ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

MEMORANDUM

on

the Draft Law on Free Access to Information of Montenegro

by

ARTICLE 19
Global Campaign for Free Expression

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I. Introduction

ARTICLE 19 supports the continued efforts by the joint government and civil society working group in Montenegro to develop the Draft Law on Free Access to Information. This Memorandum analyses a translation[1] of the latest draft of the law received by ARTICLE 19 in March 2004 (current Draft), and complements ARTICLE 19 analyses of earlier drafts of this law.[2] We restrict our attention quite specifically to changes between the November 2003 draft (the previous Draft) and the current Draft.

The current Draft does contain a number of positive changes, including a broader duty to publish and the removal of an obligation on individuals to expose wrongdoing (while retaining appropriate whistleblower protection). At the same time, we are deeply concerned that two fundamental changes in the current Draft represent steps backward in the drafting process. One such change involves the entire revamping of the exceptions section (current Articles 9 and 10). This section now contains a number

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

[2] See our Memoranda of March 2003 (March 2003 Memorandum) and December 2003 (December 2003 Memorandum), as well as our Comment on Alternative Montenegrin Exceptions Proposal, also of December 2003 (2003 Comment).

of vague, and sometimes overbroad, provisions. We note that we called for more detailed elaboration of the exceptions with a view to honing them more precisely on the legitimate aims sought to be protected. Instead, they open up the potential for unduly broad interpretation and application. In addition, this section now employs various harm requirement formulations, many of which are too weak, while a harm requirement is altogether absent from some exceptions. Finally, it employs a public interest override provision that appears to be weaker than that contained in the previous Draft. A second disturbing change is that the current Draft has completely dispensed with appellate access to an independent administrative body (the Ombudsman) and also, apparently, to the courts. We detail these concerns below.

II. Analysis

A. The Exceptions Regime

Article 9 of the current Draft now contains ten separate sub-articles. Each delineates a category of information presumptively exempt from disclosure. The categories are: defence and security of the country; diplomatic and other relations with foreign countries and international organisations; financial and monetary policy and economic interests of public authorities; public healthcare and environmental protection; intellectual ownership rights; prevention, disclosure and anti-crime activities; protection of interests related to the judiciary; protection of the privacy and economic interests of natural and legal persons; protection of the "content of documents in the processing procedure"; and protection of confidential business data.

Broadly speaking, these categories represent legitimate aims which public authorities may invoke in justifying the non-disclosure of information. However, many of the categories are developed in ways that render them too broad, as we describe below, with the result that public officials may be able, and inclined, to abuse them by withholding information to which the public should have a right of access.

1. General Lead-in to the Exceptions

Article 9 begins as follows: "The right of access to information shall be limited, entirely or partially, in cases prescribed by this or any other law,[3] when it is necessary in a democratic society for the purpose of:", and then sets out the ten categories of exempted information. It would appear that a crucial term is missing from the end of the initial lead-in, namely that access may be limited for the purpose of *protecting* the interests listed. This may simply be the result of translation but it should at least be clear in the original.

Recommendation:

- The general lead-in in Article 9 should make it clear that information falling within the categories of the following sub-articles may be withheld only for the purpose of *protecting* the interests listed in the sub-articles.

2. Lead-ins to Each Sub-article

[3] We regret that the current Draft continues to contain a reference to "any other law", despite the fact that such references, as we have explained, are subject to abuse. See December 2003 Memorandum at p.4.

Each sub-article of Article 9 begins by setting out an exception category, and then follows this with the phrase "with reference to". Following this phrase is a delineation of sub-categories of information falling within the general exception.

It is unclear whether the list of sub-categories is intended to be *exhaustive* or simply illustrative, in which latter case other sub-categories could also be used to justify non-disclosure. Article 9(2) seems to suggest these lists are only illustrative. That article relates to "diplomatic and other relations with foreign countries and international organisations". The only item on the list for this exception relates to "the competence of the international court of justice, international investigative authorities or other international institutions". Surely, however, as the terms of the exception itself imply, the exception must be broader than that, covering other countries and many other international bodies. This implies that the lists are indeed illustrative only and not exhaustive.

It is highly preferable, where specific examples are supplied in this way, that they be exhaustive, and that this fact be made explicit in the law. This is for the simple reason that, otherwise, public officials, particularly those who have not rejected the culture of secrecy, will be tempted to "create" other sub-categories which they would assert fall under the general exemption category. The potential for abuse here is quite obvious.

Recommendation:

- If the list of sub-categories for each sub-article of Article 9 is retained, it should be made clear that this list is, in fact, exhaustive.

3. Vagueness and Overbreadth in the Sub-categories

Various of the sub-categories are vague, or are overbroad (in the sense that they exempt information which should not be exempted in a fully compliant freedom of information regime). We detail the most problematic cases below.

Article 9(1) contains three problematic exceptions:

- It exempts information which would "violate …[the] memory of victims, or inflict suffering to persons close to the victims". In the first place, the sub-article does not clarify what these would be victims of. Assuming that these are intended to be victims of emergencies (as possibly implied in the sub-article), it is quite unclear, in the second place, what information would be included in the phrase "violating the memory of victims"; at the same time, any information whatsoever about a victim might be such that its disclosure would "inflict suffering to persons close to the victims". Yet, it is clear that information falling within these broad categories – relating, for example, to ways in which emergencies could be averted, or ways in which persons could be protected in the event of emergencies – could be of great public importance and interest.
- It exempts information "with regard to the safety of citizens and facilities …". For reasons similar to those just described, this sub-category is too broad, potentially exempting from disclosure all sorts of information of significant public interest relating to ways in which the safety of citizens might be secured.
- It exempts information "related to the military intelligence service" – subject to a very weak harm requirement discussed in the next section. Again, this

extremely broad exemption could reach information which simply must be subject to disclosure including, for example, information about corruption in the intelligence service.

Other examples of provisions which sweep too broadly include:

- Article 9(5), which exempts background information for dissertations or scientific studies, where disclosure might hinder "their use, adequate assessment, or person in charge of the assessment, as well as the person who commissioned the study": The potential harm to persons in charge of assessment or who commissioned the studies is unspecified – information relating to the fact that a publicly-funded study was poorly or fraudulently designed could certainly work to the embarrassment of such persons and thus could improperly be exempt as potentially "harming" them. Equally, any "background" information would be exempt as long as the study was in "use". Without further specification, this could be for a period of years or decades.
- Article 9(7), which exempts information "containing data on victims of the offence": Statistical data on offences, for example, including data on the number of victims of certain violent crimes, locations of the crimes, etc., could be of immense importance to the public, yet might be thought to be exempted under this sub-article.
- Article 9(8), which exempts information "containing data on annual income with the exception of a court ruling enforcement": Information relating to the annual income of public officials, however, is of clear public interest and should not be exempted.
- Article 9(9) (apparently relating to the deliberative processes of public authorities), which exempts information "containing data on the preparatory work of the public authorities and having no meaning on their own": This phrase is followed a phrase in parentheses, which reads: "opinions and recommendations prepared by or for a public authority, reports or consultations". It is quite unclear what these phrases taken together mean, and therefore it is unclear which information is being exempted. However, we note that public officials normally err on the side of caution and decline to release information which should properly be disclosed. To take a single example where this might be expected to occur: this exemption does not appear to be restricted to the point in time during which the deliberation process actually takes place and thus might exempt from disclosure opinions and recommendations on which disastrous public decisions were based. In light of recent events in the United States and the United Kingdom, it is difficult to imagine a category of information of higher public interest.

We recognise that the development of these sub-categories is an attempt to delineate the general category set out in each sub-article. It is one thing to draft a clear and narrow exception but another to provide an open list of examples for each exception. The latter runs the serious risk of being subject to considerable abuse. Our general recommendation here is to refrain from trying to set out in detail what sorts of information fall into each exception. Rather, the exceptions should be precisely and narrowly drafted so that they clearly do not cover information which should be

subject to disclosure, taking into account the presence of an adequate harm requirement.[4]

Recommendations:

- Article 9 should be redrafted, along the lines of Articles 25-32 of the *Model Law*, to eliminate overbroad and vague language and to prevent abuse of its exception regime.

4. Harm Requirement

In sharp contrast to the previous Draft, which subjected each exception to the requirement that information withheld must be such that its disclosure would cause a "substantial harm to the legitimate interest", the current Draft drops a general harm requirement and, instead, interposes partial and radically varying harm requirements for certain, but not all, individual sub-categories. We give some prominent examples below.

- Information relating to the state security service and other bodies in charge of national security matters is exempted "except in cases of danger, when it is obvious that the access will not jeopardise the Constitutional order and security" (Article 9(1)). This harm requirement is difficult to understand. "Cases of danger" is an undefined term, but presumably the idea is that any information relating to security is fully exempt whenever a situation of actual danger does not obtain. In other words, in most situations, information relating to security is exempt, subject to no harm requirement.[5] Even in a danger situation, the harm requirement imposed is rather weak: instead of requiring a showing that "the Constitutional order and security" *would be* jeopardised, this sub-article creates a presumption in favour of nondisclosure, rebuttable only where the public official judges that it is *obvious* that disclosure would *not* jeopardize such interests. This is clearly a high threshold, one which public officials would probably very rarely consider has been attained.[6]
- Article 9(2) exempts certain information relating to international organisations if disclosure "could jeopardise" certain diplomatic relations. This is far too weak a standard, permitting the withholding of information on the mere possibility that harm might result from disclosure.[7]
- Numerous provisions have no harm requirement whatsoever, including Article 9(7), and certain sub-articles of Articles 9(8) and 9(9).
- In contrast, various provisions employ a stricter probability standard, more in line with international best practice. For example, Article 9(3) exempts from disclosure information which "*would* undermine the credibility or functioning

[4] See ARTICLE 19's *A Model Freedom of Information Law* (*Model Law)* (London: 2001), Articles 25-32, for examples of exception provisions which avoid the vagueness and overbreadth from which many of the current Draft's provisions suffer.

[5] This is not literally correct, in light of the fact that the current Draft contains a public interest override – in fact, as we explain below, Article 9(1) is potentially subject to two different public override provisions. The point in the text above is that this sub-category of Article 9(1) is not subject to an explicit harm requirement.

[6] The phrase "unless it is obvious that the access will not jeopardise [the relevant interest]" occurs twice more in Article 9(1); these instances are also subject to the same criticism.

[7] The same sort of weak construction, involving "could", rather than something like "would be highly likely to", occurs in various other provisions, including Article 9(3) ("could cause damage or jeopardise the position of the state") and Article 9(6) ("could jeopardise the investigation procedure").

of financial or insurance systems"; Article 9(4) exempts information which "*would be* detrimental to health of individuals or population"; and Article 9(10) exempts information which "*would probably* disclose a confidential source" (emphases supplied).

As we have explained previously,[8] it is vitally important that each exception in a freedom of information law be subject to a clear and strict harm requirement, cast in terms of the *substantial harm* to a legitimate interest which *would, or would be likely to result* from disclosure of the exempted information. We strongly recommend that an analogous harm requirement be required before access to information may be refused.

It is worth pointing out in this regard that an appropriately strong harm requirement of the sort just described undoes much of the damage potentially caused by overbroad exception categories such as some of the ones described above. This is because, while the category in question would appear to justify the withholding of a great deal of information which should be subject to disclosure in a compliant freedom of information regime, the disclosure of much of that information would not harm at all, and certainly would not substantially harm, any legitimate State interest. To take an example from above, even though Article 9(1) would, by terms, appear to exempt from disclosure information about corruption in the intelligence services, it is obvious that the disclosure of such information could not possibly harm any *legitimate* interest that the government could have. Thus, were Article 9(1) to stipulate that the information covered could only be withheld from disclosure if substantial harm to the security services would result from its disclosure, the Article would not in fact justify the retention of information relating to corruption in such services.

Recommendation:

- Specific harm requirements should be added to each of the exceptions listed in Article 9, cast in terms of the likelihood of substantial harm to the legitimate interests protected if the information were disclosed.

5. Public Interest Override

The final sentence of Article 9 of the current Draft contains a public interest override which is similar to the one contained in the previous Draft. However, it is restricted in application to "paragraph 1 of this Article" (excepting from disclosure information relating to "defence and security of the country"). Thus, by terms, the Article 9 public interest override does *not* apply to any of the other exception categories.

New Article 10 contains a new public interest override provision which clearly does apply to all of the exceptions in Article 9; however, as explained just below, this provision is much weaker than the current Article 9 provision. Although the intention is probably that Article 10 supplement Article 9, in fact, because it is more detailed, it may actually override the Article 9 provision with respect to defence and security information, and in any event is the only override applicable to the other Article 9 exceptions.

[8] See the December 2003 Memorandum at page 4, for example.

The Article 10 override is substantially weaker than the (partial) Article 9 override. Article 10 requires disclosure only where "disclosure of the information clearly overrides the damage that can be expected as a consequence" of the disclosure. This imposes a heavy burden on the requester, who must not only show that the pubic interest in disclosure is greater than any potential harm resulting from disclosure, but also that the public interest "clearly overrides the damage". This is a very high standard, which in any case misplaces the burden of proof. The *presumption* should be in favour of disclosure (as it is in the partial Article 9 override). Given this fact, the burden should be on the public body to show that the potential harm to a legitimate interest resulting from the disclosure of exempt information would be greater than the public interest in disclosure. Absent such a showing, the rule should be that disclosure is required.

There is strong reason to think that it will be this weaker provision which will have general application in the freedom of information regime created by the current Draft, notwithstanding the presence of the partial Article 9 override. Here is why. The Article 10 provision specifies that it shall *only* be applicable in cases involving information relating to material violations of law; criminal acts and "inappropriate rulings"; abuse of authority or negligence in the performance of official duties; unauthorised use of public funds; or threats to individuals, the population, or the environment. As many of these categories intersect with the category of information relating to the defence and security of the country, Article 10 has the effect of specifying a lower standard for these situations than the rule set out in Article 9. Given the specificity of Article 10, it is likely that it will actually be understood as overriding Article 9 in cases involving information relating to the defence and security of the country insofar as these involve any of the above enumerated categories (material violations of law, and so on). Since the Article 10 provision will also, of course, be applied in the case of all the other Article 9 exceptions, the effect will be that the Article 10 provision will in all likelihood by the only override provision actually applied by public officials.

Recommendation:

- The public interest override in Article 9 should be reformulated so that it is applicable to all Article 9 exceptions, and should take the place of the current Article 10 public interest override provision.

B. Removal of the Right of Appeal

Article 24 of the previous Draft provided for an appeal to the Ombudsman of refusals of information requests; such appeals were to be free of charge. This Article has been removed in its entirety from the current Draft. Moreover, Article 23 of the previous Draft provided for an "administrative lawsuit" in the event that a request for information had been denied, by which phrase we understood an appeal before an independent judicial body.

As a result, the only provision in the current Draft for any type of review of denials of access requests is Article 24, which provides: "An administrative dispute procedure may be instituted against a decision passed upon the request for granting access to

information".[9] It is not clear exactly what this means: whether, for example, this provides only for an internal "administrative" review to a higher official in the public authority which originally denied the request or whether the provision is for review by an independent quasi-judicial body, perhaps modelled on the Ombudsman. (We are aware of the recent passage of legislation creating an office of Ombudsman for Human Rights but we are not conversant with the details of the law.)

We simply note that the integrity of a freedom of information regime crucially relies on the existence of an appeals process which is truly independent, that is, free from political and other governmental pressure. To this end, freedom of information laws in many jurisdictions create separate, independent administrative bodies to which refusals to disclose requested information may be appealed. Independence is typically secured, in part, through the appointments process for members of these bodies and through ensuring that members can command significant social support and respect. The bodies 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. Appeals to these bodies are usually cheap (or free), and quick.

In the event that the Ombudsman meets these standards of independence, and that it has the powers just described, it is highly regrettable that the previously-existing provision for appeals to such office has disappeared from the current Draft. In this case, we strongly recommend the reinstatement of the relevant portion of Section 24 of the previous Draft. On the other hand, in the event that the Ombudsman as currently constituted does not have the required independence, or the necessary powers, we recommend that the current Draft be amended to provide for the creation of such an office.

At the same time, and for similar reasons, it is of equally critical importance that the law provide for an appeal to the courts as well.

Recommendations:

- The law should provide for an appeal to an independent administrative body which will be cheap or free and rapid, and from there to the courts.

[9] Various other articles also provide access to an administrative dispute procedure: Article 15 (in the context of the extension of deadlines; Article 16 (in the context of a failure to respond to requests, which failure is deemed to be a refusal); and Article 19 (in the context of refusals based on a pubic authority's inability to determine which authority is competent to act on the request). Additionally, Article 27 provides that all issues not regulated by the current Draft are subject to "the administrative procedure and administrative dispute procedure".