Memorandum

on the

Lithuanian Draft Law on
The Right to Receive Information

By

ARTICLE 19
The International Centre Against Censorship

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INTRODUCTION

The Lithuanian Parliament is currently considering a draft law on the *Right to Receive Information from the State and Municipal Institutions*. The draft was prepared by a group of experts convened by the Lithuanian Centre for Human Rights and is to be fully debated during the summer session of the Lithuanian Parliament.

ARTICLE 19 welcomes the steps taken by the Lithuanian Centre for Human Rights and the Lithuanian Parliament to combat Lithuania's long established and entrenched culture of official secrecy. The presentation of a draft freedom of information law to Parliament is an encouraging step and the draft law itself contains a number of positive elements. These include short time limits for the resolution of access requests, the provision of a public interest balancing test in the exemption sections, the inclusion of an appeals procedure against refusals to grant access to information, and the obligation of state institutions to publish regular information about their activities and structure.

There are, however, a number of areas in which the draft law could be significantly improved in order to safeguard the public's right to know effectively. The following analysis deals with ARTICLE 19's major concerns and draws upon our recent publication entitled *The Public's Right to Know: Principles on Freedom of Information Legislation*, which sets out principles of international and comparative best practice in relation to freedom of information legislation.

BACKGROUND

Lithuania acceded to the International Covenant on Civil and Political Rights on November 20th 1991 and ratified the European Convention on Human Rights on June 20th 1995. Both Article 10 of the European Convention and

Article 19 of the International Covenant protect freedom of expression in broadly similar terms. Article 10 of the European Convention states:

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.*

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. International jurisprudence has consistently emphasised the special importance of freedom of expression in a democratic society and there can 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(1) which stated:

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

The importance of freedom of information has also been stressed in a number of reports of the UN Special Rapporteur on Freedom of Opinion and Expression,[1] while Freedom of Information Acts have been adopted in almost all mature democracies and many newly democratic countries, such as Hungary.

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 well informed and has confidence in its government.

As an aspect of the international guarantee of freedom of expression, freedom of information is commonly understood to comprise a number of different elements. One significant element refers to the right of citizens to access information 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 the broadest possible range of

[1] See his 1997 and 1998 reports. UN Doc. E/CN.4/1997/31 and UN Doc. E/CN.4/1998/40.

official information and ensure that its record keeping procedures make this possible. The overriding aim of a freedom of information regime should be to provide maximum disclosure of official information in practice.

ANALYSIS OF THE DRAFT LAW

I – General Measures

The first weakness in the draft law is the manner in which it lays out the general provisions regulating access to information.

(i)Definition of "Information" and "Records"

The definition section in Article 2 states that information is "public and private information in the official records of the state and municipal institutions". It further defines an "official record" as "any written, graphic, audiovideotaped, computer readable record or any other document related to the activities of the institution and created in it or received by it".

These definitions are unnecessarily complicated, are confusing and are open to misuse. Firstly, all information held by a public body should, in principle, be subject to disclosure under the draft law. There is no need to differentiate between public and private information nor to restrict access only to documents relating to the activities of the institution. Any information which is legitimately exempt from disclosure will be covered by one of the exemption sections. Secondly, an effective freedom of information regime demands that access be granted to the record containing the information sought, rather than to the information itself. This ensures that misleading information is not provided either deliberately or by mistake, that applicants are satisfied with the information they receive and also provides an incentive for public bodies to manage their record-keeping effectively and efficiently. The distinction between information and official record should accordingly be abolished. "Official record" should be defined as broadly as possible to include all records held by the body in whatever form.

(ii) Definition of State and Municipal Institutions

Article 2(5) of the draft law defines the "State and Municipal Institutions" that are subject to this law.

For the purposes of disclosure of information, the definition of a "public body" to which the draft law is to apply should focus on the type of service provided rather than on formal designations. It should include all branches and levels of government, including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, quasi-autonomous non-governmental organisations, judicial bodies and private bodies which carry out public functions (such as maintaining roads or operating rail lines). The use of vague terms to define these bodies in Article 2(5), such as "[bodies which carry out] certain functions of executive power or of public administration", is inappropriate. The law

should clearly define which types of bodies are to be subject to the obligations of the draft law, ensuring that no public body is completely exempt from its reach.

(iii) Duties of State and Municipal Institutions

Article 3 of the draft law imposes duties on public authorities to publish certain routine information about their activities.

While the imposition of such a responsibility upon public bodies is to be welcomed, the scope of the obligations in Article 3 is too narrow. 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. Public bodies should, as a minimum, be under an obligation to publish the following categories of information:

- Operational information about how the public body functions, including costs, objectives, audited accounts, standards, achievements and so on;
- Information on any requests, complaints or other direct action 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;
- The content of any decision or policy affecting the public, along with the reasons for the decision and background material of importance in framing the decision.

Article 3 should be amended accordingly.

(iv) *Reception of Private Information*

Article 6 states that an applicant may receive private information about him or herself unless this is contrary to other legal provisions.

The article is unnecessary and confusing. Since all information held by a public body should be subject to disclosure, there is no need to repeat this principle specifically in relation to information about an applicant. Such information should be released upon request unless it legitimately falls within one of the exemption sections. The article also makes release under the draft law subject to the requirements of other laws. This is inappropriate. A freedom of information law should ideally cover the field in relation to access to official information. Even if this is not possible, there should be a requirement that other legislation be interpreted in a manner consistent with its provisions. It is vital that the regime of exceptions provided for in the draft law be comprehensive and that other laws not be permitted to extend it.

II – Procedure for Providing Information

(i) *Time Limits*

Article 8 provides for strict deadlines of 14 days within which access requests are to be dealt with by public bodies. While this is to be greatly welcomed, paragraph two of the article provides that the information referred to in Article 3, providing for regular publication of routine information, should be made available within three days. Since this type of information should, however, be published without an access request needing to be made, the paragraph is superfluous.

(ii) *Type of Access*

Article 9 sets out how information is to be released.

Paragraph one establishes that information should be "real, exact, fair and complete". While these are positive aims, it should not be necessary to spell them out since access should be granted to the record itself rather than the information it contains (see above). In order to protect the integrity of official records, the law should provide for sanctions against those who damage, destroy or falsify them.

Paragraph 4 of Article 9 requires the public body to request permission from any individual whose rights or legal interests might be affected by the release of information in the possession of the body. While it may be acceptable in limited circumstances to provide for such a mechanism to protect the legitimately private affairs of individuals, its application should be clearly and exhaustively set out and specifically tied to the appropriate exemption provision dealing with privacy.

Paragraph 5 of Article 9 appears to provide a general exemption to the obligation to disclose information. This is inappropriate. Firstly, any exemptions should be dealt with together, in one article so that they are all subject to the same tests. Secondly, the phrase "violate the rights and legal interests of others" is too vague to constitute a proper exemption to the requirement to disclose official information.

(ii) *Fees*

Article 11 provides that a fee may be required to pay for information which amounts to more than 5 pages and for copies of any official document.

While it may be legitimate to provide for limited charges to deter frivolous requests and to cover some of the costs of the public body. Any charges should not be so high as to deter people from making requests and should, in any event, be spelt out clearly in the legislation or subsidiary and easily accessible enactments.

IV - The Regime of Exemptions

Articles 12 and 13 set out the categories of information which must or may be exempt from disclosure under the draft law.

The most difficult and controversial aspect of any freedom of information law is the regime of exemptions and it is vital that the balance between the public's right to know and other legitimate public interests be carefully considered when setting out such a regime.

As a general rule, all information should be subject to disclosure unless the public body concerned can show that release of the information would satisfy the following three-part test.

- The information relates to one of the legitimate exemptions spelt out in the law;
- Disclosure of the information would cause substantial harm to the interest protected by the exemption;
- The harm to that interest would be greater than the public interest in having the information.

While Article 13 does provide for a weak public interest test, Article 12 has no test whatsoever and neither article establishes the threshold test described above. Their potential application is, accordingly, too wide and could allow for the withholding of information which ought to be released.

Article 12 allows for the withholding of information whose release is prohibited by other laws. As discussed above, this is unacceptable and could render the entire freedom of information regime meaningless. The regime of exemptions in the draft law should exhaustively cover all categories of official information which are not to be disclosed.

While most of the categories of exemption in Articles 12 and 13 are broadly acceptable, it is important that exemptions be spelt out as narrowly and specifically as possible. The use of vague terms such as " Rights and legal interests of other persons" should be avoided in favour of specific categories of information which are to be exempted. Exemptions should be based on the content rather than the type of record concerned and should, where appropriate, be time limited to allow for later release when the interest which the exemption protects is no longer valid.

V – Appeals Procedures

Part V of the draft law sets out the avenues for appeal against the refusal of a public body to grant access to information. Two levels of appeal are provided. One to the head of the public body to which the request has been made, and one further right to the courts in accordance with the "law on the justice of administrative cases".

While the existence of a right of appeal against adverse decisions is to be welcomed, the procedures ought to be strengthened to allow for an effective and independent overview of the functioning of the freedom of information regime and thereby to ensure that the fundamental aim of the law, to satisfy the public's right to know, is achieved.

Ideally, a three-level appeal structure against adverse decisions should be introduced. The first, as is already provided for in Article 14(1), should be an internal appeal to a designated person or body within the public body to whom the request has been made. Secondly, and most importantly, the law should provide for an individual right of appeal to an independent administrative body. This could be an existing body such as an Ombudsman or Human Rights Commission, or a body set up specifically for the purpose. In either case, the independence of the body should be guaranteed, both formally and through the process by which the staff are appointed. In order to ensure independence, such appointments should be made by representative bodies, such as an all-party parliamentary committee and the process should be open and allow for public input and nominations. Individuals appointed to such a body should be required to meet strict standards of professionalism, independence and competence and be subject to strict conflict of interest rules.

The administrative body should have full powers to investigate any appeal, including the ability to compel witness and to require the public body to provide it with any information or record for its consideration, *in camera* if necessary. The administrative body should have the power to dismiss the appeal, to require the public body to disclose the information, to adjust any charges levied by the public body, to fine public bodies for obstructive behaviour and to impose costs on public bodies in relation to appeals.

The third avenue of appeal should be, as provided by Articles 14 and 15, to the courts in accordance with the normal requirements of administrative law.

VI - Omissions

The draft law is missing some key elements that would serve to strengthen access to information and the public's right to know.

(i) Open Meetings

The legislation should enshrine a presumption that all decision-making meetings of governing bodies, such as local government committees, planning and zoning boards, education authorities and elected bodies performing public services are open to the public. In the event that meetings are to be closed, the reasons for closing the meeting must be exposed to the public and open to public debate.

(ii) Promotional Activities

The law should provide for activities promoting freedom of information, both within the civil service itself and throughout the public at large. Such activities would serve to explain the need for this freedom and the acceptable restraints upon it and provide training to civil servants who will be required to come to grips with the new legislation and culture of openness. Incentives should be provided to government departments such as annual reports to parliament, possibly with rewards to those departments whose response to access requests is most in keeping with the letter and spirit of the law.

(iii) Whistleblower Protection

Finally, the law should provide protection for individuals who release information on official wrongdoing – "Whistleblowers".

Individuals should be protected from any legal, administrative or employment-related sanctions for releasing such information. 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. 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. Such protection should apply even where disclosure would otherwise be in breach of a legal or employment requirement.

In some countries, protection for whistleblowers is conditional upon a requirement to release the information to certain individuals or oversight bodies. While this is generally appropriate, protection should also be available, where the public interest demands, in the context of disclosure to other individuals or even to the media. Public interest in this context would include situations where the benefits of disclosure outweigh the harm of disclosure or where alternative release is necessary to protect a key interest. Such key interests include 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.

Recommendations

- Amend Article 2(1) to remove the distinction between public and private "information".
- Amend Article 2(1) & (2) to remove the distinction between "information" and "official record" and to ensure that access is granted to records rather than merely to the information they contain.
- Amend Article 2(2) to ensure that "official record" includes all records in whatever form held by a public body.

- Amend Article 2(5) to define the bodies to be subject to the law more clearly.
- Amend Article 3 to ensure that public bodies are required to publish a broader range of information about their structure and activities.
- Delete Article 6.
- Delete Article 8(2).
- Delete Article 9(1) and replace it with a provision providing sanctions against those who damage, destroy or falsify records of a public body.
- Delete Article 9(4).
- Delete Article 9(5).
- Amend Article 11 to spell out more clearly when and how any fees will be calculated in relation to an access request.
- Amend Articles 12 and 13 to introduce a substantial harm and public interest test to all of the exemptions, to remove vague and overly broad exemptions and to ensure that exemptions may be time-limited where appropriate.
- Amend Article 12 to ensure that other laws are not permitted to extend the range of exceptions to the principle of disclosure set out in this law.
- Amend Part V to establish an independent administrative body to hear appeals against decisions of public bodies in relation to access requests.
- Introduce an Article requiring open meetings for all national and local governing bodies.
- Introduce an Article requiring promotional activities for freedom of information, including incentives for public bodies to deal with access requests in keeping with the letter and spirit of the law.
- Introduce a mechanism to provide protection for “whistleblowers”.