ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

MEMORANDUM

on the

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

by

ARTICLE 19
Global Campaign for Free Expression

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Commissioned by the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe

OSCE

I. Introduction

This Memorandum analyses the Law of the Republic of Uzbekistan on "Principles of and Guarantees for Freedom of Information" (Law), passed by the Oliy Majlis or legislature in December 2002.[1]

There are a number of positive elements in the Law, including: a strong and explicit commitment to, and to the protection by the State of, the right to seek and to receive information; a commitment to openness, transparency and accessibility; an assertion of the prevalence of international law over domestic law on the matters covered by the Law; and clear and reasonable procedures and deadlines for responding to information requests.

Despite these positive elements, ARTICLE 19 has fundamental concerns with the Law, of two basic types. First, the Law totally inappropriately lumps together under one head provisions directly relating to freedom of information with a wide and confusing array of other types of provisions quite unrelated to freedom of information. Some of these relate to specific duties which mass media and (other) private entities working in the public interest have regarding the public and the government, while others permit the government to "determine [the] objectives and directions of activity" of this same class of private entities. Still others relate to the misuse by anyone of confidential information about others which they control or impose duties on government to prohibit the dissemination of information in certain categories.

Such a mixing of provisions is counterproductive. A true *freedom of information* law creates rights in persons to access information held by public bodies and a corresponding duty of relevant officials to provide such access and to facilitate the means of access. Such a law establishes, in effect, a partnership between government and persons for the development and maintenance of a culture of openness and transparency, in which persons can monitor the fundamental workings of government, and which facilitates the true responsiveness of government to those whom it serves. In this context, rules relating to the media, or rules relating to the ways non-governmental bodies and persons manage or disseminate information, are simply out of place. Worse, however, the mixture of provisions in this way carries the entirely erroneous implication that others – particularly the mass media – have similar or analogous obligations to public bodies under a freedom of information regime.

Second, focussing specifically on the freedom of information regime strictly so-called, the Law contains a system of exceptions whose effect is to exclude from public access a vast range of information. With this system in place, as well as with the Law's overbroad scope, its open-ended subservience to other (unspecified) legislation and its failure to protect certain important kinds of disclosures (details as to all of which are provided below), the laudatory protections and goals of openness and transparency announced in the Law are very seriously undermined in practice.

[1] The analysis is based on an unofficial English translation of the Law. ARTICLE 19 accepts no responsibility for errors based on inaccurate or mistaken translation.

After setting out the basic principles of international law relating specifically to freedom of information, this Memorandum analyses those provisions of the Law which are especially problematic. The analysis is divided into two main parts. In the first part, we discuss only those provisions directly relating to the right to freedom of information, as described above. These, to repeat, are the only provisions which relate to the right to access information held by public authorities. The second part of the analysis briefly touches on other provisions of the Law, not strictly related to freedom of information, but which are highly problematic in their own right.

The first part of the analysis will, where appropriate, draw on a set of standards on freedom of information developed by ARTICLE 19 and set out in *The Public's Right to Know: Principles on Freedom of Information Legislation* (ARTICLE 19 Principles).[2] These Principles have been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression.[3]

II. International and Constitutional Guarantees

In a companion Memorandum, we have summarised the basic international and constitutional guarantees for freedom of expression, with particular attention to protections for the mass media.[4] In this Memorandum, we restrict ourselves to developing those international and constitutional freedom of expression provisions which are specifically related to freedom of information.

First, Article 19 of the *Universal Declaration on Human Rights* (UDHR),[5] specifically refers to freedom of information, providing that:

> Everyone has the right to … seek[and] receive … information and ideas through any media regardless of frontiers.

The *International Covenant on Civil and Political Rights* (ICCPR)[6] also contains this protection, in nearly identical language.

The UN Special Rapporteur on Freedom of Opinion and Expression has provided extensive commentary on the right to freedom of information 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."[7] 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."[8] In his 1998 Annual Report, the Special Rapporteur declared that freedom of information includes the right to access information held by the State:

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[2] (London, June 1999).
[3] See Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 43.
[4] See our Memorandum on the Law of the Republic of Uzbekistan on Mass Media (June 2004).
[5] UN General Assembly Resolution 217A(III) of 10 December 1948.
[6] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.
[7] 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.
[8] Resolution 1997/27, 11 April 1997, para. 12(d).

> [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…."[9]

Once again, his views were welcomed by the Commission on Human Rights.[10]

Uzbekistan is a member of the OSCE, which has referred to a right to freedom of information in a number of documents. For example, paragraph 28.9 of the 1991 Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE[11] states:

> The participating States will endeavour to maintain freedom of expression and *freedom of information*, consistent with their international obligations and commitments … (emphasis supplied).

The Constitution of the Republic of Uzbekistan also explicitly recognises a right of access to information. Its Article 29 provides:

> Everyone shall have the right to seek [and] obtain … any information, except that which is directed against the existing constitutional system and in some other instances specified by law.

Additionally, Article 30 obligates State bodies, public officials and public associations to "allow any citizen access to documents, resolutions and other materials, relating to their rights and interests". Article 43 provides that the State "shall safeguard the rights and freedoms of citizens proclaimed by the Constitution and laws".

While the right to freedom of information is fundamental, it is not absolute. Restrictions on the right are permissible but only if they satisfy a strict three-part test. Specifically, any such restriction must be (a) prescribed by law, (b) in support of an aim recognised as legitimate in international law, and (c) necessary for the pursuit of the legitimate aim.[12]

Critically, the necessity part of this test means that a restriction on the right to information – in particular, the refusal by a public body to release information pursuant to a request – will be justified only if (a) disclosure of the information would, or would be likely to, cause substantial harm to a legitimate interest, and (b) the harm caused by the disclosure of the information outweighs the public interest in the disclosure.[13]

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[9] 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.

[10] Resolution 1998/42, 17 April 1998, para. 2. In recognition of the key importance of freedom of information, and the need to secure it through legislation, laws giving individuals a right to access information held by public authorities have been adopted in almost all mature democracies. In addition, many newly democratic countries have recently adopted freedom of information laws. Many other countries in transition have either recently adopted, or are currently in the process of adopting, freedom of information laws.

[11] 5 June - 29 July 1990.

[12] ARTICLE 19 Principles, Principle 4.

[13] *Ibid.*.

III. Analysis of the Law

III.1 Freedom of Information Regime

III.1.1 General Outline

Article 1 of the Law states that its goal is "the observance of principles of and guarantees for freedom of information, the right to *search for* [and] *receive* … information …" (emphases added).[14] Article 4 establishes the right of everyone to engage in these activities, while Article 8 provides that the State shall "protect" the right. Article 4 further provides that the right of access to information may be "limited only in accordance with the legislation", and only for the purpose of protection of (a) human rights and freedoms, (b) the "foundations of the constitutional order", (c) society's moral values, (d) "intellectual, cultural and scientific potentials" and (e) State security. Article 6 sets out the general rule that any *non-confidential* information "shall be open and transparent" and then sets out a list of categories of non-confidential information. Article 8 requires certain bodies, including State and administrative bodies (but also a host of others), to provide means by which individuals may familiarise themselves about their rights, including (presumptively) about their rights to access information. Article 9 sets out a reasonably clear procedure, and pertinent (and reasonable) deadlines for making and processing applications for access to information, while Article 10 outlines conditions under which applications may be denied. Article 13 contains some provisions relating to personal data about "physical persons" with the implication that such information may not be released by public officials.

III.1.2 Scope of Coverage of the Law

It would appear that the duty to provide access to information is imposed on a wide range of non-governmental bodies (as well as on government bodies), although this is by no means perfectly clear. On one hand, Article 8, for example, provides: "State and administration bodies, self-governance bodies, *social associations*, *and other non-state non-for profit organizations* and public officials shall be obliged … to provide each individual with an opportunity of getting familiar with the information that involves his rights … [as well as information which would] support users thereof on the rights, freedoms and responsibilities of individuals … and *other issues of public interest*" (emphases added).[15] On the other hand, the operative process provisions (for example, relating to submission of requests) do not specify to whom such requests must be directed[16] and the assertion of the general right of access to information does not specify that it is a right only to information held by public bodies.

Analysis

[14] That same Article also refers to the investigation, dissemination, use and storage of information.

[15] We acknowledge the possibility that Article 8 imposes on certain private entities only a duty to *publish* certain information, rather than a duty to provide access to information in its control. At best, the language of the Article is ambiguous here. For instance, it provides that such entities must "provide each individual *with an opportunity*" to become familiar with the specified information.

[16] Article 9 does provide: "In the instances if a body or public official does not hold the information applied for", they must notify the requester of such fact. This mention of a public official may suggest that this part of the Law is indeed restricted to public bodies and officials. At a minimum, the Law would have to be substantially clarified, along the lines suggested in the text, to ensure that it is read in this way.

By terms, therefore, the Law would appear to establish a right of access to information held not only by public bodies but also by a range of non-State bodies, including bodies which have no identifiable relation to the State, such as non-governmental organisations and "social organisations".[17] In contrast, *commercial* entities would not appear to have any such obligations imposed upon them.

This scope of coverage, as we have already implied, represents a misconception of the role of a freedom of information regime. It is critical, to be sure, that public bodies, as well as private bodies which carry out public functions,[18] are subject to an obligation of openness and transparency and that people have access to an extremely wide range of information held by these bodies. But for other private bodies – particularly non-governmental organisations and social organisations, whose work often involves critique of government and its policies – a *blanket* obligation to "open their books" to all, including government officials, would potentially subject them to abuses and would probably be unduly onerous for them. While it may be appropriate to subject even these kinds of bodies, as South Africa has done, to access obligations in the narrow case where the information is necessary for the exercise or protection of a right, such an obligation must be precisely defined and carefully limited. In sharp contrast is this Law, which would appear to impose no constraints at all on what kinds of information may be demanded from private bodies.

Furthermore, to the extent that it is appropriate for private bodies to be under an obligation of openness, there is no warrant for distinguishing between non-profit and commercial bodies. The South African law, it may be noted, makes no such distinction. We can only assume that the distinction in the current Law is based on the mistaken view that private non-profit bodies are somehow analogous to public bodies. Indeed, we are concerned that this view has led to a belief that it is appropriate for government to have substantial control over the activities of these bodies, much as it has over public bodies. While these private bodies do often undertake work of public interest, they differ fundamentally from public bodies, precisely in that they are, or should be, fully independent of government.

Recommendations:

- Careful consideration should be given to the extent to which freedom of information obligations should be imposed on private bodies beyond those which carry out statutory or public functions.
- Any freedom of information obligations imposed on private bodies should apply equally to non-profit and to commercial bodies.

III.1.3 System of Exceptions

The Law contains a number of provisions which expressly provide for, or imply the existence of, exceptions to the putatively general right of access to information. For example, the second paragraph of Article 4 states:

[17] We are not informed as to what "social organisations" are but we assume for the purpose of this Memorandum that, like non-state not-for-profit organisations, they are private entities. If this assumption is mistaken, our objections below relating to the inappropriateness of subjecting private entities to freedom of information, and certain other rules, will not apply to social organisations.

[18] For a definition of 'public body', see ARTICLE 19's *A Model Freedom of Information Law* (London, 2001) (Model Law), Article 6.

> Access to information shall be limited only in accordance with the legislation and for the purpose of protection of human rights and freedoms; foundations of the constitutional order; moral values of the society; intellectual, cultural and scientific potentials; and security of the State.

Furthermore, Article 6 provides that all information, except confidential information, "shall be open and transparent". That Article then goes on to provide a list of information which is *non*-confidential, from which it follows that all information not included on the list *is* confidential and is, therefore, not subject to openness and transparency. The list of non-confidential information includes "legislation" relating to rights and freedoms and to the "legal status" of a range of entities; information relating to the environment, sanitation, and other information "necessary for security of the population, settlements operating capacities, and communications"; and information already publicly available in institutions such as libraries and archives.

Article 10 establishes that a request for information may be denied if the requested information is confidential or if "due to its disclosure, rights and legitimate interests of an individual, or interests of society and the State may be infringed".

Finally, Article 11 provides that information falling into a number of categories "shall be protected". These categories include information whose "abusive usage *may* damage" its owner (emphasis added) and information whose disclosure could threaten "personal, public, and state security". Also information may be withheld if it would prevent the "distorting and falsification of information".

Analysis

There are severe problems with this exceptions regime. In the first place, some of the aims, protection of which is a ground for limiting access to information, are not recognised as legitimate aims under the ICCPR. According to Article 19(3) of the ICCPR, an *exhaustive* list of legitimate aims is the rights and reputations of others, national security, public order, public health and morals. Clearly, the Article 4 aim of protecting "intellectual, cultural and scientific potentials" is not on the ICCPR list, and therefore should not be a ground for refusing to disclose information. The terms employed for this ground, moreover, are extremely broad and could be used abusively by public officials to withhold from public view a wide range of information of clear public importance, including, for instance, any study whatsoever which had an "intellectual" component.

Equally, the aim of protecting the "foundations of the constitutional order" is drafted in dangerously broad terms, with strong potential for abuse. It is true that, to the extent that protecting the foundations of the constitutional order could involve the protection of national security or public order, this aim would be legitimate. But any further reach of this aim – for example, to protect the "honour of the Republic", if this were a constitutional value – would be illegitimate.

The aims implicitly set out in Article 10 is even broader than those listed in Article 4, thereby potentially importing into the Law a virtually indeterminate number of aims which could further justify the denial of information requests. The Article appears to say that requests for access to the information may be denied whenever disclosure might infringe *any* "legitimate interest" of any individual or *any* interest of society or *any* interest of the State. While the exact relation between Article 4 and Article 10 is

unclear, the most plausible reading is that the latter expands the aims for which information may be withheld from public access beyond those listed in Article 4, and far beyond those deemed legitimate by the ICCPR.[19]

Second, the attempt to define the category of *non*-confidential information is misguided. The idea here, presumably, is to define exhaustively a class of information which *is* subject to disclosure. A freedom of information law based on a general commitment to openness and transparency should do precisely the opposite by creating a *presumption* that all information is non-confidential, and hence subject to disclosure. The Law should then provide a list of narrowly-drawn categories of information which will be counted as confidential under certain circumstances. Defining non-confidential information, as is the case here, runs the risk of excluding wide categories of information which should be subject to disclosure. In this case, for instance, information about the salaries of public officials, about public fraud and about the workings of government – to name a very few – are arguably not included within the listed categories and would, thus, end up being counted as confidential.

Third, Article 10 includes at best a very weak harm requirement, only requiring a finding that disclosure of the information *may* infringe the rights of individuals, the interests of society or the State. Mere possibility is all that is required and no guidance whatsoever is given as to the standards to be applied to the term 'may infringe'. It is thus open to officials who wish to maintain a culture of secrecy to find that any information at all – about allegations of corruption, about events in other parts of the world, about the health of important public officials, about the activities of non-governmental organisations, about the state of the economy – could *possibly* have some negative impact (could "infringe") on some "interest" of society or the State. This provision, in other words, appears to give carte blanche to public officials to refuse any and all requests for information.

This weak harm requirement should be replaced by a suitably stringent harm requirement. In place of "may infringe" in Article 10 (and the equally problematical "may damage" of Article 11), a single requirement should be added to the Law, to the effect that information may be withheld only where the aims sought to be protected *would, or would be highly likely to, be substantially prejudiced* by the disclosure of the information.[20]

The Law also needs a public interest override. Article 6 appears to import into the Law the concept of public interest, in requiring the bodies listed to disclose to the mass media information of public interest. It would appear, however, that this is a species of obligation to publish, and it seems likely that the exceptions in Article 10 and 11 would override the Article 6 obligation, or at least remain unaffected by it. It is also unclear whether the Article 6 obligation applies regardless of any potential harm that might result by the disclosure of information. The Law should contain a general provision, applicable to every article, which gives the appropriate weight to the public interest of requested information. In particular, it should permit public officials to

[19] Similar considerations apply to most of the Article 11 "protections", which are drafted in terms which are so broad or vague (two notable examples are "abusive usage" and "distorting") that their presence in the Law invites considerable abuse.

[20] For various formulations of an acceptably strong harm test, see the *Model Law*, Articles 25-32.

deny information requests only where the harm to a legitimate aim which would result from the information's disclosure would outweigh the public interest in disclosure.

Recommendations:

- All the exceptions from the duty to disclose requested information should be redrafted in clear and narrow terms to ensure that they protect only legitimate aims.
- Each of the exception categories should be subject to a harm test, cast in terms of a likelihood of serious prejudice to a legitimate interest.
- A public interest override should be added to the Law, providing that information may be withheld only when the harm to a legitimate interest which would result from the information's disclosure outweighs the public interest in the disclosure.

III.1.4 References to Other Legislation

The Law refers, sometimes explicitly and sometimes implicitly, to other legislation and other procedures. Articles 6 and 10, for instance, implicitly import the standards of other legislation relating to the withholding of certain information from public view into the Law's own substantive provisions. These articles provide, implicitly, that any information classified as, for example, a State secret under other legislation will be counted as "confidential", and therefore subject to withholding, under this Law. This view is supported by Article 2, which explicitly provides for the operation of other laws in the regime created by this Law, stating: "Legislation on principles of and guarantees for freedom of information shall consist of the present law *and other legislation*" (emphasis added).

Analysis

A freedom of information law should clearly state that other legislation must be interpreted in a manner consistent with its provisions and that, in case of conflict, the freedom of information law will prevail. Otherwise, many of its protections will prove to be illusory. To follow up on the example just above: the law "On Protection of the State Secrets" (State Secrets Law) is drafted in extremely broad terms, providing for the potential classification of a vast range of information.[21] The State Secrets Law in no way defers to, or even mentions, the provisions of the freedom of information Law. In effect, all information classified as a State secret under the State Secrets Law will be beyond the reach of persons in Uzbekistan, regardless of the public interest in its disclosure, and even if disclosure of the information might not in any way be harmful to any aim listed in the freedom of information law.[22]

[21] See our Memorandum on the Law of the Republic of Uzbekistan on "Protection of the State Secrets".

[22] In this regard, it is incumbent upon us to point out a problem which perhaps is particularly emblematic of the difficult situation which the combination of this Law and the State Secrets Law imposes on people. We are informed that, unlike in neighbouring countries such as Kyrgyzstan and Tajikistan, where lists of issues or categories of information which are considered to be State secrets are published, this list is itself treated as a State secret in Uzbekistan. Article 15 of the Law, which mandates the "protection of state secrets", arguably imposes obligations on all persons not to disseminate State secrets. Persons in the country, therefore, may well be subject to liability for disseminating State secrets without having any idea what information which might be in their possession could fall into this category. This situation is only exacerbated by the extremely broad definition of "state secret" contained in the State Secrets Law and which, presumably, is applicable to this Law.

Recommendations:

- The Law should explicitly state that, in the event that provisions of other legislation are inconsistent with any of its provisions, its provisions shall prevail.
- References to other legislation and procedures should, where possible, be removed from the Law. In the event that such removal is impossible, the legislation or other procedures should be identified specifically, for example by name.

III.1.5 Costs

Article 9 provides: "Information may be provided on a commercial basis in accordance with the established procedure".

Analysis

This provision is subject to considerable abuse. The term "commercial basis" is left undefined. By terms, the provision is consistent with the imposition of onerous, perhaps impossibly high, fees on all, or perhaps only certain disfavoured, applicants for information.

Individuals should not be deterred from making requests for information by excessive costs, as this will have an adverse impact on the free flow of information. The Law should ensure that fees for information requests shall not exceed the actual cost of searching for, preparing and communicating the information. Moreover, consideration should be given to providing that requests for personal information or in the public interest are free or at least very low cost.

Recommendation:

- Article 9 should be amended to provide that fees for information requests shall not exceed the actual cost of searching for, preparing and communicating the information. Ideally, costs should be waived, or at least reduced, for requests for personal information or in the public interest.

III.1.6 Obligation to Publish

Article 8 states:

> State and administration bodies[23] … shall be obliged … to provide each individual with an opportunity of getting familiar with the information that involves his rights, freedoms, and legitimate interest; to provide accessible resources and mass information support to users thereof on the rights, freedoms and responsibilities of individuals, their security, and other issues of public interest.

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

Analysis

Public bodies should indeed be under an obligation to publish key information about their activities and functions. Accordingly, these provisions (insofar as they apply to public bodies) are positive. However, they should be further elaborated to specify in

[23] Other, private, bodies are included in the list. As we have already noted, a freedom of information law should not, in general, impose obligations on private bodies.

more detail what types of information they should provide. At least the following categories of information should be required to be published, even in the absence of a request:

- a description of each body's structure, functions, duties and finances;
- relevant details concerning services provided;
- any direct request or complaints mechanisms available to members of the public;
- a guide containing information about each body's record-keeping systems and the type of information it holds;
- the content of all decisions and/or policies (and underlying reasons or rationales) each body has adopted which affect the public;
- mechanisms for making representations to and otherwise influencing the policies of each body.

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

Recommendations:

- The Law should establish both a general obligation to publish and key categories of information that must be published.
- Article 6 should provide that the information it mentions should be made generally available rather than being made available only to the mass media.

III.1.7 Right of Appeal

Article 7 states that refusals of requests for information by the "owner or holder of information" can be appealed in accordance "with the procedure established by the legislation", while Article 9 establishes that parties who have been refused information or who have received incorrect information have a right to compensation for material or moral damages. The Law therefore presumably provides for an appeal to the courts but not to an administrative body.

Analysis

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

Recommendation:

- The Law should provide for an appeal to an independent administrative body, as well as to the courts. An initial internal appeal mechanism would also be welcome.

III.1.8 Omissions

A number of issues which are important for an effective freedom of information regime have been omitted from the Law.

Maintenance of Records

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

Protection for "Whistleblowing" and for Good Faith Disclosures

The Law lacks two kinds of protection which are necessary for effective implementation of the right to freedom of information. First, protection from legal or employment-related sanction should be extended to so-called whistleblowers, persons who release information on wrongdoing, or information that could disclose a serious threat to health, safety or the environment, regardless of whether it is exempt, provided that the person acts in good faith and in the reasonable belief that the information is in fact true. Second, protection from criminal and civil liability should be extended to those who release information pursuant to the Law where the individual in question acts reasonably and in good faith, even if the information is in fact exempt under the terms of the Law.[24]

Information Officers

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

Severability

If a request for information relates to a document containing exempt information, any information in the document or other record which is not exempt should, to the extent that it may reasonably be severed from the rest of the information, be disclosed.

Guide to using the act

An independent body, for example an Information Commissioner, should be required to publish and widely disseminate a clear, simple guide containing practical information on how to use the freedom of information law. We have already noted that Article 8 does impose certain positive duties in this regard on public bodies. However, it would be preferable if the Law explicitly provided that specific information about the right of access to information, including information on the procedures by which such access may be secured, should be made readily available to all.

Recommendations:

- Public bodies should be required to meet certain minimum standards in relation to record maintenance.

[24] See *Model Law*, Articles 47 and 48.

- The law should provide protection for whistleblowers and for certain good faith disclosures pursuant to the Law.
- All public bodies should be required to appoint an Information Officer who should be centrally responsible for that body's compliance with the provisions of the Law.
- The Law should provide that, where only part of a record is exempt, the rest of the record should be subject to disclosure.
- A guide on how to use the Law should be required to be published and widely disseminated.

III.2 Provisions not Related to Freedom of Information

In this part of the Memorandum, we comment briefly on those provisions of the Law which are not related to the question of access to information held by public bodies and which are particularly problematic. We preface this part with a repetition of the fundamental point that none of the provisions discussed below has any place in a freedom of information law.

III.2.1 "False News" Provision

Article 7 provides that "mass media outlets, as well as a source and author of information, shall be liable for untruthfulness in accordance with the procedure established by the legislation".

Analysis

Such liability for publishing "false news" is not legitimate under international law. For example, statements by the UN Human Rights Committee, established by the ICCPR, have expressed concern at the presence of false news provisions in national law. In 1995, the Committee noted, in respect of Tunisia, its "concern that those sections of the Press Code dealing with … false information unduly limit the exercise of freedom of opinion and expression".[25] Article 49 of the Tunisian Press Code provides for up to three years' imprisonment for the bad faith publication of false news which has disrupted or is likely to disrupt public order. In 1998, the Committee criticised Armenia for a false news provision which prohibits the publication of false and unverified news reports, breach of which may lead to a three-month suspension of the media outlet's operations.[26]

Of course, all responsible mass media are very much concerned to "get the news right", and employ their best efforts to do so. It is entirely appropriate for the mass media, individually and collectively, to develop voluntary codes of practice governing investigative and other techniques to ensure, as far as is practicable, that they publish responsibly, with every reasonable effort made to check the reliability of what they publish. But it is one thing for the media to regulate itself in this regard and quite another for the government to impose such regulation on them.

[25] *Annual General Assembly Report of the Human Rights Committee*, UN Doc. A/50/40, 3 October 1995, para. 89.

[26] See *Concluding Observations of the Human Rights Committee: Armenia*, UN Doc. CCPR/C/79/Add.100, 19 November 1998, para. 20.

Recommendation:

- A prohibition on false news such as that found in Article 7 should not exist in Uzbekistan law.[27]

III.2.2 Obligations on Private Non-Profit Organisations

The obligations imposed by the Law on non-State not-for-profit organisations and social organisations include the following:

- to disclose to the mass media (Article 6) and to individuals more generally (Article 8) information on certain specific matters but also, generally, on issues of public interest; and
- to "protect" confidential and certain other information (Article 11).

Analysis

While one might hope and expect that organisations which work in the public interest would, of their own accord, provide information to the media and perhaps directly to the public on matters such as those specified in these articles, it is a violation of their right to freedom of expression to force them to provide such information, including because the right of freedom of expression includes the right *not* to express oneself in the event that one chooses not to. Furthermore, these provisions are clearly open to serious abuse. It is a matter of judgement whether or not something is of public interest, and yet failure to disclose this would be a breach of the Law. Accordingly, the disclosure obligations under these articles, insofar as they apply to private organisations, are inappropriate.

Appropriate privacy legislation may well impose some obligation on private organisations to refrain from disseminating certain "confidential" information, where such dissemination would violate the legitimate privacy rights of individuals. In the first place, a duty of this sort should not be included in a freedom of information law. Second, any such duty should apply to all private bodies, including commercial bodies, not just to non-profit ones. Third, the category of "confidential information" is potentially extremely broad. If, as may well be the case, confidential information is understood as any information not listed as non-confidential in Article 6, private bodies' duty to protect confidential information is an immense and open-ended responsibility, which will make them understandably reluctant to disclose much information of public interest.

Recommendations:

- The information provision duties imposed on private organisations by Articles 6 and 8 should not exist in Uzbekistan law.
- The Article 11 duty on private organisations to protect confidential information, as set out in the Law, should not exist in Uzbekistan law.

[27] It is our normal practice to recommend the removal of objectionable provisions from the law being analysed. For the provisions discussed in this part of the Memorandum, however, we recommend their removal from all Uzbekistan legislation. For these provisions, the first point (given the specific remit of this Memorandum) is that they have no place in a freedom of information law. The second point is that they have no place anywhere else in the country's legislation.

III.2.3 Distortion of Information

Article 7 prohibits the "[d]istortion and falsification of information".

Analysis

This provision, apparently applying indiscriminately to all persons and entities, is in flagrant violation of international law. "Distortion" is undefined, and could easily be interpreted to apply to any kind of fictional writing or broadcasting, to deliberate hyperbole or exaggeration, to humour of all kinds and so on. Similarly, "falsification" is undefined and could also be interpreted extremely broadly. We have already noted that "false news" prohibitions, which are analogous to a prohibition on falisification of information, are illegitimate.[28]

Recommendation:

- The prohibitions noted above should not exist in Uzbekistan law.

III.2.4 'Harmful' Use of Information

Article 13 contains a general prohibition on the "usage" of information relating to individuals which causes them "pecuniary or moral damage" or which prevents them from exercising their rights or "legitimate" interests (first Article 13 provision). It also imposes liability on any physical or juridical person who receives, holds or uses information relating to individuals "in violation of the procedure for usage [of] such information" (second Article 13 provision).

Analysis

The first Article 13 provision prohibits the "usage" of any information – even *true* information – as long as some "pecuniary or moral" damage results from its usage or if it prevents the relevant individual from exercising a right or interest. This provision is far too broad. To give just one example, the prohibition would apply to the dissemination of true information about the illegal sales practices of a retail establishment because such dissemination could cause it pecuniary damage. Moreover, because the Law does not define a "legitimate" interest, this may well be interpreted unduly broadly to prohibit expression protected under international law.

The second Article 13 provision is also very problematical. It makes reference to a procedure for the usage of information about individuals without in any way specifying what the procedure is; of particular note in this regard is that the prohibition applies even to the *receipt* of such information, even if the recipient had no control at all over this. At all events, absent a clear specification of what such procedure is, it is simply impossible to understand what, in practice, is prohibited. As such, the prohibition is in violation of the first part of the three-part test which requires that restrictions "provided by law" be sufficiently clear that persons can tell what they are prohibited from doing.

Recommendation:

- The first Article 13 prohibition should not exist in Uzbekistan law.
- The second Article 13 prohibition should not exist in Uzbekistan law. In the

[28] We do not suggest that it would be inappropriate to prohibit *public* officials and institutions from distorting or falsifying information. But a blanket prohibition on this kind of expression is unacceptable.

event that it is retained, the procedure to which it refers should be specified in detail and should in no way violate international law relating to freedom of expression.

III.2.5 Control over Information

Article 14, provides for the protection of the "information security of society", by preventing "illegal information and psychological influence on social conciseness and manipulation thereof", as well as by allowing for counteraction of "information expansion aimed at deformation of national consciousness, [and] uprooting of the society from its historical and national traditions and customs …".

Analysis

This appears to be an unacceptably broad provision, although it is far from clear what it means or how it will be applied in practice. Part of the difficulty, we concede, may be in the translation but, at least as we understand it, among other things Article 14 calls for the prohibition of the dissemination of any information which may have the tendency to cause people to question "social conciseness" or (as we interpret this obscure phrase), social cohesion (or perhaps conformity). Surely any social critique, no matter how even-handed, well-researched or well-intentioned, even if very mild in tone and fully constructive in intent, could be judged by some official or other to influence persons to think again about social conciseness. Equally obviously, this is perfectly legitimate. As a result, publication of any information critical of government or society could be prohibited.

It bears emphasis in this regard that very few of the "aims" contained in Article 14 – such as preventing psychological influence on or manipulation of social conciseness, developing the intellectual, cultural, and historical values of the society and the research and technological capacities of the State, or counteracting the deformation of national consciousness or the uprooting of the society from its historical and national traditions and customs – has any obvious connection to any of the legitimate aims recognised by the ICCPR. Certainly, for example, none of these aims could be said with any plausibility to be sufficiently closely related to public order or national security.

It is not clear how this prohibition will be applied but it is at least possible that it may be understood as justifying a system of prior restraint, something that is permitted, if at all, only in very limited circumstances and never for the general control of media content.

Recommendation:

- The provisions of Article 14 discussed above should not exist in Uzbekistan law.

III.2.6 Protecting State Secrets

Article 15, among other things, directs the State to protect State secrets and State information resources from "unauthorized access thereto". It also directs the State to prevent the dissemination of information relating to, among other things, "pushing from power legally elected or appointed officials and committing other attempts to the public order".

Analysis
The first part of the first provision (relating to State secrets) is simply redundant with the State Secrets Law and related legislation, which provide in no uncertain terms for the protection of State secrets. The repetition of this provision is not only unnecessary, but it is also hardly consistent with the Law's announcement of a policy of openness and transparency.

The second provision suffers from the same kind of overbreadth which we have noted with respect to other provisions of the Law. The term "pushing from power" is undefined. While it may be proper to prohibit the dissemination of information advocating the violent overthrow of the government – which prohibition is explicitly included in another provision of Article 15 – the notion of "pushing from power" is clearly a great deal broader than that. Any information critical of an elected or appointed official – for example, a detailed factual report on his or her fraudulent activities or a critical analysis of his or her voting record in Parliament – could be viewed as tending to "push [him or her] from power". Yet this kind of information dissemination is of critical importance in democracies; far from being prohibited, it should be encouraged.

Recommendations:
- The provisions in Article 15 relating to State secrets and State information resources should be removed from the Law.
- The provision relating to disseminating information tending to "push from power legally elected or appointed officials" should not exist in Uzbekistan law.

III.2.7 Other Powers Accorded to the State

Article 12 provides: "State policy for information security shall regulate public relations in the information sphere and *determine principal objectives and directions of activity* of state and administration bodies, self-governance bodies, as well as social associations, and other non-state non-for-profit organizations, individuals for protection of information security of a person, society, and the State" (emphasis added).

Analysis
While it may be appropriate for the State to regulate the "public relations" and the "principal objectives and directions of activity" of its own bodies, it is obviously totally inappropriate for it to regulate such public relations, and even more so, the principal objectives and directions of activity, of private organisations, even in the service of "information security". Such a power of government effectively subjects all activities of all organisations to the prior approval of government, in violation of a host of human rights including, but not limited to, the right to freedom of expression.

Recommendation:
- Article 12 of the Law should be restricted in application to public bodies.