NOTE

on

the Croatian NGO Joint Statement on The Public's Right to Know

by

ARTICLE 19
Global Campaign for Free Expression

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I. Introduction

ARTICLE 19 very much welcomes the initiative by the Croatian NGO movement to advocate in favour of a freedom of information law in Croatia and the joint statement issued with this in mind. We have long advocated the passage of freedom of information legislation to give practical effect to the public's right to know and, in particular, to the right to access information held by public authorities. Advocacy in favour of the right to know is particularly important in Croatia given that, as noted in the statement, it is the only country in South-East Europe, and one of very few in the whole of Europe, where there is not even a draft freedom of information law being considered.

The statement is very progressive, setting out well the underlying rationale for reflecting freedom of information legislation, as well as the main principles such legislation should respect. At the same time, we feel that the position set out in the statement would benefit from some refinements and clarifications, as well as a few additions. This Note sets out our suggestions in this regard, along with recommendations. Our goal is not to critique the statement as such, but rather to assist

the NGO community in its efforts to prepare draft freedom of information legislation in line with the highest international standards.

Our comments are recommendations are set out in some detail below. Some of our key recommendations relate to the idea that everyone, not just citizens, should benefit from the right to information, the need for an administrative body to which any refusals to disclose information may be appealed, and the need for promotional measures, including training for public officials, to ensure that the information regime works in practice.

The comments in this Note are based on two key ARTICLE 19 publications, *The Public's Right to Know: Principles on Freedom of Information Legislation* (ARTICLE 19 Principles)[1] and *A Model Freedom of Information Law* (Model Law).[2] These publications represent broad international consensus on best practice in this area. This Note is based on an English language version of the statement dated 24 February 2003.

II. International and Constitutional Standards

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

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

In ensuing international human rights instruments, freedom of information was not set out separately but was included in the fundamental right to freedom of expression, which includes the right to seek, receive and impart information. Article 19 of the *Universal Declaration of Human Rights* (UDHR),[4] generally considered to be the flagship statement of international human rights, binding on all States as a matter of customary international law, guarantees the right to freedom of expression in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The *International Covenant on Civil and Political Rights* (ICCPR),[5] a legally binding treaty which is binding on Croatia,[6] guarantees the right to freedom of opinion and expression in very similar terms to the UDHR, also in Article 19. The *European Convention on Human Rights* (ECHR),[7] ratified by Croatia on 5 November 1997, also guarantees freedom of expression, at Article 10.

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[1] ARTICLE 19 (London, 1999).
[2] ARTICLE 19 (London, 2001).
[3] 14 December 1946.
[4] UN General Assembly Resolution 217A(III), 10 December 1948.
[5] UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.
[6] Croatia entered a Declaration of ratification on 12 October 1992.
[7] E.T.S. No. 5, adopted 4 November 1950, entered into force 3 September 1953.

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

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

> [T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems….[8]

In November 1999, the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – came together for the first time in November 1999 under the auspices of ARTICLE 19. They adopted a Joint Declaration which included the following statement:

> Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.[9]

In March 1999, a Commonwealth Expert Group Meeting in London adopted a document setting out a number of principles and guidelines on the right to know and freedom of information as a human right, including the following:

> Freedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions.[10]

These principles and guidelines were endorsed by the Commonwealth Law Ministers at their May 1999 Meeting[11] and recognised by the Commonwealth Heads of Government Meeting in November 1999.[12]

Within Europe, the Committee of Ministers of the Council of Europe recently adopted a Recommendation on Access to Official Documents,[13] calling on all Member States to adopt legislation giving effect to this right. The Recommendation provides for a

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[8] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14. These views were welcomed by the Commission. See Resolution 1998/42, 17 April 1998, para. 2.
[9] 26 November 1999.
[10] Quoted in *Communiqué*, Meeting of Commonwealth Law Ministers, Port of Spain, 10 May 1999.
[11] *Ibid.*, para. 21.
[12] The *Durban Communiqué*, Commonwealth Heads of Government Meeting, Durban, 15 November 1999, para. 57.
[13] R(2000)2, adopted 21 February 2002.

general guarantee of the right to access official documents, as well as specific guidance on how this right should be guaranteed in practice:

> III
> *General principle on access to official documents*
>
> Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including national origin.

The European Union has also recently taken steps to give practical legal effect to the right to information. The European Parliament and the Council adopted a regulation on access to European Parliament, Council and Commission documents in May 2001.[14] The preamble, which provides the rationale for the Regulation, states in part:

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

The purpose of the Regulation is "to ensure the widest possible access to documents".[15]

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

Article 38 of the Constitution of the Republic of Croatia states, in part:

> Freedom of thought and expression shall be guaranteed.
>
> Freedom of expression shall specifically include freedom of the press and other media of communication, freedom of speech and public expression, and free establishment of all institutions of public communication.
>
> Censorship shall be forbidden. Journalists shall have the right to freedom of reporting and access to information.

[14] Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.
[15] *Ibid.*, Article 1(a).

This specifically guarantees the right to access information only to journalists, but everyone is guaranteed the right to freedom of expression, which, as noted above, includes freedom of information.

III. Comments on the Joint Statement

Preamble

The Preamble sets out well the rationale for freedom of information legislation, as well as the international statements underpinning this right. We have just two, related comments on this part of the statement. The text refers in several places to citizens. While this is often appropriate, at the same time we are of the view that non-citizens should also benefit from the right to information. Ideally, everyone should be able to request and receive information from public authorities and the most established freedom of information systems, for example in Sweden and the United States, do apply broadly, even to residents of other countries. The exclusive focus on citizens in the preamble provides justification for restricting the application of the law.

The Preamble also claims that since citizens pay their taxes, they have a right to demand responsible behaviour from the authorities. We note that the right to information does not flow from the fact of paying taxes, but rather from the principle that in a democracy, the government derives its authority and legitimacy from the people, to whom it is responsible. Those who do not pay taxes, for example because of poverty, are equally entitled to benefit from the right to freedom of information.

Recommendations:

- In providing a rationale for freedom of information, less emphasis should be placed on citizens, and more on the idea that everyone has a right to know.
- In setting out the underlying rationale for freedom of information, the key principle to be stressed is the idea of democratic accountability and legitimacy, not paying taxes.

Principle 1

Consistently with the point made above, this Principle should not grant only citizens the right to information. Everyone should benefit, consistent with the title of this Principle; at a minimum, these rights should apply to all residents. It would also be useful to clarify that individuals do not have to demonstrate a particular interest in the information sought to exercise this right

Consideration should be given to adding a definition of information here, as well as to moving the description of public bodies from Principle 2. The definition should make it clear that all information held by public bodies, regardless of its form, is covered.

On the other hand, the second paragraph of this Principle fits better under Principle 2, the obligation to publish.

Recommendations:

- Everyone, not just citizens, should benefit from the right to information, regardless of whether or not they can demonstrate a specific interest in the information sought.
- Consideration should be given to providing a clear, and broad, definition of information in Principle 1 and to moving the definition of a public body from Principle 2 to this Principle.
- The parts of this Principle on the obligation to publish should be consolidated with the similar provisions in Principle 2.

Principle 2

This Principle should make it clear that the freedom of information regime should set out a number of key categories of information that all public bodies are required to publish, even in the absence of a request.

The last paragraph of this Principle implies that information classified as secret is not subject to disclosure. Classification is an administrative practice which should not be determinative as to whether or not the information in question should be disclosed. Rather, the law should set out clearly the regime of exceptions and any information not covered by an exception should be subject to disclosure, whether or not it has been classified. Otherwise, civil servants could effectively negate the right to information simply by classifying sensitive or embarrassing information.

Recommendations:

- The freedom of information regime should set out clearly the key categories of information that must be proactively published by public bodies.
- All information which does not fall within the scope of established exceptions should be subject to disclosure.

Principle 3

This Principle focuses on public education, but a freedom of information law should also provide for training for public officials on how to implement the law. A number of other measures to combat the culture of secrecy that pervades most public bodies should also be considered (see below).

Recommendations:

- Provision for training for public officials and for addressing the culture of secrecy should be incorporated into Principle 3.

Principle 4

This Principle sets out the regime of exceptions for the freedom of information law. It should be clear that information may not be withheld unless disclosure would pose a risk of serious harm to the interests listed there. It is not enough, for example, for information to relate to national security; the disclosure of that information must pose a risk of serious harm to national security.

This Principle should also set out the idea of severability, whereby where it is possible to remove the secret parts of a document, the rest of the document should still be disclosed. Finally, consideration should be given to introducing overall time limits beyond which all information would be presumed to be subject to disclosure.

This Principle also provides protection to individuals who disclose information in good faith and being "certain of the truthfulness of the information". It may be noted that there are two different circumstances where this Principle might come into play. First, an official could disclose information pursuant to a request under the freedom of information law, even though the information was in fact covered by an exception. Second, a whistleblower could disclose information on his or her own initiative, where the information discloses evidence of wrongdoing or mis-management. These are different contexts and it might be useful to distinguish them clearly.

In any case, it is not appropriate to require the official to be certain that the information is correct. Often, the information will have been provided by someone else and the official cannot verify with certainty that it is true. Instead, it is enough if he or she has a reasonable belief in its veracity.

Recommendations:

- Principle 4 should make it clear that information is subject to disclosure unless this would pose a risk of serious harm to one of the interests listed.
- The principle of severability should be added to this Principle.
- The freedom of information regime should provide for overall time limits beyond which information would be presumed to be subject to disclosure.
- The two types of good faith disclosures – pursuant to a request and by a whistleblower – should be distinguished in the freedom of information regime.
- The standard of certainty should be replaced by one of reasonable belief in the accuracy of the information.

Principle 5

This Principle sets out in brief the process for accessing information, as well as the right of appeal. Further procedural rights that might be included here are the right to written reasons for any refusal to provide information and the right to request the form in which the information will be provided.

The statement provides for appeals from a refusal to disclose information to the courts. In our experience, the success in practice of a freedom of information regime depends on individuals having the right to appeal refusals to an administrative body which can process such appeals rapidly and at a low cost. A special body could be constituted specifically for information appeals or, particularly in a smaller country like Croatia, this task could be allocated to an existing body, such as a human rights commission or ombudsman. A further right to appeal to the courts is also desirable but only a small number of cases can be expected to be appealed that far, given the time and cost involved.

Finally, this Principle refers to the criminal act of destroying data and the need for record maintenance standards. In our view, these are two different things. Destroying data with intent to deprive people of the right to access that information should, as

recommended by the Principle, be a criminal offence. However, in practice much data is, over time, destroyed as part of an effective records management system (it is not practical to keep all records forever). To ensure this happens appropriately, as well as to promote better record-keeping generally, both for administrative efficiency and to protect the right to access that information, it is desirable to ensure a locus of responsibility for setting minimum record maintenance standards, for example, with the justice department or the information commissioner, where one exists.

Recommendations:

- Consideration should be given to adding further procedural protections, as specified above, to Principle 5.
- The freedom of information regime should include the right to appeal any refusal to disclose information to an administrative review body.
- A system for ensuring that minimum record maintenance standards are set and respected should be provided for.

Omissions

There are a couple of other issues which should be addressed in a freedom of information regime. First, the statement does not make it clear how the freedom of information law will relate to other laws and whether, in particular, it will override secrecy legislation. In our view, this is essential if the previous practices of secrecy are to be overcome.

Second, a number of promotional measures should be provided for. A specific body, preferably the administrative body responsible for appeals, should be required to publish and widely disseminate a guide to using the freedom of information regime. Requiring public bodies to appoint information officers can facilitate the right of access and ensure a locus of responsibility for the obligations under the law.

Recommendations:

- It should be clear that the freedom of information regime will override secrecy laws to the extent of any inconsistency.
- The freedom of information regime should include a number of promotional measures, as stipulated above.