

Comments on Draft Philippine FOI Law

By ARTICLE 19

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The following comments on the Philippine freedom of information law are based on a draft of An Act Implementing the Right of Access to Information on Matters of Public Concern Guaranteed under Section Seven, Article III of the 1987 Constitution and For Other Purposes (draft Act) provided to ARTICLE 19 by the Philippine Access to Information Network (ATIN) in October 2003. They are intended to assist the working group preparing a draft of the Act which is consistent with the highest international and comparative standards.

Title

The Title appears essentially to limit the scope of the law to that of the corresponding constitutional provision, which applies only to information on matters of public concern. As noted in our comments of July 2002, this is an unfortunate limitation and there would appear to be no reason why a law on access to information could not go beyond the scope of the constitutional provision. We therefore recommend that the title be amended to make it clear that the law implements both the constitutional right and the larger right recognised under international law and under many formulations of the right to freedom of expression (see also comments relating to sections 2 and 4).

Section 2

This section sets out a statement of State policy in this area, which is restricted to the right to access information on matters of public concern. As with the title and scope of information (section 4), we recommend that this be phrased more broadly.

Section 3

This section contains a broad formulation of the bodies covered by the obligations under the draft Act. Consideration could be given to adding statutory bodies (some of which may not be covered by the present formulation). Consideration could also be given to adding private bodies which carry out public functions.

Section 4

This section sets out the scope of the law in relation to information covered. It both provides a list of specific types of information and a catch-all for other information imbued with public interest. The first part of the section actually includes both forms of recording information – tapes, microfilm, videos, etc. – and specific types of information – statements of policy, final opinions, orders, etc. – and it is thus a bit unclear what the precise ambit of the law is in relation to information. We reiterate our view that the draft Act should cover all information held by public bodies, regardless of whether or not this can be said to be of public interest.

Section 5

This section deals with exceptions (we prefer this term to exemptions as the latter implies the right of access is more of a privilege than a right). In our view, the exceptions regime in a freedom of information law should include all legitimate

grounds for refusing access to information and, as a result, it should not be permitted to be expanded by other laws.

This section still fails to include some important grounds for refusing to disclose information including legally privileged information, information provided on a confidential basis the disclosure of which would harm the commercial interests of the provider or reveal a trade secret and information the disclosure of which would harm a public economic interest, such as management of the economy or the commercial interests of a public body. On the other hand, paragraph (e) of this section allows it to be expanded by other laws. We recommend that this section be expanded to include all legitimate grounds for refusing to disclose information but that, at the same time, it effectively repeal other laws, to the extent that they are inconsistent with its provisions. Allowing other laws to expand the scope of secrecy is, in our view, a serious problem with a regime of exceptions, although it is also true that in most (but not all) countries existing laws are left in place.

Another problem with the regime of exceptions is that there is no provision for a public interest override, whereby the information should still be disclosed where the overall public interest would be served by this. We recommend that a public interest override be included in the draft Act.

Finally, the provision in the law we analysed in July 2002 for a review of declassification after 5 years and automatic termination of classification after 10 years has been removed from the draft Act. Although we did recommend some changes to that provision, it is a positive measure to ensure that information does not remain classified for long periods of time and we recommend that consideration be given to including it in the draft Act.

Paragraph (b)(1)

This paragraph allows access to be refused where disclosure of the information would ‘unduly interfere with’ military operations and law enforcement. It is not entirely clear what this standard would imply, but it seems likely to be lower than a harm test *per se*, inasmuch as inconvenience, in addition to harm, would be included. We recommend that the test in this paragraph be replaced by one based on the idea of a likelihood of harm to the protected interests.

Paragraph (c)

This paragraph excludes from the obligation of disclosure all documents ‘obtained by any committee of the two Houses of Congress’. This is a very broad class exception (i.e. not linked to any harm), far broader than the exception relating to cabinet that is found in some laws (which we also question). It is sure to include much information the disclosure of would not be likely to cause any harm at all and it is not clear why it was deemed necessary. We recommend that this provision either be removed from the draft entirely or that it be significantly narrowed, preferably through the introduction of a harm test.

Section 6

This section provides that a request for information shall be responded to within 2 working days or such other reasonable period of time that may be agreed by the parties. In our view 2 days is an unreasonably short period of time to comply with requests. It

is preferable to set out an achievable time limit in the law as otherwise, public bodies will be in constant breach of the law leading to an undermining of respect for it. We recommend that the time limit for responding to requests be lengthened to at least 10 days. On the other hand, this section allows for extension of the time limit, among other things, to ‘consider fortuitous events or other events from force majeure, or other analogous cases.’ This is a vague and broad formulation and we question whether it is necessary. We recommend that this provision be removed from the draft Act.

This section also provides for the levying of reasonable fees for the cost of reproduction of the information. This is supplemented by section 10(e), which provides for the promulgation of a schedule of fees. We recommend that these two provisions be explicitly linked. Furthermore, consideration might be given to providing for lower fees for certain requests, such as requests for personal information or requests in the public interest.

Section 9

This section provides for penalties of imprisonment for denying access to information ‘without a valid ground’. We support the idea of penalties in such cases, but only where the denial was done with the explicit intention of preventing access to information. Also, imprisonment is an extremely harsh penalty for such a wrong. The experience in other countries shows that penalties of this sort are rarely imposed. We recommend that less stringent penalties, such as a fine, also be provided for in such cases.

Omissions

Information Commissioner

The draft Act provides for oversight by the Office of the Ombudsman. In our view, an administrative oversight body is essential to the success of a freedom of information law and this is supported by the experience in other countries. The South African law, for example, failed to provide for such a body and campaigners there are now trying to have this remedied through amendments to the law. Such bodies play a key role both in terms of an appeals mechanism (being far more accessible and rapid than the courts) and in terms of promotional measures. While we welcome the inclusion of the Ombudsman as an administrative appeal, we note that the oversight body should also play a promotional role for the law. We therefore recommend either that an oversight body specifically for the freedom of information system be provided for in the draft Act or that the Ombudsman be directed to establish a specific branch dealing with access to information which also has a positive promotional role under the law.

Duty to Publish

The draft Act fails to impose a positive duty to publish information, even in the absence of a request, on public bodies. In our view, this is an important part of an open information regime and we strongly recommend that a obligation of this sort be added to the draft Act. The ARTICLE 19 Model Law, for example, requires public bodies to actively publish the following information:

- (a) a description of its structure, functions, duties and finances;
- (b) relevant details concerning any services it provides directly to members of the public;

- (c) any direct request or complaints mechanisms available to members of the public regarding acts or a failure to act by that body, along with a summary of any requests, complaints or other direct actions by members of the public and that body's response;
- (d) a simple guide containing adequate information about its record-keeping systems, the types and forms of information it holds, the categories of information it publishes and the procedure to be followed in making a request for information;
- (e) a description of the powers and duties of its senior officers, and the procedure it follows in making decisions;
- (f) any regulations, policies, rules, guides or manuals regarding the discharge by that body of its functions;
- (g) the content of all decisions and/or policies it has adopted which affect the public, along with the reasons for them, any authoritative interpretations of them, and any important background material; and
- (h) any mechanisms or procedures by which members of the public may make representations or otherwise influence the formulation of policy or the exercise of powers by that body.

Form of Access

As with the draft we analysed in July 2002, the draft Act does not provide for requesters to specify what form of access to the information in question they would prefer (this might include, for example, inspection of the record, a paper copy, an electronic copy, and so on). We recommend that such a provision be added to the draft Act.

Record Maintenance

Proper record maintenance is essential to the success in practice of a freedom of information law. If public bodies cannot locate records, they will be unable to provide information to requesters. The draft Act fails to make any provision for record maintenance. We recommend that a system be put in place whereby some central body – for example, the Minister of Justice – sets standards for record maintenance from time-to-time and then these standards are monitored by another, independent body – for example, the Information Commissioner.

Protected Disclosures

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. 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. We recommend that both sorts of protection are provided for in the draft Act.

Other Promotional Measures

A number of other promotional measures might be considered. Many laws provide for the appointment by public bodies of information officers, with overall responsibility for ensuring that the public body fulfils its obligations under the law and to provide a central point of contact for requesters. Such officers can help to promote

implementation of the law and we recommend that consideration be given to requiring public bodies to appoint these officers.

The ARTICLE 19 Model Law provides for the publication and wide dissemination of a guide to using the Act by the Information Commissioner. This can be useful in informing the public of their rights under the law and in assisting potential requesters. We recommend that consideration be given to providing for the publication of a guide to using the law.

Most freedom of information laws include some reporting obligations. Public bodies should be required to report on their activities in implementing the law, either to the Information Commissioner or to the responsible minister. Such reports should include detailed information about the number of requests and how they have been dealt with, including appeals, measures taken to promote better record keeping, information actively published and so on. The Information Commissioner (or responsible minister), in turn, should be required to report on an annual basis to the Congress on overall progress under the law, including recommendations. This ensures that Congress has a chance to consider the system at least annually. We recommend that consideration be given to providing for the dual reporting system described.

We also recommend that consideration be given to including provisions in the law relating to training of public officials. Such training is essential for implementation of the law in practice. At a minimum, the administrative oversight body should be given a role in relationship to such training and public bodies should be required to report on measures taken in their annual reports. The law could also set minimum obligations for public bodies regarding this training.