ARTICLE 19
The Global Campaign for Free Expression

MEMORANDUM
ON THE GUATEMALAN DRAFT LAW ON ACCESS TO PUBLIC INFORMATION

London, July 2000

Introduction

A draft law on Access to Public Information has been prepared in Guatemala. Following is an analysis of the draft law, which assesses its compliance with international standards on freedom of expression and with best practice in freedom of information legislation.

ARTICLE 19 welcomes the initiative by the Guatemalan authorities to introduce such legislation and applauds the fact that this first official draft is an improvement on earlier working documents. The law is basically well structured and clearly laid out. However, there remain a number of inadequacies in the proposed law which do need to be addressed to ensure that the public's right to know is guaranteed. These are discussed below.[1]

Guatemala's International Obligations to Protect Freedom of Expression and Access to Information

Guatemala is a party to the International Covenant on Civil and Political Rights and the American Convention on Human Rights, both of which protect freedom of expression, including freedom of information. International jurisprudence has consistently emphasised the special importance of freedom of expression in a democratic society.

For example, the Inter-American Court of Human Rights has stated:

> Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade union, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its opinions, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.[2]

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[1] The law has been analysed from the Spanish original. We apologise for any confusion, inaccuracy or misunderstandings due to misinterpretation.

[2] Inter-American Court of Human Rights, Compulsory Membership in an Association. Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of 13 November 1985. Series A No. 5, para. 70.

The European Court of Human Rights also stated, in a landmark case:

> Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.[3]

Restrictions on expression, not least in relation to the media, are illegitimate except in the most narrowly drawn circumstances, spelt out in paragraph 3 of Article 19 of the ICCPR and paragraph 2 of Article 13 of the ACHR. The test for restrictions is a strict one, presenting a high standard which any interference must overcome. It requires that there must be a previously established grounds for liability; that any restriction be expressly and precisely defined by law; that the objective in the introducing the restriction be legitimate; and that the grounds of liability are "necessary to ensure" the aforementioned ends.[4] All these criteria must be met in order for the restriction to be legitimate.

The right to freedom of expression is also protected by Article 35 of the Guatemalan Constitution. The first paragraph states that:

> *Es libre la emisión del pensamiento por cualesquiera medios de difusión. Sin censura ni licencia previa. Esta derecho constitucional no podrá ser restringido por ley o disposición gubernamental alguna*
> .

In addition, freedom of information is protected by paragraph 5 of Article 35 of the Constitution which states that:

> *Es libre el acceso a las fuentes de información y ninguna autoridad podrá jlimitar ese derecho.*

The Constitution also places some explicit requirements on the state with regard to access to of information. Article 30 states:

> *Publicidad de los actos administrativos. Todos los actos de la administración son publicos. Los interesados tienen derecho a obtener, en cualquier tiempo, informes, copias, reproducciones y certificacions que soliciten y la exhibición de los expedientes que deseen consultar, salvo que se trate de asuntos militares o diplomáticos de seguridad nacional, o de datos suministratdos por particulares bajo garantía de confidencia.*

Article 31 states:

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[3] Handyside v United Kingdom, (1976), Series A , No.24, para.49.

[4] Inter-American Court of Human Rights, Compulsory Membership in an Association. Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of 13 November 1985. Series A No. 5, para. 39.

Acceso a archivos o registros estatales. Toda persona tiene el derecho de conocer lo que de ella conste en archivos, fichas o cualquier otra forma de registros estatales, y la finalidad a que se dedica esta información, así como a corrección, rectificación y actualización. Quedan prohibidos los registros en archivos de filiación de filiación política, excepto los propios de las autoridades electorales y de los partidos políticos.

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. At its very first session in 1946 the United Nations General Assembly adopted Resolution 59(I) which stated

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

The Inter-American Court of Human Rights has stated:

> The right protected by Article 13 … has a special scope and character, which are evidenced by the dual aspect of freedom of expression. It requires, on the one hand, that no one be arbitrarily limited or impeded in expression his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.[5]

Its importance has also been stressed in a number of reports of the UN Special Rapporteur on Freedom of Opinion and Expression[6], while Freedom of Information Acts have been adopted in many mature democracies and many newly democratic countries, such as South Africa, Hungary, and the Czech Republic.

A proper freedom of information regime is a vital aspect of open government and a fundamental underpinning of democracy. It is only where there is a free flow of information that accountability can be ensured, corruption avoided and citizens' right to know satisfied. Freedom of information is also a crucial prerequisite for sustainable development. Resource management, social initiatives and economic strategies can only be effective if the public is informed and has confidence in its 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 an important one in the present context, refers to the right of citizens to access information and records held by public authorities, both through routine government publication of information and through provision for direct access requests.

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[5] Inter-American Court of Human Rights, Compulsory Membership in an Association. Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of 13 November 1985. Series A No. 5, para. 30.

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

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 its record keeping procedures make this possible and ensure that the access regime facilitates the maximum disclosure of information.

The Draft Law

1. Definitions

Information
Article 3 of the draft text lays out the right to obtain official information. However, although it does not state that it should just be written information that is accessible, it also does not specifically include information *in any form*. In an age when technology is developing very fast, written information is now by no means the main form in which information is stored. It is increasingly stored in many other formats, all of which should be accessible to the public for such a law to be effective.

Article 13(1) of the American Convention on Human Rights, to which Guatemala is a party, states that everyone has the right to seek "information and ideas of all kinds … either orally, in writing, in print, in the form of art, or through any other medium of one's choice".

In addition, ARTICLE 19's *Principles on Freedom of Information Legislation* state that "'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)".

See also under *Process* below.

Recommendation

- Provision for access to information in whatever form it is stored should be added to this article.

Bodies Covered

i. Public Bodies
Article 2 of the text requires that access should apply to information held by any section of the State (*cualquier dependencia del Estado*). This definition, however, is too narrow and is open to interpretation. The law requires a clear definition of which bodies should be covered, focusing on the type of service provided rather than on formal designations. Even if the Constitution defines what is meant by a *dependencia del Estado*, for the purposes of such a law, it needs to be clearly stated.

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 and operating rail lines).

ii. Private Companies

ARTICLE 19 welcomes the inclusion of Article 5 which covers private companies which carry out public services. For consistency of structure, if a provision is added to define more clearly the public bodies covered by the law, this provision should be incorporated within it.

However, other private bodies should also be subject to disclosure if they hold information whose disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health.

Recommendation

- Add a provision which defines in greater detail those public bodies which are covered by the law and which includes private companies carrying out public functions as well as those which hold information which may affect the public interest.

2. Exemptions

In all freedom of information drafts, one of the most difficult and controversial elements of a freedom of information regime are the regime of exemptions. In this draft, these are dealt with in the Preamble and in Articles 6 and 7.

The second paragraph of the Preamble outlines the broad reasons under which the right to freedom of expression can be restricted, all of which are ones which conform with international law. However, as mentioned above under international standards, it is to be noted that restrictions are only valid if they meet a strict test, which includes an assessment of the necessity of the restriction.

In the case of freedom of information legislation, it is not generally considered that all the justifications for restricting freedom of expression, listed in international treaties, are "necessary" grounds to restrict the disclosure of public information. The case in point here is "public morals". One might in certain circumstances want to restrict the general dissemination of information on the grounds that it might offend public morals, particularly if members of the public might come across such expression unknowingly. However, there is no good reason to withhold public information that someone is *actively* seeking on those grounds. After all, according to Article 1 of the draft law, this information belongs to the Guatemalan people and if an individual wishes to exercise their right to obtain this information, then its disclosure is hardly likely to offend public morals.

Public Interest / Substantial Harm Test

The problem in this draft is generally not so much the number or content of the exemptions as the almost non-existent test for using them. Principle 4 of *The Public's Right to Know: Principles on Freedom of Information Legislation* sets out a three-part test which any refusal to disclose information must satisfy:

i. the information must relate to a legitimate aim listed in the law;
ii. disclosure must threaten to cause substantial harm to that aim; and
iii. the harm to the aim must be greater than the public interest in having the information.[7]

In this draft text, the only test for obtaining information included under the first four exemptions is if disclosure is ordered by a competent judge and under due legal process. This does not allow any kind of internal assessment within the public body concerned of whether there is an interest in disclosing the information. This seriously undermines the possibility of the timely release of information which falls under one of the exempted categories but which it is in the public interest to receive. Any process which requires the applicant to appeal to a judge in order to obtain information is going to be too slow and too costly to be of benefit; this is particularly concerned in cases where the public health or safety might be endangered. The requirement to have to go before a judge also acts as a deterrent to anyone wanting to obtain information which they think should legitimately be available to the public.

An adequate harm and public interest test, following the three-part test above, needs to be incorporated into the freedom of information law and to be available for use by public officials. This kind of law has very specific requirements and the kinds of processes and criteria used in other situations may not be relevant to such a regime.

Class exemptions

In the case of Article 6(e) which is not subject to the order of a competent judge, there is effectively no possibility of the disclosure of information. This is a complete class exemption which means that information that could be interpreted as falling under such a category could not be disclosed under any circumstances, irrespective of whether there was an overriding public interest in the information. This is unacceptable in a freedom of information regime and there can be no justification for withholding such information under any circumstances. All categories of exemptions **must** be subject to the public interest and substantial harm test.

Types of Information covered

- The categories of exempted information listed under Article 6 are broadly speaking acceptable, subject to the introduction of a public interest and substantial harm test for **all** categories, as mentioned above.

- Of much more concern is Article 7 which defines an Official Secret. The inclusion of such a definition is in itself extremely positive and is to be welcomed – to leave the definition to other legislation could seriously undermine the effectiveness of such a law. However, the definition provided here is worryingly broad and vague, and is open to great abuse by the authorities who may be able to use it to withhold all sorts of information which should rightly be disclosed. Specifically:

[7] ARTICLE 19, *The Public's Right to Know: Principles on Freedom of Information Legislation*, London, 1999

i. The privacy or confidentiality of an individual does not belong here as a justification for withholding information. This is indeed a legitimate reason to withhold information from the general public. However, the individual to whom the information refers has a right to access it (as is provided for in Article 4 of this draft law). There is, therefore, a contradiction between the right of the individual to obtain personal information held by the public authorities and the need to obtain the order of a competent judge to obtain such information as provided for by Articles 6 and 7. The protection of the privacy or confidentiality of *another* individual (ie not the applicant) should be a reason under Article 6 for withholding information and this should be subject to the public interest and substantial harm tests.

ii. The range of information which is excluded from disclosure by Article 7 is potentially extremely broad and open to serious abuse by the authorities. What are termed official secrets here are usually classed under "national security" National security justifications for withholding information are legitimate; however, they should be as narrowly defined as possible and, most crucially, **subject to the public interest / substantial harm test**, stated above. In all the cases mentioned, there may be a public interest in receiving the information as long as the harm caused does not outweigh the public interest.

iii. Information should only be withheld for national security reasons if substantial harm could be reasonably predicted to result from disclosure. Therefore the wording "danger, risk or threat" in paragraphs (a), (b), (c) and (d) is far too broad and is open to wide interpretation. The reasons given in (a), (b), and (c) could be good justifications for withholding information but not just because there is a "danger, risk or threat". There must be a real and serious likelihood of substantial harm being caused. In lots of cases, the public may have a right to know of such dangers or threats. In addition, the reasons given in paragraph (d) also seem extremely broad and do not seem to provide a good reason for withholding information. It may be a linguistic problem, but as far as ARTICLE 19 understands it, the paragraph makes little sense. Similarly in paragraph (e) information provided under confidentiality which puts under risk various criteria is not strong enough. The broad wording would allow just about any information provided confidentially to be included which is not acceptable in such a law.

iv. It would be acceptable to use the term "national security" (most freedom of information legislation does this) and to provide a definition along the following lines which is provided by ARTICLE 19's *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*.[8]

> (a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force,

[8] This is available on ARTICLE 19's webiste at www.article19.org.

whether from an external source, such as a military threat, or an internal source such as incitement to violent overthrow of the government.

(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.[9]

The *Johannesburg Principles* can also provide further information on framing this clause and on drafting a strict public interest and substantial harm test.

- There are some other categories that are usually found in such laws that are missing. The key categories for exemptions which normally are legitimately included in such legislation are the following:

i. public health and safety;
ii. foreign policy, national security and defence
iii. personal / private information
iv. commercial confidentiality
v. economic interests of the country (This is legitimate so long as it does not specifically protect public bodies financial accountability. Some jurisdictions limit such an exemption information which would substantially prejudice the competitive position of a public company).
*vi. decision-making and policy formulation (This should only include internal documents. It should only apply to opinions, deliberations and negotiations and **not** to statistical or factual information.)*

In suggesting further areas for exemptions, it is clearly vital that these should be defined as narrowly as possible in a law and that each category should be subject to the public interest and substantial harm test outlined above.

Recommendations
- Remove "public morals" from paragraph two of the Preamble
- A strict public interest and substantial harm test **must be** introduced for all categories of exempted information so that there are no class exemptions.
- The public interest and substantial harm test should be available at an internal level for public officials to assess whether or not certain information should be disclosed. Judicial review should not be the first level at which it can be used.
- The wording of Article 7 needs to be substantially tightened in order to greatly restrict the potential scope of the provision.
- Introduce some other narrowly defined categories of exemptions.

[9] *The Johannesburg Principles in National Security, Freedom of Expression and Access to Information*, ARTICLE 19, London 1995, Principle 2.

Primacy of Freedom of Information
The law on freedom of information should take precedence over all other legislation in this field and it should not allow other laws to introduce different, potentially more restrictive, procedures. In several places, other legislation is allowed to override it.

Although a definition of official secret is included at Article 7, the definition of civil or military official secret is left to other legislation which means that this other legislation can seriously undermine the effectiveness of the freedom of information law.

In Article 10, costs for obtaining information from certain specified institutions are to be dictated by other laws and regulations. A high cost for information can be a significant deterrent to potential applicants and it is imperative that this law provides for an affordable regime.

Similarly, the appeals process refers to other legislation such as the Decree No. 1-86 or the Law (Article 24) on the Commission of Human Rights (Article 25) which is not ideal (see *Appeals* below).

Recommendation
- Include a definition of military and civil official secrets within this law.
- State at the outset that transparency is the basic standard and that the freedom of information law is the main law dealing with such matters.
- Bring other legislation into line with this where consistencies exist.

3. Process

Articles 9 and 10 cover the process by which information is provided.

- The reference other legislation is of some concern. Article 9(c) subordinates itself to Articles 171-177 of the Law on Judicial Organs. This means that a law on access to official information is only as good as this other law and if it is amended or weakened, then so is this law. As stated above, a law on access to information should be the primary legislation on this issue and should not be subject to other laws if it is to work effectively.

- Anyone should be able to request official information without having to state why they want it. The only information they should have to provide in order to obtain this information is a name and contact details. To require other information is unnecessary and serves no legitimate purpose. In Article 9(b) on the process, marital status, nationality and identity number are required. This should be removed.

- The timeframe of 15 days is to be welcomed as realistic and practical.

- It was mentioned above that the law should make clear in Article 3 that information *in any form* should be covered. Article 9(c) does not make this clear when it refers to "*informes, copias, reproducciones y certificaciones*". Of more concern is Article 10

which talks about the format in which written information must be provided but does not mention information stored in any other form. Similarly, costs are calculated by page which seems to exclude the provision of information which is not held in written form.

- The charge of two Quetzales per page for written information from most bodies seems reasonable. However, the charging regime for some institutions is to be set by other laws and regulations (see *Primacy of Freedom of Information Legislation* above). In addition, there is no guidance given on how to charge for information that is not stored in written form. It would be beneficial if Article 10 included a statement that the charges must be as low as is reasonably possible in order to ensure that expense does not become a deterrent to applicants.

Recommendations
- Make this law primary law on access to information and remove any unnecessary references to other legislation that could undermine the effectiveness of this law.
- Ensure that here or elsewhere in the law, it is made quite clear that information *in any form* is to be disclosed and not just written information.
- Introduce a clause to ensure that charges for obtaining information are as low as possible
- Provide guidelines for charging for all institutions and also for information that is not stored in written form.
- Remove the requirement to give marital status, nationality and identity number are in order to apply for information.

4. Mandatory Provision of Information

- Articles 11-13 require public bodies to publish certain types of information which is to be welcomed. It would, however, be of benefit to broaden and make more explicit the kinds of information which should be published by law. ARTICLE 19 recommends in its *Principles on Freedom of Information Legislation* that the following information should be made available as a minimum.

  - 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.

Recommendation
- Extend the range of information that must be disclosed in the law to include at a minimum the above.

5. Information Held by Private Companies

This section of the law appears to provide access to person information held by private companies / data protection (*habeas data*) which is set out in Article 19.

Paragrah (g) does not constitute private / personal information and therefore would not be the kind of information to be open to disclosure under such a law.

As with information held by public bodies, there should be some form of appeal for refusals to release information before the going to court. Since an internal appeal within a private company is not realistic, the human rights commissioner or ombudsman recommended for appeals against public bodies below would be a suitable independent, administrative appeals process (see *Appeals* below).

Recommendation

- Introduce an independent, administrative appeals process which is available before judicial review.
- Remove patents from the list of personal information

6. Appeals

In terms of an appeals process, Article 23 allows recourse to the courts to obtain withheld information, which is in itself problematic. As stated above, the use of the courts as the first stage of an appeal against a refusal of access is not a swift or cost effective means by which to ensure that information is released unless there are good reasons not to. The courts are generally very slow and take considerably time which may mean in the case of media requests that the information sought is not of any use by the time it is acquired.

There should always be the possibility of an internal appeal to a designated higher authority within a public authority who can review the original decision.

Then, wherever practicable, there should be an individual right of appeal to an independent administrative body, for example 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.

Recommendations

- Introduce an internal appeals process within the public body concerned
- Introduce an independent appeals process to an administrative body before appeal before the courts.

7. Safeguards

- ARTICLE 19 welcomes as very positive the provisions in Articles 14 – 18 to sanction public officials who infringe the law or who destroy records or do not keep them in good order.

- Other important safeguards which are crucial for the effective functioning of a freedom of information law and which are missing from this law include the following:

Promotional / educational activities

Experience from 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 up to ten years or more. In Bulgaria, therefore, the law should provide for a number of mechanisms to address this culture of secrecy within government. There are no such provisions in the draft law. This is a particularly serious omission in view of Bulgaria's long history of secrecy within government.

Protection for "Whistleblowers"

Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information about wrongdoing, such as 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. This should also include information about a serious threat to health, safety or the environment, whether linked to individual wrongdoing or not. Whistleblowers should benefit from protection so long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing.

Open Meetings

Freedom of information includes the public's right to know what government bodies are doing on its behalf and to participate in decision-making processes. Meetings should only be closed 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.

Recommendation

- Introduce the above-mentioned safeguards into the law.

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