



MEMORANDUM

on the

Croatian Right to Access Information Act

By

ARTICLE 19
Global Campaign for Free Expression

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I. Introduction

This Memorandum contains an analysis by ARTICLE 19 of the draft Croatian Right to Access Information Act (draft Act). ARTICLE 19 has been asked to comment on the draft Act, which was prepared by a group of NGOs in Croatia. These comments are based on an unofficial English translation of the draft Act.¹ This Memorandum follows on from our April 2003 Note on the Croatian NGO Joint Statement on The Public's Right to Know, which set out the principles which would underpin the legislation. We note that many of the recommendations contained in our April Note have been reflected in the draft Act.

ARTICLE 19 welcomes the draft Act, which will go a long way to ensuring respect for the right of freedom of information within Croatia. There are a number of positive elements in the draft Law, including its broad definition of information and obligees (public bodies required to provide information), strong procedural protections, and sanctions for bodies and individuals who undermine the right of access. At the same time, the draft Act could still be improved, for example regarding the regime of exceptions to

¹ ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.

the right to access information and a few areas where the rules could be more precise. There are also some omissions, such as the lack of a requirement to maintain records and of protection for whistleblowers.

The following analysis of the Croatian draft Act is based on two key ARTICLE 19 documents, *The Public's Right to Know: Principles on Freedom of Information Legislation* (ARTICLE 19 Principles)² and *A Model Freedom of Information Law* (ARTICLE 19 Model Law).³ These documents are based on international and best comparative practice concerning freedom of information. Both publications represent broad international consensus on best practice in this area and have been used to analyse freedom of information legislation from countries around the world.

This Memorandum does not contain an overview of the international and constitutional standards relating to freedom of information which underpin the analysis. For this information, we refer readers to our recent Note on the Croatian NGO Joint Statement on The Public's Right to Know, produced in April 2003.

II. Analysis of the draft Croatian Right to Access Information Act

1. The Regime of Exceptions

One of the most serious problems with the draft Act is the regime of exceptions to the right to access information. First, the draft Act provides, at Article 10(1), that obligees “shall deny the access to information” where the information falls within the scope of exceptions as set out in the law. While there may be circumstances where such a strong formulation as “shall deny” is warranted, in general, ARTICLE 19 advocates in favour of a more permissive system, whereby officials *may* deny access, instead of being required to do so.

Second, instead of providing for a comprehensive, self-standing set of exceptions, the draft Act allows existing secrecy laws to prevent access to information. Article 10(1) provides for denial of access where the information in question has been declared a secret either pursuant to a law, or according to “criteria prescribed by law”. The same article then goes on to define certain additional categories of secret information.

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

- the information must relate to a legitimate aim listed in the law;
- disclosure must threaten to cause substantial harm to that aim; and
- the harm to the aim must be greater than the public interest in having the information.⁴

² (London: June 1999).

³ (London: July 2001).

⁴ See the ARTICLE 19 Principles, note 2, Principle 4.

This implies first that every aim justifying non-disclosure is set out in some detail in law. Second, it is not enough for the information simply to relate to the aim; rather disclosure must threaten to cause substantial harm to that aim. Otherwise, there can be no reason not to disclose the information. For example, national security is recognised everywhere as a legitimate reason for non-disclosure of certain information, but disclosure of much information relating to the defence sector – such as the cost of pens for the armed forces – will not cause any harm to national security. Finally, even when harm is posed to a legitimate aim, there will be circumstances when the overall public interest is still served by disclosure. This might be the case, for example, in relation to information which is private in nature, but which reveals widespread corruption or wrongdoing.

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

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

There are also problems with the specific categories of secret information recognised by the draft Act. Article 10(1)(3) refers to the administrative function of the courts. Most freedom of information laws restrict their exceptions to the decision-making processes of the courts, in addition to general exceptions relating to law enforcement, privacy and confidentiality. Article 10(1)(7) refers to the need to protect the right to life, but this is already covered by Article 10(1)(4). The same article also refers to other legal provisions relating to privacy, again something that is already covered by Article 10(1).

A serious problem with Article 10(1)(7) is that it purports to exempt information from disclosure where the information could endanger “honour and respect”. It would appear that this provision confuses the role of defamation law and the right to access information. Where a public body holds information, not otherwise private in nature, which affects an individual’s honour, either the information will be correct, in which case it should nevertheless be disclosed, or it will be incorrect, in which case again it should be disclosed. In the latter case, there may be defamation implications of releasing the information, but there is no warrant for hiding the fact that a public body is holding

incorrect information, the proof of which may be the purpose of the request for the information in the first place.

Article 10(2) provides that obligees should provide access to that part of the information that may be disclosed. It is possible that this is a translation issue, but the English version of this provision is unclear. The provision should clarify that where information is severable, that portion which may be disclosed should be made public.

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

22. Notwithstanding any provision in this Part, a body may not refuse to indicate whether or not it holds a record, or refuse to communicate information, unless the harm to the protected interest outweighs the public interest in disclosure.

Recommendations:

- The regime of exceptions provided for in the draft Act should be comprehensive and should, as a result, override secrecy legislation in case of conflict.
- All duplications in the draft Act regarding exceptions should be resolved.
- Consideration should be given to removing the exception in favour of the work of administrative functions of the courts.
- The exception in favour of honour and respect should be removed from the draft Act.
- The provision dealing with severability should be reviewed to ensure that it is quite clear.
- A public interest override for exceptions should be added to the draft Act.

2. Maximum Disclosure

The principle of maximum disclosure should underpin a freedom of information law. This principle implies that all information should be covered by the regime of disclosure, subject only to a limited regime of exceptions in the overall public interest. Both information and public bodies should be defined broadly, to ensure that the scope of the law is wide.

The draft Act defines beneficiary in an extremely broad fashion, consistent with the principle of maximum disclosure. Indeed, it also includes as beneficiaries objects such as 'a building' and 'a settlement'. While this is an innovative approach to the issue of the right of access, ARTICLE 19 would advise caution when extending the right beyond entities which at least have implicate human beings as members.

The definition of obligees is also quite broad. The translation is not entirely clear on this point, but ARTICLE 19 argues that bodies which perform public functions, as well as bodies which are owned or controlled by public bodies, should be covered by the obligation to disclose information.

The draft Act defines information by reference to various forms in which information may be presented, such as text, photography, film, etc. While it is clear that an attempt has been made to be quite comprehensive, at the same time any list will inevitably have its shortcomings and general rules of law suggest that where a list is presented, any items which have been excluded are the result of conscious exclusion. As a result, it may be preferable simply to define information as any material which is capable of communication, without providing a list of the means by which such communication may take place.

Recommendations:

- Consideration should be given to excluding inanimate objects which do not involve human members from the definition of beneficiaries.
- The definition of obligees should include all bodies which perform public functions or which are under the ownership or control of public bodies.
- The definition of information should be relatively simple, and reference to the various forms in which information may be presented should be avoided.

3. Correct Information

In a couple of places, the draft Act refers to the idea of ‘accurate’ information. For example, in Article 5.1, the draft Act provides that information provided shall be ‘accurate’. Similarly, Article 16(1) provides that where a requester considers that information provided is ‘incorrect’, he or she may request a right of redress.

It is not entirely clear what these references to accurate information entail. Inasmuch as they mean that officials should provide the information actually held, this is uncontroversial. If, however, they mean that officials must ensure that the information they disclose is actually correct, they represent a misunderstanding of how a freedom of information system works. Public bodies are under an obligation to disclose the information they actually hold, regardless of whether or not it is correct. In some cases, this information will have been provided by third parties. In other cases, the government official who produced the information may have made an honest mistake. In yet other cases, the information may represent a dishonest position put forward by government officials. In all cases, the obligation is simply to disclose the information actually held. For example, a journalist may want the information to prove that the government had misled people. In such a case, the actual document, including any incorrect information it might contain, is precisely what is wanted.

Recommendation:

- All references in the draft law to ‘accurate’ information should be removed.

4. Procedural Provisions

Article 11 provides for various means of accessing information, including direct provision of the information to the requester, access to the document, as well as a general category of other means of access. Consideration should be given to specifying here certain other common and often desirable forms of access, such as a copy in electronic format (often the cheapest and most efficient form of access) or accessing machine-readable information through an onsite machine (such as a video player). Article 20 provides that a requester may specify that the information should be mailed or otherwise sent to him or her. This should, for the sake of clarity, be combined with Article 11, or at least appear directly after that article.

Article 14(1) provides for extension of the time to grant access to information from 8 days up to 15 days where the information is not at the central office of the obligee or where one request relates to multiple pieces of information. Consideration should be given to also allowing for an extension where it is necessary to contact a third party before releasing the information.

Article 15(2)(1) provides for the refusal of a request where the same requester was granted access within 30 days prior to the new request. This appears to be an excessively short timeframe. Instead, consideration should be given to allowing refusal where the same requester was granted access to substantially the same information at any prior time.

Recommendations:

- Consideration should be given to specifying a few more common forms of access in Article 11, which should also incorporate Article 20.
- Consideration should be given to adding a third ground for extending the time for granting access to information, namely where it is necessary to contact a third party.
- Consideration should be given to amending Article 15(2)(1) to provide for refusal of a request where the same requester has already been granted access to substantially the same information.

5. Appeals

Article 17(1) provides that a requester may appeal against a decision by an obligee within 8 days and to “the competent body”. An appeal then lies from the decision of this body to the administrative court for any decision denying the request (Article 17(3)).

It is unclear what is meant by the reference to a “competent body”. As we specified in our earlier Note, 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. What is important is that the body is administrative, not judicial, in nature (so that its procedures are rapid and low-cost) and that it is independent of government.

Eight days is an unreasonably short period of time within which to require a requester to lodge an appeal. Unlike an obligee, a requester will often be an individual and there may be many reasons why it is not possible to lodge a request in such a short period of time (for example, the person might be on holiday when the notice of refusal to provide the information arrives).

Finally, it should be clear that the grounds for lodging an appeal are not restricted to a refusal to satisfy the original request but may also include undue delay in providing information, excessive fees being charged or a failure to communicate the information in the form requested.

Recommendations:

- An appeal should lie in the first instance to an independent administrative body against a decision of the obligee.
- The period allowed for lodging an appeal should be extended from eight days to at least 30 days.
- The grounds for an appeal should not be restricted to a failure to provide the information requested but should also include such things as undue delay, excessive fees or providing the information in the wrong form.

6. Obligation to Publish

Article 21 of the draft Act sets out the obligation on public bodies to publish certain key types of information, even in the absence of a request. The types of information covered include decisions and measures affecting the public, information on the activities of obligees, including financial information, and information on requests and the manner in which they have been resolved.

This is an important and progressive obligation. However, the draft Act could be still more detailed regarding the types of information that must be provided. The ARTICLE 19 Model Law, for example, requires every public body to actively publish the following information:

- (a) a description of its structure, functions, duties and finances;
- (b) relevant details concerning any services it provides directly to members of the public;
- (c) any direct request or complaints mechanisms available to members of the public regarding acts or a failure to act by that body, along with a summary of any requests, complaints or other direct actions by members of the public and that body's response;
- (d) a simple guide containing adequate information about its record-keeping systems, the types and forms of information it holds, the categories of information it publishes and the procedure to be followed in making a request for information;
- (e) a description of the powers and duties of its senior officers, and the procedure it follows in making decisions;
- (f) any regulations, policies, rules, guides or manuals regarding the discharge by that body of its functions;

- (g) the content of all decisions and/or policies it has adopted which affect the public, along with the reasons for them, any authoritative interpretations of them, and any important background material; and
- (h) any mechanisms or procedures by which members of the public may make representations or otherwise influence the formulation of policy or the exercise of powers by that body.⁵

Recommendation:

- Consideration should be given to including within the draft Act more detail on the obligation of public bodies to publish information proactively.

7. Open Meetings

Article 22 of the draft Act provides for open government meetings. Obligees are required to determine conditions for public attendance at meetings, and also to inform the public about such meetings (their agenda, timing and the possibility of attendance), as well as how to apply to attend and the number of members of the public that may attend.

This is a commendable provision which is, unfortunately, found in far too few freedom of information laws. At the same time, far more detail is needed in relation to this obligation. It is not sufficient, for example, to allow obligees to determine their own conditions for attendance at meetings; rather, at a minimum the law needs to set out the basic principles which should apply to meetings, based on an underlying presumption of openness.

Recommendation:

- The regime for open meetings established by Article 22 needs to be far more detailed, setting out the standards applicable to this obligation. Alternately, consideration could be given to adopting a separate law dealing specifically with this issue.

8. Fees and Costs

Article 19 of the draft Act deals with the issue of fees and costs. Article 19(1) provides that the fee for submitting a request shall be set by the obligees, while Article 19(2) provides that the obligees shall set the cost for actual provision of the information, which shall not exceed the real cost of such provision. Article 19(3) provides that the criteria for determining the amount of the fee and cost shall be determined by the government.

It would be simpler for the government just to set the fee for lodging an information request, which can be the same for all requests. Regarding the costs, the law should set out clearly what, precisely, may be charged. For example, in some countries public bodies are allowed to charge for the cost of searching for and preparing the information, while in others, costs are restricted to actual duplication and mailing costs. Again, it is preferable for the government to set centrally as much of the costing structure as possible (for example, a rate per page of photocopying, etc.). Finally, consideration should be given to providing that certain types of requests, such as requests for personal information or requests in the public interest, should either be free or should cost less

⁵ Note 3, section 17.

than other requests. In this regard, a request for information for purposes of publication should normally be presumed to be in the public interest.

Recommendations:

- The law should require the government to set one central fee for lodging an information request.
- The law should set out clearly exactly which costs may be charged regarding a freedom of information request and the government should be required to set central rates and conditions regarding these costs.
- Consideration should be given to providing for personal and public interest requests to be charged less than other requests or to be granted for free.

9. Protection for Disclosures

Article 24 of the draft Act provides that an official who reveals information beyond his or her authority, in good faith and for the sake of ensuring timely provision of information to the public, shall not be held liable as long as the information is not subject to an exception under the act.

In our view, despite the positive nature of this provision, this is the wrong standard to apply to such disclosures. Any official who, acting reasonably and in good faith, discloses information to the public pursuant to an information request, should be protected against sanction even if the information is covered by an exception. The purpose of such protection is to ensure that civil servants will not continuously err on the side of caution when faced with information requests. In practice, particularly during the initial period of application of a freedom of information law, officials will often be unsure about whether or not certain information is covered by an exception. Due to historical secrecy in most countries, such officials will normally have a very conservative approach to releasing information. Protection against sanction for good faith mistakes is essential to changing this culture of secrecy. On the other hand, experience in other countries shows that the cases where officials wrongly disclose information are rare, so providing them with protection does not lead to harm.

Furthermore, individuals who disclose confidential information about wrongdoing in the public interest – often referred to as whistleblowers – should be protected against sanction for such disclosures. This is important to help ensure that matters of public interest do reach the public. For example, whistleblowers can provide an important safety valve against corruption or serious mismanagement in government.

Recommendations:

- Individuals should be protected against sanction for the mistaken disclosure of even legitimately confidential information as long as they acted reasonably and in good faith.
- Whistleblowers, individuals who disclose information about wrongdoing, should be protected against sanction as long as they acted reasonably and in good faith.

10. Individual Responsibility for Obstructing Disclosure

Article 29 provides for individual responsibility for officials, who shall be fined if they obstruct access to information, without justification. Since this is a quasi-criminal provision, responsibility should only ensue when the official in question acts wilfully.

Recommendation:

- Individuals should be liable to fines for obstruction of access to information only where they have acted wilfully.

11. Omissions

Reports

The draft Act fails to provide for an overview system for obligees, although it does require them to make public general information regarding requests and their resolution (Articles 1(1) and (3)). Many laws require public bodies to provide reports on their activities under the law to an oversight body, who can then use these reports both to report to the legislature and to monitor the performance of the public body in question. It should be clear that such reports must be provided on an annual basis. The law should contain some detail regarding the contents of such reports. For example, the ARTICLE 19 Model Law provides that annual reports by public bodies must contain information on:

- (a) the number of requests for information received, granted in full or in part, and refused;
- (b) how often and which sections of the Act were relied upon to refuse, in part or in full, requests for information;
- (c) appeals from refusals to communicate information;
- (d) fees charged for requests for information;
- (e) its activities pursuant to section 17 (duty to publish);
- (f) its activities pursuant to section 19 (maintenance of records); and
- (g) its activities pursuant to section 20 (training of officials).⁶

Guide to Using the Law

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

Record Maintenance

A freedom of information law can be seriously undermined if public authorities keep such poor records that they cannot locate the information sought by requesters. To help avoid this problem, many freedom of information laws place an obligation on public authorities to maintain their records in good condition. The UK Freedom of Information Act 2000, for example, provides for the Lord Chancellor (the minister of justice) to adopt a code of practice concerning the keeping, management and destruction of records by public authorities, with a view to ensuring best practice in this regard across the civil service.

⁶ Note 3, section 21.

Recommendations:

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