MEMORANDUM

on the

Serbian draft Law on Free Access to Information of Public Importance

by

ARTICLE 19
Global Campaign for Free Expression

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I. Introduction

This Memorandum analyses the most recent Serbian "Draft Law on Free Access to Information of Public Importance" (the Current Draft Law), currently being discussed in the Serbian Parliament.[1]

This is the latest in a serious of draft laws on freedom of information. The Current Draft Law differs only in some particulars from the previous draft and our principal focus in this Memorandum is with concerns raised by the recent changes. However, we also briefly note, in closing, those areas of the Current Draft Law where we still consider there to be problems from earlier drafts, with the hope that there still is time to amend the Current Draft Law further so as to protect to the maximum degree possible the right of all to access information.[2] Where appropriate, we will refer to our analyses of previous draft versions of this law, in particular to our July 2003 Memorandum on the Serbian draft

[1] The analysis is based on a translation. We accept no responsibility for errors based on mistranslation.
[2] See the 2003 Memorandum for a summary of international law and standards relating to the right to access information, and also for a brief discussion of Serbia's constitutional commitments in this regard.

Law on Free Access to Information of Public Importance (July 2003 Memorandum) and to our "Updated Briefing Note", September 2003 (Briefing Note).

It is important to note at the outset that certain positive changes appear in the Current Draft Law. For one thing, it has clarified that oral requests are to be treated in the same way as written requests. Current Article 15 now provides: "A public authority shall also be obliged to allow access to information on the basis of the oral request of the applicant, in which case the request shall be entered in the register of submitted requests and the same deadlines as regards the requests lodged in writing shall apply". It is also positive that the initial deadline for responses to requests has been shortened from 20 to 15 days (Article 16). Finally, Article 17 now explicitly provides that the provision of access to a document will be without cost (but see below for a potential difficulty relating to costs).

II. New Provisions in the Current Draft Law

II.1 Change in Scope of Coverage

The Current Draft Law omits an important provision which existed in the previous draft. The latter, in its Article 3, included within its definition of "public authority body" any "person that has been vested certain functions by the public authority by contract or otherwise". This inclusion was particularly appropriate, in light of the increasing tendency in Serbia for private entities to be involved contractually in public works of various kinds. Information about public works of this sort is precisely the sort of information to which access must be mandatory under a fully compliant freedom of information regime. It should not matter whether the public work is being done by public bodies or by private entities pursuant to contractual arrangements.

Recommendation:

- Article 3 of the Current Draft Law should be amended to include within its definition of "public authority body" any person or entity which undertakes any statutory or public function.

II.2 Limited Appeal in Certain Cases

Article 22 of the Current Draft Law provides, in part: "There is no right to appeal against decisions of the competent services of the National Assembly, President of the Republic of Serbia, Government of the Republic of Serbia, Supreme Court of Serbia, Constitutional Court and the Republic Public Prosecutor".

We are informed that the effect of this provision is as follows: (1) the Ombudsman has no jurisdiction over appeals of denials of requests for information made to any of the bodies or persons listed in this provision; and (2) appeals of such denials are possible only through an administrative judicial review procedure.

Analysis

This provision is quite worrisome. On the one hand, the bodies and persons listed in this provision are of central importance to the governing of the country. Consequently, much of the information in their possession will be of significant public interest and

importance. It will be precisely the kind of information to which access should be guaranteed by a freedom of information law.

While one may bring a case for judicial review against any refusal by the bodies and persons listed to provide information, this will offer little benefit to most requesters. Bringing appeals is inevitably expensive, and likely far out of reach of many ordinary people. Not only will lawyers' fees need to be paid; as well, a court tax must be paid. Additionally, we are also informed that such appeals can take a great deal of time; by the time a complainant actually prevails, the information he or she sought may well have lost any value to him or her.

We are of the view that appeals from the bodies listed in Article 22 should, like all appeals, be possible to the Ombudsman. We are aware that this may require additional changes which would accord the Ombudsman a status appropriate to hear such appeals.

Recommendation:

- Appeals from decisions of all public bodies, including those listed in the above provision of Article 22, should go to the Ombudsman. The provision of Article 22 noted above should be removed from the Current Draft Law.

II.3 Vague Language in Article 8

The first paragraph of Article 8 provides: "The rights in this Law may be exceptionally subjected to limitations prescribed by this law if that is necessary in a democratic society in order to prevent a serious violation of an overriding interest based on the Constitution or the law".

Analysis

It is very positive that this provision establishes the presumption of a right of access to information, and that limitations are only exceptions. It is also positive that the provision appears to try to impose a fairly high standard on such exceptions.

At the same time, we are concerned that the concept of an "overriding interest" is undefined. A public official who was unsympathetic to the right to freedom of information might read this term as allowing any "interest" in any law whatsoever as providing a basis for withholding information. As we explained in the July 2003 Memorandum, only certain interests are, in international law, considered legitimate as grounds for restricting freedom of expression and freedom of information. An exhaustive list of such interests is to be found in Article 10(2) of the *European Convention of Human Rights*;[3] a similar list may be found in Article 19(3) of the *International Covenant on Civil and Political Rights*.[4] Accordingly, this provision of the Current Draft Law should

[3] The full list is: national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, protection of the reputation or rights of others, prevention of the disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary.

[4] The full list is: rights or reputations of others, protection of national security or public order, or of public health or morals.

be revised so that a refusal of access to information may be justified only where this would cause serious harm to a legitimate interest listed.

Recommendations:

- The first provision of Article 8 should be revised to provide that the right of access to information may be limited, exceptionally, only where release of the information would *seriously prejudice a legitimate interest*.

II.4 Costs

Article 17 continues to permit the imposition of charges for the "necessary costs of duplication". However, it now also provides that the "costs of delivery [may be assessed] in the event of delivery of information". This latter provision suffers from some vagueness. In particular, the term "delivery" is not defined. We assume that it refers, innocuously, to the cost of sending the information to the requester, for example by post or courier. However, it may be interpreted more broadly by certain officials. For example, they might interpret "deliver" to mean whatever efforts, other than duplicating, might be required in retrieving the information. Because the article in no way imposes a ceiling or any other constraints on the imposition of "delivery" costs, there remains the possibility of abuse.

Recommendation:

- Article 17 should specify that "costs of delivery" only refers to any costs incurred in physically delivering the requested information to the requester.

III. Problems from Previous Analyses Which Remain

Some of the recommendations contained in the July 2003 Memorandum or the Briefing Note do not appear in the Current Draft Law. Two omissions are of particularly serious concern.

III.1 Information of Public Importance

The previous draft limited the right of access to information of 'public importance' and then defined this broadly. This approach has been retained in the Current Draft Law. As we noted in the Briefing Note, we believe that this is an unfortunate approach: "The right [to access to information] should apply to all information held by a public body, without regard to whether or not it is of public importance. Conditioning the right in this way unduly limits it and adds a serious complicating factor to the request process, which is likely to create unnecessary obstacles to access".

Recommendation:

- Article 2 of the Current Draft Law should create a presumption that all information held by a public authority is subject to disclosure, subject only to the regime of exceptions. Information should not be categorised into information of "public importance" and other information.

III.2 Whistleblower Protection

The Briefing Note noted with concern the fact that the whistleblower protection which had existed in a previous draft had been deleted. The Current Draft Law also fails to provide for whistleblower protection, that is, protection against legal or employment-related sanctions for persons who release information on wrongdoing, or information that could disclose a serious threat to health, safety or the environment, provided that the person acts in good faith and in the reasonable belief that the information is in fact true.

Recommendation:

- The Current Draft Law should provide protection for whistleblowers against any legal, administrative or employment-related sanction.