

Comments on Draft General
Comment No. 34 re Article 19
ICCPR:

The Right of Access to Information

submitted by

the Open Society Justice Initiative

January 2011

Written Comments of the Open Society Justice Initiative
on Draft General Comment No. 34,
Paragraphs re Access to Information

Introduction

1. The Open Society Justice Initiative hereby submits our comments on the Committee's draft General Comment on Article 19.¹ Given that several other organizations are also submitting comments, we have limited our comments to paragraphs 18-20, concerning Access to Information, and para. 31, concerning restrictions on that right.
2. The Open Society Justice Initiative, an operational program of the Open Society Foundations, uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. We foster accountability for international crimes, combat racial discrimination and statelessness, support criminal justice reform, address abuses related to national security and counterterrorism, expand freedom of information and expression, and stem corruption linked to the exploitation of natural resources. Our staff are based in Abuja, Amsterdam, Bishkek, Brussels, Budapest, Freetown, The Hague, London, Mexico City, New York, Paris, Phnom Penh, Santo Domingo, and Washington, D.C. The Justice Initiative participates in standard setting activities and files amicus curiae briefs before national and international courts and tribunals on significant questions of law where its expertise may be of assistance. In the area of the right of access to information, the Justice Initiative was one of a handful of independent experts invited to participate in the drafting of the Council of Europe Convention on Access to Official Documents, the Model Inter-American Law and Implementation Guide on Access to Information, and the Model Law and Implementation Guide on Access to Information for Africa. We have submitted written comments on the right of access to information, after having been granted leave to do so, in two cases before the European Court of Human Rights and three cases before the Inter-American Court of Human Rights, and have litigated, or filed amicus briefs in, numerous domestic cases.²
3. We welcome the Committee's elaboration of a General Comment on Article 19, and applaud the Committee's affirmation of a strong right to freedom of expression, including the right of access to information held by public bodies.
4. The changes to the draft text that we propose – set forth in full in Appendix A – are not as demanding as the best law and practice that we have documented in our

¹ Our comments are based on the text of General Comment 34 found here:
<http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.GC.34.CRP.4.doc>

² Information about these cases, including the briefs we submitted, our available on our website:
<http://www.soros.org/initiatives/justice/litigation?keywords=&subject=Freedom+of+Information+%26+Expression&status=&submit.x=8&submit.y=5>.

comparative research.³ Rather, our recommendations reflect broad international consensus concerning the contours of the right as evidenced by declaratory statements of UN and regional bodies, judgments of regional and top national courts, and strong trends in legislation and state practice.

A. Inclusion of the Legislature among Covered Bodies

5. We recommend adding the legislature to the judiciary and other public bodies listed in para. 18 that are subject to the right of access to information (ATI). Inclusion of the legislature may well be implicit in the current text but is sufficiently important to warrant explicit reference.
6. The Principles on Freedom of Information Legislation, developed by the non-governmental organization Article 19 in 1999, endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression, and referred to by the Human Rights Commission in its 2000 resolution on freedom of expression, expressly state: “No public bodies should be completely excluded from the ambit of the law, even if the majority of their functions fall within the zone of exceptions. This applies to all branches of Government (that is, the executive, legislative and judicial branches)”⁴
7. The Model Inter-American Law on Access to Information – drafted by the OAS Department of International Law in cooperation with the Inter-American Juridical Committee, the Special Rapporteurship for Freedom of Expression, the Department of State Modernization and Good Governance, and independent experts, approved by the Permanent Council of the OAS, and welcomed by the OAS General Assembly – applies to all public authorities, including “the executive, legislative and judicial branches at all levels of government.”⁵
8. The Commonwealth also has embraced the notion that access to information laws should extend to the legislature. In March 1999, an Expert Group convened by the Commonwealth Secretariat adopted a number of principles and guidelines, endorsed by the Commonwealth Law Ministers in May 1999, including that the right to

³ Much of this research is posted on our website, www.right2info.org, which collects and analyzes laws, case-law, declaratory statements and progressive practices submitted by more than 70 contributors from around the world.

⁴ The Public’s Right to Know: Principles on Freedom of Information Legislation, Annex II, Report of the Special Rapporteur, Mr. Abid Hussain, on the promotion and protection of the right to freedom of opinion and expression, E/CN.4/2000/63, 18 Jan 2000, hereinafter referred to as “Principles on Freedom of Information Legislation,” Principle 4. See also Principle 1: “[T]he definition of public body . . . should include all branches and levels of Government, including local government, elected bodies, . . . [and others].”

⁵ Art. 3, Model Inter-American Law on Access to Information (document CP/CAJP-2840/10), Appendix to AG/RES. 2607 (XL-O/10), adopted by the OAS General Assembly on June 8, 2010, http://www.oas.org/dil/AG-RES_2607-2010_eng.pdf. For more information about the drafting and status of the Model Law see http://www.oas.org/dil/access_to_information_model_law.htm.

freedom of information should enable every individual “to obtain records and information held by the executive, the legislative and the judicial arms of the state...”⁶ The Freedom of Information Model Bill drafted by the Commonwealth Secretariat expressly extends coverage to the houses of Parliament and their committees.⁷

9. The rationales that call for transparency of the executive apply with equal force to the legislature and judiciary: legislative bodies and judicial authorities perform public functions and are financed with public money; and transparency of these institutions increases public confidence in them, enables the public to reach informed opinions concerning their functioning, fosters efficiency and reduces corruption.
10. In the case of legislative bodies, meetings and their records are open to the public in most countries, but the practice is not consistent concerning the documents and reports on which legislators base their decisions. The fact that a considerable degree of openness already exists in the legislative branch of many if not most countries supports the conclusion that the access to information norm now applies to the legislature as well as to other branches of government.
11. The public has a right of access to legislative information held by legislative bodies in at least 25 countries of Europe,⁸ most Latin American countries, at least 11 countries in Asia and the Pacific (Australia, India, Japan, Nepal, New Zealand, Pakistan, Philippines, South Korea, Tajikistan, Thailand, Uzbekistan), and at least four of the six countries in Africa that have access to information laws (Liberia, South Africa, Uganda, and Zimbabwe).⁹

B. Duty of Public Bodies to Disclose Information; Right of Everyone to Access Information

12. We recommend adding the following sentence to the end of para. 18:

⁶ *Communiqué*, Commonwealth Functional Co-operation Report of the Committee of the Whole (Durban: Commonwealth Heads of Government Meeting, 15 November 1999), para. 20.

⁷ Sec. 4 (definition of public authority), Freedom of Information Model Bill, available at: http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BAC090445-A8AB-490B-8D4B-F110BD2F3AB1%7D_Freedom%20of%20Information.pdf.

⁸ In 20 of those 25 countries, legislative information comes within the scope of the ATI laws: Albania, Armenia, Bosnia & Herzegovina, Bulgaria, Croatia, Finland, Ireland, Latvia, Lithuania, Macedonia, Moldova, Montenegro, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Sweden and the United Kingdom. In at least five other countries – Czech Republic, France, Georgia, Germany and the Netherlands – the public has a right of access to legislative information pursuant to laws other than the ATI law. See Justice Initiative, “Access to Information Held by the Legislation Branch,” <http://www.right2info.org/scope-of-bodies-covered-by-access-to-information/legislative-branch>. For the texts of the laws of these countries, see <http://www.right2info.org/laws>. These laws were compiled by the Justice Initiative with help from experts in more than 70 countries, see <http://www.right2info.org/about/welcome#contributors>.

⁹ For the texts of the laws of these countries, see <http://www.right2info.org/laws>, *id.*

Public bodies hold information not for themselves but as custodians of the public good; they have an obligation to disclose information and every member of the public has a corresponding right to receive information, without the need to prove a special interest in the information.

13. This sentence sets forth the core of the right, and makes clear that a) public bodies have an affirmative duty to make certain key categories of information available to the public, b) the right is not merely a political right held by citizens but is a right of “everyone” or “every member of the public,” and c) the information requester does not need to specify a direct interest in the information.
14. This phrasing of the right was endorsed by the first Special Rapporteur of the UN Human Rights Commission in 2000 in Principle 1 of “Principles on Freedom of Information Legislation,” and was reaffirmed by the UN Rapporteur, together with the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression in their Joint Declaration of 2004, and by those three rapporteurs plus the African Commission on Human and Peoples Rights Special Rapporteur on Freedom of Expression in 2006 and 2010.¹⁰
15. Similarly Principle IV(1) of the African Declaration on Freedom of Expression provides that “Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.”¹¹

1. Duty of Proactive Disclosure.

16. The duty of proactive disclosure, noted in the above-cited documents, has been elaborated in several treaties and international statements of principles, and is reflected in the law and practice of most countries with access to information regimes.¹² Proactive disclosure is one of the most effective means to promote the effective enjoyment of the right of access to information. It also promotes accountability, efficiency, informed public participation, and improved service delivery.

¹⁰ Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OAS Special Rapporteur on Freedom of Expression, the OSCE Representative on Freedom of the Media, and the African Commission on Human Rights Special Rapporteur on Freedom of Expression, December 2006, Section on Openness of National and International Public Bodies, pt 1.

¹¹ Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia.

¹² Helen Darbishire, *Proactive Transparency: The Future of the Right to Information?* World Bank Institute, Access to Information Working Paper Series (2010), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/09/16/000333038_20100916002141/Rendered/PDF/565980WP0Box351roactiveTransparency.pdf. See esp. Chapter 4 on International and Comparative Standards for Disclosure, pp. 19-22.

17. The categories of information that are most commonly required to be published and updated, generally on an annual basis, are the following: institutional information (e.g., internal regulations, functions and powers); organizational information (e.g., names and contact information of the information officer and others with responsibilities to respond to public requests); operational information (policies, activities, reports); decisions and acts; public services information; budget information (including subsidies); information re decision-making and public participation; information about the lists, databases, publications and other information held.¹³

18. The Council of Europe Convention on Access to Official Documents, adopted in 2009, provides:

At its own initiative and where appropriate, a public authority shall take the necessary measures to make public official documents which it holds in the interest of promoting the transparency and efficiency of public administration and to encourage informed participation by the public in matters of general interest.¹⁴ Similarly, the Declaration of Principles on Freedom of Expression in Africa states that “public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest”¹⁵

19. Both the UN Convention Against Corruption¹⁶ and the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters¹⁷ specify classes of information that member states should disclose proactively.

2. The right is a right of everyone.

20. In addition to the above statements of UN and African Union bodies, authoritative bodies of the OAS and the Council of Europe have expressly asserted that the right of access to information extends to everyone. The Inter-American Court of Human Rights affirmed this principle in its landmark 2006 judgment, *Claude Reyes v. Chile*,¹⁸ and the principle is codified in the Model Inter-American Law on Access to Information. The Council of Europe Convention on Access to Official Documents

¹³ *Id.* at pp. 21-22.

¹⁴ Art. 10, Council of Europe Convention on Access to Official Documents, adopted 18 June 2009, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/205.htm>, hereafter referred to as the Council of Europe Convention.

¹⁵ Principle IV(2), point 4, Declaration of Principles on Freedom of Expression in Africa, *supra*.

¹⁶ UN Convention Against Corruption, adopted by UN GA Res 58/4 of 31 Oct 2003.

¹⁷ Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted 25 June 1998, available at <http://www.unece.org/env/pp/documents/cep43e.pdf>.

¹⁸ *Claude Reyes et al v. Chile*, Judgment of 19 September 2006, para. 77: “The Convention protects the right of *all individuals* to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention.” (emphasis added). Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf.

provides that “Each Party shall guarantee the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities.”¹⁹

21. Despite widespread affirmation of this principle by international bodies, it bears repetition in this General Comment because some states have limited the right to citizens. A survey of constitutional provisions and national level laws of 86 countries revealed that some 20 per cent guarantee a right of access to information only to citizens and generally also to legal persons based in the state. Of course, the other side of this disappointing statistic is that nearly 70 per cent of national laws grant the right of access to “everyone” or “all persons,” and 10 percent, to all citizens and residents.²⁰

3. The requester does not need to prove a special interest in the information.

22. The principle that the information requester does not need to assert, let alone prove, any specific interest in the requested information is intrinsic to the status of the right as a component of the right to freedom of expression and has been affirmed by UN bodies and leading regional and national courts and legislatures. The Principles on Freedom of Information Legislation expressly state, in Principle 1, that “The exercise of this right should not require individuals to demonstrate a specific interest in the information.” The Inter-American Court made clear in *Claude Reyes* that the requested information “should be provided without the need to prove direct interest or personal involvement.”²¹ The Council of Europe Convention on Access to Official Documents, which culminated some twenty years of European standard-setting in the field, similarly provides that “an applicant for an official document shall not be obliged to give reasons for having access to the official document.”²² In fact, the Convention provides that state parties may even allow applicants to remain anonymous, “except when disclosure of identity is essential in order to process the request [for information].”²³
23. The recent jurisprudence of the European Court of Human Rights strongly suggests that governments may not condition disclosure of public information upon a showing of personal interest or specific harm resulting to the latter from denial of access. The applicants in both the *Társaság*²⁴ and *Kenedi*²⁵ cases – a human rights watchdog group and a historian, respectively – requested access to the information at issue out of a presumed desire to contribute to societal debate on matters of public interest. Whatever other personal or institutional motives may have been at play, they had no

¹⁹ Art. 2(1), Council of Europe Convention on Access to Official Documents, adopted 18 June 2009.

²⁰ See chart with information concerning the relevant statutory and constitutional provisions of 86 countries, organized by region, attached as Annex B.

²¹ *Claude Reyes*, *supra* note 17, at para. 77.

²² Art. 4.1. Note that the Convention’s definition of an “official document” includes all information held by a public authority, in whatever form it may be recorded.

²³ Art. 4.2. This would apply, for example, to requests for access to one’s own personal data.

²⁴ See *Társaság a Szabadságjogokért v. Hungary*, ECtHR, Judgment of 14 April 2009. *Kenedi v. Hungary*, ECtHR, Judgment of 26 May 2009.

²⁵ *Kenedi v. Hungary*, ECtHR, Judgment of 26 May 2009.

role in the analysis of the Court, which focused rather on the nature of the requested information. By the same token, it cannot be left to the government to decide who in its jurisdiction may access public information or contribute to public debate.

24. Many national access to information laws, especially those passed most recently, similarly specify that the exercise of the right may not be conditioned upon a showing of any specific interest in the requested information. For instance, the Russian Federation's law on access to information, which entered into force in 2010, provides that information users have the right "not to substantiate the necessity of receiving the requested information on the activities of government bodies and bodies of local self-government, provided access to this information is not restricted."²⁶ Liberia's Freedom of Information Act of 2010, the most recent law adopted in Africa, includes the following among law's five fundamental principles: "The right to information is independent of a personal interest in the information, and there is no need whatsoever for a person requesting information to provide a reason or justification for his or her request."²⁷
25. In sum, asking an information requester to specify the reasons for his or her request would be tantamount to, and no less impermissible under Article 19 than, requiring a speaker to justify his or her interest in exercising the right to freedom of expression.

C. Principle of Maximum Disclosure

26. We recommend adding this sentence following the above recommended sentence:

The principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances, where necessary to protect the interests, and pursuant to the requirements, listed in Art 19(3), as discussed in paras. 22 et seq., and where the harm to the listed interest exceeds the public interest in having access to the information.

1. Principle of Maximum Disclosure

27. The principle of maximum disclosure is a core principle which bears express affirmation in order to provide guidance to those bodies entrusted with interpreting and applying the right, including in the face of countervailing interests and rights. The principle of maximum disclosure is set forth in Principle 1 of the Principles on Freedom of Information Legislation, as well as in the 2004, 2006 and 2010 joint

26 Federal Law On Providing Access to Information on the Activities of Government Bodies and Bodies of Local Self-Government, No. 8-FZ, February 9, 2009, entered into force Jan 1, 2010, art. 8.3 (unofficial English translation, available at <http://www.svobodainfo.org/en/node/439>).

²⁷ Sec. 1.4(e), Liberia Freedom of Information Act of 2010, available at <http://www.right2info.org/resources/publications/Liberia%20FOI%20Act%202010.doc>.

declarations of the three and four rapporteurs on freedom of expression and/or media.²⁸

28. The Inter-American Court of Human Rights has similarly observed that “in a democratic society, it is essential that the State authorities are governed by the principle of maximum disclosure, which establishes the presumption that all information is accessible, subject to a limited system of exceptions.”²⁹ Similar statements are included in the Freedom of Expression Principles for Africa,³⁰ and the Council of Europe Convention.³¹

2. Limited Restrictions

29. We suggest that it is worthwhile to include a phrase referencing the norms concerning limited restrictions set forth in paragraphs 22-37 in order to make clear the relevance of those paragraphs to the right of access to information, especially given that the section on “Limitative scope of restrictions on freedom of expression in certain specific areas,” paras. 38-51, does not refer at all to access to information.

3. Principles of Harm and Overriding Public Interest

30. Principles concerning restrictions that are specific to the right of access to information, and accordingly warrant inclusion either in paragraph 18 or else in paras. 22 et seq., concern the requirements that information should be released unless a) disclosure would or would be likely to harm one of the enumerated interests, and b) the harm would outweigh the public interest in disclosure.
31. These two principles – harm and an express weighing of harm vs. public interest – have been embraced by numerous international and national bodies. Principle 4 of the Principles on Freedom of Information Legislation sets forth these principles as follows:

It is not sufficient that information simply fall within the scope of a legitimate aim listed in the law. The public body must also show that the disclosure of the information would cause substantial harm to that legitimate aim. In some cases, disclosure may benefit as well as harm the aim. For example, the exposure of corruption in the military may at first sight appear to weaken national defence but actually, over time, help to eliminate corruption and strengthen the armed forces. For non-disclosure

²⁸ Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OAS Special Rapporteur on Freedom of Expression, the OSCE Representative on Freedom of the Media, Dec. 2004, at <http://www.osce.org/fom/38632>; Joint Declaration of the preceding three mandates and the African Commission on Human Rights Special Rapporteur on Freedom of Expression, Dec. 2006, at <http://www.osce.org/fom/23489>; Joint Declaration 2010, at <http://www.article19.org/pdfs/press/international-special-rapporteurs-for-free-expression-highlight-critical-ten.pdf-2010>.

²⁹ *Claude Reyes*, *supra* note 17, para. 92.

³⁰ Declaration of Principles on FOE in Africa, Principle IV(1).

³¹ COE Convention, *supra* note 14, pream. Paras. 5 and 7.

to be legitimate in such cases, the net effect of disclosure must be to cause substantial harm to the aim. ...

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 benefits of disclosure outweigh the harm. 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 law should provide for disclosure of the information.

32. The harm and public interest principles were affirmed by the four Special Rapporteurs on Freedom of Expression/ Media in their 2006 Joint Declaration.³²
33. The Model Inter-American Law provides that public authorities may not refuse to disclose information “unless the harm to the interest protected by the relevant exemption outweighs the general public interest in disclosure.”³³
34. The Council of Europe Convention, Art 3(2) states that: “Access to information contained in an official document may be refused if its disclosure would or would be likely to harm any of the listed interests, unless there is an overriding public interest in disclosure.”
35. Most ATI laws enacted since the late 1990s include a harm test and public interest override. The UK’s FOI Act 2000 is typical; the UK’s Information Commissioner issued a useful 7-page guidance note explaining the harm and public interest provisions and providing guidance on their application in practice.³⁴

D. Right of Appeal to a Court or Other Independent Body from a Refusal, whether Express or Implied

36. We recommend that the third sentence of para. 20 be changed to read as follows:

Arrangements should be put in place for appeals to a court or other independent and impartial body from refusals, whether express or implied, to provide access to information.

37. Virtually all international and regional bodies that have elaborated standards on the right of access to information have emphasized the importance of establishing a

³² Joint Declaration, 2006, *supra* note 27, section on “Openness of National and International Public Bodies,” pt 3.

³³ Art 43, Model Inter-American Law, *supra* note 5.

³⁴ Information Commissioner’s Office, “Guidance Awareness 3: The Public Interest Test,” Version 3, 1 July 2009,

http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/FEP038_PUBLIC_INTEREST_TEST_V3.ashx.

procedure by which denials of information may be appealed to a body that is impartial and independent of the body that refused the information. Several normative statements, including the Inter-American Juridical Committee Principles and the Model Inter-American Law, assert that the information requester must have an opportunity for both an administrative appeal and an appeal to the courts.³⁵ The four mandates on freedom of expression have emphasized that requesters must at least have recourse to an independent administrative body that has the power to provide redress where warranted.³⁶

38. The Declaration of Principles for Africa, Principle IV(2), point 3, states that “any refusal to disclose information shall be subject to appeal to an independent body and/or the courts ...”
39. The Council of Europe Convention establishes a right to a “review procedure before a court or another independent and impartial body established by law.”³⁷
40. We suggest inclusion of the words “whether express or implied” to modify “refusals” in order to respond to the problem that a high percentage of information requests receive no response at all.³⁸

E. No Sanctions for Good Faith Disclosures

41. We recommend addition of the following sentence to the end of paragraph 20:

A public servant or member of the armed forces with responsibility for responding to information requests should not be punished for releasing information which he or she in good faith believed should be disclosed pursuant to law.

42. We recommend the above sentence as a general principle of international law necessary to give effect to the object and purpose of the right of access to information. The principle is not expressly stated in most national access to information laws, but rather is widely observed in practice. Such a statement is needed, nonetheless, to address the handful of outlier countries that have onerous privacy and other secrecy provisions, sometimes included within a notional access to

³⁵ Principle 8, Inter-American Juridical Committee, Principles on the Right of Access to Information, CJI/RES. 147 (LXXIII-O/08), 7 Aug 2008, states: “Individuals should have the right to appeal against any refusal or obstruction to provide access to information to an administrative jurisdiction. There should also be a right to bring an appeal to the courts against the decisions of this administrative body.” http://www.oas.org/cji/eng/CJI-RES_147_LXXIII-O-08_eng.pdf. This principle is elaborated in the Model Inter-American Law, arts. 45 *et seq.*

³⁶ 2006 Joint Declaration, section on Openness of National and International Public Bodies, pt. 4.

³⁷ Art. 8(1), COE Convention, *supra* note 14.

³⁸ A study coordinated by the Justice Initiative involving the filing of 1,926 requests in 14 countries found that 47 percent of requests met with no response at all, and that even in countries with dedicated access to information laws, the rate of non-responses was 38 percent. *Transparency & Silence: A Survey of Access to Information Laws and Practices in 14 Countries* (2006).

information law, and that use such provisions to punish disclosures of information in the public interest. Clearly, public servants and members of the armed forces who are tasked with implementing laws that include access to information provisions must feel safe from sanction for good faith releases if cultures of secrecy around the world are ever to give way to cultures of transparency and accountability.

43. We also recommend addition of the following sentence, which sets forth a protection for what are often called whistleblowers:

Nor should a public servant or member of the armed forces be punished for the release of information which he or she reasonably believed disclosed wrongdoing or a serious threat to public health, safety or the environment, so long as (a) he or she attempted to draw attention to the issues through internal reporting, or else is able to demonstrate that internal reporting would likely have been ineffective, and (b) any harm from the disclosure was outweighed by the public interest in the information.

44. An increasing number of countries are offering protection to public, private and social sector employees and members of the armed forces who disclose information to which they have access by virtue of their employment in the good faith and reasonable belief that the information reveals wrongdoing or serious threats to public health, safety or the environment.³⁹ These laws are often motivated by an interest to reduce corruption or improve governance. For instance, the UN Convention Against Corruption recommends that countries adopt “appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention”.⁴⁰ The Council of Europe, in 2010, issued a study of whistleblower protection regimes in Europe and other parts of the globe and adopted a set of principles to serve as a guide to its member States for instituting similar legislation.⁴¹ While the trend through 2010 was towards increasing protection of whistleblowers, the disclosure by WikiLeaks of diplomatic cables undeniably has led many countries to consider increased penalties for unauthorized disclosure of publicly-held information.

45. The Human Rights Committee raised concerns about laws that impede public employees from disclosing information of public interest in its concluding observations on the United Kingdom’s 2008 report. The Committee noted its continuing concern “that powers under the Official Secrets Act 1989 have been exercised to frustrate former employees of the Crown from bringing into the public

³⁹ Canada, Ghana, New Zealand, South Africa, Norway, Romania, Uganda, the United Kingdom, and the United States have among the most protective whistleblower protections.

⁴⁰ Article 14, UNCAC, sec. 33. See David Banisar, Whistleblowing: International Standards and Developments (World Bank-Institute for Social Research, UNAM, Washington, DC), http://www.corrupcion.unam.mx/documentos/investigaciones/banisar_paper.pdf.

⁴¹ See Resolution No. 1729 of the Parliamentary Assembly of the Council of Europe, at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1729.htm>.

domain issues of genuine public interest, and ... that disclosures of information are penalized even where they are not harmful to national security.⁴²

46. The language that we recommend finds support in the Declaration of Principles on Freedom of Expression in Africa, which provides that: “no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or which would disclose a serious threat to health, safety or the environment, save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society.”⁴³ Rather than including that principle’s final caveat – which is vague and highly susceptible to abuse – we propose language based on the practice of states that offer effective whistleblower protection.⁴⁴

F. National Security Restrictions should not be used to suppress information of public interest.

47. We suggest making the following changes to the second sentence of para. 31:

Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, such as official secrets and sedition laws, are crafted and applied in a manner that conforms to paragraph 3. It is not compatible with paragraph 3, for instance, to invoke ~~treason~~ such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information of ~~legitimate public interest~~.⁴⁵

These changes are recommended in order to respond to the fact that treason, official secrets, sedition and related laws are often used to suppress information, in violation of the right of access to information, as well as to punish those who disseminate the information. The reasoning for this recommendation is similar to that advanced in support of the previous recommendation.

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⁴² United Kingdom of Great Britain and Northern Ireland 30/07/2008 (CCPR/C/GBR/CO/6).

⁴³ Principle IV(2), point 5.

⁴⁴ See Banisar, Whistleblowing: International Standards, *supra* note 40.

⁴⁵ Concluding observations on the Russian Federation (CCPR/CO/79/RUS); concluding observations on the United Kingdom of Great Britain and Northern Ireland 30/07/2008 (CCPR/C/GBR/CO/6), para. 24.

**ANNEX A: CONSOLIDATED TEXT OF
PROPOSED CHANGES TO PARAS. 18-20, and 31**

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Access to information

18. Article 19, paragraph 2 embraces a general right of access to information held by public bodies. Such information includes all records held by a public body, regardless of the form in which the information is stored, its source and the date of production. Public bodies include all levels of State bodies and organs, including the legislature and judiciary, and with regard to the carrying out of public functions, may include other bodies. Public bodies have an obligation to disclose information, and every member of the public has a corresponding right to receive information, without the need to prove a special interest in the information.⁴⁶ The principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances, where necessary to protect the interests, and pursuant to the requirements, listed in Art 19(3),⁴⁷ as discussed in paras. 22 et seq., and where the harm to the listed interest exceeds the public interest in disclosure.

....

20. To give effect to the right of access to information, States parties should enact the necessary procedures, ~~such as preferably by means of freedom of information legislation.~~⁴⁸ The procedures should provide for the rapid processing of requests for information according to clear rules that are compatible with the Covenant. Arrangements should be put in place for appeals to a court or other independent and impartial body from refusals,

⁴⁶ The Public's Right to Know: Principles on Freedom of Information Legislation, Annex II, Report of the Special Rapporteur, Mr. Abid Hussain, on the promotion and protection of the right to freedom of opinion and expression, E/CN.4/2000/63, 18 Jan 2000, p. 56, Principle 1.

⁴⁷ Id.

⁴⁸ Concluding observations on Azerbaijan (CCPR/C/79/Add.38 (1994)).

whether express or implied, to provide access to information. Fees for the processing of requests for information should not be such as to constitute an unreasonable impediment to access to information. Authorities should provide reasons for any refusal to provide access to information. States parties should make every effort to ensure easy, effective and practical access to state-controlled information in the public domain. A public servant or member of the armed forces with responsibility for responding to information requests should not be punished for releasing information which he or she in good faith believed should be disclosed pursuant to law. Nor should a public servant or member of the armed forces be punished for the release of information which he or she reasonably believed disclosed wrongdoing or a serious threat to public health, safety or the environment, so long as (a) he or she attempted to draw attention to the issues through internal reporting, or else is able to demonstrate that internal reporting would likely have been ineffective, and (b) any harm from the disclosure was outweighed by the public interest in the information.

....

31. Extreme care must be taken by States parties to ensure that treason laws⁴⁹ and similar provisions relating to national security, such as official secrets and sedition laws, are crafted and applied in a manner that conforms to paragraph 3. It is not compatible with paragraph 3, for instance, to invoke reason such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information of legitimate public interest.⁵⁰ Nor is it generally appropriate to include in the remit of a state secrets law such categories of information as those relating to the commercial sector, banking and scientific progress.⁵¹ The Committee has found in one case that a restriction on the issuing of a statement in support of a labour dispute, including for the convening of a national strike was not permissible on the grounds of national security.⁵²

⁴⁹ Concluding observations on Hong Kong (CCPR/C/HKG/CO/2).

⁵⁰ Concluding observations on the Russian Federation (CCPR/CO/79/RUS); concluding observations on the [United Kingdom of Great Britain and Northern Ireland 30/07/2008 \(CCPR/C/GBR/CO/6\)](#), para. 24.

⁵¹ Concluding observations on Uzbekistan (CCPR/CO/71/UZB).

⁵² Jong-Kyu Sohn v. Republic of Korea, No. 518/1992.

Annex B – Who has the right to access information?

COUNTRY	Everyone, Any Person	Only Citizens & Residents	Only Citizens	Others
AFRICA				
Angola	Any person.			
Ethiopia	All persons. ⁱ			
Ghana	All persons. ⁱⁱ			
Liberia	Everyone. ⁱⁱⁱ			
Malawi	Every person. ^{iv}			
Mozambique			All citizens. ^v	
South Africa	The people of South Africa. ^{vi} Any person.			
Uganda			Every citizen. ^{vii}	
Zimbabwe		Any citizen or resident. Unregistered media agencies and foreign gov'ts are excluded. ^{viii}		
Subtotal - 9	6	1	2	0
AMERICAS				
Antigua & Barbuda	Any person. Every person.			
Argentina			Every citizen is entitled to request public information. ^{ix}	
Belize	Every person.			
Brazil	Every person. ^x			
Canada		Citizens, other permanent residents, corporations in Canada.		
Columbia	Individuals. Any person.			
Chile	Everyone. ^{xi}			
Dominican Republic	Any person.			
Ecuador			Citizens.	
Guatemala	Any individual or entity, public or private. ^{xii}			

Honduras	Everyone. ^{xiii}			
Jamaica	Members of the public.			
Mexico	All persons.			
Panama	No information available.			
Paraguay	People's right. Everyone. ^{xiv}			
Peru	All persons. Every individual.			
Trinidad & Tobago	Any person. Members of the public.			
Uruguay	All persons. ^{xv}			
USA	Any person or org, regardless of country of origin or citizenship.			
Subtotal- 19	16	1	2	0
ASIA & PACIFIC				
Australia	The Australian community. Every person has a legally enforceable right to obtain access.			
Bangladesh			Every citizen. ^{xvi}	
China			citizens, legal persons and other organizations ^{xvii}	
India	All Indian citizens.			
Indonesia	Every individual. ^{xviii}			
Japan	Any individual or company, both Japanese and foreign.			
Nepal			Citizens	
New Zealand		Any citizen, resident or company in New Zealand.		
Pakistan			Any citizen.	
Philippines	The people. Citizen. ^{xix}			
South Korea		Citizens. A separate		

		decree allows access by companies with an office in Korea and resident foreigners.		
Tajikistan			Citizens, state bodies, organizations and associations.	
Thailand			Citizens.	
Uzbekistan	Every person.			
Subtotal -14	6	2	6	0
MIDDLE EAST				
Israel		Citizen and residents, & non-citizens re info concerning their rights in Israel.		
Jordan	Everyone. ^{xx}			
Subtotal -2	1	1	0	0
EUROPE				
Albania	Everyone.			
Armenia	Everyone regardless of citizenship or residency.			
Austria	Anyone.			
Azerbaijan	Everyone.			
Belgium	Everyone. Individuals.			
Bosnia & Herzegovina	Any person or legal entity, both in and outside of Bosnia.			
Bulgaria	Any person or legal entity.			
Croatia	Any domestic or foreign physical or legal person.			
Czech Republic	Everybody. Any natural or legal person.			
Denmark	Any person.			
Estonia		Citizens, citizens of		

		other states and stateless persons present in Estonia.		
Finland	Every person.			
France	All persons.			
Georgia	Anyone.			
Germany	Any person.			
Greece	All persons.			
Hungary	Everyone, including people otherwise legally incapable of suing or being sued, is entitled to be a party to an FOI suit. ^{xxi}			
Iceland	Individuals, including non-residents, and legal entities.			
Ireland	The public.			
Italy				Any person who has an interest to safeguard in legally relevant situations.
Kosovo		Any “habitual resident” or person eligible to be a resident of Kosovo or natural or legal persons in Kosovo may request. The institutions may also grant the right to non-residents.		
Latvia	Everyone. Any private person (natural or legal). ^{xxii}			
Liechtenstein	Individuals.			
Lithuania		Citizens, residents and legal persons in Lithuania or other EU and EEA countries.		
Macedonia	Any natural or legal person.			
Moldova	Any person. ^{xxiii}			
Montenegro	Any natural or legal person.			

Netherlands	Any person.			
Norway	Everyone. Any person.			
Poland			A citizen.	
Portugal			Citizens.	
Romania	Any person.			
Russia			Citizens and legal entities. ^{xxiv}	
Serbia	Any person whether Serbian or foreign national, whether or not resident in Serbia. ^{xxv}			
Slovakia	Everybody. Any person or organization.			
Slovenia	Everyone.			
Spain			Spanish citizens.	
Sweden		Every Swedish subject and resident.		
Switzerland	Every person. Any person.			
Turkey			Citizens and legal persons. Foreigners re their interests if the country they are from allows Turkish citizens the similar privilege.	
Ukraine			All citizens of Ukraine, juridical persons and governmental bodies. ^{xxvi}	
United Kingdom	Any person.			
Subtotal-42	31	4	6	1
TOTAL	60	9	16	1
86				

ⁱ Article 12, Law on Mass Media and Freedom, 2008

ⁱⁱ Constitution of Ghana 1992, Article 21(f).

ⁱⁱⁱ Section 1.4 (b), ATI, 2010

^{iv} Constitution of Malawi, 1994, Article 37.

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- ^v Article 74 (1) of the Constitution.
- ^{vi} *Clause v Information Officer of South African Airways* [2006] SCA 163 (RSA). The Supreme Court of Appeal of South Africa. Available at: <http://www.ufs.ac.za/apps/law/appeal/files/2006/4/886Clause.pdf>
- ^{vii} Part II, Article 5, Uganda Law. The Access to Information Act (2005). Acts Supplement to the Uganda Gazette, No. 42 Volume XCVIII, 19 July 2005. Available at: http://www.freedominfo.org/documents/uganda_ati_act_2005.pdf
- ^{viii} Part II, Article 5, Zimbabwe Law No. 5 Chapter 10:27. The Access to Information and Protection of Privacy Amendment Act (2003). Forthcoming amendments available at: <http://www.kubatana.net/docs/legisl/aippaamd030611.pdf>
- ^{ix} Article 6, *Presidential Decree Enacted Freedom of Information in the Executive Branch*. Data Protection Laws website, 30 December 2003. Available at: <http://www.dataprotectionlaws.com.ar/blog/2003/12/30/presidential-decree-enacted-freedom-of-information-in-the-executive-branch/>
- ^x Art. 5(XIV) of Constitution of Brazil.
- ^{xi} Article 10, ATI.
- ^{xii} Article 5, ATI, 2008.
- ^{xiii} Article 1, ATI.
- ^{xiv} Article 28 of the Constitution.
- ^{xv} Section 3, ATI, 2008
- ^{xvi} Section 4, ATI, 2009
- ^{xvii} Art. 1, Regulations on Disclosure of Government Information 2007
- ^{xviii} Article 4, ATI, 2008
- ^{xix} Article III, Section 7, Constitution of 1987.
- ^{xx} Article 7, ATI.
- ^{xxi} Art 21 (4), Hungary Act LXIII of 1982. Protection of Personal Data and the Publicity of Data of Public Interest (1992). Available at: http://www.privacy.org/pi/countries/hungary/hungary_privacy_law_1992.html
- ^{xxii} Section 10(3), Latvia Freedom of Information Act (1998). Available at: <http://www.eps.gov.lv/files/juridiskabaze/IAL.doc>
- ^{xxiii} Moldova ATI Law 2000, Art. 4(1).
- ^{xxiv} Russia ATI Law, Art. 1(3).
- ^{xxv} II.5. Who has the Right to Access Information? “A Guide on the Law of Free Access to Information.” Available at: http://www.poverenik.org.yu/Dokumentacija/eng_22_ldok.pdf
- ^{xxvi} Section 1, Article 9, Ukraine Law No. 2658-XII. Law of Ukraine on Information (1992). Available at: <http://www.archives.gov.ua/Eng/Law-base/Legislations1991-1994.php#03>

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