

ACCESS TO PUBLIC INFORMATION IN UKRAINE

achievements
and challenges
between adoption
of the Law and
the present day





**MINISTRY OF
FOREIGN AFFAIRS
OF DENMARK**
Danida



This publication is prepared under the Human Rights for Ukraine (HR4U) project, implemented by the United Nations Development Programme in Ukraine with financial support from the Ministry of Foreign Affairs of Denmark during 2019–2023.

The opinions, attitudes, and assessments contained in the report do not necessarily reflect those of the Ministry of Foreign Affairs of Denmark, the United Nations Development Programme or other UN Agencies.

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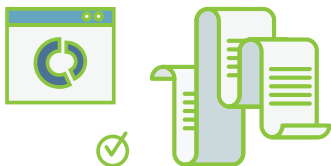


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INTRODUCTION

Adoption of well-structured, comprehensible and high-quality legislation on access to public information in 2011 became an essential step towards the development of transparent and accountable government, countering corruption and ensuring progress towards achieving the Sustainable Development Goals in Ukraine. However, these efforts took a long time and faced numerous obstacles. Several challenges still remain to be resolved. Some of these challenges can be addressed by improving the legislation, but most of them require all participants in the process to perform their statutory duties in a more careful and precise manner. Better observance of the public's right of access to information can be achieved by improving the awareness of duty bearers in this field and by taking action to reduce the number of information requests, for example by publishing different categories of information in the ways envisaged in legislation. Effective and prompt liability for violating legislation on access to information, combined with mechanisms to quickly resolve disputes in this area will improve the situation.

This policy brief is intended to provide a general overview of the current state of implementation of legislation on access to public information, as well as to identify the challenges in the field and make recommendations.



A QUALITATIVE LAW ALSO REQUIRES IMPLEMENTATION

Establishing a clear statutory mechanism for access to public information was a key priority of civic activists in Ukraine in the beginning of the 2000s. Investigative journalists, civic activists and citizens concerned with the issues quickly mastered this effective method for combatting corruption after the Law was adopted, by identifying and overseeing spending of budgetary funds, revealing abuses of authority in distribution of land, and accessing information on the revenues of civil servants by accessing their declarations.

Based on the international standards developed by well-known international NGO Article 19, the Law of Ukraine “On Access to Public Information”¹ that was adopted in 2011, ranked in the top ten in the Global Right To Information Rating in 2012. An obvious advantage of the Law was that it contained well-defined principles and measures and was not too intertwined with other poorly developed and controversial provisions of Ukrainian legislation.

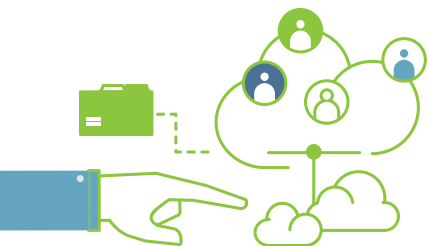
After Ukraine became independent in 1991, a first attempt was made to regulate access to information in Article 34 of the Constitution of Ukraine, which proclaimed the right of Ukrainian citizens to freely collect, store, use and disseminate information by oral, written or other means of their choice.

¹ Law of Ukraine “On Access to Public Information”

The second part of this Article provided legal grounds for limiting this right, and this limitation was later developed in the provisions of the Law of Ukraine “On Access to Public Information” and court practice. The current Law of Ukraine “On Information”, which was adopted in 1992, established a legal basis for regulating access to information; this Law is still in effect but contains some ambiguous provisions. Changing the approach to the status of information of local authorities and self-government bodies was vital. Under the Law of Ukraine “On Access to Public Information” all information collected or created by responsible officials in the course of their activity is considered public information, and access to this information can only be limited if its dissemination could cause harm. As of yet, despite rich case-law, the reluctance of duty-bearing officials to apply the so-called “three-component test” has not been overcome. The “three-component test”, which duty bearers are obliged to use, is a judicial tool for checking the legitimacy of classifying the information.

The rule envisaged in Article 6(2) of the Law of Ukraine “On Access to Public Information” is consistent with Article 10(2) of the European Convention on Human Rights and requires the duty bearers to identify and carry out an assessment of conflicting interests: the interest of society to know, on the one hand, and the legitimate right of individuals to restrict dissemination of the information, on the other. This examination instrument certainly meets the best standards for the right to freedom of expression, but requires high level of knowledge, impartiality and responsibility from duty bearers. As current court practice shows, the duty bearers prefer to make formal refusals justifying them by the special access regime to the classified document or information, and avoiding taking responsibility for assessing the public importance of the information. There is constant high demand for training events for duty bearers, but rapid turnover of staff of duty-bearing institutions, and low desire to make independent decisions, are barriers to fundamental change.

Therefore, between 2011 and 2015 civil activists directed their efforts more towards developing court practice that would get into specifics and interpret the provisions of the Law on the issues of (i) whether certain types of information are explicitly open; (ii) how the duty bearers should apply the “three-component test” and (iii) which authority is responsible for that specific type of public information. Due to these efforts, it became obvious in 2013-2014 that duty bearers (who were information administrators) were obliged to provide copies of declarations of state officials and Members of Parliament. This laid the foundation for many journalistic anti-corruption investigations. The adoption of the Resolution of the Plenum of the Supreme Administrative Court of Ukraine No. 10 dated September 29, 2016 was an important stage in crystallizing approaches to providing access to public information. This document contained answers to many questions that were sometimes resolved in judicial practice in a controversial manner.



OMBUDSPERSON AS AUTHORITY OVERSEEING ACCESS TO INFORMATION

One of the most important challenges to implementation of the Law of Ukraine “On Access to Public Information” remains as of yet unresolved: ensuring there is an institutionally capable, powerful and independent body that provides effective oversight over implementation of the requirements of access to public information legislation by public information administrators. From the moment the Law was adopted, its implementation was overseen by the prosecution, as this was the institution vested with the powers of general supervision over compliance with national legislation at that time. This approach proved extremely ineffective because of the lack of administrative or other statutory liability for offences in the field of access to public information (the related article of the Code of Ukraine on Administrative Offences² was only introduced in 2014). Instructions from prosecutors’ offices to duty bearers about violations of legal requirements on access to information neither had any significant consequences nor produced any systematic legal positions or recommendations.

The prosecution system’s reform and revision of the institution’s powers at the end of 2014 led to the need to find another institution to effectively supervise compliance with legislation on access to public information. To this end, the necessary changes were made to the Code of Ukraine on Administrative Offences.

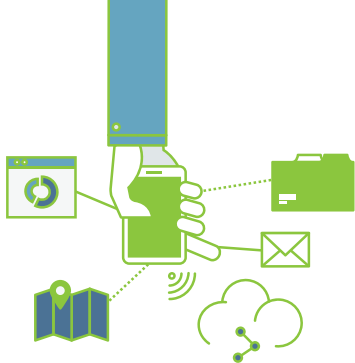
² Code of Ukraine on Administrative Offences

Specifically Article 255 was amended to empower the Ombudsperson (Ukrainian Parliament Commissioner for Human Rights) to draw up protocols on administrative violations of access to information.

There are currently two different ways of settling disputes about access to information in Ukraine: an appeal to a court with the authority to make a decision on the merits (that is, to determine whether the duty bearer's refusal to provide access to information was made in accordance with the procedure prescribed by law) or an appeal to the Parliament Commissioner of Ukraine for Human Rights, whose regional representatives issue protocols on violations of the right of access to information, which, in turn, serve as the basis for the imposition of administrative penalties by the court.

These changes had their impact, and officials responsible for public information who illegally refused information requests were brought to justice in administrative liability proceedings. However, because of the gaps in the procedure of bringing to the liability, as well as the Ombudsperson Office's lack of material and human resources, not all complaints concerning violations of the right of access to information resulted in the duty bearers being held liable and the imposition of penalties. Furthermore, the function of parliamentary control over observance of human rights exercised by the Ombudsperson under the Law of Ukraine "On the Parliamentary Commissioner of Ukraine for Human Rights"³ does not include the power to initiate administrative proceedings. Parliamentary oversight is a different form from traditional types of state oversight, therefore neither the position in the structure of state bodies nor the authority of the Ombudsman do not characterize it as a state power enforcement body.

³ Law of Ukraine "On Parliament Commissioner of Ukraine for Human Rights"



LEGISLATIVE AMENDMENTS AND NEW OVERSIGHT BODY FOR ACCESS TO INFORMATION

The main argument in favour of establishing a new independent body is that it would work in a timely fashion and could be accessed free of charge. The protection of the right to information currently provided by Ombudsperson does not entail any additional expenses for the applicant. However, the Ombudsperson's oversight is made less efficient and effective by the defective mechanism for bringing defendants to administrative liability envisaged in the Code of Ukraine on Administrative Offences. Regional Ombudsperson's representatives can only record cases of offences in the protocol but have no authority to prosecute on their own. They send the protocols to the court that brings the guilty person to account, but only on condition that the three months have not passed since the moment the violation took place, as prescribed in the Code of Ukraine on Administrative Offences. In addition, the Ombudsperson's representatives have no authority to carry out effective investigations; for example they have no right to compel a person suspected of committing an offence to appear before a court. The Ombudsperson's submissions are recommendations by their nature, and in order to bring someone to account for not fulfilling the Ombudsperson's lawful requirements, its representatives must again draw up an additional protocol on an administrative offence, which is submitted to court for review.

Despite the shortcomings described above concerning bringing offenders to account, the number of appeals to Ombudsperson is increasing every year because the other option for appealing against limitations of access to information rights is to file lawsuits in court, which entails additional financial costs and difficulties. The high court fee rate is another obstacle highlighted by right to information activists. Currently, the plaintiff is required to pay a court fee of approximately US\$28 at first instance and a fee of approximately US\$57-71 in the court of appeal. Although in absolute terms these fees may not seem overwhelming, given the nature of the relationship from which the dispute appeared, it is not fair. Lengthy court trials are an equally important obstacle to restoration of the violated right of access to information.

The main challenge concerning establishing a new specialized body on access to information (either individual or collective: for example, an Information Commissioner or an Information Commission) and ensuring its effective work is to determine a method of election or appointment that would ensure the body's independence. The more powerful and influential the body becomes in deciding disputes over access to information, especially where information of high public interest is concerned, the greater the desire that politicians would have to control it. The election or appointment procedure for the body must ensure its independence from political influence and guarantee that positions in this body are not subject to political bargaining and agreements. Analysis in the Report of the Directorate of the Information Society DGI (2016) SASG/2016/07⁴ suggests that there is a possibility for such a body to be created in the Ukrainian public governance system and offers a tentative structure for it.

It should be mentioned that some legislative initiatives, including Draft Law 2913, have been brought before Parliament aiming to address the problem. However, since 2014 not one draft law that would dramatically improve access to information legislation has been endorsed by

⁴Report of DGI (2016) SASG/2016/07 (Directorate of Information Society and Action Against Crime, Information Society Department, Media and Internet Division), on Institutional Mapping Analysis In Sphere of Information Policy and Media In Ukraine, prepared on the basis of the expert opinion by Eve Solomon, Tanja Kerševan Smokvina and Nataša Pirc Musar, 26 September 2016

the Parliament. Likewise, despite overall progress in implementation of legislation on access to public information between 2011 and 2018, the unsuccessful attempt to ratify the Council of Europe Convention on access to official documents (Tromso Convention) was an unwelcome surprise. Despite the general positive attitude towards the Convention and advocacy by the public sector, there were not enough votes in Parliament to adopt the law. While the standards of access to information established in the Convention are not higher than the standards envisaged in Ukraine's national legislation, the international oversight mechanisms that could be introduced in accordance with the Convention, would certainly increase the transparency of the governments of the Council of Europe. In particular, introducing international oversight of observance of the right to access official documents, and putting this right at Convention level, could add more weight to it and prevent attempts to distort or depreciate this right by means of national legislation in the future.



CIVIL SOCIETY AS A DRIVER OF CHANGE

Civil society and NGOs made an important contribution to the process of implementing the legislation on access to information. The mechanisms provided by the Law of Ukraine “On Access to Public Information” were timely and their implementation was widely supported by donor organizations. Demand for training events and educational courses for activists, journalists and duty bearers is still high. In addition, good coordination of stakeholders’ efforts resulted in the progress in implementation of legislation on access to public information. At the end of 2015 several NGOs, with the Ombudsperson’s Office, united into the informal “Ombudsman +” platform, which enabled them to coordinate their monitoring of implementation of legislation on access to information. Before this, NGOs monitored compliance with access legislation using their own, often incomplete, methodologies: this led to contradictions and opposing assessments. Now, coordinated work involving the Ombudsperson’s Office has resulted in a joint methodology and the first comprehensive monitoring of all regions of Ukraine in 2017.



INFORMATION DISSEMINATION AND OPEN DATA

Civic activists and journalists use access to public information on a daily basis, mainly using the most popular way of accessing information: submission of requests. Annual increases in the volume of requests for access to information generate complaints from duty bearers. Along with the most simple and obvious way of accessing public information – obtaining information directly from the responsible officials in answer to requests – the Law of Ukraine “On Access to Public Information» also includes an obligation on the part of duty bearers to disseminate information in a various ways, including in the form of open data.

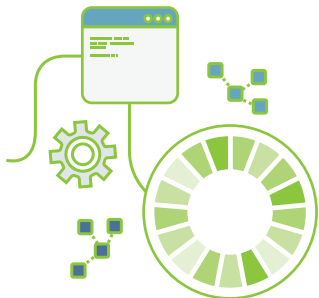
The provisions of the abovementioned Law prohibit duty bearers from rejecting requests for information on the basis that information requested by the applicant is freely available: for example, published on the public authority’s official website. Though the requirement to disclose certain categories of information is provided for by law and failure to comply with such a requirement may result in administrative liability for the responsible officials, such situation does not encourage the duty bearers to direct their efforts to complete and prompt dissemination of the information that is within their control.

Particularly critical gaps have been identified concerning dissemination of open data. In 2015, an article addressing this was added to the Law of Ukraine “On Access to Public Information”, and in accordance with the provisions of this Law and the Law of Ukraine On Openness of Using Public

Funds⁵, duty bearers should disseminate open data information via their official websites, and also publish it on the state open data web portal (<https://data.gov.ua/>) and the United Web Portal of budgetary expenditure (<https://spending.gov.ua/edata>). Cabinet of Ministers Resolution 835 of 21 October 2015, which regulates the procedure for dissemination and prescribes which datasets should be made public by the duty bearers, needs to be updated and amended. The duty bearers attribute the gap in meeting the requirements for publishing information in open data format to poor-quality equipment and limited human capacity caused by staff turnover. This highlights the need to increase oversight by the Ombudsperson and opportunities for civil society activists and organizations to engage in continued professional training for civil servants.

It is still too early to talk about the existence of a publicly available information database that has enough data for machine processing, but recent years have shown improvements in the accumulation of such databases. For example, the Open Data Barometer (a ranking of countries by development of open data published in late September 2018) indicates that Ukraine has made significant progress in enabling open data.

⁵ Law of Ukraine “On Openness of Using Public Funds”



ACCESS TO INFORMATION AND SUSTAINABLE DEVELOPMENT GOALS

The importance of ensuring broad, prompt and unrestricted access to public information concerning Ukraine's progress towards achieving the Sustainable Development Goals (SDGs) should be emphasized separately. In 2017 the Ministry of Economic Development and Trade of Ukraine prepared the National Report «Sustainable Development Goals: Ukraine»⁶, which defined the basic indicators for achieving the SDGs in Ukraine. As indicated in the report, more than 800 leading experts in the SDG thematic areas participated in the consultations that preceded this report. However, of the indicators assessed in the Report, SDG indicator 16.10.2 “Number of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information” was not examined. We hope that this shortcoming will be addressed in 2019, as it is difficult to overestimate the impact of access to information on progress towards Goal 16 “Peace, Justice and Strong Institutions” as well as towards the SDGs as a whole.

At the same time, Ukraine's progress in implementing SDG indicator 16.9.2 was evaluated in international monitoring conducted in 2017 by the Centre for Law and Democracy (Canada) as part of the Freedom of Information Advocates Network initiative. Public organizations from various countries including Ukraine provided reports on the current status of implementation of access to information legislation.

⁶ National Report “Sustainable Development Goals: Ukraine”

The evaluation methodology was based on metadata developed by UNESCO for SDG 16, and was aimed to provide a basis for state self-assessment in the years to come. The result of the assessment Measuring SDG 16.10.2: A Synthesis Report on the Freedom of Information Advocates Network (FOIANet) Methodology⁷ showed a high level of compliance with the indicator in Ukraine, and generally welcomed Ukraine's progress in implementing guarantees of access to information.

Given the real progress in access to public information in Ukraine, proper international assessment could improve the image of Ukraine in the world and become a good inspiring reason in the future. Therefore, everyone interested in this process: civic activists, non-governmental organizations, authorities and the Ombudsperson should make greater efforts to raise awareness of the impact of access to information on progress towards achieving the SDGs, and develop a plan for assessing and improving implementation of SDG indicator 16.10.2 at state level.

⁷ Measuring SDG 16.10.2: A Synthesis Report on the Freedom of Information Advocates Network (FOIANet) Methodology



CONCLUSIONS AND RECOMMENDATIONS

In summary, we can say that there has been tangible progress in improving access to public information between 2011 and 2018, and that this has had a powerful impact on strengthening activities against corruption and processes that contribute to building transparent and democratic governance. However, several challenges still need to be addressed in order to transform ad hoc success into sustainable achievement. The progress of previous years should be formalized in relevant state policies, further developed with support and coordination from state authorities at all levels and backed up by effective oversight.

In this context, the following recommendations can be offered to improve implementation of the legislation on access to public information:

- ▶ Ensure full access to public information from state bodies and responsible authorities by raising awareness among duty bearers, monitoring and effective oversight, and compliance with the requirements for full disclosure of public information in order to reduce the burden on duty bearers and the oversight authority.
- ▶ Introduce mechanisms for effective oversight and rapid elimination of violations of the right to access to information for the state and the oversight body, including the possibility of implementing it through introduction of an independent institution, competent and able to exercise such control and protect the right to information in a way

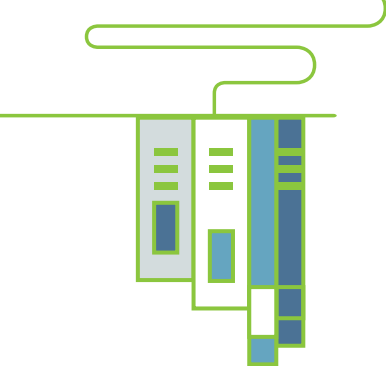
that is accessible for everyone. Increase the capacity of the existing oversight authority. Conduct extensive educational and explanatory work among public duty bearers and requestors on the issues that cause the majority of violations.



Utilize the potential of “proactive” access – publicizing and using information in the format of open data – as widely as possible on the part of duty bearers and civic activists. In order to monitor proper disclosure, strengthen the Ombudsman’s Office and its regional representatives’ capacity to oversee disclosure of information and open data sets.



On the part of the state and civil society, ensure Ukraine’s progress in implementing the Sustainable Development Goals by developing a strategic plan to improve implementation of Goal 16 “Peace, justice and strong institutions” and in particular indicator 16.10.2, which reflects the introduction and implementation of legislative guarantees of free access to public information. Develop a plan to achieve the SDGs at state level. Monitoring and evaluating implementation of such a plan will stimulate further movement and serve as a road map for subsequent legislative initiatives.



NOTES



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