing a public interest in information)[8], access should also be granted to *documents* held by public bodies; if such documents contain personal data or business secrets and similar information, these parts of the (copy of the) document must be 'blackened' before granting access.

Whether such general regulations will suffice, may be doubtful. Recent endeavors to introduce more explicit access laws have not been successful in Austria. The same is true for Germany.

Coming back to the situation in Ukraine, if it should not be possible to add a more detailed list of lawful exemptions from access to the Ukrainian Law on Access, other methods should be found to establish a list of acceptable exemptions with the effect of guiding the 'information processors' (Article 13 (1) of the Law). The Parliament Commissioner could, at least, publish on its website a constantly updated list with its own findings and the decisions of the competent courts on access to public information. Such a list would be extremely useful when trying to draw up educational material for information processors. Foreseeing a legal obligation for the courts to inform the Commissioner about their relevant jurisprudence would be a valuable support.

4.3. Re-use of public information

The Ukrainian Law on Access to Public Information is very brief about the reuse of public information. However, during the meetings the representatives of the Commissioner have identified, that it is common that information received is used for other purposes than those, which the information was initially collected for, causing questions as to the legality of the re-use, issues on personal data protection and so on.

Possible additions as to the legality of the re-use as well as issues on personal data protection which might demand for amendments of the Law could take into account the European Directive on Reuse of Public Sector Information (2013/37/EU).

The Directive provides a common legal framework for government-held data (public sector information). It is built around two key principles: transparency and fair competition. It acknowledges that documents produced by public sector bodies constitute a vast, diverse and

[7] Ra 2017/03/0083 vom 29. Mai 2018 und Ro 2017/07/0026 vom 24. Mai 2018.
[8] This refers to the so called "watchdog" function of journalists, NGOs, bloggers etc. which has been stressed in the jurisprudence of the ECtHR.

valuable pool of resources that can benefit the knowledge economy, that open data policies which encourage the wide availability and re-use of public sector information and play an important role in development of new services based on novel ways to combine and make use of such information. Therefore, it encourages its member states to make as much information available for re-use as possible and leaves upon a member state or public body to determine, which public data should be available for re-use, and which – not.

The provisions of the Law of the Republic of Lithuania on the Right to Obtain Information from State and Municipal Institutions and Bodies could be a good example for necessary amendments of the Ukrainian law.

First, the Law on the Right to Obtain Information from State and Municipal Institutions and Bodies established the definition of re-use of documents (Article 3 ("Main definitions for the purposes of this Law"), para. 2):

> *"Re-use of a document ('re-use') means the use of documents by applicants and/or their representatives, for commercial or non-commercial purposes other than the initial purpose within the public function for which the documents were produced. Exchange of documents between institutions in the provision of public or administrative services or in pursuit of other public functions does not constitute the re-use of documents."*

Secondly, the objective and purpose of this law (Article 1 ("Objective and purpose of the Law"), para. 2) was supplemented by setting that:

> "*2. This Law:*
>
> *1) Establishes an obligation for the State and municipal institutions and bodies, and undertakings and public establishments referred to in Article 2(1) of this Law to provide documents, and the cases when granting exclusive rights to re-use documents is prohibited;*
>
> *2) Sets out conditions for the re-use of documents;"*

Thirdly, the application of the Law (Article 2 ("Application of the Law"), para. 2) provided that:

> *"2. This Law shall not apply to:*
>
> *6) Part of the documents the supply of which is not prohibited which contains personal data the re-use of which is incompatible with regulations with regard to the processing of personal data;"*

The Law on the Right to Obtain Information from State and Municipal Institutions and Bodies was also supplemented with an article determining competence of state institutions in the area of re-use (Article 7 ("Competence of State institutions in the area of re-use")), as well as rights and obligations in providing documents to applicants (Article 16 ("Institution's rights and obligations in providing documents to applicants"), para. 1):

“1. The Government shall establish areas for re-use development, targets and the ways of their achievement.

2. The Ministry of Economy of the Republic of Lithuania shall formulate the State policy in the area of re-use and within its remit shall:

1) submit proposals to the Government concerning areas for re-use development, targets and the ways of their achievement;

2) coordinate and regulate actions by institutions when they implement within their remit the State policy in the field of re-use;

3) submit conclusions regarding draft laws and other legal acts in connection with re-use;

4) following the entry into force of the directive referred to in the Annex to this Law, draw up every three years a report on the availability of documents for re-use and the conditions under which these documents are made available and the means of redress for applicants and deliver it to the European Commission; on the basis of that report, which shall be made public, the monitoring of the implementation of the provisions of Article 10 of this Law shall be carried out;

5) execute other functions delegated in relation to re-use.

3. An institution authorised by the Minister of Economy shall carry out the monitoring of re-use and shall:

1) provide methodological assistance to institutions as regards the compiling of sets of documents and metadata;

2) supply the metadata of the sets of documents to the European Open Data Portal and ensure their integrity and dissemination across the European Union;

3) carry out monitoring in relation to the compiling of the sets of documents and provide aggregated information to the Ministry of Economy;

4) provide advice to institutions and applicants on the issues of conditions for producing, obtaining and re-using the sets of documents;

5) execute other functions delegated to him.

4. Institutions shall implement within their remit the State policy in the field of re-use.”

“When providing documents the institution shall ensure that:

1) the applicant is able to re-use documents, including documents the intellectual property rights to which belong to libraries (including the libraries of higher education schools), museums and State archives, under the conditions laid down by this Law; <...>".

Additionally, the scope of permit to re-use documents was established (Article 8 "Permit to re-use documents"):

"1. Without a separate permit from an institution and without having a contract, an applicant may use the documents obtained as follows:

1) make publicly known in any manner, also make them publicly available on the internet;

2) reproduce in any form or manner;

3) translate into other languages;

4) adapt, process or remake otherwise;

5) distribute or supply (transfer) otherwise to third persons.

2. Documents obtained from an institution must not be distorted and/or used to directly advertise products or services or for the purpose of giving an impression that the product or service is supported or promoted otherwise by the institution, and must not be used for illegal, fraudulent and unfair purposes or in support of such purposes and used so that third persons are misled.

3. When re-using documents obtained from an institution an applicant must indicate the source and the date of receipt of the documents, and ensure that the rights and legitimate interests of third persons will not be affected. Responsibility for the correctness of the documents adapted, processed or remade otherwise shall lie with the applicant. Responsibility for the legal consequences caused by such documents shall lie with the applicant.

4. Conditions for re-use other than those indicated in paragraphs 1, 2 and 3 of this article may be established only in the laws of the Republic of Lithuania or European Union legislation.

5. An applicant shall be allowed to re-use documents without an institution's authorisation in observance of the conditions stipulated in paragraphs 1, 2 and 3 of this article, other laws of the Republic of Lithuania and European Union legislation. Documents which the applicant is allowed to re-use without the institution's authorisation and a respective reference to this Law, other laws of the Republic of Lithuania and European Union legislation laying down conditions for re-use shall be published on the institution's website.

6. If, on the basis of the laws of the Republic of Lithuania or European Union legislation, an institution is instructed to establish conditions for re-use other than those indicated in paragraph 5 of this article, these conditions must not unreasonably restrict re-use possibilities and competition, also must not discriminate against the applicants using documents for the same purpose.

7. In the case referred to in paragraph 6 of this article, an institution shall establish special conditions for re-use and incorporate them into the contract which must be concluded by the institution supplying documents with any applicant when the latter applies, with the exceptions established by laws or other regulations adopted on the basis thereof. When concluding that contract the institution shall not be entitled to give privileges to the applicant on the grounds of his/her race, nationality, gender, social status and other particularities, with the exception of the cases established by this Law. By the contract the applicant shall be granted a special permit to re-use documents. Special conditions for re-use shall be published on the institution's website.

8. The institution shall offer the applicant the possibility of concluding the contract referred to in paragraph 7 of this article either in writing or through electronic means. Where a set of documents is provided through electronic means, the recommended contract shall be concluded only electronically. Documents to which special conditions for re-use apply shall be published on the institution's website."

The Law on the Right to Obtain Information from State and Municipal Institutions and Bodies also established prohibition of granting exclusive rights (Article 9 "Prohibition on granting exclusive rights"):

"1. An institution shall be prohibited from entering into agreements with applicants on granting exclusive rights to re-use documents, save for the exceptions established by this Law.

2. The re-use of the documents obtained from an institution and agreements with the institution on the supply of documents shall not grant the applicant exclusive rights to re-use documents.

3. An exclusive right to re-use documents may be granted to the applicant only if it is necessary for the provision of public services by the applicant, with the exception of the case referred to in paragraph 4 of this article. An agreement on the granting of an exclusive right shall be subject to regular review at least every three years.

4. If an exclusive right to re-use documents is necessary for the digitalisation of Lithuania's cultural heritage, the agreement on the granting of an exclusive right shall be concluded for a period not longer than 10 years.

5. The agreements on the granting of exclusive rights to re-use documents referred to in paragraphs 3 and 4 of this article shall be transparent and published.

6. After having entered into the agreement on the granting of an exclusive right in accordance with the provisions of this article, the applicant must provide the institution with one free copy of Lithuania's digitalised cultural heritage. At the end of that agreement the institution shall make available this copy for re-use to other applicants."

Also, charges for the supply of documents were established (Article 10 ("Charges for the supply of documents for re-use"):

"1. Documents, save for register data, register information and data supplied to the register and/or copies thereof, shall be provided to applicants for re-use free of charge, unless other laws provide otherwise.

2. Where charges are made for the supply of documents, including register data, register information, data supplied to the register and/or copies thereof as well as State information system data, for re-use they shall not exceed the cost of document duplication (reproduction, issue, copying), provision and publication.

3. In the calculation of charges for the supply of documents for re-use, the requirements indicated in paragraph 2 of this article shall not apply to the institution which uses, in accordance with the procedure established by laws, income from the supply of documents for re-use to finance the major share (over 50 %) of costs incurred in the provision of public or administrative services or exercise of other public functions, or the institution which uses, in accordance with the procedure established by laws, income from the supply of documents for re-use to finance the major share (over 50 %) of costs incurred in collecting, producing, reproducing or publishing them.

4. In the cases referred to in paragraph 3 of this article, the amount of the charge for the supply of documents, including register data, register information, data supplied to the register and/or copies thereof as well as State information system data, for re-use shall be calculated in accordance with the procedure laid down by the Government. The procedure approved by the Government shall also establish the categories of expense classified as costs which may be included in the amount of the calculated charge (register, information system depreciation, maintenance, salary and other expenses determined by the Government). The total income of an institution from the supply of documents for re-use, including register data, register information, data supplied to the register and/or copies thereof as well as State information system data, shall not exceed the cost of the collection, production, reproduction and publication of documents, including register data, register information, data supplied to the register and/or copies thereof as well as State information system data, together with a reasonable return on investment.

5. The requirement indicated in paragraph 2 of this article shall not apply to libraries, including the libraries of higher education schools, museums and State archives. The total income of the institutions referred to in this paragraph received from the supply of documents for re-use shall not exceed the cost of the collection, production, reproduction, publication and storage of documents and payment for intellectual

property rights, together with a reasonable return on investment. The amount of charges for the supply of the documents of libraries, including the libraries of higher education schools, museums and State archives shall be calculated in accordance with the procedure established by the Government.

6. The amount of charges for the supply for re-use of documents, produced according to the applicant's individual needs, shall not exceed the costs incurred in relation to their systematisation, adaptation, processing or other remake, transfer and provision to the applicant."

4.4. Means of providing access to information

Article 5 of the Ukrainian Law on Access to Public Information ("Providing access to information") establishes that access to information is ensured by: 1) systematic and prompt publication of information and 2) provision of information on the requests for information. As to proactive publication of information, the Law states that this might be done, among other ways, on official web-sites in the internet. However, the obstacle to access information online is that not all Ukrainian state institutions and bodies, especially in regions, have their own webpages.

It was discussed during earlier expert missions that this is not in line with European trends and growing demand and necessity of digitalised information. Having a webpage should be a duty of state and municipal institutions. Namely, having constantly updated web-pages enable citizens to exercise their right to access to public information more properly, efficiently and promptly.

Under these circumstances, it is recommended to supplement Article 5 of the Ukrainian Law on Access to Public Information by establishing a duty of state and municipal institutions and other bodies to have web-pages and regularly update them.

For example, Article 5 of the Law on the Right to Obtain Information from State and Municipal Institutions and Bodies ("Information about the activities of an institution") provides:

"1. Information about the activities of an institution shall be public and be published on the institution's website in accordance with the procedure established by the Government of the Republic of Lithuania."

It also provides for specific information, which must be published on institution's website, such as:

1) depersonalised certificates of the Ombudsmen of the Seimas of the Republic of Lithuania concerning the completed investigation of a complaint and information about the results of a review by the institution of proposals (recommendations) from Seimas Ombudsmen;

2) depersonalised information about decisions by the Auditor General of the Republic of Lithuania and his deputies in respect of the institution based on public audit reports, also about remedying the infringements of legal acts indicated in the decisions and the implementation of instructions, proposals and recommendations;

3) depersonalised binding court decisions stating that infringements have been committed at the institution, also information about the measures taken in connection with the remedying of these infringements of legal acts;

4) depersonalised information about the misconduct in office ascertained at an institution and the professional sanctions being applied for this misconduct. If the decision to impose a professional sanction was appealed against in accordance with the statutory procedure, information about it shall be published only after the decision of the court or another institution that examined the service dispute has taken effect;

5) depersonalised information about the incentives and awards received by the institution's civil servants;

6) the average fixed (allocated) salary of the institution's civil servants, State politicians, judges, State officials and employees working under employment contracts ('employees') in accordance with the office held (the average fixed (allocated) salary of an employee who is the only person at the body holding a given office shall be made public only upon receipt of his consent)(Article 5, para. 2);

7) documents which the applicant is allowed to re-use without the institution's authorisation and a respective reference to this Law, other laws of the Republic of Lithuania and European Union legislation laying down conditions for re-use (Article 8, para. 5);

8) special conditions for re-use (Article 8, para. 7) and documents to which special conditions for re-use apply (Article 8, para. 8);

9) established amount of charges for the supply of documents, the legal basis for their calculation and the procedure for paying charges (Article 11, para. 1) and all information on the procedure for appealing against the amount of charges established or calculated for the supply of documents (Article 11, para. 1);

10) request form (Article 12, para. 1);

11) other information established by the Government (Article 5, para. 2).

In addition, a separate legal act or an adapted Article 15 of the Ukrainian Law on Access to Public Information could formulate the requirements for web-pages of public institutions. As an example, in Lithuania there is a special regulation called *The Description of General Requirements for the Web-sites of State and Municipal Institutions and Establishments* (hereinafter – the Description).

The Description provides for a duty for each institution to have a web-site or publish the information in a centralized portal. For example, it provides that the Registry of the Seimas of the Republic of Lithuania and the Office of the President of the Republic of Lithuania *may not have individual websites*, but the information specified in the Description must be submitted on the websites of the President of the Republic of Lithuania or the President of the Republic respectively.

Among the requirements for web-pages, provided by the Description, there are requirements for web-site structure, information content, web-site administration, electronic information security, adaptation for the use of the disabled in accordance with the established recommendations, representativeness and easy recognition. The Description requires that the information provided in institutions' web-sites must be systematized and updated on a regular basis. Also, the Internet site of an institution must guarantee reciprocal communication between the Internet user and the institution (in the form of e-mail and / or questions and answers).

In order to reduce the number of access to information requests for information that is already available on the websites of public institutions, the Law should be supplemented with the provision stating, that in case the requested information is published online, only reference to it should be provided by the requested institution.

For example, in the Law on the Right to Obtain Information from State and Municipal Institutions and Bodies, it is the ground to refuse to provide information if it is published on institution's website. Article 15 ("Refusal to provide documents") provides:

> *"1. An institution shall refuse to provide documents to the applicant if:*
>
> *<...> the requested documents have been published on the institution's website, in the media and using electronic means; in such case, the source of their publication shall be notified to the applicant within three working days of receipt of the request at the institution".*

Relevant provisions on the nature and design of publications of information by public bodies on their website can, for instance, be found in the Austrian e-Government Law. There is, however, a much more comprehensive approach to 'open data' taken by the Austrian Government in the 'Open Government Data' Initiative, which provides a platform for structured publication of information of all kinds of general interest. At the same time this platform is the single point of contact to the EU European Data Portal. Extensive information can be found under https://www.data.gv.at/infos/zielsetzung-data-gv-at/.

4.5. Time limit for consideration of requests for information

According to Article 20 of the Ukrainian Law on Access to Public Information, the information processor shall give a response to the request for information no later than in *five*

working days from the date of the receipt of the request. This is a very short time and most often it is very problematic for institutions/bodies to respond so promptly.

As an example, the Law on the Right to Obtain Information from State and Municipal Institutions and Bodies (Article 14) allows 20 working days for an institution to handle the request. The Austrian Federal Law on the obligation to grant access to public information foresees 8 weeks as timeframe for the response. The EU regulation in this area, Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (Article 7), allows 15 working days for this purpose.

In exceptional cases, such as in the event of an application relating to a very long document or to a very large number of documents, the time limit may be extended up to another 20 working days in Lithuania or up to 15 working days for EU institutions.

It is also very important to clearly define, how these terms are calculated. For example, The Civil Code of the Republic of Lithuania (Article 1.118) sets up the start of the term:

> *"1. The term starts on the morrow day from zero hours zero minutes after that calendar date or to the event that determines the start of the term, unless otherwise provided by law."*

Also, the Law on the Right to Obtain Information from State and Municipal Institutions and Bodies specifies, that "<...>. If the applicant was asked to specify or supplement the application, the deadline for processing the application and for submitting the documents shall be calculated *from the date of receipt of the revised or supplemented application* by the institution" (Article 14, para. 1).

It is suggested that the Ukrainian Law on Access to Public Information would establish more reasonable time limits to handle requests for information and provide for clear term calculation, including cases of revised or supplemented requests.

4.6. Preventing and responding to abuse

During the meetings with the representatives of the Commissioner, numerous examples of abuse of the right to access public information were identified, such as repetitive, frivolous or vexatious requests, as well as financial burden of the institution in providing copies to numerous requests from same requestors. To tackle those issues, law amendment suggestions and regulation examples are given below.

In Austria, for instance, there are no explicit provisions on abuse of access rights. However, as dealing with access requests has, in Austria, to follow the normal rules for administrative procedures, the rules of the General Law on Administrative Procedure apply, where according to Article 35 persons, who willfully engage public administration, *can be fined*. Where access has to be given by bodies outside those institutions who can impose fines, the general legal principle will have to be applied, that nobody may abuse his rights to the disadvantage of others. This principle has, for instance also lately been recognized by the EU General Data Protection Regulation (GDPR), where Article 12, which deals with the ways how data subjects may exercise their rights, foresees in its paragraph 5 that in case of requests of a data which are "manifestly unfounded or excessive, in particular because of their repetitive character", the controller may either:

- refuse to act on behalf of the request, or
- he can charge a reasonable fee for taking action on behalf of the request.

This solution seems to be generally applicable. The question whether a request was really abusive must be solved by appealing to the competent authority. In a quarrel with non-government bodies this would have to be a court. In the afore-mentioned example of Article 12 of GDPR it is foreseen, that it is the party, who should in principle answer the request, who shall bear the burden of demonstrating that the request was "manifestly unfounded or excessive".

4.6.1. Repetitive requests

The Ukrainian Information Law in Article 22 (" Refusal and postponement to satisfy a request for information") provides, that the information processor has the right to refuse to satisfy the request when: 1) the information processor does not and is not obliged according to its competence, provided by law, to possess information regarding which the request was made; 2) information requested belongs to the category of information with restricted access pursuant this Law; 3) the person who submitted the request for information, has not paid for the actual costs for copying or printing; and 4) the requirements to the request for information, provided by this Law are not met.

The law does not provide any possibility to refuse the repeated requests from the same subject and the public body gets overburdened by such requests. Moreover, such amendments are necessary due to the fact that the Article 21 of the Ukrainian Law on Access to Public Information states that information upon request is provided free of charge, except if the reply to the request for information involves making copies of documents in volume more than 10 pages, then requester shall reimburse the actual costs of copying and printing.

Therefore, Article 22 of the Law should be amended to limit the abuse of right by submitting repeated requests and at the same time avoid should not be payments for printing/copying.

As an example, in the Law on the Right to Obtain Information from State and Municipal Institutions and Bodies, Article 15 ("Refusal to provide documents"), para. 1., stipulates that an institution shall refuse to provide documents to the applicant if "the same applicant is repeatedly requesting the same documents which have already been provided to him".

Also, in order to ensure the right to good public administration of the information requestors, Article 22 of the Ukrainian Law on Access to Public Information should be supplemented with a provision, that the refusal to satisfy a request for information should be taken promptly and on the instant given to the requester.

For example, the Law on the Right to Obtain Information from State and Municipal Institutions and Bodies, Article 15 ("Refusal to provide documents"), para. 2 establishes that:

> *"If the institution determines the grounds for refusing to provide documents to the applicant referred to in paragraph 1 of this article, it shall within three working days of the day of receipt of the request at the institution adopt a decision to refuse to provide documents to the applicant. Having determined that there are grounds for a refusal to provide documents to him, the institution must notify the applicant on the next working day following decision adoption accordingly, indicate the legal basis and inform him of the procedure for appealing against that decision."*

4.6.2. Frivolous or vexatious requests

The Ukrainian Law on Access to Public Information does not provide the sufficient mechanisms to deal with frivolous or vexatious requests for public information. Therefore, Article 22 of the Ukrainian Law on Access to Public Information should be supplemented to allow authority to decline to process requests that are frivolous or vexatious or when it is impossible to clearly identify the person submitting request.

For example, Article 12 ("Submitting a request") para. 4 of the Law on the Right to Obtain Information from State and Municipal Institutions and Bodies provides that:

> *"Having established that the data contained in the applicant's request are incomplete or inaccurate, the institution shall within three working days of receipt of the request ask the applicant to clarify the request and shall indicate the data which are missing in the request and where to obtain them, and where the data provided in the request are inaccurate, shall explain inaccuracies in the data provided and how to correct them."*

Also, Article 12, para. 2, the Law on the Right to Obtain Information from State and Municipal Institutions and Bodies provides that the requests may be transmitted electronically, provided that it is possible to identify the applicant. Article 15 ("Refusal to provide documents"), para. 1, regulates that an institution shall refuse to provide documents to the applicant if "it is impossible to identify the applicant".

4.6.3. Disproportionate labour and time costs

The Ukrainian Law on Access to Public Information does not provide for possibility to decline to process the request if it requires unreasonably high level of work. For this reason, Article 22 of the Ukrainian Law on Access to Public Information could be also supplemented with this ground of refusal.

For example, the Law on the Right to Obtain Information from State and Municipal Institutions and Bodies in Article 15 ("Refusal to provide documents"), para. 1 provides that an institution shall refuse to provide documents to the applicant if: "according to the applicant's request, special adaptation, processing or other remaking of documents would be necessary, which would entail disproportionate costs in terms of labour and time".

Project experts also suggest amending the Ukrainian Law on Access to Public Information including a provision stating that as much as possible priority should be given to provision of information using internet and electronic resources.

For example, Article 17 ("Provision of documents"), para. 3 of the Law on the Right to Obtain Information from State and Municipal Institutions and Bodies provides that:

> *"Documents shall be provided to applicants as sets of documents or parts thereof, giving priority to the provision of documents online or through electronic communications networks*."

ANNEX

Recommendations for amendments in the Law of Ukraine On Access to Public Information

1. Suggestions for improving the structure and content of the Law:

1) Art. 5 should be added to Section I, thus establishing, as a further general principle, that access can be given either by publication (open data) or upon request;

2) Art. 5 should be enhanced by clarifying that access to information is ensured also by "3) granting access to documents on special request";

3) the heading of Section II should be changed into something like 'lawful restrictions of access';

4) in Section II each type of information with restricted access should be defined immediately after naming it in Article 6 (1); then the special conditions for access for each type of restricted information should be listed;

5) the cases, where access may never be denied (e.g. Art. 6 (5)) should be listed in a separate Article;

6) a new Section should be introduced about 'open data'; they are now dealt with in Art. 10^1 and 11;

7) the timeframe for having to answer to requests for access according to the Law on access and according to the Law on data protection should be harmonized in order to avoid serious problems because of wrong qualification of a request as being based on the one or the other Law;

8) the power of the Commissioner to issue administrative protocols should be replaced by the power to impose administrative sanctions (fines) in case that a recommendation issued by the Commissioner to an information processor has not been followed;

9) a provision concerning abuse of the right to access should also be adopted in the Law. The experts suggest to follow the example of the Art. 12 of the General Data Protection Regulation, which foresees in its paragraph 5 that in case of requests of a data subject which are "manifestly unfounded or excessive, in particular because of their repetitive character", the controller may either

- refuse to act on behalf of the request, or

- he can charge a reasonable fee for taking action on behalf of the request.

Additionally, it should be foreseen that it is the party, who should in principle answer the request, who shall bear the burden of demonstrating that the request was "manifestly unfounded or excessive".

10) For further improvements in the interest of harmonization with the (draft) Law on personal data protection see Chapter B.

2. Publication of a List of practical examples for lawful and unlawful restrictions of access to public information

- The Parliament Commissioner could publish on its website a constantly updated list with his/her own findings and the decisions of the competent courts on access to public information. Such a list would be extremely useful as orientation for all information processors.
- The courts could probably be obliged by a legal provision to inform the Commissioner about their decisions on access to public information.