



ACCESS TO INFORMATION PROGRAMME

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ARTICLE 19

The International Centre Against Censorship

MEMORANDUM ON THE BULGARIAN DRAFT LAW ON ACCESS TO PUBLIC INFORMATION

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Introduction

The Bulgarian Parliament is currently in the process of considering a draft law on Access to Public Information which will go before the National Assembly for its second reading in September 1999. This is one of three laws that are planned to cover publicly held information¹ and to date it is the only one which has been prepared and is ready for discussion.



Following is an analysis of the draft law, which assesses its compliance with international standards on freedom of expression and with best practice in freedom of information legislation. Whilst ARTICLE 19 welcomes the initiative by the Bulgarian authorities to introduce such legislation, it is also concerned that this proposed law is poorly drafted and therefore may not provide the public with adequate access to information. It is vague, repetitive and contradictory in its wording and also poorly organised with the result that its exact scope is unclear. This leaves it open to broad interpretation which may run counter to the aim of the law, which is to facilitate maximum access by the public to official information in Bulgaria.

Bulgaria's International Obligations to Protect Freedom of Expression and Access to Information

Bulgaria is a party to both the International Covenant on Civil and Political Rights and the European Convention on Human Rights and Fundamental Freedoms, which protect freedom of expression, including freedom of information. International jurisprudence has consistently emphasised the special importance of freedom of expression in a democratic society. For example, in a landmark case the European Court of Human Rights stated:

Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.²



Restrictions on expression, not least in relation to the media, are illegitimate except in the most narrowly drawn circumstances, spelt out in paragraph 3 of Article 19 of the ICCPR and paragraph 2 of Article 10 of the ECHR. The test for restrictions is a strict one, presenting a high standard which any interference must overcome. It requires that any restriction be “prescribed by law”, and be “necessary” for the purpose of safeguarding one of the interests listed in the paragraphs. The test of “necessity” demands that a “pressing social need” be demonstrated, and that restrictions may be justified by reference to reasons which are “relevant and sufficient”³. In addition, measures must be proportionate to the aim pursued and must not go beyond what is strictly required to satisfy the aim.

The right to freedom of expression is also protected by Article 39 of the Bulgarian Constitution. Paragraph 1 states that:

Everyone shall be entitled to express an opinion or to publicise it through words, written and oral, sound or image, or in any other way.

In addition, freedom of information is protected by Article 41 of the Constitution. This states that:

- (1) Everyone shall be entitled to seek, obtain and disseminate information. This right shall not be exercised to the detriment of the rights and reputation of others, or to the detriment of national security, public order, public health and morality.
- (2) Citizens shall be entitled to obtain information from state bodies and agencies on any matter of legitimate interest to them which is not a state or official secret and does not affect the rights of others.

Freedom of information is an important element of the international guarantee of



freedom of expression, which includes the right to receive, as well as to impart, information and ideas. There can be little doubt as to the importance of freedom of information. At its very first session in 1946 the United Nations General Assembly adopted Resolution 59(I) which stated

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

Its importance has also been stressed in a number of reports of the UN Special Rapporteur on Freedom of Opinion and Expression⁴, while Freedom of Information Acts have been adopted in almost all mature democracies and many newly democratic countries, such as Hungary, and are in the process of adoption in the Czech Republic and Moldova.

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

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



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

The Draft Law

Purpose of the Law

A freedom of information law should clearly state at the outset the purpose of the act, which should be to provide the right of access to publicly-held information, and thus should set a basic standard of disclosure. Article 1, however, states that the law regulates the “social relations regarding access to public information”. This provision is imprecise in its meaning but clearly does not imply a right of access and does not appear to set a tenor of maximum disclosure subject to the restrictions laid out in the law.

Recommendation

* This provision should be reworded to state that the purpose of the Act is to guarantee to everyone the right of access to publicly-held information.

Definitions

A freedom of information law should define clearly what is meant by “information”; it should include all records held by a public body. The draft law lacks an adequate definition of this term.

Article 2(1) defines public information as “any information of public significance



which relates to the public life in the Republic of Bulgaria, and gives the citizens the opportunity to form an opinion of their own on the activities carried out by the persons obliged under the act”. Both these clauses are potentially limiting and inappropriate since the regime should cover all information held by public bodies unless it falls under a list of narrow exemptions. No specific purpose should be required for releasing such information and it is, therefore, irrelevant whether or not the information is of public significance or will specifically assist citizens in forming opinions.

Articles 9 to 11 further confuse the definition of public information by dividing it into “official” and “state-office” information, neither of which are adequately defined and each of which is then subject to different conditions.⁵ “Other public information”, which is again not defined, is subject to a third set of conditions.⁶ The provisions for dealing with the three types of information are in addition vague, unclear and repeat issues found elsewhere in the draft.

Recommendation

* Since all information held by public bodies should be covered, these numerous terms for such information should be removed. The law should state that all publicly-held information is covered unless it can justifiably be regarded as exempt. (see below).

* One regime for dealing with all publicly-held information should be clearly and precisely prescribed.

Bodies which are covered

A freedom of information law should define clearly what is meant by “public body”. A public body which is covered by a freedom of information law should be understood very broadly to include all branches and levels of government, including pri-



vate bodies which carry out public functions and which hold information whose disclosure might harm key public interests, such as the environment and health. The draft law lacks an adequate definition of this term.

Article 3(1) covers information “kept with the state or the local self-governance bodies”; Article 3(2) then adds any other information created and kept by “public law entities”, if other laws so stipulate, indicating that other laws could override the access to information law. This is a major deficiency: it is not acceptable for other laws to take precedence over the law regulating access to official information. See “Primacy of Freedom of Information Legislation” below.

Article 3(3) and (4) are unclear and later in the act are provided with a different regime from Article 3, subsections (1) and (2). The purpose of subsection (4) which gives “mass media transparency” as a reason for disclosing information is also unclear in its purpose. See “Mass Media” below.

Recommendation

* To define clearly and in one place which public, and where relevant private, bodies are covered by the law.

Who Has The Right to Obtain Information?

The right to access publicly-held information should be held by everyone in the territory concerned, irrespective of whether they are citizens or not. However, in a number of places, including Article 4(1) and (2), the law refers to the right of “citizens” to information. Article 4(3) does allow foreign citizens and those without citizenship to receive information under subsection (1) but it is not clear whether they are then implicitly covered by other provisions which refer to the rights of citizens, such



as Article 2(1) and (3) and Article 19(1).

Article 4(1) also provides for the possibility of other legislation overriding this law by allowing other laws to provide “special procedures for searching, receiving and disseminating such information”. See “Primacy of Freedom of Information Legislation” below.

Recommendation

* To provide access to publicly-held information for all persons in the territory concerned, irrespective of their citizenship.

Exemptions

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

In this draft law, the exemptions are broad, unclear, contradictory and are scattered throughout the document.⁷ Article 7(1) states that no restrictions are valid unless the information is a state or state-office secret but then goes on to allow other laws to restrict information (see “Freedom of Information Legislation Takes Precedence” below). Other provisions in the law provide numerous exceptions to disclosure, beyond the state or state-office secret.

The exceptions do not always refer to specific categories of information but enumerate broad notions - for example, Article 5 permits the withholding of information which conflicts with “recognised moral standards” and Article 6(1) is concerned with the preservation of the citizen’s “personal integrity”. Other more specific categories, such as “public health” and “public order” and “other persons’ rights and reputation”,



go beyond what is generally considered a legitimate restriction under a freedom of information regime⁸.

Article 8(2) excludes all information kept within the state archives; since there is no other proposed or existing legislation to cover access to information and records held by the state archives, Article 8(2) effectively declares the entire contents of the archives secret. Furthermore, in the absence of specific legislation covering archives, there is no provision of when information becomes eligible for archiving.

In addition, there is no “harm” or “public interest” test in the decision to refuse disclosure of information; any information which falls under one of the exemptions listed in the law can be withheld. For example, Article 9(2) states that “a state or state-office secret, and the access thereto [can be] restricted”. Such a procedure means that, in effect, all such classified information lies outside the freedom of information regime, irrespective of whether any harm would be caused by its disclosure. This is in contravention of the principle that all information should be covered by the law and then be subject to the widely-recognised three-part test on exemptions, which is:

- (1) the information must relate to a legitimate aim listed in the law;
- (2) disclosure must threaten to cause substantial harm to that aim; and
- (3) the harm to the aim must be greater than the public interest in having the information. This means that even if it can be shown that disclosure would cause substantial harm to a legitimate aim, the information should still be disclosed if the benefits of disclosure outweigh the harm.⁹

Article 7(2) is of particular concern: it states that “Access to public information may either be full or partial” but does not specify what this means and when partial disclosure might apply. This effectively provides a justification for a public body to

withhold information without any other reason.

Recommendation

* The exceptions should be narrowly drawn and clearly stated in one section only of the law and the justifications for refusing to disclose information should meet the three part test outlined above. Partial disclosure of information should meet the same three part test and the applicant should be informed both that the disclosure is only partial and the reasons for such partial disclosure.

Primacy of Freedom of Information Legislation

The law on freedom of information should take precedence over all other legislation in this field and it should not allow other laws to introduce different, potentially more restrictive, procedures. In several places, this draft provides that other legislation might introduce different regimes for disclosure of official information and that such legislation might be used in place of this law. This includes Article 3(2) (see “Bodies which are Covered” above), Article 4(1) (see “Who has the Right to Obtain Information” above) and Article 7(1) (see “Exemptions” above). Such provisions undermine the principle that this law is the law dealing with publicly-held information.

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

Recommendation

* The law should require that the principle of disclosure takes precedence and that other legislation be interpreted in a manner consistent with its provisions. Where this



is not possible, other legislation dealing with publicly-held information should be subject to the principles underlying this law.

* A commitment should be made, over the longer term, to bring all laws relating to information, particularly secrecy laws, into line with the principles underpinning the freedom of information law.

Costs

The law is contradictory and vague with regard to the costs of obtaining information. Under Section III of Chapter Two, which is the part which specifically deals with costs, Article 20(1) states that access will be free¹⁰. Article 20(2) then goes on, in contradiction, to explain the process by which the charging tariff will be calculated. The law does not state anywhere how much the charges are likely to be except that they must not exceed the actual cost of providing the information (Article 20(2)). It is important that fees are not so high as to deter potential applicants.

Recommendation

* Remove references to free access to information if a charging system is to be introduced. If certain types of information are to be provided free of charge, this and the categories to which it refers should be clearly specified.

* Introduce a clause requiring that charges should not be so high as to deter potential requests.

Procedure

It is to be welcomed that there is a requirement for the authorities to respond within 14 days from the registration date of a request for information. This is considerably quicker than the timeframes provided in Freedom of Information Acts in countries



such as New Zealand, the United States, Canada, Australia or in the draft Freedom of Information Act in the United Kingdom.¹¹

However, Article 30(2) requires clarification of an unclear request within 30 days otherwise the application will not be considered. This seems unnecessary and serves no useful purpose. Under Article 30(1), the term for consideration of a request shall start anew from the date when clarification is given so it is of no consequence to the body holding the information whether this happens within 30 days or longer. There will be no obligation upon it to act until such time as the applicant has provided the necessary clarification.

Of particular concern is the requirement under Article 32 that, if certain kinds of information which were provided to the public body by a third party are requested, then the written consent of the third party is required before disclosure. To have another party dictating what information may and may not be disclosed undermines the basic tenet of the law. If information provided to a public authority by a third party is genuinely sensitive and meets the criteria in the three party test outlined under “Exemptions” above, then it will automatically be withheld anyway. There is no justification for a separate provision on this subject.

Appeals

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



before the courts.

This draft law provides only for appeal directly to the courts, under the Administrative Procedure Act or the Supreme Administrative Court Act¹². Appeals must be lodged within 30 days; this is an unnecessarily short period and appears to serve no useful purpose.

Recommendation

* There should be provision for an internal appeals process within the public body and for the establishment of an independent administrative body with full powers to investigate an appeal, including the power to call witnesses and to require the public body to provide information, as well as the power to dismiss the appeal, compel disclosure, adjust charges, impose fines and costs on the public body.

* Appeals before the Courts should be able to review the case on its merits as well as the reasonableness of the public body's actions.

Omissions

There are a number of issues which are important for an effective freedom of information regime and which have been omitted from the draft law. They include:

Obligation to publish certain types of information

Freedom of information implies not only that public bodies accede to requests for information but also that they publish and disseminate widely documents of significant public interest, subject only to reasonable limits based on resources and capacity.

Recommendation

* The law should establish both a general obligation to publish and key categories of information that must be published.¹³

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

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

Recommendation

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

Promotional / educational activities

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

Recommendation

- * make provision for a pro-active campaign of public education and dissemination of information about the right of access to information, the scope of information which is available and the manner in which such rights may be exercised.
- * provide a number of mechanisms to change the culture of secrecy within govern-



ment , for example, by providing training for public officials on the scope and importance of freedom of information legislation, on the procedures for disclosing information and on how to maintain and access records.

Protection for “Whistleblowers”

Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information about wrongdoing, such as the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body. This should also include information about a serious threat to health, safety or the environment, whether linked to individual wrongdoing or not. Whistleblowers should benefit from protection so long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing.

Recommendation

* Such protection should be included in the draft law.

Open Meetings

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

Recommendation

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

Other Comments

Organisation and Wording of the Document

The document is poorly organised and confused. This makes it difficult to establish its exact scope. For example, exemptions are included in numerous provisions throughout the draft law, rather than being kept together in one section and procedural issues are covered under Section III of Chapter Two as well as under Chapter Three.

In addition, there are a number of provisions which are either so unclear as to be rendered virtually meaningless, or they reiterate issues covered elsewhere in the law. For example, the whole of Article 6 has little or no meaning and touches on issues covered elsewhere in the draft.

There are also contradictions in the law, for example regarding costs¹⁴ and on exemptions, which are specified throughout the law in varying and often incomprehensible ways.¹⁵

Recommendation

* The law should be reorganised so that separate and distinct sections cover its purpose, the definitions of what information it covers, the bodies it covers, the exemptions, the procedure by which information can be obtained, costs, the appeals process, and so on..

* The wording of law should be improved so that the provisions are clear and precise and repetition and contradictions should be eliminated.

Mass Media

Article 18 of the draft law provides conditions for the disclosure of information concerning the mass media. ARTICLE 19 is concerned that this provision is unnecessary and, as it is worded, may be used to oblige private media enterprises to disclose information.

A law on access to publicly-held information should only cover publicly-funded bodies, with the exception of some private bodies which undertake public work. Thus, any provision on the mass media should only cover the state-funded media and not private media enterprises. Even then the state-funded media should have a right to protect anonymous sources of information.

However, even given such conditions, there seems no useful purpose for the provisions included under Article 18. Any legitimately sensitive information, such as a trade or commercial secret, would fall under the justifiable exemptions and could therefore be withheld so there is no need at all to introduce a special clause for the media.

Recommendation

* Remove Article 18 from the draft.

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¹ The other two are the Personal Data Protection Act and the Protected Information Act which will cover State and Official Secrecy.

² *Handyside v United Kingdom*, (1976), Series A , No.24, para.49.

³ See, for example, *Sunday Times v United Kingdom*, (1979), Series A, No.30, para.62.

⁴ See his 1997 and 1998 reports. UN Doc. E/CN.4/1997/31 and UN Doc. E/CN.4/1998/40.

⁵ Chapter Two, Section I - Articles 12 to 16 - cover “Access to Official and State-Office Public Information”

⁶ Chapter Two, Section II - Articles 17 to 19.

⁷ For example at: Articles 4(1), 5, 7(1) and (2), 8(2), 13(2), 17(2), 28(1), 32(1) and 38.

⁸ ARTICLE 19 suggests that exemptions should be limited to matters such as law enforcement, privacy, national security, commercial and other confidentiality, public or individual safety, and the effectiveness and integrity of government decision-making processes. See *The Public’s Rights to Know, Principles on Freedom of Information Legislation*, ARTICLE 19, June 1999, Principle 4, p6.

⁹ *The Public’s Right to Know: Principles on Freedom of Information Legislation*, ARTICLE 19, June 1999, Principle 4, p5.

¹⁰ In several places in Chapter Two (Access to Public Information), it is also stated that access to various types of information shall be free, for example at Articles 13(1) and 17(1).

¹¹ In New Zealand and the United States it is 20 days; in Canada and Australia, 30 days and in the draft UK law, 40 days.

¹² Article 41(1)



¹³ The Public's Right to Know: Principles on Freedom of Information Legislation, ARTICLE 19, June 1999, Principle 2, p3.

¹⁴ Article 20

¹⁵ International standards, in particular under the European Convention on Human Rights, require that a legitimate restriction on freedom of expression must meet a three-part test. The first requirement of this test is that the restriction must be “prescribed” by national law. In order to fulfil such a requirement, a law should be sufficiently narrowly, precisely and clearly drafted so that a reasonable person can understand its meaning. Laws which are vague and contradictory, as is the case in this draft law, do not meet the “prescribed by law” criteria.