ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

MEMORANDUM

on the

draft Law of the Republic of Uzbekistan on "Principles and Guarantees of Freedom of Information"

by

ARTICLE 19
Global Campaign for Free Expression

London
December 2002

Introduction

The government of Uzbekistan is currently considering the adoption of a Law on "Principles and Guarantees of Freedom of Information." ARTICLE 19 welcomes the initiative to pass a law designed to ensure respect for the right to freedom of information. ARTICLE 19 has been requested to provide this analysis in order to ensure that the Freedom of Information Law is, so far as possible, in line with international standards of freedom of information.

There are a number of positive elements in the law, such as the provisions on openness, affirming everyone's right to seek information, and the prevalence of international law over domestic law. However, many of these are effectively annulled by other provisions. [ADD COMMENT ON WHICH ONES]

1. International and Constitutional Guarantees

Article 19 of the Universal Declaration on Human Rights (UDHR),[1] binding on all States as a matter of customary international law, sets out the fundamental 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 regardless of frontiers.

The International Covenant on Civil and Political Rights (ICCPR),[2] a formally binding legal treaty ratified by Uzbekistan in September 1995, guarantees the right to freedom of opinion and expression at Article 19, in terms very similar to the UDHR. Furthermore, the Preamble of the 1992 Constitution of Uzbekistan states that the Uzbekistan "recogniz[es] priority of the generally accepted norms of the international law".

The right to free expression is also protected at Article 67 of the Constitution, which states:

> The mass media shall be free and act in accordance with the law... Censorship is impermissible.

International law goes beyond simply requiring States to refrain from interfering with the free flow of information and ideas. It also places an obligation on States to take positive steps to ensure that key rights, including freedom of expression and access to information, are respected. Pursuant to Article 2 of the ICCPR, States must "adopt such legislative or other measures as may be necessary to give effect to the rights recognized by the Covenant." This means that States must create an environment in which a diverse, vigorous and independent media can flourish, thereby satisfying the public's right to know.

Freedom of information, including the right to access information held by public authorities, is a core element of the international guarantee of freedom of expression. There is little doubt as to the importance of freedom of information. The United Nations General Assembly, at its very first session in 1946, adopted Resolution 59(I), which stated:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.[3]

The right to freedom of information as an aspect of freedom of expression has been recognised by the UN. The UN Special Rapporteur on Freedom of Opinion and Expression has provided extensive commentary on this right in his annual reports to the UN Commission on Human Rights. In 1997, he stated: "The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold

[1] UN General Assembly Resolution 217A(III) of 10 December 1948.
[2] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.
[3] Adopted 14 December 1946.

information from the people at large … is to be strongly checked."[4] His commentary on this subject was welcomed by the UN Commission on Human Rights, which called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications."[5] In his 1998 Annual Report, the Special Rapporteur declared that freedom of information includes the right to access information held by the State:

> [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…."[6]

Once again, his views were welcomed by the Commission on Human Rights.[7]

The European Court of Human Rights has stopped short of interpreting Article 10 of the ECHR as including a right to access information held by public authorities, but it has required public authorities to release information based on the right to family life.[8]

In recognition of the key importance of freedom of information, and the need to secure it through legislation, laws giving individuals a right to access information held by public authorities have been adopted in almost all mature democracies. In addition, many newly democratic countries – including Albania, Bulgaria, Bosnia-Herzegovina, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Moldova and Slovakia – have recently adopted freedom of information laws. Many other countries in transition have either recently adopted, or are currently in the process of adopting, freedom of information laws.

2. Overall Approach

Article 1 states that the goal of the draft law is "the realisation of each individual's right to freely search for, receive, *research, disseminate, use and store information*…" [emphasis added]. The draft law therefore focuses not only on the right to freedom of information but also more generally on issues relating to expression. It is important that freedom of information (FOI) laws focus on ensuring access to information held by public authorities, in part so that they do not lose focus. An FOI law should clearly state this at the outset, setting a basic standard of disclosure based on the principle of *maximum disclosure*. This principle establishes a presumption that all information held by public authorities should be available to the public. Information belongs to the people and the State merely holds it on their behalf.

The draft law also includes data protection measures. Data protection is a complex subject and it is normally addressed in separate laws, rather than being incorporated in FOI laws. If the authors wish to retain provisions on data protection in the draft law

[4] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1997/31, 4 February 1997.
[5] Resolution 1997/27, 11 April 1997, para. 12(d).
[6] 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.
[7] Resolution 1998/42, 17 April 1998, para. 2.
[8] See *Leander* v. *Sweden*, 26 March 1987, 9 EHRR 433; *Gaskin* v. *United Kingdom*, 7 July 1989, 12 EHRR 36; *Guerra and Ors.* v. *Italy*, 19 February 1998.

they need to further elaborate and clarify them, thus ensuring that they are not open to varying interpretation and possible abuse. Articles relating to data protection should, if retained, be gathered together in one section of the law, be treated as distinct from the provisions on access to publicly-held information, and be set out in much greater detail.

In addition, the draft law places a number of general restrictions on the free flow of information to "prevent threats to informational security" (Articles 11 to 15). However, such restrictions, to the extent that they are legitimate (see below) apply to the *dissemination* of information rather to access to information, and hence find no place in a freedom of information law.

The principles included in the ARTICLE 19 publication *The Public's Right to Know*[9] provide guidance in the setting up of a good freedom of information regime. The first principle, on which all other standards are based, is the above-mentioned principle of maximum disclosure. Exceptions to this general rule are permissible, but only when these are narrow and specific, and when they are applied in order to defend legitimate aims such as the protection of national security and public order. They should also fully satisfy a strict three-part test, described below (see System of Exceptions). This is essential to ensure that information disclosure is refused *only when* it is imperative under specific circumstances.

Recommendations:

- The law should establish at the outset that it is guided by the principle of maximum disclosure.
- The law should focus on the right to access information and, as a result, all references to the dissemination of information, and other general references to freedom of expression, should be deleted.
- The provisions on data protection should be removed or, at a minimum, these provisions should be subject to significant further elaboration and placed in the same section, distinct from the FOI provisions.
- Articles 11 to 15 should be deleted.

3. Comments on Specific Provisions

3.1 Definitions

Article 3 defines information as "data on people, objects, facts, events, occurrences and processes …". This definition is excessively vague and might be interpreted to include forms of expression such as the coverage of events by the media. On this interpretation, it would place restrictions on expression whereas a freedom of information law should provide for access to information held by public bodies, as well as some private bodies which undertake public work. 'Information' should, instead, be defined broadly to include all records held by public bodies.[10]

[9] (ARTICLE 19, London: June 1999).

[10] This should be regardless of the form of the record (document, tape etc) and its source (whether it was produced by the public body or a different body).

Article 8 refers to public bodies as "government structures as well as organs of citizen self-government, public associations, enterprises, agencies, organisations and bureaucrats". This definition is too narrow. Public bodies should be defined broadly to include bodies established by or under the Constitution, those that form part of any level or branch of government, those that carry out public functions or that are owned, controlled or substantially financed by the government. All these bodies carry out public functions and/or are financed through taxpayers' money.

Recommendations:

- The definitions of 'information' and 'public body' should be amended in accordance with the above.
- It should be clear that this law does not place restrictions on freedom of expression.

3.2 System of Exceptions

The second paragraph of Article 4 states:

> Freedom of information can only be limited in accordance with the law and for the sake of protection of rights and liberties of individuals, fundamentals of constitutional regime, moral values of the community as well as national security and the country's spiritual, cultural and scientific potential.

Furthermore, Article 6 states, in part, "Information must be open and public, except for confidential information," although it does go on to establish a number of categories of information which may not be considered confidential. Furthermore, Article 10 provides that disclosure may be refused, "if the information is confidential or if its disclosure can cause damage to the rights and legitimate interests of the individual, community and state."

The right to freedom of information is not absolute and some restrictions are allowed to satisfy certain legitimate aims. However, such restrictions must satisfy a strict three-part test:
(1) the information must threaten harm to a *legitimate aim* provided for by law;
(2) disclosure must pose a real and substantial threat of *harm* to that aim; and
(3) the *harm* to the legitimate aim must outweigh any *public interest* served by having the information disclosed. [11]

The 'harm' and 'public interest' standards establish a presumption that the vast majority of information held by public authorities is subject to disclosure (the principle of maximum disclosure referred to above), either upon request or pursuant to a positive obligation on public authorities to publish the information.

There are a number of problems with the provisions outlined above. Articles 4 and 10 provide for an excessively broad list of aims warranting exceptions to the right to information. For example, aims such as the 'country's spiritual life' are simply not

[11] *The Public's Right to Know*, op.cit., Principle 4.

legitimate, while the rights and legitimate interests of individuals, the community and the State is excessively vague. The law should provide a detailed, comprehensive and narrow list of reasons justifying any refusal to disclosure information. These may include:

- personal information;
- legal privilege;
- commercial and confidential information;
- health and safety;
- law enforcement;
- defence and security;
- public economic interests; and
- policy making and operations of public bodies

Once it has been established that an exception relates to a legitimate aim, the other elements of the three-part test need be examined. First, it needs to be shown that disclosure of the information would harm the legitimate aim. Second, a balancing exercise must be undertaken in all cases to assess whether the damage is greater than the public interest in receiving the information (public interest override). Only where the harm to the legitimate interest outweighs the public interest in disclosure may a refusal to disclose be considered legitimate.

Articles 6 and 10 implicitly place secrecy laws, providing for the classification of certain documents as 'confidential', on a superior footing to the freedom of information law. This is backed up by Article 2, stating that "legislation on principles and guarantees of freedom of information consists in the present law *and other statutes*" [italics added]. This deference to other laws and, indeed, administrative classification procedures, is problematic since many of these laws and procedures do not meet the above-mentioned three-part test. They were not drafted or put in place with the goal of promoting openness and many are out-dated and/or overly secretive. Therefore, by referring to 'other laws', the draft FOI law does not promote open government, but effectively perpetuates secretive practices.

Instead, an FOI law should clearly state that other legislation should be interpreted in a manner consistent with its provisions. Ultimately, laws that are inconsistent with an FOI law should be repealed or amended. In particular, State secrets laws should not be used to limit the level of openness provided by an FOI law.

Recommendations:

- Ensure that exceptions are clearly and narrowly drawn and subject to the strict three-part test outlined above;
- Insert a detailed and exhaustive list of legitimate aims for the refusal of information;
- Delete references to other laws.

3.3 Information Security

The provisions dealing with 'information security'[12] in Articles 11 to 15 are particularly worrisome aspects of the law, imposing very wide and free-standing restrictions on the free flow of information. These include restrictions purporting to protect individual information (Articles 11 and 13); to regulate "community relations in the field of information" (Article 12); to preserve of cultural and historic values (Article 14); to prevent psychological influence and manipulation of the public conscience (Article 14); to protect social stability (Article 14) and national security (Article 15); and to prevent war propaganda and racial discrimination (Article 15).

The main problem with these restrictions is that they have little or nothing to do with the issue of access to information but rather deal with the general issue of restrictions on the *dissemination* of information. They have, therefore, no place in a freedom of information law. In any case, to the extent that they are applicable to freedom of information, they are impermissibly broad and/or vague, and lack harm tests and public interest overrides.

Many of these restrictions are impermissibly broad and/or vague even to justify restrictions on freedom of expression. Furthermore, the tone of these provisions sets a negative perspective by placing an emphasis on *withholding* information rather than calling for openness and free flow of information. There is simply no place in an FOI law for this type of provisions: the legitimacy of exceptions to the general right to seek and obtain information, should, instead, simply be verified in light of the three-part test outlined above.

3.4 Obligation to Publish

Article 8 states:

> Government structures … are obliged to ensure that everyone has the an opportunity to familiarise himself/herself with information on this/her rights, liberties and legitimate interests, create accessible information recourses, ensure mass information of users on citizens' rights, liberties, and duties, their security as well as other information of public interest.

Article 6 also states that governmental bodies should provide the media with official reports on events and facts of public interest, including information such as health hazards and the environment.

Public bodies should be under an obligation to publish key information about their activities and functions of their own motion. However, the positive provision at Article 8 should be further elaborated, by stating clearly, at a minimum, what are the specific types of information that should be published by all public bodies. These should include key categories of information, including but not limited to:

- a description of its structure, functions, duties and finances;
- relevant details concerning services provided;
- any direct request or complaints mechanisms available to members of the public;

[12] This is defined at Article 3 as "the state of security of the interests of the citizens, the community and the state in the field of information".

- a guide containing information about its record-keeping systems and the type of information it holds;
- the content of all decisions and/or policies it has adopted which affect the public, as well as the reasons;
- mechanisms for members of the public to made representation and influence the body's policies.

In addition, Article 6 should be amended so that the information in question is not merely given to the media, but to everyone. There should be no corresponding obligation on the media to carry such information, which this provision might be seen to imply.

Recommendations:

- The law should establish both a general obligation to publish and key categories of information that must be published.
- Article 6 should apply not only to the mass media but to everyone. It should be clear that Article 6 does not impose a positive obligation on the mass media to pass on public information they receive and that this should be a matter for editorial independence.

3.5 Right of Appeal

Article 7 states that refusals to the right to FOI by the 'owner of information' can be appealed, whilst Article 9 establishes that parties who have been refused information or who have received incorrect information have a right to compensation for material or moral damages. The draft law provides for a general right of appeal to the courts but does not provide for an administrative level of appeal.

Ideally, there should be three levels of appeal: first to a higher authority within the requested institution, then to an *independent* administrative body (such as an Ombudsperson, Human Rights Commission or the Information Commissioner) and finally to courts. Although an appeal to the courts is important, it is not sufficient given the lengthy and costly implications of court challenges. An administrative body can provide timely, cheap redress for those who have been refused access to information and, in our experience, is a crucial component of an effective freedom of information system.

Recommendation:

- The law should provide for an appeal to an independent administrative body, as well as to the courts.

4. Omissions

There are a number of issues which are important for an effective freedom of information regime and which have been omitted from the draft law.

Costs

Individuals should not be deterred from making requests for information by excessive costs, as this will have an adverse impact on the free flow of information. The law should ensure that fees for information requests shall not exceed the actual cost of searching for, preparing and communicating the information. Moreover, payment of fees should not be required for requests for personal information or for requests in the public interest.

Maintenance of Records
The draft law should provide for some system to establish and apply minimum standards for maintenance of records. In many countries, poor record-keeping is one of the main obstacles to implementation of the right to know.

Protection for "Whistleblowers"
Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information about wrongdoing, such as the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body. This should also include information about a serious threat to health, safety or the environment, whether linked to individual wrongdoing or not. Whistleblowers should benefit from protection so long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing.

Protection for Those Disclosing Information in Good Faith
Officials should be protected from sanctions when they have acted in good faith in disclosing information, even when they have in fact made an honest mistake by disseminating information that should not have been disclosed.

Information Officers
To ensure that the mechanisms for processing information requests are efficient, it is recommended that each public body appoint an Information Officer to act as central contact within the public body for receiving requests for information and assisting individuals seeking to obtain information. The Information Officer should also be required to submit an annual report on the activities of the public body to promote freedom of information, to facilitate monitoring and to ensure openness.

Severability
If a request for information relates to a record containing information which falls within the scope of an exception, any information in the record which is not subject to an exception should, to the extent that it may reasonably be severed from the rest of the information, be communicated to the requester.

Guide to using the act
An independent body, for example the Information Commissioner, should be required to publish and widely disseminate a clear, simple guide containing practical information on how to use the freedom of information law.

Recommendations:
- The law should ensure include clear rules on what fees may be charged for requests for information, in accordance with the above.

- Public bodies should be required to meet certain minimum standards in relation to record maintenance.
- The law should provide protection for whistleblowers.
- Protection should be provided to public officials who make *bona fide* mistakes in responding to access to information requests.
- All public bodies should be required to appoint an Information Officer, who should be centrally responsible with that body for ensuring compliance with the law.
- The law should provide that were only part of a record is subject to an exception, the rest of the record should still be disclosed.
- A guide on how to use the law should be required to be published and widely disseminated.