ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

MEMORANDUM

on

the draft Paraguayan Free Access to Public Information Law

by

ARTICLE 19
Global Campaign for Free Expression

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I. Introduction

This Memorandum contains an analysis by ARTICLE 19 of the draft Paraguayan Free Access to Public Information Law (draft Law). ARTICLE 19 has been asked to comment on this draft Law, which has been prepared by members of the Freedom of Expression Forum and has the backing of a range of groups listed at the end of the draft Law. The draft Law is currently in Congress and it will be reviewed by a bi-cameral commission in March. It is hoped that the draft Law will be placed before the Senate later this year. Our comments are based on an unofficial English translation of the draft Law, received by ARTICLE 19 in January 2003.[1]

ARTICLE 19 welcomes moves to adopt legislation on the right to freedom of information in Paraguay. There are a number of positive elements in the draft Law, including broad definitions of information and which institutions are subject to the law, a broad positive obligation to publish information, good process guarantees and provision for punishment for those who obstruct access to information. At the same time, the draft Law has a number of weaknesses, including the unduly broad regime of exceptions, the

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

lack of protection for whistleblowers, the failure to require public authorities to report on their information activities and the lack of provision for appeals to an independent administrative body. This Memorandum sets out our main concerns with the draft Law.

The following analysis of the draft Law is based on two key ARTICLE 19 documents, *The Public's Right to Know: Principles on Freedom of Information Legislation* (ARTICLE 19 Principles)[2] and *A Model Freedom of Information Law* (ARTICLE 19 Model Law).[3] These documents are based on international and best comparative practice concerning freedom of information. Both publications represent broad international consensus on best practice in this area and have been used to analyse freedom of information legislation from countries around the world.

II. International and Constitutional Obligations

The Guarantee of Freedom of Expression

Article 19 of the *Universal Declaration of Human Rights* (UDHR),[4] a UN General Assembly resolution, binding on all States as a matter of customary international law, sets out the fundamental right to freedom of expression in the following terms:

> 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 regardless of frontiers.

The *International Covenant on Civil and Political Rights* (ICCPR),[5] a formally binding legal treaty ratified by Paraguay in June 1992, guarantees the right to freedom of opinion and expression also at Article 19, in terms very similar to the UDHR. By ratifying the ICCPR, States Parties agree to refrain from interfering with the rights protected therein, including the right to freedom of expression. However, the ICCPR also places an obligation on States Parties to take positive steps to ensure that rights, including freedom of expression and information, are respected. Pursuant to Article 2 of the ICCPR, States must "adopt such legislative or other measures as may be necessary to give effect to the rights recognized by the Covenant." This means that States must create an environment in which a diverse, vigorous and independent media can flourish, and provide effective guarantees for freedom of information, thereby satisfying the public's right to know.

Paraguay has also ratified the *American Convention on Human Rights* (ACHR),[6] which guarantees the right to freedom of expression at Article 13(1), as follows:

> Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of

[2] (London: June 1999).
[3] (London: July 2001).
[4] UN General Assembly Resolution 217A(III) of 10 December 1948.
[5] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.
[6] Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978.

> frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

Article 2 of the ACHR, like its ICCPR counterpart, requires States Parties to take positive measures to promote and protect the rights guaranteed therein.

Freedom of expression is also guaranteed by the two other regional human rights treaties, the *African Charter on Human and Peoples' Rights*[7] and the *European Convention on Human Rights*.[8]

Freedom of Information

In the earlier international human rights instruments, freedom of information was not set out separately but included as part of the fundamental right to freedom of expression. Freedom of expression, as noted above, includes the right to seek, receive and impart information and freedom of information, including the right to access information held by public authorities, is clearly a core element of this right. There is little doubt as to the importance of freedom of information. The United Nations General Assembly, at its very first session in 1946, adopted Resolution 59(I), which states:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.[9]

The right to freedom of information as an aspect of freedom of expression has repeatedly been recognised by the UN. The UN Special Rapporteur on Freedom of Opinion and Expression has provided extensive commentary on this right in his Annual Reports to the UN Commission on Human Rights. In 1997, he stated: "The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large … is to be strongly checked."[10] 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."[11] In his 1998 Annual Report, the Special Rapporteur declared that freedom of information includes the right to access information held by the State:

> [T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems…."[12]

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[7] Adopted at Nairobi, Kenya, 26 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.
[8] Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953
[9] Adopted 14 December 1946.
[10] Report of the Special Rapporteur, 4 February 1997, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1997/31.
[11] Resolution 1997/27, 11 April 1997, para. 12(d).
[12] Report of the Special Rapporteur, 28 January 1998, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, para. 14.

In 2000, the Special Rapporteur provided extensive commentary on the content of the right to information as follows:

- Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;

- Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;

- As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;

- A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;

- All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);

- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;

- The law should establish a presumption that all meetings of governing bodies are open to the public;

- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;

- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.[13]

Once again, his views were welcomed by the Commission on Human Rights.[14]

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 –

[13] 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. 44.
[14] Resolution 2000/38, 20 April 2000, para. 2.

came together for the first time in November 1999 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.[15]

The right to freedom of information has also been explicitly recognised in all three regional systems for the protection of human rights. Within the Inter-American system, the Inter-American Commission on Human Rights approved the Inter-American Declaration of Principles on Freedom of Expression in October 2000.[16] The Preamble reaffirms with absolute clarity the right to freedom of information:

> CONVINCED that guaranteeing the right to access to information held by the State will ensure greater transparency and accountability of government activities and the strengthening of democratic institutions; …
>
> REAFFIRMING that the principles of the Declaration of Chapultepec constitute a basic document that contemplates the protection and defense of freedom of expression, freedom and independence of the press and the right to information;

The Principles unequivocally recognise freedom of information, including the right to access information held by the State, as both an aspect of freedom of expression and a fundamental right on its own:

> 3. Every person has the right to access information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.
>
> 4. Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

Shortly after the adoption of these Principles, a group of experts met in Lima, Peru and adopted the *Lima Principles*.[17] These Principles elaborate in greater detail on the content of the right to freedom of information in the context of the Americas. Two years later, in November 2003, a major international conference on freedom of information was again held in Peru, bringing together a wide range of civil society experts, as well as officials and politicians. The conference adopted the *Declaration of the SOCIUS Peru 2003: Access to Information Seminar*, which states, among other things:

> We recommend that Governments Adopt and implement access to information laws based on the underlying principle of openness, as elaborated in the attached "Guidelines on Access to Information Legislation".[18]

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[15] 26 November 1999.
[16] 108th Regular Session, 19 October 2000.
[17] Adopted in Lima, 16 November 2000.
[18] 28 November 2003.

These Guidelines set out in some detail the standards to which freedom of information legislation should conform.[19]

The African Commission on Human and Peoples' Rights recently adopted a Declaration of Principles on Freedom of Expression in Africa,[20] Principle IV of which states, in part:

> 1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
> 2. The right to information shall be guaranteed by law in accordance with the following principles:
>   - everyone has the right to access information held by public bodies;
>   - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
>   - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
>   - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
>   - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
>   - secrecy laws shall be amended as necessary to comply with freedom of information principles.

Within Europe, the Committee of Ministers of the Council of Europe adopted a Recommendation on Access to Official Documents in 2002.[21] Principle III provides generally:

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

The rest of the Recommendation goes on to elaborate in some detail the principles which should apply to this right. Of particular interest in Principle IV, which states:

> **IV. Possible limitations to access to official documents**
>
> 1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:
>
> i. national security, defence and international relations;
> ii. public safety;
> iii. the prevention, investigation and prosecution of criminal activities;
> iv. privacy and other legitimate private interests;
> v. commercial and other economic interests, be they private or public;
> vi. the equality of parties concerning court proceedings;
> vii. nature;
> viii. inspection, control and supervision by public authorities;

[19] Available at: http://www.britishcouncil.org/socius/english/declaration.pdf.
[20] Adopted at the 32nd Session, 17-23 October 2002.
[21] Recommendation No. R(2002)2, adopted 21 February 2002.

ix. the economic, monetary and exchange rate policies of the state;
x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.[22]

National freedom of information laws have been adopted in record numbers over the past ten years in a number of countries, some of which include India, Israel, Jamaica, Japan, Mexico, Pakistan, Peru, South Africa, South Korea, Thailand, Trinidad and Tobago, and the United Kingdom, as well as most of East and Central Europe. These countries join a number of other countries which enacted such laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia and Canada, bringing the total number of States with freedom of information laws to over 50. A growing number of inter-governmental bodies, such as the European Union, the UNDP and the World Bank, have also adopted policies on the right to information. With the adoption of a strong Free Access to Public Information Law, Paraguay will join a long list of nations which have already taken this important step towards guaranteeing freedom of information.

Constitutional Guarantees

The Constitution of Paraguay includes a guarantee of freedom of opinion and expression at Article 26:

(1) Free expression and the freedom of the press, as well as the dissemination of thoughts and opinions, without any type of censorship, and with no more limitations than the ones established by this Constitution, are hereby guaranteed. In consequence, no law is to be passed that restricts or makes these rights unfeasible. There will be no press crimes; they will be considered common crimes committed through the press.
(2) Everyone has the right to generate, process, or disseminate information and to use any legal, effective instrument to achieve these goals.

Article 27 of the Constitution goes on to elaborate on the right to freedom of the media, while Article 29 addresses the specific rights of journalists. Article 28 explicitly guarantees the right to freedom of information as follows:

(1) The people's right to receive true, responsible, and equitable information is hereby recognized.
(2) Everyone has free access to public sources of information. The laws will regulate the corresponding procedures, deadlines and sanctions, in order to make this right effective.

A constitutional provision guaranteeing the right to information in this manner is very welcome. ARTICLE 19 assumes that the draft Law has been developed with a specific view to implementing the obligations set out in Article 28(2) of the Constitution.

[22] *Ibid.*

ARTICLE 19 has already analysed these constitutional provisions guaranteeing freedom of expression and information.[23]

III. Analysis of the Draft Law

1. Objectives

Article 1 of the draft Law sets out the objectives as being to 'promote transparency in the governmental sphere and to guarantee access to information related to administrative and governmental acts'. The objectives of a law are important in part because they may be used as interpretive guides for the rest of the provisions in the law.

Although the objectives set out in the draft Law are positive, at the same time they are unduly limited, in particular as they suggest the objective is only to promote the disclosure of information about official acts. In practice, the draft Law goes much further than this but, as noted, this limitation may be used to impose an unduly narrow interpretation on other provisions.

Recommendation:

- The objectives of the draft Law should be broadened, for example, to include promoting openness in the public sector generally and to giving effect to the constitutional right to access information held by public bodies.

2. Maximum Disclosure

The principle of maximum disclosure should underpin all freedom of information laws. It establishes a presumption that all information held by public authorities should be available to the public, subject only to narrow exceptions established by law to protect overriding legitimate interests. This implies that both public authorities and information should be defined broadly.

Article 5 of the draft Law defines the scope of information covered by providing a long list of types of information included, such as laws, projects, budgets, internal reports, letters and so on. It then goes on to also include,

> all information contained in written, photographic or recorded material, as well as in satellite images, magnetic or digital tape or in any other format which has been created or obtained by the institution in question and is in its possession and under its control.

This definition is, in many ways, excellent, and formally includes all information held by public bodies. At the same time, we generally recommend that specific lists be avoided as they can result in a situation where some officials fail to provide access to types of information not included in the list. The approach taken at Article 7(1) of the ARTICLE 19 Model Law, for example, is to define information as follows:

[23] Available at: www.article19.org.

> For purposes of this Act, a record includes any recorded information, regardless of its form, source, date of creation, or official status, whether or not it was created by the body that holds it and whether or not it is classified.

Article 3 defines those bodies covered by the obligation to disclose information broadly to include State bodies, whether central or decentralised and including autonomous entities, and State companies and companies with some public ownership, as well as private companies acting under public contract. The ARTICLE 19 Model Law also includes bodies undertaking public functions.[24]

Recommendations:

- Consideration should be given to replacing the list of types of information covered by the draft Law with a simple but expansive definition of information, along the lines of the definition quoted above.
- Consideration should be given to adding bodies which undertake public functions to the list of those subject to the law.

3. Obligation to Publish

Article 4 of the draft Law requires those subject to the law to publish various categories of information, including about the organisation of the institution, how it functions and its decision-making processes, its policy and action plan formulation, how its documents are indexed and its information access procedures.

The obligation to publish certain key categories of information, even in the absence of a request for information, is an important aspect of the right to information. The ARTICLE 19 Model Law, for example, provides for active publication of the following categories of information:

> (a) a description of its structure, functions, duties and finances;
> (b) relevant details concerning any services it provides directly to members of the public;
> (c) any direct request or complaints mechanisms available to members of the public regarding acts or a failure to act by that body, along with a summary of any requests, complaints or other direct actions by members of the public and that body's response;
> (d) a simple guide containing adequate information about its record-keeping systems, the types and forms of information it holds, the categories of information it publishes and the procedure to be followed in making a request for information;
> (e) a description of the powers and duties of its senior officers, and the procedure it follows in making decisions;
> (f) any regulations, policies, rules, guides or manuals regarding the discharge by that body of its functions;
> (g) the content of all decisions and/or policies it has adopted which affect the public, along with the reasons for them, any authoritative interpretations of them, and any important background material; and

[24] Note 3, section 6(1)(e).

(h) any mechanisms or procedures by which members of the public may make representations or otherwise influence the formulation of policy or the exercise of powers by that body.[25]

Consideration should be given to ensuring that the obligation as set out in Article 4 of the draft Law covers all of the categories set out above.

Article 4 provides simply that those subject to this obligation should publish this information by those means they consider most suitable. It would be preferable if the draft Law specifically required them to publish the information in a manner that ensured wide public accessibility. In the Model Law, for example, public authorities are required to publish this information in an accessible manner.[26]

Recommendations:

- Consideration should be given to broadening still further the categories of information which must be published, pursuant to Article 4, even in the absence of a request.
- Consideration should be given to requiring those subject to the law to publish the information in a manner that ensures public accessibility, rather than leaving this entirely to their discretion.

4. The Regime of Exceptions

The regime of exceptions is set out in Article 7 of the draft Law. Article 7 provides that access may be limited only on the basis of a specific legal provision and where the information falls within one of nine categories of exception, as follows:

a) information the disclosure of which would 'affect' the privacy of an individual or the 'confidentiality of data';
b) information where evidence exists that disclosure would cause damage to security or international relations, where the classification criteria have been specifically set out in law, and where the documents are appropriately classified in accordance with these criteria;
c) information that 'refers to' industrial or commercial secrets, or intellectual property;
d) information the disclosure of which 'could prejudice' the functioning of the banking or financial system;
e) information that 'refers' to third parties, obtained in a confidential manner and that is protected by banking secrecy;
f) information contained in a closed document relating to selection of contractors which 'can harm' the principle of equality of competition, until the process has concluded;
g) legal information disclosing the procedural strategy for litigation or legal theories prepared exclusively to be used in judicial or administrative processes;

[25] Note 3, section 17.
[26] *Ibid.*

h) information the disclosure of which 'can threaten' life of security of complaints or witnesses of investigations or which can reveal the strategy to be used in an investigation; and
i) examinations or competitions for public posts, until the results have been announced.

Article 7(2) also sets out time limits on non-disclosure of information. The exceptions set out in paragraphs d), f), g), h) and i) are relevant only as long as the reasons for preventing release apply. For exception b), in favour of security and international relations, the information must be made public once the period of classification provided for in the classification law has expired and, in any case, within five years, although this may be extended once, for a maximum of another five years.

It is well established that the right to information requires that all individual requests for information from public bodies must be met unless the public body can demonstrate that the information requested falls within the scope of a limited regime of exceptions. One of the most problematic issues for any freedom of information law is how to balance the need for exceptions and yet prevent those exceptions from undermining the very purpose of the legislation.

Under international law, freedom of information, like freedom of expression, may be subject to restrictions, but only where these restrictions can be justified through strict tests of legitimacy and necessity. International and comparative standards, including the ARTICLE 19 Principles, have established that a public authority may not refuse to disclose information unless it can show that the information meets the following strict three-part test:

- the information must relate to a legitimate aim listed in the law;
- disclosure must threaten to cause substantial harm to that aim; and
- the harm to the aim must be greater than the public interest in having the information.[27]

The first part of this test requires that a complete list of the legitimate aims that may justify non-disclosure should be provided in the access to information law; no other aims may be relied on to deny access. The second part of this test requires that the public authority demonstrate that disclosure would cause substantial harm to the legitimate aim. It is not enough for the information simply to fall within the scope of the legitimate aim, for example, be related to national security. Instead, the public authority must also show that disclosure of the information would harm that aim. Otherwise, there is simply no justification not to disclose information in the absence of a risk of harm.

The third part of the test requires a balancing exercise to assess whether the risk of harm to the legitimate aim from disclosure is greater than the public interest in accessing the information (this is often called the public interest override). If, taking into account all the circumstances, the risk of harm from disclosure is greater than the public interest in

[27] Note 2, Principle 4.

accessing the information, then the information may legitimately be withheld. This might not, however, be the case, for example where the information, while representing an invasion of privacy, also reveals serious corruption. It is implicit in the three-part test that exceptions to the right to information always be considered on a case-by-case basis.

It is not clear whether Article 7 effectively overrides secrecy laws to the extent of any inconsistency between its provisions and their own limitations on the disclosure of information. We certainly recommend that it should. In most countries, there are numerous secrecy provisions in many different laws, most of which have not been drafted with the objective of openness in mind. ARTICLE 19 recommends that freedom of information laws include a comprehensive internal system of exceptions, covering every legitimate ground for refusing to disclose information, but that, in exchange, they override secrecy laws to the extent of any inconsistency. In this way, every legitimate secrecy interest would be protected but, at the same time, maximum disclosure would be promoted and historical practices of secrecy would be overcome.

All of the exceptions in Article 7 serve legitimate aims, the first part of the test for restrictions. However, in some cases these are framed broadly, or are unclear. To address this, consideration should be given to adding certain 'exceptions to exceptions' to the draft Law. For example, in recognition of the importance of openness about the actions of public officials, the ARTICLE 19 Model Law provides that the exception in favour of personal information does not apply where "the individual is or was an official of a public body and the information relates to his or her function as a public official".[28]

Furthermore, all of the exceptions in Article 7 do require some sort of harm to a protected interest.[29] However, a range of different terms are used for this harm, some of which seem to set rather a low standard. For example, Article 7(a) simply requires that disclosure would 'affect' privacy or confidentiality, Article 7(e) requires only that the information is protected by banking secrets, and Articles 7(d) and (f) use the respective terms 'could prejudice' or 'can harm'. The term 'could' establishes an unreasonably low standard which is likely to lead to undue limitations on the right to access information. Article 7(b), in contrast, specifically requires that disclosure of the information 'would cause damage'.

ARTICLE 19 recommends that the draft Law employ a consistent term for the harm which would justify non-disclosure of information. Furthermore, this term should ensure that it is only where there is a real risk of harm that information may be withheld. The ARTICLE 19 Model Law, for example, consistently uses the term: "would, or would be likely to, seriously prejudice".

The draft Law also fails to provide for a public interest override, the third part of the test for limitations on access to information. In our experience, a public interest override is

[28] Note 3, section 25(2)(d).

[29] Formally, Articles 7(c), (g) and (i) do not refer to a specific harm. However, it is pretty clear from the wording of these provisions that harm would result if the information in question were disclosed. Article 7(i), furthermore, is limited in scope to an active recruitment process.

crucial to the effective functioning of a freedom of information regime. It is simply not possible to envisage in advance all of the circumstances in which information should still be disclosed, even if this might harm a legitimate interest, and to address these through exceptions to exceptions, as recommended above. The relevant provision in the ARTICLE 19 Model Law provides:

> Notwithstanding any provision in this Part, a body may not refuse to indicate whether or not it holds a record, or refuse to communicate information, unless the harm to the protected interest outweighs the public interest in disclosure.[30]

The time limits set out in Article 7(2) are very welcome, particularly for security information. However, it is unclear why the rule that the information must be disclosed once the harm no longer threatens is restricted to certain exceptions. We recommend that any refusal to disclose information must be justified by reference to a harm that threatens at the time of the request.

Recommendations:

- It should be clarified that Article 7 means that the draft Law effectively overrides secrecy laws to the extent of any inconsistency.
- The exceptions in Article 7 should be reviewed to ensure they are all clear, detailed and narrow, and consideration should be given to including 'exceptions to exceptions' to this end.
- All exceptions in the draft Law should be subject to a consistent harm test as described above.
- A general public interest override, along the lines suggested, should be added to the draft Law.
- Consideration should be given to applying the Article 7(2) rule, limiting non-disclosure to the period during which the causes preventing release apply, to all of the exceptions.

5. Appeals

Article 13 provides for an appeal to a superior officer of the public authority in question within ten days and from there to the courts or, at the discretion of the requester, directly to the courts. Such appeals may contest any denial of access to the information requested, in full or in part, or the fees charged for an access request.

Consideration should be given to extending the time period for an internal appeal. Ten days is an extremely short period of time and may not give a requester sufficient time to consider whether or not he or she wishes to lodge an internal appeal. The purpose of short timeframes is to ensure timely access to public information by those requesting it; providing for short timeframes for appeals in no way advances this interest.

Ideally, there should be three levels of appeal: first to a higher authority within the public authority, then to an independent administrative body and finally to the courts. The draft Law provides for the first and third levels of appeal, but not the second. An

[30] Note 3, section 22.

administrative level of appeal is important as it is both quick and less expensive than the formal court system, and it is more effective than an internal, and possibly biased, appeal. Although the draft Law does set very clear and short timeframes for decision-making on appeal to the courts, it may be difficult for the courts to actually comply with these timeframe, given their complex procedural, evidential and due process rules.

Experience in other countries shows that an administrative level of appeal is crucial to the effective implementation of freedom of information legislation. Most democratic countries provide for such an appeal in their freedom of information laws. For example, the Federal Transparency and Access to Public Government Information Law, recently adopted in Mexico,[31] provides for an appeal to the Federal Institute of Access to Information. The UK Freedom of Information Act 2000 provides for an appeal to the Information Commissioner. In both of these cases, the bodies were specifically established under the access to information law but, in some other countries, the law simply provides for an appeal to an existing body, such as an Ombudsman or human rights commission.

Recommendations:

- Consideration should be given to extending the period for lodging an internal appeal pursuant to Article 13 beyond the current ten days.
- The draft Law should provide for an appeal from decisions of a public authority to an independent administrative body either specifically created for this purpose or an existing body which could take on this function.

6. Miscellaneous

Form of Access

Article 6 provides for requesters both to inspect documents and to be provided with simple or certified copies. While this is positive, there are other important forms of access that may be desirable. For example, many requesters may wish to obtain an electronic copy of a document or a transcript of a record that may only be viewed or heard with the assistance of a machine.

Fees

Article 9 provides that requests to examine documents shall be free while, for requests for copies of documents, charges relating only to the cost of reproducing the document may be levied. This is, in general, a positive provision, limiting fees in accordance with the principle that people should not be denied their right to access information by excessive charges. At the same time, consideration should be given to providing for the central establishment of a schedule of fees for reproducing documents and, presumably, other sorts of records. This will ensure standard practice in this regard across all public authorities and prevent a situation arising where there is a patchwork of different fee structures across the public service, with some public authorities effectively charging much higher rates for access than others.

[31] Adopted in June 2002. Available at: http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB68/laweng.pdf. Available in the Spanish original at: http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB68/lawesp.pdf.

Requests

Article 10(1) appears to provide that all requests should be directed to the official responsible for the information requested. In general, requesters will at best know which institution holds the information and will rarely be able to locate the specific individual who is responsible for it. Furthermore, in some cases the information requested, which may involve a number of different documents, may be under the responsibility of different officers. Many freedom of information laws require public bodies to appoint a central information officer with specific responsibility for handling requests. He or she will then undertake the task of locating the information within the institution.

Timeframes

The draft Law sets very tight timeframes for a number of different activities, including a three-day timeframe for inspecting documents (Article 11(1)) and, as has already been noted, very specific timeframes for all aspects of internal and court appeals (Article 13). While short timeframes are to be promoted, at the same time excessively short timeframes may actually undermine implementation of the law. For example, officials will have to consider whether requested information falls within the scope of an exception. Three days may be insufficient for this purpose. If officials are unable to keep up with these timeframes in practice, they will constantly be operating in breach of the law, undermining its legal quality. As a result, short but realistic timeframes are to be preferred.

Obstructing Access

Article 15 provides for quasi-criminal liability for any official who "arbitrarily denies the request or obstructs the requester's access". ARTICLE 19 supports criminal penalties for those who obstruct access, but only where such penalties respect the basic criminal rule requiring mental, as well as physical responsibility (*mens reas*). We therefore recommend that this article be amended to provide for liability only where the obstruction was wilful or otherwise done with the intention of obstructing access.

Recommendations:

- Consideration should be given to providing for more options for requesters in terms of the form of access to the information requested.
- Consideration should be given to providing, in the draft Law, for some central authority, such as the Minister of Justice, to establish a schedule of fees for copying documents and other records.
- Article 10, providing that requests should be lodged with the individual responsible for the information, should be amended to provide simply that requests should be lodged with the appropriate institution. Furthermore, consideration should be given to requiring those subject to the law to appoint central information officers to receive and process requests.
- The timeframes set out in the draft Law should be reviewed to ensure that they are realistic and, where they are not, consideration should be given to extending them to the point where they are realistic.
- Consideration should be given to amending Article 15 to provide for liability only in

the context of wilful obstruction of access to information.

7. Omissions

The draft Law omits to include a number of provisions which are either essential or of great value to the effective operation of a system of access to information. These are outlined below.

Protected Disclosures

The draft Law does not protect individuals who release otherwise confidential information to expose wrongdoing or which exposes a serious threat to health, safety or the environment (so-called whistleblowers). These individuals should be protected against sanction as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing. Whistleblowers provide an important safety value against corruption and the like.

The draft Law also fails to protect officials who, pursuant to a request under the law, disclose information mistakenly but reasonably and in good faith. If officials can be penalised for making even reasonable mistakes, they will necessarily err on the side of caution and be reluctant to disclose information even if it should be disclosed. Given the culture of secrecy that normally prevails within government, such reluctance to disclose may already be a longstanding practice. For this reason, protection for reasonable, even if mistaken, disclosures under the law is important.

Record Maintenance

An access to information law can be seriously undermined if public authorities keep such poor records that they cannot locate the information sought. To help avoid this problem, many such laws place an obligation on public authorities to maintain their records in good condition. The UK Freedom of Information Act 2000, for example, provides for the Lord Chancellor (the minister of justice) to adopt a code of practice concerning the keeping, management and destruction of records by public authorities, with a view to ensuring best practice in this regard across the civil service. Good record keeping is important not only for access to information, but also for effective, modern, government, so the benefits of such a system will extend far beyond the scope of the draft Law.

Annual Report

It is important that public authorities keep records of their various information disclosure activities and that they be required to report annually on these activities. Such reports are an important means of monitoring the performance of public bodies in the information field and most access to information laws provide for them. For example, the ARTICLE 19 Model Law provides that annual reports by public authorities must contain information on:

(a) the number of requests for information received, granted in full or in part, and refused;
(b) how often and which sections of the Act were relied upon to refuse, in part or in full, requests for information;
(c) appeals from refusals to communicate information;

(d) fees charged for requests for information;
(e) its activities pursuant to section 17 (duty to publish);
(f) its activities pursuant to section 19 (maintenance of records); and
(g) its activities pursuant to section 20 (training of officials).[32]

Ideally, this annual report should be published and formally submitted to the independent administrative body responsible for oversight of the law, and that body should in turn be required to report annually to the legislature on overall progress in implementing the law.

Positive Measures to Promote Openness

Proper implementation of an access to information law requires measures to be taken both to ensure that the public are aware of their rights under the new law and to address the prevailing culture of secrecy within public authorities. It is desirable that an independent administrative body be allocated responsibility for both functions, whether this be a new body created specifically for this purpose or an existing body, such as an ombudsman or human rights commission.

The body should be required to produce and disseminate widely a guide to using the law, which is accessible to members of the general public. It should also be given a broader public educational role.

Similarly, a range of measures need to be put in place to address the culture of secrecy within government. This clearly includes training of public officials but goes beyond this and could include a variety of other measures. Ideally, as noted, an independent administrative body should be given a general promotional role under the law, including addressing this concern.

Recommendations:

- The draft Law should provide protection against sanction to whistleblowers and those who disclose information pursuant to a request under the law, as long as they acted reasonably and in good faith.
- Consideration should be given to adding a system for record maintenance to the draft Law.
- Public authorities should be required to publish an annual report on their activities in implementing the draft Law.
- Consideration should be given to ensuring that an independent administrative body is given responsibility both for public education regarding the access to information law and for promoting a change in the culture of secrecy within government, including through training.

[32] Note 3, section 21.