



TIME TO RESET THE CODE LOCKS

*Realising the Right to Know in Azerbaijan after the Adoption
of the 2005 Law on the Right to Obtain Information*

ARTICLE 19:
Global Campaign for Free Expression

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EXECUTIVE SUMMARY

In December 2005, Azerbaijan enacted the Law on the Right to Obtain Information (“the Law on RTI”), which has been recognised as an important step forward for the establishment of open and transparent public governance in the country. The Law on RTI is widely considered as progressive and as a demonstration of positive political will to realise the right to freedom of information, a fundamental right guaranteed in international human rights law. However, concerns remain about gaps between the Law on RTI appears on the books and its implementation in practice.

This report explores the understanding of the right to access to information in Azerbaijan almost four years after the adoption of the Law on RTI and the system that exists to guarantee this right. It seeks to inform and suggest recommendations to various national actors with the aim of encouraging them to investigate, provide remedies and eradicate violations of the right to freedom of information. The findings in this report are based on the results of a multi-fold project carried out by ARTICLE 19 and its partners in Azerbaijan through several months in 2008 – 2009; the project included legal analysis, research (through test requests, focus groups and in-depth interviews) and litigation of the right to freedom of information in Azerbaijan.

The fundamental right to freedom of information is set out in numerous international human rights instruments including Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. A growing international consensus of a fundamental right to access officially held information is reflected in the rapid growth in regional standards and in the number of laws covering this right worldwide over the past decade. Azerbaijan followed this trend in 2005, when, in line with its binding obligations under international law to respect freedom of information, it adopted a legal instrument that sets out a specific legal framework through the Law on RTI.

While the adoption of the Law on RTI was widely welcomed, several concerns were raised, including regarding its broad regime of exceptions, the lack of sanctions for violations of the law, the unclear relationship between this law and other legislation, as well as the absence of a comprehensive strategy and action plan. Since its enactment more than four years ago, ongoing concerns have been raised about its implementation.

Based on the research findings current shortcomings and failures in the implementation of the Law on RTI include: refusals or inadequate responses of public authorities to requests for information, both as part of sample requests as well as a poor track record in previous research, no responses to written or telephone requests and unjustified refusals. Furthermore, inadequate responses of public authorities to requests for information are characterised by the varied attitudes among public authorities leading to different responses to the same questions, the need for personal contacts in order to receive information, incomplete responses and a careful approach by the information seekers. In addition, public authorities fail to meet procedural requirements set in the Law on RTI, as deadlines are disregarded, additional information or a “justification” for the requests is being required, tracking systems of requests are not set in place and institutions claim they are not “information owners”.

An entrenched culture of secrecy and the mindset within government institutions, also acknowledged by public officials themselves, impedes access to information. Participants in the research observed that this culture of secrecy has a debilitating effect on civil societies’ eagerness to seek information, in particular at local level. This is exacerbated by poor knowledge about the right to freedom of information in society particularly among researchers, academics, the unemployed and refugees and even among government officials, the

“information owners” themselves. The research also revealed a lack of the necessary infrastructure for provision of information. Contrary to existing provisions in the Law on RTI, information officials or departments within public authorities are often absent. This is further characterised by a delay or failure to create internet resources. There is no mechanism available to facilitate access to public meetings and events and even more crucial, despite a clear reference to the appointment of an Information Ombudsman by the Parliament in the law, such an institution has never been established. The lack of sanctions for obstruction to access to information is considered a serious obstacle in the effective implementation of an effective freedom of information regime.

Currently, in the absence of an appointed Information Ombudsman, the only way to appeal against the refusal of an information request is through the court system. Current possibilities to bring sanctions are limited to provisions under the Code of Administrative Offences. So far none of the cases brought against government institutions under these provisions have provided a precedent for successfully holding individuals to account. Without such sanctions, there is little impetus for government officials to change their attitude. Although some disputes are resolved amicably, such instances are rare.

In the framework of this report, ARTICLE 19 attempted to test the effectiveness of the existing legislation in Azerbaijan also via court litigation. As final decisions have not yet been issued, it is not possible to assess their results at this stage and the two cases are mentioned as examples of issues that need to be addressed via litigation in Azerbaijan.

The right to freedom of information enables citizens to make informed choices and allows them to scrutinise the actions of their government. It is essential in creating a relationship of trust between state bodies and the general public, allowing for transparency and public participation in decision-making. However, our findings indicate that in Azerbaijan, despite the existence of a legal framework which allows for access to information in accordance with international best practises, this is not a reality. The adoption of the Law on RTI has not brought desired change and the Azerbaijani Government has not demonstrated any serious commitment to openness or transparency.

ARTICLE 19 strongly believes that it is time to reset the code locks that continue to prevent the creation of an effective information regime in Azerbaijan. However, unless and until the Azerbaijani Government puts in place and implements a comprehensive action plan to publicly address the failure to implement Law on RTI, the right to freedom of information will remain inaccessible.

RECOMMENDATIONS

The failure to effectively promote and protect the right to freedom of information in Azerbaijan is directly attributable to the actions – or inactions – of the Azerbaijani Government. Thus, primary responsibility for the redress of problems outlined in this report lies with the Government. The recommendations below highlight specific actions that the Government should take immediately to address the situation and make the right to information a reality for all in Azerbaijan. Finally, they include recommendations to the civil society and media in Azerbaijan, in the framework of freedom of information and as important actors in the process of implementation of the right.

ARTICLE 19 urges the Government of Azerbaijan to:

- introduce the principle of maximum disclosure into all national legislation linked to access to information (and in particular the Law on State Secrets);
- hold periodic press conferences with the President, open to all local media;
- establish effective information management systems and procedures within all public institutions and government departments, with particular priority given to the Presidential Administration;
- appoint without delay an Information Ombudsman in a transparent and democratic manner;
- ensure that all public bodies include in their annual budgets separate budget lines for information management, appoint designated information officers, set up information management systems, create and maintain up-to-date official websites, and hold regular public briefings;
- ensure that all sessions of elected bodies are open to the public and broadcast on TV/radio whenever possible, and require elected bodies to provide public notice of meetings in advance to give the media and private citizens a real opportunity to participate;
- publicly commit to create an environment of openness within public institutions, take measures to change the culture of secrecy prevailing in public institutions, and create incentives to encourage open behaviour in the area of freedom of information;
- strengthen the legal requirements for state-owned or subsidised companies and those holding a monopoly to provide information to the public, and enforce these requirements through the court system;
- hold the management of public institutions responsible for ensuring access to information and for fostering cultural change in their institutions, for example by holding monthly briefings;
- establish clear reprimand procedures for managers of public institutions and government departments who fail to comply with the Law on RTI;
- train high-level public officials, members of the judiciary and vulnerable groups in society, such as IDPs/refugees and people with disabilities, who participate in information exchange, on the implementation of the Law on RTI, taking into account international best practises;
- take initiative in publishing an annual report showing data on citizens' requests for information; and
- closely engage with the NGO community and the media to develop a comprehensive strategy for the implementation of an effective freedom of information regime.

To civil society in Azerbaijan, it is recommended to:

- continue active monitoring of access to freedom of information in practise, both through research and strategic litigation in the national and international court systems;
- demand openness from the authorities and build coalitions to create coordinated public pressure to develop open governance;
- recognise positive efforts by public bodies to answer freedom of information requests, to reduce the negative stigma surrounding freedom of information which further perpetuates the culture of secrecy, and to encourage other bodies to follow suit; and
- include members of the judiciary and representatives of vulnerable groups in any trainings that are provided on access to information to improve their knowledge and understanding of the right of access to information, and continue general activities to raise public awareness about the laws on FOI and RTI.

To the media in Azerbaijan, it is recommended to:

- provide maximum exposure of violations of the right to information not only from a procedural point of view, but also placing this in the context of other principles, such as public participation in decision-making or environmental protection;
- follow up on requests that remain unanswered, and if necessary bring complaints against government officials to court, rather than using personal contacts or bribes; and
- when appropriate, provide positive exposure to public bodies that regularly comply with information requests.

INTRODUCTION

The right to access information held by public authorities, sometimes referred to as “freedom of information”, has long been recognised as an extremely important human right for its key role both in a democratic society and in the realisation of a number of other fundamental human rights. Freedom of information enables citizens to make informed choices and allows them to scrutinise the actions of their government. It is essential in creating a relationship of trust between state bodies and the general public, allowing for transparency and public participation in decision-making. Without an individual right to access information, state authorities can control the flow of information, “hiding” material that is damaging to the government and selectively releasing information which the government deems appropriate for public consumption only. In such a climate, corruption thrives and human rights violations can remain unchecked.

Freedom of information is also considered fundamental to achieving sustainable development outcomes and a pre-condition for the realisation of other human rights. Better access to information can empower vulnerable and disadvantaged communities to advocate their own interests and rights and become active stakeholders in development. In societies where information flows widely and access to communication services is widespread, markets and government institutions are likely to become more efficient, transparent and accountable. The institutions and organisations that serve vulnerable groups in society and represent their interests, for instance NGOs, can be more effective.¹

Azerbaijan adopted a legislative framework for the access to information at the end of 2005, when the Parliament enacted the Law on the Right to Obtain Information (further “*the Law on RTI*”).² In the drafting process of the Law, the Government engaged in broad consultations with civil society and international experts. ARTICLE 19, along with numerous other international and domestic organisations, welcomed the adoption of this Law as an important first step towards making freedom of information a reality for everyone in Azerbaijan, and honouring Azerbaijan’s international obligations in this area.

This report explores the understanding of the right to access to information in Azerbaijan almost four years after the adoption of the Law on RTI and the system that exists to guarantee this right. It examines the practical experience of obtaining information from state institutions and the interaction between civil society and public bodies to realise the right to access to information, also within the judicial system.

Structure of the report

The Executive Summary and Recommendations precede this Introduction; next is a section discussing the research methodology. The report is then divided into three interrelated sections: the first presents international human rights standards that govern the freedom of information and key observations made by other human rights mechanisms; the second provides an overview of the domestic legal framework on the right to information in Azerbaijan as well as a legal analysis of its shortcomings; the third section examines the implementation of the Law on RTI and the results of ARTICLE 19’s research and monitoring in Azerbaijan undertaken in 2008 - 2009; the final part outlines ARTICLE 19’s conclusions.

¹ The significance of information and communication technologies for reducing poverty, London: DfID, January 2002.

² The Law on the Right to Obtain Information, approved by the Azerbaijan Parliament on 30 September 2005 and signed by the President on 19 December 2005.

1 METHODOLOGY

The findings of this report are based on the results of a multi-fold project carried out by ARTICLE 19 in Azerbaijan through several months in 2008 – 2009 and included legal analysis, research and litigation on the right to freedom of information in Azerbaijan.

The legal analysis of the legal framework was conducted by ARTICLE 19's staff. Where appropriate, the report also incorporates available analysis or criticism of other international organisations on the state of implementation of the right to information in Azerbaijan.

The research conducted by ARTICLE 19 and its local partner, Yeni Nesil (New Generation – Union of Journalists), comprised of:

- *Test requests for information to public authorities:* in July - October 2008, the project sent a small sample of 40 written requests for information under the Law on RTI to different public authorities. Those included the Azerbaijani Parliament (the *Milli Mejlis*), state companies, courts, ministries and their local branches and municipalities; 20 of the requests targeted public authorities in the capital, Baku, 10 were sent to authorities in Ganja and 10 to authorities in Sumgait (these are the three largest cities in the country). The requests contained simple questions, such as 'How many complaints did the Supreme Court in the past year [2007] receive on the basis of decisions of lower courts? Answering these questions would not require any substantial research by the authorities. Applicants of the requests were divided into two groups –journalists and ordinary citizens. All requests were sent by registered mail in order to make sure they were delivered. In those instances where no response to a request was received, a second request was sent also by registered mail. Subsequently, the responses to the requests were analysed by the project team to assess how the authorities implement the Law on RTI and what are the main problems in the implementation. The responses were analysed according to whether the response met the set deadline; whether it was complete; whether the respective authority required further information about the applicant before responding; and whether there were any differences with requests filed by journalist as compared to ordinary citizens.
- *Focus group discussions:* in April - October 2008, the project organised four focus groups of 36 randomly selected participants of a diverse background, including journalists from leading media outlets, academics, NGO representatives, pensioners and refugees. Two focus groups were organised in Baku, one in Ganja and one in Sumgait. Each focus group discussion lasted approximately 1.5 - 2 hours, followed a set scenario and was recorded on an audiotape. Their aim was to examine participants' knowledge of and experience with the right to access information, their contact with public authorities holding such information and their recommendations to improve the implementation of the Law.
- *In-depth interviews:* simultaneously, the project also organised 40 individual in-depth interviews (20 in Baku, 10 in Ganja and 10 in Sumgait), aimed at examining the experiences of various individuals in pursuing the right to freedom of information. The interviewees included 21 government officials, 10 NGO representatives and 9 journalists. The government officials ranged from municipal administrators to representatives from local and national legislative, judicial and executive branches; all had a minimum of three years of work experience. Journalists came from newspaper, television and radio outlets. In March and May 2009, several follow-up interviews took place in Baku.

Participants of focus groups and interviewees did not receive any material compensation in return for participating in the research. They were all informed of the purpose of the focus group/ interview, its voluntary nature, and the ways in which the information would be collected and used. None of the participants or interviewees is identified by name to safeguard their privacy and ensure there is no retaliation against them; this is also indicated in the relevant citations. Further, certain other identifying information such as organisation affiliation has been withheld for the same reasons.

A part of the project has been also litigation of cases to test various issues of right to information at the Azerbaijani courts. However, at the time of the completion of the research, none of the test cases had reached the final stage (final court decision). Hence, the section dealing with judicial practise is based on litigation experiences of other organisations and earlier litigation work of the Media Rights Institute in Baku, and reflects litigation within the project only to a limited extent.

2 INTERNATIONAL HUMAN RIGHTS FRAMEWORK ON FREEDOM OF INFORMATION

2.1 International human rights standards and freedom of information

The United Nations, at the very first meeting of the General Assembly, adopted a Resolution on the free circulation of information in its broadest sense, stating:

*Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.*³

Still, in the earliest international human rights instruments, the freedom of information was not set out separately, but included as part of the fundamental right to freedom of expression. Article 19 of the *Universal Declaration of Human Rights* (further “UDHR”)⁴ sets out the fundamental right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.⁵ Similar guarantees of freedom of expression can be found in the *International Covenant on Civil and Political Rights* (further “the ICCPR”),⁶ a legally binding UN treaty ratified by more than 150 States, including Azerbaijan, again under Article 19:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any media of his choice.

That the right to information is an aspect of freedom of expression has repeatedly been confirmed by United Nations bodies. The UN Special Rapporteur on Freedom of Opinion and Expression declared in 1998 that:

*[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems....*⁷

The Special Rapporteur developed his commentary on freedom of information in his 2000 annual report to the Commission on Human Rights, noting the fundamental importance of this right not only to democracy and freedom, but also to the right to public participation and to the realisation of the right to development.⁸ The UN Human Rights Committee, the body

³ Resolution 59(1), 14 December 1946.

⁴ UN General Assembly Resolution 217A(III) of 10 December 1948.

⁵ See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit).

⁶ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, ratified by Azerbaijan 13 August 1992.

⁷ Report of the Special Rapporteur, 28 January 1998, *Promotion and protection of the right to freedom opinion and expression*, UN Doc. E/CN.4/1998/40, para 14.

⁸ Report of the Special Rapporteur, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para 42.

established to supervise implementation of the ICCPR, has also frequently urged States to enact freedom of information legislation, as it did in 1994 on Azerbaijan.⁹

In December 2004, the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe and the Special Rapporteur on Freedom of Expression of the Organisation of American States – issued a Joint Declaration which included the following statement:

*The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.*¹⁰

The right to information has also been explicitly recognised in all three regional systems for the protection of human rights, *the European Convention on Human Rights* (further “ECHR”),¹¹ *the African Charter on Human and Peoples’ Rights*¹² and *the American Convention on Human Rights*.¹³

Within Europe, the Committee of Ministers of the Council of Europe, of which Azerbaijan is a member, adopted a Recommendation on Access to Official Documents in 2002.¹⁴ Principle III provides generally:

Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

Most recently, the Committee of Ministers of the Council of Europe adopted the European Convention on Access to Official Documents,¹⁵ the first international binding instrument that obliges the state parties to guarantee the right to information held by public authorities to everyone, without discrimination on any ground.¹⁶

In April 2009, the European Court of Human Rights (further “*European Court*”) explicitly stipulated that Article 10 of the ECHR guarantees the “freedom to receive information” held by public authorities. In the case of *TASZ v. Hungary*¹⁷, the European Court also noted the important role played by the media and other independent monitors, including NGOs, in creating “forums for public debate” and emphasized that any interference with the ability of such groups to obtain information of public interest must be able to withstand the “most careful

⁹ See, for example, the Concluding Observations on Ireland (UN Doc. CCPR/C/79/Add.21, 28 July 1993); and on Azerbaijan (UN Doc. A/49/40, 27 July 1994).

¹⁰ See Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, available at <http://www.cidh.org/Relatoria/showarticle.asp?artID=319&IID=1>.

¹¹ The European Convention on Human Rights and Fundamental Freedoms, adopted on 4 November 1950, E.T.S. No. 5, entered into force on 3 September 1953. Azerbaijan ratified the Convention on 15 April 2002.

¹² Adopted at Nairobi, Kenya, 26 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

¹³ Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978.

¹⁴ Recommendation No. R(2002)2, adopted 21 February 2002.

¹⁵ Adopted by the Committee of Ministers on 27 November 2008 at the 1042bis meeting of the Ministers’ Deputies. Currently the Convention is open for signatures.

¹⁶ *Ibid.*, Article 2 para 1.

¹⁷ *Társaság a Szabadságjogokért v. Hungary*, Application no. 37374/05, decision of 14 April 2009.

scrutiny.”¹⁸ The European Court also stressed that governments have an obligation “not to impede the flow of information” on matters of public concern.¹⁹

The growing international consensus that there is a fundamental right to access officially held information is further reflected in the rapid growth on the number of such laws worldwide over the past decade. States which have recently adopted right to information legislation include India, Israel, Jamaica, Japan, Mexico, Pakistan, Peru, South Africa, South Korea, Thailand, Trinidad and Tobago, and the United Kingdom, as well as most of East and Central Europe. These countries join a number of other countries which enacted access laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia and Canada, bringing the total number of States with right to information laws to at least 80. A growing number of inter-governmental bodies, such as the European Union, the UNDP and the World Bank, have also adopted policies on the right to information.

2.2 Limitations on freedom of information

International law recognises that freedom of information is not absolute and needs to be balanced against other important social interests, such as national security, economic stability, or privacy. It should not go so far as to cause more harm than good; however, at the same time, claims about the harm that would result from releasing a record should be treated with great caution, given that most governments tend to practice excessive secrecy.

Under international law, restrictions on the right to information must meet the requirements stipulated in Article 19 para 3 of the ICCPR:

The exercise of the rights [to freedom of expression and information] may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;*
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.*

The requirements of Article 19 para 3 translate into a three-part test (confirmed as applying generally to freedom of expression by the UN Human Rights Committee²⁰, UN Special Rapporteur²¹, regional instruments²² and a number of national and international courts), whereby a public body must disclose any information which it holds and is asked for, unless:

- the information concerns a legitimate protected interest provided by law;
- disclosure threatens substantial harm to that interest; and
- the harm to the protected interest is greater than the public interest in having the information.

Cumulatively, the three-part test is designed to guarantee that information is only withheld when it is in the overall public interest. If applied properly, this test would rule out all blanket exclusions and class exceptions as well as any provisions whose real aim is to protect the

¹⁸ *Ibid.*, para 26 and 27.

¹⁹ *Ibid.*, para 36.

²⁰ See, for example, *Laptsevich v. Belarus*, decision of 20 March 2000, Communication No. 780/1997.

²¹ Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 Jan. 2000, para. 44.

²² See, for example, Recommendation No. R(2002)2 of the Committee of Ministers of the Council of Europe to Member States on access to official documents, adopted 21 February 2002, Principle IV

government from harassment, to prevent the exposure of wrongdoing, to avoid the concealment of information from the public or to preclude entrenching a particular ideology.

As for the first leg of the test, a complete list of the legitimate aims which may justify non-disclosure should be provided in the law. This list should include only interests, which constitute legitimate grounds for refusing to disclose documents. For example, the Council of Europe Recommendations provide valuable insight into such aims, as they include national security, defence and international relations, public safety, the prevention, investigation and prosecution of criminal activities, privacy and other legitimate private interests, commercial and other economic interests, be they private or public, the equality of parties concerning court proceedings, nature, inspection, control and supervision by public authorities, the economic, monetary and exchange-rate policies of the state and the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.²³ Exceptions should be narrowly drawn so as to avoid including material, which does not harm the legitimate interest. Only interferences that are absolutely necessary in a democratic society for the protection of the legitimate interest should be permissible. They should be based on the content, rather than the type, of the document. To meet this standard, exceptions should, where relevant, be time-limited. For example, the justification for classifying information on the basis of national security may well disappear after a specific national security threat subsides.

Second, it is not sufficient that for information to simply fall within the scope of a legitimate aim listed and refusals must meet a substantial harm test. The public body must show that the disclosure of the information would cause substantial harm to that legitimate aim and that the interference is therefore necessary and justified. In some cases, disclosure may benefit as well as harm the aim. For example, the exposure of corruption in the military may at first sight appear to weaken national defence but actually, over time, help to eliminate the corruption and strengthen the armed forces. Non-disclosure may, therefore, only be justified where, taking all of the circumstances into account, disclosure poses a serious risk of substantial harm to the legitimate aim being protected.

Third and finally, even if it can be shown that disclosure of the information would cause substantial harm to a legitimate aim, the information should still be disclosed if the benefits of disclosure outweigh the harm. This third part of the test, which is commonly known as the "public interest override", is of particular importance. It expresses the reasonable idea that the decision whether or not to disclose information should depend on which course of action will, on balance, cause the least harm. For example, granting a request for information about corruption in the armed forces could pose a risk to national security, since it would reveal weaknesses in the army to foreign countries. Nevertheless, such a request should probably be granted, since exposing problems in the country's defence will allow them to be addressed and thus in the long run strengthen, rather than weaken, national security.

2.3 Principles of effective access to information

In the process of adopting freedom of information instruments and laws, some basic principles have emerged that underlie good freedom of information legislation. In 1999, ARTICLE 19 summarised the best practises in *The Public's Right to Know*²⁴ publication and identified the following nine principles important in order to implement the right of access to information effectively:

²³ Recommendation Rec (2002)2 of the Committee of Ministers to member states on access to official documents, adopted on 21 February 2002 at the 784th meeting of the Ministers' Deputies, Article IV.

²⁴ ARTICLE 19, *The Public's Right to Know, Principles on Freedom of Information Legislation*, ARTICLE 19, London, June 1999, available at: www.article19.org/pdfs/standards/righttoknow.pdf.

- Freedom of information legislation should be guided by the principle of maximum disclosure.
- Public bodies should be obliged to publish key information.
- Public bodies must actively promote open government.
- Exceptions to the right to access information should be clearly and narrowly drawn and subject to strict 'harm' and 'public interest' tests.
- Requests for information should be processed rapidly and fairly, and an independent review of any refusals should be available.
- Excessive costs should not deter people from making requests for information.
- Meetings of public bodies should be open to the public.
- Laws that are inconsistent with the principle of maximum disclosure should be amended or repealed.
- Individuals who release information on wrongdoing – whistleblowers – must be protected.

In 2000, Mr. Abid Hussain, the United Nations Special Rapporteur on Freedom of Expression endorsed this same set of principles in his report to the United Nations Commission on Human Rights, and the Commission referred to them in its 2000 resolution on freedom of expression. In 1999, Mr. Santiago Canton, the Organisation of American States Special Rapporteur on Freedom of Expression referred to the principles in the report of the Inter-American Commission on Human Rights.

These principles also correspond closely to those adopted by the Committee of Ministers of the Council of Europe in a Recommendation on Access to Information Held by Public Authorities, as far back as 1981 and in the Recommendation on Access to Official Documents adopted in 2002.

3 DOMESTIC FRAMEWORK ON FREEDOM OF INFORMATION IN AZERBAIJAN

3.1 Freedom of information in Azerbaijan's legislation

International law requires Azerbaijan to make freedom of information a reality for all. As a member state of the UN, the Council of Europe and the Organisation for Security and Cooperation in Europe, and as a signatory to major international and regional human rights treaties, Azerbaijan has binding obligations under international law to respect freedom of information.

Upon joining the Council of Europe in 2001, Azerbaijan assumed a responsibility to “accept the principles of the rule of law and of the enjoyment by all people within [their] jurisdiction of human rights and fundamental freedoms”²⁵ and undertook an obligation to “guarantee freedom of expression and the independence of the media and journalists and to “exclude the use of administrative measures to restrict the freedom of the media.”²⁶ As a member state of the OSCE, Azerbaijan “reaffirmed the importance of ... the free flow of information as well as the public's access to information.”²⁷

Azerbaijan undertook further binding obligations to introduce freedom of information legislation upon acceding to the *Aarhus Convention* in March 2000, by which it promised to “guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters”.²⁸ Also, by ratifying the *UN Convention against Corruption* in November 2005, Azerbaijan committed itself to “ensuring that the public has effective access to information” and “enhancing the transparency of and promoting the contribution of the public to decision-making processes”.²⁹ The Convention imposes an obligation on its State Parties to “promote transparency and accountability in the management of public finances”, including through reporting on revenue and expenditure.³⁰

According to Article 151 of the Constitution, international treaties have prevalence over national legislation. In national legislation, freedom of information and the limitations of the right are provided by the following laws:

- **The Constitution**³¹

The Constitution guarantees the right to information in three aspects: Article 39 (Right to live in a healthy environment), Article 50 (Freedom of Information) and Article 57 para 1 (which gives citizens the right to petition state bodies). Article 39 stipulates that “everyone has the right to gain information about the true ecological situation and to get compensation for

²⁵ Statute of the Council of Europe, London, 5 May 1949, Article 3.

²⁶ Azerbaijan's Application for Membership of the Council of Europe, Opinion No. 222 (2000), Parliamentary Assembly, iv.d.

²⁷ The OSCE Charter for European Security, November 1999, para.26

²⁸ Article 1, UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, UN Doc. ECE/CEP/43, adopted 25 June 1998, entry into force 30 October 2001, accession by Azerbaijan 23 March 2000.

²⁹ See Article 13 para 1 (b) and (a) of the UN Convention against Corruption, adopted by the UN General Assembly by Resolution 58/4 of 31 October 2003, signed by Azerbaijan 27 February 2004.

³⁰ See Article 9 para 2 of the UN Convention against Corruption.

³¹ The Constitution of the Republic of Azerbaijan, adopted on 12 November 1995 and subsequently amended, available at: http://www.constcourt.gov.az/en/download/legislation/constitution_of_AR.pdf.

damage done to his/her health and property because of violations of ecological requirements.” Article 50 provides that:

- I. *Everyone is free to look for, acquire, transfer, prepare and distribute information.*
- II. *Freedom of mass media is guaranteed. State censorship in mass media, including press is prohibited.*

Article 57 para 1 provides that individuals have “the right to appeal personally and also to submit individual and collective written applications to State bodies. Each application should be responded to in an established order and term.”

- **The Law on the Right to Obtain Information³²**

The Law on RTI is the main legal instrument in Azerbaijan that sets out the legal framework for accessing information. The Law contains 58 provisions grouped into seven chapters. The first chapter (General Provisions) guarantees the right to any person. He/she is entitled to inquire about the availability of information, to get support from information owners, and to obtain the requested information freely. Definitions and relevant principles of access to information and the scope of the law are also set out in the first part. Chapter II sets out the obligations of information owners concerning information management, in particular responding to information requests, maintaining document registers, regularly disclosing information, protecting information, etc. The procedure for obtaining information is described in Chapter III. Chapter IV regulates the obligation of information owners to disclose certain types of information without specific requests. A long list of the types of information subject to such disclosure is set out. Chapter V is one of the longest, providing instructions for the classification and use of limited-access information. Further, the various mechanisms for oversight of compliance with the Law are outlined in detail, including descriptions of the powers of the Office of the Information Ombudsman and the processes for the consideration of complaints. Chapter VII includes transitional provisions setting out deadlines for implementing certain requirements of the law, including the establishment of the Office of the Information Ombudsman.

- **The Law on Freedom of Information³³**

The Law, which predated the Law on RTI, guarantees the right of every person to search, obtains, transfer, produce and extend any information. In Article 5, it sets out basic principles on the guarantee of freedom of information: the openness of information and the freedom to exchange it; objectivity, completeness, and authenticity of information; the lawfulness of the search, acquisition, use, propagation and protection of information; the protection of individual privacy; and the protection of personality, society, and the State. The law states that the legal right to information is set by other legislation. Information is divided into categories of open information and limited-access information. Open information is to be disclosed in periodic official publications, publication through the media and by release of information directly to individuals and juridical persons. The law also sets rules on the collection and use of personal information. Article 14 provides that individuals have a right to access information about themselves. Refusals to release information can be appealed to a court. Sanctions can be imposed on those who violate the law.

³² The Law of the Republic of Azerbaijan on the Right to Obtain Information, available at: http://portal.unesco.org/ci/en/ev.php-URL_ID=26135&URL_DO=DO_TOPIC&URL_SECTION=201.html

³³ The Law on Freedom of Information, adopted in June 1998 and amended in 2000, 2003, 2004 and 2006.

- **The Law on Obtaining Environmental Information**³⁴

The Law, based on the standards of the Aarhus Convention, allows for any person to demand information from the State and local bodies on the state of the environment including the earth, water, atmosphere, and living organisms. A personal interest is not necessary. The request must be in writing and according to the article 9.2 of the Law; refusals to respond to requests must be given within ten days. Urgent requests should be responded to in 24 hours. Other requests should be responded within one month, but it can be delayed for another month if the request is complex. Denials can be appealed in court. Government bodies must provide regular information in the media, publish annual reports on the state of the environment and maintain publicly available electronic databanks.

- **The Law on Mass Media**³⁵

The Law outlaws any censorship of mass media outlets and the creation of any state institution with this purpose. In Article 8, it secures the right of information for mass media outlets, including the right to correct and immediate information about the economic, political, public and social situation; about the activities of governmental bodies, municipalities, administrations, enterprises, organisations, public unions, political parties and officials. The Law also protects journalists and editorial boards from exposing their sources. Journalists are allowed to complain if information is not provided. Civil, administrative and criminal sanctions may be applied toward persons who have prevented the transfer of information to mass media outlets or who have applied censorship illegally.

- **The Law on State Secrets**³⁶

Information held by private bodies can be classified as secret. The Law defines state secrets as information relating to the military, foreign policy, economic, scientific intelligence, counterintelligence and investigatory activities, which, if divulged, could damage the security of the Republic. It provides for three levels of secrets: Of Special Importance, Top Secret and Secret. Information can be classified for thirty years at which point classification can be extended. The list of information must be reviewed every five years. The law prohibits the following information from being classified as a state secret: information about natural disasters and other emergencies and their consequences; the state of ecology, public health, sanitation, demography, education, and crime; the privileges and compensation given to citizens, officials, enterprises, offices and organisations; violations of human rights and freedoms of citizens; the health of top officials; and violations of laws by State bodies and their functionaries.

- **The Criminal Code**³⁷

The Code makes it a criminal offence to disclose state secrets. Article 284 para 1 stipulates that the disclosure of data, constituting a state secret, by a person to whom it was entrusted with or became known to whilst in service or work, in the absence of signs of high treason, is punishable with imprisonment from two to five years, with deprivation of the right to hold certain positions or to engage in certain activities for up to three years. According to Article 284 para 2, the same act, resulting in serious consequences, is punishable by imprisonment from three to seven years with deprivation of the right to hold certain positions or to engage in certain activities for up to five years.

³⁴ The Law on Obtaining Environmental Information, adopted on 12 March 2002.

³⁵ The Law on Mass Media, adopted on 7 December 1999, last amended in April 2009.

³⁶ The Law on State Secrets, adopted on 7 September 2004.

³⁷ The Criminal Code, adopted 30 December 1999.

- **The Law on Combating Terrorism³⁸**

According to Article 11 of the Law, the release of public information during acts of terrorism shall be determined by the chief of the operations staff. There are prohibitions on disseminating the following information: information relating to tactics and technical measures; information that would threaten the lives and health of people in the zone of operation; information justifying terrorism or propaganda; and information about persons participating in the operations or supporting it. The Law details the scope of investigative powers, the rights of citizens and the mechanics of prosecution.

- **The Code of Administrative Offences³⁹**

The Code includes specific sanctions for violations of legislation on access to information in Article 181 para 3. This article provides that officials should be fined for unjustly limiting the right to information or for providing false information, for refusing to provide access to information, for refusing to receive a written request for information, for violating the rules on record management, or for persecution for the dissemination of information about offences, which are a matter of public. Such violations are punishable with a fine ranging from 20 manat (approximately 15 GBP) for an individual to 300 manat (approximately 227 GBP) for a juridical person. In addition, requesting information with the pretext of using this for official use or use of an official position to receive information for personal purposes is punishable with a fine up to 90 manat (approximately 68 GBP). Separate articles outline sanctions for illegally restricting the provision of information about the environment and violations of the right of journalists to information.

3.2 Shortcomings in existing legislation on freedom of information

As mentioned above, the principal piece of legislation governing freedom of information in Azerbaijan is the Law on RTI of 2005. Its adoption was widely welcomed by international and domestic organisations as an important first step towards making freedom of information a reality for everyone in Azerbaijan. For example, the Media Rights Institute commended the law as “a legislative base that will provide true freedom of information.”⁴⁰ In 2006, Sahib Mammadov, chair of an NGO researching access to information in Azerbaijan positively commented on the inclusive consultative process of the adoption of the Law and the fact that the Law introduced specific mechanisms for requesting public information.⁴¹ In the comparative legal survey of 2008, Toby Mendel called the Law on RTI a “progressive piece of legislation which improved throughout the drafting process, demonstrating positive political will. It includes provision for an independent administrative oversight body (a sort of Information Ombudsman), strong process provisions and extensive proactive publication obligations.”⁴² However, already at the time of the adoption of the Law on RTI, experts and international and domestic civil society representatives pointed to its shortcomings. The Milli Mejlis, Azerbaijan’s Parliament, has identified deficiencies of the Law on RTI to a limited extent. Reportedly, its Commission for Social Affairs conducted a public meeting at the beginning of 2008, during which it agreed to review proposals to improve the Law by 1 July 2008.⁴³ However, at the time of the publication of this report, such a review had not taken place.

³⁸ The Law on Combating Terrorism, adopted on 18 June 1999.

³⁹ The Code of Administrative Offences, adopted on 20 June 2000.

⁴⁰ Media Rights Institute. “How Does the Law «On Obtaining of Information» Work In Azerbaijan?” 13 August 2008 <http://www.mediarights.az/index.php?lngs=eng&id=8>

⁴¹ Mammadov, Sahib, ed. *Obtaining Information in Azerbaijan Republic. Legislation and Practise. Report on Results of Monitoring.* Baku, 2006

⁴² Mendel, Toby. *Freedom of Information: A Comparative Legal Survey.* 2008, 43.

⁴³ An NGO representative, focus group in Baku, July 2008.

Examining the domestic legal framework below considering the nine principles for effective freedom of information legislation (see *The Public's Right to Know* mentioned above) the following can be stated:

- The **regime of exceptions provided in the Law on RTI is too broad**. Many of the exceptions do not incorporate a harm test but instead, set out blanket categories of information that may not be disclosed.
- The Law on RTI does not address the **question of notification of third parties**.⁴⁴
- The Law on RTI and the Law on Obtaining Environmental Information do not include any provisions either on sanctions **for obstruction of access, or on protection of officials acting in good faith or whistleblowers**.

Sanctions for non-implementation of the Law on RTI and the Law on Obtaining Environmental Information were introduced in the Code of Civil Procedures, however they were removed in May 2009 and currently the only sanctions for non-implementation are included in the Code of Administrative Offences. Earlier, in its latest report on Azerbaijan of the Council of Europe Group of States against Corruption stated that it remains unclear whether they would be effective (in the absence of the “Authorized Agency on Information Matters”).⁴⁵

- The **relationship between the Law on RTI and other laws** is unclear, in particular with the Law on State Secrets and the Law on Combating Terrorism. The list of secret information contained in the Law on State Secrets is rather vague, leaving it open to broad interpretation. Similarly, the Law on Combating Terrorism does not provide any guidance as to what would constitute “information that would threaten the lives and health of people in the zone of operation”, allowing the government to determine what would fall under this category of information. It is doubtful that the prohibition of access to such information would pass the three part test mentioned above.
- The criticism of the existing framework also pointed out that only introducing legislation on access to information is not enough. **A comprehensive strategy and action plan** for the implementation of the freedom of information laws, jointly with the media, experts and NGOs, should be developed.⁴⁶ Nonetheless, to date the Government has not developed such strategy and has not instituted a mechanism for its development. In February 2008 it was reported that “the Azerbaijani authorities and the OSCE Baku Office were working out a

⁴⁴ This issue relates to cases where a decision to release certain information in a record has potential to affect the interests of a third party. This is a complex issue and its interpretation can give rise to difficulties and confusion for public bodies, requesters and third parties. The Law on RTI lacks the necessary framework. Article 27 provides that a request is considered satisfied when the information has been provided, the request has been forwarded and the applicant notified, the applicant has been advised on how to access the information, or the applicant receives a “grounded notification on the refusal” to provide information. This is supplemented by Article 21 para 3, which provides that the response to any refusal to provide information should be “explicit” and indicate the specific legal provisions upon which it is based.

⁴⁵ See joint and Second Round Evaluation, Compliance Report on Azerbaijan, adopted by GRECO at its 39th Plenary Meeting in Strasbourg (6-10 October 2008, available at [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC1&2\(2008\)4_Azerbaijan_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC1&2(2008)4_Azerbaijan_EN.pdf)

⁴⁶ See the Recommendations of the OSCE's First South Caucasus Media Conference, held in Tbilisi on 25-26 October 2004, available at http://www.osce.org/press_rel/2004/pdf_documents/10-4478-rfm1.pdf. See also the Statement and Recommendations on the Azerbaijani official draft Law “On Obtaining Information” of ARTICLE 19 from 12 April 2005, available at <http://www.article19.org/pdfs/press/azerb-foi-law-ap-05.pdf>.

Unified Communication Strategy and Information Coordination Mechanisms for Public Institutions and Media'.⁴⁷ However, this strategy had not been made public by the end of September 2009. Similarly, there had not been any response to a 2008 proposal developed by civil society and the government to set up a national program on access to information.⁴⁸

⁴⁷ See the Report by the Commissioner for Human Rights, Mr Thomas Hammarberg, on his visit to Azerbaijan (3-7 September 2007), Strasbourg, 20 February 2008, CommDH(2008)2, available at <https://wcd.coe.int/ViewDoc.jsp?id=1251577&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>.

⁴⁸ http://www.contact.com.az/index.php?type=news&lang=en&news_id=9031.

4 REALISING THE RIGHT TO KNOW IN AZERBAIJAN - PRACTICAL EXPERIENCES

“We requested information from the municipality of the town Novkhani in relation to existing problems with the infrastructure there. After two weeks we received a phone call from the head of the administration of the municipality, who arranged a meeting with us and orally answered our questions. He didn’t respond in writing, but instead met with the inhabitants of the town and partially managed to solve their problems.”⁴⁹

This example gives good insight into what benefits an effective information regime can bring, particularly in terms of effective governance. It was raised at one of the focus groups organised, between July and October 2008, as part of the research for this report to find out more about practical experiences in Azerbaijan with regards to access to information.

In the following section, the results of the project research and monitoring are organised with respect to the issues identified as main obstacles to effective access to information in Azerbaijan:

- Refusals of public authorities to respond to requests for information;
- Inadequate responses by public authorities to requests for information;
- Failure to meet procedural requirements set out in the Law on RTI;
- Culture of secrecy and corruption;
- Poor knowledge about the right to freedom of information in Azerbaijani society; and
- Lack of the necessary infrastructure for provision of information.

4.1 Refusals by public authorities to respond to requests for information

The project gathered extensive evidence of a systematic failure by the public authorities to respond adequately to requests for information:

- *Failure to respond to sample requests:* In July - October 2008, a partner to the project, Yeni Nesil (New Generation – Union of Journalists), sent 40 sample requests for information to various public institutions in the three major cities in Azerbaijan (20 requests to authorities in the capital city of Baku, 10 requests to authorities in Ganja and 10 to authorities in Sumgait). A response was obtained only in 60% of cases. Despite sending reminders to the respective authorities, 16 institutions, both at the local and national level, failed to respond to requests. Those included the local branch of the State Fund for Social Protection and its main office in Baku, as well as local branches and the national offices of the Ministry of Health, the Ministry of Defence, and the state company Azerenergy.
- A poor track record of responding to requests was also established in previous periods of research. For example, in January 2008, a coalition of NGOs reporting on the implementation of Azerbaijan’s commitments as part of the European Neighbourhood

⁴⁹ Discussion with an NGO representative, focus group in Baku, July 2008.

Policy indicated that only 25% of requests for information were answered.⁵⁰ In May 2009, the Media Rights Institute published the results of one of the longest running monitoring projects, which was conducted from October 2006 to May 2009.⁵¹ The Institute reported that during this period, in seven out of ten cases, public authorities did not provide answers to requests from the media. Out of 960 inquiries submitted to 260 government institutions, only 304 were responded to, leaving a staggering 68 percent of requests unanswered. Among the worst “offenders” who failed to respond were the Baku City Executive Authority (which did not respond to 9 information requests), the Prosecutor General (which did not respond to 7 information requests), the *Milli Mejlis* (which did not respond to 4 information requests) and the Ministry of Defence Industry (which did not respond to 3 requests). Other bodies that did not respond to requests include the Cabinet of Ministers, the Supreme Court, the Court of Appeals and various district authorities around Baku. Municipalities were also identified as particularly blatant in their disregard for the Law on RTI: within the Media Rights Institute project, 166 information requests were sent to municipalities in and around Baku, and not a single one was responded to in a manner consistent with the law.

- *No responses to written requests:* Almost 50% of the participants taking part in the research stated that they had experience with public authorities failing to respond to their requests for information, including institutions such as the Ministry of Emergency Situations, the Ministry of Justice, the *Milli Mejlis* and a local branch of the judiciary in Ganja. At the same time, the participants indicated that almost one-third of the public authorities gave no reasons or justifications for their refusals. In such situations, media representatives said they often did not pursue those requests further, but only referred to the failure of the authorities in respective media articles. However, a number of NGO representatives said that they would make the situation public: they would start public campaigns on the issue and/or go to court to get the Law implemented, even if they could not expect positive results: “If we don’t receive a response – we’ll start a campaign. For example, in 2004, we started a campaign against the Baku City Executive Authority. We lost all the court cases, but it was the first such precedent in Azerbaijan, and it was used as an example in various European and international reports.”⁵²
- *No response to telephone requests:* Information requests submitted by telephone or in person are not registered, and government institutions do not have a system whereby this could be done systematically. ‘How would you prove that you phoned all day, but no-one answered the phone? In that case you cannot accuse anyone of not responding. Therefore, it is far more effective to submit a request in writing’.⁵³ In such cases journalists do have the option of mentioning in public that they received no response: ‘I repeatedly contacted the Ministry of Transport and phoned them at least 20 times. All the time I received the answer that the person I needed was not at his/her desk. I never received a reply and wrote in my article that I couldn’t get the information from that department, but I never mentioned a name.’⁵⁴ An NGO representative tried to receive an answer by phone from the State Committee for Refugees and Displaced Persons on several occasions in March and April 2009. His question as to why the

⁵⁰ See Progress Assessment of the Action Plan which Azerbaijan signed with the European Union, January 2008, available at

http://www.enpi-programming.eu/wcm/dmdocuments/azerbaijan_civil%20soc%20progress%20assessment%202008.pdf

⁵¹ Khalid Agaliyev, ed. The Media Rights Institute’s Analysis of the Freedom of Information Situation in Azerbaijan, Baku, May 2009.

⁵² Discussion with an NGO representative, focus group in Baku, July 2008.

⁵³ Discussion with an NGO representative, focus group in Baku, July 2008.

⁵⁴ Discussion with a journalist, focus group in Baku, July 2008.

provision of food packages to some of the IDP camps had stopped since January 2009 remained unanswered.

- *Unjustified refusals:* Most participants in the research experienced “unjustified” refusals for providing information from the authorities. “I remember an answer from the State Border Agency very well. Someone called our editor and said ‘Why do you want this information; do you know that our work is secret? You are meddling in our affairs.’”⁵⁵. Referring the authorities to their obligations under the Law on RTI does not necessary yield the expected results: “I even tried to explain that there is such a thing as the Law on RTI, but even trying to explain this didn’t help. They didn’t give us any information.”⁵⁶

4.2 Inadequate responses by public authorities to requests for information

According to the research, instances where the requests for information would be fully and adequately satisfied are rare, resulting in the low level of confidence that those requesting information have in public authorities: “Today in Azerbaijan we rejoice when we receive an answer from the authorities.”⁵⁷ Only a few participants in the research indicated that they had a positive experience in their quest for information. For example, one journalist in Baku positively commented on the response from the Office of the Prosecutor General with regards to a murder investigation; the office was “well organised and even had the district prosecutor answer my query directly.”⁵⁸ However, more often, those seeking access to information would experience the following:

- *Varied attitudes among public authorities:* The attitude of public authorities to requests varies from authority to authority and positive experience is more a result of a personal initiative of the official responsible for the information services, than a systematic commitment by the Government to make access to information a reality: “It used to be near-to-impossible to receive any information from the Prosecutor General’s Office. Now, with the arrival of a new head of their information service, things have changed. He knows what he should be doing and if he can’t answer it himself, he’ll forward your query to another department, which can give you a more detailed response.”⁵⁹

Participants in the survey mostly commented positively on the experience with requests for information from the Prosecutor General, the Ministry of Youth and Sport, the Ministry of Communication and Information Technology, the Ministry of Environment and Natural Resources and the State Committee for Refugees and Displaced Persons. At the same time, the Presidential Administration, the *Milli Mejlis*, the Cabinet of Ministers, and the Baku City Executive Authority have the worst reputation amongst those participating in the focus groups - they are considered the most difficult to approach: “Every day we request information - from the Prosecutor General’s Office, the Ministry of Internal Affairs and the like. All of them respond, even at the level of regional administration. For example, the Ministry of Education responds in writing and with the signature of the Minister. Others, such as the Presidential Administration and the *Milli Mejlis* rarely respond and only give information through personal contacts.”⁶⁰

⁵⁵ Discussion with a journalist, focus group in Baku, September 2008.

⁵⁶ Discussion with a journalist, focus group in Baku, September 2008.

⁵⁷ Discussion with a journalist, focus group in Baku, September 2008.

⁵⁸ Discussion with a journalist, focus group in Baku, September 2008.

⁵⁹ Discussion with a journalist, focus group in Baku, September 2008.

⁶⁰ Discussion with an NGO representative, focus group in Baku, July 2008.

The Ministry of Internal Affairs was also mentioned: 'Since there is a new information department, their responses have been very quick. The official there finds any information and gives you an answer within 30 minutes – one hour.'⁶¹ However, in some aspects, this Ministry was also mentioned as one of the institutions with which participants had negative experiences: "The Ministry of Internal Affairs doesn't have a record-management system and therefore it doesn't know how to provide the public with relevant information."⁶²

According to the survey participants, the authorities also seemed to pay more attention to requests from the media: in the sample survey for the project, out of 14 requests sent by individual citizens, the response was received only in 8 cases; while 26 requests were sent by journalists and received 16 responses. Positive experiences were also linked to particular topics about which the information was being requested. For instance, requests for information related to issues of women tended to receive positive responses.

- *Different responses to the same questions:* earlier research by the Media Rights Institute in May 2009 (mentioned above) showed that different government bodies responded to the same questions in very different manners. For example, in response to requests for information about their respective budgets (which state bodies are required by legislation to post on their websites), the Ministry of Education responded positively; the Ministries of Foreign Affairs, Industry and Energy, Defence Industry, Health, Transportation, Emergency Situations, and Agriculture gave general answers; and the Ministry of Internal Affairs did not provide a response on the grounds that such information was a "state secret". In response to requests for information regarding the monthly salaries of ministers and their deputies, the Ministries of Ecology and Natural Resources, Economic Development, Justice, and Labour and Social Protection responded with the requested information; the Ministries of Culture and Tourism, Finance, and Taxes refused to answer on the basis that a presidential decree set the salary schedule; the Ministry of Communication and Information Technology did not answer, claiming that the requested information was of a personal nature; and the Ministry of Defence Industry refused to answer because the person who requested the information did not present his identification card (which is not required by law).
- *Need for personal contacts in order to receive information:* Various participants complained that they needed personal relationships with officials in public authorities in order to receive adequate answers: "We mainly receive the information we need through our personal contacts".⁶³ The need to have good personal contacts was identified also by journalists, who further complained that some authorities were particularly notorious in their failure to respond to requests, especially the Presidential Administration and the *Milli Mejlis*: "The situation with the Presidential Administration is awful. They rarely pick up the phone and the answers they provide are not acceptable. And this is the Presidential Administration, the institution where journalists turn to most."⁶⁴ Similar problems were identified by NGOs: "Twice, we addressed the Commander-in-Chief, the President about the fact that the Ministry of Defence had not responded to two concrete questions, but even that didn't help and we never received a reply".⁶⁵

⁶¹ Discussion with a journalist, focus group in Baku, July 2008.

⁶² Discussion with an NGO representative, focus group in Baku, July 2008.

⁶³ Discussion with an economist, focus group in Baku, October 2008

⁶⁴ Discussion with a journalist group in Baku, September 2008.

⁶⁵ Discussion with an NGO representative, focus group in Baku, July 2008.

- *Incomplete responses:* Most NGO representatives and journalists complained that too often, responses to the requests were incomplete or vague and failed to answer all the questions contained in the requests. “We requested information about a new waste-processing plant and whether or not there had been consultations, public hearings or a strategic assessment of the project. After one month and four days we received an answer of 1.5 pages, but our three questions remained unanswered.”⁶⁶

The same problem was identified in the sample survey: in those 24 cases where the public authorities responded to requests sought by the project, only 14 responses (58%) could be considered complete. Particularly positive was a response from the city municipality of Sumgait that not only responded in full, but also added additional information. However, others, such as the Sumgait Education Authority, only responded to some questions and avoided questions like “did you hold a tender for the construction of a new school and if yes, when was it held?”, or would refer questions well within their competency to higher-level institutions. The Ministry of Justice suggested the applicant to search for the requested information on their website that, however, was not functioning at the time. The Supreme Court also pointed to its website for more detailed information; but the information was not available on the site at the time.

The Media Rights Institute’s report from May 2009 (mentioned above) found very similar results: out of the 304 responses received; only 124 included complete answers. Only 62 responses were both complete and issued within the required time frame, meaning only 6.5 percent of the 960 inquiries were responded to in a manner fully compliant with the Law on RTI.⁶⁷

The poor quality of responses to requests for information has been criticised by various other sources. For example, a journalist requesting information from the Azerbaijan Agriculture Investment Project in May 2009 stated that he had asked four concrete questions, but received a general response with abstract information (moreover, he also reported that days before he had reportedly been threatened over the phone by project staff, who assumed that his questions were based on letter of complaint and demanded a copy.)⁶⁸ Even the exchange of information among government institutions themselves seems to be problematic. For example a representative of the State Committee for Women, Families and Children, who did not want to be named, stated to the TURAN News Agency in May 2009 that the State Committee is unable to receive statistical data from the Health Ministry on maternal and infant mortality rates.⁶⁹

- *Careful approach by the information seekers:* A response to request is often received only if the applicant is persistent and careful in how the information provided is used: “There were instances when press departments refused to answer my calls, but I managed to get an answer in the end. In my articles I never name anyone, knowing that the next time I would request information from them, it would make matters only worse and I would never get an answer.”⁷⁰

⁶⁶ Discussion with an NGO representative, focus group in Baku, July 2008.

⁶⁷ Khalid Agaliyev, ed., *The Media Rights Institute’s Analysis of the Freedom of Information Situation in Azerbaijan*. Baku, May 2009.

⁶⁸ See IRFS, *Office that Threatened Journalist Last Week Now Invites Him for Cooperation*, 5 May 2008, available at <http://www.irfs.az/content/view/735/lang.en>.

⁶⁹ See www.top7.az, 19 May 2009.

⁷⁰ Discussion with a journalist, focus group in Baku, September 2008.

4.3 Failure to meet procedural requirements set in the Law on RTI

The research identified a wide range of instances where the public authorities would fail to meet procedural requirements set out by the Law on RTI, in particular:

- *Failure to meet the deadlines for responses to requests:* According to the Law on RTI, a public authority should respond to requests for information within seven working days.⁷¹ If a question needs additional research, another seven working days are permissible once an institution has informed the applicant about the situation. However, the research showed that responses to information are rarely provided within the seven-day deadline: only five of the 24 responses received within the sample survey arrived within the set time-limit of seven days, and all came from the city of Sumgait. The Ministry of Foreign Affairs, the Ministry of Economic Development, Azergas, the State Committee for Statistics and the State Committee for Refugees and Displaced Persons responded with a delay of a few days. Others took up to a month to reply. Even responses to very simple questions for which information should be readily available (e.g. “how many students are currently enrolled in secondary schools in the city of Ganja”) took between 12 and 17 days. Some government institutions, such as the Baku City Executive Authority and the *Milli Mejlis* responded over three weeks late. Participants in the research further indicated that the seven-day deadline was not observed even when a question was linked to a certain time-line: ‘In May [2008], we asked the Presidential Administration in writing what their plans were for the celebration of the 90th anniversary of Azerbaijani independence [on 28 May]. A response came from the Ministry of Culture and Tourism that our request would be reviewed and we’d be informed. We have not received a response to date [October 2008].’⁷²
- *Requiring additional information in order to respond to requests:* In some instances, the public authorities (with exceptions of those in Ganja and Sumgait) required additional information on the applicants prior to granting the request, although the Law on RTI does not require the applicant to justify the request. In the sample-request research, six institutions, including the Ministry of Labour and Social Protection, questioned the applicants’ background, asked where they were employed and requested additional information or justifications regarding their information requests. The Ministry of Justice responded to the request of a journalist only after receiving the number and date of the registration of his newspaper as well as its tax registration.
- *Requiring “justification” for the requests:* In some cases, the public authorities refused to provide information claiming that the applicant “did not sufficiently justify their need for the requested information.” For example, the Court of Appeals in Baku refused to answer a request by an individual about the number of judges employed by the court and the number of cases it reviewed between 1 January - 1 July 2008, considering it to be “unjustified.”
- *Failure to set a tracking system for requests:* Participants in the research also complained that unless they send the requests for information by registered mail, there is no system within government structures that tracks the requests. The lack of a tracking system leaves an easy way out for those public authorities that do not want to respond. However, even in the cases when requests are sent by registered mail, the authorities sometime deny that they receive them: “In June 2008, we sent an

⁷¹ See Article 24 para 1 of the Law on RTI, which states: “A request for information should be dealt with as soon as practicable, but no later than seven working days.”

⁷² Discussion with a teacher, focus group in Baku, October 2008.

information request to the Baku City Executive Authority and the Cabinet of Ministers regarding their budgets. We re-sent our request after the given deadline of seven days, and although we have receipts confirming that the letters were delivered, they answered that they had received no such request.”⁷³

- *Claims of not being “information owners”*: The research also found that some “information owners” claimed not to fall under the regime of the Law on RTI and systematically refused to comply with the Law. In particular, these were companies which receive governmental subsidies or have a monopoly position. “When we send an inquiry to the State Oil Company of Azerbaijan (SOCAR) they answer that they do not hold such information. Such organisations as Azergas, Azerenergy and the State Oil Company do not think of themselves as information owners. The State Oil Company does not consider that it has a state budget and there is no way we can prove that they have a monopoly on the oil market in Azerbaijan.”⁷⁴ In another case, the State Oil Company interpreted the Law on RTI in such a way that it concluded it could be considered an ‘information owner’, but not with regards to financial information.⁷⁵

4.4 Culture of secrecy and corruption

A culture of secrecy is still deeply entrenched in Azerbaijani society, and the public authorities are adverse towards fulfilling their obligations under this Law that purports to bring in transparency and accountability to the government. It has been broadly acknowledged that one of the reasons for the lack of access to information in Azerbaijan is the mindset within government institutions. As noted during a focus group in Baku, “there is a prevailing culture, whereby officials are scared to even provide insignificant information without their manager giving permission.”⁷⁶ At least one-third of the surveyed journalists confirmed that they use ‘confidential’ sources in their work.⁷⁷

Government officials themselves acknowledge that the mindset of public officials impedes access to information; for example seven government officials interviewed by the project explicitly recognised this. They also admitted that “within ministries and state committees, the access-to-information regime is entirely dependent on the political will of those at the top. In most institutions, internal regulations require the information department or press departments tasked with the provision of information to clear any response, be it written or in person, with the relevant minister or director. The openness of institutions depends entirely on personalities, and is not systematically regulated according to the provisions of the Law on RTI.”⁷⁸

Participants in the research observed that such a culture has had a debilitating effect on civil society’s eagerness to seek information locally. Many NGO representatives confirmed that faced with this climate, they rarely request information at the local level, as almost no decisions are made at that level and the requests would not receive responses.⁷⁹ This is sometimes linked to corruption; ‘The government is often afraid to give even a minimal amount of information; most officials wait for guidance and permission from their managers to provide

⁷³ Discussion with an economist, focus group in Baku, October 2008.

⁷⁴ Discussion with an NGO representative, focus group in Baku, July 2008.

⁷⁵ Response from SOCAR to the Public Union for Economic Initiatives regarding an information request on foreign investment projects, foreign credits and chartered capital, 27 February 2009.

⁷⁶ Discussion with a teacher, focus group in Baku, October 2008.

⁷⁷ In-depth interviews with media representatives (July – October 2008)

⁷⁸ Interview with a government official, Baku, March 2009.

⁷⁹ In-depth interviews with NGO representatives (July – October 2008)

information. It also happens regularly that officials expect a certain 'reward' for providing information.⁸⁰

Some participants also complained that some public authorities, like the Housing Operations Authority, Medical Commissions or State Vehicle Inspection, are notorious for demanding bribes for any official information or documentation that they are obliged to provide under the Law on RTI: "Everywhere you turn to for information and documents, they demand payment. It's very difficult to get any documentation from the State Vehicle Inspection; they demand a lot of money. Without personal contacts you will not get anywhere."⁸¹

4.5 Poor knowledge of the right to freedom of information in Azerbaijani society

On the whole, the research showed that those NGOs and media professionals who participated in the focus groups and in-depth interviews had a good grasp of existing legislation in the field. They had a good grasp of the various provisions of the Law on RTI, such as the time limits and the obligations of public institutions, and asserted that they regularly refer to the Law in their requests. Two-thirds of participants also indicated that they refer to the Constitution in their requests.

However, the same cannot be said about other segments of society, including researchers, academics, unemployed persons and refugees. They knew only very little about existing legislation and claimed that even when submitting requests for information, they would never refer to the Law on RTI as the basis for their requests.

Poor knowledge of the main requirements of the Law on RTI was identified even among government officials, the "information owners" themselves. Many interviewed officials were fully unaware of the purpose of the Law on RTI and its major underlying principles, such as the principle of "maximum disclosure" or the scope of limitations on the right (e.g. the "harm" and "public interest" threshold.) Also, more than half of the government officials interviewed for the project said they treated requests by journalists differently from requests for information by individual citizens, preferring to respond to journalists, since "this information reaches a broader audience."⁸² Hence, in some cases, government officials would demand proof the person requesting the information was actually a journalist, by checking if they were employed by a media outlet. Several journalists interviewed for the report corroborated this experience and confirmed that being a journalist was a major factor in their ability to receive positive responses. Moreover, when asked on what legislative basis the government officials satisfied requests for information, the government officials responded that if they refer to anything, it would mostly be to the Law on Mass Media. This again is an indication that public institutions consider that requests for information from media workers have prevalence over those submitted by others. On the other hand, government officials also treat requests for information by journalists with more apprehension, as they consider the media to be unprofessional, politically biased, tactless and lacking in morals.

In order to overcome these issues, the need for more resources and an information campaign was identified as a priority by the participants. As one teacher from Ganja noted, "independent consultants are needed, who can inform the general population and advise them. For example, they can inform people who want to address the Social Security Fund, and who are

⁸⁰ Discussion with an NGO representative, focus group in Baku, July 2008.

⁸¹ Discussion with a participant of a focus group in Ganja, September 2008.

⁸² Results of in-depth interviews with government officials, July – October 2008.

now easily deceived. Knowing the right information, no-one will be able to mislead them.”⁸³ Education programmes for the population were suggested also by a women’s rights activist in Baku, who pointed out that “often people, when they want to receive some kind of information, wait for it as if it is a favour. They should understand that it is actually an obligation of that same official to provide the population with this information and that they have the full right to demand it.”⁸⁴

4.6 Lack of necessary infrastructure for provision of information

Full and effective access to information requires sufficient financial, technical and human resources. Research uncovered many shortcomings in this respect, namely:

- *Absence of information officials or departments within public authorities:* According to the Law on RTI, all institutions should appoint an information official or establish an information department (not a press department), for which resources should be made available from the budget.⁸⁵ Although most of the government officials interviewed for the report claimed that management systems for the provision of information had been introduced, at the time of the publication of this report, there were no special departments charged with provision of information in the “power” ministries, such as the Ministry of Defence, the Ministry of Emergency Situations, and the Ministry of Defence Industry. These ministries do provide information, but they do not consider it part of their responsibilities to have direct communication with the general public, and only provide information to the media. Even government officials taking part in the survey acknowledged that this is an impediment to the effective implementation of the Law on RTI.

The absence of an information department at the State Fund for Social Protection was particularly criticised: “The State Fund for Social Protection does not have a special information department or service, and it is extremely difficult to receive correct information. When you speak to them, they say they either don’t have it or they don’t have the authority. This is the Fund where most ordinary citizens go. The authorities have created an impossible situation. If our organisation [a well-established NGO] already has great difficulties in getting any kind of information out of them, then I can’t imagine what ordinary citizens have to go through.”⁸⁶

Many public authorities were unaware of the obligation to establish a specific information department or to establish an information management system, such as databases: “We did some research and found out that some institutions don’t even know that they should have such departments. They don’t know how and from which budget this should be funded and don’t know about the requirement to set up a record/information management system. They don’t understand that there is a difference between an information department and a press department.”⁸⁷

- *Failure to create Internet resources:* The Law on RTI also requires state authorities to create their own Internet Information Resources “as soon as practicable, but no later than one year from the publication of the Law”; municipalities had a three-year time-limit. On their websites, authorities are supposed to provide at least 34 types of information.⁸⁸ Nonetheless, until the publication of the report, the Ministry of Defence

⁸³ Discussion with a teacher, focus group in Ganja, September 2008.

⁸⁴ Discussion with a women’s rights activist, focus group in Baku, July 2008.

⁸⁵ See Article 10 para 3 of the Law on RTI.

⁸⁶ Discussion with an NGO representative, focus group in Baku, July 2008.

⁸⁷ Discussion with a journalist, focus group in Baku, September 2008.

⁸⁸ See Article 56 of the Law on RTI.

and the majority of municipalities did not have websites, and the information on existing websites was incomplete. “I contacted the Ministry of Education about some documents by the European Commission. They told me that the information was on their site, but when I tried, the pages didn’t work and I could only access very general information. I got in touch with an NGO to get the information”.⁸⁹

Additionally, in 2005, the Government adopted a national programme entitled “Electronic Azerbaijan (2005-2008)” aiming to improve Internet use, resources and accessibility throughout Azerbaijan. In 2008, its ranking on the Global E-Survey improved, rising to the 89th position from its previous ranking of 101st in 2005.⁹⁰ One of the positive developments, according to the survey, is the existence of a ‘Head of State Website that Encourages Citizen Engagement’, which includes the possibility for citizens to leave and receive feedback. However, at the end of 2008, reportedly only five percent of Azerbaijan’s population had Internet access, and concrete steps to connect in particularly remote regions, such as establishing Public Information Centres (PICs), have been lacking. According to an independent expert, Alyaskar Mammedli, the creation of PICs will solve the problem of access to information, ‘as the low circulation of local newspapers does not provide access to information through the press, so it is necessary to use electronic carriers’.⁹¹

- *Failure to guarantee the access to public meetings and events:* an integral part of an effective information management regime is full access to official meetings, including court hearings and other places of public events. However, there is no mechanism available to facilitate such access. For example, even information on up-to-date meeting schedules for hearings of the Parliament does not exist, and the agendas of the hearings are not circulated or posted to the website. Draft legislative proposals are not made public in advance, and on the day of parliamentary discussions, only a small number of copies are made available to select journalists. Calls by journalists for a change in this practise are systematically ignored.⁹² TV journalists are only allowed to film parliament from the press gallery in the back of the parliamentary chambers, allegedly to avoid catching parliamentarians sleeping. President Aliyev has never held a press conference open to all Azerbaijani media since he came to power in 2003. Only a handful of pro-government journalists are allowed to be present at the public events he attends in Azerbaijan⁹³. One journalist who took part in the in-depth interviews recalled that his accreditation to the Constitutional Court was revoked, preventing him from attending court cases in 2008. Independent journalists were reportedly not allowed to interview anyone at the scene of the killings of 13 persons at the State Oil Academy on 30 April 2009. Information about the investigation into the killings has been very limited. Access to court hearings is often restricted, for example under the pretext that the courtroom is full.
- *Failure to appoint an Information Ombudsman:* The Law on RTI stipulates that an Information Ombudsman should be appointed within six months of the enactment of the law;⁹⁴ that would be by June 2006. However, more than three years later and despite international and domestic criticism, the Information Ombudsman has not been appointed and no information is available as to when/if this would be done.⁹⁵ The

⁸⁹ Discussion with a historian, focus group in Sumgait, October 2008.

⁹⁰ <http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN028607.pdf>

⁹¹ http://www.contact.com.az/index.php?type=news&lang=az&news_id=9031.

⁹² Interview with an independent journalist, Baku, May 2009.

⁹³ Interview with a journalist in Baku, May 2009.

⁹⁴ See Article 57 of the Law on RTI.

⁹⁵ See for example, Letter of ARTICLE 19 to His Excellency President Aliyev from 15 September 2006, available at <http://www.article19.org/pdfs/letters/azerb-letter-to-president-foi.pdf>; Joint First and Second

participants in the survey for this project perceive this failure to be one of the major hurdles preventing the development of a successful information regime in Azerbaijan.

- *Lack of sanctions for obstruction to access:* As mentioned earlier, the Law on RTI does not include provisions for sanctions for the obstruction of access, or for the protection of officials acting in good faith or whistleblowers. Although administrative sanctions were separately introduced in other legislation, they have not been imposed effectively. Many participants viewed the lack of sanctions as a serious obstacle in effective implementation of freedom of information legislation: “It is unclear who should be held accountable and for what, just for refusing to answer or also for lying, etc.”⁹⁶ Currently individual government officials are not being held to account. “If a certain government institution loses a court case and receives a fine, it should follow that there should also be consequences for the individual government official (in particular directors), such as dismissals etc.”⁹⁷

Round Evaluation, Compliance Report on Azerbaijan, adopted by GRECO at its 39th Plenary Meeting in Strasbourg (6-10 October 2008, available at [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC1&2\(2008\)4_Azerbaijan_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC1&2(2008)4_Azerbaijan_EN.pdf); Report by the Commissioner for Human Rights, Mr Thomas Hammarberg, on his visit to Azerbaijan (3-7 September 2007), Strasbourg, 20 February 2008, CommDH(2008)2, available at <https://wcd.coe.int/ViewDoc.jsp?id=1251577&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>; Media Rights Institute, Legal Challenge to Mass Media, Annual report 2008, Baku, January 2009, available at <http://www.mediarights.az/index.php?lngs=eng&id=20>.

⁹⁶ NGO focus group, Baku, July 2008.

⁹⁷ *Ibid.*

5 DEFENDING FREEDOM OF INFORMATION - JUDICIAL PRACTISE

“If the country isn’t ruled by law, you won’t be able to improve anything. I have to say that in general our laws aren’t too bad, you can work with them. But when they are not implemented you need independent judges and for government officials to be punished appropriately.”⁹⁸

In the absence of an Information Ombudsman, who would be able to intervene and provide guidance in disputes regarding implementation of the Law on RTI, currently, the only way to appeal against the refusal of an information request is through the court system. This can be done by pursuing an individual responsibility for breaches of the law under Article 181 para 3 of the Code of Administrative Offences. This article provides that officials should be fined for unjustly limiting the right to information or for providing false information, for refusing to provide access to information, for refusing to receive a written request for information, for violating the rules on record management, or for persecution for the dissemination of information about offences, which are a matter of public concern. However, so far, none of the cases brought against government institutions under this provision for failure to provide information in accordance with the Law on RTI have provided a precedent for successfully holding individuals to account. Without such sanctions there is little impetus for government officials to change their attitude in relation to information requests.

Previously, it was possible to file a claim for access to information with a relevant district court under Article 265 of the Code of Civil Procedures. According to this provision, courts had the right to issue special rulings in the case of an establishment of breaches of the law and other normative acts in the course of activities of a legal entity, state authority, local self-governing body or other organisation, official or physical person. Courts then sent the special rulings to one of these bodies, which were obliged to notify the courts of remedial measures within one month. As for the effectiveness of this provision, analysis of available domestic jurisprudence on cases under the Code of Civil Procedures showed varied results. As early as 2006, the Yasamal District Court ruled against the Public Broadcasting Service (ITV) for refusing to answer a journalist’s request for information about the annual budget of ITV and about its financial audit. After this decision, ITV provided a response, but the provided information was incomplete. When the complainant went back to court, it ruled that because an answer had been given, the company was in compliance with the obligations as stated in the RTI Law, and ruled against the complainant.⁹⁹ As Article 265 was removed from the Code of Civil Procedures on 26 May 2009 the only avenue to challenge violations regarding access to information is through the Code of Administrative Offences.

In several cases, parties have resolved the dispute amicably. For example, the following two cases show that the threat of court proceedings can give the “information owners” a little nudge in the right direction. In July 2008, two Media Rights Institute lawyers, Khalid Agaliev and Fariz Namazli, sent an information request to two municipalities, Saray and Jeyrabatan regarding how much and which land had been granted to the management of the municipality by the state. Both responses were initially incomplete. The head of the Saray municipality referred to the municipality’s website. Despite the website providing some general information,

⁹⁸ Discussion with an NGO representative, focus group in Baku, July 2008.

⁹⁹ See Freedom of Information in Azerbaijan Bulletin, Baku, June 2007, available at: <http://www.mediarights.az/index.php?lngs=eng&do=print&cats=1.%203.%206.%2010.%2011&id=6>.

the lawyers were unable to find answers to their questions, and follow-up requests for information were ignored. Subsequently, the applicants submitted both cases to court. In the first case, after the start of the trial proceedings, the head of the Saray municipality presented all the requested information, and the information was also made public on the municipality's website. The trial was discontinued. In September 2008, after the initiation of the court case against the Jeyrabatan municipality, the municipality presented the requested information to lawyer Khalid Agaliyev.

The cases above are in the minority. In a May 2009 report, the MRI recorded that when it sued the public authorities for failing to provide access to information, only 30% of their complaints were accepted for consideration at the regional and city courts. In contrast, all claims at the municipal level were considered.¹⁰⁰ Some of them, like the examples above, were then settled without a court decision. In its 2008 report¹⁰¹, the Institute states that none of the 37 legal complaints it lodged during the year were decided in its favour. Of these complaints, the court of first instance rejected 31 cases. One of the most notable of them was a case concerning a complaint filed by Ishakhan Ashurov, the lawyer of imprisoned journalist Eynulla Fatullayev, against the Minister of Foreign Affairs, Elmar Mammadyarov, for inadequately responding to a request for information [full disclosure of a letter]. Criminal charges were brought against Fatullayev on the basis of a letter by the Ministry of Foreign Affairs expressing concern about the article 'The Aliyevs are going to war'. In the letter, the Ministry reiterates the concerns expressed by representatives of international and local organisations, as well as private individuals. They reportedly wrote to the aforementioned ministry expressing concerns for their safety. The letter written by the Ministry of Foreign Affairs formed part of the evidence in the court case against Fatullayev, as a result of which he was convicted and sentenced to 8.5 years imprisonment (when combined with a previous conviction on criminal defamation charges) on charges of terrorism, incitement of ethnic hatred and tax evasion. The Yasamal District Court rejected Isakhan Ashurov's access to information claim to receive a copy of the letter on 24 November 2008 and the Baku Court of Appeals upheld this decision on 10 February 2009.¹⁰²

5.1 Case studies

Within the project that provided the basis for this report, ARTICLE 19 attempted to test the effectiveness of the existing legislation in Azerbaijan also via court litigation. At the time of publication of this report, several proceedings had been initiated in relation to the refusal of state bodies to provide information. As final decisions have not yet been issued, it is not possible to assess their results at this stage. The following two cases are mentioned as examples of issues that have to be addressed via litigation in Azerbaijan, and a brief analysis of the legal situation challenged in them.

5.1.1 Fariz Namazli v. the Binagadi Local Executive Authority

This case concerns Fariz Mubariz Namazli, a media lawyer and freedom of information activist, who works for the Media Rights Institute. In November 2008, he filed an information request with the Binagadi Local Executive Authority (further "BLEA"), requesting to be provided with information about the total amount of the annual budget of the BLEA and the revenues from BLEA services in the first half of 2008, and to be granted access to the documents reflecting the expenses of the financial means obtained as result of budgetary means and services. Namazli pointed out that he was unable to obtain the respective

¹⁰⁰ Khalid Agaliyev, ed., *The Media Rights Institute's Analysis of the Freedom of Information Situation in Azerbaijan*. Baku, May 2009.

¹⁰¹ Khalid Agaliyev, ed., *Annual Report (2008)*. Baku, January 2009.

¹⁰² See Institute for Reporters' Freedom and Safety, www.irfs.az, 10 February 2009.

information from the BLEA website, despite the obligation of public authorities under the Law on RTI to publish this type of information. He also referred to the Presidential Decree of 28 June 2008, which adopted the National Strategy to Increase Transparency and Fight Corruption. The Strategy obliges state bodies to make available all information regarding their activities. On 17 December 2008, the first deputy chief of the BLEA, Mr. F.Aslanov, refused to fulfil the request stating that it was out of the BLEA competence to present the requested information to any citizen, organisation or institution. No references to the Law on RTI were made in the rejection.

Subsequently, Mr. Namazli appealed this decision with the Binagadi District Court (hereafter “BDC”). In the proceedings, the BLEA asserted that the refusal was justified based on Article 15 para 4 of the Law on RTI, which prevents officials from acquiring any information for private or other purposes, and that the request did not fall under the scope of Article 29 of the Law. On 25 February 2009, the BDC rejected Mr. Namazli’s appeal as unsubstantiated, citing various provisions of the Law on RTI. The BDC concluded that the Law on RTI did not prescribe that information owners should grant access to the information requested by Mr. Namazli. On 6 April 2009, Mr. Namazli appealed this decision with the Baku Appellate Court (hereafter “BAC”), disputing the BDC’s findings. On 5 June 2009 the Civil Law Chamber of the BAC issued a decision. Finding the appellant’s requests groundless, the BAC upheld the BDC’s decision of 25 February 2009. Referring to Article 15.4 of the FOI, the BAC held that Mr Namazli could not acquire information for private purposes on the pretext of official duties.¹⁰³ The appellate judges noted that Mr. Namazli had not stated the reasons for his information request. That is why the BAC concluded that the request for information might have been made for private purposes. The court regarded the latter as a ground for refusal of information requests and upheld the decision of the first-instance court. On 12 September 2009, Mr. Namazli filed a request for appellate review by the Azerbaijani Supreme Court.

ARTICLE 19 filed written comments before the Appellate and Supreme Court in this case. We believe that the decisions in this case constitute a violation of Namazli’s right to freedom of information, as an integral part of the right to freedom of expression, based on the following:

- Interference with the right was not prescribed by law: the BLEA refused to provide information without any reasoning or specification for the rejection, which runs contrary to the requirement that interference with freedom of information should be prescribed by law.
- The restriction on Mr Namazli’s right was not legitimate: given the public character of information concerning local authorities’ budgets around the world, it is impossible to accept that a refusal by a local executive authority to disclose this type of information may pursue any legitimate aim recognised by international law.
- Restriction was not necessary in a democratic society: Mr Namazli legitimately attempted to gather information on a matter of public importance. This type of information is widely available across Europe. Typically, the disclosure of this sort of information does not require a special request, and local authorities publish it on their websites. There is no “pressing social need” which could justify exemption of the local authorities in Azerbaijan from the overall openness regarding budgetary and financial matters of such organisations in Europe. In addition, access to information legislation is a key anti-corruption measure. Therefore, refusals to provide information about the local authorities’ budget and revenues adversely affect the ability of the public to control public matter and to fight corruption.

¹⁰³ Article 15.4 states:

“A civil servant may not acquire any information for his private purposes on the pretext of official duties or making use of his official position, nor use the information acquired during fulfilment of official duties for other purposes.”

5.1.2 Azar Mehtiyev v. the State Oil Company

The case concerns Azer Seyfali Mehtiyev, chairman of the Assistance for Economic Initiatives, an NGO based in Baku. On 27 February 2009, he filed an information request with the State Oil Company of Azerbaijan (further "SOCAR"), requesting to be provided with information about the company's projects abroad over the last few years, the amount of the SOCAR's assets, and the financial sources of these projects; the current credit projects and the amount of foreign credits obtained for them; and the chartered capital, the amount of company assets, as well as the reasons for their increase over the last three years.

On 11 March 2009, SOCAR refused to provide the requested information on the ground that it is not an information owner under the FOI law. On 19 March 2009, Mr. Mehtiyev filed a complaint against the refusal with the Sabail District Court ("SDC"). He argued that SOCAR is a subordinate body of the state which holds a dominant position in oil production and, therefore, that every citizen has the right to obtain information about its activities and projects. He requested that the SDC order SOCAR to respond to the information request. However, on 18 April 2009, the SDC refused to uphold the claim, finding it groundless.

The SDC analyzed the texts of the FOI provisions referred to by Mr Mehtiyev, and concluded that they did not apply in this case, since SOCAR is neither a state body nor a local authority and does not perform a public function. The court determined that SOCAR is obliged to provide information only about the terms of offers or the prices of goods. As the requested information did not concern the terms of offers or the prices of goods, the SDC held that SOCAR's refusal to provide the requested information was legal. On 1 September 2009, Mr Mehtiyev appealed the decision with the BAC.

ARTICLE 19 asserts that that in this case, SOCAR and the Sabail District Court violated Mr Mehtiyev's right to freedom of information and Azerbaijan's obligation to fight corruption, based on the following assessment:

- The restriction on Mr Mehtiyev's right was not legitimate: It is very difficult to see how refusing to disclose information about the assets, chartered capital, and projects of a state-owned company may pursue any of the legitimate aims recognised by international law.
- Restriction was not necessary in a democratic society: Mr. Mehtiyev was involved in the legitimate gathering of information on a matter of public importance. Access to information laws across Europe and the world guarantee access to information concerning the assets, finances and management of state-owned companies. Since there was no pressing social need for the SOCAR and the SDC to refuse the appellant's request, the denial was not necessary in a democratic society.
- Violation of Azerbaijan's obligations under international law to fight corruption: As a party to multiple intergovernmental agreements, Azerbaijan is obligated to implement and abide by certain standards designed to promote the international fight against corruption. Several of these standards relate to the right of free access to information. These standards apply to administrative agencies, including the judiciary, and also to state-owned industries. Therefore, by refusing to release the information requested in the referenced case, the SDC and SOCAR are in violation of the standards for access to information to which Azerbaijan is obligated to adhere.

CONCLUSIONS

The issue most often raised when access to information is discussed in Azerbaijan is: where has the Information Ombudsman been for the last three years? The Law on RTI clearly indicates when this institution should have been established and by whom, but it has never materialised. Calls from national and international organisations for the establishment of such an office have gone unheeded. The absence of an institution so crucial to the establishment of an effective information management regime and failure to address many deficiencies identified in this report have allowed for a prevailing culture of secrecy within public institutions, and is a clear sign from the Government that it is not interested in openness or transparency.

Both government officials and civil society representatives indicate that the situation has improved since the introduction of the Law on RTI. However, the general public still considers that access to information is more “a privilege” than a right, and even NGO and media representatives are not always ready to push for effective implementation of the right. They continue to play by the “old” rules using their personal contacts, and on occasion, passing bribes. The principle of maximum disclosure, an essential part of freedom of information, is often reversed, both in policy and practise. Court decisions – or the lack thereof - allow government institutions to remain closed and to not be held publicly to account. Equally, individuals are not held responsible for providing incorrect or incomplete responses or not answering at all.

At the same time “information owners” are not being provided with the right tools to develop effective mechanisms that would allow the public to request and obtain information from them. Although the majority of the national ministries have press departments, they have not set up public information offices, and due to the lack of specific funding, these often have combined responsibilities with the press services. Information management systems have not been developed and records of requests for information are not kept, making it near to impossible for information officers to deliver on their tasks. Information queries, which should be responded to within seven days, take significantly longer, certainly in part because systematic retention of documentation is lacking. Requesting information over the phone is doomed to fail without personal contacts, as requests are not registered and it is easy for government officials to deny that calls ever took place. It is particularly telling that current budget information, as required by the Law on RTI, is not available on any of the websites.

Although the Law on RTI has provided for clear regulation on access to information, this has not been incorporated into government policy. On the contrary, public authorities continue to set internal rules which are often restrictive and will not allow for greater openness or transparency. Such an environment is not conducive to developing inclusive decision-making processes or to general democratic development. In this respect, it is telling that President Aliyev has not held a press conference open to all media since he came to power in 2003. Government officials agreed that one of the main obstacles was the mindset of the authorities. However, they also felt that journalists were often unprofessional, tactless and lacked morals, which is why they were not very willing to provide information to them.

A particularly difficult group of “information owners” is the state-owned or subsidised companies or those holding a monopoly, as they systematically deny being “information owners”, a claim often backed by the court system. This has allowed them to hide completely from any public scrutiny. Industrial sectors, such as the oil industry, are not held to account, creating an excellent environment for corruption in this field.

While internet resources are slowly developing, and now almost all ministries have websites, only around five percent of Azerbaijani citizens actually have Internet access. Government policy, particularly the e-government programme, seems to assume that local Internet

resources are widely available; however, such resources haven't been set up. This has left the regions bereft of information, as newspaper distribution is declining and independent newspapers are disadvantaged by the state-owned distribution system. Regional officials seem less informed and less able to respond to information requests, and direct most queries to their headquarters in Baku. A particularly difficult region, which is outside the scope of this report, is the Autonomous Region of Nakhchivan, where access to information is even more limited, both because of the logistical difficulty of getting materials to the exclave and because of severe restrictions imposed by the local authorities.¹⁰⁴

Almost half of the information requests sent as part of the test requests remained unanswered, similar to the experience of the participants taking part in the in-depth interviews and the focus groups. When answers are received, they are often vague or abstract and sometimes even untrue. Many participants were sceptical of the government's intentions. Although they had seen a marked improvement since the introduction of the Law on RTI, they believed the 'openness' of the authorities was limited to certain areas not considered to be 'politically' sensitive, such as social issues. Going through the court system to take government institutions to account is a long, tenuous process, most likely with a negative result, although in some cases, amicable decisions are reached.

This report has aimed to document the implementation of the right to freedom of information in Azerbaijan several years after the adoption of the Law on RTI. It sets forth the shortcomings in the Law and practises that were uncovered during several months of research. It seeks to inform and suggest recommendations to various national actors with the aim of encouraging them to remedy and eradicate the violations of the right to freedom of information. In the end, this report seeks to be a useful advocacy tool to raise awareness of and thereby change the state of freedom of information in Azerbaijan.

¹⁰⁴ Interview with an NGO representative, Baku, March 2009.