MEMORANDUM

on

Transparency International of Costa Rica's Law on Access to Information and the Protection of Privacy

By

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Global Campaign for Free Expression

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I. Introduction

This Memorandum contains an analysis by ARTICLE 19 of the draft Law on Access to Information and the Protection of Privacy. ARTICLE 19 has been asked to comment on this draft Law, which was prepared by the Costa Rican branch of Transparency International. These comments are based on an unofficial English translation of the draft Law.

ARTICLE 19 welcomes the draft Law as it will go a long way to ensuring respect for the right of freedom of information within Costa Rica. There are a number of positive elements in the draft Law, including the provisions on disclosure, openness, the obligation to publish, low cost access to information and the comprehensive process for accessing information. At the same time, the draft Law has a number of weaknesses, including the broadly defined and excessive regime of exceptions and the inadequate system of appeals. There are also some omissions, such as the lack of protection for whistleblowers.

The following analysis of the Costa Rican draft Law is based on two key ARTICLE 19 documents, *The Public's Right to Know: Principles on Freedom of Information*

Legislation[1] and *A Model Freedom of Information Law*.[2] These documents are based on international and best comparative practice concerning freedom of information. Both publications represent broad international consensus on best practice in this area and have been used to analyse freedom of information legislation from countries around the world.

II. International and Constitutional Obligations

The Guarantee of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR),[3] binding on all States as a matter of customary international law, sets out the fundamental 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 regardless of frontiers.

The *International Covenant on Civil and Political Rights* (ICCPR),[4] a formally binding legal treaty ratified by Costa Rica in November 1968, guarantees the right to freedom of opinion and expression at Article 19, in terms very similar to the UDHR.

By ratifying the ICCPR, State parties agree to refrain from interfering with the rights protected therein, including the right to freedom of expression. However, the ICCPR also places an obligation on States to take positive steps to ensure that key rights, including freedom of expression and access to information, are respected. Pursuant to Article 2 of the ICCPR, States must "adopt such legislative or other measures as may be necessary to give effect to the rights recognized by the Covenant." This means that States must create an environment in which a diverse, vigorous and independent media can flourish, and provide effective guarantees for freedom of information, thereby satisfying the public's right to know.

Freedom of expression is also guaranteed by the *American Convention on Human Rights*,[5] which Costa Rica ratified in March 1970. The right to freedom of expression is guaranteed at Article 13(1) of the American Convention, which states:

> Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

[1] (London: June 1999).
[2] (London: July 2001).
[3] UN General Assembly Resolution 217A(III) of 10 December 1948.
[4] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.
[5] O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, 18 July 1978.

Freedom of information, including the right to access information held by public authorities, is a core element of the international guarantee of freedom of expression. There is little doubt as to the importance of freedom of information. The United Nations General Assembly, at its very first session in 1946, adopted Resolution 59(I), which states:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.[6]

The right to freedom of information as an aspect of freedom of expression has been recognised by the UN. The UN Special Rapporteur on Freedom of Opinion and Expression has provided extensive commentary on this right in his Annual Reports to the UN Commission on Human Rights. In 1997, he stated: "The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large … is to be strongly checked."[7] His commentary on this subject was welcomed by the UN Commission on Human Rights, which called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications."[8] In his 1998 Annual Report, the Special Rapporteur declared that freedom of information includes the right to access information held by the State:

> [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…."[9]

Once again, his views were welcomed by the Commission on Human Rights.[10]

The right to freedom of information has also been explicitly recognised in the Inter-American system. In October 2000, the Inter-American Commission on Human Rights approved the Inter-American Declaration of Principles on Freedom of Expression.[11] The Preamble reaffirms with absolute clarity the right to 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;

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[6] Adopted 14 December 1946.
[7] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1997/31, 4 February 1997.
[8] Resolution 1997/27, 11 April 1997, para. 12(d).
[9] 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.
[10] Resolution 1998/42, 17 April 1998, para. 2.
[11] 108th Regular Session, 19 October 2000.

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:

> 3. 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.
>
> 4. 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.

The recognition of the importance of freedom of expression by the Inter-American system has been echoed in other places around the world. Regional bodies like the Council of Europe[12] and the European Union[13] have also reiterated the importance of the right to information. National freedom of information laws have been adopted in record numbers over the past seven years in a number of countries, some of which include Fiji, India, Israel, Japan, Mexico, Nigeria, Pakistan, Peru, South Africa, South Korea, Thailand, Trinidad and Tobago, and the United Kingdom, as well as most of East and Central Europe. These countries they join a number of other countries which enacted such laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia and Canada. With the adoption of a strong Access to Information and the Protection of Privacy Law, Costa Rica will join a long list of nations which have already taken this important step towards guaranteeing freedom of information.

Constitutional Guarantees

The 1949 Constitution of Costa Rica[14] contains a number of provisions that deal directly with freedom of expression and freedom of information. Articles 28 and 29 both address the right to freedom of expression and information, while Article 30 specifically addresses the right of access to information.

The expression of opinions is protected under Article 28, which states:

> No one may be disturbed or persecuted for the expression of his opinions or for any act which does not infringe the law.
>
> <…>
>
> However, clergymen or secular individuals cannot make political propaganda in any way invoking religious motives or making use of religious beliefs.

[12] Recommendation on Access to Official Documents, R(2000)2, adopted by the Committee of Ministers of the Council of Europe on 21 February 2002.
[13] 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.
[14] As updated to 2001.

Article 29 guarantees the right to freedom of expression as follows:

> Every person may communicate his thoughts verbally or in writing and publish them without previous censorship; but he shall be liable for any abuses committed in the exercise of this right, in such cases and in the manner established by law.

Article 30 refers specifically to right of access to information, stating:

> Free access to administrative departments for purposes of information on matters of public interest is guaranteed.
>
> State secrets are excluded from this provision.

A constitutional provision guaranteeing the right to information is welcome. At the same time, this provision is unduly limited in a number of ways. First, it specifies the guarantee only in relation to 'administrative departments'. The ARTICLE 19 Principles make it clear the law should cover all public bodies, defined as any body which provides a public service. The underlying rationale for access applies to all public bodies. Furthermore, the constitutional guarantee is limited to information "on matters of public interest". Again, the ARTICLE 19 Principles, based on international standards, make it clear that all information should be covered by the right.[15] To limit it in this way allows administrative bodies to make inevitably subjective judgements about what is in the public interest.

The exception relating to State secrets is also problematic. Although there are legitimate reasons for restricting access to certain information, any restrictions should be based on a risk of harm to a limited list of legitimate interests. The constitutional provision should reflect the need for exceptions to be limited in this way.

Recommendations:

- The constitutional guarantee of the right to information should cover all information and all public bodies, and should limit the scope of exceptions to those which cause harm to a legitimate interest.

III. Analysis of the Law of Access to Information and the Protection of Privacy

1. Maximum Disclosure

The principle of maximum disclosure should form the core of any freedom of information policy. This principle establishes a presumption that all information held by public authorities should be available to the public, subject only to narrow exceptions established by law to protect overriding legitimate interests.

[15] *The Public's Right to Know*, note 1, Principle 1.

Article 2 of the draft Law defines information as including:

> …any type of documentation financed by the public purse which serves as the basis of a decision of an administrative nature, as well as the minutes of official meetings.

Article 5 further specifies that records and documents shall include, "all those documents which are preserved or recorded in writing, or by visual or acoustic means or in any other way, whose purpose or objective is public in nature."

These definitions place undue limitations on the definition of information. Article 2 is restricted to documentation financed by the public purse and which serves as the basis for an administrative decision, only part of the information held by public bodies, much of which is provided by private parties or is not used as a basis for decision-making. Article 5 is restricted to documents whose purpose is public in nature. This is a highly subjective notion and is anyway not an appropriate limit on the scope of access.

ARTICLE 19 Principle 1 states:

> … 'information'… should be defined broadly. 'Information' includes all records held by a public body, regardless of the form in which the information is stored (document, tape, electronic recording and so on), its source (whether it was produced by the public body or some other body) and the date of production.[16]

Article 5 further provides:

> Any drafts, working documents, or projects which do not form part of a procedure and which are destroyed after the procedure has been completed… will not be considered to be records and documents.

There is no legitimate reason to exclude information from the ambit of the law in this way. Where necessary, exceptions can provide for the protection of legitimate interests. It is normal for bodies to destroy records, but this should be the subject of clear regulations and procedures, to ensure that it is done appropriately.

On the other hand, the definition of 'Public Administration' in Article 1, which delineates the bodies covered by the obligation to disclose, is both clear and broad. It should, however, be noted that the obligation to disclose information should be limited to the public function of bodies which are public only in part of their work.

Finally, Article 11(d) of the draft Law states that individuals, when requesting information from public authorities, must provide a justification of the reasons why the information is needed. This is contrary to international standards, which provide for a presumption of access with the onus on any body seeking to deny access to prove that it is subject to an exception. It is also open to abuse, as authorities may, upon hearing the reasons for a request, illegitimately seek to deny it.

[16] *Ibid.*

Recommendations:

- A broad definition of 'information' should replace the restrictive definitions provided in Articles 2 and 5 of the draft Law.
- Article 11(d) should be repealed.

2. Obligation to Publish

The draft Law includes a number of articles relating to the obligation to publish, including Articles 10, 24, 25, 27 and 28. Collectively, these provisions provide for a wide range of information to be published. The draft Law fails, however, to require public administrations to publish information specifically pertaining to information requests and complaints.

Article 26 of the draft Law sets out a number of cases where public administrations do not have to publish draft regulations and acts of a general nature. These are, by-and-large, illegitimate. For example, an exception to the obligation to publish acts whenever this may create "confusion on the part of the public" does not correspond to an interest of sufficient importance to warrant restricting the right to information and is, in any case, excessively subjective. Similarly, the exception in favour of the public interest reverses the presumption that even putatively secret information should be disclosed where this is in the public interest. These prohibitions are also excessively vague; any restrictions on freedom of information must be clear and narrow. It may be noted that there is no need for specific exceptions to the obligation to publish, as these should be covered by general exceptions.

Recommendations:

- The obligation to publish should be extended to include information relating to requests for information.
- Article 26 should be deleted.

4. Limited Scope of Exceptions

A number of provisions in the draft Law set out restrictions on the right to freedom of information. Article 3 provides for access to information about administrative procedures in progress, but only "to the full extent permitted by the corresponding regulations". It is not clear what this means in practice, but it could be construed as a restriction on the right of access.

Articles 6 and 7 are the main exceptions provisions, dealing, respectively, with public and private reasons for secrecy. Article 6 includes, among other things, restrictions set out in other laws. Article 21 proposes a general time limit of five years on the classification of information, unless otherwise specified, and after this period, all documents should become public and be subject to full disclosure.

The exercise of freedom of information requires that all individual requests for information from public bodies must be met unless the public body can demonstrate that the information requested falls within the scope of a limited regime of exceptions. One of the most problematic 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.

Under international law, freedom of information, like freedom of expression, may be subject to restrictions, but only where these restrictions can be justified through strict tests of legitimacy and necessity. International and comparative standards, including the ARTICLE 19 principles, have established that a public authority may not refuse to disclose information unless it can show that the information meets a strict 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.[17]

The first part of this test requires that a complete list of the legitimate aims that may justify non-disclosure should be provided within the law, so as to hold public bodies to a limited set of exceptions. The second part of this test requires that the public body demonstrate that disclosure would cause substantial harm to the legitimate aim. The third part of the test requires a balancing exercise to assess whether the harm to the legitimate aim is greater than the public interest in freedom of information (this is often called the public interest override). If the harm to the legitimate aim is greater than the public interest, then the exception is permissible. It is implicit in this test that exceptions to the right to information always be considered on a case-by-case basis.

The provision in Article 6 preserving existing secrecy laws effectively continues the old system of secrecy rather than replacing it with a new, more open system. ARTICLE 19 therefore recommends that freedom of information laws override secrecy laws but, at the same time, provide a comprehensive internal system of exceptions.

A number of the exceptions are worded in excessively vague or broad language. For example, Article 6 exempts information that may affect "the operation of banks or the financial system". There is no specification as to what within the banking and financial system should be kept secret or what interest is being protected. The draft Law fails to specify which specific legitimate interests need secrecy protection.

A serious problem with the draft Law is that most of the exceptions provided for do not require a risk of harm to the protected from disclosure, the second element of the three-part test noted above. Furthermore, only one exception, in favour of personal information, recognises a form of public interest override.

[17] *Ibid.*, Principle 4.

Finally, if a document contains some information that falls within the scope of an exception but also contains information that does not, only that portion of the document that is exempt should be subject to non-disclosure, provided that it is practical to release the remaining portion (called 'severability').

Recommendations:

- Articles 6 and 7 should be reviewed to ensure that all the exceptions are clear, detailed and narrow.
- All exceptions within the draft Law should be subject to a harm test and public interest override.
- The principle of severability should be provided for in the draft Law.

5. Process to Facilitate Access

The Costa Rican draft Law includes a number of excellent provisions on facilitating access to information. Indeed, an entire chapter of the Law is dedicated to 'the procedure for the exercise of the right to information and of access to information', containing clear provisions on how individuals should make requests for information and how the Public Administration is required to respond to these requests.

The following suggestions would further improve this regime. Article 11 provides for requesters to be offered assistance in completing their requests for information. It should be made explicit in this provision that this also applies to cases where individuals cannot provide written requests, for example because they are illiterate or disabled. Article 17 provides for an inquiry office for provision of information via electronic means, but the draft Law does not otherwise require public administrations to appoint information officers. ARTICLE 19 recommends that public bodies be required to appoint such officers, who can serve as a central point for receiving requests for information, for ensuring that the process prescribed by the Law is complied with and generally for promoting best information practices.

One serious omission is that the draft Law fails to provide for an independent administrative body to which refusals to disclose information could be appealed. Article 18 provides for an appeal to the "superior hierarchical authority" of the body which has refused to disclose information, but this is presumably a type of internal appeal (in the sense that the body will normally still be part of the government).

Ideally, there should be three levels of appeal: first to a higher authority within the requested institution, then to an independent administrative body and finally to the courts. An administrative level of appeal is important as it is both quick and less expensive than the formal court system, and it is more effective than an internal, and possibly biased, appeal. Experience in other countries shows that an administrative level of appeal is crucial to the effective implementation of freedom of information legislation. Most democratic countries provide for such an appeal in their freedom of information laws. For example, the recently adopted Mexican Federal Transparency and Access to Public

Government Information Law provides for an independent body, the Federal Institute of Access to Information, to whom appeals may be preferred.

It is not necessary, however, to create a new body to undertake this function, which may be administratively onerous, particularly in a smaller country like Costa Rica. Instead, this function can be allocated to an existing body, such as an Ombudsman or Human Rights Commission. One possibility for Costa Rica is to allocate this task to the well-established office of Ombudsman, *La Defensoría de los Habitantes*.

The draft Law should also provide for an appeal from decisions by the independent administrative body to the courts.

Recommendations:

- It should be clear that Article 11 also covers situations where assistance is required to produce a written request for information.
- The draft Law should require all public administrations to appoint an information officer or to provide for an information office.
- The draft Law should provide for an independent administrative body to hear appeals concerning freedom of information, and for a right of appeal from this body to the courts.

6. Sanctions

Chapter five of the Costa Rican draft Law deals with penal and administrative sanctions concerning access of information provisions. Article 31 provides for sanctions for unauthorised access to information while Article 32 prohibits wilful dissemination of restricted information. Both provisions prescribe a punishment of the loss of liberty from one to three years, while Article 31 additionally offers the option of a fine.

Sanctions for wrongly disclosing information must, like all other restrictions on freedom of information, be proportionate so that they do not have a chilling effect on freedom of information. The Model Law actually protects those who have wrongly disseminated information pursuant to the law, as well as whistleblowers, from sanction as long as they acted reasonably and in good faith (see below). Article 32 is likely to have a chilling effect on the free flow of information, as civil servants will be likely to err in favour of secrecy rather than risk its sanction. At best, a fine should be provided in this case, subject to protection for whistleblowers.

Recommendations:

- Any sanction for the release of information should be proportionate to the harm done; imprisonment is not an appropriate sanction in this context.

7. Protection for Good Faith Disclosures and Whistleblowers

The Costa Rican draft Law does not protect civil servants who disclose restricted information in good faith or individuals who release information considered to be confidential to expose wrongdoing (so-called whistleblowers). These protections can help to ensure that information is disclosed in the public interest and to address the culture of secrecy within government.

Individuals who work within the public administration should be protected from any legal, administrative or employment-related sanctions for releasing information considered to be restricted as long as they acted reasonably and in good faith. This same protection from sanction should cover individuals who release information about wrongdoing, or which exposes a serious threat to health, safety or the environment. Whistleblowers should benefit from protection so long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing.

Recommendation:

- The draft Law should provide protection against sanction to civil servants who mistakenly disclose restricted information and to whistleblowers, as long as they acted reasonably and in good faith.