



NOTE

on

the draft Armenian Freedom of Information Law

ARTICLE 19
Global Campaign for Free Expression

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Article 1

Pursuant to this article, the scope of the draft law extends to State and local self-government bodies, as well as other organisations. ARTICLE 19 recommends, first, that a more detailed and expansive definition of public bodies be included in the law. It is of some importance that the law makes it very clear which public bodies are covered, to avoid disputes about this later on. Furthermore, the definition of public bodies needs to be broader than set out in the law. For example, public institutions and public corporations should be covered. Public bodies should be defined broadly, based on their public function and then any legitimate concerns regarding secrecy can be covered in the exceptions section. We therefore recommend that the following bodies be listed as public bodies for purposes of this law:

- any body established by or under the Constitution;
- any body established by statute;
- any body which forms part of any level or branch of Government;
- any body owned, controlled or substantially financed by funds provided by Government or the State; or
- any body carrying out a statutory or public function, to the extent of their public function.

It is also unclear from the draft law which private bodies are covered and to what extent. ARTICLE 19 notes that private bodies are not covered at all in most FOI laws around the world. Only South Africa presently covers private bodies, and then only to the extent that the information requested is necessary for the exercise or protection of a human right. Although there is no principled reason why private bodies should not be covered, this would require careful attention. As a result, and to avoid delay, it may be premature to include them in the draft law.

Paragraph 3 provides that the law does not apply to international information exchanges. There is no legitimate reason to limit the law in this way and this is not the practice in other countries. ARTICLE 19 recommends that this paragraph be removed from the draft law.

Article 3

The definition of information could be expanded to make it clear that all information is covered, regardless not only of its form (as currently specified) but also regardless of its date, official status (i.e. whether or not it is classified) or who created the information (i.e. it should be covered even if it was not produced by the public body which holds it).

Article 6

Paragraph 2 provides that everyone has the right make a written request for information. This might be interpreted as ruling out oral requests (which we address in more detail below) and is, in any case, unnecessary here since Article 9 deals with the procedure for making requests. ARTICLE 19 therefore recommends that this paragraph simply note that everyone has a right to make a request for information.

Paragraph 3 provides for a right to make an oral request for information on how to request information. This is unnecessary since Article 7 requires all public bodies to publish and disseminate this information annually. Also, it implies that other oral requests are not permitted, which is not, of course, the case. ARTICLE 19 therefore recommends that this paragraph be removed.

Paragraph 6 provides that information freedom can only be limited by the law. Article 8 deals with exceptions to the right to information, so this paragraph 6 should either refer to the exceptions provisions of Article 8 or be removed.

Article 7

Paragraph 1 refers to procedures for providing oral and/or written information. There seems no point to refer to this distinction here and ARTICLE 19 recommends that the phrase “oral and/or written” be removed.

Paragraph 2 places a special obligation on unions and organisations to publicise information, referring to other laws and their Charters. This is unnecessary inasmuch

as the obligations it refers to already exist. Also, it is unclear why these bodies, from among all private bodies, have been singled out for this particular obligation. Finally, even in South Africa, which does place an obligation on private bodies to disclose information on request, there is no obligation to actively publish information in this way. ARTICLE 19 therefore recommends that this paragraph be removed.

Paragraph 3 refers to a legal obligation on State and local government bodies to publish legal acts. There is no need to repeat this obligation here so ARTICLE 19 recommends that this paragraph be removed.

Paragraph 4 refers to the obligation to publicise immediately certain information through the press. There may be more effective ways to publicise information than through the press, particularly in rural areas. The following language could be considered instead:

...publish and widely disseminate in an accessible form [the relevant information].

Paragraph 5 lists a number of types of information which should be publicised. The following could be added to this list:

- policies (refer to Estonian law which has a more specific definition of this);
- public consultation around policies;
- public complaints mechanisms; and
- a list of the categories of information held by the body.

Paragraph 5 requires publication annually but some of the types of information listed – notably about vacancies and policies – should be published as soon as they become available.

Article 8

Article 8 provides for a regime of exceptions based on a series of secrecy laws relating to national security, public order, health and so on. There are a number of problems with this. First, and most importantly, these laws were not drafted with open government in mind and, in most cases, promote an overly secretive approach to information. Indeed, one of the aims of the new FOI law should be to change the existing system of secrecy, not to reinforce it. Second, some of the interests listed in Article 8 should not be there, such as the honour and reputation of others. Third, this Article fails to establish any objective test for assessing the legitimacy of a restriction, leaving it entirely up to the existing legislation.

ARTICLE 19 would recommend, instead, that the FOI law provide for its own, detailed regime of exceptions, in line with the practice in most countries around the world. Such a regime would list all legitimate reasons to refuse to disclose information. Each exception should include a harm test (so that the exception relating to national security, for example, would require a risk of harm to national security and not simply except all information relating to national security). The list of legitimate exceptions recognised in the ARTICLE 19 Model Law is as follows (refer to the Model Law for the exact wording of each exception):

- personal information;
- legal privilege;
- commercial and confidential information;
- health and safety;
- law enforcement;
- defence and security;
- public economic interests; and
- policy making and operations of public bodies

Each of these exceptions includes a harm test apart from the one on legal privilege, where harm is assumed.

Furthermore, all exceptions should be subject to a public interest override so that where the overall public interest is served by disclosure, the information should be disclosed even if this will harm one of the protected interests. In the ARTICLE 19 Model Law this provision reads as follows:

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

If the regime of exceptions is comprehensive, there is no need for it to be extended by secrecy laws. As a result, under the approach recommended above, the law should include a provision to the effect that in case of conflict between the FOI law and a secrecy law, the former dominates. In the ARTICLE 19 Model Law this provision reads as follows:

5. (1) This Act applies to the exclusion of any provision of other legislation that prohibits or restricts the disclosure of a record by a public or private body.

Article 9

Paragraph 1 lists the information which must be provided on a request for information, including citizenship. If the law applies to everyone, which ARTICLE 19 recommends, there is no need for applicants to state their citizenship.

Paragraph 2 provides that a written application should be registered and processed as defined by the government. It is important that applications not only be registered but also that applicants be given a receipt acknowledging this registration. Inasmuch as other laws set out clearly the manner in which applications should be processed, there is no need to repeat this here.

Paragraph 4 refers to Article 6(3), which we recommend deleting. This paragraph should, therefore, also be deleted. However, we do recommend that a provision on oral requests be added to the law, to make it clear that public bodies should respond to such requests where possible. One option would be as follows:

Information shall be provided in response to an oral request where the public body in question can, without unduly diverting its resources, provide the information in less than one hour, subject only to the exceptions listed in this law.

Paragraph 5 provides for the information to be provided in written or oral form, depending on the request of the applicant. There are, however, a number of other possibilities here. The information may be in the form of an audio cassette tape, for example. In case of electronic files, some applicants may wish for these to be provided on disc, while others would prefer a printout. The Model Law provides for the following options in terms of form of disclosure:

- a true copy of the record in permanent or other form;
- an opportunity to inspect the record, where necessary using equipment normally available to the body;
- an opportunity to copy the record, using his or her own equipment;
- a written transcript of the words contained in a sound or visual form;
- a transcript of the content of a record, in print, sound or visual form, where such transcript is capable of being produced using equipment normally available to the body; or
- a transcript of the record from shorthand or other codified form.

However, it is also necessary to protect public bodies from unduly onerous requests and, in some cases, to protect the information itself. The Model Law thus allows the public body to provide the information in another form where to provide it in the form requested would either be unduly time-consuming or would risk harming the information.

Paragraph 5 also sets out the time limits for disclosing information. These should be amended to provide for disclosure, “as soon as possible and in any event within 5 working days (or 15 working days, as the case may be)”

Paragraph 5(b) allows the public body not to disclose where the information has already been published. This is probably unnecessary and may make it difficult for some requesters (e.g. where they cannot easily access the original material). It would be better to remove this provision, but allow the public body to charge for providing the information in question.

An obligation on officials to provide assistance to requesters might be added to Article 9. Such assistance should be provided in two cases. First, some requesters may require assistance in formulating their requests, in particular in making a request which is sufficiently precise to enable officials to find the information sought. Second, assistance may be necessary where the applicants are unable to complete the form, for example because of illiteracy or disability.

Article 10

Paragraph 1 provides that oral requests, and written requests which promote certain important interests, should be provided free of charge. Requests for personal information should also be provided free of charge.

Paragraph 2 allows public bodies to charge fees for requests other than those listed in paragraph 1. To avoid different levels of fees being charged by different public bodies, and to prevent excessively high fees being charged to deter requests, a uniform schedule of fees should be set by the minister responsible for implementation of the law. This schedule will need to be amended from time-to-time but this is a transparent, accessible and fair way of setting fees.

Paragraph 3 provides for fees by NGOs for information requests. This paragraph is unclear in translation. Furthermore, there is no justification for applying this rule only to NGOs and not other private bodies. In any case, as noted above, ARTICLE 19 recommends that private bodies not be covered by this law, or, if they are, only to the extent that the information is necessary for the exercise or protection of a human right. In this case, this paragraph should be deleted, since information needed for rights should be provided free of charge.

Article 11

Paragraph 3 of this article provides, where a request for information is refused, for an appeal to a higher authority in the same body and then to the courts.

In practice, the effective implementation of a freedom of information regime is dependent on requesters being able to access a rapid and low-cost independent appeals system. An internal appeal, while beneficial, is clearly not independent. Appeals to the courts, which should be independent, are slow and costly. As a result, in most countries the law provides for an appeal to an independent administrative body, such as a Human Rights Commission, Ombudsman or special Information Commissioner. This ensures that ordinary people can appeal against refusals to disclose information and is a significant element in a functioning freedom of information system.

There are many different forms such a body could take and ARTICLE 19 refers readers to the Model Law for one such example. What is important is that the body is protected against political interference, and has the necessary powers to review refusals to disclose effectively and to ensure that its decisions are implemented in practice.

ARTICLE 19 understands that at present under the Armenian Constitution only the president can appoint bodies such as an information commission and that, as a result, it is not possible to guarantee the independence of these bodies. Furthermore, there is a constitutional review process underway which will, hopefully, change this rule. Furthermore, the constitutional review process may lead to the appointment of an Ombudsman and it might make sense in the Armenian context to grant this body powers in the area of freedom of information rather than to create a new body. It may, therefore, be sensible to wait until after the constitutional review before adding an administrative appeal mechanism to the law. However, this should be a priority once the new constitution is in place.

Article 12

Paragraph (d) requires public bodies to define their procedures of providing information, including the official responsible for providing information. This implies that public bodies must appoint such an individual, but this obligation should be made clearer in the law. Also, this individual should be given certain explicit tasks under the law, including to promote the best possible practices in relation to the maintenance and disposal of information.

Omissions

Good Faith Mistakes

In some cases, it will not be entirely clear whether or not information is covered by an exception and civil servants will have to make decisions about this. Given the complexity of the issues involved, it is inevitable that they will make mistakes. Experience in other countries shows that where they risk punishment for disclosing information by mistake, civil servants tend to interpret the exception clauses in the law excessively broadly, undermining the right to information. As a result, in many countries individuals are protected from punishment for disclosures under the act as long as they acted reasonably and in good faith. The provision on this in the Model Law states:

48. No one shall be subjected to civil or criminal action, or any employment detriment, for anything done in good faith in the exercise, performance or purported performance of any power or duty in terms of this Act, as long as they acted reasonably and in good faith.

Protection for Whistleblowers

There are circumstances where the overall public interest is served by information disclosure even though the information in question is not otherwise subject to disclosure under the law. An example would be the situation in Chernobyl, where people working at the power station would have known that things were starting to go wrong and should have informed the public about it, even though this was probably covered by secrecy rules.

As a result, many freedom of information or other laws protect “whistleblowers”, individuals who disclose information in the face of an overriding public interest, as long as they acted reasonably and in good faith. The provision on this in the Model Law states:

47. (1) No one may be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment obligation, for releasing information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment.
(2) For purposes of sub-section (1), wrongdoing includes the commission of a criminal offence, failure to comply with a legal

obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body.

Maintenance of Records

The right to access information will be frustrated seriously if public bodies do not keep their information in good order, as they will be unable to find information, even if they do hold it. Furthermore, over time most information held by public bodies is destroyed, with the remainder being transferred to the public archives, as it is not possible to store all information. The procedures for deciding which information to keep and which to destroy are, therefore, of some importance.

As a result, a good freedom of information law should also provide for some standardised system for management of information by public bodies. The UK FOI law, for example, provides that the minister responsible for justice is tasked with developing a code of practice regarding the maintenance and destruction of records which public bodies are required to abide by. This ensures that all public bodies must meet certain minimum standards in this regard, and also that record keeping practices are uniform throughout the civil service. Consideration should be given to including a provision of this sort in the draft Armenian law.

Reporting on Information Requests

Pursuant to Article 7(5), public bodies are required to report annually on a number of matters. In many countries, these bodies are also required to report on information requests, listing such things as:

- the number of requests for information received, granted and refused;
- how often and which sections of the law were relied upon to refuse requests for information;
- appeals from refusals to disclose information;
- fees charged for requests for information;
- what is has actively published (pursuant to Article 7 of the draft law); and
- steps taken in the area of record maintenance.

Existing Disclosure Practices

Consideration should be given to adding an article to the draft law that makes it clear that this law is not intended to limit any existing practices or mechanisms of disclosure. The clause to this effect in the Model Law reads as follows:

5.(2) Nothing in this Act limits or otherwise restricts the disclosure of information pursuant to any other legislation, policy or practice.

Time Limits

Consideration should be given to adding time limits beyond which all information must be disclosed, even if it was once secret, for example after thirty years. An exceptional procedure could be established to continue to classify information for which there is still a need for secrecy beyond such time limits. This is common

practice in other countries and ensures that, over time, practically all information becomes public.