

# **MEMORANDUM**

**on the**

## **Amendments to the Bulgarian Access to Public Information Act**

**By**

### **ARTICLE 19 Global Campaign for Free Expression**

**London**

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#### ***Introduction***

The Bulgarian government is currently considering a number of amendments to the Access to Public Information Act (APIA). ARTICLE 19 welcomes the decision to amend the current law to ensure that it is more fully in compliance with international standards relating to freedom of information. The amendments are generally very positive and, if adopted, would greatly improve the current law. At the same time, the amendments fail to address a number of problems and omissions in the current law. We urge the Bulgarian government to ensure that these amendments are adopted and, at the same time, to take advantage of this opportunity to bring the law fully into line with international standards.

This Memorandum provides an analysis of the draft amendments, noting both positive features as well as setting out a number of ARTICLE 19's key concerns. It supplements an earlier ARTICLE 19 Memorandum of July 1999 analysing a draft of the existing law. It also provides a number of recommendations to address our concerns. The analysis and recommendations are based on international and comparative practice in this area, as set out in the ARTICLE 19 publication, *The Public's Right to Know: Principles on Freedom of Information Legislation*.<sup>1</sup>

Positive features of the amendments include, in particular, the addition of an administrative appeal procedure, the lifting of the legal obligation on the media, including the private media, to provide information, and the expansion of the definition of public information.

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<sup>1</sup> (London: June 1999).

Key problems include a number of confusing provisions, the excessive regime of exceptions, the lack of an obligation to publish key categories of information and the lack of protection for whistleblowers.

## ***International and Constitutional Obligations***

Bulgaria is a party to both the International Covenant on Civil and Political Rights and the European Convention on Human Rights and Fundamental Freedoms, both of which protect freedom of expression, including freedom of information. International jurisprudence has consistently emphasised the special importance of freedom of expression in a democratic society. For example, in a landmark case the European Court of Human Rights stated:

Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.<sup>2</sup>

Restrictions on expression, not least in relation to the media, are illegitimate except in narrowly drawn circumstances, spelt out in Article 19(3) of the ICCPR and Article 10(2) of the ECHR. The test for restrictions is a strict one, presenting a high standard which any interference must overcome. It requires that any restriction be “prescribed by law”, and be “necessary” for the purpose of safeguarding one of the interests listed in the paragraphs. The test of “necessity” demands that a “pressing social need” be demonstrated, and that restrictions are justified by reference to reasons which are “relevant and sufficient”.<sup>3</sup> In addition, measures must be proportionate to the aim pursued and must not go beyond what is strictly required to satisfy the aim.

The right to freedom of expression is also protected by Article 39(1) of the Bulgarian Constitution, which states:

Everyone shall be entitled to express an opinion or to publicise it through words, written and oral, sound or image, or in any other way.

In addition, freedom of information is protected by Article 41 of the Constitution. This states:

- (1) Everyone shall be entitled to seek, obtain and disseminate information. This right shall not be exercised to the detriment of the rights and reputation of others, or to the detriment of national security, public order, public health and morality.
- (2) Citizens shall be entitled to obtain information from state bodies and agencies on any matter of legitimate interest to them which is not a state or official secret and does not affect the rights of others.

Freedom of information is an important element of the international guarantee of freedom of expression, which includes the right to receive, as well as to impart, information and ideas. There can

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<sup>2</sup> *Handyside v. United Kingdom*, Judgment of 7 December 1976, Application No. 5493/72, 1 EHRR 737, para.49.

<sup>3</sup> See, for example, *Sunday Times v. United Kingdom*, Judgment of 26 April 1979, Application No. 6538/74, 2 EHRR 245, para.62.

be little doubt as to the importance of freedom of information. At its very first session in 1946 the United Nations General Assembly adopted Resolution 59(I), which stated:

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.<sup>4</sup>

Its importance has also been stressed in a number of annual reports of the UN Special Rapporteur on Freedom of Opinion and Expression to the UN Commission on Human Rights,<sup>5</sup> while Freedom of Information Acts have been adopted in almost all mature democracies and many newly democratic countries, such as Hungary, the Czech Republic and Romania.

A proper freedom of information regime is a vital aspect of open government and a fundamental underpinning of democracy. It is only where there is a free flow of information that accountability can be ensured, corruption avoided and citizens' right to know satisfied. Freedom of information is also a crucial prerequisite for sustainable development. Resource management, social initiatives and economic strategies can only be effective if the public is informed and has confidence in its government.

As an aspect of the international guarantee of freedom of expression, freedom of information is commonly understood as comprising a number of different elements. One such element, and an important one in the present context, refers to the right of citizens to access information and records held by public authorities, both through routine government publication of information and through provision for direct access requests.

To comport fully with the right to freedom of information, the state must establish cheap and efficient procedures for the public to access official information, ensure that its record keeping procedures make this possible and ensure that the access regime facilitates the maximum disclosure of information.

## ***Positive Features***

The existing law, at Article 2(1), defines public information as “any information of public significance which relates to the public life in the Republic of Bulgaria, and gives the citizens the opportunity to form an opinion of their own on the activities carried out by the persons obliged under the act”. This is excessively restrictive; an access to information law should apply to all information held by public authorities. The proposed amendment of Article 2(1) represents a clear improvement, providing that “public information shall be any information created, received or kept by the persons having obligations under this Act, which has not been defined as state or another protected secret by law”. However, the second part of the article is problematic, since it means that secrecy laws effectively override the freedom of information law (see below).

The existing law, at Articles 3(2)(3), 18 and 19, places an obligation on the private media, as well as public bodies, to provide information on request. These obligations could be abused for political or

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<sup>4</sup> 14 December 1946.

<sup>5</sup> See his 1997 and 1998 annual reports, UN Doc. E/CN.4/1997/31 and UN Doc. E/CN.4/1998/40.

other illegitimate reasons and also treat the private media as though it were a public body. The amendments propose to delete all of these provisions.

Article 13(2)(1) of the existing law excepts from disclosure information which relates to preparatory work of an administrative body and has no significance in itself. This is an extremely broad and unjustified restriction. The amendments limit its application to the period during which the preparatory work is being done. However, they stop short of subjecting this exception to a harm test, whereby only disclosures which would interfere with the preparatory work would be covered.

ARTICLE 19 very much welcomes the proposed addition of Article 39a, stating:

Decisions to grant access to public information or to refuse to grant access to public information, as well as implicit refusals may be appealed in an administrative procedure before the higher-ranking administrative body under the Administrative Procedure Act.

The practical usefulness of freedom of information legislation is significantly enhanced where an administrative appeals mechanism is available and the lack of such a mechanism is a serious weakness in the existing law.

## ***Areas of Concern***

### **Purpose of the Law**

A freedom of information law should clearly state at the outset its purpose, which should be to guarantee in practice the right of access to publicly-held information. Article 1, however, states that the law regulates the “social relations regarding access to public information”. This provision is imprecise in its meaning and, in particular, does not clearly state the right of access based on the principle of maximum disclosure.

#### **Recommendation:**

- This provision should be reworded to state that the purpose of the Act is to provide for the right of access to information held by public bodies based on the principle of maximum disclosure.

### **Beneficiaries**

Article 4 provides, in different provisions, for Bulgarian citizens, non-citizens and legal entities to enjoy the right to access information held by public bodies. It would be preferable if the law simply provided that everyone enjoyed the right, making it clear that it applies equally to all.

Furthermore, Article 4(1) limits this right, in respect of citizens, where other laws provide “special procedures for searching, receiving and disseminating such information”. There is no reason why a freedom of information act should not apply over and above other disclosure provisions. These other provisions may be more costly, or procedurally more difficult, and it is unfair, as well as illogical, to exclude application of the freedom of information act in those cases.

#### **Recommendation:**

- Article 4 should provide simply that everyone has the right to access information held by public bodies, subject to the provisions of the act.

## Definition of Information

A freedom of information law should provide a clear and broad definition of “information”, which should include all records held by public bodies. The draft law lacks an adequate definition of this term. Instead, Articles 9-11 divide information into two categories, namely “official public information” and “administrative public information”. These terms are not adequately defined but, more problematically, the law establishes different conditions and standards for disclosure of the two types of information (see Articles 12-13).

### Recommendation:

- A clear and broad definition of information should be added to the law to replace Articles 9-11.

## Exceptions

There are a number of problems with the regime of exceptions in the law, which have not been addressed by the amendments. A key problem is that the freedom of information law allows other laws to establish exceptions to disclosure (see below) rather than setting out a comprehensive and exclusive list of exceptions within the law. Exceptions are scattered throughout the law<sup>6</sup> and in some cases are repetitive and potentially inconsistent. The exceptions should be brought together in one section.

It is now widely-recognised that exceptions to the right to access information must meet a strict three-part test as follows:

- (1) the information must relate to a legitimate aim clearly and narrowly defined by the law;
- (2) disclosure must threaten to cause substantial harm to that aim; and
- (3) the harm to the aim must be greater than the public interest in having the information.

The last part of the test means that even if it can be shown that disclosure would cause substantial harm to a legitimate aim, the information should still be disclosed if the benefits of disclosure outweigh the harm.<sup>7</sup>

A number of exceptions fail to meet this test either because they are excessively broadly worded or because they are not subject to a specific harm test. None are subject to a public interest override. For example, Article 5 permits the withholding of information which conflicts with “recognised moral standards”. Article 37(1)(2) excepts information which “affects” a third party’s interests. This is clearly not legitimate; information about corruption would affect third party interests and yet should normally be subject to disclosure. Furthermore, it is not subject to a harm test.

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<sup>6</sup> See, for example Articles 5, 7(1), 9(2) and Section III of Chapter 2.

<sup>7</sup> *The Public’s Right to Know: Principles on Freedom of Information Legislation*, ARTICLE 19 (London: June 1999), Principle 4.

Article 7(2) is of particular concern, stating: “Access to public information may either be full or partial.” This provision is unclear, in particular as regards when partial disclosure might apply. As it stands, this provision might justify the withholding of information without any reason.

**Recommendations:**

- Exceptions should be clear and narrowly drawn, and should be brought together in one section of the law.
- All exceptions should be subject to a specific harm test and a public interest override.
- Article 7(2) should either be removed or be clarified.

## **Primacy of Freedom of Information Legislation**

A law on freedom of information should take precedence over all secrecy legislation and it should not allow other laws to introduce different, potentially more restrictive, standards and procedures for non-disclosure of information. In several places – including Articles 4(1), 7(1) and 9(2) – the law provides that other legislation may provide for exceptions to the right to access information as provided for. Such provisions undermine the right to information. A freedom of information law should set out all grounds for refusing to disclose information and these grounds should not be permitted to be extended by other laws. As a result, the freedom of information law should expressly override secrecy laws.

Furthermore, an effort should be made to ensure that all secrecy laws are brought into line with the freedom of information law as soon as possible.

**Recommendation:**

- The law should provide for a comprehensive set of exceptions to the right of access and should provide that the freedom of information law expressly overrides secrecy laws.

## **Omissions**

There are a number of provisions which are important for an effective freedom of information regime and which have been omitted from the law and not addressed in the proposed amendments. The following section outlines key additions which ARTICLE 19 recommends.

## **Obligation to Publish**

Freedom of information implies not only that public bodies accede to requests for information but also that they publish and disseminate widely documents of significant public interest, subject only to reasonable limits based on resources and capacity.

**Recommendation:**

- The law should establish both a general obligation to publish and also specify key categories of information that must be published.<sup>8</sup>

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<sup>8</sup> *Ibid.*, Principle 2.

## **Maintenance of Records**

In order to protect the integrity and availability of records, the law should both place an obligation on public bodies to keep records in good order and provide for criminal penalties for wilful destruction of records.

### **Recommendations:**

- The law should establish minimum standards regarding the maintenance and preservation of records by public bodies.
- The law should provide for a criminal offence for wilful destruction of records.

## **Promotional and Educational Activities**

It is necessary to undertake a programme of public education to ensure that the public are aware of their rights under the law. Experience from countries which have introduced freedom of information legislation shows that a change in the culture of the civil service from one of secrecy to one of transparency is a slow process which can take up to ten years or more. There are no such provisions in the current law, a particularly serious omission in view of Bulgaria's long history of secrecy within government.

### **Recommendations:**

- The law should require public authorities to undertake an active campaign of public education and dissemination of information about the right of access to information.
- The law should provide for a number of mechanisms to change the culture of secrecy within government, including through training for public officials.

## **Protection for "Whistleblowers"**

Individuals should be protected from legal, administrative or employment-related sanctions for releasing, reasonably and in good faith, information about wrongdoing, such as 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.

### **Recommendation:**

- The law should include protection against sanction for whistleblowers.