MEDIA FORWARD

This policy brief series is part of the Media Enabling Democracy, Inclusion and Accountability in Moldova (MEDIA-M) project

October 2020 I No 13

Privacy and Freedom of Expression in Moldova: A Dangerous Imbalance for Journalists

Patricia Zghibarta

Introduction

Limitations on access to information continue to pose a serious challenge to the work of Moldovan journalists. Since 2013, the country has dropped from 55th to 91st place in the World Press Freedom Index,[1] and is currently 60th out of 126 states in the World Justice Project's access to information ranking.[2] A primary driver of this problem is the Moldovan state's systematic legal and administrative tendency to prioritize citizens' rights to privacy and personal data protection over their equally important rights to truth and free expression. Too often, journalists' efforts to access critical information for the public are blocked when government authorities and other information providers reject their requests on unreasonable grounds related to privacy protection or other procedural issues.

The underlying cause of this legal-administrative imbalance is multi-faceted, stemming from an outdated and flawed legal framework that puts unreasonable burdens on journalists in the course of their work, as well as the uneven application of the law by information providers and courts. This brief investigates these challenges and offers recommendations for Moldova's government to restore the important yet fragile balance between privacy and free expression.

The relationship between privacy, personal data protection, access to information and freedom of expression

Moldova is a signatory to several international and European agreements which guarantee the right to privacy and data protection.[3] [4] [5] The terms "privacy" and "personal data protection" are sometimes used interchangeably, with data protection considered a component of privacy. Nevertheless, there are nuanced differences in the scope of the two terms as they are defined in international law.[6] Under both Moldovan and European law, data protection specifically applies to the protection of information,[7] while privacy can include an expanded scope of tangible and intangible identifying elements – for example, an individual's physical space.[8] On the other hand, some personal data, such as billing information used for online purchases, does not qualify for protection as privacy. Notably, while legal entities like companies have no right to personal data protection, the European Court of Human Rights (ECtHR) has recognized they do have a right to privacy.[9]

The right to freedom of expression – defined as "freedom to hold opinions and to receive and impart information" – is also guaranteed under European law.[10] This right is particularly

USAID FROM THE AMERICAN PEOPLE · UKaid from the British people · Internews · Freedom House

important for journalistic activity; the ECtHR noted that "the gathering of information is an essential preparatory step in journalism and is an inherent, protected part of press freedom."[11] The fundamental need for journalists to gather information implies that there is an inherent tension between their right to access information and their subjects' rights to privacy and data protection. Nevertheless, the ECtHR has emphasized that the two rights "deserve equal respect," and that the margin of appreciation (that is, the amount of flexibility governments have in fulfilling their obligations)[12] "should in theory be the same in both cases."[13] In practice, however, Moldovan authorities systematically fail to follow this principle due to reasons explained below.

Privacy and data protection laws are legal shields against information access

Current Moldovan laws defining citizens' rights to privacy and access to information are outdated and flawed. The Law on Access to Information, which establishes the procedure and legal justification for journalists to request information, was adopted in 2000 and uses confusing and poorly defined terms. For example, the Law uses the term "official information"[14] rather than the broader and more suitable term "information of public interest," which is enshrined as a right in the Moldovan Constitution.[15] The Law on Personal Data Protection was adopted in 2011, and is based on an outdated EU Directive that was replaced by the General Data Protection Regulation (GDPR) in 2018. As a result, unlike the GDPR, the current Law does not establish clear rules for the media's access to information or clarify the relationship between the rights of access to information and data protection. For example, it fails to clarify when and if personal data may be considered information of public interest that could be provided to journalists.

The Law does provide some privileges to journalists – for example, journalists may collect and publish information about a person without their consent as long as it is done solely as part of their journalistic activity.[16] However, strict conditions are required for this exception to apply – either the subject must voluntarily make the information public, or the information should be directly connected to 1) the subject's role as a public figure or 2) actions by the subject which have a public character. These conditions are particularly problematic for investigative journalists, whose stories often rely on information about non-public individuals or information that subjects intentionally try to keep from the public eye.

There have been several proposals to amend these laws in recent years, the most recent of which was developed by a joint civil society initiative by the Association for Independent Press (API), the Independent Journalism Center (IJC), and the Electronic Press Association from Moldova in cooperation with Freedom House.[17] Submitted to the Ministry of Justice and Parliament for consideration in July 2020, this amendment package builds on improvements from earlier legislative proposals and seeks to eliminate legal ambiguities that have disproportionately hindered journalists' access to information in favor of privacy and personal data protections. For example, the amendment package substitutes the term "official information" with the more correct "information of public interest," providing an explicit definition of this term and establishing clear procedures for journalists to access the appropriate data. Importantly, it also establishes the legal presumption that any piece of information must be considered "of public interest" unless information providers prove otherwise. This is a significant shift from the current situation, in which journalists are regularly asked to provide explanations as to why they require access to certain information, leaving the door open to authorities to reject their requests on the basis of personal data concerns. Along these lines, the package also introduces several measures to increase transparency of public agencies and prohibit common forms of discrimination against media outlets and journalists.

Finally, the package includes amendments to the Civil Code, which in 2019 explicitly introduced the right to the protection of an individual's public reputation or image, and established an exhaustive list of actions that amount to interference in private life, including intercepting communications, capturing or using voice or images, or publishing or broadcasting news about an individual's intimate or family life without their consent.[18] While the Code acknowledges that there are legal limits to the protection of private life,[19] the amendment package includes an explicit exception to the right to privacy when personal data of public interest is requested under the Law on Access to Information and the Law on Freedom of Expression.

At the time of writing, the Moldovan Parliament has not yet begun consideration of the package, and there is no official timeline for this process.

The chilling effect of lawsuits against journalists

The lack of clarity and bias towards privacy protection in Moldovan law also means that – even when journalists get the information they need – they are still at high risk to be targeted in a lawsuit after publication. Officials and public figures regularly file libel suits against journalists on the basis of protecting their dignity, honor and reputation from critical stories. For example, the Center for Investigative Journalism has been sued 17 times on these and similar grounds in its history.[20] The demands of plaintiffs in libel cases can vary widely, ranging anywhere from 1,000,000 MDL[21] (about $60,000) to a symbolic 1 MDL ($0.01) for compensation of moral damages.[22] Most commonly, plaintiffs are satisfied with compelling media outlets to make a public apology and remove the offending publication from the public record. Analysis of court cases indicates that, when such cases reach the Supreme Court of Justice (SCJ), the Court rules in journalists' favor the vast majority of the time.[23] Nevertheless, even the

threat of lawsuits can have serious chilling effects on freedom of speech, as legal battles are complex, time-consuming, and costly – even when journalists eventually win.[24]

Flawed implementation of the law by information providers and courts

To make matters worse, information providers often exploit existing legal ambiguities to justify restricting access to information. For example, authorities often delay responding to information requests or reject requests outright on data protection grounds. A 2017 study by CPR Moldova reported that authorities invoked the Law on Personal Data Protection to limit or deny about 40 percent of their information requests, even when the requests did not concern personal data.[25] Recent reports by the National Center for Personal Data Protection and the NGO Lawyers for Human Rights confirmed that such abuse of data protection laws continues to be a significant problem.[26] [27]

High fees for accessing information are another important obstacle for journalists.[28] The Law on Access to Information allows information providers to charge fees for providing information, although these fees are not to exceed the costs of making copies, translating, or sending the information. In reality, journalists sometimes report they are compelled to pay excessive costs. In one notable case, *Ziarul de Garda* journalists reported that they paid 896 MDL (about $55) for six pages from the Agency for Public Services, which holds public records on which journalists frequently rely.[29]

Biased implementation of the legal framework may also be encouraged by court decisions that incorrectly or inconsistently classify information requests as petitions. Compared to information requests, the process of filing petitions involves stricter bureaucratic processes and longer processing times, causing additional burdens for journalists.[30] It also presents an additional pretext for information providers to invalidate information requests at their discretion. In 2019, for instance, the Chisinau Court of Appeals rejected a lawsuit brought by the Association for Independent Press (API) against the National Integrity Authority. The Authority had rejected an information request submitted by API on the grounds that the request did not comply with the regulations for petitions, as it was not signed electronically; the Court supported this action.[31] The practical impact of the ongoing legal ambiguity for classifying information requests is that journalists are unable to receive clear guidance on the requirements they must fulfill to perform the basic function and duty of their profession to gather information.

The Supreme Court of Justice escalates the legal crisis

The legal ambiguities surrounding access to information reached a climax on June 17, 2020, when the SCJ issued a controversial decision in the case of *Lawyers for Human Rights Association and Tataru Ana vs Agency for Public Services*.[32] The case related to an incident whereby the Agency rejected an information request submitted by Lawyers for Human Rights on the grounds that the NGO had failed to complete a procedure that was required under the Administrative Code (which governs petitions), but not under the Law on Access to Information (which governs standard information requests). Instead of ruling on which law was applicable, or whether the procedures the two laws demanded were compatible, the SCJ concluded that the Law on Access to Information as a whole became inapplicable when the Administrative Code came into force in April 2019.

The Court's decision implies that going forward, all information requests will be considered petitions under the Administrative Code. Journalists[33] and scholars[34] responded to the announcement with concern, highlighting the huge negative impact this legal reclassification could carry for citizens' and journalists' right to access to information. For example, the Administrative Code requires journalists to wait up to 30 days instead of 15 working days for a reply to their requests; in some circumstances, the wait may be extended by up to 90 days. Journalists will also be compelled to submit formal, electronically signed information requests rather than the previously-accepted and simpler email format. Importantly, under the Administrative Code, information providers are defined only as public authorities; private companies that are contracted by public authorities or deliver public services are no longer required to respond to information requests.

This decision came as a surprise. When Parliament adopted the Administrative Code in 2018, it explicitly repealed the Law on Petitioning, but did not mention the Law on Access to Information. In addition, recent government decisions have been issued as if the Law on Access to Information remains in force. The Commission for Exceptional Situations' Instruction No. 1, [35] which controversially extended the timeframe for officials to respond to information requests under the emergency regime of the COVID-19 pandemic,[36] was based on the timeframe set down in the Law on Access to Information.[37] Moreover, in July 2020, the SCJ itself issued several decisions applying the Law on Access to Information, such as *Constantin Tanase vs the Nation Probation Inspectorate*[38] and *Burac Victor vs the Public Institution 'State Information Agency Moldpres*.'[39] This indicates that the SCJ itself is inconsistent and may ultimately be compelled to change its view on the Law's validity and legal force.

The Constitutional Court may soon have a final say on this issue. In July, the Court registered two requests submitted by Lawyers for Human Rights to rule on the constitutionality of an article of the Administrative Code[40] [41] as it pertains to the Law on Access to Information and other legislation. As a result, the Court could soon clarify the relationship between the two laws; however, a date has not yet been set for the Court's consideration of this matter. In the meantime, journalists are left alone to navigate ambiguous and unpredictable rules on access to information.

Conclusions and Recommendations

As it stands, the balance between freedom of expression and privacy in Moldova tilts heavily towards privacy, creating substantial barriers for journalists who must collect information for their work. The problem is systematic: the national legislation is flawed, information providers implement the law selectively, and courts interpret and apply it inconsistently. A successful strategy to rebalance these rights must address the imbalance everywhere it exists. To ensure that rebalancing achieves truly meaningful outcomes for media, the government should:

Adopt the legislative package proposed in July 2020

As highlighted earlier, the amendment package recently proposed by civil society organizations would bring essential improvements to access to information. Most significantly, it would abolish legal ambiguities that have historically allowed information providers and courts to interpret or apply the law incorrectly or abusively. The SCJ's recent decision throwing the Law on Access to Information into limbo has made passage of a replacement even more urgent. Parliament should adopt the package into law as quickly as possible.

Rebalance the two rights in public institutions

Information providers are the first point of contact for journalists trying to gain access to information. Transparency and accountability demand that they provide journalists and the public with information they are entitled to effectively and without delay. Government institutions should publish much more information on their websites, such as employees' contact information, activity reports and budgets, and information on public procurement. This would increase access to information for the public and reduce the administrative burden of responding to information requests. Public sector employees should also receive training on personal data, privacy, and media law, so they can be aware and knowledgeable of their obligations to provide as much information as possible, rather than relying on legal ambiguity as an excuse to provide nothing. Proactive information sharing would also reduce the risk that government offices will be targeted in costly access to information-related lawsuits that they often face in Moldova's higher courts.

Fill in the institutional vacuum around defending the right of access to information

Current law explicitly tasks the National Center for Personal Data Protection with ensuring the Law on Data Protection is properly enforced. However, there is no similar office actively safeguarding the right of access to information. Instead, access to information is protected in bits and pieces by the courts when they consider individual lawsuits, meaning the response to violations of access to information law is fragmented and weak. A government institution should be specifically tasked with protecting access to information – either by giving a new mandate to the Ombudsman or by creating a new institution.

Ensure uniform judicial practice

None of the above recommendations will be effective if courts do not interpret and apply the law in a uniform manner. So far, when considering cases related to access to information, courts have generally focused on procedural issues such as the format of information requests, rather than clearly defining the boundaries of the rights to privacy and access to information. The Supreme Court of Justice should issue a consultative opinion explicitly clarifying how courts should strike the balance between these rights.

Endnotes

1 Reporters without Borders, *Moldova*, available at: <https://rsf.org/en/moldova> accessed 31 July 2020.

2 World Justice Project, *Rule of Law Index*, available at: <https://bit.ly/2EKs094> accessed 31 July 2020.

3 See UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> accessed 8 August 2020.

4 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Article 10 (1).

5 Council of Europe, *Convention for the Protection of Individuals with Regard to the Automatic Processing of Individual Data*, 28 January 1981, ETS 108, available at: <https://www.refworld.org/docid/3dde1005a.html>, accessed 29 September 2020.

6 Juliane Kokott, Christoph Sobotta, 'The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR' (2013) International Data Privacy Law, Vol 3, No 4.

7 *EU General Data Protection Regulation (GDPR):* Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.Article 4.

8 See Law No. 64 of 23.04.2010 on freedom of expression and Law No. 133 of 08.07.2011 on Personal Data Protection.

9 *Bernh Larsen Holding AS and others v Norway* (2013) App no 24117/08, para 159.

10 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Article 10 (1).

11 *Shapovalov v Ukraine* (2012) App no 45835/05, para 68.

12 S. Greer – *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Council of Europe, 2000, p. 5.

13 Council of Europe/European Court of Human Rights, *Guide on Article 8 of the Convention – Right to respect for private and family life* (2020) p 15.

14 *Law No. 982 of 11.05.2000 on Access to Information*, available at: <https://bit.ly/2S3DmYU> accessed 31 July 2020.

15 Constitution of the Republic of Moldova, entered into force on August 27, 1994, Article 34.

16 *Law No. 133 of 08.07.2011 on Personal Data Protection*, available at: <https://bit.ly/33FNONs> accessed 31 July 2020.

17 Justicemoldova.md, 'Proiectul de lege pentru îmbunătățirea accesului la informațiile de interes public a fost prezentat și consultat online' (The draft law on improvement of access to information of public interest was presented and consulted online), available at: <https://bit.ly/34PpLvY> accessed 25 August 2020.

18 See Articles 45-47 of the Civil Code of the Republic of Moldova, republished in the Official Gazzette no. 66-75 from 1 March 2019 Art.132.

19 *Ibid*, Article 47.

20 Independent Journalism Center, 'The White Paper of the Moldovan media' (2020), available at <https://bit.ly/2YN2gzl> accessed on 25 August 2020.

21 See, for instance, *Vladimir Voronin vs ÎCS Jurnal de Chișinău Plus SRL, Cheianu Constantin* (2018) SCJ case no 2ra-1525/18; *Uzunov Andrei vs ÎS Publicatia periodică ziarul raional Taraclia Svet* (2019) SC case no 2ra-1266/19.

22 *Lazari Constantin vs Ziarul Adevarul Moldova* (2014) SC case no 2ra-1479/14.

23 See, for instance, *Ruta-Prim SRL, Iurie Topala vs Redactia Ziarului Moldova Suverana, Belrinschi Ion, Casa Editoriala Moldova Suverana si Vialon SRL* (2013) SCJ case no 2ra-1947/13; *Bobeico Vladimir vs Ziarul Plaiul Orheian* (2013) SCJ case no 2ra-1466/13; *Pruteanu Oleg vs AO Asociatia Reporteri de Investigatie si Securitate Editoriala din Moldova* (2019) SCCJ case no 2ra-1895/19; *Uzunov Andrei vs ÎS Publicatia periodică ziarul raional Taraclia Svet* (2019) SCJ case no 2ra-1266/19; *Ghenadii Cosovan, Victor Alexeev, Anatolie Caraman, Veaceslav Balacci vs ICS Jurnal de Chisinau Plus SRL, Constantin Cheianu, Anatol Durbala* (2020) SCJ case no 2ra-22/20; *Cirlan Gheorghe vs ICS Jurnal de Chisinau Plus SRL, Grosu Tamara, Nistor Nicolae, Burlacu Eufrosinia* (2020) SCJ case no 2ra-494/20.

24 Vasile Botnaru, 'Alina Radu: Investigațiile sunt un produs de lux, necesită mult timp pentru documentare și bani pentru acces la informație' (Interview with Alina Radu: Investigations are a luxury product, requiring a lot of time for documentation and money to access information), available at <https://bit.ly/32TcfoL> accessed 25 August 2020.

25 CPR, 'Cum statul ingradeste presei accesul la informatia de interes public?' (How the state limits the access of media to informaiton of public interest?), available at: <https://bit.ly/33JF7BG> accessed 25 July 2020.

26 The Center for Personal Data Protection, 'Activity report for 2019', p. 58, available at: <https://bit.ly/2QDuWqx>.

27 Lawyers for Human Rights, "Social Experiment Method For Measuring the Level of Receptivity of Central and Local Public Authorities for Reuqests for Public Information," 2020. Available at <https://bit.ly/2GYdWtH> accessed 12 October 2020.

28 Natalia Ionel and Victor Gotisan, 'Why access to information is still a problem in Moldova' (*Freedom House*, March 2020) available at: <https://bit.ly/2XN4K0z> accessed July 31 2020.

29 Anatolie Esanu, 'Cât îi costă pe jurnaliști, în timp și bani, accesul la informație' (How much time and money does access to information cost for journalists) (*Ziarul de Garda*, 23 February 2018) <https://bit.ly/33OOAaT> accessed 31 July 2020.

30 Petitions were regulated under the Law on Petitioning until April 2019, when the new Administrative Code came into force. The new Administrative Code reflects the same issues vis-à-vis petitions as the earlier Law it replaced.

31 *AO Asociatia Presei Independente vs Autoritatea Nationala de Integritate RM* (2019) Chisinau Court of Appeal case no 3a-622/19.

32 *Asociatia Juristii pentru Drepturile Omului si Tataru Ana vs Agentia pentru Servicii Publice* (2020) SCJ case no 3ra-554/20.

33 Media Azi, 'CSJ: Legea privind accesul la informație este inaplicabilă. Ce consecințe ar putea avea o decizie a magistraților' (SCJ: Law on Access to Information is inapplicable. What consequences could a degision of the magistrates have) (*Media Azi*, 26 June 2020) available at: <https://bit.ly/3gJVd1L> accessed 28 July 2020.

34 See Veronica Mocanu, 'Interpretations and practical differences between the request for access to official information and petition' (2019) Revista Institutului National de Justitie No 4 (51) pp 46-49.

35 The Commision for Exceptional Situations of the Republic of Moldova is a temporary body that was formed in March 2020 to manage the emergency situation in Moldova during the COVID-19 pandemic.

36 Commision for Exceptional Situations of the Republic of Moldova, Instruction No 1 of 18 March 2020, available at: <https://bit.ly/2PCxBjV> accessed 6 August 2020.

37 Anticoruptie.md, 'Guvernul triplează termenul de soluționare a cererilor de acces la informația de interes public pe durata stării de urgență // Ce spun experții' (The Government triples the term for examining requests for access to information of public interest during the state of emergency // What do the experts say) (*Anticoruptie.md*, 3 April 2020) available at: <https://bit.ly/2F0RmiT> accessed 31 July 2020.

38 *Constantin Tanase vs Inspectoratul National de Probatiune* (2020) SCJ case no 3ra-692/20.

39 *Burac Victor vs IP Agentia Informationala de Stat Moldpres* (2020) SCJ case no 3ra-614/20.

40 Claim no 117g from 16 July 2020, available at: <https://bit.ly/2FUVyln>.

41 Claim no 128g from 30 July 2020, available at: <https://bit.ly/3jsmSoV>.

Patricia Zghibarta

Patricia Zghibarta is an expert in rule of law and justice sector reform. She holds a BA from Moldova State University and an LL.M. from the University of Cambridge, where she was a Chevening and Cambridge Trust Scholar. Her fields of interest include public international law, international dispute settlement, and the interplay between law and technology.

The Media Forward Policy Brief series is made possible by the generous support of the American and British people through the United States Agency for International Development (USAID) and the British Embassy in Chisinau. The contents are the responsibility of Freedom House and do not necessarily reflect the views of the UK, USAID or the United States Government.

Freedom House

Freedom House is a nonprofit, nonpartisan organization that supports democratic change, monitors freedom, and advocates for democracy and human rights.

1850 M Street NW,
11th Floor
Washington,
DC 20036

www.freedomhouse.org
Facebook.com/FreedomHouseDC
@FreedomHouse
202.296.5101
info@freedomhouse.org