

Ensuring consistency, effectiveness and justice in implementation of law on access to information

1. Expand the subjects who have the right to access information to ensure consistency

Clause 1, Article 4 of the draft Law on access to information stipulates that *"citizens must exercise their right of access to information under the provisions of this Law"*.

According to explanation of agency that is in charge of drafting the document, this regulation institutionalizes Article 25 of the 2013 Constitution; and access to information is "citizen right" rather than "human right", hence the only subjects that have right to access to information are "citizens". However, in the draft Law, the name "Law on access to information" itself does **not impose any restriction** on right to information of other subjects.

While the draft Law on access to information does not contain provisions allowing legal entities to access information, Clause 2, Article 36 of the draft Law states that *"Citizens can require information via their organizations, unions, businesses "*.

Hence, there is an inconsistency between the name and the provisions of the draft Law, as well as between the provisions themselves. [1] Therefore, Towards Transparency recommends:

- Broaden the subject having the right to access information to include *both individuals and legal entities*, and simultaneously specify cases that individuals exercise their right to access

information via organizations, unions and businesses, and how their right should be implemented.

- In case individuals (including both Vietnamese and foreigners residing in Vietnam) and legal entities are entitled with right to information, the law should point out: *what kind of information above-mentioned subject have access to, what kind of information only Vietnamese citizens can access, what type of information is inaccessible (belong to State secrets).*

According to international experience [2], restrictions on access to information are considered legitimate only if they are necessary to protect a limited list of public and private interests. Restriction on access to information should be based on public interest, not on particular interests of an agency, an organization or a specific unit.

2. Ensure the implementation of right to access information of vulnerable groups

Clause 2, Article 4 of the draft Law on access to information regulates the right to access to information for people who do not have capacity to perform civil actions, have difficulties in cognition and behavioral control.

Clause 6, Article 3 stipulates that the State has responsibility to help, create favorable opportunities for the disabled and those who reside in hard to reach communities to practice their right to information.

However, the draft Law should contain more detailed provisions to ensure the right to information of vulnerable groups such as the disabled, ethnic minorities ... Specifically:

- Clause 6, Article 3 instead of regulating that “State shall create favorable conditions ...”, the provisions should be amended toward clearer direction: “The State **guarantees [3]** the favorable conditions for *the vulnerable, the disabled, ethnic minorities, other hard*

to reach communities, *Vietnamese citizens living abroad who have difficulty* to exercise their right to access information “.

- Clause 2, Article 4 should be supplemented with provision that the disabled are allowed to exercise their right to access information ***via their guardians or legal representatives***.
- Clause 3, Article 18 on the methods to publish information to the disabled, other hard to reach communities, need to be supplemented with the provision of ***converting information to different appropriate forms*** (like braille, ethnic language ...). It is not necessary to translate all information into the ethnic languages but where particular information and documents are required, in order to avoid wasting human and material resources.
- Article 12 should be added the provision ***on exemption or reduction of fee*** (the cost of translating, copying, capturing, sending documents, ...) for group of people with extremely difficult economic condition, ethnic minorities ... to provide them with sufficient opportunity to exercise their right to access information.
- Part a, Clause 1, Article 24 states that: in case the requesters are *illiterate* or *disabled*, could not make written requests, officials have responsibility to assist them fill all required content in the information request form which are specified in Clause 2, Article 24. However, the draft Law does not include the case if ***the officials are not able to communicate with the requesters*** (ethnic minorities or disabled people who use their own language, foreigners ...) Therefore, this provision should be ***supplemented with the receipt of information via legal representative, guardian or organization acting as their sponsor***.

3. Clarify principles determining the information to which citizens do not have access

We believe that the drafting law committee should clearly define the principles determining the inaccessible information in Clause 2, Article 6. Whether ***‘experts’ opinions in the policy making process***” should be classified as inaccessible information ***or*** accessible information with conditions? Because, “experts” themselves can not represent state agencies to provide information affecting politics, national security, and cause harm to state.

Besides, in many cases, allowing public to access experts’ opinions could ***help raise awareness and social understanding*** on a technical issue or create a basis for discussion, positive social feedback, practically contribute to the making and passing policy, reinforce the rationale and practice of those policies.

4. Determine responsibilities and scope of providing information of agency “creating” and “holding” information

Clause 1, Article 9 of the draft Law on access to information stipulated: *“Central state agencies, central offices of political organizations, political-social organizations have responsibility to disseminate information they **create**; state agencies, political organizations, political-social organizations, the armed forces, businesses, state-owned enterprises, and other organizations using the State budget shall disseminate information they **create or hold**”.*

However, information which is ***“created”*** and ***“held”*** by agencies, organizations and enterprises of State should be defined in more detail, because information created by a single agency can be held by many agencies and vice versa. Thus, ***the responsibility to disseminate information*** will belong to which department?

If there are too many agencies (even at different levels)

provide information, hence, information may be inconsistent, even misleading. Moreover, when an agency disseminate information they ***did not create***, handling errors is quite impossible, and public may express skepticism about the accuracy of documents that agency provide.

Therefore, we recommend drafting agency to identify extents of information provided; and obligations of the agency “create” or “hold” information.

There should be provisions regulating responses when agency receiving requests ***does not create or hold information*** in the draft Law. Accordingly, the agency must inform and guide requesters to send written requests to ***the agency creating information***.

International experience shows that in such case, the agency receiving requests should directly send initial requests to the agency creating information. [4]

5. Establish and define responsibilities and authority of an independent administrative agency to be in charge of access to information

Provisions of Article 1 and Clause 3, Article 14 of the draft Law on access to information is currently not consistent.

Specifically, Article 1 stipulates: The subjects have responsibility to disseminate information are “... *State agencies, political – social organizations, the armed forces, businesses, state-owned enterprises, agencies and other organizations using state budget ...*”.

And Clause 3, Article 14 stipulates that: The “Complaints, lawsuits and denunciations on accessing information shall comply with the provisions of *law on complaints* and denunciations and procedure law”.

However, Article 1 of the Law on Complaints in 2011 only

states that “complaints and resolving complaints against the decision, administrative acts **of governmental departments, the administrative person in the governmental departments ...** “. Article 1 of the Law on Denunciations 2011 only provides that “denunciation and resolving denunciations **for law violation of public officials and employees when performing tasks and duties ...**”.

Thus, when there are complaints and denunciations, only **state administrative organisations** are under scope of the Law on Complaint and Denunciation; while other agencies that can provide information such as political-social organizations, the armed forces, businesses, state-owned enterprises, agencies and other organizations using state budget are not covered under the scope of these two laws.

Besides, when forming mechanisms on access to information, there should be **appropriate sanctions** to guarantee full compliance with provisions of the Law on access to information. The draft Law has now given tough sanctions in: Article 11 (Prohibited Acts), Article 15 (Violations Handling) and Article 34 (Responsibilities of agencies, organizations, units providing information). However, state agencies often hesitate to disclose information and **the head** of these agencies do not want to discipline individuals who have obstructed the right to information. Hence, there is a need to have more independent mechanism to apply different forms of sanction toward the violation of right to information.

Therefore, the establishment of an independent administrative body specialized in settling complaints and denunciations of access to information is essential so as to ensure the effective enforcement of right to information.

6. Additional provisions protect the legitimate provision of information

Beside the sanctions, effective Law on access to information

must contain **safeguards** described by law to ensure that those **who are in charge of providing information** are free to disclose information with no concern about criminal liability when on duty.

International experience shows that law should **protect justifiable disclosure of information**. The draft Law now has no provision for this.

Another important measure is to protect those who disclosing justifiable information to **denounce wrongdoing** in the operation of governmental institutions and enterprises. The draft Law also does not contain provision on that issue. It is a loop hole in the draft and a deficiency if we overlook the mechanism protecting people who can provide hidden or concealed information which not under scope of information agency can refuse to provide [5]

7. Other issues

Clause 4, Article 2 of the draft Law on access to information stipulated that "Access to information is the action of reading, seeing, listening, taking notes, copying, capturing information", to supplement this provision, "sharing, recording sound and images" should also be added.

Clause 1, Article 6 of the draft Law on access to information states that "When State secrets are decoded, under the provisions of this Law, citizens can have access to them ". However, the draft does not specify that after being decoded, information classified as state secrets will be accessible under which conditions (freely access or access on demand). It is difficult for citizens to access information of this type, because state agencies can easily reject due to no specific regulations. Therefore, the draft Law should clearly describe "Information which is classified as state secret after being decoded shall comply with the provisions of this law about providing information on public requests"

- Article 12 of the draft Law regulate the fee on access to information, according to that, *"Citizens who require information do not have to pay fees and charges. Requesters have only to pay the **actual cost** of printing, copying, capturing and sending information by mail, fax"*. Law on fees and charges in 2015 has no specific regulations on this case. Therefore, the draft Law on access to information need to include **a consistent calculation method for each category**, avoid the inconsistency between the different locations, different agencies.

- Clause 2, Article 24 of the draft Law on access to information specify content of request form. In our opinion, the draft regulation is too detailed, some provisions can be sorted as **only required when the requested information are for limited access**, such as reason, purpose for information requested, full name, residential address, citizen identification card ... For the public and accessible information, it is unnecessary for people to provide contact information, reason, purpose in the request form as set out in points a and d, Clause 2, Article 24 of the draft Law. In the world, many countries allow requester to send requests orally or even via phone (such as South Africa, Azerbaijan, Kyrgyzstan). International experience shows that most law does not require requester to give reason for asking information and all have regulation for transferring request **or** notify people of the agency holding information they requested. [6]

[1] International experience shows that this right should be open to everyone, including legal entities, regardless of nationality or residence. It is argued that it is a challenge, because such provision might affect national security or place a burden on governmental departments. However, this argument

is not persuasive enough. The draft Law states that citizens are not allowed to provide sensitive information relating to national security (Clause 1, Article 6); but in countries that give all citizens the right to request information, their experience has shown that the amount of requests for information of this type are few and absolutely not a burden to the state bodies (according to *Analysis of the draft Law on access to information* – November /2015, the Center for Law and Democracy, Canada and Towards Transparency).

[2] The exceptions and refusal to provide information (according to *Analysis of the draft Law on access to information* – November /2015, the Center for Law and Democracy, Canada and Towards Transparency).

[3] According to *Recommendation for draft Law on access to information* (People's Participation Working Group – PPWG, June/2015).

[4] The procedures to request for information (according to *Analysis of the draft Law on access to information* – November /2015, the Center for Law and Democracy, Canada and Towards Transparency).

[5] According to *the draft Law on access to information of Vietnam: from analysis to comparison with international standards and experience* (Towards Transparency, August/2015).

[6] The procedures to request for information (according to *Analysis of the draft Law on access to information* – November /2015, the Center for Law and Democracy, Canada and Towards Transparency).