

Towards Transparency Newsletter

September 2018

Vietnam's Law on Access to Information: what citizens need is more than a law

The International Right to Know Day on the 28th of September provides Towards Transparency (TT) with the opportunity to re-evaluate the Vietnamese perspective on the right to information. As of the 1st of July this year, Vietnam joined the group 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 and effective exercise of civic rights. While the current LAI reached further international standards, compared with the 2015 draft law, some significant shortfalls remain due for a large part to vague terminology, as well as both a lack of enforcement mechanisms and public awareness.

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

From secrecy to visibility: 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

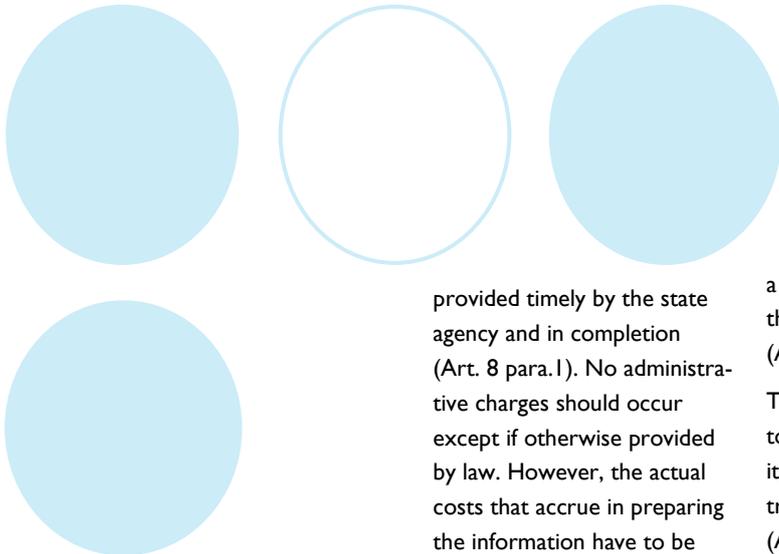
access information held by state agencies. The entry into force follows two years since the LAI was passed in the National Assembly in April 2016. However, early discussions and efforts to introduce a legal framework for the right to information date back from 2009.

The LAI is divided into five chapters and 37 articles. Chapter I sets out general provisions applicable to the state agencies' duty to make certain types of information publicly available (Chapter II) and the citizens' right to request the provision of information (Chapter III). Chapter IV assigns the state's responsibility in granting access to infor-

mation while Chapter V lays down final implementation provisions.

The LAI aims to implement and strengthen the constitutionally enshrined civic right to access information. Principally, it allows all citizens – upon request – to be provided with information created by a state agency as well as imposing an obligation on said authorities to make certain kinds of information freely accessible to the public.

Citizens wishing to file a request of information may do so in person, in written or via electronic means, giving the reasons for their request (Art. 24). Principally, the information is to be



“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”

provided timely by the state agency and in completion (Art. 8 para.1). No administrative charges should 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 fall 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).

The LAI’s second pillar relates to the visibility 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 environmental 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

Democracy (CLD), 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 points on the Right to Information Legislation Rating (RTI rating - a program funded by the Access Info Europe (AIE) and CLD that evaluates the strength of legal frameworks for the right to information, based on the categories of right of access, scope, requesting procedures, exception and refusals, appeals, sanctions and protections and promotional measures). After adopting a number of changes,



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

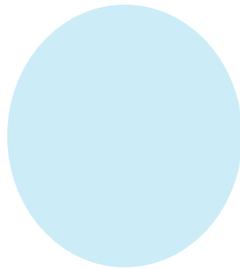
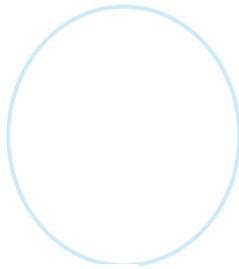
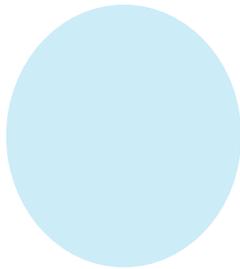
published in a manner so that persons with disabilities or living in more isolated areas gain access, too.

Efforts in promoting compliance with international standards

Towards Transparency, in cooperation with the Centre for Law and

TT and CLD suggested – particularly regarding procedural aspects of requesting information – that the LAI then reached 68 points in the RTI rating, ranked 86th out of 112 countries in 2016.

A notable suggestion that was taken on by the drafting board concerned the requirement of providing feedbacks and guiding citizens who request information (Art. 26, 27). 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). In that regard TT's suggestions have added further clarity to the LAI as the time limit is now assessed in "working days" as opposed to "days". Furthermore, as TT advised, the Art. 25 para. 2 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, LAI

authorities took upon TT's suggestion to concretize 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 gives a detailed description of information to be made available, most notably financial information on public authorities (Art. 17 dd-h, l, m), including information on the use of development assistance fund and non-governmental aid

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.

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 effectivity in two ways: Firstly, it leads to an unclear allocation of responsibilities. Hence, whilst it may be highlighted that the LAI foresees the creation of divisions or an assignment of individuals responsible for the provision of information (Art. 33 para 2) within the state agencies, 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 assess-

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Ms. Nguyen Thi Kieu Vien - TT Executive Director provided TT's perspective on Vietnam's secondary legislation to guide the implementation of the Law on Access to Information

Art. 28 para. 1 constitutes an improved coherent and concise system of reasons to refuse the provision of information. Secondly, Art. 28 para 2 imposes an obligation on the state agency 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' proactive duty to disseminate information, the drafting au-

(Art. 17 e) and information on public investment and procurement projects (Art. 17 g).

All you need is law? Facing the implementation challenges ahead

The enactment of the LAI is of great importance to the Vietnamese civil

“In the coming time, TT and other interested CSOs look forward to continued engagement from the state, development partners, non-state actors towards achieving greater openness and improved anti-corruption in Vietnam”

ment of confidentiality of an information and the latter for the actual transfer to the requesting 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, 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.

Secondly, vague language bears the potential of creating loopholes as well as differences in interpretation. This is particularly problematic with regards to LAI Art. 6 and 7 relating to classified information and Art. 28 on the grounds for refusal of information. For example, the ground for refusal in Art. 28 d) requested information [...] affecting its routine activities” bears the risk of developing into a simple, yet hard to refute excuse to dismiss unwanted requests. Furthermore, the lack of interpretational guidance of the term “state secrets” used in LAI Art. 6 may likely lead to a reluctance to give out information in case of doubt for fear of negative consequences. However, where a successful request depends on individual assessment only, coherent implementation of the LAI cannot be secured. This is true even more as contradictions with other laws such as using the concept of “state

secrets”, yet with a different objective, may arise.

Most critically, the LAI lacks mechanisms to enforce its provisions efficiently, from a state perspective as well as from individual requesting citizens. Whilst it is true that LAI Article 11 presents 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 2), without an independent agency overseeing the LAI’s implementation, one may question whether and how these acts would be detected or prosecuted. Moreover, the LAI or the Decree 13 do not contain

to be activated in order to raise awareness. 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 – in its full potential – is limited to Vietnamese citizens (for foreigners compare Art. 36 para 1) 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 2a) and hence the absence of a possibility to request information anonymously introduces another hurdle to be overcome.

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



Towards Transparency’s independent international expert - Mr. Toby Mendel provided his inputs to the Vietnamese law drafters in a workshop “Sharing international experiences in implementing the Law on Access to Information”, organized by TT.

provisions compelling state agencies to make available to the public the kinds of information set out in Art. 17: There is no duty to regularly disclose to what extent and in which form information have already been disseminated nor does a sanction system for underperforming state agencies exist.

This lack of publicity and public accountability also means that additional resources have

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, efficient enforcement of the LAI should have been ensured by oversight through an independent body.

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