MEMORANDUM

On the

DRAFT FREEDOM OF INFORMATION ACT

Of the

SLOVAK REPUBLIC

BY

ARTICLE 19
The Global Campaign for Free Expression

London

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Introduction

ARTICLE 19, The Global Campaign for Free Expression, has been asked to comment upon a draft freedom of information law for the Slovak Republic.

ARTICLE 19 welcomes the draft and regards it as an extremely positive contribution to the advancement of freedom of expression and information the Slovak Republic. The draft is largely very positive; it is well structured and written and includes a number of very important safeguards for the transparency of government.

The following analysis sets out the obligations which international law imposes upon Slovakia in relation to freedom of expression in general and freedom of information in particular then suggests a number of changes to the Draft Freedom of Information Law to ensure that it genuinely reflects the highest standards of freedom of expression.

The Slovak Republic's Obligations to respect Freedom of Expression Under International Law and the Constitution

The Slovak Republic is a party to both the European Convention on Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights. Both of these international human rights treaties protect freedom of expression and information in similar terms. Article 10 of the European Convention states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public

authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

The overriding importance of freedom of expression as a human right has been widely recognised, both for its own sake and as an essential underpinning of democracy and means of safeguarding other human rights. At its very first session in 1946 the United Nations General Assembly declared it:

> A fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.[1]

The European Court of Human Rights has also recognised the key role of freedom of expression:

> [F]reedom of expression constitutes one of the essential foundations of society, one of the basic conditions for its progress and for the development of every man … it is applicable not only to "information" or "ideas" that are favourably received … but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society".[2]

International jurisprudence has also consistently emphasised the special role of the free media in a State governed by the rule of law. For example, the European Court of Human Rights has stated:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[3]

Freedom of expression and information are also protected by Article 26 of the Constitution of the Slovak Republic which states:

> (1) Freedom of expression and the right to information shall be guaranteed.
> (2) Every person has the right to express his or her opinion in words, writing, print, images and any other means, and also to seek, receive and disseminate ideas and information both nationally and internationally. No approval process shall be required for publication of the press. Radio and television companies may be required to seek permission from governmental authorities to set up private businesses. Further details shall be provided by law.
> (3) Censorship shall be prohibited.
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> …
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> (5) State bodies and territorial self-administration bodies are under an obligation to provide information on their activities in an appropriate manner and in the state language. The conditions and manner of execution will be specified by law.

[1] Resolution 59(1), 14 December 1946.
[2] *Handyside v. United Kingdom*, 7 December 1976, 1 EHRR 737.49.
[3] *Castells v Spain,* (1992), Series A, No. 236 , para. 43.

Freedom of expression is not, however, absolute. Every system of international and domestic rights recognises carefully drawn and limited restrictions on freedom of expression to take into account the values of individual dignity and democracy. Under international human rights law, Slovak laws which restrict freedom of expression must comply with the provisions of Article 19(3) of the ICCPR and Article 10(2) of the ECHR. Article 10(2) is expressed in the following terms:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary.

Article 19(3) of the ICCPR and Article 26(4) of the Slovak Constitution are in similar terms. Accordingly, restrictions on freedom of expression must meet a strict three-part test.[4] First, the interference must be provided for by law. This implies that the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[5] Second, the interference must pursue one of the legitimate aims listed in Article 10(2); this list is exclusive. Third, the interference must be necessary to secure that aim. This implies that it serves a pressing social need, that the reasons given to justify it are relevant and sufficient and that the interference is proportionate to the legitimate aim pursued.[6] This is a strict test, presenting a high standard which any interference must overcome.

Freedom of information is an important element of the international guarantee of freedom of expression, which includes the right to receive, as well as to impart, information and ideas. There can be little doubt as to the importance of freedom of information. At its very first session in 1946 the United Nations General Assembly 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.

Its importance has also been stressed in a number of reports of the UN Special Rapporteur on Freedom of Opinion and Expression[7], while Freedom of Information Acts have been adopted in almost many mature democracies and many newly democratic countries, such as Hungary, Czech Republic, Latvia, Georgia and Albania and are in the process of adoption in Bulgaria and Moldova.

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[4] See, for example, *The Sunday Times v. United Kingdom*, 26 April 1979, No. 30, 2 EHRR 245, paras. 45.
[5] *The Sunday Times*, *op cit*., para. 49.
[6] See the ECHR case, *Lingens v. Austria*, 8 July 1986, 8 EHRR 407, paras. 39-40.
[7] See his 1997 and 1998 reports. UN Doc. E/CN.4/1997/31 and UN Doc. E/CN.4/1998/40.

A proper freedom of information regime is a vital aspect of open government and a fundamental underpinning of democracy. It is only where there is a free flow of information that accountability can be ensured, corruption avoided and citizens' right to know satisfied. Freedom of information is also a crucial prerequisite for sustainable development. Resource management, social initiatives and economic strategies can only be effective if the public is informed and has confidence in its government.

As an aspect of the international guarantee of freedom of expression, freedom of information is commonly understood as comprising a number of different elements. One such element, and an important one in the present context, refers to the right of citizens to access information and records held by public authorities, both through routine government publication of information and through provision for direct access requests.

To comport fully with the right to freedom of information, the state must establish cheap and efficient procedures for the public to access official information, ensure that its record keeping procedures make this possible and ensure that the access regime facilitates the maximum disclosure of information.

Specific Comments on the Draft Freedom of Information Law

This draft law contains some very positive provisions whichincorporate some important principles and safeguards into the law and this is to be welcomed. In many respects the draft law is fully consistent with Slovakia's international obligations in relation to freedom of expression. Some provisions, however, are inappropriate, require clarification or could benefit from further safeguards. The following analysis is not intended to be exhaustive and other comments could be made; it is intended to touch upon some of the key problems that exist in the draft law.

- **Subject of the Act**

In order to provide a strong protection of the principle of freedom of information within the law, Article 1 could be rephrased to state that the law provides for access to publicly-held information. The expression "regulate[s] the terms, procedure and scope of the free access to information" is not a sufficiently positive statement of this right.

- **Bodies which are covered**

A freedom of information law should define clearly what is meant by "public body". A public body which is covered by a freedom of information law should be understood very broadly to include all branches and levels of government, including private bodies which carry out public functions and which hold information whose disclosure might harm key public interests, such as the environment and health. The draft law includes at Article 2(1) a definition of the obligees which covers some of these areas – but in order to ensure full scrutiny of the public administration, it should be more specific. As it is phrased at the moment, it is not clear whether judicial bodies, the police force,

state-funded health services or quasi-governmental organisations would be included, for example.

- **Exemptions**

The permissible exemptions in a freedom of information law should be clearly and narrowly drawn and subject to substantial "harm" and "public interest" tests.

Many of the exemptions listed in this draft law are clear; however there are some areas in which more clarity would be beneficial, for example in Article 12(1) some of the categories are vague and therefore open to abuse, for example Article 12(1)(e) on the decision making of the courts and law enforcement bodies. This processes require a certain amount of transparency and such broad wording has the potential to be dangerous.

In addition, not all exemptions categories are subjected to a "harm" or "public interest" test in the decision to refuse disclosure of information. Such a test requires that any information which falls under one of the exemptions listed in the law can be withheld. According to ARTICLE 19, for information to be held, the following three-part test should be used:

(1) the information must relate to a legitimate aim listed in the law;
(2) disclosure must threaten to cause substantial harm to that aim; and
(3) the harm to the aim must be greater than the public interest in having the information. This means that even if it can be shown that disclosure would cause substantial harm to a legitimate aim, the information should still be disclosed if the benefits of disclosure outweigh the harm.[8]

Some of the categories of restricted information in the draft law are subject to a public interest test, for example Article 10(2) However, other categories such as professional or state secrets in Article 8 are not. No categories of restricted information are subject to such a harm test.

Recommendation

- The law should provide that *all* refusals of disclosure of information should meet the three-part test outlined above.

- **Procedure**

One of the greatest areas of concern in this draft law is the requirement in several places including Article 10(3) and Article 12(1)(c), that, if certain kinds of information which were provided to the public body by a third party are requested, then the written consent of the third party is required before disclosure. To have another party dictating what information may and may not be disclosed undermines the basic tenet of the law. If information provided to a public authority by a third party is genuinely sensitive and meets the criteria in the three party test outlined under "Exemptions" above, then it

[8] *The Public's Right to Know: Principles on Freedom of Information Legislation*, ARTICLE 19, June 1999, Principle 4, p5.

will automatically be withheld anyway. There is no justification for a separate provision on this subject.

Recommendation

- The requirement for third-parties to give consent for disclosure of publicly held information should be deleted.

- **Primacy of Freedom of Information Legislation**

The law on freedom of information should take precedence over all other legislation in this field and it should not allow other laws to introduce different, potentially more restrictive, procedures. In several places, this draft provides that other legislation might introduce different regimes for disclosure of official information and that such legislation might be used in place of this law. This includes Article 8 on the *Protection of Confidential Facts* and Article 10(1) on *Trade Secret Protection*. Such provisions undermine the principle that this law is *the* law dealing with publicly-held information. Whilst it is to be welcomed that Article 15 provides that information disclosed under this lawa should not be deemed to violate non-disclosure rules stipulated in a large number of special acts, this is not phrased in a sufficiently positive way; it would be better to either amend these other acts (see below) or to state that the Freedom of Information takes precedence over all other legislation dealing with the provision of publicly-held information.

In addition, it does not provide that other laws, such as the law on state, professional or trade secrets, should be brought into line with this law as soon as possible and, in the meantime, should be subject to the principles of the freedom of information law.

Recommendation

- The law should require that the principle of disclosure takes precedence and that other legislation be interpreted in a manner consistent with its provisions. Where this is not possible, other legislation dealing with publicly-held information should be subject to the principles underlying this law.
- A commitment should be made, over the longer term, to bring all laws relating to information, particularly secrecy laws, into line with the principles underpinning the freedom of information law.

- **Appeals**

Freedom of information legislation should ideally provide for a three-tier appeals procedure wherever practical; there should be an internal appeal to a designated higher authority within the public body, but in all cases, there should be an individual right of appeal to an independent administrative body for a refusal to disclose information by a public body; and in all cases too there should be a process for both the individual and the public body to appeal the decision of the administrative body before the courts.

This draft law provides only for appeal directly to the courts, under Article 21. Appeals must be lodged within 30 days; this is an unnecessarily short period and appears to serve no useful purpose.

Recommendation

- There should be provision for an internal appeals process within the public body and for the establishment of an independent administrative body with full powers to investigate an appeal, including the power to call witnesses and to require the public body to provide information, as well as the power to dismiss the appeal, compel disclosure, adjust charges, impose fines and costs on the public body.
- Appeals before the Courts should be able to review the case on its merits as well as the reasonableness of the public body's actions.

- **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. They include:

Obligation to not to destroy information and to keep it in good order

In order to protect the integrity and availability of records, the law should:

Recommendation

- provide that obstruction of access to, or the wilful destruction of records is a criminal offence; and
- establish minimum standards regarding the maintenance and preservation of records by public bodies.

Promotional / educational activities

Experience from countries which have introduced freedom of information legislation shows that a change in the culture of the civil service from one of secrecy to one of transparency is a slow process which can take up to ten years or more. In Slovakia, therefore, the law should provide for a number of mechanisms to address this culture of secrecy within government. There are no such provisions in the draft law. This is a particularly serious omission in view of Slovakia's long history of secrecy within government. The law should, therefore:

Recommendation

- make provision for a pro-active campaign of public education and dissemination of information about the right of access to information, the scope of information which is available and the manner in which such rights may be exercised.

provide a number of mechanisms to change the culture of secrecy within government , for example, by providing training for public officials on the scope and importance of freedom of information legislation, on the procedures for disclosing information and on how to maintain and access records

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.

Recommendation

- Such protection should be included in the draft law.

Open Meetings

Freedom of information includes the public's right to know what government bodies are doing on its behalf and to participate in decision-making processes. Meetings should only be closed in accordance with established procedures and where adequate reasons for closure exist. Any decision to close a meeting should itself be open to the public.

Recommendation

- The law should establish a presumption that all meetings of governing bodies are open to the public, that adequate notice of meetings must be given in advance to allow for attendance and that meetings may be closed wholly or in part only.