

Towards Transparency Newsletter

October 2018

Vietnam's Law on Access to Information: implementation challenges ahead!

The International Right to Know Day on the 28th of September is an occasion for TT to provide some insights on the newly applicable Vietnam's right to information legislation. Indeed, as of July this year, Vietnam joined the rank of more than 100 countries legally recognizing individuals' right to access information held by public authorities. TT welcomes the enactment of the Law on Access to Information (LAI) as an important step forward to greater accountability of public authorities, contributing to the fight against corruption and effective exercise of civic rights. Even though in comparison to the 2015 draft law, the current LAI has further advanced in reaching international standards, various shortfalls remain, caused most problematically by the use of vague terminology as well as a lack of enforcement mechanisms and public awareness.

“The law on access to information aims to implement and strengthen the constitutionally enshrined civic right to access information”

From secrecy to openness: Increasing scrutiny on public authorities' actions

The Law on Access to Information (No. 104/2016/QH13 - LAI) and its accompanying Decree detailing, and providing measures to implement the Law on Access to Information (No 13/2018/ND-CP – Decree 13) have entered into force on 1st July 2018. Most remarkably, the LAI constitutes the first legal outlet for citizens to actively

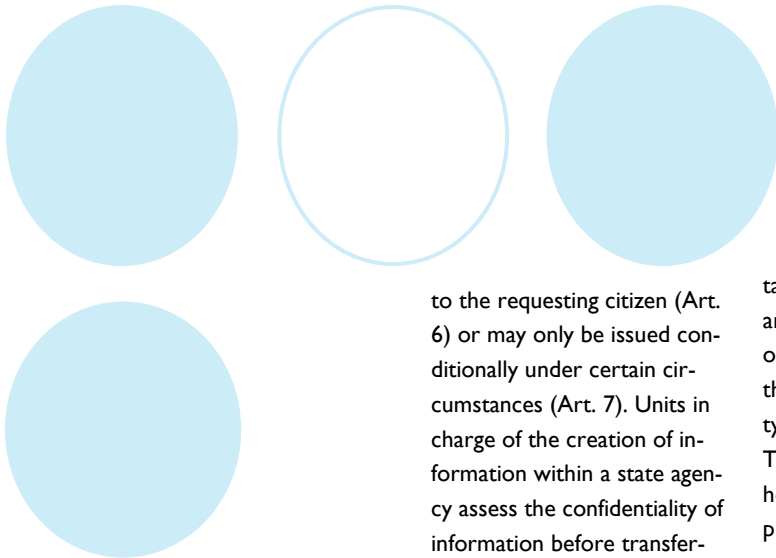
access information held by state agencies. The entry into force follows two years after the LAI had been passed in the National Assembly in April 2016. However, early discussions and efforts to introduce a legal framework for the right to information date back from 2009.

The LAI, which is divided into five chapters and 37 articles, aims to implement and strengthen the constitutionally enshrined civic right to access to information. Principally, it allows all citizens – upon request – to be provided with information created by state agencies as well as imposing an obligation on said authorities to

make certain kinds of information freely accessible to the public.

Firstly, citizens wishing to file a request of information may do so in person, written or via electronic means, giving the reasons for their request (Art. 24). Principally, the information is to be provided by the state agency timely and in completion (Art. 8 para.1). No administrative charges occur except if otherwise provided by law. However, the actual costs that accrue in preparing the information have to be borne by the citizen requesting the information (Art. 12).

The LAI foresees certain categories of information which are either inaccessible



to the requesting citizen (Art. 6) or may only be issued conditionally under certain circumstances (Art. 7). Units in charge of the creation of information within a state agency assess the confidentiality of information before transferring them to the units in charge of information provision (Art. 7 of Decree 13). Information that falls under the former category include inter alia state secrets, information that could harm the life or belongings of a third party and documents that relate to internal affairs of state agencies. The latter category comprises information relating to business or private secrets. These details may only be issued if the affected consented.

The state agency may refuse a request of information inter alia if it is classified information (Art. 6, 7), if it does not possess the information or if the provision of information affects its routine activities (Art. 28 para. 1). A refusal has to be issued in writing to the requester, stating the reason for the negative decision (Art. 28 para. 2). The requester has the right to file a complaint or lawsuit with the responsible state authority (Art. 14).

Secondly, the LAI's requires the openness and accessibility of governmental, administrative and legislative work (Art. 17 subs.). The public should gain access to information of state agencies e.g. on the law making process, state planning or environmen-

tal risks. These information are to be disseminated online on state agency websites, via the Official Gazette or other types of mass media (Art. 18). The Decree 13 concretizes how the information can be published in a manner so that persons with disabilities or living in more isolated areas gain access, too.

TT's support to promote compliance with international standards

comparatively assessing the overall strength of a legal framework for RTI, which is carried out under a program funded by the Access Info Europe (AIE) and CLD). After adopting a first set of recommendations by TT and CLD – particularly regarding procedural aspects of requesting information – the LAI then reached 68/150 points in the RTI rating, ranked 86th out of 112 countries in 2016.

A notable suggestion that was taken on by the law drafters concerned the requirement of providing receipts, feedbacks and guide citizens who re-

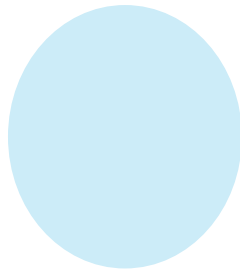
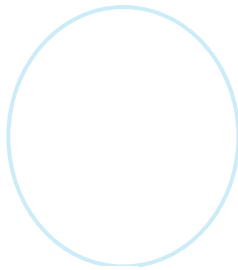
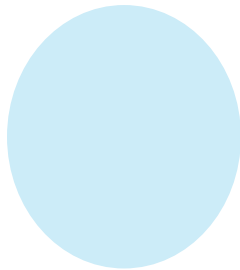
“Under LAI, the public should gain access to information of state agencies e.g. on the law making process, state planning or environmental risks”



Young people are interested to know how they will be able to exercise their right to access to information.

Towards Transparency (TT), in cooperation with the Centre for Law and Democracy (CLD) – a Canadian NGO with vast experience in researching and analyzing worldwide legislations on right to information, has continuously monitored and advised on the drafting process of both the LAI and Decree 13. The first public draft of August 2015 scored 59/150 points on the Right to Information Legislation Rating (RTI rating - a reliable tool for

request information (Art. 26, 27 of the LAI, Art. 5 of Decree 13). This is particularly relevant in order to retrace whether the state agencies are compliant with the prescribed response time (Art. 29; Art. 30 and Art. 31 of the LAI). Further, as TT advised, the Art. 25 para. 2 LAI was clarified so as to require the state agency to provide information in the form provided by the requester, except if it is unsuitable to the nature of the requested information or the agency's capacity.



A further complex issue that was influenced by TT's recommendation concerns the refusal of requests. Firstly, Art. 28 para. 1 LAI currently provides an improved coherent and concise list of reasons why requests for information should be denied. Secondly, Art. 28 para 2 LAI imposes an obligation on the state agencies to clearly state the reasons for the refusal to provide information. Hence, an essential cornerstone for challenging a refusal and making state agencies more accountable is laid.

As for the state agencies' pro-

mation to be made available, such as financial information on public authorities (Art. 17, para. 1), including information on the use of development assistance fund and non-governmental aid (Art. 17, para. 1, e)) and information on public investment and procurement projects (Art. 17, para. 1, g)).

All you need is law? Implementation challenges ahead

However, due to the LAI's use of vague terminology and a lack of enforcement mechanisms, a key challenge for such positive change will be to guide the LAI's coherent implementation within the state agencies themselves. Furthermore, given certain structural shortfalls of the LAI, much will depend on the civil society's – particularly the media's – awareness and persistent claim to their right to information.

The LAI's broad wording weakens its effectiveness in two ways

Firstly, it leads to an unclear allocation of responsibilities. Whilst it may be highlighted that the LAI foresees the creation of divisions or an assignment of individuals responsible for the provision of information within the state agencies (Art. 33 para 2), that provision has not been sufficiently clarified by Decree 13. Rather, in Art. 7 of Decree 13, a distinction between “units in charge of information creation” and “units in charge of information provision” is introduced. Their relation in regards to competency or subordination is not further clarified, except for the fact that the former is responsible for the assessment of confidentiality of an information and the latter for the actual transfer to the requesting

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TT's independent international expert - Mr. Toby Mendel provided his inputs to the Vietnamese law drafters in a workshop "Sharing international experiences in implementing the LAI", organized by TT from 14 to 15 August 2017.

active duty to disseminate information, the government law makers took upon TT's suggestion to specify the nature of the respective information. The draft law's broadly worded requirements focused on structural organizational information and a general category of “necessary information for the community interests and health”. In its Art. 17 the LAI now provides a detailed description of infor-

The enactment of the LAI is of great importance to the Vietnamese civil society as it increases the transparency of public authority operations – a precondition to the effective exercise of civil liberties and the fight against corruption. The latter's success shall be also a cornerstone in creating a fair and competitive environment for doing business in Vietnam.

“To address the lack of public awareness and accountability mechanisms, additional resources must be made available”

citizen. A more desirable approach would have been to install a single competent division or individual responsible for the request. Further advice from other departments or state agencies could have then be sought on a case-by-case basis. Consequently, friction loss or a culture of mutual finger pointing could have been avoided. Moreover, both the *LAI* and *Decree 13* introduced the terminology of “information-providing” agencies, leaving it open whether this term is congruent to “state agencies” of the *LAI* or if it refers to a different type of public authority.

Vague language bears the potential of creating loopholes and differences in interpretation

This second issue is particularly problematic with regards to Art. 6 and 7 *LAI* relating to classified information and Art. 28 *LAI* on the grounds for refusal of information. For example, the ground for refusal in Art. 28 para.1, dd *LAI* - “requested information [...] affecting its routine activities” bears the risk of developing into a simple, yet hard to refute excuse to dismiss unwanted requests. Further, the lack of interpretational guidance of the term “state secrets” used in Art. 6 *LAI* may likely lead public officials to be reluctant to give out information in case of doubt for fear of negative consequences. However, where a request’s approval depends on the public official’s personal interpretation, coherent implementation of the

LAI can be hampered.

Most critically, the LAI lacks effective mechanisms to enforce its provisions, from both State and citizens’ perspective

Whilst it is true that Article 11 *LAI* installs an enumeration of certain “prohibited acts” such as providing intentionally false information (para 1) or providing information harmful to the honor, dignity or reputation of an individual (para 3), without an independent agency overseeing the *LAI*’s implementation as normally ob-

agencies exist.

Currently, citizens and media are still not fully aware on how to best exercise their right to access to information. To address this lack of public awareness and accountability mechanisms, additional resources must be made available. These efforts should firstly be directed towards the media as an amplifier for communal attention and alertness. However, it should be noted that the right to request information is limited to Vietnamese citizens (for foreigners compare Art. 36 para 1 *LAI*) and depends on their stating a reason for the request. Furthermore, the requirement to clearly identify the requester by name, address, passport number (Art. 24 para 2 *LAI*) and hence the absence of a possibility to request information anonymously introduce another hurdle to be overcome.

The *LAI* does foresee a right to file a complaint or lawsuit against a state agency in its Art.



« Passing the law is an important step in the right direction. However, will this new law change current practices? Will public officials make it easier for citizens when requesting for information? » - Ms. Nguyen Thi Kieu Vien, TT’s Executive Director.

served in countries such as India, United Kingdom, Denmark and Canada, it stands to question whether and how these acts would be detected or prosecuted. Further, the *LAI* or the *Decree 13* do not contain provisions compelling state agencies to make available to the public the kinds of information set out in Art. 17, nor does a sanction system for underperforming state

14. However, it completely misses guidance as to terms, procedures and time limits of such a claim. Given the timely and financial investments that such procedures before a state agency usually involve, effective enforcement of the *LAI* should have been ensured by oversight through an independent body.

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