MEMORANDUM

on

the draft Law On Introducing Changes to the Law of Ukraine 'On Information'

ARTICLE 19
Global Campaign for Free Expression

November 2003

I. Introduction

The draft Law On Introducing Changes to the Law of Ukraine 'On Information' (draft Law) is an attempt to substantially rewrite an already-existing Ukrainian law governing a wide range of issues relating to information. Revisions include, but are not limited to, the introduction of a freedom of information regime (only a bare skeleton of which is present in the existing Law) and provisions exempting from liability persons who disclose certain types of information with critical content.

With the exception of some general remarks in Section II, we focus exclusively on the freedom of information regime that the draft Law envisages. Section III contains an overview of international standards on freedom of information while Section IV provides an analysis of our main concerns with the draft Law.

II. General Remarks on the Draft Law

The draft Law covers a vast range of topics, all relating in diverse ways to the management and control of information by public, and in some cases private, bodies. In addition to freedom of information, topics (many of which are already found in the

existing Law) include research and education in information technology and activity; means and procedures for collecting various kinds of information (including statistical information, administrative information, mass information, information about government, legal information, personal information, reference information, and sociological information); principles of the ownership of information; liability for a range of information-related offenses; principles of information activity in the international context; and some provisions relating to journalists.

ARTICLE 19 has serious concerns with some of these provisions, many of which are in breach of international standards relating to freedom of expression. Furthermore, in our view, the various issues addressed in the existing Law, as it would be amended by the draft Law, should be separated out and treated separately, rather than all being mixed together under the general, but somewhat vague, category of information. For example, the draft Law contains a number of provisions relating to "offence or slander", and in particular relating to the publication of information critical of the government and some of its officials. The issue of protection of reputation should be addressed in a law of general application, either specifically relating to defamation or in the civil code. However, as noted above, this Memorandum is restricted in scope to addressing concerns with the freedom of information regime set out in the draft Law. We will not, therefore, develop many of our more general concerns with the draft Law.

We strongly recommend that the freedom of information (FOI) regime, which, as noted, the draft Law would insert, more-or-less for the first time, into the existing Law, be set out in a separate law dealing specifically with this issue. Freedom of information, in the primary sense of a right to access information held by public bodies, is very different from the other issues covered by the information law, despite its name. The inclusion of a regime providing for access to publicly-held information in a law that covers such a vast range of other matters will result in a system that will be, in practice, confusing and overly complex, and this may well lead to interpretive as well as other problems. The consequence may well be that, even if such revisions were to go into effect, they might not be complied with adequately, thereby undermining the public's right to know.

III. International Freedom of Information Standards

The *Universal Declaration of Human Rights* (UDHR)[1] is generally considered to be the flagship statement of international human rights, binding on all States as a matter of customary international law. Article 19 of the UDHR guarantees not only the right to freedom of expression, but also the right to information, in the following terms:

> Everyone has the right to freedom of 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.…[emphasis added]

[1] UN General Assembly Resolution 217A(III), 10 December 1948.

The *International Covenant on Civil and Political Rights* (ICCPR),[2] which Ukraine ratified in 1973, guarantees the right to information in similar terms, providing:

> Everyone shall have the right to freedom of expression: this right shall include freedom to *seek, receive* and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print.… [emphasis added]

Freedom of expression is also guaranteed by the *European Convention on Human Rights* (ECHR),[3] ratified by Ukraine in September 1997, as well as the other two regional systems for the protection of human rights, at Article 13 of the *American Convention on Human Rights*[4] and Article 9 of the *African Charter on Human and Peoples' Rights*.[5]

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 information from the people at large … is to be strongly checked."[6] 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."[7] 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…."[8]

Once again, his views were welcomed by the Commission on Human Rights.[9]

In 2002, the Committee of Ministers of the Council of Europe adopted a detailed Recommendation on Access to Official Documents,[10] which states:

> **III. General principle on access to official documents**

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[2] Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.
[3] ETS Series No. 5, adopted 4 November 1950, in force 3 September 1953. As of 7 July 2003, there were 44 State Parties.
[4] Adopted 22 November 1969, in force 18 July 1978.
[5] Adopted 26 June 1981, in force 21 October 1986.
[6] 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.
[7] Resolution 1997/27, 11 April 1997, para. 12(d).
[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.
[9] Resolution 1998/42, 17 April 1998, para. 2.
[10] Adopted 21 February 2002, http://cm.coe.int/stat/E/Public/2002/adopted_texts/recommendations/2002r2.htm.

> Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.
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> **IV. Possible limitations to access to official documents**
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> 1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:
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> i. national security, defence and international relations;
> ii. public safety;
> iii. the prevention, investigation and prosecution of criminal activities;
> iv. privacy and other legitimate private interests;
> v. commercial and other economic interests, be they private or public;
> vi. the equality of parties concerning court proceedings;
> vii. nature;
> viii. inspection, control and supervision by public authorities;
> ix. the economic, monetary and exchange rate policies of the state;
> x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.
>
> 2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.

The Council has recommended that all member States should be guided in their law and practice by these principles.[11]

The following analysis of the draft Law also draws on two key ARTICLE 19 documents, *The Public's Right to Know: Principles on Freedom of Information Legislation* (ARTICLE 19 Principles)[12] and *A Model Freedom of Information Law* (ARTICLE 19 Model Law).[13] 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.

The right to freedom of information is not absolute. However, any restrictions must meet a strict three-part test, namely that any restriction must be (1) provided by law, (2) for the purpose of safeguarding a clearly defined legitimate interest, and (3) necessary to secure the interest. Critical to an understanding of this test is the meaning of "necessary". At a minimum, a restriction on access to information is "necessary" for securing a legitimate interest only if (1) disclosure of the information sought would cause substantial harm to the interest, and (2) the harm to the interest caused by disclosure is greater than the public interest in having access to the information.

[11] Preamble.
[12] (London: June 1999).
[13] (London: July 2001).

IV. Detailed Analysis of the FOI Provisions of the Draft Law

We note, to begin with, that the draft Law has many extremely positive aspects relating to freedom of information. These include a detailed duty on government agencies to publish (including the obligation to create and disseminate information manuals and reports); a right to receive information not only from government agencies but also, in certain circumstances, from private bodies; a right to receive information in languages other than Ukrainian in certain circumstances; access to information free of charge;[14] the provision of access to personal information and the right to correct such information; the provision of a wide range of means by which information requests can be submitted; reasonable reply deadlines (but see below); a reasonable system of appeals (also commented on below); the provision for public education campaigns and a system to monitor the operation of the law, once it is in force; an obligation on government agencies to grant requests for limited access information if such information has already been made available to the public, regardless of the reason; and obligations relating to the maintenance and organization of information, including prohibitions on the destruction of information.

At the same time, we have a number of concerns with the draft Law and believe that it could still be improved. These concerns are detailed below.

IV.1 Definition of Information

The draft Law defines "information" quite broadly as "any communication that can be presented in the form of characters or symbols and stored on any material medium external to human consciousness". Article 1 goes on to carve out a special class of information, called "official information", in a rather complicated way.

There are two separate difficulties with this definitional procedure. First, we recognise that the inclusion of a definition of "official information" derives in part from trying to work within the confines of an already-existing definition. However, article 10, which lays out the basic right to information, provides that the right is to "official *and other* information". As a result, the definition of "official information" in fact serves no function relevant to freedom of information and, at least for the purpose of access to information, should be eliminated in favour of the broad definition of "information" in article 1. We emphasise that, often, the result of more limited definitions of "information", or indeed of other terms central to an FOI regime, leave the door open to abuse by officials and others who may remain committed to a culture of secrecy.

Second, the initial definition of "information" in article 1 could be interpreted extremely broadly to cover even thoughts which, although they have never been recorded, "can be presented in the form of characters or symbols". We suggest that a simpler definition be adopted, more in line with international standards. Such a definition, in part based on materials already in article 1, might look like the following: "information includes any

[14] At the same time, in our view it is permissible for the information provider to pass on the reasonable costs of communicating the information. See the ARTICLE 19 Model Law, section 11.

recorded information held by any body to which the draft Law applies, regardless of the form in which it is stored and regardless of its source".

Recommendations:

- The definition of "official information" should be eliminated from the draft Law, at least in relation to freedom of information, and references in the draft Law to "official and other information" should be replaced simply with references to "information".
- The definition of "information" should be modified along the lines suggested just above.

IV.2 Definition of Bodies Covered by the Law

A similar point can be made with respect to the definition of "subjects of information activity". Again, we recognise that the new definition has been crafted to fit in with the already-existing definition. However, the length of the list of subjects of information activity brings with it the potential that certain entities may inadvertently be excluded, for example, depending on how the original text is interpreted, certain types of non-governmental organizations. This gives rise to the possibility that certain officials who wish to withhold information may seek refuge in the definition, deciding that the requester is in fact not a "subject of information activity". The preferred approach is to write with a clean slate and to provide simply that the right to information is a right possessed by every person, or everyone, making it clear that this includes both natural and legal persons.

Recommendation:

- The draft Law should simply provide that everyone has the right to access information rather than attempting to enumerate an exhaustive list of the beneficiaries of this right.

IV.3 The Regime of Exceptions

We have serious reservations about the complex regime of exceptions, which permits public and private entities to refuse certain information requests.

IV.3.a State and Other Secrets

Before setting out the regime of exceptions, the draft Law defines a category of information that will generally be excluded from the obligation to disclose. Article 31 initially defines "limited access information" to include information constituting State secrets, information constituting other legislatively stipulated secrets and confidential information. 'Confidential information' is defined in article 33 as private confidential information, excluding any information held by public bodies. Article 34 defines secret information either as information deemed to be secret "on the grounds of individual laws", or as information falling within a list, most (but not all) of whose particular components are uncontroversial.

There is a critical ambiguity here. In particular, the first definition of "State secret" (in terms of "on the grounds of individual laws") allows that information can be deemed a *State secret* based on such laws, regardless of its content. While the draft Law does

stipulate that information can be classified as secret only "in accordance with the law on information", it is unclear how this would work in the case of State secrets precisely because there appears to be no content restrictions as to this classification. In effect, the term "State secret" remains undefined in the draft Law, and the reference to "other individual laws" is entirely open-ended. This gap in the draft Law is extremely problematic because it leaves the way open to serious abuse. We strongly suggest that the approach to "other legislatively stipulated secret information" (discussed immediately below) be adopted in the case of State secrets as well – that is, that the draft Law provide a clear, narrow and exhaustive list of categories of State secrets that may, in certain circumstances, be withheld from public scrutiny. In the alternative, and at a minimum, the draft Law should contain an exhaustive list of laws that define "State secrets".[15]

In contrast to this highly problematic treatment of State secrets is the unique and potentially positive approach taken in the second part of article 34. "Other legislatively stipulated secret information" is subjected to the requirement that the information fall within one of the enumerated categories. This effectively imposes the requirement on *any other law that provides for the classification of information as secret* that it respect the content categories that the article spells out. In principle, this can be a sound means by which a freedom of information law may have the "last say" on what information may be withheld from public view on the basis that it is secret.

While this approach, therefore, is positive, there are certain specific provisions in the article that are problematic. For example, the article provides that information may be classified as secret if it "[e]nsures interests of state control, inspection and oversight". However, it is not at all clear what information is included in this category, in light of the vagueness of the terms "control" and "oversight". Further, the provision allowing the classification as secret of information relating to the "protect[ion of] reputation and rights of people" simply has no place in a freedom of information law. Protections against defamation belong in a suitable defamation law of general application.

Finally, we emphasise a point that we make in detail below, that each permissible category of secret information should contain the proviso that access to information falling under that category may be refused only if its release would result in serious harm.

Recommendations:

- The draft Law should explicitly override any secrecy or other laws that could be construed as providing for the withholding of information properly disclosed pursuant to the provisions of the draft Law. It should contain an exhaustive list of categories of information that could qualify as "State secrets", in the manner provided in article 34 for "other legislatively stipulated secrets." In the alternative, and at a minimum, it should contain an exhaustive list of all laws that define "State secrets".

[15] We note that the ARTICLE 19 Model Law adopts an approach that bypasses the problematic concept of "State secret" altogether, providing in section 30 that an information request may be denied only if its acceptance would be likely to "cause serious prejudice to the defence or national security" of the relevant State (and subject to a general public interest override). In our view, this provides all the protection necessary in the area of "State secrets".

- The article 34 provision permitting the classification as secret of information that "[e]nsures interests of state control, inspection and oversight" should be eliminated, or at a minimum, clarified and narrowed.
- The provision permitting the classification as secret of information relating to the "protect[ion of] reputation and rights of people" should be eliminated.

IV.3.b. Explicit Exceptions

Article 44, at first glance, would appear to contain the exception regime, providing that an information request may be rejected (or delayed) if it, in effect, is a request for limited access information, or personal information (or if a number of other principally uncontroversial conditions obtain). Subject to the comment just above (in (a)), as well as to the comments below on a harm requirement and on an adequate public interest override, this article would seem to be in compliance with international standards. (It is to be noted that the first paragraph of article 36 effectively creates an exception for limited access information. We suggest that the exception there be deleted, and that article 36 be revised to contain a general rider that establishes the general presumption that everyone has the right to information owned by the government.)

Article 44 is followed by article 45, which envisages a set of "special cases" for rejecting information. These special cases are for the most part fairly uncontroversial, and may find counterparts in the ARTICLE 19 Model Law. However, the treatment of these "special cases" in a separate article is somewhat convoluted. It would be better to have a single article, or perhaps Part of the draft Law, entitled "Exceptions," which lays out the exceptions with no suggestion of hierarchy or difference in status.

Certain exceptions in article 45 do pose particular problems. In particular, the exception for "[m]emoranda or letter[s] that have been exchange[d] between institutions and organizations that are in a state of court conflict" is much too broad, and should be restricted to information subject to legal privilege. The exception for "data pertaining to legitimate income of individuals and legal entities" also is too broad, including in its reach such information of obvious public importance and relevance as the salaries of public officials (particularly, high-ranking ones).

Recommendations:

- There should be a single exceptions article, or Part with subarticles, with no implication that any of the exceptions have a "special" status different from the others.
- Article 36 should be revised so that it simply creates the presumption that everyone has the right to information owned by the government.
- The exception in article 45 for memoranda and letters exchanged during court conflict should be restricted to information subject to legal privilege.
- The exception in article 45 for data pertaining to the legitimate income of individuals and legal entities should be eliminated, or, at a minimum, be restricted to private individuals and entities.

IV.3.c Lack of a Harm Requirement

An FOI exception regime must be subject to a harm requirement if it is to comply with international law. As noted above, the "necessity" part of the three-part test for restrictions on the right to information requires that any exception to the right must condition a refusal to disclose requested information on the likelihood of *substantial harm* that would result from the disclosure.

The exception regime in the draft Law generally lacks such a harm requirement. For example, State secrets and other legislatively stipulated secrets are excepted, with no mention whatsoever of any possible harm from their disclosure. The same is true with respect to confidential or personal information.

In contrast, some exceptions do advert to possible harm, albeit in terms that are rather weak: for example, article 45 exempts the disclosure of information on investigative activity, and relating to the courts, "in cases when such disclosure *may harm* investigation, violate human right to fair and objective court proceedings [or] *endanger* health or life of any person" (emphases supplied). Again, further on in the same article, government information relating to defending positions in court is exempted, but only where "provision of such data would *weaken* their position in a court case" (emphasis supplied).

It is positive that the drafters are aware of the need to submit some exceptions to a harm requirement. They need to go farther, however, and to submit *every* exception to a strong harm requirement: a restriction on access to information so as to protect an interest recognised by the draft Law should be subject to the requirement that disclosure of the information would, or would be likely to, *cause serious prejudice* to the interest. (See the ARTICLE 19 Model Law for examples of how the harm requirement is applied to various interests.)

Recommendation:

- Each exception should be explicitly conditioned by a harm test, cast in terms of a risk of serious prejudice to the interest that the exception seeks to protect, along the lines illustrated in the ARTICLE 19 Model Law.

IV.3.d Public Interest Override

As we have already noted, the necessity prong of the three-part test also requires that, despite the likelihood of serious prejudice to a legitimately protected interest, information must be disclosed if the public interest in disclosure outweighs the potential harm in disclosure.

The draft Law contains a provision that is in some ways similar to this fundamental standard, but it is probably substantially weaker and needs to be revised. In particular, article 35 provides for disclosure, upon request, of limited access information if (a) the information is socially significant and (b) "the right of the public to know this information prevails over the owner's right to its protection". Socially significant information is defined by a list that includes helping persons make a "justified political choice", facilitating familiarity with certain facts important to the quality of life,

facilitating the assertion of rights, freedoms and obligations, and preventing detrimental actions.

There are three fundamental difficulties with this provision. First, it applies only to requests for limited access information. However, as already noted, the draft Law exempts from disclosure a range of other information (various categories stipulated in articles 44 and the "special cases" of article 45), which the article 35 override does not appear to apply to. International standards, by contrast, require that the public interest override apply to all exceptions from disclosure.

Second, the definition of 'socially significant' or 'public interest' information by means of a list, admittedly of matters of some importance, is unduly limited. The concept of the public interest is very wide and it is very unlikely that it can be adequately captured in a list of particular interests that purports to be exhaustive. We suggest, therefore, that the list of interests be replaced by a simple reference to the concept of public interest, which itself should be left undefined.

Third, the "weighing test" specified in the article is unclear. It requires a balance between two different rights, namely the right of the public to know and the right of the information owner not to disclose the information. By contrast, international standards require that the public interest in disclosure be weighed against the *potential harm* from disclosure of the information. This is a much more precise and clear test focusing not on a presumed right to secrecy but rather on the specific reason militating against disclosure, namely the harm which might result. It may be that this is what the drafters intended, in which case this is unclear. In any case, the provision should be redrafted.

Recommendation:

- Article 35 should be redrafted as a general public interest override, eliminating the restriction to limited access information and the list of types of information of social significance, and providing for disclosure whenever the public interest in disclosure outweighs the harm that disclosure would or might cause.

IV.4 Time Limits for Responding to Requests

We welcome the tight time limit – five business days – within which an initial response to an information request must be provided and the 15-day period within which the information is to be provided. However, article 47 may undo part of the good that these limitations may otherwise do, in providing that a "new term" may be specified by the body to which the request has been requested, in the event that the requested information "can not be provided within the fifteen-day term".

There are two difficulties here. First, the article does not place any conditions on when the body receiving the information request deems that the information "can not be provided". The draft Law should make it clear that delays may be appropriate only in rare and clearly defined circumstances. For example, section 9 of the ARTICLE 19 Model Law provides for delays only to the extent "strictly necessary, and in any case [for] not more than [a total of] forty working days, where the request is for a large number of

records or requires a search through a large number of records, and where compliance within [the Model Law's initial deadline of] twenty working days would unreasonably interfere with the activities of the body". This quotation also illustrates the second difficulty with article 47, namely that it fails to put an overall limit on the "new term" for providing the information. This may just be an oversight but we suggest that a specific, and quite short, deadline be included in the article.

Recommendations:

- The draft Law should enumerate clearly the circumstances in which the set deadlines for responding to information requests and for providing access to requested information may be extended.
- The draft Law should set out a maximum time limit for the extension deadlines, just as it does for the initial deadlines.

IV.5 Appeals to the Human Rights Commissioner

We welcome the extensive provisions relating to the Human Rights Commissioner (the Commissioner); in particular, that appeals may go to the Commissioner and that the Commissioner has extensive responsibilities relating to public education and to monitoring the effectiveness of the law.

While the draft Law empowers the Commissioner to hear complaints, it simply provides that the relevant procedures for hearing complaints are set out in the law creating and regulating the Office of the Commissioner. As we are not familiar with this law, we are unable to comment substantively on whether or not the appeals mechanism provided by the draft Law is adequate. In this regard, we note that a freedom of information regime should provide for review of refusals to disclose information, in the first instance, to an *independent* administrative body. Such appeals should be either cost-free or low-cost, administratively simple and swift.

The independence of the body should be secured, in part, through the appointments process for members and through ensuring that members command significant social support and respect. The body should have the power to compel production of any document or record, to order the public authority or private body to disclose the record, to reduce any fees charged and to take appropriate steps to remedy any unjustifiable delays. The right of appeal to the courts provided for under the draft Law should be *from* decisions by this administrative body.

As noted, we are unfamiliar with the law creating the Office of the Commissioner, and are therefore unable to say whether this Office conforms to the conditions noted above or would be able to provide appellate services of the sort just described.

Recommendation:

- An independent administrative body, along the lines described above, should be tasked with both dealing with appeals from refusals to disclose information and providing an education function. In the event that the Human Rights Commissioner does not possess the relevant features or powers, the draft Law should create such an

administrative body.

IV.6 Absence of Whistleblower and Other Protection

The draft Law does not appear to contain protection from criminal and civil liability for civil servants who disclose information pursuant to the draft Law, reasonably and in good faith, even where such information is, in fact, not supposed to be released. Such protection is crucial to changing the culture of secrecy; without it, civil servants will be concerned about being sanctioned for making a mistake and will err on the side of caution, often egregiously, refusing to disclose much non-exempt information.

The draft Law also fails to provide protection for so-called whistleblowers. This is protection against legal or employment-related sanctions for persons who release information, even if it is exempt under the draft Law, where they act in good faith and with a reasonable belief that the information is true and that it discloses wrongdoing, or a threat to health, safety or the environment.

Both protections should be provided in the draft Law. Sections 47 and 48 of the ARTICLE 19 Model Law provide examples of these protections.

Recommendation:

- The draft Law should contain protection for both persons making disclosures pursuant to the law and for whistleblowers, as long as they acted reasonably and in good faith.