MEMORANDUM

on the

Russian Federal Law "On Access to Information Concerning Activities of Government Departments and Local Self-Government"

by

ARTICLE 19
Global Campaign for Free Expression

London
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I. Introduction

This Memorandum provides an analysis of the Russian federal draft Law "On Access to Information Concerning Activities of Government Departments and Local Self-Government" (the draft Law), recently published by the Government of the Russian Federation.[1]

The draft Law, which we understand has yet to be laid before Parliament, implements the constitutional guarantee for freedom of information, supplementing existing rudimentary access to information provisions in the existing federal Law "On Information, Informatization and Information Protection." It lays down procedures for the consideration of access requests, including an appeal procedure in cases where access is refused, and requires government departments proactively to publish information in a number of key categories. The draft Law also reiterates a number of the exclusions and

[1] The translation of the draft Law received by ARTICLE 19 is not dated.

limitations on access included in the existing Law on Information and allows for further limitations to be enacted by law or through implementing ordinances and regulations.

ARTICLE 19 welcomes in principle efforts by the Federal Government to enact freedom of information legislation. At the same time, we are concerned that the draft Law as presently constituted falls short of international standards in the field. It applies only to local and federal government departments, not to all public bodies, and contains some sweeping exceptions that may be further extended by law or even by regulations. The draft Law operates in addition to existing secrecy laws but fails to override them or to provide a single regime for access. It applies only to information 'concerning activities' of departments and archive material is explicitly excluded from. Finally, the draft Law fails to incorporate measures to address the culture of secrecy, which could be tackled through mandatory training for public officials, public education and protection for good faith disclosures, for example by whistleblowers.

It is our recommendation, therefore, that this draft Law be revised before it is laid before Parliament. What is needed at the federal level is a single, overarching freedom of information law that provides a comprehensive guarantee of access to information held by all public bodies, subject to narrowly drawn exceptions, with appropriate and effective oversight and appeal mechanisms. Our concerns are outlined in detail, below, along with recommendations and suggestions for improvement. Section II of this Memorandum first outlines international standards on freedom of expression and information, as developed under the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights*. Section III analyses the draft Law against these standards. In particular, this analysis will rely on Recommendation (2002)2 of the Committee of Ministers of the Council of Europe on Access to Official Documents,[2] which elaborates the right to access to information in the context of the *European Convention on Human Rights*, and ARTICLE 19's *The Public's Right to Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles),[3] a standard-setting document based on international human rights treaties, as well as international best practice. The ARTICLE 19 Principles have been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression.[4]

II. International and Constitutional Obligations

The Russian Federation is a party to the *International Covenant on Civil and Political Rights* (ICCPR)[5] and on 5 May 1998 ratified the *European Convention on Human Rights* (ECHR). [6] Article 19 of the ICCPR and Article 10 of the ECHR protect freedom of expression in similar terms. Article 10(1) of the ECHR states:

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[2] Adopted 21 February 2002, http://cm.coe.int/stat/E/Public/2002/adopted_texts/recommendations/2002r2.htm.
[3] (London: 1999). Available at http://www.article19.org/docimages/512.htm.
[4] UN Doc. E/CN.4/2000/63, 5 April 2000.
[5] Adopted by UN General Assembly Resolution 2200A (XXI), 16 December 1966, in force 23 March 1976, ratified by Russia 16 October 1973. As of 9 December 2002, there were 149 State Parties and another 8 States who had signed but not yet ratified the treaty.
[6] ETS Series No. 5, adopted 4 November 1950, in force 3 September 1953. As of 26 March 2003, there

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

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

> Freedom of information is a fundamental human right and… the touchstone of all the freedoms to which the UN is consecrated.[7]

As this Resolution notes, freedom of information is both fundamentally important in its own right and is also key to the fulfilment of all other rights. It is only in societies where the free flow of information and ideas is permitted that democracy can flourish. In addition, freedom of expression is essential if violations of human rights are to be exposed and challenged. The press plays a crucial role in promoting the free flow of information and ideas.[8]

The particular importance in a democratic society of freedom of expression has been stressed many times by international human rights courts. For example, the European Court of Human Rights has stated, in a quotation which now features in almost all its cases involving freedom of expression:

> [F]reedom 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.[9]

This has been affirmed by both the UN Human Rights Committee and the Inter-American Court of Human Rights, which has stated:

> Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. ... [I]t can be said that a society that is not well informed is not a society that is truly free.[10]

Restrictions

International law permits limited restrictions on the right to freedom of expression and information in order to protect various private and public interests. The parameters of such

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were 44 State Parties.

[7] 14 December 1946.

[8] See, for example, *Colombani and others v. France*, 25 June 2002, Application No. 51279/99 (European Court of Human Rights), para. 65.

[9] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

[10] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, para. 70.

restrictions are provided for in both Article 19 of the ICCPR and Article 10 of the ECHR. Article 10(2) of the ECHR states:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

Any restriction on the right to freedom of expression must meet a strict three-part test. This test, which has been confirmed by both the Human Rights Committee[11] and the European Court of Human Rights,[12] requires that any restriction must be provided by law, be for the purpose of safeguarding a legitimate interest, and be 'necessary' to secure this interest.

The first condition, that any restrictions should be 'provided by law', is not satisfied merely by setting out the restriction in domestic law. Legislation must itself be in accordance with human rights principles set out in the ICCPR.[13] The European Court of Human Rights, in its jurisprudence on the similarly worded ECHR provisions on freedom of expression, has required that all restrictions be clearly formulated and readily accessible.[14] The second condition requires that legislative measures restricting free expression must truly pursue one of the aims listed, namely the rights or reputations of others or the protection of national security, public order ('ordre public') or of public health or morals. The third condition means that even measures that seek to protect a legitimate interest must meet the requisite standard established by the term "necessary". Any restriction must restrict freedom of expression as little as possible,[15] the measures adopted must be carefully designed to achieve the objective in question and they should not be arbitrary, unfair or based on irrational considerations.[16] Vague or broadly defined restrictions, even if they satisfy the "provided by law" criterion, are unacceptable because they go beyond what is strictly required to protect the legitimate interest.

Freedom of Information

The right to freedom of expression extends beyond the right of the individual journalist to report on matters of general interest. The public at large also has a right to receive information,[17] recognised in Article 29 of the Russian Constitution as well as in Article 10 of the ECHR, and to seek information, as guaranteed under Article 19 of the ICCPR.

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[11] For example, in *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.
[12] For example in *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90.
[13] *Faurisson v. France*, 8 November 1996, Communication No. 550/1993 (UN Human Rights Committee).
[14] See, for example, *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, 2 EHRR 245, para. 49.
[15] *Handyside v. the United Kingdom*, note 9, para. 49 (European Court of Human Rights).
[16] See *R. v. Oakes* (1986), 26 DLR (4th) 200, pp. 227-8 (Canadian Supreme Court).
[17] See *Observer and Guardian v. the United Kingdom*, 26 November 1991, Application No. 13585/88, para. 59 (ECHR) and *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63 (ECHR).

In November 1999, 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 adopted a Joint Declaration stating that:

> 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.[18]

As far back as 1982, the Member States of the Council of Europe adopted a Declaration stating that among the objectives sought to be achieved in the area of freedom of expression was "the pursuit of an open information policy in the public sector, including access to information, in order to enhance the individual's understanding of, and his ability to discuss freely political, social, economic and cultural matters."[19] In 2002, the Committee of Ministers of the Council of Europe adopted a Recommendation on Access to Official Documents,[20] which states:

> **III. General principle on access to official documents**
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> 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.
>
> **IV. Possible limitations to access to official documents**
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> 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:
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> 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;
> 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.

The 'harm test' outlined under '*IV. Possible limitations*' is crucial. This is linked to the test under Article 10(2) ECHR that any restrictions should be 'necessary in a democratic society' and means that it is not sufficient for a State merely to show that certain information falls within a proscribed category; it must also show that disclosure of the information will in the particular case cause substantial harm.

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[18] 26 November 1999.
[19] Council of Europe Declaration on the Freedom of Expression and Information, adopted 29 April 1982.
[20] Note 2.

The ARTICLE 19 Principles, in common with the Council of Europe Recommendation, establish that even if it can be shown that disclosure of the information would cause substantial harm to a legitimate aim, the information should still be disclosed if the public interest in disclosure outweighs the harm that would be done.[21] For example, certain information may be private in nature but at the same time expose high-level corruption within government. In such cases, the benefit in having the information disclosed may outweigh the harm done to the private interests of the official concerned. This test implies that every request for access has to be judged on an individual basis and that a blanket-rule limiting access to an entire class of information cannot be justified.

In recognition of the importance of giving legislative recognition to freedom of information, in the past five years, a record number of countries from around the world – including Fiji, Japan, Mexico, Nigeria, South Africa, South Korea, Thailand, Trinidad and Tobago, the United Kingdom and most East and Central European States – have taken steps to enact legislation giving effect to this right. In doing so, they join those countries which enacted such laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia, and Canada.

Constitutional Guarantees

The overriding importance of international human rights guarantees is formally recognised in the Russian Constitution. Article 15(4) of the Constitution states:

> The commonly recognised principles and norms of the international law and the international treaties of the Russian Federation are a component part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty apply.

As a result, where Russian federal or regional law clashes with provisions of international human rights law, the latter takes precedence. As well as recognising the overriding character of international human rights law, the Constitution itself also protects human rights.[22] Freedom of expression and information is explicitly protected in Article 29, which states:

> 1. Everyone shall have the right to freedom of thought and speech.
> (…)
> 4. Everyone shall have the right to seek, get, transfer, produce and disseminate information by any lawful means. The list of information constituting the state secret shall be established by the federal law.

Article 29(4) of the Constitution grants the right to "seek, get, transfer, produce and disseminate" information by any *lawful* means. This implies that there are unlawful means of communicating, a possibility not recognized under international law. The ICCPR states simply that the right to freedom of expression may be exercised by

[21] Note 3, Principle 4.
[22] Article 2 of the Constitution provides: "Man, his rights and freedoms shall be the supreme value. It shall be a duty of the state to recognise, respect and protect the rights and liberties of man and citizen."

everyone, "either orally, in writing or in print, in the form of art or through any other media of his choice", without qualification. Additionally, international law protects the right "regardless of frontiers", something the Russian Constitution fails to make explicit.

Finally, freedom of expression is subject to an additional limitation, provided by Article 56 of the Russian Constitution, which states, in part:

> 1. Individual restrictions of rights and liberties with identification of the extent and term of their duration may be instituted in conformity with the federal constitutional law under conditions of the state of emergency in order to ensure the safety of citizens and protection of the constitutional system.
>
> 2. A state of emergency throughout the territory of the Russian Federation and in individual areas thereof may be introduced in the circumstances and in conformity with the procedures defined by the federal constitutional law.

Article 4 of the ICCPR permits States to derogate from their obligations under the ICCPR in "time of public emergency which threatens the life of the nation", the existence of which has been "officially proclaimed". However, any derogation must be strictly limited to meet the demands of the situation. Article 56 of the Russian Constitution does not contain such qualified language; the life of the nation need not be at risk prior to suspending a guaranteed right and there is no requirement to limit the derogation as much as possible. Restrictions need only conform to federal constitutional law.

Recommendations:

- Article 29(4) should be amended to remove the word "lawful".
- Article 56 should be amended to require that the life of the nation be threatened before any derogation to the exercise of Constitutional rights may be imposed. In addition, if derogations are imposed, the Constitution should require that they be as limited and specific as possible.

III. Analysis of the draft Law on Access to Information

The three-fold aim of the draft Law, as set out in the preamble, is "[to establish] the procedures by which government departments and local self-government will discharge their duties as to providing the access of citizens and organisations to information concerning activities of government departments and local self-government; [to specify] the terms and rules of procedure under which citizens and organisations can obtain information concerning activities of government departments and local self-government; and [to ensure] transparency of the government for citizens and [exercise] public control over activities of government and local self-government."

The first of these aims is unnecessarily narrow in scope; the rights guaranteed in the draft Law extend only to government departments or agencies and unnamed local government bodies (see below). The third aim, while laudable, is not fully realised in the draft Law, mainly because it is too narrow in scope, contains too many loopholes and fails to offer sufficient guarantees to enable true 'transparency of government' and 'public control

over activities of government'. This Section analyses in detail the various provisions of the draft Law. Recommendations are provided at the end of each sub-section.

Scope of application

The draft Law operates alongside existing legislation to provide procedures for access to "information concerning activities" held by government departments or agencies and local government. Article 1 defines 'government department' as including any government agency formed under the Constitution of the Russian Federation. However, the draft Law has limited application to a number of departments and public bodies, including legislative authorities, tax and customs agencies, the police and prosecutors, and defence and security authorities, in relation to which Article 1 states that access requests must "[take] into account such specifics as defined for such types of department and agencies under other federal laws". Article 2 mentions a number of other laws that are relevant in this regard, including the existing Law on Information, and notes that "other ordinances and regulations … may be enacted."

As regards the scope of information covered, Article 1 contains a puzzling reference to information that is 'deposited in the archives', which is excluded from the scope of the draft Law altogether. The consequence of this would appear to be that the draft Law will apply only to information held in 'active files'.

Analysis

The ARTICLE 19 Principles state that "all information held by public bodies should be subject to disclosure". 'Public bodies' are defined by reference to "the type of service provided rather than [by] formal designations. To this end, [they] should include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quangos (quasi non-governmental organisations), judicial bodies, and private bodies which carry out public functions (such as maintaining roads or operating rail lines)."[23] The Council of Europe's Recommendation contains a similar definition,[24] and also stresses that "all information recorded in any form, drawn up or received and held by public authorities and linked to any public or administrative function"[25] must be subject to disclosure.

The draft Law fails to implement these principles. A range of public bodies do not appear to be covered, including bodies that are substantially funded or controlled by government, whether they are formally public or private. The scope of information covered by the draft Law is restricted to "information concerning activities of government departments" and archive material is excluded.

Recommendation:

- The draft Law should apply to all information help by any public body, as well as by

[23] Note 3, Principle 1.
[24] Note 2, under I. and II.
[25] *Ibid.*, under I.

private bodies who perform a public function. Where private bodies hold information relevant to the enforcement of a right, this should also be subject to a duty of disclosure.

Regime of Exceptions

The draft Law does not, unlike most freedom of information laws around the world, set out in detail the circumstances under which access to information may be refused. Instead, Article 4 provides that access "shall be limited if such data and records are treated as classified information or confidential information under the Russian Federal legislation." Article 5 requires each (local) government department to draw up a list of documents or categories of documents that fall within these exceptions.

Analysis

The heart of any freedom of information regime should be based on the all-encompassing principle of maximum disclosure, subject to certain carefully and narrowly drawn limitations. Principle 1 of the ARTICLE 19 Principles states "The principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances."[26] This means that all individual requests for information from public bodies should be met unless the public body can show that the information falls within the scope of the limited regime of exceptions. A refusal to disclose information is not justified unless the public authority can show that the information meets a 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.

Non-disclosure of information must be justified on a case-by-case basis, and all three parts of the test must be met. A list of legitimate aims is provided in the Council of Europe's Recommendation, as cited above, including such matters as national security, defence and international relations, public safety and the prevention, investigation and prosecution of criminal activities.[27]

An important final element of the test for non-disclosure is the public interest override. Even if it can be shown that disclosure of the information would cause substantial harm to a legitimate aim, the information should still be disclosed if the benefits of disclosure outweigh the harm. As noted above, for example, there may be circumstances where private information exposes high-level corruption so that the principle of disclosure should still prevail, in the overall public interest.[28]

[26] Note 3.
[27] Note 2, under IV. See Section II.
[28] ARTICLE 19 Principles, note 3, Principle 4.

The regime of exceptions in the draft Law, whilst incorporating the presumption of accessibility, signally fails to meet these standards. There is no requirement of harm to a legitimate interest and no public interest override. The reference to drawing up categories of documents to which the public may have no access implies that requests will not be considered on a case-by-case basis, which is contrary to the whole thrust of the ARTICLE 19 Principles and Council of Europe Recommendation.

There are serious problems with the approach adopted in the draft Law, which simply defers to secrecy laws for the exceptions.[29] It may be noted that in most countries there are secrecy provisions in numerous other laws, many of which date back decades and were not drafted with the principle of openness, or of participatory democracy, in mind. To preserve all of these provisions fails to signal a change with previous practices, characterised by excessive secrecy, and means that the freedom of information law cannot serve to promote significantly greater openness in government.

As a result of the above, ARTICLE 19 recommends that freedom of information laws should override inconsistent secrecy provisions. This approach has been adopted in a number of jurisdictions. In other countries, such as Sweden, the law requires all secrecy provisions to be brought together in one law. This at least avoids a situation where a wide range of secrecy provisions from the past seriously undermines the freedom of information law. At a minimum, there should be a commitment to ensuring that there is a single, overarching freedom of information regime.

Recommendations:

- Articles 3 and 4 should be redrafted to provide a comprehensive framework of principles, starting from the principle of maximum disclosure, and a list of narrowly-drawn exceptions, in accordance with the three-part test outlined above.

Requests for Access

Chapter II of the draft Law lays down the procedural framework for the processing of access requests. Article 10 reiterates a number of rights that may be exercised by 'any user' of information. These 'rights' include a right 'to obtain true and whole information' without having to give reasons, the right to appeal against a denial of access and the right to compensation for any loss from a refusal to disclose information. Under the second (unnumbered) paragraph of Article 10, any 'user' wishing to lodge a request for access has to supply "such personal data as may be necessary for the fulfilment of [the] request", "observe the routine rules of procedure and terms of access" and pay a fee.

Article 11 lays down a number of rights and obligations of government departments. These include a 'right' to refuse to disclose information in such instances as are specified by the draft Law, as well as obligations to ensure that they comply with the procedural requirements of the law, to "create … conditions needed for exercising the right of access to information", to set up general-access user systems as specified and to ensure that

[29] The Final Provision Article 26 of the draft Law requires other laws to be brought in line with it but this presumably is general in nature and does not overcome the specific stipulations of Article 4.

'disabled (blind)' people can access information. Article 12 requires government departments to appoint information officers or units with responsibility for ensuring their obligations under the law are met. Article 7 sets out a number of forms of access to information which requesters may stipulate in their requests.

Articles 15 and 17 provide time limits for the consideration of requests. If a department does not hold the information requested but is aware that another department does, the request should be transferred to that department within 7 days. In all other cases, requests should be processed within 30 days, with the possibility of a 15-day extension. Pursuant to Article 18, access may be refused if the information requested falls within one of the excluded categories, if the information is held in a public system to which the requester has ready access, if the requester has already been provided with the information, if the department does not hold the information or it is not clear from the request what information is being asked for, or if the required fee has not been paid. Any refusal to provide information must be notified to the applicant, along with the legal provision relied upon for such refusal (Article 16).

Articles 19-21 set out the regime of fees for access. Article 19 specifies a number of circumstances in which access shall be free, including where it is provided in verbal form or via general-use information systems. Pursuant to Article 20, fees may be charged for the cost of copying and delivering the information, as well as for the costs of searching for or creating the information. A federal decree shall specify the charges which may be levied by federal departments while other bodies endorse their own fee lists.

Analysis

These procedural provisions are largely in line with international standards. Article 16 limits the response in a case where access is not being provided on the basis that the information is exempt to "the government ordinance or regulation (indicating its type, number and date of enactment) by virtue of which such data or records have been attributed to classified information". This is inadequate. The body denying access should be required to provided full reasons for the refusal, subject only to the need to keep the information itself secret.

Consideration should also be given to providing for a central, binding fee schedule for all public bodies covered. Where this is not possible, for example due to divided federal jurisdiction, the central authority at the State level should establish the fee schedule. Otherwise, there is the possibility of inconsistency in the level of fees being charged, as well as of some departments charging excessive fees. Furthermore, consideration should be given to providing for lower fees or free access for certain types of requests, particularly requests in the public interest. The draft Law allows government departments to charge for a wide range of services, including searching and creating the information, which can be very expensive. Finally, consideration should be given to a fee structure whereby a set initial amount of time, for example 2 hours, is allocated free to requesters, who then only have to pay for additional time. The whole idea of a freedom of information law is to ensure access to information and this can be seriously undermined by an excessive fee structure.

Recommendations:

- Government departments should be required to provide full reasons for any refusal to disclose information.
- Consideration should be given to substantially reworking the fee system in accordance with the recommendations above.

Appeal procedures and supervision

Under Article 5, departments themselves are supposed to 'settle' any information disputes with users. Departments are also required to "exercise control" over their own observance of the law and they are "required to consider … any … matters related to ensuring the transparency of information concerning activities of government departments and local self-government". Under Article 23, the responsibility for such self-control is delegated to the departmental information officer, under such procedures as may be drawn up by the department concerned. Article 23 specifies further that final control shall rest with the federal Prosecutor's office.

Article 19 provides that users may lodge appeals against "legal acts or actions…which may infringe their right of access" and "demand damages". Article 22 provides that any citizen or organisation may appeal against a refusal to disclose to the 'review officer' of the department concerned, or to a court or the federal Human Rights Commissioner. No procedural details are set out but Article 22 does provide that these may be provided for at the administrative level by federal legislation. In the meantime, Article 25 provides that, "The Decree of the Presidium of the Supreme Soviet of the USSR of 12 April 1968, No. 2534-VII 'On the Procedure of Consideration of Citizens' Proposals, Applications and Appeals" shall be effective to the extent that it does not contradict this Federal Law."

Analysis

Article 23 envisages that external control and supervision of the implementation of the draft Law shall be exercised by the office of the federal Prosecutor. ARTICLE 19 doubts whether this is an appropriate mechanism for the implementation of the draft Law and promotion of freedom of information at the federal level. Most modern freedom of information laws establish an independent Commissioner or Ombudsman to carry out this important task.[30] The advantage of setting up a specialised body to deal with information concerns is that this body will build up extensive knowledge and experience of the various issues associated with FOI. As the single supervisory body, it will be in a position to share experiences across different government departments, provide advice and to set up training. Finally, as a specialised body, it will be able to devote itself fully to FOI issues in a way that the federal Prosecutor's office could never do.

The appeals system in the draft Law is consistent with the ARTICLE 19 Principles, which envisage three levels of appeal, internal, administrative and before the courts.

[30] See, for example, the UK Freedom of Information Act 2000, c. 36: http://www.legislation.hmso.gov.uk/acts/acts2000/20000036.htm.

However, we are concerned that no procedures are provided for in the draft Law and that this important matter is left for future consideration. It is not even clear whether internal reviews must be exhausted before a complaint can be lodged with the courts or with the Human Rights Commissioner. Furthermore, the grounds of appeal are not clear – would they include, for example, a refusal to provide the information in the form requested or a claim that the fees charged were excessive – and the powers of the Human Rights Commission – for example to order damages, review the information or order government departments to disclose information – are not clear. We note that given the specific nature of appeals against a refusal to disclose information, it is not appropriate to treat this in the same generic manner as other administrative appeals.

Recommendations:

- The draft Law should provide for supervision of its application by a specialised independent administrative body, such as an Information Commissioner or Ombudsman.
- The draft Law should clearly set out the appeals procedure for refusals to disclose, as well as the powers of the reviewing body.

Addressing the Culture of Secrecy

The draft Law fails to take adequate steps to address the culture of secrecy that still prevails in most government departments. A number of measures are relevant in this context. There is a need for public education regarding the right of access under the new law. Some central body, for example an information commissioner, could be given responsibility for ensuring the publication and wide dissemination of a simple guide to using the law. There is a need for freedom of information training for public employees.[31] Government departments should be required to report annually to the legislature on steps they have taken to implement the law, as well as on information requests which have been processed by them, including how many were refused, the grounds for such refusals and so on.

Finally, certain individuals should be protected against sanction for disclosing information. Civil servants who leak information which discloses wrongdoing or serious maladministration, for example relating to fraud or corruption (so-called 'whistleblowers'), should be protected as long as they acted in good faith and in the reasonable belief the information was correct.[32] Similarly, civil servants should be protected against sanction for information disclosed pursuant to the freedom of information law, again as long as they acted reasonably and in good faith. Otherwise, they will be wary of disclosing information for fear of making a mistake and the goals of the legislation will be defeated.

[31] For example, as provided in the Mexican Federal Transparency and Access to Public Government Information Law, Article 37. Available at: http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB68/laweng.pdf.

[32] ARTICLE 19 Principles, note 3, Principle 9.

Recommendations:

- The draft Law should require measures to be taken to address the culture of secrecy, including through mandatory training of public officials, as well as public education.
- The draft Law should require government departments to report annually on the implementation of the Law, including the number of access requests received and granted.
- The draft Law should provide protection for 'whistleblowers' and other civil servants who release information reasonably and in good faith.