The Public's Right to Know

Principles on Freedom of Information Legislation

INTERNATIONAL STANDARDS SERIES

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ARTICLE 19

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PREFACE

Information is the oxygen of democracy. If people do not know what is happening in their society, if the actions of those who rule them are hidden, then they cannot take a meaningful part in the affairs of that society. But information is not just a necessity for people – it is an essential part of good government. Bad government needs secrecy to survive. It allows inefficiency, wastefulness and corruption to thrive. As Amartya Sen, the Nobel Prize-winning economist has observed, there has not been a substantial famine in a country with a democratic form of government and a relatively free press. Information allows people to scrutinise the actions of a government and is the basis for proper, informed debate of those actions.

Most governments, however, prefer to conduct their business in secret. In Swahili, one of the words for government means "fierce secret". Even democratic governments would rather conduct the bulk of their business away from the eyes of the public. And governments can always find reasons for maintaining secrecy – the interests of national security, public order and the wider public interest are a few examples. Too often governments treat official information as their property, rather than something which they hold and maintain on behalf of the people.

That is why ARTICLE 19 has produced this set of international principles – to set a standard against which anyone can measure whether domestic laws genuinely permit access to official information. They set out clearly and precisely the ways in which governments can achieve maximum openness, in line with the best international standards and practice.

Principles are important as standards but on their own they are not enough. They need to be used – by campaigners, by lawyers, by elected representatives and by public officials. They need applying in the particular circumstances that face each society, by people who understand their importance and are committed to transparency in government. We publish these principles as a contribution to improving governance and accountability and strengthening democracy across the world.

BACKGROUND

These Principles set out standards for national and international regimes which give effect to the right to freedom of information. They are designed primarily for national legislation on freedom of information or access to official information but are equally applicable to information held by inter-governmental bodies such as the United Nations and the European Union.

The Principles are based on international and regional law and standards, evolving state practice (as reflected, *inter alia*, in national laws and judgments of national courts) and the general principles of law recognised by the community of nations. They are the product of a long process of study, analysis and consultation overseen by ARTICLE 19, drawing on extensive experience and work with partner organisations in many countries around the world.

PRINCIPLE 1. MAXIMUM DISCLOSURE

Freedom of information legislation should be guided by the principle of maximum disclosure

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 (see Principle 4). This principle encapsulates the basic rationale underlying the very concept of freedom of information and ideally it should be provided for in the Constitution to make it clear that access to official information is a basic right. The overriding goal of legislation should be to implement maximum disclosure in practice.

Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information. Everyone present in the territory of the country should benefit from this right. The exercise of this right should not require individuals to demonstrate a specific interest in the information. Where a public authority seeks to deny access to information, it should bear the onus of justifying the refusal at each stage of the proceedings. In other words, the public authority must show that the information which it wishes to withhold comes within the scope of the limited regime of exceptions, as detailed below.

Definitions

Both ‘information’ and ‘public bodies’ should be defined broadly.

'Information' includes all records held by a public body, regardless of the form in which the information is stored (document, tape, electronic recording and so on), its source (whether it was produced by the public body or some other body) and the date of production. The legislation should also apply to records which have been classified, subjecting them to the same test as all other records.

For purposes of disclosure of information, the definition of 'public body' should focus on the type of service provided rather than on formal designations. To this end, 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, non-departmental bodies or quangos (quasi non-governmental organisations), judicial bodies, and private bodies which carry out public functions (such as maintaining roads 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. Inter-governmental organisations should also be subject to freedom of information regimes based on the principles set down in this document.

Destruction of records

To protect the integrity and availability of records, the law should provide that obstruction of access to, or the willful destruction of records is a criminal offence. The law should also establish minimum standards regarding the maintenance and preservation of records by public bodies. Such bodies should be required to allocate sufficient resources and attention to ensuring that public record-keeping is adequate. In addition, to prevent any attempt to doctor or otherwise alter records, the obligation to disclose should apply to records themselves and not just the information they contain.

PRINCIPLE 2. OBLIGATION TO PUBLISH

Public bodies should be under an obligation to publish key information

Freedom of information implies not only that public bodies accede to requests for information but also that they publish and disseminate widely documents of significant public interest, subject only to reasonable limits based on resources and capacity. Which information should be published will depend on the public body concerned. The law should establish both a general obligation to publish and key categories of information that must be published.

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, particularly where the body provides direct services to the public;
- information on any requests, complaints or other direct actions 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; and
- the content of any decision or policy affecting the public, along with reasons for the decision and background material of importance in framing the decision.

PRINCIPLE 3. PROMOTION OF OPEN GOVERNMENT

Public bodies must actively promote open government

Informing the public of their rights and promoting a culture of openness within government are essential if the goals of freedom of information legislation are to be realised. Indeed, experience in various countries shows that a recalcitrant civil service can undermine even the most progressive legislation. Promotional activities are, therefore, an essential component of a freedom of information regime. This is an area where the particular activities will vary from country to country, depending on factors such as the way the civil service is organised, key constraints to the free disclosure of information, literacy levels and the degree of awareness of the general public. The law should require that adequate resources and attention are devoted to the question of promoting the goals of the legislation.

Public Education

As a minimum, the law should make provision for public education and the dissemination of information regarding the right to access information, the scope of information which is available and the manner in which such rights may be exercised. In countries where newspaper distribution or literacy levels are low, the broadcast media are a particularly important vehicle for such dissemination and education. Creative alternatives, such as town meetings or mobile film units, should be explored. Ideally, such activities should be undertaken both by individual public bodies and a specially designated and adequately funded official body – either the one which reviews requests for information, or another body established specifically for this purpose.

Tackling the culture of official secrecy

The law should provide for a number of mechanisms to address the problem of a culture of secrecy within government. These should include a requirement that public bodies provide freedom of information training for their employees. Such training should address the importance and scope of freedom of information, procedural mechanisms for accessing information, how to maintain and access records efficiently, the scope of whistleblower protection, and what sort of information a body is required to publish.

The official body responsible for public education should also play a role in promoting openness within government. Initiatives might include incentives for public bodies that perform well, campaigns to address secrecy problems and communications campaigns encouraging bodies that are improving and criticising those which remain excessively secret. Another possibility is the production of an annual report to Parliament and/or Parliamentary bodies on remaining problems and achievements, which might also include measures taken to improve public access to information, any remaining constraints to the free flow of information which have been identified and measures to be taken in the year ahead.

Public bodies should be encouraged to adopt internal codes on access and openness.

PRINCIPLE 4. LIMITED SCOPE OF EXCEPTIONS

Exceptions should be clearly and narrowly drawn and subject to strict "harm" and "public interest" tests

All individual requests for information from public bodies should be met unless the public body can show that the information falls within the scope of the limited regime of exceptions. A refusal to disclose information is not justified unless the public authority can show that the information meets a strict three-part test.

The three-part test

- the information must relate to a legitimate aim listed in the law;
- disclosure must threaten to cause substantial harm to that aim; and
- the harm to the aim must be greater than the public interest in having the information.

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) as well as to all

functions of government (including, for example, functions of security and defence bodies). Non-disclosure of information must be justified on a case-by-case basis.

Restrictions whose aim is to protect governments from embarrassment or the exposure of wrongdoing can never be justified.

Legitimate aims justifying exceptions

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.

Refusals must meet a substantial harm test

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 the corruption and strengthen the armed forces. For non-disclosure to be legitimate in such cases, the net effect of disclosure must be to cause substantial harm to the aim.

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 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. 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.

PRINCIPLE 5. PROCESSES TO FACILITATE ACCESS

Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available

A process for deciding upon requests for information should be specified at three different levels: within the public body; appeals to an independent administrative body; and appeals to the courts. Where necessary, provision should be made to ensure full access to information for certain groups, for example those who cannot read or write, those who do not speak the language of the record, or those who suffer from disabilities such as blindness.

All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information. Generally, bodies should designate an individual who is responsible for processing such requests and for ensuring compliance with the law.

Public bodies should also be required to assist applicants whose requests relate to published information, or are unclear, excessively broad or otherwise in need of reformulation. On the other hand, public bodies should be able to refuse frivolous or vexatious requests. Public bodies should not have to provide individuals with information that is contained in a publication, but in such cases the body should direct the applicant to the published source.

The law should provide for strict time limits for the processing of requests and require that any refusals be accompanied by substantive written reasons.

Appeals

Wherever practical, provision should be made for an internal appeal to a designated higher authority within the public authority who can review the original decision.

In all cases, the law should provide for an individual right of appeal to an independent administrative body from a refusal by a public body to disclose information. This may be either an existing body, such as an Ombudsman or Human Rights Commission, or one specially established for this purpose. In either case, the body must meet certain standards and have certain powers. Its independence should be guaranteed, both formally and through the process by which the head and/or board is/are appointed.

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, for example regarding 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 procedure by which the administrative body processes appeals over requests for information which have been refused should be designed to operate rapidly and cost as little as is reasonably possible. This ensures that all members of the public can access this procedure and that excessive delays do not undermine the whole purpose of requesting information in the first place.

The administrative body should be granted full powers to investigate any appeal, including the ability to compel witnesses and, importantly, to require the public body to provide it with any information or record for its consideration, *in camera* where necessary and justified.

Upon the conclusion of an investigation, 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 where warranted and/or to impose costs on public bodies in relation to the appeal.

The administrative body should also have the power to refer to the courts cases which disclose evidence of criminal obstruction of access to or willful destruction of records.

Both the applicant and the public body should be able to appeal to the courts against decisions of the administrative body. Such appeals should include full power to review the case on its merits and not be limited to the question of whether the administrative body has acted reasonably. This will ensure that due attention is given to resolving difficult questions and that a consistent approach to freedom of expression issues is promoted.

PRINCIPLE 6. COSTS

Individuals should not be deterred from making requests for information by excessive costs

The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants, given that the whole rationale behind freedom of information laws is to promote open access to information. It is well established that the long-term benefits of openness far exceed the costs. In any case, experience in a number of countries suggests that access costs are not an effective means of offsetting the costs of a freedom of information regime.

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 the information. The latter should be waived or significantly reduced for requests for personal information or for requests in the public interest (which should be presumed where the purpose of the request is connected with publication). In some jurisdictions, higher fees are levied on commercial requests as a means of subsidising public interest requests.

PRINCIPLE 7. OPEN MEETINGS

Meetings of public bodies should be open to the public

Freedom of information includes the public's right to know what the government is doing on its behalf and to participate in decision-making processes. Freedom of information legislation should therefore establish a presumption that all meetings of governing bodies are open to the public.

"Governing" in this context refers primarily to the exercise of decision-making powers, so bodies which merely proffer advice would not be covered. Political committees – meetings of members of the same political party – are not considered to be governing bodies.

On the other hand, meetings of elected bodies and their committees, planning and zoning boards, boards of public and educational authorities and public industrial development agencies would be included.

A "meeting" in this context refers primarily to a formal meeting, namely the official convening of a public body for the purpose of conducting public business. Factors that indicate that a meeting is formal are the requirement for a quorum and the applicability of formal procedural rules.

Notice of meetings is necessary if the public is to have a real opportunity to participate and 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.

PRINCIPLE 8. DISCLOSURE TAKES PRECEDENCE

Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed

The law on freedom of information should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions. Where this is not possible, other legislation dealing with publicly-held information should be subject to the principles underlying the freedom of information legislation.

The regime of exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it. In particular, secrecy laws should not make it illegal for officials to divulge information which they are required to disclose under the freedom of information law.

Over the longer term, a commitment should be made to bring all laws relating to information into line with the principles underpinning the freedom of information law.

In addition, officials should be protected from sanctions where they have, reasonably and in good faith, disclosed information pursuant to a freedom of information request, even if it subsequently transpires that the information is not subject to disclosure. Otherwise, the culture of secrecy which envelopes many governing bodies will be maintained as officials may be excessively cautious about requests for information, to avoid any personal risk.

PRINCIPLE 9. PROTECTION FOR WHISTLEBLOWERS

Individuals who release information on wrongdoing – whistleblowers – must be protected

Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on 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 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.

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 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.

ARTICLE 19

Global Campaign for Free Expression

ARTICLE 19 takes its name and purpose from Article 19 of the Universal Declaration of Human Rights.

> *Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*

ARTICLE 19's mission statement is:

> ARTICLE 19 will work to promote, protect and develop freedom of expression, including access to information and the means of communication. We will do this through advocacy, standard-setting, campaigns, research, litigation and the building of partnerships. We will engage global, regional and State institutions, as well as the private sector, in critical dialogue and hold them accountable for the implementation of international standards.

ARTICLE 19 seeks to achieve its mission by:

- strengthening the legal, institutional and policy frameworks for freedom of expression and access to information at the global, regional and national levels, including through the development of legal standards;
- increasing global, regional and national awareness and support for such initiatives;
- engaging with civil society actors to build global, regional and national capacities to monitor and shape the policies and actions of governments, corporate actors, professional groups and multilateral institutions with regard to freedom of expression and access to information; and
- promoting broader popular participation by all citizens in public affairs and decision-making at the global, regional and national levels through the promotion of free expression and access to information

ARTICLE 19 is a non-governmental, charitable organisation (UK Charity No. 327421). For more information please contact us at:

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