

ARTICLE 19

The Public's Right to Know: Principles on Right to Information Legislation

2016

These Principles were originally developed in 1999 and updated in 2015. They have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression, in his report to the 2000 Session of the United Nations Commission on Human Rights (E/CN.4/2000/63), and referred to by the Commission in its 2000 Resolution on freedom of expression, as well as by his successor in 2013 in his report to the UN General Assembly in 2013 (A/68/362, 4 September 2013).

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ARTICLE 19 would appreciate receiving a copy of any materials in which information from this report is used.

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Principle 1: Maximum disclosure

Right to 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 the right to information in international law and ideally 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. The right should be available to all persons and informal and formal organisations, regardless of citizenship or residence. The exercise of this right should not require individuals to demonstrate a specific interest in the information or to explain why they wish to obtain it. 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 materials held by a public body, regardless of the form in which the information is stored (document, computer file or database, audio or video tape, electronic recording and so on), its source (whether it was produced by the public body or some other entity or person) and the date of production. The legislation should also apply to information which has been classified as secret or some other designation, subjecting them to the same test as all other information. In some jurisdictions, this extends to samples of physical materials used by public bodies in public works. The law should also include, the obligation to disclose should apply to records themselves and not just the information they contain, as the context in which it is held is information also.

For purposes of disclosure of information, the definition of ‘public body’ should include all branches and levels of government including local government, elected bodies (including national parliaments), 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) or hold decision-making authority or expend public money. No bodies, including defence and security bodies, should be exempt. 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 or affect individuals' human rights. Inter-governmental organisations should also be subject to right to information regimes based on the principles set down in this document.

Retention and Destruction of Information

To protect the integrity and availability of information, the law should establish minimum standards regarding the maintenance and preservation of information by public bodies. Such bodies should be required to allocate sufficient resources and attention to ensuring that public record-keeping is adequate. It should provide that obstruction of access to, or the willful destruction of information is a criminal offence.

Principle 2: Obligation to publish

Public bodies should be under an obligation to publish key information

The right to information implies not only that public bodies respond to requests for information but also that they proactively publish and disseminate widely information 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 routinely publish and update the following categories of information:

- operational information about how the public body functions, including objectives, organizational structures, standards, achievements, manuals, policies, procedures, rules, and key personnel;
- information on audited accounts, licenses, budgets, revenue, spending, subsidy programmes public procurement, and contracts;
- 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, including any registers of documents and databases; 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, including all environmental, social, or human rights impact assessments.

Open data and reuse

Information proactively published, as well as that released in response to requests, should be made available in open and machine readable formats when applicable, and without restrictions on its further use and publication.

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 right to 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 right to 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. Information and communications technologies can also be effective. Local public information boards and other community-based information systems should also be used. Creative alternatives, such as town meetings or mobile film units, should also be explored. 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 comprehensive right to information training for their employees. Such training should address the importance and scope of right to 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. Officials at all levels should receive some training, depending on their role.

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. Bodies should provide annual reports to Parliament and/ or Parliamentary bodies on their activities, highlighting 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.

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.

Bodies should only withhold the specific information that is exempted in documents or records and provide redacted versions of the remainder of the material.

The three-part test

- the information must relate to a legitimate aim as provided for in international 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 including human rights violations and corruption 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 recognized under international law 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 limiting the disclosure which does not harm the legitimate interest. They should be based on the content, rather than the type, of the information. Information that is withheld should be routinely reviewed to ensure that the exemption still applies. For example, the justification for classifying information on the basis of national security may well disappear after a specific national security threat subsides. Exceptions should be limited to no more than 15 years, except in extraordinary circumstances.

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. Other public interests include making an important contribution to an ongoing public debate, promote public participation in political debate, improving accountability for the running of public affairs in general and the use of public funds in particular; expose serious wrongdoings, including human rights violations, other criminal offences, abuse of public office and deliberate concealment of serious wrongdoing; and benefit public health or safety.

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

All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to request and receive information. 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 may be able to refuse clearly frivolous or vexatious requests that are only intended to disrupt the activities of the public body. Public bodies should not have to provide individuals with information that is contained in a publication that is freely available to the public, but in such cases the body must direct the applicant to the published source.

Provision should be made to ensure full access to information for disadvantaged 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.

The law should provide for strict time limits for the processing of requests on no more than one month.

The law should require that any refusals be accompanied by substantive written reasons, based on the exemptions set out in the law and provide the applicant information on their appeal rights.

Appeals

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.

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 body from a refusal by a public body to disclose information. This may be either an existing body, such as an Ombudsman or a specialised administrative body 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. The best practice is to create an independent information commission.

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 sanction 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.

The applicant should be able to appeal to the courts against decisions of the body. The court should have the full power to review the case on its merits and not be limited to the question of whether the body has acted reasonably. This will ensure that due attention is given to resolving difficult questions and that a consistent approach to right to information issues is promoted.

Principle 6: Costs

Individuals should not be deterred from obtaining public information by costs

The cost of gaining access to information held by public bodies should not prevent people from demanding information of public interest, given that the whole rationale behind right to 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 right to information regime.

Generally the principle should be that the information is provided at no or low cost and limited to the actual cost of reproduction and delivery. Costs 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) and for requests from those with incomes below the national poverty

line. In some jurisdictions, higher fees are levied on commercial requests as a means of subsidising public interest requests but this is generally not considered to be fully effective.

Principle 7: Open meetings

Meetings of public bodies should be open to the public

The right to information includes the public's right to know what the government is doing on its behalf and to participate in decision-making processes. Right to 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, but bodies which merely proffer advice may also be covered when the advice is expected to be used to influence decisions. 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 and the substantive materials to be discussed at the meeting are given sufficiently in advance to allow for attendance and engagement. This is especially important in the case of projects relating to development as part of environmental or social impact procedures.

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. Decisions made at unlawfully closed meetings should be subject to review and presumed to be void.

Principle 8: Disclosure takes precedence

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

The law on the right to information should require that other legislation be interpreted in a manner consistent with its provisions and repealed when necessary.

The regime of exceptions provided for in the right to 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 right to information law.

In addition, officials should be protected from sanctions where they have, reasonably and in good faith, disclosed information pursuant to a right to information request, even if it subsequently transpires that the information is not subject to disclosure or contains libelous materials. 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 or harms for releasing information on wrongdoing by public or private bodies. This should be established clearly in law. The best practice is for countries to adopt comprehensive laws that apply to all related aspects of criminal, civil, administrative and labour law.

“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 with 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. Those that sanction, harm or harass whistleblowers should themselves face administrative or legal sanctions or criminal penalties in the most serious cases.

In some countries, protection for whistleblowers is conditional upon a requirement to release the information to certain individuals or oversight bodies. Protection for disclosure to other individuals including to the media should be available where the persons reasonably believed that disclosure to those bodies would not result in an adequate remedy for the wrongdoing that is exposed. Anonymous disclosure should also be allowed and protected.

The “public interest” for disclosure to other parties include the media 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.

About ARTICLE 19

ARTICLE 19 envisages a world where people are free to speak their opinions, to participate in decision-making and to make informed choices about their lives.

For this to be possible, people everywhere must be able to exercise their rights to freedom of expression and freedom of information. Without these rights, democracy, good governance and development cannot happen.

We take our name 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 works so that people everywhere can express themselves freely, access information and enjoy freedom of the press. We understand freedom of expression as three things:

Freedom of expression is the right to speak

- It is the right to voice political, cultural, social and economic opinions
- It is the right to dissent
- It makes electoral democracy meaningful and builds public trust in administration.

Freedom of expression is freedom of the press

- It is the right of a free and independent media to report without fear, interference, persecution or discrimination
- It is the right to provide knowledge, give voice to the marginalised and to highlight corruption
- It creates an environment where people feel safe to question government action and to hold power accountable.

Freedom of expression is the right to know

- It is the right to access all media, internet, art, academic writings, and information held by government
- It is the right to use when demanding rights to health, to a clean environment, to truth and to justice
- It holds governments accountable for their promises, obligations and actions, preventing corruption which thrives on secrecy.

DEFENDING FREEDOM
OF EXPRESSION AND INFORMATION

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