NOTE

on the

Draft Law on Access to Information of Vietnam

ARTICLE 19

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This Note provides an analysis of the Vietnamese draft Law on Access to Information, on an article-by-article basis. The draft analysed in this Note was provided to ARTICLE 19 in English translation by the Vietnamese Ministry of Justice (MOJ) on 19 May 2009. This Note provides comments to the MOJ for the purpose of developing an access to information law which best accords with international practice in this area. It builds on a process of cooperation with the Ministry which includes hosting members of the drafting team in London, a mission to Vietnam for purposes of a Workshop on the draft Law, as well as in-depth discussions with the MOJ drafting team, and ongoing dialogue via email.

Article 1. Scope of Application

No comment.

Article 2. Subject of Application

Option 1 is preferable as it is more detailed and so creates greater certainty as to the scope of the right. At the same time, it would be good to add to Option 1 the idea, now in Option 2, including not only those bodies listed, but also any other bodies operating with State funding,

at least to the extent of that funding. This could be reflected in a provision following Article 2(2), for example as follows:

> (3) This Law also applies to the activities of any other organisations which receive public funding, to the extent of that funding.

Article 3. Interpretation of Terminologies

A key issue regarding the definition of 'information' is that it should be recorded (i.e. contained in some physical form). If this is not already reflected (this is not clear from the English translation), it should be added. Possible language for the definition of information might be:

> Information in this Law means all material which communicates something and which is held in any recorded form, including in print, electronic form, samples, models, audio or visual tapes, or any other form.

Article 4. Right on Access to Information

Article 4(2) largely overlaps with Article 16. It is generally preferable not to include such sorts of overlap, in case this may give rise to conflicting interpretations (in other words, Article 4(2) might be removed).

Article 5. Principles on Access to Information

Instead of referring to specific secrecy interests in different provisions, these could be put in one provision and also subjected to some sort of limitation, as in the following:

> (3) Protecting legitimate confidentiality interests – such as national security, other public interests, privacy and business competition – where disclosure would pose a serious risk of harm to those interests.

Article 6. Relationships between Law on Access to Information and Other Laws

If other laws provide for procedures of access that are more advantageous for an information requester – for example because they are more rapid or cost less – then these should still apply, contrary to what is stipulated in Article 6(1).

The whole of Article 6 could be reworded as follows:

> Nothing in this Law limits or otherwise restricts the disclosure of information pursuant to any other legislation.

This would then leave it open to the requester to decide which was the more favourable approach, the Law on Access to Information or another law.

Article 7. Rights and Obligations of Agencies, Organisations, Individuals Requesting Information

It would be preferable to cast Article 7(2)(a) and (c) not as obligations of the requester, but as reasons why he or she might be refused access. Furthermore, Article 7(2)(a) is too general. All a requester needs to do is to file a request properly and pay the fee. An alternative wording could be as follows:

> (2)(a) A requester shall not be entitled to access information has made a request in accordance with this Law and, where necessary, has paid the fee for access as provided for in this Law.

Regarding Article 7(2)(b), please see the comments under Article 17.

Article 8. Forbidden Actions

The actions in Article 8(1)-(3) are fine, although it should be made clear that they are directed at officials, and not ordinary citizens. As for the rules in Article 8(4)-(6), these are based on a misunderstanding of the purpose of an access to information law, and they should be removed. Regarding Article 8(4), the way to protect public bodies is by allowing them to refuse to answer abusive requests. This is a sufficient tool to protect them. Such a rule could be added to Article 22(2), and could run along the following lines:

> (2) Information that has already been provided to the same requester (a repetitive request) or where the request for information is vexatious and designed to undermine the ability of the public body to do its work.

Article 8(5) and (6) should not be part of the access to information law. First, the information in question is by definition information that is held by a public body. It should not, therefore, easily be able to be used for these purposes. Second, access may be refused, among other things to protect national security, privacy or the commercial interests of public bodies, which again would make it difficult to be abused. Finally, there are already laws of general application (secrecy laws, laws on security, and defamation and privacy laws) which protect these interests (whether or not the wrong is based on accessing information held by public bodies). It is, therefore, unnecessary to include these in an access to information law. Doing so sends a negative signal to potential requesters, which is likely to undermine the use of the law.

Article 9. Information Widely Published

This article contains a good list of information subject to proactive disclosure. Below are some examples from section 4(1)(b) of the Indian Right to Information Act 2005 that go even further and which might also be considered in the Vietnamese context:

> (ii) the powers and duties of its officers and employees;
> (iii) the procedure followed in the decision making process, including channels of supervision and accountability;
> (vii) the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;
> (ix) a directory of its officers and employees;
> (x) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;
> (xii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;
> (xiii) particulars of recipients of concessions, permits or authorisations granted by it;

Article 10. Publication of information in the Website

It is welcome that this article requires information to be published on the website of each public body. At the same time, all of the information in Article 9, which largely overlaps with this article, should be published on the website. It is recommended that Articles 9 and 10 be

merged, so that all of the information subject to proactive disclosure is contained in one article, which should start out with the following first line:

> Agencies and organisations have to publish widely the following information, including on their websites:

Article 11. Information Accessed upon Request

No comment.

Article 12. Information relating to or influencing national security or public interest

This is now much tighter and well-drafted than in previous versions. At the same time, there are still a few changes that might be considered. Article 12(1)(a) refers to national security and defence, but also to 'political stability, unification and sovereignty'. 'Political stability' is not appropriate as a restriction on access to information. It is simply too vague and too open to abuse. It could, for example, be used to refuse access to any information the government considered to be politically embarrassing. 'Unification and sovereignty' are to some extent part of the notion of national security, and to this extent do not need to be repeated. To the extent that they go beyond national security, these are not justifiable as restrictions on access to information. It may be noted these three references – namely to political stability, unification and sovereignty – are not found in other access to information laws. They should be removed from the draft Law.

It is not clear how far Article 12(6), referring to information held as confidential by officials, extends. If it is intended to refer to any information that has been classified, then it is overbroad. The whole point of including harm tests in an access to information law is to avoid simple reliance on classification, which cannot determine whether, at the time of a request, disclosure of the information would or would not cause harm. In any case, it appears to be a very open and broad limitation, not found in other access to information laws, and it should be removed from the draft Law.

Article 12(7) is far too broad, exempting a wide range of internal information, subject to approval of release by the head of the body. Article 12(2) already protects policy-making and internal operations. It may be appropriate to add the following rules to Article 12(2) and then remove Article 12(7):

> (c) seriously frustrate the success of a policy, by premature disclosure of that policy;
> (d) significantly undermine the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views.

It is not clear why Article 12(8) is considered to be necessary. Article 12(5) already protects the investigation and prosecution of crime and this should extend to the protection of witnesses and victims and their families. The removal of this provision from the draft Law is recommended.

Article 13. Personal information

This article provides a list of types of personal information. This is unsatisfactory because much of this information is not normally private in any way. One's gender, for example, is commonly known, and the same is often true of other information listed, such as name, email, etc. The test for whether information is private has to be applied at the time of a request and

taking all of the circumstances into account. It is recommended that Article 13(1) be amended to state that personal information is all information which relates to someone who may be identified from that information. The privacy exception should then be limited to personal information the disclosure of which would represent an invasion of privacy.

On the other hand, Article 13(2)(d) may be too broad, as it would include, for example, performance assessment reports and other private information. It should be restricted to information relating to the job description, position or functions of an official.

Article 14. Business Secret

No comment.

Article 15. Form of Wide Publication of Information

This is fine but it should be clear, as noted above, that information to be widely disseminated should always be available on the website (in addition to any other form of dissemination). Furthermore, it might make sense to move this article up next to Article 9, on information to be widely disseminated.

Article 16. Forms of Access to Information upon Request

See the comment under Article 4.

Article 17. Request for access to Information

Article 17(1) (third sentence), (2) and 4(d), as well as Articles 7(2)(b), 19(2) and 23(2)(b), all refer to the idea of access to "information not to be released". The idea seems to be that if sufficient reasons are provided, requesters may be given access to information that is otherwise intended to be kept secret. It is not clear where this idea came from – as it is very rare in access to information laws – but possibly from Sweden, where this approach is reflected in the law.

It is recommended that these references, and this idea, be removed from the Law (see also Article 7(2)(b)). Although the idea is interesting, in practice it seems to open up far more problems than solutions. It blurs the clear and simple lines of the vast majority of access to information laws, which are that you never need to give reasons for a request and that you have a right to everything which is not restricted, but no right to restricted information. It could easily be abused to require requesters to provide reasons for their requests, or to try to restrict the use to which they put the information which is provided to them.

Article 17(2) provides that requesters do not need to give reasons for wishing to obtain 'personal information', at least in English translation. It is assumed that this is supposed to state that they do not need to provide reasons for accessing any information.

Article 17(4), last sentence, states that, within three working days, public bodies have to provide assistance to requesters or require requester to fill in the necessary details on an application for information. It is assumed that this means that assistance must be provided within three days. Three days is too short a timeframe for requiring requesters to complete their requests.

Article 18. Oral Request to Access to Information

Article 18(1) refers to oral requests, providing that they must be dealt with, outside of cases where the law provides that requests must be in writing. It would appear that this refers to situations as described above, regarding access to information which is otherwise secret. We have already recommended that this idea be removed from the law, and this reference in Article 18(1) should similarly be removed.

Article 18(2) provides that oral requests are not formally part of the administrative procedure and do not give rise to a right of appeal. Another approach would be to require officials to reduce oral requests to writing, and then to treat them in the same way as any other request. This is the approach taken in most of the access to information laws which allow for oral requests. It has the advantage of enhancing the status of oral requests, while also placing a small additional burden on public bodies. If this approach is taken, Article 19(1) would also need to be amended.

Article 19. Decision on the Access to Information

Regarding Article 19(2), see the point above under Article 17.

Article 19(3) provides for the decision on a request to be sent to the requester in various ways. In general, the decision should be sent in the same way the request was lodged (e.g. if the request was sent electronically, then the response should be electronic too).

Article 20. Severability

Article 20(2) provides that where only part of a document is confidential, and that part may be severed from the rest of the document, public bodies "can consider" releasing the rest of the document. This should be mandatory (i.e. public bodies should be *required* to provide the non-confidential portion of the information).

Article 21. Notice on the Non-existence of Requested Information

No comment.

Article 22. Refusal of Request to Access to Information

Article 22(3) provides for a public body to refuse requests for information where such a large quantity of information is requested that to provide it "exceeds [the] capacity" of the body. It would be preferable to introduce here some objective term to assess whether or not the request is too large. A possible wording would be:

> A public or private body is not required to comply with a request for information where to do so would unreasonably divert its resources.

Article 23. Time Limit and Extension to Resolve Request

Regarding Article 23(2)(b), see the point above under Article 17.

Article 24. Fees and Costs for Access to Information

Article 24(1) refers to the idea that a fee may be charged for provision of information in an electronic format. Such requests should be free, since coping and sending the information does not cost public bodies anything.

Article 24(2)(b) refers to the idea of charging for searching for and collecting information where a very large quantity of information has been requested. It would be preferable if the law set out minimum standards for this, for example, where searching would take more than six hours.

Article 24(2)(d), providing for other costs, is currently cast in very broad terms. It would be good to narrow it down as follows:

> Reasonable other costs for other services directly related to the processing of a request, if any.

Article 24 fails to provide for fee waivers. Requesters who are below the poverty line, for example, should not have to pay for requests. It is also in the overall public interest to promote requests where the purpose of the request is to pass the information along to the wider public (for example, in the case of requests from journalists). Fees should also not be charged for requests for personal information. A possible formulation of this is as follows:

> Fees shall not be charged where requesters are below the poverty line, for requests for personal information, or for requests which are in the public interest, including because the requester is seeking information for purposes of informing the wider public.

Article 25. Disclosure of Information for the Public Interest

The inclusion of this article in the draft Law is very welcome. However, the standard for application of this rule, that the disclosure be 'necessary' in the public interest or to protect the interests listed, is too restrictive. In better practice access to information laws, the information is required to be disclosed whenever this is in the overall public interest. Indeed, in best practice laws, public bodies must show that the damage to the protected interest from disclosure is greater than the public interest in knowing the information. A good example of this is the 2007 Nicaraguan Law on Access to Public Information, which requires public bodies to show the following before they may refuse to disclose information:

> The damage that may be produced with the liberation of the information is greater than the pubic interest to know the relevant information. (Article 3(7)(c))

Article 25 envisages proactive publication, for example via the website and/or media, as the main way of getting public interest information into the public domain. It should also make it clear that this rule applies in the context of a request for information (i.e. that such requests should be fulfilled even where the information is 'not to be released' where disclosure is in the overall public interest).

Article 26. Responsibilities of the agencies, organisations administering, holding information

The list of responsibilities for public bodies set out in this article is welcome. Article 26(3) and (4) require public bodies to put in place information management systems to ensure that information is stored in a manner that facilitates the right of access. This is positive but does not go far enough, since it fails to impose specific standards in this area on public bodies. A better system – found in many right to information laws – is to allocate responsibility to a central authority, for example the Ministry of the Interior or of Justice, to set minimum information management standards for all public bodies, along with the power to enforce those standards (for example by imposing fines on public bodies which fail to meet the standards).

Article 27. Protection of Information Provider (Protection of Whistleblower)

The inclusion of protection for whistleblowers in the draft Law is very welcome. However, the interests protected – health, safety and the environment – while worthy, are too limited. Most whistleblower protection rules also (indeed primarily) provide protection for the disclosure of information about the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, abuse of power or serious misconduct. These should be added to the Law.

Article 28. Ensuring budget for Implementation

No comment.

Article 29. Complaint and Appeal

Article 29(1) lists a number of grounds of complaint, including refusal of a request, a failure to respect the timelines and excessive fees. A failure to provide adequate notice of a decision on a request (in accordance with Article 19) or to fail to provide access in the form specified by the requester (in accordance with Article 16) should also be grounds for a complaint.

Article 30. Compensation of Damage

Provisions on compensation are not commonly found in access to information laws, although there is certainly nothing wrong in principle with this idea. However, it should not be seen as a replacement for appropriate redress for failures to provide information which do not lead to actual, demonstrable damages. In particular, everyone who has wrongly been refused information should be given access to that information, even if they have not suffered an actual financial loss.

Article 31. Settlement of Violation

No comment.

Article 32. Oversight and Monitoring of Law Implementation

This article is generally welcome and it is useful to assign responsibility for promotional measures to a central agency in this way. It would, however, be preferable to identify the actual agency in the draft Law, rather than leaving this up to the government.

More serious problems arise in relation to the role of this agency in relation to complaints, pursuant to Article 32(1)(c). First, complaints need to be heard by an independent body. While an internal complaint can be useful, proper consideration of a complaint requires independence from the body that first refused it. This cannot be achieved within a governmental agency. In many countries, the access to information law creates a dedicated independent body – for example an information commissioner – to hear complaints. Second, far more detail as to how complaints will be dealt with is needed. The law should set out the manner in which complaints can be lodged, as well as the timelines for processing complaints and the power of the oversight body to order release of the information or to impose other appropriate remedies.

The report provided for in Article 32(1)(d) is welcome but the ability of a central agency to prepare such a report depends on the submission to it by all public bodies of relevant

information, for example about the number of requests they have received and so on. Such an obligation could be added to Article 26.

Article 33. Amendment of Relevant Laws and Regulations

This article is positive. Consideration might also be given to adding that the purpose of amending these other laws is to bring them into line with the access to information law, so as to ensure that conflicts do not arise.

Article 34. Provision of Detailed Regulations for Implementation

The purpose of this article is not clear. First, the draft Law already provides fairly detailed procedures for accessing information. Second, the oversight body has the power, under Article 32(1)(a) to develop such regulations as may be necessary to implement the law.

Article 35. Effect of Enforcement

The draft Law may be formally adopted as soon as the first quarter of 2010. This article would then delay the coming into force of the law for more than another two years. Experience in other countries suggests that one year is quite enough for public bodies to prepare for implementation. This is particularly the case given that Article 26(4) gives public bodies up to two years from the date of publication of the law to establish their websites, probably the most onerous obligation that they need to prepare for in advance.

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