MEMORANDUM

on the

Kosovo "Draft Law on Access to Official Documents"

by

ARTICLE 19
Global Campaign for Free Expression

London
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I. Introduction

This Memorandum analyses the Kosovo "Draft Law on Access to Official Documents" (draft Law) as passed by the Assembly of Kosovo and currently awaiting promulgation, against international standards on freedom of expression and information.[1]

ARTICLE 19 welcomes the draft Law as a positive step in advancing freedom of information and promoting transparency and openness in Kosovo. It incorporates many of the key elements needed in an effective freedom of information law, including wide scope of application, a procedure for accessing information, time limits for disclosing information and an appeals process.

We welcome that the draft Law envisages that all administrative organs in Kosovo should be subject to the same access regime. We understand that under the Constitutional Framework for Provisional Self-Government, the Assembly, acting alone, cannot bind a number of these bodies or offices. At the same time, we believe that it is crucial to the

[1] The version we have used for our comments is dated 13 March 2003 but the analysis does take into account a number of amendments passed on 26 June 2003.

establishment of democratic structures in Kosovo that all bodies exercising public functions should be subject to an effective freedom of information regime. In our view, the obligation of openness needs to include those international actors in Kosovo which effectively stand in the position of public bodies. This includes UNMIK and all of the bodies under its direction or control.

Although we welcome the draft Law, and note its positive features, there remain areas in which improvements could be made. This Memorandum provides our analysis of these areas, with a view to aiding analysis and furthering discussion. Section II of this Memorandum outlines the relevant constitutional guarantees, as well as international standards in this area. Section III analyses the draft Law against these standards. In particular, this analysis relies on 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 Council of Europe Member States, and two key ARTICLE 19 publications, *A Model Freedom of Information Law* (the ARTICLE 19 Model Law)[3] and *The Public's Right to Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles).[4] The latter, a standard-setting document based on international human rights treaties as well as international best practice, has been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression.[5]

II. International Obligations and Constitutional Guarantees

II.1 The Importance of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR),[6] a United Nations General Assembly Resolution, guarantees the right to freedom of expression and information 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 right to freedom of expression is also guaranteed in the *International Covenant on Civil and Political Rights* (ICCPR),[7] also at Article 19, and the *European Convention on Human Rights*,[8] at Article 10. Under Chapter 3 of UNMIK Regulation 2001/9, all three instruments are binding on the Kosovo authorities and are directly applicable within Kosovo.[9]

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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: 2001). Available at: http://www.article19.org/docimages/1112.htm.
[4] (London: 1999). Available at http://www.article19.org/docimages/512.htm.
[5] See UN Doc. E/CN.4/2000/63, 5 April 2000, para. 43.
[6] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[7] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.
[8] Adopted 4 November 1950, in force 3 September 1953.
[9] Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9, 15 May 2001. Available online at: http://www.unmikonline.org/regulations/2001/reg09-01.htm.

Freedom of information is an important component of the international guarantee of freedom of expression, which includes the right to seek and receive, as well as to impart, information and ideas. 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 stated:

> Freedom of information is a fundamental human right and… the touchstone of all the freedoms to which the UN is consecrated.[10]

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. In addition, freedom of expression and information is essential if violations of human rights are to be exposed and challenged.

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 almost all its cases involving freedom of expression:

> [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.[11]

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.[12]

II.2 Restrictions

International law permits limited restrictions on the right to freedom of expression and information in order to protect various private and public interests. The parameters of such restrictions are provided for in both Article 19 of the ICCPR and Article 10 of the ECHR. 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.

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[10] 14 December 1946.

[11] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

[12] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, para. 70.

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 Human Rights Committee[13] and the European Court of Human Rights,[14] requires that any restriction must be prescribed by law, be for the purpose of safeguarding a legitimate interest, and be 'necessary' to secure this interest.

The first condition, that any restrictions should be 'prescribed by law', is not satisfied merely by setting out the restriction in domestic law. Legislation must itself be in accordance with human rights principles set out in the ECHR and ICCPR.[15] The European Court of Human Rights, elaborating on the meaning of the phrase "prescribed by law", has required that all restrictions be clearly formulated and readily accessible.[16] The second condition requires that legislative measures restricting free expression must truly pursue one of the legitimate aims listed. The third condition means that even measures that seek to protect a legitimate interest must meet the requisite standard established by the term "necessary". Any restriction must restrict freedom of expression as little as possible,[17] the measures adopted must be carefully designed to achieve the objective in question and they should not be arbitrary, unfair or based on irrational considerations.[18] Vague or broadly defined restrictions, even if they satisfy the "prescribed by law" criterion, are unacceptable because they go beyond what is strictly required to protect the legitimate interest.

II.3 Freedom of Information

The right to freedom of expression extends beyond the right of individual to express themselves; the public at large also have a right to receive information,[19] recognised in Article 4 of the Constitutional Framework for Provisional Self-Government[20] as well as in Article 10 of the ECHR, and to seek information, as guaranteed under 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.[21]

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[13] For example, in *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.
[14] For example in *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90.
[15] See *Faurisson v. France*, 8 November 1996, Communication No. 550/1993 (UN Human Rights Committee).
[16] See, for example, *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, 2 EHRR 245, para. 49.
[17] See *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49 (European Court of Human Rights).
[18] See *R. v. Oakes* (1986), 26 DLR (4th) 200, pp. 227-8 (Supreme Court of Canada).
[19] See *Observer and Guardian v. the United Kingdom*, 26 November 1991, Application No. 13585/88, para. 59 (European Court of Human Rights) and *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63 (European Court of Human Rights).
[20] Note 9.
[21] 26 November 1999.

As far back as 1982, the Member States of the Council of Europe 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."[22] In 2002, the Committee of Ministers of the Council of Europe adopted a Recommendation on Access to Official Documents,[23] 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.
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> **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.
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> 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 of Europe recommends that all Member States should be guided in their law and practice by these principles.[24] Although Kosovo is not a member state of the Council of Europe, the Recommendation nonetheless sets a standard toward which Kosovo should strive.

The 'harm test' outlined under *IV. Possible limitations* is crucial. This is linked to the test under Article 10(2) ECHR that any restrictions on freedom of expression 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.

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[22] Council of Europe Declaration on the Freedom of Expression and Information, adopted 29 April 1982.
[23] Note 2.
[24] Note 2, Preamble.

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.[25] 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.

In recognition of the importance of giving legislative recognition to freedom of information, in the past five years, a record number of countries from around the world – including Turkey, Fiji, Japan, Mexico, Nigeria, South Africa, South Korea, Thailand, Trinidad and Tobago, the United Kingdom and most East and Central European States – have taken steps to enact legislation giving effect to this right. In doing so, they join those countries which enacted such laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia, and Canada.

III. Analysis of the Draft Law on Access to Official Documents

This section analyses the draft Law in detail against international standards in the field, providing recommendations and suggestions for improvement throughout.

III.1 Scope of the Draft Law

Under sections 2 and 3 of the draft Law, "any habitual resident of Kosovo, and any natural or legal person residing or having its registered office in Kosovo, has a right of access to documents of [any Provisional Institution of Self-Government (PISG) organ or agency thereof, any municipality organ or agency thereof, any of the independent bodies and offices listed in or established under Chapter 11 of UNMIK Regulation No. 2001/9 (Constitutional Framework) [and] the Kosovo Trust Agency]". There is some inconsistency with regard to the persons entitled to seek access; the Preamble has been amended to read that all "citizens" have a right of access, although Article 3 restricts access to "habitual residents."

The types of information to which access may be had are determined in sections 2 and 3. Under section 2(b), access may be sought to "any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility". Article 3(3) similarly states "This Law shall apply to all documents held by an institution … in all areas of activity of the institutions."

<u>Analysis</u>
First, we welcome the decision in principle that the draft Law should apply to all institutions of provisional self-government, including those set up under Chapter 11 of the Constitutional Framework. This includes important bodies such as the Housing and

[25] Note 4, Principle 4.

Property Claims Commission and the Office of the Auditor-General, for whom openness and transparency is a necessary precondition if they are to enjoy public confidence. We understand that there may be legal obstacles to them being bound by a draft Law adopted by the Assembly, insofar as Chapter 11 of the Constitutional Framework states explicitly that these bodies will "carry out their functions independently of the Provisional Institutions of Self-Government" and that they are bound only by the "legal instruments by which they are established."[26] To the extent that this poses an obstacle we urge the drafters to find creative solutions to this, for example by amending the legal instruments establishing each of the six bodies mentioned.

Second, although a broad range of public bodies and organisations will be subject to the access regime set out in the law, the Law as drafted will not apply to private bodies that carry out public functions. This is a significant oversight and contrary to both the ARTICLE 19 Principles and the CoE Recommendation. The latter recommends that all "natural and legal persons insofar as they perform public functions or exercise administrative authority" be subject to an FOI regime.[27] The law also fails to cover bodies which are owned, controlled or substantially financed by funds provided by Government or the State, such as nationalised industries, public corporations, quasi non-governmental organisations legislative bodies and judicial authorities.

Third, the Law restricts access to those persons who are either citizens or habitual residents. This is unnecessarily restrictive and contrary to established international standards in the field. Both the ARTICLE 19 Model Law and the CoE Recommendation state that "everyone" should have a right of access to information, regardless of residential status or citizenship.[28]

Fourth, sections 2(b) and 3(3) appear to limit the information to which access may be had to documents that are in the possession of an institution and that fall within its areas of activity. This means that if an important document regarding the protection of the environment should find its way to a government department dealing with transport, that department may decide it is under no obligation to grant access to it. This is unnecessarily restrictive and is also likely to lead to misunderstandings. The hypothetical environmental policy document posited above might well be in the possession of the department of transport to assess its implications for transport policy, in which case it arguably would be required to release the document.

Fifth, as currently drafted the Law requires that requests be made for individual 'documents' rather than 'information'. In practice, this is likely to be overly restrictive. Many applicants will not be able to pinpoint a specific document to which their request relates. Although we appreciate that public registers will be drawn up listing the majority of documents to which access may be had, many individuals will find the use of such registers overly complicated and may as a result decide not to lodge a request for access at all. For this reason, the ARTICLE 19 Model Law recommends that access requests

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[26] Constitutional Framework for Provisional Self-Government, note 9, Articles 11.1 and 11.2.
[27] CoE Recommendation, note 2, Section I.ii; ARTICLE 19 Principles, note 4, Principle 1.
[28] CoE Recommendation, note 2, Section III; ARTICLE 19 Model Law, note 3, section 3.

may be made for "information." The relevant institution should then be under an obligation to indicate whether the "information" concerned is held in one or in several records or not held at all.[29]

Recommendations:

- The draft Law should apply to all bodies that perform public functions or that are established by statute or owned, controlled or substantially financed by the State. To the extent that certain institutions may constitutionally fall outside the scope of Assembly laws and regulations, a solution should be found to bring them within the scope of the regime established by the draft Law.
- The right of access to information should apply to all, not just citizens or residents.
- The draft Law should apply to all documents in the possession or under the control of a relevant body or institution, not just those that are relevant to its sphere of competence.
- The draft Law should grant a right of access to 'information' rather than 'documents'.

III.2 Exceptions

The draft Law outlines a number of exceptions, detailing the categories of documents to which access may be refused. Under section 4(1), access must be refused if disclosure of a document would undermine the protection of public security, defence and military matters, international relations, financial, monetary or economic policy or the privacy and the integrity of an individual. A further list of protected interests is provided in section 4(2), including the commercial interests of a natural or legal person, including intellectual property; court proceedings and legal advice; and "the purpose of inspections, investigations and audits". Unlike the protected interests in the first paragraph, these are subject to a public interest override so that, if there is an overriding public interest in disclosure, documents must be disclosed. The criteria for whether or not a public interest override should apply are found in section 4(8), which states: "In determining whether there is an overriding public interest in disclosure the institutions shall have due regard to considerations such as any failure to comply with a legal obligation, the existence of any offence, miscarriage of justice, abuse of authority or neglect in the performance of an official duty, unauthorized use of public funds, or danger to the health or safety of an individual or the general public."

Under section 4(3), internal documents that "[relate] to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure." Under section 4(4), access to internal documents may even be refused after a decision has been taken regarding the content matter of the document if "disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."

Section 4(5) provides for 'third party' consultation: "As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception

[29] ARTICLE 19 Model Law, note 3, section 4.

in section 4.1 or 4.2 is applicable, unless it is clear that the document shall or shall not be disclosed."

Under section 4(6), "[if] only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released."

Finally, under section 8, institutions may draw up rules with regard to "sensitive documents" which need not be recorded in public registers and access to which may be refused "in a manner which does not harm the interests protected in section 4." Special provision for these sensitive documents is also made in section 3, stating that they may be subject to "special treatment", and section 4, which provides that the Government shall "compile the list of documents to be treated as sensitive documents, according to the areas specified in the articles 4 and 8, defending the public interest."

Analysis

The exceptions regime is at the heart of the access regime, defining which documents are subject to disclosure and which may be withheld. As such, these provisions are crucial to the success of the draft Law in achieving its stated aim of allowing closer participation in the decision-making process of public institutions and guaranteeing greater legitimacy, transparency, efficiency and accountability.[30]

Although many of the aims listed in Article 4 pursuant to which disclosure may be refused are in accordance with international standards, the regime needs to be amended in a number of key areas. First, section 4 provides that disclosure of a document may be refused if to do so would "undermine" a protected interest. This falls below the standard advocated in the ARTICLE 19 Principles, which recommend that access be disclosed only if to do so would "threaten to cause substantial harm" to that interest.[31]

Second, the public interest override that applies under sections 4(2), (3) and (4) should apply to all categories of exemptions, in accordance with both the CoE Recommendation and the ARTICLE 19 Principles.[32]

Third, the draft Law is overly protective of a number of interests. Under section 4(4), access to documents that relate to internal deliberations and decision-making processes may be refused even after the decision has been taken or deliberation come to an end. This is excessively restrictive and not in line with international standards on this point. For example, the CoE Recommendation allows access to such documents to be refused only "during the internal preparation of a matter."[33] Similarly, under section 4(5), an institution that receives an access request with regard to 'third party documents' is required to consult that third party before deciding whether to grant access. This is problematic both because it is wholly unclear what constitutes a 'third party document' – it could refer to a document that originates with a third party as well as a document in

[30] As stated in the Preamble.
[31] ARTICLE 19 Principles, note 4, Principle 4.
[32] CoE Recommendation, note 2, Section IV.2; ARTICLE 19 Principles, note 4, Principle 4.
[33] CoE Recommendation, note 2, Section IV.1.x.

which third parties are merely discussed or mentioned – but also because in practice, it may well be interpreted to grant that third party a veto over release.

Finally, section 8, allowing relevant bodies to draw up internal rules with regard to 'sensitive documents' whose existence may be kept out of public registers, could significantly undermine the access regime. Although access to these documents can be refused only on the basis of one of the grounds listed in section 4, only minimal reasons need be given – so as "not [to] harm the interests protected."[34] Since they will not appear in the public registers to be drawn up under section 10, the very existence of these documents will be hidden from the public eye. Thus, institutions may draw up internal rules to 'hide' large numbers of documents, thereby effectively withdrawing them from public scrutiny even though, formally, they are subject to the same access regime. This is compounded by the problem, discussed above, that access requests must be made for 'documents' rather than 'information', requiring applicants to pinpoint the document to which they seek access rather than being allowed to describe the information sought. Although we appreciate that in certain, limited cases, it will not be possible even to disclose whether or not an institution holds certain information, for example relating to sensitive police intelligence sources, the law should be far more specific on the categories of information concerned. As drafted, the law leaves institutions excessive discretion to draw up their own guidelines.

Recommendations:

- The draft Law should allow access to be refused only where disclosure would "seriously harm" a legitimate interest.
- All exceptions should be subject to a public interest override.
- The provision allowing for access to documents that relate to internal decision-making processes to be refused even after the decision concerned has been taken should be removed.
- The provision requiring third parties to be consulted should be revised to make it clear what documents it covers and to clarify that the views of the third party are only relevant to the extent that they help clarify whether or not the document is covered by one of the exceptions listed in the law (in other words, that the third party has no right of veto over information disclosure).
- The provisions dealing with categories of sensitive documents should be revised to indicate more precisely the types of documents that may be withheld from the public register.

III.3 Processing Access Requests

Under section 5, access requests have to be made in writing and be sufficiently precise to enable the institution concerned to identify the document(s) to which access is being sought. Applicants who fail to lodge a sufficiently precise application will be asked to provide clarification and, if necessary, be referred to the institution's public register of documents. Upon receipt of a request for information, institutions should send an acknowledgement to the applicant and deal with the request within 15 working days.

[34] Section 8(4).

Should the request relate to an exceptionally long document, or a large number of documents, the 15 day time limit may be extended by another 15 days.

If an institution fails to reply, or refuses to release a document, an applicant may make a confirmatory application asking the institution to reconsider its position. An institution that refuses to release a document, either fully or in part, is required to give reasons for its refusal. Should the institution continue to refuse to release the document, or fail to deal with the confirmatory request within 15 days, the applicant may institute court proceedings or lodge a complaint with the Ombudsperson under the Constitutional Framework (the supervision and appeals mechanism is dealt with more fully below).[35]

Under section 9 of the draft Law, an applicant may have access to the documents requested on the spot or by receiving a copy, including electronically. The cost of copies may be charged to the applicant; section 9(1) states that this should not exceed the real copying cost. If a document to which access is requested has already been published, section 9(3) provides that the institution may refer the applicant to the place of publication. Section 12 provides that "members of communities, as defined in the Constitutional Framework, may exercise their rights … in their respective language."

<u>Analysis</u>
Although in basic terms, many procedural issues are set out in clear terms there are a number of oversights and omissions.

With regard to time limits, there is no expedited procedure for access requests that relate to public health, the environment or the protection of an individual's life or liberty as is found in some freedom of information laws around the world. Instead, the 15-day deadline provided in section 6 as currently drafted applies to all categories of information. The draft Law should provide for such expedited procedures and, more generally, should require that all requests be dealt with 'promptly'[36] and in any case within 15 working days.

Second, the draft Law dictates that applications be made "in any written form". There is no provision in the law for those who may not be able to make a request for information in written form for reasons of illiteracy or disability. The ARTICLE 19 Principles state that provision should be made to ensure full access to information for certain groups, such as those who are illiterate and those suffering from disabilities such as blindness.[37] For example, the draft Law should allow for a request to be dictated to an official who will reduce it to writing, including their name and position within the body; a copy thereof should given to the person who made the request.

The draft Law also fails to provide for a centralised fee schedule – which may be drawn up by the institutions concerned in consultation with a Freedom of Information Commissioner (see below) – fee waivers or significant reductions for requests that are

[35] Note 9.
[36] See CoE Recommendation, note 2, Section VI.3.
[37] ARTICLE 19 Principles, note 4, Principle 5.

made in the public interest, or for a ceiling above which fees should not rise. A centralised fee schedule is needed to ensure consistency in approach across the various different institutions; fee waivers or fee reductions for public interest requests are an appropriate response to aiding the important activities of civil society activists or the media.

Recommendations:

- The draft Law should require that all requests are dealt with promptly, and in any case within 15 working days.
- The draft Law should provide for an expedited procedure for requests for information necessary for the protection of public health, acute environmental emergencies or the protection of life or liberty.
- The draft Law should allow for requests to be made orally as well as in writing or in any other form.
- The draft Law should provide for a centralised fee schedule, fee waivers or fee reductions for public interest requests, and a ceiling above which access fees should not rise.

III.4 Administrative Practices

The draft Law requires relevant institutions to take several measures to promote transparency and enable easy access to information. Most significantly, section 10 requires each institution to which the law applies to establish a public register, preferably in electronic format, listing all documents held by that institution.[38] As far as possible, documents should be made available electronically through the register. Section 11 provides that, at a minimum, legislative documents and documents relating to the adoption of other acts that are legally binding should be directly accessible. It also recommends that, where possible, policy documents or other documents relating to 'strategy' should be directly accessible. If a document is not directly accessible through the register, the register entry should indicate where the document is located.

More generally, section 14 of the draft Law provides that the institutions shall develop "good administrative practices" and shall establish "an inter-institutional committee to examine best practices, to address possible conflicts and to discuss future developments on public access to documents". Each institution must also inform the public of the rights they enjoy under the Law, and nominate a contact person within the institution to whom requests may be directed.

Analysis

We welcome the requirement that each institution shall draw up a public register of the documents it holds, preferably in electronic format, with direct links to several of them. We also welcome the requirement that institutions should take measures to promote openness. At the same time, in order to instil a climate of openness and transparency the

[38] Section 10(1) fails to specify which documents should be listed, but it is clear from the context that this refers to all documents minus those exempted by virtue of section 8. The lack of clarity is a drafting issue and should be cleared up.

draft Law should go further and require institutions to publish a far greater range of documents, and to do more to tackle the 'culture of secrecy' that exists at many levels within the public administration.

As the ARTICLE 19 Principles make clear, "freedom of information implies not only that public bodies accede to requests for information, but also that they publish and disseminate widely documents of public interest, subject only to reasonable limits based on resources and capacity."[39] Although the categories and type of material that ought to be published proactively will differ from institution to institution, at a minimum the following should be made available directly, in addition to the materials specified in section 11:

- operational information about how the public body functions, including costs, objectives, audited accounts, standards, achievements and so on, particularly where the body provides direct services to the public;
- information on any requests, complaints or other direct actions which members of the public may take in relation to the public body;
- guidance on processes by which members of the public may provide input into major policy or legislative proposals;
- the types of information which the body holds and the form in which this information is held; and
- the content of any decision or policy affecting the public, along with reasons for the decision and background material of importance in framing the decision.[40]

The institutions should also take measures to tackle the prevailing culture of secrecy. Internal codes on openness and transparency should be developed, based on the draft Law, and institutions should be required to provide freedom of information training for their employees. Such training should address the importance and scope of freedom of information, procedural mechanisms for accessing information, how to maintain and access records efficiently, the scope of whistleblower protection (this is discussed in further detail below) and what sort of information a body is required to publish. Aside from the general requirement to establish good administrative practices, these issues are not touched upon in the draft Law.

Although the draft Law requires institutions to adopt best practices in freedom of information, as well as to establish an inter-institutional committee to examine such practices, it fails to lay down substantive requirements on the protection of the integrity and availability of records. At a minimum, the draft Law should require that standards be established regarding the maintenance and preservation of records. The law should also provide that obstruction of access to, or the wilful destruction of records is a criminal offence. Additionally, to prevent any attempt to doctor or otherwise alter records, the obligation to disclose should apply to records themselves and not just the information they contain.

Recommendations:

[39] ARTICLE 19 Principles, note 4, Principle 2.
[40] *Ibid.* See also ARTICLE 19 Model Law, note 3, section 17.

- The law should establish both a general obligation to publish as well as key categories of information that must be published, as detailed above.
- Provision for employee training on freedom of information principles should be incorporated into the law.
- The draft Law should require that institutions adopt internal codes on access and openness.
- The stipulation in section 9 that all institutions must take "requisite measures" to educate the public on their rights should be expanded upon to include a minimum standard for public education.
- The draft Law should provide for a system, in accordance with the recommendations above, for record maintenance.
- The law should create a criminal offence for obstruction of access to, or wilful destruction of records.

III.5 Appeals and Supervision

The draft Law does not envisage that a body be set up to supervise the implementation of the Law, provide advice on access to information issues or review appeals. Under section 7, a refusal of a confirmatory application is to be appealed to a court of law, or a complaint may be lodged with the Ombudsperson established under the Constitutional Framework. More generally, the relevant institutions themselves will be responsible for ensuring implementation of the law internally, although the inter-institutional committee to be established under section 14 can be expected to play a role in this regard. The institutions are also required to publish an annual report detailing the number of cases in which they refused access and the number of "sensitive documents" kept outside the registers, while the Office of the Prime Minister will be file an Annual Report with the Assembly on the implementation of the law including, if appropriate, proposals for revision of the law.

Analysis

Apart from the provision of an appeal to a court of law, we are very concerned that the supervision and appeals mechanism as currently envisaged will not be effective in practice. In particular, the lack of an independent external body charged with the supervision of the law is an important oversight. We doubt whether the independent level of oversight required can be provided through the inter-institutional mechanism or through the Office of the Prime Minister, and we also doubt whether the Ombudsperson established under the Constitutional Framework will have the necessary resources to deal with the large number of cases that will be directed to it if the public are made aware of their rights under the freedom of information law.

For these reasons, we strongly recommend that the draft Law should establish an independent Information Commissioner, or, alternatively, that a specific and sufficiently-resourced 'information department' be set up within the office of the Ombudsperson to supervise implementation of the law. The Information Commissioner or Ombudsperson should be assigned a significant role in the implementation and supervision of the law and assume many of the tasks currently assigned either to the institutions themselves or to the Office of the Prime Minister. Its powers and responsibilities should include:

(a) monitoring and reporting on the compliance of public bodies with their obligations under the law, including in the absence of specific complaints;
(b) making recommendations for reform both of a general nature and directed at specific public bodies;
(c) co-operating with or undertaking training activities for public officials on the right to information and the effective implementation of the law;
(d) referring to the appropriate authorities cases which reasonably disclose evidence of criminal offences under the law;
(e) publicising the requirements of the law and the rights of individuals under it;
(f) receiving and investigating complaints;
(g) accepting the annual reports of the institutions;
(h) presenting an annual report to the legislative body/bodies.[41]

The Commissioner or Ombudsperson should be fully independent from government and have all necessary powers to investigate complaints, including to compel witnesses. It should receive full annual reports from each of the institutions covered by the law, not just limited to the number of refusals and sensitive documents,[42] but including full details on such matters as the total number of requests received and granted, and measures taken internally to promote transparency and openness. As an administrative matter, it is crucial to the success of the law that the Commissioner or Ombudsperson be given sufficient resources to carry out these tasks.

In addition, as currently drafted the law fails clearly to stipulate whether an applicant who is refused (partial) access is entitled to apply both to a court and to the Ombudsperson, and if so in what order, or whether the two processes are mutually exclusive. We recommend that an initial appeal should be available to the Information Commissioner or Ombudsperson, whose decision may then be appealed to the courts.

Recommendations:

- The draft Law should establish an independent office, such as an Information Commissioner, with powers and responsibilities as outlined above. Alternatively, a special and sufficiently resourced department should be set up within the existing Ombudsperson's office to take on this role.
- The draft Law should provide for refusals to be appealed initially to the Information Commissioner or Ombudsperson and from there to the courts.

III.6 Whistleblowers

Freedom of information laws should provide protection for persons who disclose information in contravention of a professional legal obligation of confidentiality in order to reveal wrongdoing. 'Wrongdoing' in this context includes such matters as the commission of a criminal offence, corruption, dishonesty or other serious maladministration or a miscarriage of justice. 'Whistleblowers', as such individuals are colloquially known,[43] should be protected from legal liability whenever they act in good

[41] See the ARTICLE 19 Model Law, note 3, section 38.
[42] Section 16.
[43] The origin of the term may lie in a 1903 New Jersey Statute (NJ Laws of 1903, Chap. 257, section 35),

faith and in the reasonable belief that the information disclosed is substantially true. In addition, protection will also be needed to ensure that the whistleblower does not suffer administrative or employment related sanctions, such as a demotion.[44] The draft Law fails to provide such protection.

Recommendation:
- The draft Law should provide protection for whistleblowers.

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. See, generally: http://www.lawmall.com/files/pamphle2.html.

[44] ARTICLE 19 Principles, note 4, Principle 9.