



NOTE

on

the draft Law On Introducing Changes to the Law of Ukraine ‘On Information’

**ARTICLE 19
Global Campaign for Free Expression**

February 2004

I. Introduction

The draft Law “On Introducing Changes to the Law of Ukraine ‘On Information’” (draft Law) is an attempt to substantially rewrite an already-existing Ukrainian law governing a wide range of issues relating to information. The currently-existing law “On Information” contains only a skeletal outline of a full freedom of information regime and the amendments seek to develop this into a fully fledged system of access to publicly held information.

In a November 2003 Memorandum (Memorandum), ARTICLE 19 extensively commented specifically on the freedom of information regime contained in an earlier version of the draft Law. Based in significant part on these comments, the drafters made substantial and generally positive revisions to that previous version. The result is the new draft Law, which would create a freedom of information regime compliant, for the most part, with international law.

In addition to providing us with a translation of the draft Law,¹ the drafters have provided us with an “Explanation of Kharkiv Group for Human Rights” (Explanation) which contains descriptions of and explanations for the various revisions made to the previous draft. We base our comments below on these documents.

II. Positive Revisions to the Previous Draft

Virtually every revision to the previous draft is positive. Such revisions include:

- an explicit reference to the only national legislation which, under the draft Law, may provide for classification of information as state secrets (in Article 4 and particularly in Article 31(2), which provides (with new language in italics): “Classification of information into state secret and access to such information shall be executed in accordance with the laws of Ukraine ‘*On State Secret*’ and the ‘*Code of Information Forming State Secret*’. *The list of categories of such information shall not be subject to expanded interpretation*”);
- removal of the broadly-worded categories falling under “other legislatively stipulated secret information” to which we objected in the Memorandum;
- removal of a provision prohibiting, by implication, the release of information relating to the income of public officials;
- removal of provisions relating to insult and slander/libel;
- inclusion of a significantly improved public interest override provision (which we comment on in the following Section);
- addition of a clearly-defined 40-day period (to replace the otherwise unspecified “new term”) during which responses to information requests may be delayed, as well as a condition on when such extensions may be imposed (specifically, only when “a request objectively takes more time than [the initial 15-day period]” (Article 42(2)); and
- addition of whistleblower protection (Article 59).

We welcome each of these revisions. At the same time, there are areas in which the draft Law could be improved even further. We discuss these below.

III. Further Desirable Changes

III.1 A Separate Freedom of Information Law

In the November 2003 Memorandum, we recommended, in light of the fact that the issue of a right to access information held by public bodies – the principal focus of a freedom of information regime – is very different from other freedom of expression issues, that the freedom of information regime be set out in a separate law. According to the Explanation, however, there are strong reasons relating to Ukraine’s particular situation which argue against this approach. Principal amongst these is the simple fact that “amendments” are a great deal easier to pass through the Parliament than a new law. In this case, an existing law already has a freedom of information component and it is a more promising strategy to introduce “amendments” to this law than to prise off the

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

freedom of information provisions and to introduce them in a new piece of legislation. While we reiterate our view that, in principle, freedom of information legislation should be free-standing, we acknowledge that this may not be a practical reality at this time in Ukraine.

III.2 Definition of Information

The draft Law continues to define “information” quite broadly as “any communication that can be presented in the form of characters or symbols and stored on any material medium external to human consciousness”. Article 1 goes on to carve out a special class of information, called “official information”, in a rather complicated way. We pointed out in the Memorandum that the distinction between official and unofficial information performed no function in relation to the right of access to information and that it should therefore be removed, at least from any provision relating to freedom of information. In addition, we suggested that the definition, in its present form, was too broad in that it could reach even thoughts, to which access should not necessarily be given in a freedom of information law.²

Recommendations:

- The definition of “official information” should be removed from the draft Law, at least in relation to freedom of information, and the references to “official and other information” should be replaced simply with references to “information”.
- The definition of “information” should be modified along the lines suggested in the November 2003 Memorandum.

III.3 Definition of Bodies Covered by the Law

The Memorandum also raised concerns about the approach whereby the “subjects of information activity” were set out in a list, which necessarily runs the risk of excluding certain entities from having a right of access. Instead, we recommended that the law should provide for a broad right of access to information for “everyone” – all persons, natural and legal. The draft Law retains the list, however. This retention is based on the fact, described in the Explanation, that certain entities, including religious organizations and some NGOs, have a somewhat nebulous legal status which could result in their being denied access to information based on the notion that they are neither legal nor natural persons. In light of this possibility, a compromise which might be appropriate would be to provide that all persons, natural and legal, as well as such entities as religious organisations, trade unions and public associations, have the right of access.

Recommendation:

² We note the Explanation’s assertion that the broad definition of ‘information’ is needed to protect from disclosure journalistic sources whose names have not been memorialised in a document. We of course recognise that it is critically important, from the perspective of freedom of expression generally, that journalistic sources be protected, and that a broad definition of ‘information’ may be a necessary part of this protection. However, the definitional needs in the freedom of information context, possessing as it does different pressure points, may well be somewhat different. This is perhaps a good example of the potential tensions that may be encountered when freedom of information is regulated in the same legal instrument which regulates press and other expression-related matters.

- The draft Law should provide for a broad right of access by every person, natural and legal, and then specifically provide that this includes those entities identified as potentially problematic in the Explanation.

III.4 Lack of a Harm Requirement

As we noted in the Memorandum, exceptions to the right to access information are legitimate only where they include a harm requirement. Otherwise, they cannot meet the necessity part of the test for restrictions on the right to freedom of information. Specifically, the appropriateness of a refusal to disclose information must be conditioned on a showing that disclosure would likely result in *substantial harm* to a legitimate aim. While certain exceptions in the draft Law contain some version of a harm requirement, others continue not to be subject to any such requirement.

The Explanation asserts that there is no need to include such a harm requirement for every exception because this is effectively covered by the (revised) public interest override (see below). We welcome the revisions to the public interest override, which should ensure the release of information in the event that the public interest in release exceeds the potential harm of release. It may be noted, however, that a harm requirement is a simple reflection of the basic assumption behind a freedom of information law, namely that information must be disclosed unless disclosure would cause prejudice to some legitimate public or private interest. This is why international standards on freedom of information, including those promulgated by the Council of Europe, uniformly refer to the harm requirement.³

Furthermore, the public interest override does not accomplish all that an explicit harm requirement would. Absent a requirement of substantial harm, for example, it would be possible under the draft Law for public officials to retain information whose release would not be particularly harmful, as long as the public interest in the information (although not necessarily the interest to the person requesting the information) was, or was deemed to be, minimal. In contrast, an explicit “substantial harm” requirement establishes an appropriately high threshold for any refusal to disclose information: *regardless of any question of public interest*, public officials may not refuse to release information unless they are able to show the potential for substantial harm resulting from the release. Even then, of course, they will be required to release the information if the public interest override is engaged. Furthermore, although the public interest override is of great importance, it is necessarily a nebulous concept and the necessity of formulating arguments on this basis may pose an unnecessary burden on requesters. This may be contrasted with the harm requirement, which is normally a very concrete matter.

³ See Recommendation No. R(2002)2 of the Committee of Ministers of the Council of Europe to member states on access to official documents, adopted 21 February 2002.

Recommendation:

- We reiterate our recommendation that each exception should be explicitly conditioned by a harm test, cast in terms of a risk of serious prejudice to the interest that the exception seeks to protect.⁴

III.5 Public Interest Override

We welcome the inclusion of a significantly revised public interest override provision in the draft Law. New Article 32(1) provides: “Any information (including restricted access information) can be disseminated without its owner[‘s permission] if such information is publicly material, i.e. it is a subject of public interest and public’s right to know this information is greater than the potential harm can be caused by its dissemination”. Article 32(2) provides an illustrative list of categories of information that are to count as “publicly material”, while Article 32(3) explicitly provides that the list is not exhaustive.

This provision represents a substantial improvement over the previous “public interest override”, which was cast in terms of the prevailing of the public interest over the right of the owner to protect the requested information.⁵ There are, however, two difficulties with the new provision which call for improvement.

First, and most fundamentally, as it stands, the provision only *permits* a public official to release exempt information in the event that he or she determines that the public interest in its release is sufficiently high. By terms, therefore, the official is free to withhold the information notwithstanding that determination. This is contrary to international standards in this area, which *require* the release of exempt information when the public interest in the release of the information is sufficiently high. The Article, therefore, should be recast in *obligatory* rather than *permissive* terms.

Second, the Article now effectively imposes the burden on the information requester to show that the public interest is sufficiently high to justify the release of the requested information. But it is the right of access that is fundamental, and which therefore should be presumed. Accordingly, the burden should be on the person who would withhold the information to show that the harm resulting from its release would be greater than the public interest in its release. In short, the burden of proof in this provision should be reversed.

Recommendations:

- Article 32 should be redrafted to require the release of information, even limited access information, when the terms of its public interest override provision are met.

⁴ See *A Model Freedom of Information Law*, ARTICLE 19 (London: July 2001), Articles 27-32, for ways of writing in such a harm requirement into a range of exception provisions.

⁵ A version of this latter provision remains in the draft Law at current Article 39(7), which now provides: “Limited access information must be provided upon request if a competent agency or court has established that such information is socially significant [as defined in Article 32] and the right of the public to such information prevails over the right of its owner to protection of such information”. Assuming that the changes we recommend are made to the Article 32 public interest override, we recommend that this provision be removed from the draft Law, as redundant and potentially confusing.

- The burden of proof should be reversed: information should be disclosed unless it is shown that the harm resulting from its release would be greater than the public interest in its release.

III.6 Appeals to the Human Rights Commissioner

We reiterate our concern that the Human Rights Commissioner, to whom appeals may go, be truly independent of government. We are informed that members of civil society are not in unanimous agreement as to whether this Commissioner, created under separate legislation, is independent in the required sense.⁶ In addition, we are unclear as to whether appeals to this Commissioner would be sufficiently swift and cheap effectively to secure the freedom of information regime against abuse. We would urge the drafters to consider these matters and to make appropriate adjustments in the draft Law as may be required.

Recommendation:

- The system of appeals in the draft Law should be reconsidered in favour of a system which provides for appeals to an unequivocally independent body with the capacity to resolve appeals rapidly and cheaply.

III.7 Protection from Liability for Innocent Errors

As noted in the Introduction, the draft Law now contains a welcome whistleblower provision. Still lacking from the draft Law, however, is a provision which would protect from criminal and civil liability, as well as employment-related sanction, public officials who disclose information pursuant to the draft Law, reasonably and in good faith, even where such information is, in fact, not supposed to be released. Such protection is crucial to changing the culture of secrecy; without it, public officials will be concerned about being sanctioned for making a mistake and will err on the side of caution, often egregiously, refusing to disclose much non-exempt information.

Recommendation:

- The draft Law should contain protection for persons making disclosures pursuant to the law, as long as they acted reasonably and in good faith.

⁶ See Principle 5 of ARTICLE 19's *The Public's Right to Know: Principles on Freedom of Information Legislation* (London: 1999) for details on how to ensure such independence.