



Comments

by

ARTICLE 19
Global Campaign for Free Expression

on the

**'Pre-dictamen' proposals to regulate the right to access to
public information enshrined in the Peruvian Constitution**

London, May 2002

Introduction

On 20 May 2002, ARTICLE 19 received a summary (referred to as 'pre-dictamen') of a draft law proposing to implement the constitutional guarantee of the right of freedom of information in Peru. The pre-dictamen is to be discussed imminently in the Peruvian Congress and ARTICLE 19 is providing these initial comments as an aid to discussion.

The comments below refer only to the pre-dictamen; we have not been able to examine the full text of the draft law. They are based on extensive study and experience of best practice in a large number of countries around the world, as crystallised in two of ARTICLE 19's publications, namely *The Public's Right to Know: Principles on Freedom of Information Legislation*, published in June 1999 and *A Model Freedom of Information Law*, published in July 2001.

Overview

The pre-dictamen contains a number of positive features. It restates the constitutional guarantee of freedom of information, making it clear that in principle all public bodies are under an obligation to disclose information held by them. It also outlines a speedy procedure for access requests, including a

constitutional guarantee of 'habeas data' where an access request is refused, and it provides for certain exceptions and exclusions.

However, the regime as envisaged can certainly be improved upon, and there are a number of important oversights. This is particularly the case for the proposed regime of exclusions and exceptions, which fails to incorporate the requirement that a public body denying access to information must show that disclosure would result in substantial harm. It also includes vague definitions of some categories of exceptions, for example related to 'international deals', and there is a serious loophole allowing for further exceptions to be adopted by other laws. Furthermore, the definition of a 'public entity' is too narrow and there are some important omissions. Public bodies should be under a stronger obligation to publish key categories of information proactively, there should be strong protection for individuals who release information on matters of public interest and the law should ensure independent administrative oversight of the obligations of public bodies.

Exceptions and Exclusions

To a large extent, the exceptions and exclusions regime is at the heart of any freedom of information law. Article 12 of the pre-dictamen outlines the regime of exceptions in the proposed Peruvian law. A number of different categories are provided. First, all information expressly classified as secret for reasons of national security and that is held to guarantee the safety of persons is exempt from the right of access. This restates the exception provided in Article 2.IV of the Constitution. Legitimate reasons must be provided for any security classifications, which are reviewed every five years. The only exception to this exception concerns information relating to the violation of human rights or humanitarian law.

The second exception applies to all information whose public knowledge could affect the interests of the country in negotiations or international deals. The third exception effectively recognises as legitimate any exceptions in other laws. A fourth exception applies to information falling under banking, tax, commercial or technological secrecy. Fifth, all information internal to the administration – such as advice, recommendations or opinions provided as part of the government decision making process – is exempt, but only until a decision has been made on the relevant issue. Sixth, all legal advice and correspondence is exempt. Seventh, any information linked to current investigations into the exercise of the sanctioning power of the public administration is exempt until the investigation is concluded. Eighth, information that has the aim of preventing and repressing crime and whose release could hinder that aim is exempted. Ninth, there is an exception for private information.

With regard to this last category, there is a limited public interest override: Article 12 states that “[a]dministrative bodies are obliged to provide this information if the person requesting it shows in their request that the information is of public interest to collaborate in the explanation of the workings or activities of an administrative entity or of a public official.” A

further override applies to personal information, where the individual in question consents to its release.

Finally, the pre-dictamen points out that the exceptions regime must be interpreted restrictively and that the right to access to information cannot be limited further than is provided by this law.

Comment

The regime envisaged by the pre-dictamen contains some positive elements, such as the public interest override on private information – although this is limited – and the requirement that all exceptions be interpreted narrowly. At the same time, a number of improvements could be made and there are some important oversights.

First, a serious problem is that many exceptions are not subject to a harm test. It is not sufficient that information simply falls within the scope of a protected interest, such as national security; the public body should be required to show that disclosure of the information would cause a substantial harm to that interest.

Second, the recognition of exceptions in other laws is of very serious concern, as it allows Congress to widen the exceptions simply by passing a law exempting further categories of information. As a matter of principle, a freedom of information law should provide a closed regime, including an exhaustive list of all legitimate exceptions. This is particularly the case when, as in Peru, the right to freedom of information is constitutionally guaranteed, lending special status to the implementing law. Moreover, in the present case the exception runs counter to the spirit of the pre-dictamen itself, which states in the final paragraph of Article 12: “The cases established in the present article are the only ones for which the access to state information can be limited. They must be interpreted in a restrictive manner as they refer to a limitation of a fundamental right.”

Similarly, Article 15 provides that existing legal norms governing information will govern access, effectively rendering the access law inferior to existing laws. This is undesirable and should be deleted from the law.

Third, the public interest override applies only to private information relating to the workings or activities of a public official or entity. This is too narrow; the override should apply whenever the public interest in disclosure outweighs the protected interest, regardless of the type of information or the nature of the public interest in question.

Fourth, the exception for ‘material whose public knowledge could affect the interests of the country in negotiations or international deals’ is very vague and broadly stated, particularly in the absence of a harm requirement. It could lead to the suppression of important information, for example showing mismanagement or corruption in government.

Recommendations:

- The law should incorporate a harm test to all exceptions, requiring public bodies to justify denial of access by showing that disclosure would cause a substantial harm to one of the legitimate aims.
- The law should provide a 'closed regime' and other laws should not be permitted to extend the regime of exceptions in the access law.
- The public interest override should apply whenever the public interest in disclosure outweighs the harm to the protected interest.
- The exception relating to information that might harm the government in negotiations or international deals should either be tightened to refer to intergovernmental relations, or be removed.

Omissions

The pre-dictamen fails to address two important issues related to freedom of information: protection for 'whistleblowers' and an independent administrative appeals mechanism.

Whistleblowers

All individuals, including both public and private sector employees, should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing. "Wrongdoing" in this context includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body. It also includes a serious threat to health, safety or the environment, whether linked to individual wrongdoing or not. Such 'whistleblowers' should benefit from protection as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing. The protection should apply even where disclosure would otherwise be in breach of a legal or employment requirement.

The "public interest" in this context would include situations where the benefits of disclosure outweigh the harm, or where an alternative means of releasing the information is necessary to protect a key interest. This would apply, for example, in situations where whistleblowers need protection from retaliation, where the problem is unlikely to be resolved through formal mechanisms, where there is an exceptionally serious reason for releasing the information, such as an imminent threat to public health or safety, or where there is a risk that evidence of wrongdoing will otherwise be concealed or destroyed.

The law should also explicitly protect public officials who mistakenly, but reasonably and in good faith, release information in response to a request. Officials will inevitably make mistakes but, given the prevailing culture of secrecy, it is important to ensure that those who err by being excessively open are not penalised.

Independent review and oversight

Article 11 of the pre-dictamen provides that the 'habeas data' procedure is available to anyone whose request for access has been denied. This is a judicial procedure, guaranteed under Article 200.III of the Constitution and implementing legislation. While we have not had the opportunity to examine this procedure in detail, we stress that judicial supervision alone is insufficient to guarantee the implementation of the right to access information. Judicial proceedings are often expensive, as well as slow and cumbersome, and therefore inaccessible to many people. Individuals whose request for information has been denied should be able to appeal to an administrative body, such as a specially established information commissioner or ombudsman, with the power independently to review the request. Appeals should be expeditious and low-cost and the administrative body should also have wider powers to supervise and promote compliance with the law. For example, if a public body frequently fails to respond to requests within the established time limits, the supervisory body should have the power to investigate and, if necessary, to impose sanctions.

Recommendations:

- The law should provide protection to whistleblowers and those who mistakenly but reasonably and in good faith release information pursuant to a request.
- The law should ensure that individuals whose requests for information have been refused can appeal against that refusal to an independent administrative body.

Miscellaneous

Finally, there are a number of other ways in which the law could be improved.

Article 3 of the pre-dictamen provides that only those bodies mentioned in Article 1 of the Law of General Administrative Procedures fall under the constitutional obligation to release information. While we have not had the opportunity to examine this Law, we would like to stress that all public bodies should be under an obligation to disclose information. Under international law this applies to any entity performing a public function including, for example, a private body exercising a public function, such as a security firm with a contract to run prisons. Article 2 of the Constitution specifically refers to "any public entity". This should not be narrowed down under the pre-dictamen.

Similarly, Article 5 requires only those bodies that are integrated in the public administration to make available information over the Internet. This obligation should apply to all public bodies. Moreover, all public bodies should be under a strong obligation to publish and disseminate widely documents of significant public interest, subject only to reasonable limits based on resources and capacity. As a minimum, this should extend to the following categories of information:

- operational information about how the public body functions, including costs, objectives, audited accounts, standards, achievements and so on, particularly where the body provides direct services to the public;

- information on any requests, complaints or other direct actions which members of the public may take in relation to the public body;
- guidance on processes by which members of the public may provide input into major policy or legislative proposals;
- the types of information which the body holds and the form in which this information is held; and
- the content of any decision or policy affecting the public, along with reasons for the decision and background material of importance in framing the decision.

As far as possible, this information should be available over the Internet as well as through traditional means of publication.

Article 8 provides a parallel route for accessing information, by allowing requesters direct access to information during office hours. This is a positive feature. However, the pre-dictamen should make it clear that persons who have made use of this route should not be excluded from using the written procedure established under Article 7.

Article 11 guarantees the right of habeas data, as provided under Article 200, number 3, of the Constitution and the implementing rules. We have not had the opportunity to examine the implementing rules, so we cannot comment on this in detail. We would, however, like to point out that in cases such as these, the burden of proof should rest firmly with the public body to justify its denial. All proceedings should take place in accordance with the fair trial guarantees set out in Article 14 of the International Covenant on Civil and Political Rights.

Finally, the second of the ‘complementary dispositions’ at the end of the pre-dictamen states that public bodies that have already approved procedures for access to information should bring them into line with the provisions of the present law. While this is a reasonable requirement, ARTICLE 19 recommends that public bodies that wish to operate a more liberal regime than envisaged by the pre-dictamen should be allowed to do so.

Recommendations:

- The law should apply to all bodies that perform a public function.
- All public bodies should make use of the Internet to make information available, including through the publication of indexes and registers listing the kind of information held by a particular body.
- Public bodies should be under an obligation pro-actively to publish key categories of information.
- Use of the direct access procedure should not preclude later use of the written procedure, and vice versa.
- All procedures for habeas data should comply with the fair trial requirements stated in Article 14 ICCPR.
- The law should allow public bodies that wish to operate a more liberal regime than envisaged by the pre-dictamen should be allowed to do so.

