MEMORANDUM

on

the Macedonian Law on Free Access to Public Information

ARTICLE 19
Global Campaign for Free Expression

November 2003

I. Introduction

This Memorandum analyses the official draft Macedonian Law on Free Access to Public Information (draft Law) published by the Ministry of Justice. The English translation we have received is not an official translation and differences pointed out to us between the Macedonian and English translations have been noted in the analysis.

ARTICLE 19 welcomes the draft Law and regards it as a positive step to advance freedom of expression and information in Macedonia. The draft Law has some of the key elements needed in an effective freedom of information law, including an independent oversight body, accommodation of oral requests for information and provision for liability for those who intentionally block access to information.

There are, however, areas in which the draft Law could be considerably improved in order to safeguard the public's right to know. A particular concern is the excessive regime of exceptions to the right of access. Other concerns include the confusing regime for appeals from refusals of access, the lack of a strong obligation to publish even in the absence of a request for information and the failure to establish a system to ensure that records are maintained in good condition by public authorities.

We analyse the draft Law against international standards. Section II outlines these standards, particularly as developed under the *Universal Declaration of Human*

Rights (UDHR)[1] and the *European Convention on Human Rights* (ECHR),[2] as illustrated and expounded in the Council of Europe's Recommendation on Access to Official Documents[3] and two key ARTICLE 19 publications, *The Public's Right to Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles)[4] and *A Model Freedom of Information Law* (the ARTICLE 19 Model Law).[5] Section III contains the principal analysis of the draft Law.

II. International and Constitutional Standards

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

> Freedom of information is a fundamental human right and… the touchstone of all the freedoms to which the UN is consecrated.[6]

In ensuing international human rights instruments, freedom of information was not set out separately but was included in the fundamental right to freedom of expression, which includes the right to seek, receive and impart information. Article 19 of the *Universal Declaration of Human Rights* (UDHR), generally considered to be the flagship statement of international human rights, binding on all States as a matter of customary international law, guarantees the 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 and regardless of frontiers.

The *International Covenant on Civil and Political Rights* (ICCPR),[7] a legally binding treaty which is binding on Macedonia,[8] guarantees the right to freedom of opinion and expression in very similar terms to the UDHR, also in Article 19. The ECHR, ratified by Macedonia on 10 April 1997, also guarantees freedom of expression, at Article 10.

Numerous official statements have been made to the effect that the right to freedom of expression includes a right to access information held by public authorities. The right to information has also been proposed as an independent human right. Some of the key standard setting statements on this issue follow.

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[1] UN General Assembly Resolution 217A(III), 10 December 1948.
[2] E.T.S. No. 5, adopted 4 November 1950, entered into force 3 September 1953.
[3] R(2000)2, adopted by the Committee of Ministers on 21 February 2002.
[4] ARTICLE 19 (London, 1999). 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.
[5] ARTICLE 19 (London, 2001).
[6] 14 December 1946.
[7] UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.
[8] Macedonia ratified this treaty on 18 January 1994.

The UN Special Rapporteur on Freedom of Opinion and Expression has frequently noted that the right to freedom of expression includes the right to access information held by public authorities. He first broached this topic in 1995 and has included commentary on it in all of his annual reports since 1997. For example, in his 1998 Annual Report, the UN Special Rapporteur stated:

> [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….[9]

In November 1999, the three special mandates on freedom of expression – 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 – 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.[10]

Within Europe, as noted above, the Committee of Ministers of the Council of Europe has adopted a Recommendation on Access to Official Documents, calling on all Member States to adopt legislation giving effect to this right. The Recommendation provides for a general guarantee of the right to access official documents, as well as specific guidance on how this right should be guaranteed in practice:

> III
> *General principle on access to official documents*
>
> 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 national origin.

The European Union has also recently taken steps to give practical legal effect to the right to information. The European Parliament and the Council adopted a regulation on access to European Parliament, Council and Commission documents in May 2001.[11] The preamble, which provides the rationale for the Regulation, states in part:

> Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights….

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[9] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14. These views were welcomed by the Commission. See Resolution 1998/42, 17 April 1998, para. 2.

[10] 26 November 1999.

[11] Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

The purpose of the Regulation is "to ensure the widest possible access to documents".[12]

These international developments find their parallel in the passage or preparation of freedom of information legislation in countries in every region of the world. Most States in Europe now have freedom of information legislation on the books with the passage by the United Kingdom, in November 2000, of the Freedom of Information Act, 2000. In Asia, India and Pakistan have recently adopted freedom of information laws, joining Hong Kong, Japan, South Korea and Thailand, and bills are currently pending before the Sri Lankan, Indonesian and Philippine parliaments. These developments are now starting to take root in Africa, where a number of draft freedom of information laws have been tabled recently, adding to the legislation already in force in South Africa and Zimbabwe. In the Americas, freedom of information legislation has been passed in the United States, Canada, Mexico and Peru, and draft laws are being prepared in Argentina, Ecuador, Guatemala, Nicaragua, Uruguay and Paraguay.

Article 16 of the Constitution of Macedonia states:

> (1) The freedom of personal conviction, conscience, thought and public expression of thought is guaranteed.
> (2) The freedom of speech, public address, public information and the establishment of institutions for public information is guaranteed.
> (3) Free access to information and the freedom of reception and transmission of information are guaranteed.
> (4) The right of reply via the mass media is guaranteed.
> (5) The right to a correction in the mass media is guaranteed.
> (6) The right to protect a source of information in the mass media is guaranteed.
> (7) Censorship is prohibited.

This specifically guarantees the right to access information, in sub-article (4).

III. Analysis of the Draft Law

a) The Scope of the Draft Law

The General Provisions set out the scope of the draft Law. It is important that the definitions in this section are broadly defined in order to allow genuine and uninhibited access to all information, subject to a limited range of exceptions. This section defines the meaning of public bodies (Article 1) and public information (Article 3) and describes the obligation on the information-holders "'to provide free access to information" (Article 5).

Article 1(1) defines the public bodies that are obliged to disclose information under the draft Law. It defines the obligees as "administrative bodies, local self-government units and the City of Skopje, public institutions and services, as well as legal and natural persons rendering public services." Article 1(2) states that "unless specified otherwise by this law, the right to free access to information regulated by another law shall also be exercised."

[12] *Ibid*., Article 1(a).

Article 3 defines the meaning of 'public information' as information 'originating' from the work of an information-holder. It also lists the forms in which the information may be held as "document, act, file, registry, record or documented material…."

Article 6 elaborates on the principles underlying the right to free access to information as "legality, publicity, equality, accuracy, fairness, cost-efficiency, publication and protection of personal information".

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.

The scope of the bodies obliged to disclose information in Article 1(1) is not as clear as it should be. In particular, although this may be implied, it is not very clear whether it includes all bodies established by law or financed by the public funds. In some countries, the definition of bodies obliged to disclose information under freedom of information laws goes even further. For example, the recently adopted[13] Law of Republic of Armenia on Freedom of Information brings within its ambit, "private companies of public importance," defined as companies that have a monopoly over a service (for example telecommunications) even if these companies do not receive any public funds.

It is not entirely clear what is the purpose of Article 1(2), providing for other laws regulating access to information to be exercised unless specified otherwise by the draft Law. In any case, it should be clear that these laws, which may be more restrictive than the draft Law, may not undermine the regime of openness it establishes.

Article 3 limits the scope of the draft Law to public information 'originating' from an information-holder. This considerably narrows the scope of the draft Law as all public bodies hold much information that they did not produce themselves and this information should also be subject to disclosure. Rather than defining 'public information' as information 'originating' from a public body, it should be defined as any recorded information, regardless of whether or not it was created by the body that holds it.[14] Article 3 also lists the forms in which information may be presented and, while it is clear that an attempt has been made to be quite comprehensive, at the same time any list will inevitably have its shortcomings and general rules of law suggest that where a list is presented, any items which have been excluded are the result of conscious exclusion. As a result, it may be preferable simply to define information as any material which is capable of communication, without providing a list of the means by which such communication may take place.

Finally, Article 6, defining the principles underpinning the right to access information, is confusing. The principles listed are, by-and-large, very general in nature and

[13] Adopted by the National Parliament of RA on 23 September 2003.
[14] See the ARTICLE 19 Model Law, section 7.

several would or should apply to any law. It is hard to see how these particular principles will assist in promoting the right to information, or even in interpreting the law. In this regard, these principles may be distinguished from the objectives, for example, of the South African Promotion of Access to Information Act,[15] which include, among other things, "to promote transparency, accountability and effective governance of all public and private bodies" and to give effect to the constitutional obligations of the State of promoting a human rights culture and social justice".

Recommendations:

- The definition of public bodies in Article 1(1) should make it clear that it includes any body that carries out a public function or which is financed in whole or in part by public funds.
- Article 1(2) should be redrafted to make it clear that in every case the more liberal access provisions prevail.
- Article 3 should be redrafted to refer to information 'held by' rather than 'originating from' public bodies and the reference to the forms in which information may be held should be removed.
- The principles underpinning the draft Law should either be removed or redrafted so as to promote the attainment of openness goals.

b) The Regime of Exceptions

One of the most serious problems with the draft Act is the regime of exceptions to free access to information. First, Article 7 provides that obligees "*shall* deny the access to information" where the information falls within the scope of exceptions as set out in the draft Law. While there may be circumstances where such a strong formulation as "shall deny" is warranted, in general, ARTICLE 19 advocates a more permissive system, whereby officials *may* deny access, instead of being required to do so.

In Article 7, there are 18 separate provisions setting out exceptions to the right of access to information. Many of them are unclear, repetitive and overlapping, and in many cases different interests are embraced under one provision. Under international law, all information should be accessible subject only to a regime of exceptions that is narrowly and precisely drawn. Otherwise, the very purpose of a freedom of information law will be undermined.

ARTICLE 19 recommends that all information be subject to disclosure unless it meets a strict three-part test, as follows:

- the information must relate to a legitimate aim listed in the law;
- disclosure must threaten to cause substantial harm to that aim; and
- The harm to the aim must be greater than the public interest in having the information.[16]

This implies first that every aim justifying non-disclosure is set out in some detail in law. Second, it is not enough for the information simply to relate to the aim; rather disclosure must threaten to cause substantial harm to that aim. Otherwise, there can be

[15] Act No. 2, 2000. Available at: http://www.gov.za/gazette/acts/2000/a2-00.pdf.
[16] See the ARTICLE 19 Principles, Principle 4.

no reason not to disclose the information. For example, national security is recognised everywhere as a legitimate reason for non-disclosure of certain information, but disclosure of much information relating to the defence sector – such as the cost of pens for the armed forces – will not cause any harm to national security. Finally, even when harm is posed to a legitimate aim, there will be circumstances when the overall public interest is still served by disclosure. This might be the case, for example, in relation to information that is private in nature, but which reveals widespread corruption or wrongdoing.

Instead of providing for a comprehensive, self-standing set of exceptions, the draft Law posits both other laws and the administrative classification of information as exceptions to the right of access. Thus, Article 7(18) refers to "other pieces of information determined by Law" as information to which access must be denied. Article 7(2) provides that information that "has been declared as classified State, military, official or business information" is not subject to disclosure. Neither of these provisions incorporate a harm test or public interest override.

To allow secrecy provisions in other laws – of which there can be expected to be many in Macedonia, as there are in other countries – to override the freedom of information law, fails to respect these principles. Secrecy laws will often have been drafted without the idea of open government in mind, some quite a long time ago when notions of democracy and transparency were very different. Many, if not most, will fail to meet the standards set out above. Indeed, to preserve the whole range of secrecy laws will seriously undermine the freedom of information law. It will also leave in place the existing secrecy regime, whereas an important goal of a freedom of information law is to herald in a new system of open government.

The same is true of allowing administrative classification to override the freedom of information law. Such classification is often not based on either a harm test or the notion of the public interest but rather on internal administrative practices. A wide range of officials have the power to classify and allowing all of these people to effectively override the access law seriously undermines it.

Instead of simply leaving secrecy provisions in place or of allowing classification to render a document secret, ARTICLE 19 recommends that the draft Law provide a comprehensive list of exceptions to the basic principle of disclosure, complete with requirements of harm and a public interest override. The draft Law should then provide that in case of conflict, it would override any existing secrecy provisions or document classification. This has the effect of protecting any legitimate secrecy interests, but consistently with international and constitutional standards of openness.

Some of the exceptions posited in Article 7 are simply illegitimate in the sense that they are not appropriate grounds for denying access to information. This applies, for example, to Article 7(5), referring to archives, and Article 7(16), referring to the protection of national heritage. It is hard to understand how the release of information could harm national heritage, for example, and other countries have not found it necessary to include such exceptions in their laws and yet have not experienced any problems.

Another example of an illegitimate exception is Article 7(4), which provides for the right of access to information to be restricted if the information might damage the "private life, dignity and reputation" of a citizen. Dignity and reputation should not be subject to exceptions in a freedom of information law. The release of information about corruption could damage somebody's reputation, but this is not a legitimate ground for withholding information. A further problem with Article 7(4) is that it fails to distinguish between the right to privacy of ordinary people and public officials. Individuals who are/were officials of a public body should not benefit from the right to privacy where "the information relates to his/her function as a public official."[17] Furthermore, there need to be clear exceptions to the privacy exception. The ARTICLE 19 Model Law, for example, provides for release of even private information where:

> a) the third party has effectively consented to the disclosure of information;
> b) the person making the request is the guardian of the third party, or the next of kin or the executor of the will of a deceased third party;
> c) the third party has been deceased for more than 20 years;
> d) the individual is/was an official body and the information relates to his or her function as a public official.[18]

In some cases, the provisions of Article 7 group unrelated interests together, creating confusion as to the aim of the provision in question. For example, Article 7(1) renders exempt information that can "jeopardise the protection of national and public safety and the defence of the State". Public safety is largely unrelated to national security and defence of the State and should be included in a separate provision.

In other cases, there is confusing overlap between different provisions. For example, non-disclosure of information in the interests on public safety, as specified in Article 7(1) is undefined while Article 7(10) is more precise, referring to human health and the environment. The whole area of public safety should be under one heading and the scope of this exception should be defined clearly. The ARTICLE 19 Model Law, for example, gives a simple definition based on harm to individuals:

> A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would…endanger the life, health or safety of any individual.[19]

Another confusing overlap is between Articles 7(4) – referring to personal rights – and Article 7(13) – which also refers to the violation of a third party's rights in the context of a need for written consent. These provisions should be integrated. Similarly, Articles 7(8) and 7(11) refer, respectively, to commercial and property interests. Again, this is confusing.

Articles 7(3) and 7(6) refer to the idea of information the disclosure of which would "imply violation of the confidentiality" of, respectively, information managed by the intelligence services and taxation procedures. This standard is far lower than a proper harm test for two reasons. First, it only refers to the idea of implying a violation

[17] ARTICLE 19 Model Law, section 25(2)(d).
[18] *Ibid.*, section 25(2)(a) to (d).
[19] *Ibid.*, section 28.

whereas the proper standard would be to pose a serious risk of violation of. Second, it is unclear what is meant by the idea of confidentiality of these bodies and services. As currently phrased, this could apply to any information 'held' by the intelligence services or 'about' the intelligence services, clearly an unacceptably broad exception.

In some cases, the exceptions do not include a harm test at all, making them class exceptions. Article 7(7), for example, excludes all information "related to investigation procedures and initiating charges for criminal acts", regardless of whether or not disclosure would harm these activities. Similarly, Article 7(8) excludes all information which is "related to commercial and other economic interests".

In any case, Article 7(8) is too broadly defined and could be used to refuse to disclose information about state corruption or mismanagement of the economy. The ARTICLE 19 Model Law, for example, restricts the exception for private economic interests to the following clearly defined limits:

> A body may refuse to communicate information if:-
> (a) the information was obtained from a third party and to communicate it would constitute an actionable breach of confidence:
> (b) the information was obtained on confidence from a third party and :
> i. it contains a trade secret; or
> ii. to communicate it would…seriously prejudice the commercial or financial interest of that third party;…[20]

Articles 7(7), 7(9) and 7(14) on criminal investigation procedures, the management of court procedures and prevention of criminal activities would be better grouped together in one exception concerning law enforcement. Such an provision should clearly state that information may be withheld only where disclosure,

> would, or would be likely to, cause serious prejudice to:-
> (a) prevention or detection of a crime;
> (b) apprehension or prosecution of offenders;
> (c) 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.[21]

Article 7(15) refers to information which 'hinders the operation of agencies performing inspection and supervision'. This article is ill defined as it fails to specify which agencies and what kinds of inspections or supervisions are covered by this exception.

The scope of Article 7(17), exempting information "in the process of drafting" where disclosure "would be misinterpreted in terms of contents" is unclear. While ARTICLE 19 recognises that there is some legitimate scope to this exception, at the same time, the potential for it being misinterpreted is grave. The legitimate core of this exception relate to the harm that may be caused to effective formulation of government policy. The ARTICLE 19 Model Law provides a useful reference in this regard:

[20] *Ibid.*, section 27.
[21] *Ibid.*, 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: –
   (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.[22]

Finally, a serious problem with the regime of exceptions is that it fails to include a public interest override. However carefully the regime of exceptions is crafted, it is impossible to take into account the many situations where the overall public interest is served by disclosure. This may be the case, for example, where information that would harm national security also discloses massive corruption, an evil which also undermines security, so that the information should still be made public. In recognition of the importance of the overall public interest in a free flow of information, many freedom of information laws include a general public interest override. The ARTICLE 19 Model Law, for example, 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.[23]

Recommendations:

- The draft Law should provide that where information falls within the scope of an exception the official may, rather than shall, refuse access to it.
- Articles 7(18) and 7(2) should be removed from the draft Law, which should include a comprehensive regime of exceptions without the possibility of extension by other laws or by administrative classification.
- Articles 7(5) and 7(16) should be removed from the draft Law.
- The part of Article 7(4) protecting dignity and reputation should also be removed and the protection of the privacy of public officials should not extend to information relating to their work as public officials.
- The regime of exceptions should be reworked to remove all duplication and overlap and to ensure that similar exceptions are brought together under one provision.
- All exceptions should include a clear internal harm test so that information may be withheld only where disclosure would threaten substantial harm to a protected interest.
- All exceptions should be clearly and narrowly defined; those that fail to meet this test at present, as outlined above (including Articles 7(7),7(8),7(9),7(14),7(15) and 7(17)).

[22] *Ibid.*, section 32.
[23] *Ibid.*, Article 22.

- The regime of exceptions should incorporate a public interest override that applies to all exceptions listed in the draft Law.

c) Procedures

The procedures for accessing information are laid down in Sections IV to VII of the draft Law. The time lines established for responding to a request (15 days with the possibility of extension to 30 days for a large requests) are in line with international standards. The description of the procedure for submitting written and oral requests, redirecting requests to the relevant body and responding to a request are sufficiently detailed and comprehensive. However, there are some provisions which are confusing and which need to be clarified and improved.

There are two suggested provisions accessing information of personal nature in Article 11. These limit access to information of personal nature to "persons to whom the information is related to or to a person who is authorised…". This provision effectively poses another exception to the right of access, but this concern is already dealt with in Articles 7(4) (13) so should not be duplicated under procedure.

Article 13 specifies that information requests may be submitted in oral or written form. Consideration should be given to specifying here certain common and often desirable means of requesting information, such as via email.

In the English translation, Article 15, which provides for the submission of written requests, refers to a procedure specified by the 'present' law. We understand that the Macedonian version omits such a reference to the 'present' Law. It should be clear that this is what is intended because otherwise different laws could specify a patchwork set of procedures, some of which may be less conducive to promoting openness than others.

Article 20(1) requires the information released to be 'complete and accurate'. Inasmuch as this requires the information holder to provide all the information requested this is a good provision. However, the inclusion of the word 'accurate' could give rise to the misunderstanding that information held by a public body which was not accurate should not be disclosed, which is clearly misguided. An information officer should not have the decision to withhold 'inaccurate' information and nor is it his/her duty to correct the information. Rather, all information should be provided, as long as it is held by the public body.

Article 21 prescribes the forms in which information can be provided. There is a significant difference in the drafting of this Article in the Macedonian and English versions. In the English translation, the first paragraph provides for the information to be viewed on the spot or for the information holder to provide "a summary, a photocopy or an electronic record". The Macedonian version states only that "the information-holder is obliged to provide that [the information] in a way that will give to the requester enough time to learn the content of the information".

This provision as drafted in the Macedonian version appears to provide only for an on-the-spot inspection of the information and should be redrafted to make clear that the information should be provided to the requester in the form he/she requests, unless this would be likely to harm the actual record.

Recommendations:

- Article 11, effectively providing for another, unnecessary exception to the right of access, should be removed.
- Consideration should be given to including within Article 13 other means of submitting requests, such as via email.
- Article 20(1) should either be removed from the draft Law or it should be made quite clear that it is not an additional basis for refusing to disclose information.
- It should be clear that Article 21(1) establishes the right of the requester to specify his or her preferred form of access and that access should normally be provided in this form, unless to do so would risk harming the record containing the information.

d) Appeal Procedures

Section VIII provides for an appeals procedure. The draft Law establishes a five person "National Commission for free access to information of public nature" which will receive appeals from any denials to disclose information and it also provides for requester to forward complaints to the Ombudsman. It is unclear why a dual appeal mechanism has been provided for and what order, if any, the appeals process should follow.

There is a limitation on appeals from refusals to disclose information, at Article 26, of 15 days. For reasons of practicality and fairness, ARTICLE 19 suggests that this be increased to at least 45 days.[24]

The ARTICLE 19 Model Law also incorporates a clause which states that, in relation to any appeal, the "burden of proof shall be on the public or private body to show that it acted in accordance with its obligations…."[25] This is consistent with the whole idea behind a freedom of information law, namely a strong presumption in favour of disclosure, so that the body seeking to deny access to information must show that this presumption is overcome.

The procedure for appointing members to the Commission is generally positive, although consideration should be given to providing more of an opportunity for civil society input. However, Article 27 appears to unnecessarily limit the terms of Commission members (Art. 27(1)) and the Commission President (Art. 27(3)). The former provides that members are appointed for four years, "without re-appointment eligibility", while the latter provides that the President's mandate is limited to one year, also "without the right of re-appointment". This seems unduly limited. It would be more convenient, to promote the Commission's efficiency and practicality, that the President is allowed to stay in post for at least two years and even then be re-elected by the Commission, and that members are allowed to be re-appointed. One term in office seems a very short time and it could obstruct the continuity of the work of the Commission.

[24] *Ibid.*, section 45(1).
[25] *Ibid.*, section 45(2).

The competency of the Commission is regulated by Article 30. Article 30(1) – providing for the power to decide upon appeals from information requesters – is omitted from the Macedonian version of the draft Law and we suggest that it be put in as it the first obligation of the Commission.

Article 33 allows for complaints to be addressed to the Ombudsman, "in cases the information requester believes that the decision….has violated the fight of free access to information". As already noted, it is not clear why a second right of appeal has been included in the draft Law. In any case, the reasons for this need to be made clear and the relationship between these two systems needs to be clarified.

Article 34 provides protection for 'whistleblowers'. This provision, while welcome, is unclear, perhaps due to translation. The grounds upon which whistleblower protection can be claimed, in particular, need to be clear in the draft Law.

Article 35 refers to "the law regulating the general administrative procedure" in relation to request procedures. As already noted in relation to Article 1(2), it is preferable for the draft Law to be internally complete and not to allow other laws to affect its provisions. The reason for this is that others laws where not drafted with the goal of openness in mind and they may, as a result, be more restrictive than the freedom of information law.

Recommendations

- The time for lodging an appeal, Article 26, should be extended from 15 to 45 days and it should be made clear that in case of an appeal, the burden of proof lies with the body seeking to deny access to information.
- Consideration should be given to providing for civil society input into the appointment of members of the Commission.
- The term of office of members and the President of the Commission should be extended, in accordance with the suggestions above.
- It should be clear that the competency of the Commission includes the right to hear appeals from cases of denial of access to information.
- The relationship of the Commission and the Ombudsman needs to be clarified in the draft Law.
- The draft Law should clarify the conditions under which whistleblower protection may be claimed.
- Article 35 should be removed from the draft Law.

e) Omissions

Duty to Publish

The draft Law fails to require obligees to publish various categories of information, although it does require them to make general information regarding requests available. Many laws require public bodies to provide reports on their freedom of information activities, which can then be used to report on the legislature and to monitor the performance of the public body in question. The draft Law should also state that these reports are to be published yearly and should contain some detail

regarding the contents of such reports. For example, the ARTICLE 19 Model Law provides that annual reports by public bodies must contain information on:

> (a) the number of requests for information received, granted in full or in part, and refused;
> (b) how often and which sections of the Act were relied upon to refuse, in part or in full, requests for information;
> (c) appeals from refusals to communicate information;
> (d) fees charged for requests for information;
> (e) its activities pursuant to section 17 (duty to publish);
> (f) its activities pursuant to section 19 (maintenance of records); and
> (g) its activities pursuant to section 20 (training of officials).[26]

The draft Law should also go further and place a more general obligation on all public bodies to publish, even in the absence of a request, information about their general activities, structure 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.[27]

Guide to Using the Draft Law

Many freedom of information laws require the administrative body overseeing implementation of the law, and/or each public body covered by the law, to produce a guide on how to access information. This assists citizens who wish to seek information and can be an important practical way of promoting use of the law.

Record Maintenance

A freedom of information law can be seriously undermined if public authorities keep such poor records that they cannot locate the information sought by requesters. To help avoid this problem, many freedom of information laws place an obligation on

[26] *Ibid*, section 21.
[27] *Ibid*, section 17.

public authorities to maintain their records in good condition. The UK Freedom of Information Act 2000, for example, provides for the Lord Chancellor (the minister of justice) to adopt a code of practice concerning the keeping, management and destruction of records by public authorities, with a view to ensuring best practice in this regard across the civil service.

Recommendations:

- The draft Law should include a provision requiring all public bodies to provide annual reports to an oversight body on their activities in the area of information disclosure.
- The draft Law should require public bodies to proactively publish certain key categories of information, even in the absence of a request.
- The draft Law should require an oversight body to produce a guide for individuals on how to use the draft Law.
- The draft Law should require public bodies to maintain their records in good condition and consideration should be given to establishing a system to ensure that this happens in practice.