MEMORANDUM

on the

Serbian draft Law on Free Access to Information of Public Importance

by

ARTICLE 19
Global Campaign for Free Expression

London
July 2003

I. Introduction

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

ARTICLE 19 welcomes the draft and regards it as a very positive step to advance freedom of expression and information in the Republic of Serbia. The draft has many of the key elements needed in an effective freedom of information law, including an obligation to publish, a procedure for accessing information, time limits for disclosing information, an exemptions section and an appeals process.

There are, however, areas in which the draft law could be improved further in order to safeguard the public's right to know. In particular, the exemptions regime could be improved upon, the access regime is too rigid, no fee schedule is provided for and the drafting is not always very clear, although at points this may be the result of translation.

[1] The translation of the draft Law received by ARTICLE 19 is not dated.

In order to inform and aid further discussion around the draft Law, this Memorandum analyses it against international standards on freedom of information. Section II of this Memorandum outlines the pertinent international standards on freedom of expression and information, as developed under the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights*. Section III analyses the draft Law against these standards. Two documents are relied on in particular: Recommendation (2002)2 of the Committee of Ministers of the Council of Europe on Access to Official Documents,[2] which elaborates the right to access to information in the context of the *European Convention on Human Rights*, and ARTICLE 19's *The Public's Right to Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles),[3] a standard-setting document based on international human rights treaties, as well as international best practice. The ARTICLE 19 Principles have been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression.[4]

II. International and Constitutional Obligations

The Federation of Serbia and Montenegro, of which the Republic of Serbia forms a constituent part, is a party to the *International Covenant on Civil and Political Rights* (ICCPR)[5] and, on 3 April 2003, signed the *European Convention on Human Rights* (ECHR).[6] It formally joined the Council of Europe on the same day. Article 19 of the ICCPR and Article 10 of the ECHR protect freedom of expression in similar terms. Article 19(2) of the ICCPR states:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Under Article 10 of Serbia and Montenegro's federal Constitutional Charter, both Article 10 of the ECHR and Article 19 of the ICCPR are directly applicable in Serbia and Montenegro.

The particular importance in a democratic society of freedom of expression has been stressed many times by international human rights courts. For example, the European Court of Human Rights has stated, in a quotation which now features in nearly all its cases involving freedom of expression:

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[2] Adopted 21 February 2002. Available at: http://cm.coe.int/stat/E/Public/2002/adopted_texts/recommendations/2002r2.htm.
[3] (London: ARTICLE 19, 1999). Available at: http://www.article19.org/docimages/512.htm.
[4] UN Doc. E/CN.4/2000/63, 5 April 2000.
[5] Adopted by UN General Assembly Resolution 2200A (XXI), 16 December 1966, in force 23 March 1976, ratified by Yugoslavia (Serbia and Montenegro's predecessor) on 27 April 1992. As of 7 July 2003, there were 149 State Parties and another 8 States who had signed but not yet ratified the treaty.
[6] ETS Series No. 5, adopted 4 November 1950, in force 3 September 1953. As of 7 July 2003, there were 44 State Parties.

> [F]reedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.[7]

This has been affirmed by both the UN Human Rights Committee and the Inter-American Court of Human Rights, which has stated:

> Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. ... [I]t can be said that a society that is not well informed is not a society that is truly free.[8]

Although international law recognises that freedom of expression is not an absolute right, restrictions on it must be narrowly circumscribed. Article 10(2) of the ECHR states:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

It follows that any restriction on the right to freedom of expression must meet a strict three-part test. This test, which has been confirmed by both the UN Human Rights Committee[9] and the European Court of Human Rights,[10] requires that any restriction must be provided by law, be for the purpose of safeguarding a legitimate interest, and be 'necessary' to secure this interest.

The right to freedom of expression extends beyond the right of the individual journalist to report on matters of general interest. The public at large also has a right to receive information,[11] recognised in Article 29 of Serbia and Montenegro's Charter of Human and Minority Rights and Civil Liberties as well as in Article 10 of the ECHR and Article 19 of the ICCPR. In November 1999, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression adopted a Joint Declaration stating:

> 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.[12]

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[7] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.
[8] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, para. 70.
[9] For example, in *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.
[10] For example, in *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90.
[11] See *Observer and Guardian v. the United Kingdom*, 26 November 1991, Application No. 13585/88, para. 59 (ECHR) and *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63 (ECHR).
[12] Adopted 26 November 1999, UN Doc. E/CN.4/2000/63, Annex 1.

There can be little doubt as to the importance of freedom of information. During its first session in 1946, the United Nations General Assembly adopted Resolution 59(1) which states:

> Freedom of information is a fundamental human right and… the touchstone of all the freedoms to which the UN is consecrated.[13]

As this Resolution notes, freedom of information is both fundamentally important in its own right and is also key to the fulfilment of all other rights. It is only in societies where the free flow of information and ideas is permitted that democracy can flourish. For these reasons, the Member States of the Council of Europe in 1982 adopted a Declaration stating that among the objectives sought to be achieved in the area of freedom of expression was "the pursuit of an open information policy in the public sector, including access to information, in order to enhance the individual's understanding of, and his ability to discuss freely political, social, economic and cultural matters."[14]

In 2002, the Committee of Ministers of the Council of Europe adopted a detailed Recommendation on Access to Official Documents,[15] which states:

> **III. General principle on access to official documents**
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> 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.
>
> **IV. Possible limitations to access to official documents**
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> 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:
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> 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.

The Council has recommended that all member States should be guided in their law and practice by these principles.[16]

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[13] 14 December 1946.
[14] Council of Europe Declaration on the Freedom of Expression and Information, adopted 29 April 1982.
[15] Note 2.

The 'harm test' outlined under '*IV. Possible limitations*' is crucial. This is linked to the test under Article 10(2) of the ECHR that any restrictions should be 'necessary in a democratic society' and means that it is not sufficient for a State merely to show that certain information falls within a proscribed category; it must also show that disclosure of the information will in the particular case cause substantial harm.

The ARTICLE 19 Principles, in common with the Council of Europe Recommendation, establish that even if it can be shown that disclosure of the information would cause substantial harm to a legitimate aim, the information should still be disclosed if the public interest in disclosure outweighs the harm that would be done.[17] For example, certain information may be private in nature but at the same time expose high-level corruption within government. In such cases, the benefit in having the information disclosed may outweigh the harm done to the private interests of the official concerned. This test implies that every request for access has to be judged on an individual basis and that a blanket-rule limiting access to an entire class of information cannot be justified.

III. Analysis of the draft Law on Free Access to Information of Public Importance

This section analyses the draft Law in detail against international standards in the field, providing recommendations and suggestions for improvement throughout. Where appropriate, reference will be made to the "Model Law on Free Access to Information", jointly published in January 2003 by the Lawyers Committee for Human Rights 'YUCOM', the Center for Policy Studies, the Forum for Ethnic Relations and the European Movement in Serbia (the 'YUCOM Model Law').[18]

Scope of the draft Law

Articles 6 and 7 state the general principle that everyone shall have access to information that falls within the scope of the draft Law, without discrimination.[19] The scope of the draft Law is determined, in a somewhat roundabout way, through another four separate provisions. Article 1 states that the Law "regulates the right to access to information of public importance held by public authority bodies". Article 3 defines 'information of public importance' as "information on everything anyone has a justified interest to know," regardless of the format in which it is held. Under Article 4, public authorities are defined as all State, regional or local bodies or persons vested with public authority, any legal person wholly or partly funded by a State body, and any other person whose operations are directly managed or controlled by a State body. Article 5 states: "It shall be deemed that there is a justified interest of the public … to know … information created during the work or regarding the work of a public authority; information kept by a public authority or kept at

[16] Note 2, Preamble.
[17] Note 3, Principle 4.
[18] Belgrade, January 2003.
[19] Article 8 provides an interesting elaboration on the principle of non-discrimination, prohibiting the preferential disclosure of information to certain journalists or media organisations in order to protect a 'scoop'. Under Article 48, a media outlet that suffers as a result of a breach of Article 8 may sue for damages.

the order, on behalf or at the expense of a public authority; information older than twenty years unless a public authority proves its disclosure is not justified in the public interest." Article 5(1) creates a separate category for information that may disclose a threat to the protection of public health or the environment, in relation to which "[i]t shall be deemed that there is always a justified public interest to know."

In addition to making available information on request, the draft Law also requires public authorities proactively to publish information in a number of categories. Under Article 43, every public authority must publish a directory describing, amongst other things, its powers, functions, organisation, the kinds of information it holds and the manner in which requests for access may be made.

Under Article 13, "if a public authority disputes the accuracy or completeness of public information that has been published, it shall make public the accurate and complete information." We interpret this to mean that if a story appears in the press that inaccurately reports the contents of a document held by a public authority, or if a story misrepresents the position of a public authority on a certain issue, that public authority is under an obligation to publish the correct information, including all relevant documents.

Analysis

The right of access to information held by public authorities is a fundamental human right, crucial to a functioning democracy. A law implementing this right should be as straightforward as possible, clearly stating its scope and any exceptions to it. From the draft Law's Title and Articles 1 and 3, a reader could easily infer that the scope of the draft law is limited to information 'of public importance'. Although Article 5(2) clarifies that 'information of public importance' covers all information held by a public authority, this approach is unnecessarily complex and likely to lead to misunderstandings. By contrast, the YUCOM Model Law is much clearer. Article 1 states simply:

> Public authorities in the Republic of Serbia are required to allow the applicant free access to information which they control or which is in their possession…

Second, if paragraph 2 of Article 5 determines that all information held by a public body is subject to disclosure, it is not clear why it would be necessary to create a separate category of information disclosing a threat to public health or the environment, in paragraph 1. This suggests that there may be additional restrictions on information falling under paragraph 2 that are not clear from the (translated) text of the copy of the draft Law received by us.

Third, the rationale is unclear for the separate category, in Article 5, for information older than twenty years disclosure of which may be blocked if this is deemed "not in the justified public interest". At best this is an awkward attempt to institute a presumption against secrecy beyond 20 years. If this is the intention, the rule should be stated clearly, and in the exceptions part of the law. If the intention of this provision is otherwise, then we question the need for it.

Recommendations:

- The drafting of the operative provisions determining the scope of the Bill should be simplified, clearly stating the presumption that all information held by a public authority is subject to disclosure, subject only to the regime of exceptions.
- The reference to information older than 20 years in Article 5 should be replaced with a separate provision clearly setting out the presumption that no information should be secret beyond 20 years.

Open Meetings

Article 9 of the draft Law states: "Journalists shall have the right to directly follow the work of a public authority, especially by personally attending meetings i.e. sessions of public authorities." This 'right' appears to be unlimited.

Analysis

Principle 7 of the ARTICLE 19 Principles establishes that the public should have access to all formal meetings of public bodies with decision-making powers as well as all meetings of elected bodies and their committees, and such bodies as planning boards, boards of educational authorities and public industrial development agencies. Principle 7 establishes that meetings may be closed, but only in accordance with established procedures and where adequate reasons for closure exist (for example, to protect national security interests).

Article 9 of the draft Law only partly implements Principle 7. Principle 7 envisages that meetings should be open to all. While it is commonly accepted that journalists, because of the special role they play in a democratic society, may enjoy certain privileges, such as a special press gallery and access to ICT equipment, the right to attend meetings should not be reserved exclusively to them. Under international standards, this right extends to all persons, subject to practical constraints, such as space. For example, an NGO working on environmental issues should be allowed access to a meeting, as should a class of school children on a trip to learn about principles of democracy.

Furthermore, it is not feasible for this to be an unqualified right. As drafted, this provision would grant a right to attend the meetings of a hypothetical law enforcement committee in which the names and addresses of police informants may be mentioned. This would be unworkable and lead to conflict over this provision's scope of application. Article 21 of the YUCOM Model Law is clearer on both these points.

Recommendations:

- The draft Law should establish a presumption that sessions of public bodies are open to everyone, not just journalists.
- The exceptions to this presumption must be clearly laid down in the law, in accordance with international standards.

Exemptions

Article 10 states: "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."

The heart of the exemptions regime is formed by Articles 15-17. Article 15 provides that access may be refused on a number of non-controversial grounds, such as the prevention of crime or if disclosure would substantially undermine the government's ability to manage the national economy. The fourth bullet point of Article 15, however, provides that access must be refused if disclosure would "[m]ake available information or a document qualified as secret by regulations or an official document based on the law, i.e. if such a document is accessible only to a specific group of people and its disclosure could legally or otherwise prejudice the interests that are protected by the law and outweigh the access to information interest."

Under Article 16, access must be refused if disclosure would "violate the privacy, honor or any other right of a person … except if the person has agreed [or] such information regards a personality, phenomenon or event of public interest, especially a holder of a state or political post, and is relevant with regard to the duties that person is performing." Under the last bullet-point, information may also exceptionally be disclosed, "in other events when the rights of privacy, honor or another right of the person the information personally regards is not violated". This appears to be circular and unnecessary in light of the general rule established by the same article that access may be refused only if disclosure would violate these interests.

Article 17 provides an 'overriding interest' clause that runs directly contrary to the public interest override advocated by the ARTICLE 19 Principles and the Council of Europe Recommendation. It states: "A public authority … shall not allow insight in a document … if it would thereby seriously violate a justified interest overriding the applicant's interest in free access to public information."

A number of other limitations are provided in Articles 11-14. Article 11 states that access may be refused if the applicant "is abusing" the right of access. Article 12 states that access may be refused if the information has already been made publicly available, for example on the Internet, in which case the applicant must be advised where the information can be found. Article 14 states that where parts of a requested document are covered by the regime of exemptions, partial access to the remainder of the document should be allowed.

Analysis

Although many parts of the exemptions regime are uncontroversial, there are several important issues that need to be addressed.

First, it should be made absolutely clear that the requirement in Article 10 that access may be refused only to prevent a 'serious violation' of an 'overriding interest' applies to the following provisions. This presents a high standard which is not always followed in

Articles 15 and 16. For example, under the first bullet-point of Article 16, access may be refused if disclosure would 'violate the rights of privacy, honor or any other right'. This is a lower threshold than the 'serious violation' standard set out in Article 10, and reflected in the ARTICLE 19 Principles.[20]

Second, Article 11 allows for access to be refused if the applicant 'abuses' the right of access. However, the draft Law fails to define what constitutes 'abuse', thereby allowing this provision itself to be abused by refusing access for political purposes or other illegitimate reasons.[21] The purpose of a request should not be relevant to the fulfilment of that request, outside perhaps of limited circumstances, for example where the request is clearly vexatious or repetitive.

Third, the draft Law fails to provide an exhaustive list of aims in pursuit of which access may be refused, as mandated by the Council of Europe Recommendation.[22] In particular, the last bullet-point of Article 15 allows for disclosure to be restricted through additional regulations and laws. A freedom of information law should include a comprehensive regime of exceptions, but these should not be permitted to be extended by other laws. In particular, the freedom of information law should override other, inconsistent laws. Although this bullet-point does include a qualifier, to the extent that the secrecy interest should outweigh the access interest, this should be dealt with through a comprehensive regime of exceptions in the freedom of information law, rather than other laws.

Fourth, the 'overriding interest' provision in Article 17 – providing that access must be refused if disclosure would 'seriously violate a justified interest' – provides the exact opposite of the 'public interest override required by both the ARTICLE 19 Principles and the Council of Europe Recommendation. As set out in Section II, international standards require that even if it can be shown that disclosure of the information would cause substantial harm to a legitimate aim, the information should still be disclosed if the public interest in disclosure outweighs the harm that would be done.[23] A public interest override of this sort is missing from the draft Law. Furthermore, by failing to specify which reasons a public authority may invoke to justify a refusal, Article 17 provides an additional open-ended restriction on the right of access to information.

Recommendations:

- The exemptions regime should be redrafted to provide a single, high-threshold test allowing access to be refused only if disclosure will cause substantial harm to a listed aim.
- The last bullet-point in Article 15 should be removed; the draft Law should include a comprehensive regime of exceptions but it should not be allowed to be extended by other laws.

[20] Note 3, Principle 4.
[21] For example, in the EU context the European Commission has used a similar clause to refuse access to FOI campaigners who were accused of 'testing the system':
<http://www.freedominfo.org/case/eustudy/ch5.htm>.
[22] Note 2, Principle IV.
[23] Note 17.

- The draft Law should include a public interest override, providing that information should be disclosed if the public interest in disclosure outweighs the harm that disclosure would cause.

Access Procedure

The procedure for access requests is laid down in Chapter V of the draft Law. Under Articles 19 and 20, applicants are required to submit their request in writing, providing their full name and address and as many specifics as possible about the information sought. No reasons need be given. Public authorities are required to respond within 20 days of receipt of a request. If the information to which access is requested is relevant to the protection of public health, the environment or of an individual's life or freedom, the public authority concerned must respond within 48 hours. The 20-day deadline may be extended to 40 days. However, if a public authority fails to respond within this time limit, the applicant may file a complaint with the Ombudsman (discussed below). If access is refused, the public authority must provide written reasons and inform the applicant of the possibility of appeal.

Article 23 provides: "In the event a public authority does not hold the document containing the requested information, it shall refer the request to the Ombudsman and inform him who, to its knowledge, holds the document."

If access is granted, the public authority informs the applicant of the time, place and manner in which access may be gained, as well as the cost of access. As a rule, documents may be inspected on the public authority's premises. For 'justified reasons', an applicant may request to have access at a time other than the one indicated by the public authority. If the applicant requests a copy of the document, the public authority concerned may charge for the costs of duplication (with the exception of legal texts, such as laws and regulations). Under Article 21, journalists and human rights NGOs are exempt from the requirement to pay costs. The Ombudsman is required to monitor how much public authorities charge for access, and issue recommendations "with the aim of conforming the practice".

Analysis

There are a number of positive aspects to the access regime, such as the firm deadlines, avoiding lengthy procedures, the expedited procedure for requests that relate to public health and the environment, and the fee-waiver for human rights NGOs and journalists. At the same time, however, the regime appears rigid and cumbersome in places, and fails to make use of modern information and communications technology. In addition, the failure to prescribe a centralised fee schedule or to limit fees could potentially lead to certain authorities charging prohibitive fees.

Under Article 19 of the draft Law, requests will be considered only if they are in writing and bear the applicant's full name and address. Although this would make sense for a request received by post, it is unnecessary for email requests. In fact, Articles 19 and 20, as drafted, do not appear to envisage the possibility of granting access requests via fax or

email. In view of the low cost of the latter method of delivery, this should certainly be considered.

Second, it is unclear why a public authority, if it knows that another public authority holds the information requested, should have to forward that information to the Ombudsman. It would make far more sense for this to be communicated to the applicant directly, removing what appears to be an unnecessary layer of bureaucracy.

Third, consideration should be given to providing for a central, binding fee schedule for all public bodies covered, drawn up in consultation with the Ombudsman. Otherwise, there is the possibility of inconsistency in the level of fees being charged, as well as of some departments charging excessive fees. Furthermore, consideration should be given to a fee structure whereby a set amount of information can be provided for free, for example through email, or at reduced cost. The whole purpose of a freedom of information law, namely to promote access to public information, can be seriously undermined by an excessive fee structure.

Finally, the phrase 'human rights NGO', as one of the groups in Article 21 for whom fees are waived, may in practice be interpreted restrictively to cover only a small group of organisations, excluding for example environmental pressure groups. It is recommended that the scope of this provision be broadened to include all non-governmental organisations.

Recommendations:

- The draft Law should require only the minimum necessary contact details to be provided, taking into account the manner of placing the request.
- If a public authority is aware that information requested is held by another public authority, it should inform the applicant directly.
- Consideration should be given to introducing a central fee structure, drawn up in consultation with the Ombudsman.
- All NGOs should benefit from the fee waiver.

Appeal procedures and supervision

Chapter VII of the draft Law establishes the office of the Ombudsman. Article 34 provides that s/he will be a "personality of acknowledged renown and with experience in the field of protecting or promoting human rights". Furthermore, the Ombudsman must have a law degree and fulfil the requirements for employment in State bodies.

The Ombudsman is appointed for a term of seven years and may be reappointed only once. S/he is formally appointed by the National Assembly, on the proposal of the High Judiciary Council.

Article 36 provides: "The Ombudsman shall be independent and autonomous in the exercise of his powers [and] shall neither seek nor accept orders or instructions from state bodies or other persons." No person employed by a public authority may become

Ombudsman. The Ombudsman may be dismissed by a vote of the National Assembly only if s/he has been convicted of a crime carrying a punishment of an unconditional prison sentence, in the event of permanent incapacity or if s/he holds a post or becomes employed by a State body or a political party. In addition, Article 35(2) provides that the Ombudsman may be dismissed in the event a court passes a legally binding ruling against him for a punishable act rendering him or her unworthy of performing the duties of an Ombudsman, or if s/he performs his/her duties unprofessionally or unconscientiously.

The Ombudsman's duties include monitoring respect for the law, preparing draft regulations to implement and promote the right of access to information, proposing measures to public authorities to improve access to information, training employees of public bodies, and hearing complaints against decisions of public authorities. In addition, s/he must publish an annual report on the implementation of the law, activities undertaken by public authorities as well as the Ombudsman's activities. Finally, Article 41 requires the Ombudsman to publish, without delay, a guide for the public on how to use the Law. This guide should be publicised widely, including through the print and broadcast media, the Internet and 'public panel discussions'.

The Ombudsman will have a Deputy and staff. Under Article 38, the Ombudsman's budget is determined by the National Assembly, at the proposal of the Ombudsman.

Article 26 provides that applicants may refer any refusal to provide access to the Ombudsman, including refusals to reply within the set time limit, fee requirements that appear to exceed the actual cost of duplication and other procedural anomalies. The Ombudsman must reach a decision within 30 days, giving the public authority and, if necessary, the applicant, an opportunity to respond in writing. The Ombudsman may have access to all necessary documentation. Under Article 31, the Ombudsman's decisions are binding in law. If the Ombudsman decides against the applicant, s/he may appeal to the Supreme Court of Serbia.

Under Article 28, the Ombudsman may also conduct an inquiry *ex officio*. The public authority against whom such an inquiry is instituted must be given an opportunity to respond, and the Ombudsman will have access to all documentation necessary. The Ombudsman decision is binding on the public authority.

Analysis

The supervision and appeals process provided by the draft Law is largely in line with international standards, except for two matters.

First, although the Ombudsman will be appointed by the National Assembly, a multi-party body, s/he will be nominated by the High Judiciary Council, who will only propose one candidate. The Law does not provide for transparency in the nominations process, nor does it require any civil society involvement. This may result in the appointments process being shrouded in secrecy. The only option the Assembly will have in relation to a candidate it disapproves of is to refuse to appoint him or her. It would be better if the system allowed for some public scrutiny of a list of candidates, either during proceedings

in the Assembly, or during formal nomination proceedings prior to the vote in the Assembly.

Second, although the draft Law provides that the Ombudsman may order a public authority to take the necessary measures to fulfil its obligations under the Law, we would advise that the draft Law explicitly provides that the Ombudsman may make binding orders with regard to fee schedules, as discussed above, and to impose costs on public bodies in relation to the appeal. More generally, the draft Law should clarify whether Article 31, on the binding nature of the Ombudsman's decisions, applies only in relation to individual cases and *ex officio* enquiries in relation to a specific public authority, or whether s/he can make binding recommendations across the sector.

Recommendations:

- The draft Law should provide for more transparency in the nominations process for the Ombudsman.
- The Ombudsman should have the power to impose costs on public bodies in appeal cases and to make binding orders in relation to fee schedules.
- The draft Law should clarify whether the Ombudsman has a power to make binding recommendations across the sector.

Miscellaneous

Tackling the culture of secrecy

The draft Law contains a number of measures designed to tackle the culture of secrecy that prevails within many departments of government as well as at the regional and local levels. All public authorities are required to appoint a public spokesperson who will function as a point of contact for requests and who will be responsible for good practice in information housekeeping within the body concerned, in accordance with guidelines drawn up by the Ombudsman. The spokesperson will submit an annual report on the implementation of the Law to the Ombudsman. In addition, all staff employed by public bodies are to be trained on the requirements and implementation of the Law.

Provisions such as these will greatly aid the effective implementation of the Law and are in accordance with international standards.

Whistleblowers

Article 18 provides: "A person, who gives others insight in a document in contravention of a professional legal obligation of confidentiality or another legal obligation, shall not be held legally liable if there is overriding justified interest to allow insight in the document, particularly [if it] contains information on … crime, corruption or another violation of the law, negligence or an error that inflicted serious negative consequences and if the person had justified reason to believe in the accuracy of the information."

Protection of 'whistleblowers', as such individuals are colloquially known,[24] is advocated in Principle 9 of the ARTICLE 19 Principles. However, this should go beyond merely protecting whistleblowers against legal liability. In many cases, protection will also be needed to ensure that the whistleblower does not suffer administrative or employment related sanctions, such as a demotion.

Fines and damages

Chapter X, entitled 'punitive provisions', provides significant penalties for contravention of the Law. Under Articles 49-51, fines ranging from 30,000-300,000 dinars (USD 500-5,000) may be imposed on a public authority's spokesperson or another senior person within the authority for contraventions such as failing to communicate complete and accurate information, failing to publish a directory or refusing to receive a request.

We do not consider that it is fair to impose such drastic fines on individuals within a State body. The purpose of imposing a fine for violations of the Law is to alter the behaviour of public bodies, not to target particular individuals. Such an approach may lead to scapegoating within departments and will not necessarily promote the kind of structural change needed to ensure access to information in practice. It is also unfair on individuals, who perhaps make mistakes because of insufficient training or unclear guidance notes. In such cases, it would be preferable to impose the fine on the authority as a whole, rather than to pinpoint one individual on whom to lay the blame.

Recommendations:

- Whistleblowers should be protected against any legal, administrative or employment-related sanction.
- The draft Law should provide for fines to be imposed on public authorities, not individuals working for a public authority.

[24] The origin of the term may lie in a 1903 New Jersey Statute (NJ Laws of 1903, Chap. 257, section 35), which created a penalty for every failure by a railroad to ring a bell or blow a whistle at a railroad crossing. The statute provided that 50% of the penalty was to be paid to the informer who commenced the action for recovery of the penalty. Subsequently, in various New York decisions, the term "whistleblowing" and "whistleblower statute" came into use, which could well be a reference to the 1903 New Jersey statute which rewarded persons who sued for a railroad's whistleblowing failure. See, generally:
< http://www.lawmall.com/files/pamphle2.html>.