MEMORANDUM

on

Two Drafts of the Law on Access to Public Information of Argentina

London
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ARTICLE 19 · 6-8 Amwell Street · London EC1R 1UQ · United Kingdom
Tel +44 20 7278 9292 · Fax +44 20 7278 7660 · info@article19.org · http://www.article19.org

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1. Introduction

This Memorandum contains an analysis by ARTICLE 19 of two drafts of the Argentine Access to Public Information Law, one prepared by the Senate (Senate Law) and one by the Deputies Chamber (Deputies Law).[1] The two drafts are substantially similar although they do contain a number of important differences. These are outlined in more detail in the analytical section of this Memorandum.

ARTICLE 19 welcomes moves to adopt legislation on the right to freedom of information in Argentina. Access to information is a fundamental human right, crucial to the functioning of democracy and key to the enforcement of other rights. The right to access information has been codified both in international human rights law as well as in anti-corruption conventions signed and ratified by Argentina. The government of Argentina is therefore under a binding legal obligation to enact effective access to information legislation, making the right a reality for all.

Both drafts contain a number of positive elements, including a broad definition of which institutions are subject to the law; a recognition, particularly in the Deputies Law, of the overriding nature of various public interests; a broad positive obligation to publish information; the requirement in the Deputies Law for existing classifications to be reviewed; good process guarantees and provision in the Senate Law for punishment for those who obstruct access to information. At the same time, the drafts suffer from a number of weaknesses, including the lack of provision for appeals to an independent administrative body; an unduly broad regime of exceptions; lack of proactive disclosure provisions and the lack of an independent oversight body. This Memorandum sets out our main concerns with each of the drafts.

Our analysis of the drafts is based on international law and best practice in the field of access to information, as crystallised in two key ARTICLE 19 documents: *The Public's Right to Know: Principles on Freedom of Information Legislation* (ARTICLE 19 Principles)[2] and *A Model Freedom of Information Law* (ARTICLE 19 Model Law).[3] Both publications represent broad international consensus on best practice in this area and have been used to analyse freedom of information legislation from countries around the world. Section II of this Memorandum provides an overview of international law on access to information, while Section III contains the substantive analysis of the draft laws.

[1] Our comments are based on an unofficial English translation of the draft Law. ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.
[2] (London: June 1999). This has been endorsed by, among others, the OAS Special Rapporteur on Freedom of Expression. See Annual Report of the Inter-American Commission on Human Rights, 1999, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression, OEA/Ser.L/V/II.106, Doc. 3 rev., April 13, 2000, Chapter II, Part III, Freedom of Information.
[3] (London: July 2001).

2. International and Constitutional Obligations

2.1. The Guarantee of Freedom of Expression

Article 19 of the *Universal Declaration of Human Rights* (UDHR),[4] a UN General Assembly resolution, binding on all States as a matter of customary international law, sets out the fundamental right to freedom of expression in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

The *International Covenant on Civil and Political Rights* (ICCPR),[5] a formally binding legal treaty ratified by Argentina on 8 August 1986, guarantees the right to freedom of opinion and expression also at Article 19, in terms very similar to the UDHR. By ratifying the ICCPR, States Parties agree to refrain from interfering with the rights protected therein, including the right to freedom of expression. However, the ICCPR also places an obligation on States Parties to take positive steps to ensure that rights, including freedom of expression and information, are respected. Pursuant to Article 2 of the ICCPR, States must "adopt such legislative or other measures as may be necessary to give effect to the rights recognized by the Covenant." This means that States must create an environment in which a diverse, vigorous and independent media can flourish, and provide effective guarantees for freedom of information, thereby satisfying the public's right to know.

Argentina has also ratified the *American Convention on Human Rights* (ACHR),[6] which guarantees the right to freedom of expression at Article 13(1), as follows:

> Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

Article 2 of the ACHR, like its ICCPR counterpart, requires States Parties to take positive measures to promote and protect the rights guaranteed therein.

Freedom of expression is also guaranteed by the two other regional human rights treaties, the *African Charter on Human and Peoples' Rights*[7] and the *European Convention on Human Rights*.[8]

2.2. Freedom of Information

International human rights law has, over the years, developed detailed guidance on the content of the right to information. In the earlier international human rights instruments, freedom of information was not set out separately but included as part of the fundamental

[4] UN General Assembly Resolution 217A(III) of 10 December 1948.
[5] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.
[6] Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978. Argentina ratified the Convention on 14 August 1984.
[7] Adopted at Nairobi, Kenya, 26 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.
[8] Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953

right to freedom of expression. Freedom of expression, as noted above, includes the right to seek, receive and impart information. Freedom of information, including the right to access information held by public authorities, is clearly a core element of this right.

The right to freedom of information as an aspect of freedom of expression has repeatedly been recognised by United Nations bodies. The UN Special Rapporteur on Freedom of Opinion and Expression in particular has provided extensive commentary on this right in his Annual Reports to the UN Commission on Human Rights. In 1997, he stated: "The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large … is to be strongly checked."[9] His commentary on this subject was welcomed by the UN Commission on Human Rights, which called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications."[10] In his 1998 Annual Report, the Special Rapporteur declared that freedom of information includes the right to access information held by the State:

> [T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems…."[11]

In 2000, the Special Rapporteur provided extensive commentary on the content of the right to information as follows:

- Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;
- Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
- As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
- A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;
- All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
- The law should establish a presumption that all meetings of governing bodies are open to the public;
- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the

[9] Report of the Special Rapporteur, 4 February 1997, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1997/31.
[10] Resolution 1997/27, 11 April 1997, para. 12(d).
[11] Report of the Special Rapporteur, 28 January 1998, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, para. 14.

> freedom of information law should be comprehensive and other laws should not be permitted to extend it;
> - Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.[12]

Once again, his views were welcomed by the Commission on Human Rights.[13]

In November 1999, the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe and the Special Rapporteur on Freedom of Expression of the Organisation of American States – came together for the first time in November 1999 under the auspices of ARTICLE 19. They adopted a Joint Declaration which included the following statement:

> Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.[14]

The three were even more explicit in another Joint Declaration of 6 December 2004 when they stated:

> The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.[15]

The right to freedom of information has also been explicitly recognised in all three regional systems for the protection of human rights. Within the Inter-American system, the Inter-American Commission on Human Rights approved the *Inter-American Declaration of Principles on Freedom of Expression* in October 2000.[16] The Preamble reaffirms with absolute clarity the right to freedom of information:

> CONVINCED that guaranteeing the right to access to information held by the State will ensure greater transparency and accountability of government activities and the strengthening of democratic institutions; …
>
> REAFFIRMING that the principles of the Declaration of Chapultepec constitute a basic document that contemplates the protection and defense of freedom of expression, freedom and independence of the press and the right to information;

The Principles unequivocally recognise freedom of information, including the right to access information held by the State, as both an aspect of freedom of expression and a fundamental right on its own:

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[12] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44.
[13] Resolution 2000/38, 20 April 2000, para. 2.
[14] 26 November 1999: http://www.cidh.org/Relatoria/showarticle.asp?artID=141&lID=1.
[15] See http://www.cidh.org/Relatoria/showarticle.asp?artID=319&lID=1.
[16] 108th Regular Session, 19 October 2000.

> 3. Every person has the right to access information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.
>
> 4. Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

Shortly after the adoption of these Principles, a group of experts met in Lima, Peru and adopted the *Lima Principles*.[17] These Principles elaborate in greater detail on the content of the right to freedom of information in the context of the Americas. Two years later, in November 2003, a major international conference on freedom of information was again held in Peru, bringing together a wide range of civil society experts, as well as officials and politicians. The conference adopted the *Declaration of the SOCIUS Peru 2003: Access to Information Seminar*, which states, among other things:

> We recommend that Governments Adopt and implement access to information laws based on the underlying principle of openness, as elaborated in the attached "Guidelines on Access to Information Legislation".[18]

The Guidelines set out in some detail the standards to which freedom of information legislation should conform.[19]

These standards are confirmed by a Resolution of the General Assembly of the Organisation of American States adopted in 2003, stating:

> 2. To reiterate that states are obliged to respect and promote respect for everyone's access to public information and to promote the adoption of any necessary legislative or other types of provisions to ensure its recognition and effective application.[20]

The General Assembly followed this up in 2004 with a Resolution calling on Member States to adopt and implement legislation ensuring "broad access to public information".[21] In 2005, reaffirming the previous two resolutions, the General Assembly urged States to provide for civil society participation in the drafting of access to information laws, and also urged States to include in their laws "clear and transparency exception criteria."[22]

Reflecting global recognition of the right to access information, regional human rights bodies in both Africa and Europe have recently adopted declarations calling on States to ensure effective access to information for everyone. In 2003, the African Commission on Human and Peoples' Rights recently adopted a Declaration of Principles on Freedom of Expression in Africa,[23] Principle IV of which states, in part:

> 1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

[17] Adopted in Lima, 16 November 2000.
[18] 28 November 2003.
[19] Available at: http://www.britishcouncil.org/socius/english/declaration.pdf.
[20] AG/RES. 1932 (XXXIII-O/03), of 10 June 2003.
[21] AG/RES. 2058 (XXXIV-O/04), of 8 June 2004.
[22] AG/RES. 2121 (XXXV-O/05), of 26 May 2005.
[23] Adopted at the 32nd Session, 17-23 October 2002.

2. The right to information shall be guaranteed by law in accordance with the following principles:
   - everyone has the right to access information held by public bodies;
   - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
   - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
   - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
   - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
   - secrecy laws shall be amended as necessary to comply with freedom of information principles.

Within Europe, the Committee of Ministers of the Council of Europe adopted a Recommendation on Access to Official Documents in 2002.[24] Principle III provides generally:

> Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

The rest of the Recommendation goes on to elaborate in some detail the principles which should apply to this right. Of particular interest is Principle IV, which states:

> **IV. Possible limitations to access to official documents**
>
> 1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:
>
> i. national security, defence and international relations;
> ii. public safety;
> iii. the prevention, investigation and prosecution of criminal activities;
> iv. privacy and other legitimate private interests;
> v. commercial and other economic interests, be they private or public;
> vi. the equality of parties concerning court proceedings;
> vii. nature;
> viii. inspection, control and supervision by public authorities;
> ix. the economic, monetary and exchange rate policies of the state;
> x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.
>
> 2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.[25]

Outside human rights law, an obligation on States to implement access to information legislation is included explicitly in the 2003 UN Convention against Corruption, which Argentina has signed but not yet ratified,[26] and implicitly in the 1996 Inter-American Convention against Corruption.[27]

[24] Recommendation No. R(2002)2, adopted 21 February 2002.
[25] *Ibid.*
[26] UN Convention against Corruption, adopted by UN General Assembly resolution 58/4 of 31 October 2003, signed by Argentina on 10 December 2003. Article 13 provides that States should "[ensure] that the public

From this brief overview of international law, it can be concluded that the right to access to information is now well-established in international law. Reflecting the growing international consensus on this matter, freedom of information laws have been adopted in record numbers over the past ten years in a number of countries, some of which include India, Israel, Jamaica, Japan, Mexico, Pakistan, Peru, South Africa, South Korea, Thailand, Trinidad and Tobago, and the United Kingdom, as well as most of East and Central Europe. These countries join a number of other countries which enacted such laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia and Canada, bringing the total number of States with freedom of information laws to more than 60. A growing number of inter-governmental bodies, such as the European Union, the UNDP and the World Bank, have also adopted policies on the right to information. With the adoption of a strong Access to Public Information Law, Argentina will therefore join a long list of nations which have already taken this important step towards guaranteeing freedom of information.

3. Analysis of the Draft Laws

This Section analyses the substance of the two draft laws, focusing on a number of important themes:

- the scope of application of the draft laws, analysing the range of bodies and information that the laws apply to;
- the envisaged procedure for lodging access requests;
- proactive publication, examining the range of materials public bodies should publish even in the absence of a request;
- the exceptions regime, examining the key question of which documents may legitimately be withheld from public scrutiny;
- the role of the independent oversight body; and
- protection as well as sanctions for individuals, examining the protection of whistleblowers and sanctions for obstruction access to information.

The last paragraphs of this chapter deal with a range of miscellaneous issues.

Suggestions and recommendations for improvement of the drafts are provided throughout.

3.1. Scope of Application

Senate Law

Section 5 of the Senate Law is the central access provision, providing:

> Any person has the right of requesting, accessing and receiving public information from the entities and agencies mentioned under Section 3.

Public information is defined in Section 1 as any accumulated data in a document whose contents are of general interest. At the same time, Section 6 provides that all information

has effective access to information".

[27] 29 March 1996, ratified by Argentina on 4 August 1997. Article 3 requires States to take 'preventive measures' in the fight against corruption, including mechanisms that allow civil society monitoring. 'Access to information' has been adopted by the Committee of Experts as one of the indicators in this regard (see http://www.oas.org/juridico/english/followup.htm).

produced or obtained by any of the bodies noted in Section 3 is presumed to be public, unless excluded by the present law.

Pursuant to Section 3, the law applies to central and decentralized public agencies, national universities, institutes and schools, regional corporations, the legislative and judicial branches of government, the auditor, the ombudsman and the Attorney General's office, as well as "non government entities". It also applies to government trust funds and private bodies, whether profit-making or not, which hold "public interest" or "public" information. Private entities are also defined in Section 1 as entities, among other things, whose purpose is of public interest or that perform public functions or possess public information, as well as entities which hold a public licence or concession.

Deputies Law

The Deputies Law does not restrict information to general interest information. Rather, it defines information broadly as any knowledge in whatever format, created or obtained, or under the control of a public body. A progressive provision even includes information whose creation has been totally or partly financed by public funding.

The definition of public bodies in the Deputies Law is roughly parallel to that of the Senate Law with a few key differences. First, it explicitly includes bodies where government ownership or control of decision-making exceeds 50%. Second, private bodies are covered only to the extent that they have received public funding, or a public licence or concession. Third, the judicial branch of government and the Attorney General are covered only in relationship to their administrative functions.

Analysis

The restriction of the scope of the Senate Law to information of public interest is a serious weakness. Access to information laws should apply to all information held by public bodies, regardless of whether or not someone considers it to be of general interest. This flows from the underlying rationale for these laws, which is that public bodies hold information not for themselves but on behalf of the public. Subject only to legitimate exceptions, there is no warrant for restricting this to information of general interest. Furthermore, this may lead to serious practical obstacles to access since what is of general interest is very much a question of one's perspective. Officials could abuse this provision to deny access to information the disclosure of which would be embarrassing or worse for them.

It is not clear what difference there is in coverage of the Senate Law regarding public and private bodies, since both are covered to the extent that they hold public information. It is also unclear what the relationship is between the Section 3 rule for private bodies and the definition of public body provided for in Section 1. Presumably, the former should be taken as the operative rule. Regardless, this should be clarified.

The two draft laws clearly aim to impose an obligation of disclosure on a broad range of public bodies. At the same time, the various definitions may exclude certain bodies and a more flexible approach may be warranted. Whenever lists are employed, this raises a possibility that those bodies not included on the list may be excluded. Rather than list bodies, as both drafts do, it might be preferable simply to state that the law applies to all public bodies, whether governmental in nature, or established by statute, the constitution or

any other means. This is consistent with the broad rationale for access to information, which should apply to any body that performs public functions.

The scope of the two drafts as regards private bodies is progressive but also needs more thought. An effort has been made to include private bodies to the extent that they undertake public functions and this is positive. However, the rigid 50% rule in the Deputies Law may be difficult to apply. As noted above, The Senate Law contains rather confusing provisions relating to private bodies. As a result, it appears to place unduly onerous obligations on private bodies, going beyond the standards established in other jurisdictions. While this is in many ways positive, at the same time care has to be taken when extending obligations of this sort, which involve certain costs, both financial and in terms of resources, to private bodies.

Consideration should be given to a regime for imposes access obligations primarily on those private bodies that undertake a public function. This means that private bodies would be primarily obliged to release information that is relevant to the carrying out of their public function. In addition, all private bodies should have limited disclosure obligations, for example where the information is required for the exercise or protection of a right.[28]

Recommendations:

- The access law should apply to all information held by public bodies, defined broadly, rather than being restricted, for example, to information of 'general interest'.
- Consideration should be given to replacing the current definitions of public bodies, which specify bodies covered, with more generic definitions, although these might also be supplemented by a list of bodies specifically covered.
- Consideration should be given to modifying the regime for disclosure obligations on private bodies in accordance with the above. At a minimum, the precise scope of these obligations should be made as clear as possible.

3.2. Procedural Rules

The Draft Laws

The draft Laws contain roughly similar rules regarding the procedure for responding to requests, although the Senate Law is more detailed. It requires requesters to provide detailed information, including their nationality and ID number, the precise index number of the document requested and the reason for the request. Information must normally be provided within 20 business days, although this may be extended by another 15 days whenever 'any other circumstances' make it impossible to comply within the original 20 days. Further extension of the time limits is also possible, when it is impossible to comply before that. In this case, appeal to the courts is possible. Section 8(c) allows requesters to specify whether they wish simply to view the information or to obtain a copy. Section 10 further provides that information must be provided in the form requested. It is not clear from these two provisions whether different forms of reproduction (e.g. photocopies, electronic versions, etc.) are envisaged. Section 12 of this law provides that refusals of access must be in writing and accompanied by written reasons.

[28] This is the approach taken in South Africa. See the 1996 Constitution, Section 32.

The Deputies Law contains a 'principle of informality' regarding the process for requests, although it is unclear what this means in practice. Requests must be responded to within 15 days, extendable by another 15 days on fairly precise grounds, although the draft Law does include a general category referring to any other circumstance that makes it impossible to comply within the original 15 days. A progressive provision provides for earlier release of information where this is necessary due to 'objective circumstances' which mean that taking the full 15 days would render the information useless or ineffective for the intended purpose. While welcome, it is not clear how this provision would be enforced given its highly subjective nature. This draft provides simply that information must be provided in the form requested.

Both draft laws stipulate that public bodies are not required to process or to create information to satisfy a request. Both provide that a failure to answer a request shall be a deemed refusal and, in a progressive provision, the Deputies Law provides that an ambiguous or inaccurate response shall also be deemed to be a refusal. Both laws also provide for charges to be levied for information requests, for searching for the information, for analysis and for reproduction (Section 8(g) of the Senate Law and Section 13 of the Deputies Law). Heads of public bodies are required to establish fee structures which, at least in the Deputies Law, should envisage special consideration of requests from non-profit organisations.

Analysis

By-and-large, these provisions are positive. We recommend that due consideration be given to the shorter time limit provided for in the Deputies Law for responding to requests. Furthermore, the open-ended possibility of extension envisaged in the Senate Law is unfortunate and not found in other laws.[29]

Requesters should be required to provide only the basic information necessary to process their requests. This should not include information such as their nationality, which is irrelevant to the request, or their ID numbers, also irrelevant. In no circumstances should requesters be required to provide reasons for their requests. This is irrelevant to the request, since provision of information is not conditional upon the reason, and may lead to a situation where public bodies deny or delay certain types of requests.

The rules relating to form of request in the Senate Law are a bit confusing and do not make it clear that requesters have a right to access information in the form they wish. Furthermore, the provision in both laws for a blanket rule that public bodies do not have to process information may lead to situations where requesters are unreasonably denied information, for example where it is held in computer formats which they cannot access.

The system for fees in both draft laws is, although clearly well-intentioned, at least in the Deputies Law, in need of further clarification. Ideally, fees should be set centrally, rather than by each public body, which may lead to a patchwork fee structure within the public sector. The provision for charges for searching for and analysis of information should be reconsidered. The question of how long it takes to find information depends in part on how well the public body keeps its records and requesters should not have to pay for poor public

[29] The US Freedom of Information Act does include such a provision and it has proven to be very problematical.

record-keeping. Furthermore, allowing such charges may well put access beyond the reach of most individuals, fundamentally undermining the whole purpose of the law. Finally, experience in other countries shows that processing requests for information can normally be integrated into the ongoing work of public bodies and there is no real justification for levying special charges for this.

The Deputies Law envisages lower costs for requests from non-profit bodies. Consideration should be given to amending this so that it applies more generally to requests in the public interest. For example, requests by media outlets, which will normally relate to publication of a story, should also be included in the discounted access system.

Neither law specifies that requests may be made electronically. The notice provisions in both laws could be improved. Written acknowledgement should be given of the lodging of a request, in case no response is forthcoming and to provide the basis for an appeal. In case of a refusal, written notice should be given, including the grounds for the refusal, as well as any right of appeal.

Recommendations:

- Consideration should be given to ensuring that the time limit for responding to requests is as short as possible and the law should provide generally that requests must be satisfied as soon as possible. Unlimited delay, as envisaged in the Senate Law, should not be possible.
- Requesters should only be required to provide basic information necessary to satisfy the request and should never be required to supply reasons for their request.
- The rules regarding form of access should be clarified and honed so that it is clear that requesters have a right to stipulate the desired form of access, including basic data processing.
- Consideration should be given to revising the approach to fees by providing for central fee schedules which charge only for reproduction costs and which clearly specify that requests in the public interest are either free or less costly.
- The notice provisions should be enhanced, so that notice is provided of receipt of a request and refusals are accompanied by written reasons specifying the grounds for the refusal, as well as any right of appeal.

3.3. Proactive Publication

Neither law provides for the proactive publication of a range of key information by public bodies. The Senate Law does not touch on the issue at all; and all that the Deputies Law requires is, in Section 3, the publication of information to guide requesters on how to make a request.

Although the main focus of any access to information law will be request-driven access, the proactive publication of information by public bodies is also a key element of a progressive access regime. Most people will never make a specific request for information, so that the system of proactive publication will effectively determine what public information they see. Different laws adopt a different approach to this issue but, in principle, with technological advances, in particular the Internet, public bodies should seek to make available on a proactive basis as much information as possible that may be of public interest. This will not

only promote public access but also save costs through avoiding the need to process requests for this information.

At a minimum, the law should require the publication of the following categories of information:

- operational information about how the public body functions, including costs, objectives, audited accounts, standards, achievements and so on, particularly where the body provides direct services to the public;
- information on any requests, complaints or other direct actions which members of the public may take in relation to the public body;
- guidance on processes by which members of the public may provide input into major policy or legislative proposals;
- the types of information which the body holds and the form in which this information is held; and
- the content of any decision or policy affecting the public, along with reasons for the decision and background material of importance in framing the decision.

Recommendation:

- The access laws should place a general obligation on public bodies proactively to publish a wide range of information of public interest, in accordance with the above.

3.4. Regime of Exceptions

Both laws include provisions on exceptions to the right of access, as well as rules on when and how information may be classified. The regime of exceptions is central to any access to information regime and it is crucially important that it provides an appropriate balance between the need for openness and protection of various overriding public and private interests.

The Draft Laws

Both draft Laws contain roughly similar regimes relating to exceptions (Sections 14-16 in the Senate Law and Sections 7-9 in the Deputies Law). Both generally accept secrecy provisions in other laws, provide an additional list of exceptions and then also place conditions on the process for classifying information. It is not clear from the Deputies Law whether the exceptions it provides for are binding on other laws (so that claims to secrecy are legitimate only to the extent that they fall within the scope of the exceptions listed in the present law) or are simply additional to other laws.

Most exceptions do include some kind of harm test, although this ranges, variously, from 'could endanger', to 'necessary to establish [the exception]', to 'may be endangered'. The Senate Law does not include any public interest override while the Deputies Law includes a limited public interest override in favour of public health, security or the environment and in relation only to the exception protecting third party interests (Section 7(e)).

The Deputies Law does also include a provision which may be understood as a more general public interest override, but which is probably limited in scope. Section 10, dealing with reclassification of previously classified material, provides that the information shall be

subject to disclosure even before classification has been reviewed when either the reasons for its original classification no longer exist or there is a 'higher public interest which justifies' public access. Furthermore, the Deputies Law provides for reference to classified information in a judicial decision where that information is necessary to ensure protection of a right protected by the Constitution.

The Deputies Law provides for a presumptive limit of 10 years for classification, although this may be renewed (Section 9). Both Laws provide for overall limits on classification of 30 years, except where it comes from a 'diplomatic source' (Section 15(b) of the Senate Law and Section 9 of the Deputies Law). Both draft Laws also provide for the review of previously classified information (Sections 15(e) and 23 of the Senate Law and Section 10 of the Deputies Law), although the former allows three years for reclassification whereas the latter requires this to be done in 12 months or the classification will lapse.

Both draft Laws provide for 'severability', the provision of documents with only that portion which is confidential removed (Section 16 of the Senate Law and Section 12 of the Deputies Law).

Analysis

The time limits on classification in both draft Laws are welcome but otherwise the regimes of exceptions they establish are seriously problematical. This problem is exacerbated in the Deputies Law, which provides for general classification by the President for reasons of defence or foreign policy (apparently without any limitations). Preserving secrecy provisions in other laws is a crucial weakness in both laws. These secrecy provisions, of which there may be many in different laws, some dating from many years ago, are unlikely to be consistent with modern notions of democracy and openness and are likely to be inconsistent with the basic principles of the access legislation. A key thrust behind adopting access to information legislation is to herald in a new era of openness, and simply leaving the old secrecy regime in place fundamentally undermines this.

By-and-large the exceptions in both draft Laws protect interests that are recognised under international law and other national access to information laws. In many cases, however, they could be considerably narrowed to focus on clear interests. For example, Section 7(h) of the Deputies Law contains a long list of the various elements of legally privileged information. It would be preferable simply to refer to professional obligations of secrecy, which already cover any legitimate interest here. Similarly, the exception in favour of privacy in the Deputies Law (Section 7(i)) refers to 'privacy and honour', although the latter is a very different notion and may be affected by information which is in no way private.

In a number of cases, however, no harm requirement is established or the harm requirement is insufficiently clear and stringent. Examples of the various harm requirements have already been noted. The Deputies Law, for example, covers all information which has been prepared with a view to supervising financial institutions or which is under the control of the Unit of Financial Information. Class exclusions of this sort are unnecessary since non-disclosure cannot be justified in the absence of a specific risk of harm.

As noted above, there is only a very limited public interest disclosure provision, and even this is only found in the Deputies Law. In our experience, a public interest override is crucial to the effective functioning of a freedom of information regime. It is simply not

possible to envisage in advance all of the circumstances in which information should still be disclosed, even if this might harm a legitimate interest. The relevant provision in the ARTICLE 19 Model Law provides:

> Notwithstanding any provision in this Part, a body may not refuse to indicate whether or not it holds a record, or refuse to communicate information, unless the harm to the protected interest outweighs the public interest in disclosure.[30]

It may be noted that, while welcome, the procedural rules relating to classification do not address these problems.

Recommendations:

- In case of a conflict between the access to information law and secrecy provisions, the former should prevail.
- All exceptions should be subject to a clear harm test whereby disclosure may be refused only where disclosure of the information would, or would be likely to, cause significant harm to the protected interest.
- All exceptions should be subject to a public interest override of the sort described above.

3.5. Oversight and appeals

The Senate Law does not provide for an oversight body or an independent body to which appeals against refusals to disclose may be brought. The Deputies Law provides that the Ombudsman shall be the 'control agency for the correct enforcement of this act' (Section 15).

Ideally, there should be three levels of appeal: first to a higher authority within the public authority, then to an independent administrative body and finally to the courts. Neither of the draft Laws provide for the first and third levels of appeal, and even the Deputies Law is not clear regarding the second. An administrative level of appeal is important as it is both quick and less expensive than the formal court system, and it is more effective than an internal, and hence possibly biased, appeal.

Experience in other countries shows that an administrative level of appeal is crucial to the effective implementation of freedom of information legislation. Most democratic countries provide for such an appeal in their freedom of information laws. For example, the Federal Transparency and Access to Public Government Information Law, recently adopted in Mexico,[31] provides for an appeal to the Federal Institute of Access to Information. The UK Freedom of Information Act 2000[32] provides for an appeal to the Information Commissioner. In both of these cases, the bodies were specifically established under the access to information law but, in some other countries, the law simply provides for an appeal to an existing body, such as an Ombudsman or human rights commission. It is

[30] Note 3, section 22.
[31] Adopted in June 2002. Available at: http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB68/laweng.pdf. Available in the Spanish original at: http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB68/lawesp.pdf.
[32] Available online at: http://www.cfoi.org.uk/foiact2000.html.

essential that this body be able to make binding decisions regarding access to specific documents, rather than simply making recommendations.

Another important role of an oversight body is in relation to general promotion of implementation of the access to information law. In most countries, a strong culture of secrecy prevails within public bodies and active steps are required to overcome this, including training and such things as rewards for good performers and criticism of poor performers. The public also need to be informed about their rights under the new law and also about the means by which it may be exercised. An oversight body can play a crucial role in ensuring that these activities are undertaken.

Recommendation:

- The law should provide for an oversight body with responsibility for both hearing appeals from refusals to access information and undertaking a range of more general promotional measures, as described above. This body should be independent of government and have adequate powers to undertake its tasks, including a right to review information to assess whether or not it is properly covered by an exception.

3.6. Protection and Sanctions for Individuals

The Senate Law contains a number of provisions providing for liability for either obstruction of access or the wrongful provision of information. The Deputies Law does not include any provisions on this.

Specifically, the Senate Law provides, at Sections 18-20 for the following:

- for liability under employment rules for public servants who obstruct access or provide incomplete access without any reason, or who obstruct compliance with the act;
- for liability under employment rules for public servants who allow access to exempt information;
- for civil liability for private entities which obstruct access or provide incomplete access without any reason, or who obstruct compliance with the act;
- for civil liability for private entities which allow access to exempt information; and
- for criminal penalties for individuals who wrongfully fail to provide access, or who hide or destroy public information contrary to the act.

Many access to information laws provide for penalties for individuals who wilfully obstruct access to information and this is an important way to redress the culture of secrecy. At the same time, there are problems with the provisions in the Senate Law. These provisions appear to provide for criminal penalties even where the wrong is not wilful. This is contrary to basic criminal principles and unfair. At the same time, the provision in the Senate Law treats mistaken disclosure in the same way as obstruction of access. This is confused. In fact, international standards mandate the converse: protection should be provided for those who, in good faith, disclose information even if they have made a mistake. Otherwise, it will be difficult to overcome the culture of secrecy that prevails in most public bodies.

Recommendations:

- Individuals should be subject to sanction for refusing to provide access to information, or for obstructing access to information, but only where this is done wilfully.
- Individuals who, in good faith, disclose information pursuant to the law, even if the information is in fact subject to an exception, should be protected against liability.

3.7. Miscellaneous and Omissions

3.7.1. Record Management

Access to information systems can only be effective where public bodies employ effective record keeping systems. Where records are not maintained, access is undermined. The draft Laws do provide for minimum standards in this area (see the Section 6 of the Senate Law and Section 2 of the Deputies Law), but these set insufficiently detailed standards. Far more detailed provisions would be required, however, to put this into effect. At a minimum, a system for establishing and implementing standards in this area would be required.

3.7.2. Whistleblowers

The draft Laws do not provide protection for individuals who release otherwise confidential information to expose wrongdoing or which exposes a serious threat to health, safety or the environment (so-called whistleblowers). These individuals should be protected against sanction as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing, along the lines required under Article 3(8) of the Inter-American Convention against Corruption.[33]

Recommendations:

- A system for setting minimum standards for record management should be established.
- The access to information law should provide protection for whistleblowers in accordance with the above.

[33] Note 27.