



ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

MEMORANDUM

on

The Republic of Guatemala's Draft Law on Free Access to Information

by

**ARTICLE 19
Global Campaign for Free Expression**

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1.0 Introduction

This Memorandum contains an analysis by ARTICLE 19, The Global Campaign for Free Expression, of the Republic of Guatemala's Draft Law on Free Access to Information (Draft Law). These comments are based on an unofficial translation of the Draft Law.

We welcome the Guatemalan government's move to introduce freedom of information legislation. The Draft Law includes a number of positive features, such as a broad definition of public information, the imposition on government agencies of an obligation to maintain their records and to publish certain reports, and a process for appealing government refusals to release information. The Draft Law also has some weaknesses, including the lack of independent body for reviewing access to information requests before these are appealed to the courts, an excessively large number of laws that are paramount to the freedom of information regime, and a lack of clarity regarding exactly which public bodies are governed by the Law. Additionally, the quality of the drafting also raises concerns since in many provisions the intention of the legislators is far from clear.

This submission sets out ARTICLE 19's major concerns with the Draft Law. It draws upon our key publications in this area, *The Public's Right to Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles),¹ and *A Model Freedom of Information Law* (the Model Law).² *The Public's Right to Know*, which sets out principles based on international and comparative best practice, has been endorsed by, among others, the OAS and UN Special Rapporteurs on Freedom of Expression.³

2.0 International and Constitutional Standards

2.1 International Guarantees of Freedom of Expression and Freedom of Information

Article 19 of the *Universal Declaration on Human Rights* (UDHR),⁴ a United Nations General Assembly resolution, guarantees the 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 and regardless of frontiers.

The UDHR is not directly binding on States but parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.⁵

The *International Covenant on Civil and Political Rights* (ICCPR),⁶ a formally binding legal treaty ratified by over 145 States, guarantees the right to freedom of opinion and expression at Article 19, in terms very similar to the UDHR. Guatemala became signatory to the ICCPR in 1992.

Freedom of information is an important component of the international guarantee of freedom of expression, which includes the right to seek and receive, as well as to impart, information and ideas. There can be little doubt as to the importance of freedom of information and numerous authoritative statements have been made by official bodies to this effect.

During its first session in 1946, the United Nations General Assembly adopted Resolution 59(1) which stated:

¹ (London: ARTICLE 19, June 1999). Available at: <http://www.article19.org/docimages/512.htm>.

² (London: ARTICLE 19, July 2001). Available at: <http://www.article19.org/docimages/1112.htm>.

³ See *Annual Report of the Inter-American Commission on Human Rights, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression*, OEA/Ser.L/V/II.106, Doc. 3 rev., April 13, 2000, Chapter II(B)(3) and *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 43.

⁴ UN General Assembly Resolution 217A(III), adopted 10 December 1948.

⁵ See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit).

⁶ UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

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 by the UN Special Rapporteur on Freedom of Opinion and Expression, as the following excerpt from his 1999 Report illustrates:

[T]he Special Rapporteur expresses again his view, and emphasizes, that everyone has the right to seek, receive and impart information and that this 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 - including film, microfiche, electronic capacities, video and photographs - subject only to such restrictions as referred to in article 19, paragraph 3, of the International Covenant on Civil and Political Rights.

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:

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.⁷

These principles and guidelines were endorsed by the Commonwealth Law Ministers at their May 1999 Meeting⁸ and recognised by the Commonwealth Heads of Government Meeting in November 1999.⁹

Within Europe, the Committee of Ministers of the Council of Europe recently adopted a Recommendation on Access to Official Documents,¹⁰ calling on all Member States to adopt legislation giving effect to this right. 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 2001.¹¹ 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”.¹²

⁷ Quoted in *Communiqué*, Meeting of Commonwealth Law Ministers, Port of Spain, 10 May 1999.

⁸ *Ibid.*, para. 21.

⁹ The *Durban Communiqué*, Commonwealth Heads of Government Meeting, Durban, 15 November 1999, para. 57.

¹⁰ R(2000)2, adopted 21 February 2002.

¹¹ 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.

¹² *Ibid.*, Article 1(a).

In October 2000, the Inter-American Commission on Human Rights approved the Inter-American Declaration of Principles on Freedom of Expression.¹³ The Preamble reaffirms with absolute clarity the aforementioned developments on 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:

4. 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.
5. 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.

These international developments find their parallel in the passage or preparation of freedom of information legislation in countries in every region of the world. In the past seven years, in particular, a record number of countries from around the world – including Fiji, India, Israel, Japan, Nigeria, South Africa, South Korea, Sri Lanka, Thailand, Trinidad and Tobago, the United Kingdom, a number of East and Central European States, and, of course, Guatemala – have taken steps to enact legislation giving effect to this right. In doing so, they join a large number of other countries which enacted such laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia, and Canada.

2.2 Limits to Freedom of Information

The exercise of freedom of information requires that all individual requests for information from public bodies be met unless the public body can demonstrate that the information requested falls within the scope of a limited regime of exceptions.

Under international law, freedom of information, like freedom of expression, may be subject to restrictions but only where these restrictions meet strict tests of legitimacy. International and comparative standards have established that a public authority may not refuse to disclose information unless it can show that:

1. the information relates to a legitimate aim listed in the law;
2. disclosure threatens substantial harm to that aim; and
3. the harm to the aim is greater than the public interest in having information.

¹³ 108th Regular Session, 19 October 2000.

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 law. This list should include only interests that constitute legitimate grounds for refusing to disclose documents and should be limited to such matters such as law enforcement, the protection of personal information, national security, commercial and other confidentiality, public or individual safety, and the effectiveness and integrity of government decision-making processes.

Exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest. They should be based on the content, rather than the type, of document. To meet this standard, exceptions should, where relevant, be time-limited. For example, the justification for classifying information on the basis of national security may well disappear after a specific national security threat subsides.

The second part of the test means that the fact that information simply falls within the scope of a legitimate aim listed in the law is not enough to justify its non-disclosure. To except information on that basis would be a class exception and would seriously undermine the free flow of information to the public. It would also be unjustified, since public authorities clearly have no reason to withhold information that would not actually harm a legitimate interest. Therefore, the public body must also show that the disclosure of the information would cause substantial harm to the legitimate aim.

In calculating whether harm is caused, the fact that in some cases disclosure may both benefit and harm the aim should be taken into account. For example, in relation to national security, disclosure may both undermine defence and expose corrupt buying practices. The latter, however, may lead to rooting out of corruption and the long term strengthening of the forces. To justify non-disclosure, the net effect of releasing the information must be to cause substantial harm to the aim. This test is frequently referred to as a “harm test”.

The third part of the test means that information should be disclosed even if it would cause harm to a legitimate aim if the public interest benefits of disclosure outweigh this harm. This part of the test requires the harm to the legitimate aim to be weighed against the greater public interest served by the information being disclosed. The reason for this is fairly obvious: the legitimate aim in question is just one consideration and, before a refusal to disclose can be justified, other public interests must be taken into account.

Cumulatively, the three parts of the test are designed to ensure that information is only withheld when this is in the overall public interest. If applied properly, this test would rule out all blanket exclusions and class exceptions, as well as any exceptions whose real aim is to protect the government from harassment, to prevent the exposure of wrongdoing, to conceal information from the public, or to entrench a particular ideology.

2.3 Constitutional Guarantees

Articles 30, 31 and 35 of the 1985 Constitution of the Republic of Guatemala, as amended in 1993, explicitly provide a right of access to government records. The relevant provisions state:

Article 30. Publicizing Government Actions. All government acts are public. Interested parties have the right to obtain, at any time, information, copies, reproductions and certifications that have been requested, and also the right to view files, unless the information requested information relates to military or diplomatic matters, national security, or is information submitted by private parties under a guarantee of confidentiality.

Article 31. Access to State Archives and Registers. All people have the right to know what personal information concerning them is held in state archives, files or any other form of official register, and to have this information corrected, rectified and updated.

Article 35. Freedom of the Emission of Thought... There shall be free access to the sources of information and no authority shall limit this right.

These constitutional guarantees are very positive and the right of access granted by Article 30 is very broad. However, it is subject to an equally broad restriction which prohibits access to certain information based on the type of information rather than its specific content. The provision contains no harms test or possibility of a public interest override, whereby information will be released, even if to do so may cause harm, if the public interest is better served by its disclosure.

Neither Article 31 nor Article 35 contain any limit to the exercise of the rights they guarantee, beyond those provided in subsidiary legislation.

Recommendation:

- Article 30 should be amended so that the restrictions to the right of access to government records include a harm test and public interest override, based on the content of the information rather than its type.

3.0 Analysis of the Draft Law

The Draft Law has three parts. Title I contains general provisions, Title II sets out the regime for access to public-held information and Title III deals with access to personal information held in State and private archives. While this Memorandum does address certain provisions in Title III of the Law, the right to privacy – which is at the heart of Title III – is beyond the scope of this analysis. The focus, therefore, is on those provisions directly related to freedom of information.

3.1 Object and Definitions

Article 1 of the Draft Law states that the objectives of the legislation are to guarantee the right to public information as established by Article 30 of the Constitution and to provide interested parties access to personal information held by the government, as guaranteed by the Guatemalan Constitution and international human rights treaties. The right to personal information covers both government archives and private archives that are “not for exclusive personal use”.

Article 8 specifies both the range of information available to the public and the types of public bodies to which the Draft Law applies, stating:

Every person has the right to:

Obtain at any time, at his/her cost and through the formalities of the law copies, reproductions, evidence and certifications, as well as any type of information or its display, whether it be from case files, images, facts, acts, contracts, resolutions, court orders, decisions, studies, the subject of property and other information and elements in the power of any organism, organ or dependency of the state and its centralized, decentralized or autonomous entities or businesses, as well as the people or entities that, by delegation or concession of public bodies or contract with them, provide public services in them; in those that provide public services in these last cases, in relation to these services.

The definition of what qualifies as public information is quite broad and is thus consistent with international standards. The list of bodies to which the Draft Law applies is also broad, but it is somewhat unclear, perhaps due to the translation. Article 8 refers to any “dependency of the state”, but the criteria of dependency are not elaborated. While freedom of information legislation should always be guided by the principle of maximum disclosure, it must also be clear to whom the law applies. The terms “centralized, decentralized and autonomous” are similarly vague.

The Draft Law must nonetheless be commended for including private bodies that provide public functions within its realm of applicability, consistent with Principle 1 of *The Public’s Right to Know*.

Recommendation:

- The Draft Law should be amended to include criteria for determining what constitutes a body that is dependent on the State, and thus subject to the freedom of information regime. In general, the categories of bodies to which the Draft Law applies should be more explicit.

3.2 Relationship with Other Laws

The first sentence of Article 2 states that everything relating to “data bases, information sources and other aspects referring to the right to the emission of thought is regulated in the Constitutional Law of Emission of Thought”, as established by Article 35 of the Constitution. Since the Draft Law deals extensively with data-bases and information sources, and since freedom of information is an element of freedom of expression and thought – protected by Article 35 of the Constitution – the relationship between Article 2 and the rest of the law – indeed the very meaning of the first sentence – is unclear.

The second sentence of Article 2 states that specific laws will prevail, presumably over the provisions of the Draft Law. The list includes laws relating to civil status, citizenship and community, real property and its associated rights, wills and estates, and certain public registers.

Principle 8 of the ARTICLE 19 Principles states:

The law on freedom of information should require that other legislation be interpreted, as far as possible, 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 the freedom of information legislation.

The regime of exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it. In particular, secrecy laws should not make it illegal for officials to divulge information which they are required to disclose under freedom of information law.

The Draft Law effectively has an additional category of exceptions, above and beyond those contained in Article 9 of the Law (discussed below), contrary to the ARTICLE 19 Principles. This additional category serves no obvious legitimate aim and is not subject to a harm test or public interest override, contrary to the requirements of international law.

Recommendations:

- Article 2 should be amended in the following manner:
 - The meaning of the first sentence should be made more explicit.
 - The second sentence should either be deleted or the exceptions should be redrafted to satisfy the three-part test for restrictions on freedom of information as required by international law.
- The Draft Law should contain a commitment to bring all laws relating to information into line with the principles which underpin it.

3.3 Interpretation

Article 5 states that the provisions of the Law should be broadly interpreted so as to ensure the protection of the rights guaranteed by the legislation. This is a good statement of principle but, in practice, more is needed to ensure that broad interpretation does not undermine the law. While a broad interpretation of most of the Draft Law's provisions is desirable, the exceptions should be given a narrow interpretation in order to avoid an unreasoned prioritisation of one right over another.

Recommendation:

- Article 5 should be amended to make it clear that the term “broadly” does not apply to the exceptions.

3.4 Obligation to Publish Records

Article 3(2) of the Draft Law imposes a duty on all “organisms, organs, institutions, businesses and dependencies of the state and its offices” to “make known to the public” on an annual basis, their “policies, work plans, organizational diagrams, detailed budgets and corresponding analytical execution, and in the case of budgets, the transfers that they carry out as soon as they occur.”

Paragraph (3) of the same Article requires those responsible for all State archives containing personal information to publish, through the media, an annual report on the functioning and purpose of the archive, the archive's registration system, the categories of personal information collected and the procedures for accessing the information stored in the archive.

The obligation to publish is an important part of an effective freedom of information regime. However, this provision also suffers from some defects, primarily related to its scope. First, as discussed above in the context of Article 8, it is unclear exactly which public bodies are subject to these obligations, primarily due to the vagueness of the term “dependencies.”

Second, the requirement that the bodies “make [information] known to the public” is also vague. This does not necessarily mean publication of the information and it does not include an obligation to disseminate the information as widely as possible.

Third, public bodies should be under an obligation to publish a wider range of key information than those documents identified by Article 3, subject only to reasonable limits based on resources and capacity. Principle 2 of the ARTICLE 19 Principles states that public bodies should, as a minimum, be under an obligation to publish and widely circulate the following categories of information:

- operational information about how the public body functions, including costs, objectives, audited accounts, standards, achievements and so on, particularly where the body provides direct services to the public;
- information on any requests, complaints or other direct actions which members of the public may take in relation to the public body;
- guidance on processes by which members of the public may provide input into major policy or legislative proposals;
- the types of information which the body holds and the form in which this information is held; and
- the content of any decision or policy affecting the public, along with reasons for the decision and background material of importance in framing the decision.

Finally, the requirement that State archives publish an annual report *through* the media goes some way towards the promotion of open government through public education, an important part of any freedom of information regime.¹⁴ It should, however, be clear that the media are not under a corresponding obligation to publish this information. The media cannot be required to carry details of the annual report as this would constitute an infringement of editorial independence, an essential element of freedom of expression.¹⁵

¹⁴ Note 1, Principle 3.

¹⁵ Editorial independence means the right of journalists and editors to make decisions on the basis of professional criteria, consistent with international standards, such as the newsworthiness of an event or its relevance to the public’s right to know. On this topic, see ARTICLE 19 & Media Rights Agenda, *Unshackling the Nigerian Media, An Agenda for Reform* (London: July 1997). See also, *Vgt Verein gegen Tierfabriken v. Switzerland*, 28 June 2001, Application No. 24699/94 (European Court of Human Rights).

Recommendations:

- Article 3(2) should include the following amendments:
 - the list of bodies which have an obligation to publish information should be made more explicit and vague terms such as “dependencies” should be removed;
 - the requirement to “make known to the public” certain specified records should be replaced with the obligation to “publish and widely disseminate” those records; and
 - the range of information that public bodies are required to publish should be wider, in accordance with Principle 2 of the ARTICLE 19 Principles.
- It should be clear that the obligation to publish through the media, contained in Article 3(3), does not place a corresponding obligation on the media to publish this information.

3.5 Exceptions

Exceptions from the freedom of information regime are contained in Chapter II of the Draft Law, entitled “Limitations”. The main provision is Article 9, which excepts the following types of information from disclosure:

- Military information which has been classified as national security by a competent authority;
- diplomatic information which has been classified as national security by a competent authority;
- information provided by individuals in exchange for a guarantee of confidentiality;
- records covered by Article 24 of the Constitution, which protects the confidentiality of personal documents and correspondence, as well as telephone conversations and any form of electronic communications;
- bank records of individuals;
- information in the form of analyses used by the President of the Republic in the decision-making process or for maintaining civil order “with the objective of safeguarding the democratic state”;
- information the disclosure of which would jeopardize the safety of an identifiable individual;
- information the disclosure of which would reveal a trade secret; and
- judicial matters that are deemed confidential following a legal disposition to that effect.

The exceptions listed in Article 9 will be effective for 20 years, after which all information may be consulted.

Only the first two exceptions listed in Article 9 are subject to a harm test (both through the application of Article 10, described below). Furthermore, none of the exceptions are subject to a public interest override. In addition, although a 20 year limit on classification is helpful, this provision may be read as meaning that once classified, information will remain so for the full 20 years. This is excessive and serves no identifiable purpose; a prohibition against disclosure should only endure for as long the harm it envisages.

Article 10 establishes the requirements that must be satisfied before military and diplomatic information may be withheld, as follows. First, the information must relate to military or diplomatic affairs. Second, the information must relate to national security, a condition that will be met if its disclosure would cause “substantial harm” to the “existence or independence of the country or its territorial integrity in the face of a threat of internal or external use of armed force”, the country’s capacity to respond to the threat or use of force, or ongoing diplomatic negotiations. Third, the substantial harm outweighs the public’s interest in having the information disclosed. Finally, there must be no other reasonable measures available to avoid the threatened harm and also permit the exercise of the right to information. This test is consistent with international standards regarding exceptions to the presumption in favour of disclosure, noted above in Section 2.2.

Article 11 is an attempt to elaborate the conditions necessary for labelling information confidential – the exemption contained in Article 9(c) – but in fact does not add anything to what is already there.

Article 12 contains general provisions that clarify the scope of the exceptions. Most enhance the scope of disclosure under the Draft Law, including paragraph (b) which limits the concept of national security, paragraph (c) which provides for the severability of confidential data and paragraph (d) which provides for a presumption in favour of disclosure. Paragraph (e) lists the types of information the disclosure of which will always be in the public interest, including information related to possible government wrongdoing and information collected or processed illegally. While this provides clarity, it should also be clear that this is not an exhaustive list of the situations in which the public interest will outweigh the harm to the legitimate interest. While the disclosure of this information will always be in the public interest, the concept must not be rigidly defined as its meaning will be time and context specific.

Recommendations:

- Article 9 should be amended so all exceptions are subject to a harm test and public interest override.
- The provision stating that confidential information should remain so for 20 years after which it will be release should be amended to provide for a 20-year time-limit on classification, rather than for a 20-year period of classification.
- Article 11 should be amended to provide for narrow circumstances in which information may be treated as confidential.
- Article 12(e) should be amended to make it clear that this is not an exhaustive list of the grounds for public interest disclosure.

3.6 Application Procedure

Articles 13 to 17 set out the procedure for placing an access to information request. The applicant may place either a verbal or written request directly with a public or private body and that body must provide proof of the request to the applicant (Article 14). The legislation does not specify what kind of proof is required. The official who receives the request “cannot allege incompetence or lack of authorization” to respond to the applicant, but rather is obliged to pass the request on to the relevant party or department.

Article 15 requires the public or private body either to display the requested information or physically provide it to the applicant within 72 hours of receiving the request. If the information cannot be provided, then the body must inform the applicant of that, also within 72 hours. The provision refers to “declaring the origin” of information in order to satisfy an applicant’s request. What this means in practice, however, is not clear from the wording.

Finally, Article 15 states that the only acceptable grounds for refusing an access request are those provided for by law and if, after the 72 hours have elapsed, the applicant has had no response, he or she may presume that his or her request has been denied and initiate the judicial appeal process foreseen by the Draft Law.

Article 16 states that where an applicant receives an incomplete or an ambiguous response to his or her request, he or she may choose to either initiate the judicial appeal process or to file another request.

Article 17 states that every response to an applicant must be dictated by the head of the organisation that received the request.

Analysis

The access procedure includes some positive elements, including a lack of formal requirements for the request and the availability of the process to everyone, regardless of citizenship or residence. Nonetheless, ARTICLE 19 does have some concerns.

Principle 5 of the ARTICLE 19 Principles states that: “requests for information should be processed rapidly and fairly”. Both elements are equally important and fairness should not be compromised in favour of rapidity. The Draft Law requires the body that has received a request to respond within three days either affirmatively or with a denial, with no possibility of extending the response time.

It has been ARTICLE 19’s experience that allowing an organization too short a period of time to respond to requests for information, particularly where the requests are complex or involve significant quantities of data, actually frustrates the functioning of the access regime. Section 9 of ARTICLE 19’s *Model Law* recommends that public or private bodies respond to a request “as soon as reasonably possible and in any event within twenty working days of receipt of the request.” If a request for information relates to information that appears necessary to safeguard the life or liberty of a person, a response must be provided within 48 hours. The *Model Law* also allows the public or private body to extend the period it has to respond to a request, but only to “the extent strictly necessary”, never for more than 40 days and provided the applicant receives written notice to this effect.

The 72 hours allowed to public and private bodies by the Draft Law is probably not a realistic amount of time for bodies to respond to all information requests. It should therefore be increased or, at the very least, organisations should be provided an opportunity to extend the response time in certain cases and upon providing written notice to the applicant.

Articles 14 and 17 address the role to be played by officials within an organisation in handling information requests. While these are important provisions, they are incomplete. In addition to making sure the right person receives the request (Article 14), the Draft Law should require that a specific official within the body be designated to be in charge of information procedures and be responsible for promoting the best possible practices in relation to requests, as well as record maintenance, archiving and disposal.

Recommendations:

- Article 15 should be amended so that public and private bodies have more than 72 hours to respond to requests for information. These bodies should also be afforded the opportunity to extend the response period, upon notice to the applicant, for particularly time-consuming requests.
- The Draft Law should require that the public and private bodies covered by the Act appoint an official specifically designated to promote best information practices within their organisation.

3.7 Fees

The only reference to fees made by the Draft Law is contained in Article 8 which states that every person has the right to obtain information, at any time, “at his or her cost”. While it is common to charge fees for processing information requests and disclosing information, given the primary rationale for promoting open access to information, it would be preferable to include in the Draft Law provisions limiting the cost of access so that it does not become so high as to deter potential applicants from making requests. Provision for a central system will also avoid a situation where different bodies were charging different amounts for the same amount of information. In some jurisdictions, the fee is waived or significantly reduced for requests for personal information or requests in the public interest. Higher fees may be levied for commercial requests to help subsidise personal or public interest requests.

Recommendation:

- The Draft Law should provide for a fee structure for information requests which does not allow charges to be so high as to deter potential applicants from making requests; fees for personal and public interest requests should be minimal.

3.8 Appeal Procedure

Article 18 states that if a request for information has been refused, the applicant may appeal to a court to determine whether the body has acted in accordance with Article 9 of the Draft Law regarding exceptions. The appeal may be launched with either a verbal or written application, without the need of a lawyer, within 30 days from receiving notification of the refusal, or after the expiry of the time period permitted under Article 18 has ended without a response from the relevant body (although Article 18 does not explicitly provide for a time period). Within 72 days of receiving the application, the court is obliged to issue a writ setting out the steps that must be taken to guarantee the applicant’s rights. The court will also order whichever body denied the request to turn over the requested information and justify the refusal (Article 20).

Article 21 allows the court 72 hours from receiving the information to issue a decision regarding the applicability or inapplicability of the exception claimed by the body that has refused the request. If the court rules that the information must be disclosed, then the body has three days to do so. Failure to respect the court's order may result in a fine of 1,000 – 5,000 quetzales (approximately US\$129 – \$644).

Article 22 states that an appeal against the court's decision will proceed within 72 hours after the first court submits the file to the superior jurisdictional court. While the appeal is heard, the first court will retain the information. There is no further appeal from the superior court.

Analysis

ARTICLE 19 welcomes the inclusion of an appeal procedure into Guatemala's freedom of information regime. We note that an effort has been made to ensure that the process is both timely and cost effective. At the same time, we believe that an administrative appeals mechanism is essential to ensure that the access system works effectively. Our principle concern is that the judicial system, with its strict rules of evidence and procedure, will not be able to handle the number of appeals that it will receive, within the specified time periods. If this happens, the access regime will not function adequately to guarantee the right to information.

The ARTICLE 19 Principles stipulate that a process for deciding information requests should be specified at three different levels, within the public or private body, appeals to an independent administrative body and lastly appeals to the courts.¹⁶

Whether the government decides to provide for a level of appeal within the body that initially refused the request, an access to information law should at least provide for an individual right of appeal to an independent administrative organization. This organization, commission or ombudsman must meet certain standards in order to ensure its independence from government and have certain powers that enable it to conduct full investigations and compel the disclosure of information.¹⁷ The procedure by which the administrative body processes appeals should be designed to operate as rapidly as possible so that excessive delays do not undermine the whole purpose of requesting information in the first place. An appeal to the courts should be available to both the complainant and the body that has refused access from the decision of the independent authority.

The presence of an authority that operates independently of both the government and the judiciary is especially desirable in a country such as Guatemala, where the judiciary is considered incapable of protecting citizens' rights. According to a special report prepared by Amnesty International, the Guatemalan justice system is characterized by endless delays both in appointing personnel and in hearing cases. In addition, the partiality of judges is also raised as an issue, due to corruption, fear of reprisals or both.¹⁸

¹⁶ Note 1, Principle 5.

¹⁷ Note 2, Part V.

¹⁸ Amnesty International, *Guatemala: The Lethal Legacy of Impunity*, February 2002. Available at: <http://web.amnesty.org/ai.nsf/index/amr340012002?OpenDocument&of=COUNTRIES\GUATEMALA>.

Recommendation:

- The Draft Law should provide for the creation of an independent commission that will hear appeals from an organisation's decision to refuse an access request in addition to the current appeal process. Individuals not satisfied with the independent commission's response may then appeal further to the courts.

3.9 Regime for Access to Personal Information

All of Title III of the Draft Law is devoted to providing individuals and corporate bodies with a right to access personal information that is stored in State archives and registers.

Article 23 defines "personal information" as, "all information referring to determined or determinable individuals or bodies corporate. Any person whose identity can be determined directly or indirectly will be understood as determinable, in particular through an identification number or one or several elements: characteristics of his/her physical, physiological, psychological, economic, social or cultural identity."

Articles 24 to 29 of the Draft Law deal with the collection, storage and transfer of personal and sensitive information. Since these issues are related to the protection of individual privacy, their analysis is beyond the scope of this Memorandum.

Article 30 of the Draft Law grants every individual the right to access personal information that is stored in "archives, registers, forms, databases, banks, or any other form of information storage in the organisms, bodies or dependencies of the State, be they centralized or autonomous or of its businesses". More specifically, the Law states that every one has to right to:

- know what personal information is held, who or which organization is responsible for its management, and who or what makes use of the information;
- know the purpose that the information serves;
- know that if the personal information is being used for an illegal purpose, it will be suppressed;
- have errors in the personal information corrected;
- have false information eliminated from the file;
- have sensitive information eliminated from the file; and
- have prohibited archives of personal information destroyed without compromising the confidentiality of the personal information.

Article 32 grants the "title-holder"¹⁹ of the personal information the right to receive the information requested in a "true, transparent, opportune, ample and clear fashion," accompanied by an explanation if requested. The title-holder is entitled to see the entire file containing his or her personal information, so long as information belonging to a third party is not revealed. Article 32 also states that the information requested will be provided to the applicant in writing, electronically, or in any other media format, and if the applicant speaks any of the maya, garifuna or xinca languages, the Academy of Maya Languages will provide a free translation.

¹⁹ The subject of the information.

As with requests for other types of information, the applicant seeking access to his or her personal information may submit a verbal or written request directly to the body in possession of the information. The body must supply the information to the applicant, or deny the request, within 72 hours of having received the application. Article 35 states that the only grounds for denying a request is that the applicant is not the title-holder of the data.

Article 36 states that if the information that the applicant receives is either incomplete or ambiguous, he or she may initiate a habeas data procedure (described below), or request an extension or explanation. The extension or explanation procedures are not described in the Draft Law. Article 37 states that every decision authorizing or denying an access request must be given by the person responsible for the archive.

Articles 38 to 41 of the Draft Law set out the habeas data procedure. Articles 38 and 39 state, in identical terms, that all judges or courts of the Republic are competent to hear habeas data applications.

Article 40 states that a title-holder may commence the habeas data application with written or verbal notice and without a lawyer. Within 72 hours of receiving the application, the court will issue a writ specifying whichever remedy is appropriate to guarantee the title-holder his or her right to personal information. The court can order the display of the information and has the power to order the appearance of witnesses and experts.

Article 41 requires the court to reach a decision within 72 hours of the hearing. If the court has decided that the information must be released to the title-holder, then the body that possesses the data has 24 hours to comply. Failure to comply may result in a fine of 1,000 to 5,000 quetzales (US\$129-\$644), without precluding the possibility of further civil and/or criminal responsibility.

Analysis

Guatemala's decision to guarantee a right of access to personal information separate and in addition to a general right of access to State-held records is consistent with international moves to protect individual privacy through the introduction of data protection legislation.

The access regime created by the Draft Law is largely consistent with the principles contained in the most important international declarations regarding data protection legislation, namely the *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* ("OECD Guidelines"),²⁰ the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ("Data Convention")²¹ and the European Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("EU Data Directive").²²

²⁰ (Paris: Organisation for Economic Co-Operation and Development, 1980).

²¹ E.T.S. No. 108, opened for signature 28 January 1981, entered into force 1 October 1985.

²² Directive 95/46/EC, 24 October 1995.

The EU Data Directive restricts the disclosure of personal information to the data-subject when necessary to safeguard national security, defence, public security, national economic interests, the prevention or investigation of crime, and the protection of the data subject or a third party's rights (Article 13). The Guatemalan Law only restricts disclosure to someone other than the title-holder. However, Article 9 of the Draft Law – dealing with the more general access regime – does contain categories of disclosure exceptions similar to the EU Data Directive – and it is not clear whether Article 9 also applies to the disclosure of personal information.

The EU Data Directive, like the Guatemalan law, imposes conditions on the processing of personal information. For instance, consent from the data-subject must be obtained prior to processing, the data-subject must be informed of the purposes for the collection, and the data-subject must consent to any disclosure of his or her personal information that was not foreseeable at the time of the initial collection. In addition, Article 14 of the Directive grants the data-subject a right to object to any processing of his or her personal information. Importantly, however, the Preamble of the Directive states that:

the processing of personal data for purposes of journalism or for purposes of literary or artistic expression, in particular in the audiovisual field, should qualify for exemption from the requirements of certain provisions of this Directive in so far as this is necessary to reconcile the fundamental rights of individuals with freedom of information and notably the right to receive and impart information, as guaranteed in particular in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Guatemalan Draft Law contains many of the same restrictions regarding the processing of personal information, and the requirement that the consent of the title-holder be obtained prior to its processing. However, there is no provision for the protection of freedom of expression and information similar to that found in the EU Directive. Given the conflict between the right to privacy and freedom of information, the Draft Law should include measures that seek to achieve balance between the two interests.

Recommendations:

- Title III of the Draft Law should be amended to clarify whether the regime of exceptions in Title II also apply to access requests for personal information.
- The Draft Law should be amended to include a provision that excludes journalistic and artistic activities from the application of certain provisions, notably those that impose restrictions on the processing of personal information.

3.10 Omissions

Although the Draft Law is comprehensive, the addition of certain provisions would strengthen access to information and the public's right to know.

Promotional and Educational Activities

The experience of countries that have already 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 and difficult process, which can take many years. To assist in this process, it is important to educate civil servants and to promote the idea

of freedom of information, both within government and in society-at-large. Possible activities in this regard might include:

- training civil servants on the scope and importance of freedom of information, procedures for disclosing information and maintenance of records;
- providing incentives for public bodies that successfully apply the law;
- requiring an oversight body, such as an information commissioner, to submit annual reports to the legislature on the progress (achievements and problems) in implementing and applying the freedom of information law; and
- setting up a public education campaign on the right to access information, the scope of information available and the manner in which rights may be exercised under the new law.

Whistleblower Protection

The Draft Law should provide protection for “whistleblowers”, namely individuals who release information on official misconduct. Civil servants and other individuals in the public sector sometimes have access to information which may expose official wrongdoing, but they are afraid to release it because they may face legal or employment-related sanctions “Wrongdoing” in this context includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious mal-administration regarding a public body. It also includes a serious threat to health, safety or the environment, whether linked to individual wrongdoing or not. Whistleblowers should benefit from protection as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed wrongdoing. Such protection should apply even where disclosure would otherwise be in breach of a legal or employment obligation.

Recommendations:

- The Draft Law should establish a system of education and promotion regarding freedom of information aimed both at civil servants and the general public.
 - The Draft Law should provide whistleblower protection.
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