MEMORANDUM

on

the Proposal for the Adoption of the Law on Free Access to Information of the Former Yugoslav Republic of Macedonia

by

ARTICLE 19
Global Campaign for Free Expression

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I. Introduction

ARTICLE 19 has been asked to comment on the Macedonian Proposal for the Adoption of the Law on Free Access to Information (Proposal on FOI), which we understand is being considered by the Ministry of Justice and will be the subject of a public debate in October. Our comments are based on an unofficial English translation of the Proposal on FOI.[1]

ARTICLE 19 welcomes the Proposal on FOI. We consider legislation implementing the right of access to information held by public bodies to be central to any working democracy, as well as necessary to ensure respect for the fundamental right to freedom of expression, which includes the right to seek and receive information. We also specifically welcome the Proposal, which is progressive and forward-looking, incorporating many best practices in this area. Finally, we welcome the fact that the current Proposal has

[1] ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.

incorporated many of the recommendations we made in our Memorandum on the Macedonian Law on Free Access to Public Information, published in November 2003 (2003 Memorandum).[2]

At the same time, we believe that the Proposal on FOI could still be further improved. A number of our earlier recommendations have not yet been acted on, some omissions remain and a few new issues have arisen in the current Proposal. Our concerns include the somewhat limited scope of the law, some unclear definitions in the regime of exceptions, the weak proposal for record management systems and the lack of protection for whistleblowers.

This Memorandum contains an analysis of the Proposal on FOI against international standards in this area, based on the guarantees of freedom of expression found in the *Universal Declaration of Human Rights* (UDHR),[3] the *International Covenant on Civil and Political Rights* (ICCPR),[4] and the *European Convention on Human Rights* (ECHR),[5] all of which are binding on Macedonia. These standards are illustrated and expounded upon in the Council of Europe's Recommendation on Access to Official Documents[6] and two key ARTICLE 19 publications, *The Public's Right to Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles)[7] and *A Model Freedom of Information Law* (the ARTICLE 19 Model Law).[8]

Our 2003 Memorandum provided a more detailed outline of the specific scope of these obligations in the area of freedom of information, as well as those found in the Constitution of Macedonia, and we refer readers who may be interested in this elaboration to that document.

II. Analysis of the Proposal on FOI

II.1 The Scope of the Proposal on FOI

The Proposal on FOI defines the scope of information covered, referred to in Article 3 as 'public information', as including all recorded information, regardless of its form and whether it was drawn up by or merely received by a public authority. However, the definition is limited to information "linked to any public or administrative function" and "documents under preparation" are excluded from its ambit.

Public bodies, or 'information-holders', as they are styled in the Proposal, are defined as, "administrative bodies, local self-government units and the City of Skopje, public

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[2] Available at www.article19.org/docimages/1697.doc.
[3] UN General Assembly Resolution 217A(III), 10 December 1948.
[4] UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.
[5] E.T.S. No. 5, adopted 4 November 1950, entered into force 3 September 1953.
[6] R(2000)2, adopted by the Committee of Ministers on 21 February 2002.
[7] ARTICLE 19 (London, 1999). Available at: http://www.article19.org/docimages/512.htm. The ARTICLE 19 Principles have been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression. See 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. 43.
[8] ARTICLE 19 (London, 2001). Available at: http://www.article19.org/docimages/1112.htm.

institutions and services, as well as by legal and natural persons rendering public services".

Analysis
As noted in our 2003 Memorandum, it is of the greatest importance that both information and public bodies be defined as broadly as possible for purposes of ensuring a broad right of access to information. Limitations on either information or public bodies undermine the right of access and cannot be justified.

Information should be defined broadly to cover any recorded information held by a public body. We welcome the fact that, unlike the version we analysed previously, the current Proposal is not restricted to information which originates from a public body. At the same time, the Proposal is unnecessarily limited to information linked to a public function. There is simply no justification for this and many other laws do not contain a limitation of this sort. Furthermore, the idea of a public function is impossibly subjective, so its introduction is likely to generate disputes about its scope, further undermining the right of access. Similarly, the exclusion of documents under preparation is not justified. There is an exception, in Article 7, for internal processes, and this should suffice to protect any legitimate interest in this area. Wholesale exclusion of such documents from the scope of the law means that the harm and public interest tests, which are present in Article 7, do not apply.

The definition of public bodies appears to be fairly comprehensive. At the same time, it suffers from some lack of clarity. It would be preferable if it were quite clear that all constitutional and statutory bodies were included, as well as all bodies controlled or funded by public bodies, to the extent of that funding.

Recommendations:

- Information should be defined simply as all recorded information held by public bodies, regardless of the source; no conditions should be placed on this definition.
- The definition of public bodies in Article 1 should be clarified in accordance with the recommendations above.

II.2 Regime of Exceptions

Article 1 of the Proposal on FOI states, in part: This Law excludes any provisions from other laws which may restrain or prohibit the right to free access to information regulated by this law." It is not clear whether or not this serves to ensure that, in case of conflict, the provisions of the access law will prevail over any law providing for secrecy.

The main part of the regime of exceptions is provided for in Article 7. This article sets out some ten protected interests that may justify non-disclosure, further providing that access may be refused only if disclosure "would or would be likely to harm" one of the interests listed. In addition, the information must still be released if there is an overriding public interest in disclosure.

Article 8 contains a 'severability' clause, providing for the release of any non-exempt part of a document that also contains exempt information.

Article 9 sets out the regime for personal information, prohibiting the "unreasonable disclosure of personal information about a natural third party". It also provides for exceptions to this exception, including where the person has been dead for more than 20 years or where the information relates to the official actions of a public official.

Analysis

The regime of exceptions in the current Proposal on FOI is far narrower and much more consistent with international standards than that found in the draft analysed in our 2003 Memorandum. The access law appears to override other, inconsistent laws, there is a far shorter list of protected interests, all are subject to a harm test, there is a public interest override and the official actions of public officials are now excluded from the privacy exception. At the same time, further improvements could still be made.

It is not entirely clear whether or not the provision in Article 1, quoted above, does in fact mean that the access law would prevail over a secrecy law in case of conflict. This is, as we noted in our 2003 Memorandum, a matter of the greatest importance. Otherwise, secrecy laws, including the recently enacted Law on Classified Information of the Former Yugoslav Republic of Macedonia, could override the access law, seriously undermining it. Indeed, in our Memorandum on the classification law, published in May 2004, we made this point very forcefully.[9]

As noted above, the list of protected interests in the current Proposal is far tighter, and shorter, than the previous such list. We note, however, that it still contains an exception in favour of privacy, whereas this is now adequately protected by Article 9.[10] Furthermore, some of the specific protected interests could be defined more clearly and narrowly. For example, one of the interests is listed as "inspection, control and supervision by public authorities". It is not clear what this refers to but it could certainly be interpreted unduly broadly. In contrast, for example, the ARTICLE 19 Model Law specifies the following related interests:

> (a) the prevention or detection of crime;
> (b) the apprehension or prosecution of offenders;
> (c) the administration of justice;
> (d) the assessment or collection of any tax or duty;
> (e) the operation of immigration controls; or
> (f) the assessment by a public body of whether civil or criminal proceedings, or regulatory action pursuant to any enactment, would be justified.[11]

Similarly, the Proposal contains an exception in favour of "the economic, monetary and exchange rate policies of the state", whereas the ARTICLE 19 Model Law specifies:

[9] Available at: http://www.article19.org.
[10] Article 9 should, however, be subject to a public interest override in the same way as all other exceptions.
[11] Note 8, section 29.

> (1) A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to, cause serious prejudice to the ability of the government to manage the economy of [insert name of State].
> (2) A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to, cause serious prejudice to the legitimate commercial or financial interests of a public body.
> (3) Sub-sections (1) or (2) do not apply insofar as the request relates to the results of any product or environmental testing, and the information concerned reveals a serious public safety or environmental risk.[12]

Finally, the Proposal recognises as an interest, "the confidentiality of deliberations within or between public authorities during the internal preparation of a matter." Again, the ARTICLE 19 Model Law uses much more precise and narrow language as follows:

> (1) A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to: –
> (a) cause serious prejudice to the effective formulation or development of government policy;
> (b) seriously frustrate the success of a policy, by premature disclosure of that policy;
> (c) significantly undermine the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views; or
> (d) significantly undermine the effectiveness of a testing or auditing procedure used by a public body.
> (2) Sub-section (1) does not apply to facts, analyses of facts, technical data or statistical information.[13]

We very much welcome the fact that the Proposal on FOI now includes a public interest override, whereby information must be disclosed, notwithstanding a risk of harm to a protected interest, where, "there is an overriding public interest in disclosure." At the same time, given the importance of access to information and the role of the public interest override, it would be preferable for the presumption to be reversed and for the information to be disclosed unless the harm to the protected interest *outweighs* the public interest in disclosure.

Recommendations:

- The access to information law should make it quite clear, if this is not already the case in the Proposal on FOI, that, in case of conflict, it prevails over secrecy laws.
- The description of some of the protected interests should be narrowed, in line with the comments above.
- The presumption in the public interest override should be reversed, so that information is subject to disclosure unless the harm to the protected interest outweighs the public interest in disclosure.

[12] *Ibid.*, section 31.
[13] *Ibid.*, section 32.

II.3 Procedural Matters

Part VI of the Proposal on FOI, comprising Articles 14-26, sets out the procedure for accessing information.

Provision is made for both oral and written requests, although it would appear that delivery by email is not contemplated for the latter, given that Article 16, which we assume deals with written requests,[14] requires requesters to provide their postal address. It would be preferable if requests could also be made by email, given the obvious advantages which this entails.

The Proposal provides, in Article 19, for the transfer of requests where the body which originally received the request does not hold the relevant information. In such cases, the time period for responding to requests, normally 15 days, starts to run from the point at which the body to which the request has been transferred actually receives the request. No time limits are provided for the actual transfer of the requests – as opposed to informing the requester of the transfer – so these should either be included or an overall additional time limit set out for transfer requests, say of an additional 5-7 days.

Pursuant to Article 21, information provided in response to a request must be "complete and accurate, in terms of its whole content." It is not entirely clear what this means and it may mean simply that all of the requested information should be provided and that it may not be altered prior to its release. If so, this is unobjectionable. If, on the other hand, it is taken to suggest that the information must, of itself, be accurate, then it is based on a misunderstanding of the role of an access to information regime. That role is to ensure that everyone can access the information that is actually held by public bodies, regardless of whether or not that information is itself accurate. Indeed, it may be that the very purpose of an information request is to establish that the government is holding incorrect information.

Article 21, titled 'Responding to an Information Request' appears to be restricted to cases where access is granted. The Proposal fails to stipulate what should happen where access is refused. In such cases, the requester should be provided with a notice of refusal of access, which sets out the specific exception upon which the refusal is based, reasons for the refusal and the requester's rights of appeal.

Articles 25 and 26 provide for a system of fees for information requests. This system is generally very positive, designed to keep costs low and to ensure that it operates in a transparent fashion. It does, however, allow each public body to set its own schedule of fees; consideration should be given to allocating responsibility for this to some central authority, to ensure that fees are consistent across the public service and that no public bodies charge exorbitant fees as a means of inhibiting access to information.

Recommendations:

- Provision should be made for requests for information to be made by email.

[14] This is not made explicit in the Proposal on FOI.

- Clear time limits should be set out for transferred requests.
- The access law should not require public bodies to provide accurate information; rather, they should be required to provide the precise information that they actually hold.
- The access law should require public bodies to notify requesters of any refusal to grant access and such notice should specify the exception relied upon, the reasons for the refusal and the requester's rights of appeal.
- Consideration should be given to providing for a central system of fees, overseen by one central authority.

II.4 The National Information Commission

The Proposal on FOI provides for the establishment of a five-member National Commission for Free Access to Information. This body is formally independent and an effort has been made to ensure that its independence is respected in practice. As in other cases, some of the recommendations from our 2003 Memorandum have been incorporated into the provisions dealing with the Commission.

There are two ways in which the independence of the Commission could be further enhanced. Article 27 provides for the administrative, expert and technical duties of the Commission to be performed by the Ministry of Justice. No doubt this is an attempt, taking into account the fact that Macedonia is not a large country, to limit the costs and human resources required to run the Commission. At the same time, allocating these important functions of the Commission to the Ministry of Justice could seriously undermine the former's independence. We are not aware of other countries where this has been done and strongly recommend that it be reconsidered.

Second, the appointments process for members of the Commission is overseen by Parliament, via the Commission for Selections and Appointments. This is a good way of ensuring that it is an open, multi-party process. At the same time, there could be more formal opportunities for input by civil society, for example by providing for one or more of the members to come from civil society (and perhaps be nominated by it), by allowing civil society to nominate members or by requiring a shortlist of candidates to be published, allowing for public scrutiny.

Recommendations:

- The Commission should be responsible for its own administrative, expert and technical duties. At a minimum, such resources should not be supplied by a ministry.
- The appointments process for members should ensure some role for civil society as a way of further enhancing the Commission's independence.

II.5 Miscellaneous Comments

Record Management

Article 10 of the Proposal on FOI places an obligation on public bodies to maintain their records "in a manner which facilitates the right to information." This is a positive addition, absent in the draft analysed in our 2003 Memorandum. At the same time, this

provision does not go far enough in providing for a system to ensure that this obligation is actually implemented.

There are a number of systems which could be put in place to promote good record management. One is to allocate responsibility to a central body to produce a code of practice on record management, to which all public bodies are required to conform. This ensures that there is at least a minimum platform of standards in this area. Another approach is to require each public body to prepare its own code of practice, or guidelines, on record management, perhaps to be approved by the Commission. Both of these systems should provide for regular review and updating of the codes, so as to ensure that record management practices are steadily enhanced over time.

Protected Disclosures

Article 34 provides that officials who release information with a view to informing the public in a timely, accurate and complete fashion shall not be held accountable if the information "is not within the bases of denying access to information determined in article 7" of the Proposal on FOI. It is not quite clear what the purpose of this provision is and the translation is perhaps confusing. Ideally, though, an access to information law should provide for two different sorts of protection.

First, officials who release information pursuant to a request should be protected against sanction – legal, administrative or employment-related – as long as they acted in good faith and perhaps reasonably. This should be the case whether or not the information in fact fell within the scope of the regime of exceptions. Such protection is necessary to overcome the culture of secrecy which prevails in most countries. Absent such protection, officials are likely to be ever fearful of making a mistake in releasing information, buttressed by a longstanding practice of almost never releasing any information to the public. This could seriously undermine the access to information regime and the goals of the legislation.

Second, officials who release information on wrongdoing, even in the absence of a request, should be protected against sanction, again as long as they acted in good faith. Wrongdoing in this sense should include corruption or dishonesty, breach of a legal duty, commission of a criminal offence, a miscarriage of justice or serious maladministration.

Sanctions for Destruction of Records

Articles 35-38 of the Proposal[15] provide for fines for public bodies and individuals who destroy documents with the goal of making such information inaccessible to the public. These are positive provisions which help prevent deliberate acts to deny access. At the same time, there are a number of ways officials can undermine access to information without actually destroying documents. These provisions should be broadened to cover all actions which are taken with the specific and deliberate aim of obstructing access to information.

[15] Article 36 appears to be missing.

Recommendations:

- The access law should provide for an effective system to ensure good record management systems, in addition to a simple obligation to maintain records appropriately, for example along the lines suggested above.
- Officials who release information either pursuant to a request or on wrongdoing should be protected against sanction as long as they acted in good faith.
- The penal provisions for destroying records should be extended to apply whenever public bodies or officials act with specific intent to unlawfully deny access to information.

II.6 Omissions

Duty to Publish

As we noted in our 2003 Memorandum, a good access to information regime does not only provide for request-driven access, but also places an obligation on public bodies to proactively disseminate information of key public interest. This is of some importance to ensure broad access by members of the public to this information, given that many individuals will never make an actual request for information.

The Proposal on FOI addresses this in part by requiring public bodies to report annually to the Commission concerning their activities in the area of information disclosure. The duty to publish, however, should go beyond this, requiring public bodies actively to publish a wide range of information about how they function, their budgets and so on.

The ARTICLE 19 Model Law, for example, requires public bodies to publish the following information:

> Every public body shall, in the public interest, publish and disseminate in an accessible form, at least annually, key information including but not limited to: –
> (a) a description of its structure, functions, duties and finances;
> (b) relevant details concerning any services it provides directly to members of the public;
> (c) any direct request or complaints mechanisms available to members of the public regarding acts or a failure to act by that body, along with a summary of any requests, complaints or other direct actions by members of the public and that body's response;
> (d) a simple guide containing adequate information about its record-keeping systems, the types and forms of information it holds, the categories of information it publishes and the procedure to be followed in making a request for information;
> (e) a description of the powers and duties of its senior officers, and the procedure it follows in making decisions;
> (f) any regulations, policies, rules, guides or manuals regarding the discharge by that body of its functions;
> (g) the content of all decisions and/or policies it has adopted which affect the public, along with the reasons for them, any authoritative interpretations of them, and any important background material; and

(h) any mechanisms or procedures by which members of the public may make representations or otherwise influence the formulation of policy or the exercise of powers by that body.[16]

Promoting Better Public Awareness

One of the key impediments to the success of many access to information laws is the lack of public awareness both of the very existence of the law and about how to use it. The Proposal should require the Commission to play a proactive role in this area, undertaking public education campaigns and publishing a guide on how to use the law.

Recommendations:

- The Proposal on FOI should impose a broad obligation on public bodies to proactively publish a wide range of information about how they function and so on, as suggested above.
- The Commission should be required to play an active role in promoting public awareness of the access to information law and about how to use it.

[16] Note 8, section 17.