MEMORANDUM

on

the Draft Law on Free Access to Information of Montenegro

by

ARTICLE 19
Global Campaign for Free Expression

London
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I. Introduction

ARTICLE 19 very much welcomes moves in Montenegro to draft a Law on Free Access to Information (the draft Law) which will help ensure that the public's right to know, and in particular to access information held by public authorities, is respected. We have long advocated the passage of freedom of information legislation to give practical effect to this important right.

The draft reviewed by ARTICLE 19 is very progressive, reflecting in many areas best international practice, and should, if passed into law, provide an effective guarantee for the right to information. We particularly welcome, for example, the broad definitions of public authorities and information covered, as well as the narrow regime of exceptions.

At the same time, we feel that improvements could still be made to the draft Law, which also has some omissions. This Memorandum sets out our suggestions in this regard, along with recommendations, as an aid to discussion and with a view to bringing the draft law into line with the best international standards in this area. In

particular, we recommend that the authorities should not be responsible for ensuing that the right to information is not exercised in negative ways, that specific harms should be added to each exception and that secrecy laws not be allowed to override this law. An obligation to publish key categories of information could be added to the draft law, along with an administrative appeals system, a system for ensuring record maintenance and protection for civil servants who disclose information in good faith.

The comments in this Memorandum are based on two key ARTICLE 19 publications, *The Public's Right to Know: Principles on Freedom of Information Legislation* (ARTICLE 19 Principles)[1] and *A Model Freedom of Information Law* (Model Law).[2] These publications represent broad international consensus on best practice in this area. This Memorandum analyses the version of the draft law received by ARTICLE 19 in March 2003.

The draft law was prepared by a joint government and civil society expert working group established by the Joint Initiative for the Development of the Draft Law on Free Access to Information. The Secretariat of Information, the Ministry of Justice and the Ministry of Interior, in cooperation with the Association of Young Journalists, the Free Access to Information Programme, the Centre for Transition, the Montenegrin Helsinki Committee for Human Rights and the Association of Independent Broadcast Media of Montenegro signed the Joint Initiative in December 2002, with the main objective of increasing the accountability of the authorities towards the citizens of the Republic of Montenegro and observance of their right to be informed about and to participate in processes the authorities undertake on their behalf. The group has also explicitly expressed an interest in active cooperation with the European Union, the Council of Europe, the OSCE, the European Agency for Reconstruction, the European Institute for the Media, ARTICLE 19 and other international and local organisations.

II. International and Constitutional Standards

There can be little doubt about the importance of freedom of information. During its first session in 1946, the United Nations General Assembly adopted Resolution 59(1) which stated:

> Freedom of information is a fundamental human right and… the touchstone of all the freedoms to which the UN is consecrated.[3]

In ensuing international human rights instruments, freedom of information was not set out separately but was included in the fundamental right to freedom of expression, which includes the right to seek, receive and impart information. Article 19 of the *Universal Declaration of Human Rights* (UDHR),[4] generally considered to be the flagship statement of international human rights, binding on all states as a matter of customary international law, guarantees the right to freedom of expression in the following terms:

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[1] ARTICLE 19 (London, 1999).
[2] ARTICLE 19 (London, 2001).
[3] 14 December 1946.
[4] UN General Assembly Resolution 217A(III), 10 December 1948.

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The *International Covenant on Civil and Political Rights* (ICCPR),[5] a legally binding treaty which is binding on Montenegro,[6] guarantees the right to freedom of opinion and expression in very similar terms to the UDHR, also in Article 19. The *European Convention on Human Rights* (ECHR),[7] although not formally binding on Montenegro, is a foundational document of the Council of Europe, a body which the country of Serbia and Montenegro would like to join, an event that appears imminent.[8] The ECHR also guarantees freedom of expression, at Article 10.

Numerous official statements have been made to the effect that the right to freedom of expression includes a right to access information held by public authorities. The right to information has also been proposed as an independent human right. Some of the key standard setting statements on this issue follow.

The UN Special Rapporteur on Freedom of Opinion and Expression has frequently noted that the right to freedom of expression includes the right to access information held by public authorities. He first broached this topic in 1995 and has included commentary on it in all of his annual reports since 1997. For example, in his 1998 Annual Report, the UN Special Rapporteur stated:

> [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]

In November 1999, the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – came together for the first time under the auspices of ARTICLE 19. They adopted a Joint Declaration which included the following statement:

> Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.[10]

In March 1999, a Commonwealth Expert Group Meeting in London adopted a document setting out a number of principles and guidelines on the right to know and freedom of information as a human right, including the following:

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[5] UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.
[6] The Former Republic of Yugoslavia ratified the ICCPR in March 2001.
[7] E.T.S. No. 5, adopted 4 November 1950, entered into force 3 September 1953.
[8] The Parliamentary Assembly of the Council of Europe voted on 24 Sept. 2002 in favour of accession.
[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. These views were welcomed by the Commission. See Resolution 1998/42, 17 April 1998, para. 2.
[10] 26 November 1999.

> Freedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions.[11]

These principles and guidelines were endorsed by the Commonwealth Law Ministers at their May 1999 Meeting[12] and recognised by the Commonwealth Heads of Government Meeting in November 1999.[13]

Within Europe, the Committee of Ministers of the Council of Europe recently adopted a Recommendation on Access to Official Documents,[14] calling on all Member States to adopt legislation giving effect to this right. The Recommendation provides for a general guarantee of the right to access official documents, noted below, as well as specific guidance on how this right should be guaranteed in practice:

> III
> *General principle on access to official documents*
>
> Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including national origin.

The European Union has also recently taken steps to give practical legal effect to the right to information. The European Parliament and the Council adopted a regulation on access to European Parliament, Council and Commission documents in May 2001.[15] The preamble, which provides the rationale for the Regulation, states in part:

> Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights….

The purpose of the Regulation is "to ensure the widest possible access to documents".[16]

These international developments find their parallel in the passage or preparation of freedom of information legislation in countries in every region of the world. Most States in Europe now have freedom of information legislation on the books with the passage by the United Kingdom, in November 2000, of the Freedom of Information Act, 2000. In Asia, India and Pakistan have recently adopted freedom of information laws, joining Hong Kong, Japan, South Korea and Thailand, and bills are currently pending before the Sri Lankan, Indonesian and Philippine parliaments. These developments are now starting to take root in Africa, where a number of draft freedom of information laws have been tabled recently. In the Americas, freedom of

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[11] Quoted in *Communiqué*, Meeting of Commonwealth Law Ministers, Port of Spain, 10 May 1999.
[12] *Ibid.*, para. 21.
[13] The *Durban Communiqué*, Commonwealth Heads of Government Meeting, Durban, 15 November 1999, para. 57.
[14] R(2000)2, adopted 21 February 2002.
[15] Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.
[16] *Ibid.*, Article 1(a).

information legislation has been passed in the United States, Canada, Mexico and Peru, and draft laws are being prepared in Argentina, Ecuador, Guatemala, Nicaragua, Uruguay and Paraguay.

The 1992 Constitution of the Federal Republic of Yugoslavia guaranteed freedom of expression and of the press in Articles 35, 36, 38, 39, 44, and 45. This Constitution has, however, been replaced by a new constitution of 4 February 2003, which is not available to ARTICLE 19 in translation. The Constitution of the Republic of Montenegro also contains detailed provisions guaranteeing freedom of expression and freedom of the press, at Articles 34, 35 and 37, including freedom from censorship and protection for free distribution of newspapers.

III. Analysis of the Draft Law

As noted above, the draft Law is very progressive and provides a solid basis for discussion on freedom of information. At the same time, it could still be improved. The analysis that follows provides commentary on the existing provisions of the law, and then addresses some omissions.

Article 1

Three alternative formulations are provided for in Article 1, which sets out the basis for the right to access information held by public authorities. The first formulation provides that foreigners may exercise the right on a basis of reciprocity, the second does not distinguish between nationals and foreigners while the third provides for access by foreign residents or registered legal entities.

A number of freedom of information laws do restrict access rights to citizens or residents but the more progressive laws, for example in the United States and Sweden, grant a right of access to everyone. This is clearly of benefit to non-citizens and granting broad access to foreigners can be expected to impose very little burden on public authorities, so that there is little justification for a restriction of this sort. This is reflected in section 3 of the Model Law.

Recommendation:

- Alternative No. 1 of the draft Law, which does not restrict the right of foreigners to access public information, should be preferred.

Article 4

Article 4 is the definitions part of the draft Law. Two options are provided for the definition of information; the key difference between the two is that the second option includes ‘activities’, whereas the first does not. It is not entirely clear from the translation what this means. However, there is some debate about whether ‘activities’, or information that is not recorded, so exists only in the memories of those who have been party to a discussion, should be covered by a freedom of information act. Although, in principle, there is no reason why such ‘oral’ information should not be subject to disclosure, to the best of our knowledge none of the existing laws do include it and there may be serious practical problems with this.

Article 4 includes a definition of a 'competent public authority', in addition to the general definition of a public authority, which refers to any authority with information at its disposal. This is unnecessary since, in practice, all public authorities have information at their disposal.

Recommendations:

- Consideration should be given to omitting the reference to 'activities' in the definition of information.
- The definition of a 'competent public authority' should be removed from the draft Law.

Article 6

Article 6 sets out the obligation of public authorities to provide access to information they hold. It conditions this obligation, however, providing that these authorities must make sure that, "the right is exercised in such a way as to cause no harm to other persons or be in collision with the public interest". There are potentially serious dangers with conditioning the right to information in this way. Public authorities could abuse this 'obligation' and refuse to provide access for political or corrupt reasons, claiming the applicant might use the information in a manner that was against the public interest. Furthermore, this restriction is unnecessary inasmuch as general provisions of law already provide for adequate, indeed excessive, restrictions on freedom of expression purportedly to protect the public interest.

Recommendation:

- The obligation on public authorities to ensure that the right to access information is exercised in a manner that does not cause harm to other persons or public interests should be removed from the draft Law.

Article 7

The gist of this article is that every public authority must keep an index of all types of information is holds and that this index should itself be a public document. Two alternatives are provided for Article 7 but it is not very clear from the translation what the main difference between them is.

Recommendation:

- The precise scope of Article 7 should be clarified.

Article 9

Article 9 of the draft Law sets out the regime of exceptions to the right of access. All exceptions must be necessary in a democratic society, be proportionate to the protection of a list of legitimate aims and disclosure must pose a risk of substantial harm to these aims. Furthermore, all exceptions are subject to a public interest override. The draft Law does, however, envisage that secrecy provisions in other laws shall be preserved.

This system of exceptions is, by-and-large, narrow and limited. However, the approach taken, which posits a general requirement of substantial harm to all interests, may not be as clear as listing the specific harm to each interest separately. For example, the draft Law provides for an exception for information under preparation. The envisaged harm in this case is undermining the free and frank provision of advice within government and protecting policy development processes. It would be preferable if each exception stated clearly the specific harm sought to be avoided.

Many freedom of information laws do, like the draft Law, preserve secrecy provisions in other laws. However, the laws in a number of other countries provide that any inconsistent provisions in other laws shall be overridden by the freedom of information law. This latter approach is clearly preferable from a perspective of openness, ensuring that overbroad or excessive secrecy provisions are not allowed to undermine the new law.

In at least one case, the legitimate aim is framed too narrowly, namely in relation to confidential business information, which is required to relate to science, production and technology. There may be other legitimately confidential business information, for example relating to pricing policies or advertising approaches. All confidential business information should be covered as long as its disclosure would harm the financial interests of the party which provided it.

Furthermore, at least one exception should be added to the draft law, namely to protect information the disclosure of which would harm the prevention, investigation and prosecution of criminal activities.

Recommendations:

- Specific harms should be added to each of the exceptions listed in Article 9.
- Consideration should be given to replacing the clause preserving secrecy laws with a clause providing that the freedom of information law shall prevail over inconsistent other laws.
- The confidential business information exception should be expanded, as described above.
- An exception should be added to protect law enforcement activities.

Article 10

Article 10 provides that public authorities are not required to provide access to information that has been published within the last three years. Consideration should be given to excluding information that is about to be published, for example in the next 30 days.

Recommendation:

- Consideration should be given to expanded the publications exception to cover information that is about to be published imminently.

Article 14

Article 14 sets out the time limits for responding to a request for information, which must normally be met within 8 days. Consideration should be given to adding a

general requirement that requests must be met *as soon as possible*, an in any event within 8 days. Article 14 also sets out two options regarding the possibility of extending the original 8-day time limit. The second option, but not the first, sets an overall limit on the period of any such extension, to 15 days.

Recommendations:

- Consideration should be given to requiring public authorities to meet requests for information *as soon as possible*, in addition to setting an overall limit of 8 days.
- The second option for extending the time limits, which provide for overall time limits, is preferable.

Article 17

Article 17 sets out the various forms in which access to information may be requested, including examining the information, making a photocopy or transcript, or providing a copy of the information.

Recommendation:

- Consideration should be given to making explicit reference to the possibility of receiving an electronic copy of the record in question, which is normally the cheapest form of access.

Article 24

Article 24 requires employees to 'indicate' any abuses of public power by promptly notifying the relevant public authority and the Conflict of Interest Committee. It also protects employees against any sanction for disclosing such abuses.

In some countries, protection for whistleblowers is conditioned upon their providing the information to the appropriate oversight bodies, in this case the public authority in question and the Conflict of Interest Committee. However, in general, it is recognised that formal channels are not always effective in dealing with such disclosures and, where these mechanisms fail, individuals should be protected even if they provide the information disclosing the abuse directly to the media. Furthermore, none of the existing whistleblower provisions actually *require* individuals to expose abuses. This is an onerous obligation, which some individuals may find it very difficult to comply with, particularly where the problem is widespread and they fear general retaliation.

Recommendations:

- The draft Law should recognise that official mechanisms for dealing with problems are not always effective, and provide at least some protection to individuals who disclose information about wrongdoing directly to the media.
- The idea of placing an obligation on individuals to expose wrongdoing should be reconsidered.

IV. Omissions

Information Officer

Many countries provide for the appointment of special officials within each public authority with overall responsibility for ensuring compliance with the law. This has the advantage of ensuring a locus of responsibility, as well as a clear contact point for requests.

Obligation to Publish

Most freedom of information laws provide not only for information to be provided on request but also for a positive obligation on public authorities to publish and widely disseminate various key categories of information, even in the absence of a request. The specific types of information covered varies from country to country but it should include such matters as the responsibilities and mandate of the public authority, its key policies, opportunities for public participation and so on.

Maintenance of Records

Good record maintenance is key to an effective information access regime. In many countries, the freedom of information law provides for a central authority, for example the Minister of Justice, to set and enforce minimum standards of record maintenance for public authorities.

Annual Reports

To promote openness about the implementation of the freedom of information law, and to enhance parliamentary oversight, public authorities in many countries are required to publish annual reports detailing their activities under the law. Such reports should include information on the number of requests, the number granted and refused, any appeals and the like.

Time Limits

Overall time limits on the classification of records help ensure that, at least over time, almost all public records become available. Normally, provision is also made, in exceptional cases, for extending the period of classification where this is strictly warranted by the circumstances.

Appeals to an Administrative Body

The draft Law provides for appeals from a refusal to disclose information to the administrative courts. In our experience, the success in practice of a freedom of information regime depends on individuals having the right to appeal refusals to an administrative body which can process such appeals rapidly and at a low cost. A special body could be constituted specifically for information appeals or, particularly in a smaller country like Montenegro, this task could be allocated to an existing body, such as a human rights commission or ombudsman. A further right to appeal to the courts is also desirable but only a small number of cases can be expected to be appealed that far, given the time and cost involved.

Good Faith Disclosures

A freedom of information law should protect civil servants who have disclosed information pursuant to a request, as long as they acted reasonably and in good faith. In many cases, it will be difficult to determine whether or not information should be subject to disclosure, particularly where the public interest is engaged. If civil servants are not protected against sanction for disclosing information, they will tend to err on the side of caution by not disclosing information, thereby perpetuating the culture of secrecy that pervades most governments.

Recommendations:

- Consideration should be given to requiring public authorities to appoint an information officer with final responsibility for ensuring compliance with the freedom of information law.
- A provision requiring public bodies to publish key categories of information should be added to the draft Law.
- Consideration should be given to providing for a system which establishes minimum standards of record maintenance.
- Consideration should be given to requiring public authorities to publish an annual report on their activities under the draft Law.
- Consideration should be given to providing for overall limits beyond which any classification of information would need to be strictly justified.
- The draft Law should provide for a right of appeal to an administrative body.
- Protection against sanction should be provided to civil servants who disclose information pursuant to a request, as long as they acted reasonably and in good faith.