

MEMORANDUM
on the draft Mexican
Federal Act on Access to Public Information

by
ARTICLE 19
Global Campaign for Free Expression
London,
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Introduction

ARTICLE 19 very much welcomes the initiative of the Mexican Authorities to introduce legislation giving effect to the right to information, including the right of individuals to access information held by public bodies. We have long advocated the passage of freedom of information legislation to give practical effect to the public's right to know.

The draft reviewed by ARTICLE 19 is very progressive, reflecting in many areas best international practice, and should, if passed into law, provide an effective guarantee for the right to information. We particularly welcome, for example, provisions ruling out secrecy where the information in question relates to serious human rights abuses or where the reasons which originally justified secrecy no longer pertain. We also welcome the fact that pursuant to this draft law, responsibility for disclosure of secret information is applicable only to the authority which held it, not, for example, to any media which disseminate it.

At the same time, we feel that improvements could still be made to the draft law. This Memorandum sets out our suggestions in this regard, with a view to bringing the draft Federal Act on Access to Public Information into line with the best international standards in this area. The comments herein are based on two key publications in this area, *The Public's Right to Know: Principles on Freedom of Information Legislation*¹ and *A Model Freedom of Information Law*.² As such, they represent broad

¹ ARTICLE 19 (London, 1999).

² ARTICLE 19, Centre for Policy Alternatives, Commonwealth Human Rights Initiative and Human Rights Commission of Pakistan (London, 2001).

international consensus on best practice in this area. Our analysis is based on an unofficial translation of the draft law circulated in October 2001.

International and Constitutional Standards

There can be little doubt about 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.

In ensuing international human rights instruments, freedom of information was not set out separately but as part of the fundamental right to freedom of expression, which includes the right to seek, receive and impart information. Article 19 of the Universal Declaration of Human Rights (UDHR), generally considered to be the flagship statement of international human rights, binding on all states as a matter of customary international law, 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 International Covenant on Civil and Political Rights (ICCPR), a legally binding treaty which is binding on Mexico,³ guarantees the right to freedom of opinion and expression in very similar terms to the UDHR, also in Article 19. The Inter-American Convention on Human Rights, binding on Mexico⁴ provides one of the strongest international guarantees of freedom of expression, at Article 13.

Numerous official statements have been made to the effect that the right to freedom of expression includes a right to access information held by public authorities. The right to information has also been proposed as an independent human right. Some of the key standard setting statements on this issue follow.

The UN Special Rapporteur on Freedom of Opinion and Expression has frequently noted that the right to freedom of expression includes the right to access information held by public authorities. He first broached this topic in 1995 and has included commentary on it in all of his annual reports since 1997. For example, in his 1998 Annual Report, the UN Special Rapporteur stated:

[T]he right to seek, receive and impart information 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....⁵

³ Accession on 23 March 1981.

⁴ Accession on 2 March 1981. Acceptance of jurisdiction of the Inter-American Court of Human Rights on 16 December 1998.

⁵ Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14. These views were welcomed by the Commission. See Resolution 1998/42, 17 April 1998, para. 2.

In November 1999, the three special mandates on freedom of expression – 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 – came together for the first time under the auspices of ARTICLE 19. They adopted a Joint Declaration which included the following statement:

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.⁶

In 1994, the Inter-American Press Association, a regional non-governmental organisation (NGO), organised the Hemisphere Conference on Free Speech, which adopted the Declaration of Chapultepec, a set of principles on freedom of expression.⁷ The principles explicitly recognise freedom of information as a fundamental right, which includes the right to access information held by public bodies:

2. Every person has the right to seek and receive information, express opinions and disseminate them freely. No one may restrict or deny these rights.
3. The authorities must be compelled by law to make available in a timely and reasonable manner the information generated by the public sector....

Although the Declaration of Chapultepec originally had no formal legal status, as Dr Santiago Canton, the OAS Special Rapporteur for Freedom of Expression, has noted, it “is receiving growing recognition among all social sectors of our hemisphere and is becoming a major point of reference in the area of freedom of expression.”⁸ To date, the Heads of State or Governments of 22 countries in the Americas, including Mexico,⁹ as well as numerous other prominent persons, have signed the Declaration.¹⁰

The Special Rapporteur has frequently recognised that freedom of information is a fundamental right, which includes the right to access information held by the State. In his 1999 Annual Report to the Commission, for example, he stated:

The right to access to official information is one of the cornerstones of representative democracy. In a representative system of government, the representatives should respond to the people who entrusted them with their representation and the authority to make decisions on public matters. It is to the individual who delegated the administration of public affairs to his or her representatives that belongs the right to information. Information that the State uses and produces with taxpayer money.¹¹

In October 2000, the Commission approved the Inter-American Declaration of Principles on Freedom of Expression,¹² which is the most comprehensive official

⁶ 26 November 1999.

⁷ Mexico City, 11 March 1994.

⁸ *Annual Report of the Inter-American Commission on Human Rights 1998, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter III.*

⁹ Signed by President Carlos Salinas de Gortari on 14 March 1994.

¹⁰ The countries are Argentina, Bolivia, Belize, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Puerto Rico, Uruguay, and the USA.

¹¹ Note 29 above, at 24.

¹² 108th Regular Session, 19 October 2000.

document to date on freedom of information in the Inter-American system. 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.

It is, therefore, clear that in the Inter-American system, freedom of information, including the right to access information held by the State, is a guaranteed human right.

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.¹³

These principles and guidelines were endorsed by the Commonwealth Law Ministers at their May 1999 Meeting¹⁴ and recognised by the Commonwealth Heads of Government Meeting in November 1999.¹⁵

Within Europe, the Steering Committee for Human Rights of the Council of Europe has set up a Group of Specialists on access to official information, which is expected to finalise a draft recommendation on access to information shortly. The draft will then be forwarded via the Steering Committee to the Committee of Ministers for adoption.¹⁶ The European Union has also recently taken steps to give practical legal

¹³ Quoted in *Communiqué*, Meeting of Commonwealth Law Ministers, Port of Spain, 10 May 1999.

¹⁴ *Ibid.*, para. 21.

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

¹⁶ Draft Recommendation No R (...)... of the Committee of Ministers to member States on access to official information, elaborated by the DH-S-AC at its 7th meeting, 28-30 March 2001.

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 2001.¹⁷ 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”.¹⁸

These international developments find their parallel in the passage or preparation of freedom of information legislation in countries in every region of the world. Most States in Europe now have freedom of information legislation on the books with the passage by the United Kingdom, in November 2000, of the Freedom of Information Act, 2000. In Asia, a Freedom of Information Bill is currently before the Indian Parliament and draft legislation has been or is being prepared in Pakistan and Nepal. Freedom of Information laws or codes have been passed in Hong Kong, Japan, the Philippines, South Korea and Thailand and bills are being presented in Taiwan and Indonesia. These developments are now starting to take root in Africa and South America, where a number of draft freedom of information laws have been tabled recently.

In Mexico, freedom of expression and the right to information are protected in the Constitution:¹⁹

Article 6. - The expression of ideas shall not be the subject of any judicial or administrative inquiry, except in the case that it is an attack on public ethics or the rights of third parties, it causes a crime, or it disrupts public law and order; otherwise, the right to information shall be guaranteed by the State.

Article 7. - The freedom to write and publish written material on any subject is inviolable. No law or authority may establish prior censorship or require authors or publishers to put up a guarantee, or restrict freedom of the press, which has no limits beyond respect for privacy, and public peace and ethics. In no case may printers be confiscated as instruments of crime.

Organic laws shall set forth the regulations required to prevent, on the pretext of charges of an offense of the press, the imprisonment of paper manufacturers or sellers, machine operators, or other persons employed by an establishment which has published written material that is the subject of a complaint, unless the liability of such persons has been previously demonstrated.

Analysis of the Draft Law

¹⁷ 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.

¹⁸ *Ibid.*, Article 1(a).

¹⁹ 1917 Constitution of Mexico (as amended).

The Regime of Exceptions

One of the most problematical issues for any freedom of information law is how to balance the need for some exceptions and yet prevent those exceptions from undermining the very purpose of the legislation. To achieve this balance, many countries employ a three-step test for exceptions. This is reflected in the ARTICLE 19 principles as follows:

PRINCIPLE 4. LIMITED SCOPE OF EXCEPTIONS

Exceptions should be clearly and narrowly drawn and subject to strict “harm” and “public interest” tests

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 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.

To meet this test, refusals to disclose information must be based on clear and narrowly drawn aims, listed in the legislation. Furthermore, a refusal is only valid if the disclosure on its own would, or would be likely, to cause substantial harm to the aim. It is not enough that the information simply falls within a designated category. For example, information about the total amount of money spent on the armed forces clearly relates to national security but the disclosure of that information would not of itself harm national security so the figures must be disclosed.

Finally, there will be circumstances where even though a disclosure would cause harm to a protected aim, the overall public interest is served by having the information disclosed. An example is where information which is private discloses serious corruption in government. The public clearly have a right to such information even though it may intrude on the (corrupt) individual’s privacy. A public interest override is a key feature in a freedom of information law as it is nearly impossible to draft exceptions in such a way that the public interest is fully taken into account and so effective realisation of the right to know is dependent on this override.

The draft Federal Act on Access to Public Information does require information to be disclosed unless it relates to a legitimate aim listed in the law. However, several of the exceptions are either too vague or excessively broad. For example, the first exception refers to “national safety” a term that is earlier defined as including “peace” and “social capacity for governing the country”. These are extremely vague concepts which could easily be abused to withhold information. Similarly, one exception refers to “the interests of the nation” and “its development”. Again, these terms are too vague, and also too broad, to ground an exception to the right to information.

The draft law also includes two exceptions which are not subject to a harm test. These are the exceptions covering information “related to national defence and international

cooperation in matters of safety and activities of intelligence bodies of the State” and information that “affects the processes of criminal investigation and which reveals procedural strategies in judicial or administrative processes”. It is only where disclosure would harm these interests, not simply where the information is related to them, that withholding the information may be legitimate.

Unfortunately, none of the exceptions in the draft law are subject to a public interest override.

It is clear from international practice, as reflected in ARTICLE 19’s Principle 4, quoted above, that it is up to public bodies to justify a refusal to disclose information. This flows not only from the need to promote openness but also from the fact that only they are in a position to know why they have refused a request. This is not entirely clear in the draft law.

Recommendations

- The exceptions relating to national safety, the interests of the nation and the development of the nation should be redrafted so that they are both clear and narrowly drawn;
- A requirement of harm should be included in the two exceptions noted above where this is not presently the case;
- All exceptions should be subject to a public interest override; and
- The draft law should make it clear that the onus lies on the public body, at each stage of review, to justify any refusal to disclose information.

Relationship with Other Laws

It is essential that freedom of information laws are not undermined by pre-existing secrecy laws, a serious problem in many countries. A freedom of information law should contain a comprehensive list of legitimate exceptions which should not be extended by secrecy laws, or secrecy provisions in other laws (see ARTICLE 19 Principle 8). The draft Federal Act on Access to Public Information is silent on the question of its relationship with other laws.

Recommendation

- The draft law should state explicitly that in case of conflict, its provisions override those of other laws.

Historical Release

The draft Federal Act on Access to Public Information provides, at Section 13, that the authority holding a record shall set the length of time the record shall be classified and that this term may be extended by an equivalent period, but only once. Furthermore, Section 14 provides that even during this period, information shall be disclosed where the circumstances motivating the original classification no longer pertain.

These provisions are clearly designed to prevent perpetual classification but they do not go far enough. In particular, it would be preferable for the law to set out maximum periods of classification for different types of documents (i.e. historical release), rather than leaving authorities free to decide on this period themselves. The documents would then be declassified at the end of this period, unless the authority can prove that further classification is warranted. Section 14, providing for declassification when the rationale for classification had disappeared, would still apply.

Recommendation

- Section 13 should establish set periods of classification for different types of documents and it should be up to the authority holding the information to justify any extension of these periods.

Promoting Best Practices

The draft Federal Act on Access to Public Information requires public bodies to maintain their information in a way to facilitate access and to actively publish and widely disseminate key categories of information (Section 9). It also gives the National Institute for Access to Public Information a role in terms of promoting best practices, for example in the area of research and promoting understanding of the Act. These are important provisions which underpin the public's right to information.

In some countries, the law provides for the promotion of best practice in the areas of record maintenance and the obligation to publish through the mechanism of codes of practice. All public bodies are required to adhere to codes of practice, for example in relation to record maintenance, which are developed by a central public authority, such as the body responsible for implementation of the freedom of information law. In the United Kingdom, for example, each public body is required to produce a publication scheme, when then has to be approved by the Information Commissioner. To assist in this process, the Information Commissioner produces a model publication scheme.

To address the culture of secrecy within government, it is essential that freedom of information laws give the body responsible for implementation a role both in educating the public and in training public officials (see ARTICLE 19 Principle 3). The draft law does give the National Institute a mandate to undertake seminars to promote understanding of its provisions, but does not explicitly require public bodies to co-operate with the Institute to ensure adequate training of their officials.

Recommendations

- Consideration should be given to the idea of mandatory codes of practice in relation to record maintenance and the obligation to publish;
- Public bodies should be required to co-operate with the National Institute to ensure that officials receive adequate training in relation to the implications of the Act and the means of implementation.

The Fee Structure

Section 17 of the draft Federal Act on Access to Public Information provides that no fees should be charged to those applying for information other than those associated with reproducing documents. Furthermore, fees for reproduction must be proportional to the actual cost.

Consideration should be given to providing free access to information which is personal in nature or which is requested for a public interest purpose (which should be presumed where the request is for purposes of publication).

Recommendation

- Consideration should be given to fee waivers for personal or public interest requests.

Appointments to the National Institute

The draft Federal Act on Access to Public Information provides, at Section 24, that councillors of the National Institute shall be appointed by the Honourable Congress of the Union. Section 25 sets out a number of conditions on councillors, to ensure their independence from political or other influence.

These provisions could be strengthened by requiring the appointments process to be open and by providing for public input. There are various ways of doing this, including publication of a shortlist of nominations and/or allowing civil society organisations to nominate members. Furthermore, the draft law does not explicitly protect councillors from being removed from their positions. The law should set out a limited set of conditions which would justify removal – such as incapacity or failure to attend meetings – and councillors could then challenge any removal against these grounds.

Recommendations

- The draft law should require the process for appointing councillors to the National Institute to be open and to allow for public input.
- Councillors should be protected against removal except for narrow grounds as set out in the law.

Omissions

Appeals

Sections 30 to 42 of the draft Federal Act on Access to Public Information set out in detail the procedures relating to appeals from a refusal to disclose information, first at the level of an internal appeal to the head of the relevant public body and then to the National Institute. The draft law does not provide for a judicial appeal.

There are a number of reasons supporting the inclusion of a full appeal to the courts from the decisions of the National Institute. Courts are well-placed to elaborate the precise meaning of the complex standards involved, particularly in respect of difficult or controversial cases. In addition, the large number of appeals to the National Institute that may be expected under the Act means that responsibility would have to be delegated to a body of subordinate officers. In such circumstances, only the courts can ensure that standards are applied in a consistent, uniform manner. Finally, the value of a body of jurisprudence which is easily accessible to the public should not be underestimated.

Powers of the National Institute

The draft law clearly establishes the structure and role of the National Institute but does not set out explicitly what powers it has, other than ordering public bodies to disclose information and/or comply with the Act. At a minimum, it should have the following powers:

- to carry out full investigations in relation to complaints or breaches of the Act;
- to require public bodies to produce information before them, with a view to assessing whether or not it is legitimate to refuse to disclose it, in camera if necessary;
- to adjust the fees levied by a public body for an information disclosure; and
- to refer cases disclosing possible criminal activity to the courts.

Protection for Good Faith Disclosures and Whistleblowers

To help address the culture of secrecy within government, it is important that civil servants who disclose information pursuant to freedom of information legislation are protected against sanctions – even if they did actually make a mistake and give out

information which was not subject to disclosure – as long as they acted reasonably and in good faith.

In addition, a freedom of information law should provide protection for whistleblowers, those who disclose information on wrongdoing, or which exposes a serious threat to health, safety or the environment, again as long as they acted reasonably and in good faith.

Recommendations

- The law should provide for full judicial appeal from decisions of the National Institute;
- The law should explicitly grant the National Institute the powers noted above; and
- The law should provide protection for those who disclose information pursuant to the Act and to whistleblowers, as long as they acted reasonably and in good faith