MEMORANDUM

on the draft of the

Law Regarding Access to Public Information

in the

Republic of Romania

by

ARTICLE 19
The Global Campaign for Free Expression

London

May 2001

Introduction

ARTICLE 19, The Global Campaign for Free Expression, has been asked to comment on the draft of the *Law Regarding Access to Public Information* in the Republic of Romania. We commented on a previous draft law in August 2000.[1]

ARTICLE 19 welcomes the draft and regards it as a very positive step to advance freedom of expression and information in the Republic of Romania. We note and commend the fact that the draft is an improvement over the previous draft and has most of the key elements needed in an effective freedom of information law.

There are, however, areas in which the draft law could be improved. Our major concern is that the exemptions section of the law is flawed and has the potential to undermine the public's right to know. The following analysis deals with this and other concerns, and draws upon our 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.

The Republic of Romania's International and Domestic Obligations to Protect of Freedom of Expression and Access to Information

The Republic of Romania is a party to both the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). Article 10 of the ECHR and Article 19 of the ICCPR protect freedom of expression in similar terms. Article 10 of the ECHR 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 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. There can be little doubt as to the importance of freedom of information. During its first session in 1946, the United Nations General Assembly adopted Resolution 59(1) which stated:

[1] ARTICLE 19, *Memorandum on the Draft of the Law on Access to Information of Public Interest*, London, August 2000.

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

Its importance has also been stressed in a number of reports by the UN Special Rapporteur on Freedom of Opinion and Expression, while Freedom of Information Acts have been adopted in almost all mature democracies and many newly democratic countries, including Hungary, the Czech Republic, Latvia, Georgia, and Albania.

International human rights law is incorporated into Romanian law, and, where there is a conflict between the two, has superior status. Indeed, Article 11 of the 1991 Constitution states:

> 1. The Romanian State pledges to fulfil as such and in good faith its obligations as deriving from the treaties it is a party to.
> 2. Treaties ratified by Parliament, according to law, are part of national law.

In addition, Article 20 of the Constitution states:

> 1. Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to.
> 2. Where inconsistencies exist between the covenants and treaties on fundamental human rights Romania is a party to and internal laws, the international regulations shall take precedence.

Freedom of expression and information are also explicitly protected in the Constitution. Article 30 states:

> 1. Freedom of expression, of thoughts, opinions, or beliefs, and freedom of creation, by words, in writing, in pictures, by sounds, or other means of communication in public are inviolable.
> 2. Any censorship shall be prohibited.
>
> …
>
> 4. No publication may be suppressed.
>
> …
>
> 6. Freedom of expression shall not be prejudicial to the dignity, honor, and privacy of person, and the right to one's own image.
> 7. Any defamation of the country and the nation, any instigation to a war of aggression, to national, racial, class or religious hatred, any incitement to discrimination, territorial separatism, or public violence, as well as any obscene conduct contrary to morality shall be prohibited by law.

Article 31 states:

> 1. A person's right to access to information of public interest cannot be restricted.
> 2. The public authorities, according to their competence, shall be bound to provide for correct information of the citizens in public affairs and matters of personal interest.

3. The right to information shall not be prejudicial to the protection of the young or to national security.

…

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 the public's 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 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 a key one in the present context, refers to the right of individuals 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 record-keeping procedures make this possible, and ensure that the access regime facilitates the maximum disclosure of information.

Romania has remarkably strong treaty and constitutional protection for freedom of information. Consequently, legal drafting, which is consistent with Romania's treaty and constitutional obligations, should produce an effective freedom of information law.

Analysis of the Draft Law

Regime of exemptions

Article 12, which sets out the exemptions regime, is the most problematic part of the draft law. Some of the exemption categories are too broad, some lack a harm test, and there is no public interest override. Without a comprehensive harm test and public interest override, public authorities will have wide discretion to deny requests for information, and the underlying objective of the law could be defeated.

The three-part test

A fundamental principle relating to access to information legislation is that all information, in whatever form, held by a public body for any reason must be subject to disclosure. Exemptions to this rule should be narrowly drawn and clearly spelt out in as much detail as possible in one part of the law.

Under international standards, a refusal to disclose information is not justified unless the public authority can show that the information meets a strict three-part test:

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

Legitimate Aims

A complete list of the legitimate aims which may justify non-disclosure should be provided in the law. This list should include only interests which constitute legitimate grounds for refusing to disclose documents and should be limited to matters such as law enforcement, privacy, national security, commercial and other confidentiality, public or individual safety, and the effectiveness and integrity of government decision-making processes.

Exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest. They should be based on the content, rather than the type, of the document. To meet this standard exceptions should, where relevant, be time-limited. For example, the justification for classifying information on the basis of national security may well disappear after a specific national security threat subsides.

Article 12 sets out a list of aims in (a)-(f). Most of the exemption categories are in line with international standards. Sub-paragraph (b), however, is too broad. “Proceedings” of the public authorities or institutions should be narrowed down to “decision-making processes”, and “political interests” of Romania should be narrowed down to “international relations”.

Substantial harm test

It is not sufficient that information simply falls within the scope of a legitimate aim listed in the law. The public body must also show that the information would cause *substantial harm* to that legitimate aim.

Several of the exemption categories in Article 12 have a harm test: sub-paragraph (c) refers to disclosure which “affects the fair competition”; (e) refers to disclosure which “endangers the right of a person to a fair trial” or “endangers the life, health, corporal integrity or a legitimate interest of a person”; and (f) refers to disclosure which “affects the protection of the young or of the environment”. However, Article 12(a) (national defence, public security and order), (b) (proceedings of the public authorities or institutions, and the economic and political interests of Romania) and (d) (personal data about citizens) do not have a harm test. Instead, there is a reference to classification or regulation by other laws. The law on access to information should cover the field in relation to access to publicly-held information, and have one fundamental test for all the exemptions. It should not allow other laws to introduce the fundamental test for certain exemptions. As such, there

should be a harm test incorporated into all of the exemption categories in Article 12.

Overriding public interest

Even if it can be shown that disclosure of the information would cause substantial harm to a legitimate aim, the information should still be disclosed if the *public interest* benefits of disclosure outweigh the harm. In such cases, the harm to the legitimate aim must be weighed against the public interest in having the information made public. For example, certain information may be private in nature but at the same time expose high-level corruption within government. In such cases, the harm to the legitimate aim must be weighed against the public interest in having the information made public. Where the latter is greater, the information should be disclosed.

Article 12 does not have a public interest override. In certain cases, it may be in the public interest to disclose information, even if it causes harm to a legitimate interest. In such cases, the lack of a public interest test in the exemptions section of the law may allow public authorities to withhold information that should be disclosed.

Recommendations:

- The exemption categories in Article 12(b) should be narrowed down to the "decision-making processes of the public authorities or institutions, as well as to the economic interests and international relations of Romania…"
- The exemption categories in Article 12 should all incorporate a substantial harm test.
- The exemption categories in Article 12 should be subject to a public interest override.
- The fundamental test for all the exemption categories should be in the access to information law, not in other laws.

Other Concerns

Who can access information

Although Article 1 of the Draft refers to free and unlimited access of "persons" to any information of public interest, Article 3 refers to free access to public information to any "citizen". The term "citizen" is restrictive and would presumably deny access rights to individuals in Romania, who do not have citizenship, including residents and refugees. Under international standards, every person present in the country has the right to access information.

Recommendation: Article 3 should be amended by replacing the word "citizen" with "person".

Definition of information

“Information” should be defined as broadly as possible in order to cover all the information that a public body holds. Article 2(b), which defines “information of public interest”, is consistent with international standards, but could be expanded to provide more clarity. It would be useful to add the word “source” after the word “form”, in the phrase “irrespective of the information’s form, support or presentation.” This would serve to ensure disclosure of information held by a public body which was produced by another body.

> **Recommendation:** In Article 2(b), “information” should be defined as 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.

Definition of public body

Article 2(a) provides that a public authority or institution is “any authority or public institution, as well as any state-owned enterprise that uses public financial resources and operates on Romanian territory.” Such a definition of a public body is much too narrow; it does not, for example, cover private bodies which undertake public functions, or bodies which operate under a Statutory mandate.

> **Recommendation:** The definition of “public authority or institution” in Article 2(a) should focus on the type of service provided rather than a formal designation, and includes all branches and levels of government, including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quangos (quasi non-governmental organisations), judicial bodies, and private bodies which carry out public functions (such as maintaining road or operating rail lines). Private bodies themselves should also be included if they hold information whose disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health.

Costs

Article 9(1) provides that an applicant will have to pay for any copies made. It should further provide that public bodies cannot charge unreasonably high costs, which may deter potential applicants, and that costs must be low for personal information and public interest requests.

Differing systems have been employed around the world to ensure that costs do not act as a deterrent to requests for information. In some jurisdictions, a two-tier system has been used, involving flat fees for each request, along with graduated fees depending on the actual cost of retrieving and providing information. The latter is waived or significantly reduced for requests for personal information or for requests in the public interest. In some

jurisdictions, higher fees are levied on commercial requests as a means of subsidising public interest requests.

Recommendation: Article 9 should include provisions which make it clear that (1) any cost for gaining access to information cannot be so high as to deter potential applicants, and (2) costs will be low for requests for personal information and requests in the public interest.

Accreditation of journalists

Under Article 18, the public authorities are given powers of accreditation, and can refuse to accredit, or withdraw the accreditation, of some journalists, without restricting the right of media organisations to get accreditation for other journalists.

A system which gives the public authorities an absolute power to accredit journalists may undermine freedom of expression and access to information. The potential for the public authorities to abuse this power by refusing to accredit, or withdrawing the accreditation, of individual journalists who are critical of them, is very high. Although media organisations can then get accreditation for other journalists, a system may be created where only journalists who are sympathetic to the public authorities can obtain and maintain accreditation.

Accreditation powers should be vested in a body which is independent of the public authorities. In many countries, accreditation of journalists is done independently by a professional body of journalists.

Recommendation: Article 18 should be amended to provide that an independent, professional body of journalists will provide accreditation to journalists, and that accreditation can only be refused or withdrawn by that body.

Sanctions

Article 21(1) states that a person who fails to disclose information in accordance with the Draft Law will be liable to a disciplinary punishment. However, there is no mention of either the process for implementing the disciplinary punishment or the range of punishments available. At a minimum it should provide that criminal sanctions will be imposed against individuals who obstruct access to, tamper with or destroy records.

Recommendation: Article 21 should be amended to provide that wilfully obstructing access to, doctoring, or destroying records is a criminal offence.

Appeals

Article 21(2) and (3) and Article 22 provide for the means of redress, where a person is refused access to information. The appeal process provides for a

three-stage appeal, first to the director of the public authority, then to the local court, and finally to the appeal court. This process is in accordance with international standards, but the court system can be complicated and expensive, especially for less-educated and poor individuals.

A better system of accessibility is a three-tier system of appeals, first within the public body, then to an independent administrative body, and finally to the courts. An appeal to an independent administrative body is normally less complicated and costly than an appeal to a court, which facilitates appeals, especially by less-educated and poor individuals. In addition, an administrative body can provide an independent and expert overview of the functioning of the freedom of information law, as well as performing other useful functions, such as public education and the production and submission of annual reports to Parliament.

The body could be one specifically set up for this purpose, or an existing body such as an Ombudsman or a Human Rights Commission. In either case, the independence of the body should be guaranteed, both formally and through the process by which 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 witnesses and 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 the charges levied by the public body, to fine the public body for obstructive behaviour, and to impose costs on public bodies in relation to appeals.

The third level of appeal should be to a court. Both the applicant and the public body should be able to appeal the decision of the administrative body. The court should have full power to review the case on its merits.

Recommendation: The law should provide for an individual right of appeal to an independent administrative body.

Omissions

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

1. Promotional/educational activities

The experience of 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 ten years or

more. As such, the law should provide for promotional and educational activities, both within the civil service and society-at-large, including:

- the training of civil servants on the scope and importance of freedom of information, the procedures for disclosing information, and how to maintain and access records;
- incentives for public bodies which effectively apply the law;
- the submission of an annual report to Parliament on the progress (achievements and problems) implementing and applying the freedom of information law; and
- a public education campaign on the right to access information, the scope of information available, and the manner in which a person's rights may be exercised under the new law;

2. Good record-keeping

The draft law should impose a general requirement for good record-keeping. In order to secure effective access to information, it is essential that public bodies develop systematic methods of record-keeping. Sufficient resources should be allocated to public bodies to ensure the adequacy of public record-keeping.

3. Open meetings

The public has a right to know what the government is doing on its behalf and to participate in the decision-making process. As such, the law should establish a presumption that all meetings of governing bodies are open to the public.

By "governing bodies", we mean bodies which exercise decision-making powers, such as local government committees, planning and zoning boards, education authorities, and elected bodies performing public services. Bodies which only have advisory powers and political committees (meetings of members of the same political party) are not governing bodies.

Notice of meetings is necessary if the public is to have a real opportunity to participate in the meeting of a governing body. Therefore, the law should require that adequate notice of meetings is given sufficiently in advance to allow for attendance. Meetings may be closed, but only in accordance with established procedures and where adequate reasons for closure exist. Any decision to close a meeting should itself be open to the public. The grounds for closure are broader than the list of exceptions to the rule of disclosure, but are not unlimited. Reasons for closure might, in appropriate circumstances, include public health and safety, law enforcement or investigation, employee or personnel matters, privacy, commercial matters, and national security.

4. Protection for whistleblowers

Civil servants and other individuals in the public sector sometimes have access to information which may expose official wrongdoing, but they are

afraid to release it because they may face legal or employment-related sanctions. The law should therefore provide protection for "whistleblowers"—individuals who release information on official 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. 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 wrongdoing. Such protection should apply even where disclosure would otherwise be in breach of a legal or employment obligation.

In some countries, protection for whistleblowers is conditional upon a requirement to release information to certain individuals or oversight bodies. Protection should also be available, where the public interest demands, in the context of disclosure to other individuals or even the media. 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 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.

5. Promotional/educational activities

The experience of 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 ten years or more. As such, the law should provide for promotional and educational activities, both within the civil service and society-at-large, including:

- the training of civil servants on the scope and importance of freedom of information, the procedures for disclosing information, and how to maintain and access records;
- incentives for public bodies which effectively apply the law;
- the submission of an annual report to Parliament on the progress (achievements and problems) implementing and applying the freedom of information law; and
- a public education campaign on the right to access information, the scope of information available, and the manner in which a person's rights may be exercised under the new law.

Recommendation: The law should include provisions for costs, the primacy of freedom of information legislation, open meetings of governing bodies, protection for whistleblowers, and promotional/educational activities, as set out above.