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Note on the Draft Republic of Kazakhstan Law on Access to Information and the Draft Law of the Republic of Kazakhstan on Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on the Issues of Access to Information[1]

INTRODUCTION

Kazakhstan is one of a minority of countries globally that still does not have legislation giving individuals a right to access information held by public authorities – defined as State bodies and other subjects which hold information of public value – generally known as right to information (RTI) legislation. However, the idea of preparing such legislation has been on the table for a long time now and various drafts have been prepared by different parties over the years. In June of 2015, the government circulated a draft Republic of Kazakhstan Law on Access to Information (draft Law), along with a draft Law of the Republic of Kazakhstan on Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on the Issues of Access to Information (draft Amendments). This Note provides an analysis of the draft Law and draft Amendments, taking into account international standards and better comparative practice.

The draft Law is somewhat weak as compared to the right to information laws which exist in different countries. **[strengths and weaknesses]**

It would create a robustly independent Freedom of Information Commissioner with extensive powers to review failures to respect the rules regarding requests for information and other failures to apply the law. It is broad in scope and has good procedures for making requests for information. At the same time, the regime of exceptions is rather complex and appears to have some weaknesses, mainly in the form of excessively broad exceptions. And the system of sanctions and protections, and the envisaged promotional measures, could be further strengthened.

This Note is based on international standards regarding the right to information, as reflected in the *RTI Rating*, prepared by the Centre for Law and Democracy (CLD) and Access Info Europe (RTI Rating).[2]

British Embassy
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[1] This expert opinion has been prepared with financial support of the British embassy in Kazakhstan. The views and opinions contained in the conclusion, do not reflect the views of the British Embassy in Kazakhstan.

[2] The Rating is based on a comprehensive analysis of international standards adopted both by global human rights mechanisms, such as the UN Human Rights Committee and Special Rapporteur on Freedom of Opinion and Expression, and by regional courts and other regional mechanisms. The Rating is continuously updated and now covers over 100 national laws from around the world. Information about the RTI Rating is available at: http://www.RTI-Rating.org.

It also takes into account better legislative practice from other democracies around the world.[3] A quick assessment of the draft Law based on the RTI Rating has been prepared[4] and the relevant sections of this assessment are pasted into the text of this Note at the appropriate places. The overall score of the Law, based on the RTI Rating, is as follows:

Section	Max Points	Score
1. Right of Access	6	5
2. Scope	30	23
3. Requesting Procedures	30	21
4. Exceptions and Refusals	30	12
5. Appeals	30	6
6. Sanctions and Protections	8	1
7. Promotional Measures	16	6
Total score	**150**	**74**

This score places the draft Law in 68th place out of the 102 countries around the world with national RTI laws which have been assessed on the RTI Rating.

1. RIGHT OF ACCESS AND SCOPE

The draft Law does well in terms of guarantees for the right to access information held by public authorities or right to information. This right is protected in Article 20(2) of the Constitution of the Republic of Kazakhstan. Furthermore, Article 2(2) of the draft Law provides that international treaties ratified by Kazakhstan dominate national laws in case of conflict, thereby formally ensuring that international rules on the right to information should apply in the country.

Various provisions in the draft Law – including the preamble and Articles 9(2) and 11(2) – establish that everyone has the right to request and receive information.

Article 4 of the draft Law refers to various general principles governing the right of access – such as openness, reliability, timeliness and equality, as well as non-disclosure of secrets and related principles – but there is no statement about the wider benefits of RTI, such as combating corruption, facilitating participation in public affairs and promoting good governance. This is important to provide a solid basis for interpretation of the law (i.e. in light of its benefits). Furthermore, the draft Law does not provide for its rules to be interpreted in the manner that best promotes the benefits that flow from the right to information, or even the principles set out in Article 4.

The preamble and Article 1(2) refer to the right of citizens to access information. It is clear, however, from Article 1(3), as well as Article 11(5) on requesting procedures, that the right extends to legal entities. Article 1(3) also suggests that foreign States and international organisations are "information

[3] See, for example, Toby Mendel, *Freedom of Information: A Comparative Legal Survey, 2nd Edition* (2008, Paris, UNESCO), available in English and several other languages at: http://portal.unesco.org/ci/en/ev.php-URL_ID=26159&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[4] Note that this was an informal rating that did not go through the rigorous process that applies before a rating will be uploaded to the RTI Rating website.

users" (i.e. beneficiaries of the right of access), although it is not clear exactly what this means in terms of foreign States (i.e. what foreign State bodies could make a request) or what is included in the term international organisations, which is not defined. It may be noted that this is not an approach which is commonly found in other right to information laws. Most importantly, however, the right does not extend to non-citizens, as mandated by international standards.

The definition of "information" at Article 1(1) is broad but it includes a number of qualifications that are, ultimately, both unnecessary and likely to impose an unwanted burden on officials, who have to consider whether or not the qualifications are met for every request. First, it defines information as "data on persons, subjects, facts, events, phenomenon and processes". It is not clear what the point of this qualification is, but better practice is to include all information, regardless of its subject matter. Second, it only extends to information "containing requisites allowing its identification". Once again, it is unclear what the point of this qualification is, but it is not found in better practice right to information laws and could be abused to refuse access.

Better practice is to create a right to request both specific documents and/or types of information. Thus, if the applicant knows the specific document he or she is seeking – such as the 2014 budget – he or she can specify that on the request but, otherwise, the applicant may simply ask for specific types of information – such as the total planned expenditure for 2014. Where information which is responsive to a request can reasonably easily be found in or compiled from documents, it should be provided to the applicant. The draft Law does not make it clear that applicants have the right to ask for either documents or information.

Article 8 generally appears to contain a broad definition of public authorities ("information holders"). However, this article employs terms which are not very clear such as "State authorities", "State institutions which are not state authorities" and "Subjects of quasi-governmental sector". It is possible that these terms are defined clearly in other legislation. However, it would be preferable for them to be defined in the specific legislation on the right to information. For example, it is not entirely clear whether "State authorities" includes the Head of State, the legislature (and its members) and the judiciary (for purposes of the Rating, we have assumed that these bodies are included but it would be preferable to make this explicit in the draft Law).

Two types of public authorities do not appear to be included in the definition. First, Article 3(4) stipulates that the draft Law shall not provide for access to information covered by laws relating to the archives. It has not been possible, within the context of this analysis, to study these archival laws but it is generally better practice to create one single regime for access to information held by public authorities, as this is easier for users (and often for officials as well). Having separate access systems is also potentially problematical to the extent that the laws governing the archives do not establish systems of access which are as strong as those in the draft Law. Second, Article 8 fails to bring bodies which undertake public functions within the ambit of the obligation to provide access to information.

Recommendations:

- The scope of Article 4 should be expanded to include references to the wider, external benefits which flow from the right to information. The law should also require decision makers to interpret its provisions so as best to give effect to those benefits.
- The law should make it clear that everyone, including non-citizens, has the right to make requests for information.
- The qualifications in the definition of "information" should be removed and the law should simply cover all recorded information.

- The law should make it clear that applicants may make requests for documents and/or information.
- The definition of "information holder" should be clarified and it should be clear that it covers all three branches of government, as well as the head of State and all bodies which are established by law or the Constitution, or which are owned or controlled by such bodies. It should also cover private bodies that undertake public functions and consideration should be given to bringing the archives within the ambit of the right to information law.

Right of Access

	Indicator	Max	Points	Article
1	The legal framework (including jurisprudence) recognises a fundamental right of access to information.	2	2	20(2) of Constitution
2	The legal framework creates a specific presumption in favour of access to all information held by public authorities, subject only to limited exceptions.	2	2	preamble, 9(2), 11(2)
3	The legal framework contains a specific statement of principles calling for a broad interpretation of the RTI law. The legal framework emphasises the benefits of the right to information.	2	1	4
	TOTAL	6	5	

Scope

	Indicator	Max	Points	Article
4	Everyone (including non-citizens and legal entities) has the right to file requests for information.	2	1	Preamble, 1(2), 1(3)
5	The right of access applies to all material held by or on behalf of public authorities which is recorded in any format, regardless of who produced it.	4	3	1(1)
6	Requesters have a right to access both information and records/documents (i.e. a right both to ask for information and to apply for specific documents).	2	1	
7	The right of access applies to the executive branch with no bodies or classes of information excluded. This includes executive (cabinet) and administration including all ministries, departments, local government, public schools, public health care bodies, the police, the armed forces, security services, and bodies owned or controlled by the above.	8	6	3(4), 8
8	The right of access applies to the legislature, including both administrative and other information, with no bodies excluded.	4	4	8
9	The right of access applies to the judicial branch, including both administrative and other information, with no bodies excluded.	4	4	8

10	The right of access applies to State-owned enterprises (commercial entities that are owned or controlled by the State).	2	1	8
11	The right of access applies to other public authorities, including constitutional, statutory and oversight bodies (such as an election commission or information commission/er).	2	2	8
12	The right of access applies to a) private bodies that perform a public function and b) private bodies that receive significant public funding.	2	1	8
	TOTAL	**30**	**23**	

2. DUTY TO PUBLISH

Articles 12-17 of the draft Law provide for the main system of proactive publication, although there are also related provisions elsewhere in the draft Law (such as Article 10(4), which provides for online access to sessions of the parliament and analogous bodies). Article 13 also includes a provision on open meetings.

Article 16 contains a very long and detailed list of specific documents that must be published on a proactive basis. While this is useful, it is in places at least perhaps unnecessarily detailed, for example listing, at Article 16(3)(1), "texts of speeches". It is difficult to assess, amidst all of the detail, how comprehensive it really is. For example, Article 16(3)(11) provides for the publication of information on tenders and bids, including the procedures for bidding and application forms. But it is not clear whether the outcome of tenders, and in particular the contracts concluded with successful bidders, is to be made available.

Despite this, the system of proactive publication envisaged by Article 16 is ambitious in nature. Experience in other countries shows that public authorities often fail to meet their proactive publication requirements and the draft Law does not appear to give public authorities any period of time to meet these obligations. An approach that has been suggested to resolve this problem is to phase in proactive obligations, for example over a three- or five-year period. There are various ways to establish such a system so as to ensure that public authorities continue to move forward over the allocated period of time, rather than just waiting until the end before taking any action. They could, for example, be required to prepare plans for how they are going to meet all of their proactive publication requirements over the whole period.

The proactive publication rules also rely heavily on the Internet as a means of dissemination of material, in line with practice in other countries. They also refer to "information stands", "mass media" and access for disabled persons. This is positive, but the draft Law does not place a specific obligation on public authorities to ensure that information is disseminated in a manner which ensures that it is accessible to target populations which may not have access to the Internet. For example, information about a proposed project may need to be published on notice boards in the communities that will be affected by the project.

Recommendation:

- The specific list of items subject to proactive publication in Article 16 should be reviewed to ensure that it covers all information of key importance.

- Consideration should be given to putting in place a progressive system for achieving proactive publication targets over a period of time, such as three or five years.
- Consideration should be given to requiring public authorities to publish certain information in ways that are accessible to key target populations, rather than simply online.

Note: The RTI Rating did not assess the duty to publish and so no excerpt from it is provided here.

3. REQUESTING PROCEDURES

The system for making and processing requests is, overall, an area where the draft Law does fairly well, scoring 21 of the possible 30 points in this category of the Rating. One weakness is the types of information that need to be provided to make a request. Pursuant to Article 11(5), applicants must provide their first and second name and patronymic, if desired. It is not clear whether the term "if desired" applies to the patronymic or all names, but applicants are also required to provide their individual identification number, "if any", and to sign the request. Pursuant to Article 11(7), anonymous requests will not be accepted. Better practice is only to require applicants to provide an address for delivery of the information, which might be an email address, and then to allow for anonymous requests.

The draft Law also fails specifically to prohibit public authorities from asking applicants for their reasons for making requests, although it also does not require them to provide such reasons. This creates a grey area, which might be exploited by certain public authorities to ask for such reasons, which is not legitimate according to international standards.

The draft Law includes only a very general provision on assistance to applicants, in Article 9(1)(3), which provides that the information holder must "clarify the content of the request with the person, that submitted it". Better practice is to establish much more specific obligations of assistance. This includes helping applicants who are having trouble specifying clearly the information they are looking for, or whose requests are unduly vague or unclear. It also includes providing assistance to those who cannot make a written request for information, for example because of disability or illiteracy.

Article 11(12) of the draft Law provides that the response to an application should, "based on the information user's preferences", be on paper or electronically in the language of the request, while oral requests shall be responded to orally. This appears to be an obligation to respect users preferences in terms of the form of provision of the information. However, it is unduly limited in scope. For example, better practice would be to also provide for access via inspection of documents at the premises of the public authority, for example where the applicant needed to look through a large number of documents for a small amount of information and did not necessarily want copies of all of the documents.

The draft Law generally includes strict timelines for responding to requests, including an initial response deadline of ten days (assumed to be business days), followed by a possible extension of another five business days, but only with the approval of top management (Article 11(10)). However, it fails to specify that these are maximum time limits and that, as a general rule, requests need to be responded to 'as soon as possible'. This is important to avoid a situation where public authorities wait until the end of the ten-day period even where the information is immediately accessible to them.

Article 11(13) provides for fees where the response to a request requires printing or copying. Such fees are limited to "actual costs", which shall be established centrally by the government, and "socially

vulnerable groups" shall be exempt from paying the fees. This is a very progressive system of fees. However, it could be further improved by requiring an initial number of pages – for example 15 or 20 pages – to be provided for free.

Article 7(1)(1) provides that applicants may "disseminate information using any means not prohibited by the law", in what may be seen as a basic rule on reuse of information. While positive, this does not actually establish any new right to reuse information and its implications depend on what is contained in those other laws. Ideally, a fully-fledged system for reuse of public information, including an open licence and so on, should be established either via the right to information law or via other rules. At a minimum, if such a system does not already exist, the right to information law should include a framework of rules on reuse of information. This could make it clear that there is a strong presumption in favour of open reuse of information created or owned by public authorities (while respecting intellectual property rights held by third parties). This might provide for the development of a system of open licences for this information, perhaps within a set timeframe (for example of six months).

Recommendations:

- Applicants should not be required to provide their names and identity numbers on a request but simply an address for delivery of the information, and the law should make it clear that public authorities may not ask applicants for the reasons for their requests.
- The law should impose clearer obligations of assistance on public authorities, including to help applicants clarify their requests, as needed, and to help those who are having difficulty submitting a written request.
- Consideration should be given to expanding the forms or ways in which applicants can access information.
- The law should establish a general rule requiring requests to be responded to 'as soon as possible', making it clear that the time limits are maximum rather than default periods.
- Consideration should be given to providing for a set number of pages to be provided to applicants for free.
- Consideration should be given to including a basic framework of rules in the law on the right to reuse information, including a strong presumption in favour of open reuse of information created or owned by public authorities.

	Indicator	Max	Points	Article
13	Requesters are not required to provide reasons for their requests.	2	0	
14	Requesters are only required to provide the details necessary for identifying and delivering the information (i.e. some form of address for delivery).	2	1	11(5), (7)
15	There are clear and relatively simple procedures for making requests. Requests may be submitted by any means of communication, with no requirement to use official forms or to state that the information is being requested under the access to information law.	2	2	1(5), 11(3), 11(5), 11(9)
16	Public officials are required provide assistance to help requesters formulate their requests, or to contact and	2	1	9(1)(3)

	assist requesters where requests that have been made are vague, unduly broad or otherwise need clarification.			
17	Public officials are required to provide assistance to requesters who require it because of special needs, for example because they are illiterate or disabled.	2	0	
18	Requesters are provided with a receipt or acknowledgement upon lodging a request within a reasonable timeframe, which should not exceed 5 working days	2	2	11(6)
19	Clear and appropriate procedures are in place for situations where the authority to which a request is directed does not have the requested information. This includes an obligation to inform the requester that the information is not held and to refer the requester to another institution or to transfer the request where the public authority knows where the information is held.	2	2	11(11)
20	Public authorities are required to comply with requesters' preferences regarding how they access information, subject only to clear and limited overrides (e.g. to protect a record).	2	2	11(12)
21	Public authorities are required to respond to requests as soon as possible.	2	0	
22	There are clear and reasonable maximum timelines (20 working days or less) for responding to requests, regardless of the manner of satisfying the request (including through publication).	2	2	11(10)
23	There are clear limits on timeline extensions (20 working days or less), including a requirement that requesters be notified and provided with the reasons for the extension.	2	2	11(10)
24	It is free to file requests.	2	2	11(1)
25	There are clear rules relating to access fees, which are set centrally, rather than being determined by individual public authorities. These include a requirement that fees be limited to the cost of reproducing and sending the information (so that inspection of documents and electronic copies are free) and a certain initial number of pages (at least 20) are provided for free.	2	1	11(13), 166 of Enviro Code
26	There are fee waivers for impecunious requesters	2	2	11(13)
27	There are no limitations on or charges for reuse of information received from public bodies, except where a third party (which is not a public authority) holds a legally protected copyright over the information.	2	2	7(1)(1)
	TOTAL	**30**	**21**	

4. EXCEPTIONS AND REFUSALS

The draft Law does rather poorly in terms of the regime of exceptions, earning only 12 of a possible 30 points on the RTI Rating, or 40 percent. Even this is, to some extent, a generous interpretation of the rules because no points were deducted for unduly broad or unnecessary exceptions, even though it is extremely likely that these exist in other laws, because it was not possible to conduct a review of other laws providing for secrets.

The approach towards exceptions which is taken in the draft Law is different than that taken in most better practice right to information laws. The latter normally include their own comprehensive and detailed list of exceptions and then allow other laws to elaborate on these exceptions, but not extend them (which is not necessary if the list of exceptions in the right to information law is comprehensive). In contrast, the draft Law essentially relies on other laws to establish exceptions. Thus, Article 9(1)(4) provides that public authorities may reject requests based on exceptions in other laws, while Article 9(2)(11) requires public authorities to comply with restrictions in other laws.

The problem with relying on exceptions in other laws is that it is most unlikely that all of these exceptions meet international standards in this area. In particular, international standards require restrictions to be legitimate in terms of their scope, to be subject to a harm test (so that it is only where release of the information would harm a protected interest that the exception is engaged) and to provide for a public interest override (so that information will still be released, even if this would harm a protected interest, where the overall public interest is served by disclosure).

The draft Law does impose two types of restrictions on access in other laws. Article 5 provides that restrictions are only legitimate to the "extent necessary to protect constitutional system, public order, human rights and freedoms, public health and morals". This is useful but it suffers from two problems. First, these grounds for restriction are very broad and general indeed. For example, the constitutional system includes a very broad range of rules, comprising human rights, the system of government, the legal system and so on. Restrictions which protected anything mentioned in the Constitution could arguably be justified on the basis of this provision. As a result, the number of restrictions in other laws that would actually be affected by Article 5 is probably rather limited. Second, it is not clear whether the intention of this provision is actually to impose limits on or invalidate secrecy provisions in other laws. Otherwise, however, it does impose a necessity standard on restrictions which is useful.

Second, Article 6 of the draft Law contains a list of information which shall be unrestricted, such as information about emergency situations. This is useful but it remains to be seen how effective it will be in practice given that, like Article 5, many of the rules are quite general in nature. For example, Article 6(3) provides that information on "acts of terrorism" shall be unrestricted, but this would surely not include information about investigations of terrorism, so it is unclear exactly what it would cover.

The draft Amendments do not introduce any specific limitations to restrictions in other laws, although they do incorporate the list of unrestricted information found in Article 6 into various other laws.

Although, in general, the draft Law defers to other laws to establish restrictions on the right of access, it does include a small list of categories of information that are not subject to disclosure, in Article 11(18). While all four of these protect interests that are generally recognised as legitimate under international law, three of the four lack any harm test and thereby fail to respect international standards. These are:

- Information collected in the process of State control and supervision, prior to a decision.
- Inter- or intra-agency correspondence, again prior to a decision.

- Information from foreign States or intergovernmental organisations, unless there is mutual agreement about disclosure of the information.

It is useful that the first two grounds for secrecy only last until a decision has been made on the matter, but these rules do not identify an interest which needs protection – such as the integrity of investigations or the free and frank exchange of advice – and then protect it against harm. Instead, they refer to categories of information, much of which would simply not be sensitive. Thus, some inter-agency correspondence may be sensitive, but this would certainly not apply to all such information. In terms of the last ground, better practice in such cases is that information may be withheld if disclosure of the information would harm relations with other States or intergovernmental organisations. This is quite different from failing to reach positive agreement about disclosure of the information, which will often be impossible to achieve, even when the information is not sensitive and releasing it would not harm relations.

The draft Law fails to establish any public interest override for exceptions. Such an override serves to require the disclosure of information, even where this would cause harm to a protected interest, where, on balance, the overall public interest is served by disclosure. For example, information about the purchase of weapons may be sensitive from the perspective of national security, but it may also disclose the presence of corruption in the arms purchasing system. In such cases, the overall public interest would normally be served by disclosure because this would expose the corruption and be likely to eliminate or at least reduce it. This, in turn, would lead to greater efficiencies in arms purchasing, enhancing national security in the longer term.

Better practice laws provide for an absolute override in certain cases, for example for information which exposes human rights abuses or breaches of humanitarian law. In this case, the information would need to be released regardless of the countervailing secrecy interest. Such an absolute override would then be combined with a balancing override, as described above, whereby information would need to be disclosed whenever, on balance, this served the overall public interest. In this case, the relative importance of the harm to the protected interest and the public benefits of disclosure would have to be weighed against each other to determine which was more significant.

The draft Law does not provide for an overall time limit, for example of 15 or 20 years, for exceptions protecting public interests, such as national security and the free and frank exchange of advice within government. Such limits are found in better practice right to information laws and reflect the idea that the sensitivity of information decreases substantially over time. Thus, comments which were quite sensitive when they were first made, 15 or 20 years ago, would normally not be sensitive today. Most laws do, at the same time, allow this period of secrecy to be extended in exceptional cases where the information remains sensitive after the time limit. This might be the case, for example, for certain types of national security information. Better practice in such cases is to put in place a particular procedure for engaging this special extension, such as requiring the specific agreement of a Minister.

The draft Law also does not make it clear that information must be released as soon as an exception ceases to apply. An explicit rule along these lines can help make it clear that the risk of harm should be assessed at the time of a request. Thus, even if a document has been classified as sensitive, the reasons for it being sensitive are likely to change over time and the original reasons may not apply after a couple of years or even less, depending on all of the circumstances. Under international law, to justify non-disclosure, the risk of harm must be present at the time the request is made, not at the time the document is produced.

The draft Law also fails to put in place procedures for consulting with third parties where a request relates to information provided in confidence by that third party. Such consultations are important to assess the views of the third party. Where the third party consents to disclosure of the information, this

simplifies the matter for everyone involved, since it is no longer necessary for the public authority to assess whether the information is sensitive. Where the third party objects to disclosure, consultation provides an opportunity for that party to present his or her views on the issue. This can often help the public authority decide whether or not the information really is sensitive and is also fair vis-à-vis the third party. It is, however, important that, in such cases, the views of the third party are not taken as a veto to disclosure but merely as factors to be taken into account when deciding whether or not information is in fact sensitive.

The draft Law also fails to put in place a severability rule whereby, when only part of a document is sensitive, that part should be removed and the rest of the document disclosed. Such a rule only makes sense since there is obviously no reason not to disclose the part of the document that is not sensitive and this serves the goals of openness that underlie right to information legislation.

Article 11(17) provides that, when a request is rejected, the applicant must be informed within five days, by means of a "substantiated response", which is understood as a response which includes reasons for the rejection. This is useful but better practice is to inform applicants, at the same time, of their right to appeal against this decision and how to do so.

Ideally, after a right to information law is adopted, a review of laws which have secrecy provisions needs to be conducted, to bring those laws into line with the standards in the right to information law. Since the right to information law is being accompanied by the draft Amendments, it might be useful to use this opportunity to review and amend already some of the secrecy provisions in other laws.

Recommendations:

- Consideration should be given to adopting a more 'traditional' approach to exceptions, by providing for a complete regime of exceptions in the right to information law and then allowing for this to be elaborated upon, but not extended, by other laws.
- The restrictions in Article 11(18) should be revised to identify specific interests which need protection – such as the free and frank exchange of advice within government or good relations with other States – and the application of exceptions should then be contingent on release of the information causing harm to those interests.
- The law should provide for a public interest override, which may include both absolute and balancing elements, the latter to apply whenever the interest in disclosure outweighs the competing secrecy interest.
- An overall time limit should be established, for example of 15 or 20 years, after which all information covered by exceptions to protect public interests should presumptively be released, although a special procedure to extend this in those rare cases where the sensitivity of a document persists beyond that time limit should be established.
- Information should be released as soon as an exception ceases to apply (as opposed, for example, to when a preset period of classification expires).
- The law should require public authorities to consult with third parties in relation to information provided to them by those third parties on a confidential basis, so that they may either consent to the disclosure or present their reasons as to why the information should not be released.
- The law should include a severability rule whereby, if only part of a document is sensitive, the rest of the document will be disclosed after that part has been removed.

- A requirement to inform applicants about their right to appeal against any decision rejecting their request should be added to Article 11(17).
- Consideration should be given to including amendments to some of the secrecy provisions in other laws through the new on amendments that will accompany the right to information law.

	Indicator	Max	Points	Article
28	The standards in the RTI Law trump restrictions on information disclosure (secrecy provisions) in other legislation to the extent of any conflict.	4	0	4(6), 5, 9(1)(4), 9(2)(11)
29	The exceptions to the right of access are consistent with international standards. Permissible exceptions are: national security; international relations; public health and safety; the prevention, investigation and prosecution of legal wrongs; privacy; legitimate commercial and other economic interests; management of the economy; fair administration of justice and legal advice privilege; conservation of the environment; and legitimate policy making and other operations of public authorities. It is also permissible to refer requesters to information which is already publicly available, for example online or in published form.	10	10	
30	A harm test applies to all exceptions, so that it is only where disclosure poses a risk of actual harm to a protected interest that it may be refused.	4	1	11(18)
31	There is a mandatory public interest override so that information must be disclosed where this is in the overall public interest, even if this may harm a protected interest. There are 'hard' overrides (which apply absolutely), for example for information about human rights, corruption or crimes against humanity.	4	0	
32	Information must be released as soon as an exception ceases to apply (for example, for after a contract tender process decision has been taken). The law contains a clause stating that exceptions to protect public interests do not apply to information which is over 20 years old.	2	0	
33	Clear and appropriate procedures are in place for consulting with third parties who provided information which is the subject of a request on a confidential basis. Public authorities shall take into account any objections by third parties when considering requests for information, but third parties do not have veto power over the release of information.	2	0	
34	There is a severability clause so that where only part of a record is covered by an exception the remainder must be disclosed.	2	0	
35	When refusing to provide access to information, public authorities must a) state the exact legal grounds and reason(s) for the refusal and b) inform the applicant of the relevant appeals procedures.	2	1	11(17)
	TOTAL	**30**	**12**	

5. APPEALS

This is the category of the Rating where the draft Law does worst, scoring only six out of the possible 30 points or 20 percent. A key reason for this is that the draft Law fails to establish an independent administrative oversight body to hear appeals about claimed failures to apply the law.

Better practice is to provide for three levels of appeals. First, many laws provide for internal appeals to a higher administrative authority within the public sector. This sort of appeal is recognised in Article 18 of the draft Law, which refers to appeals to a "higher-ranking state body (higher-ranking official person)". Such appeals are useful as they provide for an opportunity for the public authority to sort out the matter internally, before going to an external decision-maker. In many cases, especially in the early days of implementing a right to information law, higher level officials are more confident about disclosing information than lower-ranking officials, so an internal appeal can often resolve disputes. However, to avoid undue delays, it is important that the law place clear time limits on decision-making processes at that level, for example of 10 to 15 days (taking into account that the public authority has already had the chance to consider the matter so that this further review should not take too long).

Article 18 refers to "complaints against actions (inactions) of officials and on the decisions of information holders", which would appear to allow for complaints regarding a wide range of official failures to apply the law. It might be useful, however, to make it clear that applicants have a right to lodge a complaint for any failure to follow the rules in the law relating to requests (i.e. not only refusals to provide access but also excessive delays, charging too much, refusals to provide access in the form requested and so on).

Second, one can always appeal legal issues to the courts, and the draft Law specifically provides for this in Article 18.

However, the draft Law fails to provide for an administrative level of appeal, for example to an information commission. Experience in other countries clearly demonstrates that having an administrative oversight body – to entertain complaints but also to undertake promotional measures – is essential for the successful implementation of a right to information law. Indeed, it is no exaggeration to say that one of the key differences between successful and less successful right to information systems is the presence or otherwise of an independent oversight body. The courts are simply too costly and time consuming to be an effective level of redress for the vast majority of information applicants, while internal appeals lack the independence and objectivity of external appeals. It may be noted that the Public Council on Access to Information, under the President, established pursuant to Article 19 of the draft Law, does not have a mandate to review complaints and it is also not an independent body.

Better practice also suggests that it is better to create a dedicated body – along the lines of the information commissions that one finds in many countries – than to allocate this function to an existing body, such as an ombudsman. While the latter may have many of the attributes required for entertaining administrative appeals, experience in other countries suggests that the necessary resources for taking on the additional information function are rarely provided to dual- or multi-function bodies, and that such bodies rarely build up the specialised expertise that is required to undertake the function of providing oversight of access to information legislation.

If an administrative oversight body is to be created, it is essential that it be independent. There are many ways to promote the independence of such bodies but some of the more important are as follows:

- The member(s) of the body are appointed in a manner that is protected against political interference and they have security of tenure so that they are protected against arbitrary dismissal (procedurally/substantively) once appointed.
- The oversight body reports to and has its budget approved by the parliament, or other effective mechanisms are in place to protect its financial independence.
- There are prohibitions on individuals with strong political connections being appointed to the body, along with positive requirements of professional expertise on the part of members.

In addition to being independent, the body needs to have the necessary powers to undertake its functions. These include the power to:

- review classified documents;
- inspect the premises of public bodies;
- compel witnesses to appear before it;
- issue binding orders after deciding a complaint, including orders requiring a public authority to disclose information; and
- impose appropriate structural measures on public authorities which are structurally failing to respect their obligations under the law (for example to provide more training to their staff or to manage their documents better).

In terms of the actual appeals before an independent administrative oversight body, they should be free and not require the assistance of a lawyer. Furthermore, the law should set out clear procedures for the processing of appeals, including clear overall time limits for deciding appeals. Otherwise, there is a risk that even administrative appeals can take unduly long, defeating one of the key benefits of administrative appeals in the first place. Finally, on appeal, the public authority should bear the burden of proof of showing that it acted in compliance with the law, given that the right to information is a human right.

Recommendations:

- The law should place clear time limits on internal review (i.e. to a higher-ranking State body) of decisions regarding requests.
- The law should make it clear that complaints may be lodged for any failure to follow the rules in the law relating to requests.
- The law should provide for an appeal to an independent administrative body. Ideally, this should be a new, dedicated body, such as an information commission. Regardless, the body should have the attributes and powers listed above.

	Indicator	Max	Points	Article
36	The law offers an internal appeal which is simple, free of charge and completed within clear timelines (20 working days or less).	2	1	18
37	Requesters have the right to lodge an (external) appeal with an independent administrative oversight body (e.g. an information commission or ombudsman).	2	0	
38	The member(s) of the oversight body are appointed in a manner that is protected against political interference and have security of tenure so they are protected against	2	0	

	arbitrary dismissal (procedurally/substantively) once appointed.			
39	The oversight body reports to and has its budget approved by the parliament, or other effective mechanisms are in place to protect its financial independence.	2	0	
40	There are prohibitions on individuals with strong political connections from being appointed to this body and requirements of professional expertise.	2	0	
41	The independent oversight body has the necessary mandate and power to perform its functions, including to review classified documents and inspect the premises of public bodies.	2	0	
42	The decisions of the independent oversight body are binding.	2	0	
43	In deciding an appeal, the independent oversight body has the power to order appropriate remedies for the requester, including the declassification of information.	2	0	
44	Requesters have a right to lodge a judicial appeal in addition to an appeal to an (independent) oversight body.	2	2	7(1)(6), 18
45	Appeals (both internal and external) are free of charge and do not require legal assistance.	2	0	
46	The grounds for the external appeal are broad (including not only refusals to provide information but also refusals to provide information in the form requested, administrative silence and other breach of timelines, charging excessive fees, etc.).	4	3	18(1)
47	Clear procedures, including timelines, are in place for dealing with external appeals.	2	0	
48	In the appeal process, the government bears the burden of demonstrating that it did not operate in breach of the rules.	2	0	
49	The external appellate body has the power to impose appropriate structural measures on the public authority (e.g. to conduct more training or to engage in better record management)	2	0	
	TOTAL	**30**	**6**	

6. SANCTIONS AND PROTECTIONS

The draft Law also performs poorly in this category, scoring just two out of a possible eight points, or 25 percent. It obtains two points for various provisions establishing sanctions for obstructing access to information. These include Article 7(1)(7), which provides for financial compensation for harm caused due to failure to respect the right to information (although the procedures for this are set out in other laws) and Article 20, which provides that responsibility for violations of the right to information shall be in accordance with the rules set out in other laws. We did not have an opportunity to review these other laws as part of this analysis, so we are not aware of how effective they may be.

Article 1 of the draft Amendments would also create a new Article 456-1 of the Code of the Republic of Kazakhstan on Administrative Offences which would provide for a fine of up to thirty "monthly calculation indices" for providing information in violation of the right to information law, for refusing to provide information or for providing only incomplete information, or for failing to publish information proactively. Where such actions harm the rights and lawful interests of others, the fine shall be increased to up to 100 monthly calculation indices. This is a strong set of sanctions but it is limited to cases where (full) information is not provided (or wrong information is provided). Better practice is to provide for sanctions for any wilful breach of the law, which would include delays and overcharging, as well as destruction of documents, among other things.

The draft Law fails to provide protection for individuals who release information in good faith pursuant to the Law. This sort of protection is vitally important to give officials the confidence to release information, given that they have historically been used to working in an environment whereby nearly all information was deemed to be secret. Absent such protection, officials will always be reluctant to disclose information, out of fear that this may result in some sort of sanction.

Better practice is also to provide protection for individuals who release information in good faith with a view to exposing wrongdoing or serious problems in the administration (whistleblowers). This is an important information safety valve, ensuring that information of high public importance is more likely to be released. In many countries, whistleblowing is protected through a dedicated (i.e. separate) law but, in the absence of such a law, it is useful to include at least basic protections for whistleblowers in the right to information law. The draft Law does not include any provisions on whistleblowing.

Recommendations:

- Consideration should be given to expanding the scope of the new proposed Article 456-1 of the Code of Administrative Offences to include any wilful obstruction of a request for information.
- Protection should be provided to officials who release information in good faith pursuant to the law.
- At least a basic framework of protection should be provided for those who release information on wrongdoing.

	Indicator	Max	Points	Article
50	Sanctions may be imposed on those who wilfully act to undermine the right to information, including through the unauthorised destruction of information.	2	1	7(1)(7), 20, 456-1 of Admin Offences
51	There is a system for redressing the problem of public authorities which systematically fail to disclose information or underperform (either through imposing sanctions on them or requiring remedial actions of them).	2	0	
52	The independent oversight body and its staff are granted legal immunity for acts undertaken in good faith in the exercise or performance of any power, duty or function under the RTI Law. Others are granted similar immunity for the good faith release of information pursuant to the RTI Law.	2	0	
53	There are legal protections against imposing sanctions on	2	0	

	those who, in good faith, release information which discloses wrongdoing (i.e. whistleblowers).			
		TOTAL	**8**	**1**

7. PROMOTIONAL MEASURES

The draft Law fails to establish a number of promotional measures which are important for the success of a right to information law. Pursuant to Article 11(19), it provides that the management of public authorities shall be "personally responsible for inquiries processing arrangements, conditions of inquiries acceptance, registration, accounting and processing". This is useful, but it might be more practical to require public authorities to appoint dedicated information officers, staff who are specifically responsible for receiving and processing requests for information. This is the approach taken in many right to information laws, and it has proven to be effective.

Article 16(6) of the draft Law places an obligation on the archival body to place a list summarising the documents that it holds on the Internet. This is very useful but better practice is to extend this obligation to all public authorities.

A number of other promotional measures are simply not mentioned in the draft Law, as follows:

- Public authorities are not required to undertake public awareness raising activities, and neither is this role allocated to a central body, such as the Council. This is essential to ensure that the members of the public are aware of their rights under the new law.
- There is no obligation on or system to ensure that public authorities manage their documents and other records effectively. This is essential not only for successful implementation of the right to information law, but also for the efficient conduct of all public work. Put simply, if a public authority cannot locate information, it cannot provide that information to an information applicant (and it probably cannot discharge its other obligations effectively either).
- There is no system of reporting on what has been done to implement the law. Better practice in this regard is to require all public authorities to produce annual reports on what they have done, including detailed information about the processing of requests, and then to have a central body, which might be the Council or an information commission, if one is created, produce a central report summarising all of these efforts, which would then be provided to government and also placed before parliament (as well as being published online). Such a system of reporting is essential if the progress and challenges in implementing the law are to be identified and supported/addressed, respectively.

Recommendations:

- The law should require public authorities to appoint dedicated information officers with responsibility for receiving and processing requests for information.
- The law should require all public authorities, not just the archival body, to publish lists of the records they hold.
- The other promotional activities noted above should be provided for in the law.

Indicator		Max	Points	Article
54	Public authorities are required to appoint dedicated officials (information officers) or units with a responsibility for ensuring that they comply with their information disclosure obligations.	2	1	11(19)
55	A central body, such as an information commission(er) or government department, is given overall responsibility for promoting the right to information.	2	2	19
56	Public awareness-raising efforts (e.g. producing a guide for the public or introducing RTI awareness into schools) are required to be undertaken by law.	2	0	
57	A system is in place whereby minimum standards regarding the management of records are set and applied.	2	0	
58	Public authorities are required to create and update lists or registers of the documents in their possession, and to make these public.	2	1	16(6)
59	Training programmes for officials are required to be put in place.	2	2	9(2)(9)
60	Public authorities are required to report annually on the actions they have taken to implement their disclosure obligations. This includes statistics on requests received and how they were dealt with.	2	0	
61	A central body, such as an information commission(er) or government department, has an obligation to present a consolidated report to the legislature on implementation of the law.	2	0	
	TOTAL	**16**	**12**	

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