MEMORANDUM

on

The Albanian Law On the Right to Information on Official Documents

by

ARTICLE 19
Global Campaign for Free Expression

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Commissioned by the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe

I. Introduction

This Memorandum provides an analysis of Albania's Law on the Right to Information on Official Documents (FOI Law), adopted in 1999. The analysis was carried out by ARTICLE 19 at the request of the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe. Our comments are based on an unofficial English translation of the FOI Law.[1]

[1] ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.

This Memorandum focuses on the specific legal provisions in the FOI Law. We note, however, that there are a number of serious problems in the area of implementation. The government has changed several times since the law was adopted, and each change normally leads to the reorganisation or abolishment of various ministries, with senior public officials being moved or replaced. This is a fundamental problem for the whole process of legal and administrative reform in Albania and underlies the failure to develop administrative capacity – including to set up systems and procedures, to train officials, and so on – in order to bring about effective application of the FOI Law, as well as other reforms.

This problem is accompanied by a serious lack of awareness regarding the law at all levels of Albanian society, from government to civil society to ordinary citizens. One of ARTICLE 19's regional partner organisations, the Centre for Development and Democratisation of the Institutions, reported in 2003 that 87% of the people surveyed working in public authorities did not even know that Albania had a freedom of information law. Awareness of the law amongst ordinary people is also very low, particularly outside Tirana. As a result, there are few requests for official documents and little use of the FOI Law. Some individual journalists and NGOs do use the law, but nearly always in relation to their work on anti-corruption. It is essential that broader use is made of the Law.

The FOI Law itself, the focus of the Memorandum, is clearly well intended in parts but, notwithstanding this, is lacking several important safeguards. There are significant problems with the appeals process. The Code governing the internal appeals process envisages the possibility of long delays in responding to requests, which are unacceptable in relation to information requests. Administrative oversight is provided by the People's Advocate, the Albanian Ombudsman. However, the legislation governing this office limits its powers to advisory opinions so it cannot make binding orders to disclose. The right to judicial review of refusals to provide information has never been exercised in Albania, perhaps as a result of the small numbers of requests made for information, the excessively lengthy time for administrative review and a lack of confidence in the judiciary due to their reputation for corruption.

There are also significant problems with the scope of the Law's application and the regime of exceptions, while the Law also lacks a number of important safeguards, such as protection for "whistleblowers" and systems to promote better record maintenance.

This Memorandum analyses the FOI Law against two key ARTICLE 19 publications in this area, *The Public's Right to Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles)[2] and *A Model Freedom of Information Law* (the ARTICLE 19 Model Law).[3] The former sets out principles based on international and comparative best practice and has been endorsed by, among others, the UN Special Rapporteur on

[2] (London: ARTICLE 19, 1999). Available at: http://www.article19.org/docimages/512.htm.
[3] (London: ARTICLE 19, 2001). Available at: http://www.article19.org/docimages/1112.htm.

Freedom of Opinion and Expression.[4] The latter translates these principles into legal form.

II. International and Constitutional Obligations

Article 19 of the *Universal Declaration of Human Rights* (UDHR)[5] sets out the fundamental right to freedom of expression in the following terms:

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

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.[6]

The *International Covenant on Civil and Political Rights* (ICCPR),[7] a formally binding legal treaty, guarantees the right to freedom of opinion and expression also at Article 19, in terms very similar to the UDHR. Albania ratified the ICCPR in 1991. By ratifying the ICCPR, State Parties agree to refrain from interfering with the rights protected therein, including the right to freedom of expression. However, the ICCPR also places an obligation on State Parties to take positive steps to ensure that rights, including freedom of expression and information, are respected. Pursuant to Article 2 of the ICCPR, States must "adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." This means that States must create an environment in which a diverse, vigorous and independent media can flourish, and provide effective guarantees for freedom of information, thereby satisfying the public's right to know.

Freedom of expression is also guaranteed by the three regional human rights treaties, including the *European Convention on Human Rights*,[8] which Albania ratified in October 1996. In the earlier international human rights instruments, freedom of information was not set out separately but was instead included as part of the fundamental right to freedom of expression. Freedom of expression, as noted above, includes the right to seek, receive and impart information. Freedom of information, including the right to access information held by public authorities, is a core element of the broader right to freedom of expression.[9] The UN Special Rapporteur on Freedom of Expression and Opinion has stated:

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[4] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, para. 43.
[5] UN General Assembly Resolution 217A(III) of 10 December 1948.
[6] See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit).
[7] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.
[8] Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953
[9] See, for example, comments made by the Human Rights Committee in its Concluding Observations on the implementation of the ICCPR in Azerbaijan (adopted 27 July 1994, Un Doc. CCPR/C/79/Add.38); Urugay (adopted 8 April 1993, UN Doc. CCPR/C/79/Add.19) and Uzbekistan (adopted 4 April 2001, UN Doc. No. CCPR/CO/71/UZB).

> [T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems…[10]

There is little doubt as to the importance of freedom of information. The right to freedom of information as an aspect of freedom of expression has repeatedly been recognised by the UN. The UN Special Rapporteur on Freedom of Opinion and Expression has provided extensive commentary on this right in his annual reports to the UN Commission on Human Rights. In 1997, he stated: "The Special Rapporteur, therefore underscores once again that the tendency of many Governments to withhold information from the people at large… is to be strongly checked."[11] His commentary on this subject was welcomed by the UN Commission on Human Rights, which called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications".[12]

In 2000, the Special Rapporteur provided commentary on the content of the right to information as follows:

- Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;

- Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;

- As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;

- A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;

- All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);

[10] Report of the Special Rapporteur, 28 January 1998, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, para. 14.
[11] Report of the Special Rapporteur, 4 February 1997, *Promotion and protection of the right to freedom of opinion and expression*
[12] Resolution 1997/27, 11 April 1997, para. 12(d)

- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;

- The law should establish a presumption that all meetings of governing bodies are open to the public;

- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;

- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.[13]

Once again, his views were welcomed by the Commission on Human Rights.[14]

In November 1999, the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – came together for the first time under the auspices of ARTICLE 19. They adopted a Joint Declaration which included the following statement:

> Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.[15]

The right to freedom of information has also been explicitly recognised in all three regional systems for the protection of human rights. Within Europe, the Committee of Ministers of the Council of Europe adopted a Recommendation on Access to Official Documents in 2002.[16] Principle III provides generally:

> Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

II.1 Restrictions on Freedom of Information

International law recognises that the right to information is not absolute. However, restrictions on it must be narrowly circumscribed. Specifically, any restriction on the right must meet a strict three-part test. This test, which has been confirmed as applying generally to freedom of expression (of which freedom of information is an essential component part) by both the UN Human Rights Committee[17] and a number of national and international

[13] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, para. 44.
[14] Resolution 2000/38, 20 April 2000, para. 2.
[15] 26 November 1999
[16] Recommendation No. R(2002)2, adopted 21 February 2002.
[17] For example, in *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.

courts,[18] requires that any restriction must be provided by law, be for the purpose of safeguarding a legitimate interest, and be 'necessary' to secure this interest.

Critical to an understanding of this test in the specific context of freedom of information is the meaning of "necessary". At a minimum, a restriction on access to information is "necessary" for securing a legitimate interest only if (1) disclosure of the information sought would cause substantial harm to the interest and (2) the harm to the interest caused by disclosure is greater than the public interest in disclosure.[19]

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. Exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest. Only interferences that are absolutely necessary in a democratic society for the protection of the legitimate interest should be permissible. 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. The public body must show that the disclosure of the information would cause substantial harm to that legitimate aim and that the interference is therefore necessary and justified. 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. Non-disclosure may, therefore, only be justified where, taking all of the circumstances into account, disclosure poses a serious risk of substantial harm to the legitimate aim being protected.

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. 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.

The Council of Europe Recommendation provides valuable insight into these standards in Principle IV, which states:

> **IV. Possible limitations to access to official documents**

[18] See, for example, *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90 (European Court of Human Rights).
[19] See ARTICLE 19 Principles, note 2, Principle 4.

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

i. national security, defence and international relations;
ii. public safety;
iii. the prevention, investigation and prosecution of criminal activities;
iv. privacy and other legitimate private interests;
v. commercial and other economic interests, be they private or public;
vi. the equality of parties concerning court proceedings;
vii. nature;
viii. inspection, control and supervision by public authorities;
ix. the economic, monetary and exchange rate policies of the state;
x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.[20]

II.2 The Albanian Constitution

Article 22 of the Albanian Constitution guarantees freedom of expression as follows:

1) Freedom of expression is guaranteed.
2) Freedom of the press, radio and television is guaranteed.
3) Prior censorship of means of communication is prohibited.
4) The law may require authorization to be granted for the operation of radio or television stations.

The Albanian Constitution also provides for a specific guarantee for freedom of information in Article 23:

1) The right to information is guaranteed.
2) Everyone has the right, in compliance with law to get information about the activity of state organs, as well as of persons who exercise state functions.
3) Everybody is given the possibility to follow meetings of collectively elected organs.

Article 17 provides for limitations on rights, but only in accordance with the standards articulated in the ECHR:

1) Limitations of the rights and freedoms provided for in this Constitution may be established only by law, in the public interest or for the protection of the rights of others. A limitation shall be in proportion to the situation that has dictated it.
2) These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights.

Through Articles 5 and 122 of the Albanian Constitution, the rights guaranteed in international treaties to which it is party take precedence over any Albanian laws or practices that are incompatible with them.

[20] Note 16.

III. Analysis of the Law

III.1 Scope of Application

Article 2 of the FOI Law defines a Public Authority as "any organ of the public administration, and public entities". The information falling within the scope of the Law are "official documents" defined by Article 2 as "any document of any kind". Article 3 guarantees the "right to request information… pertaining to the activity of state organs and persons that exercise state functions".

Analysis

Freedom of information legislation should ideally 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. 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 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. Accordingly, the terms "information" and "public bodies" should be defined as broadly as possible. This principle has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression, as noted above. In 2000 he stated:

> Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; 'information' includes all records held by a public body, regardless of the form in which it is stored.[21]

Best practice would dictate that, 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, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quangos, judicial bodies and private bodies which carry out public functions, such as maintaining roads or operating rail lines. Consideration should even be given to including purely private bodies 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 if disclosure is necessary to enforce a right.

The definition of "public authority" in Article 2 of the FOI Law is vague and potentially narrow. The scope, in terms of bodies covered, of the right to information contained in Article 3 is similarly unclear and potentially restrictive, possibly limiting the scope of the Law's application to the apparatus of the State, understood narrowly as formally public bodies. The definition of what constitutes a public body should be rewritten in unambiguous language that encompasses a far wider range of bodies in accordance with

[21] Note 13.

best practice, noted above, making it clear, for example, that statutory bodies and private bodies exercising public functions lie within the scope of the Law.

The definition of "information" in the Law is also too narrow. The Law refers to "official documents", defined in Article 2 as meaning "any document of any kind" kept by a public body. The definition of information should include all records held by a public body, regardless of the form in which the information is stored (document, tape, electronic recording etc.). Again, Article 3 potentially further limits the information which members of the public have a right to receive. Article 3 merely guarantees the right to request documents "pertaining to" official activities. This could be interpreted as meaning that individuals only have the right to petition public authorities for the release of records dealing with official activities, rather than a fundamental right to all information held by public bodies.

Recommendations:

- The law should apply to a broadly defined group of "public bodies" that should include private bodies which carry out public functions.
- The law should state that the public has a right to access all records held by public bodies, regardless of the form in which they are stored, their source or the date of production.

III.2 Regime of Exceptions

Article 4 of the Law regulates the circumstances under which access to information may be restricted. It states:

> If the requested information on an official document is restricted by law, the public authority shall provide the requester with a written declaration expressing the reasons for the refusal of information and the rules under which he can get such information.

Analysis

As discussed previously, the international standards establish a strict test that must be satisfied if non-disclosure is to be justified: restrictions are acceptable only if they relate to one of a narrow list of legitimate aims set out in law, if they are subject to a substantial harm test and where the overall public interest is served by non-disclosure.

The FOI Law fails to contain any regime of exceptions, simply leaving the right of access to be restricted by any other law, either already in existence or that may be passed in the future. It is beyond the scope of the present analysis to review all Albanian laws that provide for secrecy. We note, however, that there are likely to be a large number of secrecy provisions in Albanian law and that these will rarely, if ever, have been drafted with openness in mind. As a result, it is likely that many of these provisions fail to meet the standards set out above. For example, laws relating to official secrets might restrict and even criminalise the release of information whose disclosure is in the public interest, such as the commission of wrongdoing by those in authority.

The FOI Law should be amended to provide for a comprehensive regime of exceptions, including strict harm and public interest elements. Secrecy laws should not be permitted

to extend this comprehensive regime of exceptions; in cases of inconsistency, the FOI Law should prevail. A commitment should be made over time to review all secrecy laws, with a view to amending or repealing them to bring them into line with the FOI Law.

Furthermore, the requirement to provide reasons for any refusal to provide information, already found in Article 4, should explicitly require public authorities to supply substantive reasons for the refusal, explaining clearly how the refusal complies with the requirements of the regime of exceptions provided for by the Law, and setting out the rights of appeal that are available.

Recommendations:

- Article 4 should be completely redrafted to provide for a comprehensive regime of exceptions in accordance with the standards set out above. Exceptions should be drafted in clear and narrow terms and protect only legitimate interests.
- Access should not be refused where disclosure would not pose a serious likelihood of substantial harm to a legitimate interest set out in the Law.
- Information should in any case be subject to disclosure unless the harm to the protected interest outweighs the public interest in disclosure.
- The reasons for any refusal should be required to include substantive grounds for the refusal, as well as information about any rights of appeal.

III.3 Processes to Facilitate Access

Time Limits

Articles 10, 11 and 12 of the Law regulate the time limits within which the public authority must respond to requests for information. Article 10 gives the public authority 15 days in which to accept or reject requests. Article 11 gives them 40 days in which to reply to the request. Article 12 enables the public authority to postpone replying to the request "due to the particularity of the request or the need to consult a third party".

Analysis

In his 2000 annual report to the UN Commission on Human Rights, the UN Special Rapporteur stated:

> All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written requests for the refusal(s). [22]

The key principle is that requests for information should be processed rapidly and fairly. The 15-day decision-making period provided for in Article 10 is in line with international standards, but the 40-day deadline for replying to requests in Article 11 represents an unacceptably lengthy delay to responding to applications for information and is, in any case, hard to reconcile with the shorter decision-making period. It would appear

[22] Note 13.

nonsensical for there to be a 25-day delay between making a decision on a request and responding to it.

Article 12 should be amended to specify more clearly what grounds might justify the extension of a request, in particular the size or complexity of the request. An extension to the 15-day decision-making period might be acceptable in exceptional circumstances, for example in the event of a request for an unusually large quantity of documents. Under such circumstances, the public body should be required to notify the applicant in advance, giving substantive written reasons for the delay. A delay in order to consult a third party would also be acceptable, as provided for in Article 12, in order to ensure their rights are not unjustifiably affected.

However, unless the time period set out in Article 11 is reduced, Article 12 should be repealed, since there can be no justification for further extending a 40-day response period.

Other Processes for Facilitating Access

Article 6 of the Law provides:

> A public authority shall issue rules and set up structural and practical facilities in order to provide the public with exact, full, speedy and adequate information on official documents.

Article 7 states:

> Public Authority, upon request of an interested party or on its own initiative, offers the requester other forms of submittal including the oral form. In such cases, the requester shall express his/her consent to the form offered in writing.

Analysis

As noted previously, all public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information. Although the terms of Article 6 provide in general terms for the setting up of such systems, the Law would be improved by specific requirements as to the type of systems necessary. For example, public bodies should be required to designate an individual who is responsible for processing requests for information and for ensuring compliance with the law. This person should be required to assist applicants who have difficulties making requests due to disability or illiteracy, or whose requests relate to published information, or are unclear, excessively broad or otherwise in need of reformulation.

Article 7 makes provision for providing access to information in various forms, including orally. This is positive but it would benefit from making it clear that requesters have a right to request and to receive information in different forms, subject only to overriding considerations such as undue inconvenience or harming the record. Also, the specific reference to oral information is perhaps misleading; requesters can be expected to want the information in this particular form only rarely.

Recommendations:

- The time limit within which public authorities must respond to requests for information should be shortened.
- The FOI Law should make it clear that extensions to this time limit are permitted only in exceptional circumstances and that in such cases the applicant must be provided with substantive written reasons for the delay.
- Provision should be made for the appointment of information officers to serve as the focal point for requests in each public authority. These officers should, among other things, ensure access to information for those who cannot read or write, do not speak the language of the record or suffer from disabilities such as blindness.
- The Law should make it clear that requesters have a right to specify the form of access to the information they prefer, and to be given access in that form unless there are overriding reasons not to.

III.4 Appeals

Article 15 of the Law provides:

> Everyone who believes that his/her rights, as recognised by this law are infringed is entitled to lodge an administrative appeal. Law no. 8485, dated 12.5.1999, "The Code of Administrative Procedures in the Republic of Albania" shall regulate the procedure for the administrative appeal.

Article 16 of the Law provides:

> Everyone who believes that his/her rights as recognised by this law, are infringed, is entitled to lodge a judicial appeal.

Article 18 of the Law states:

> The People's Advocate is charged to implement this law. Law No. 8545, dated 02.4.1999, "On the People's Advocate" provides for the competencies of the People's Advocate, regarding the right to information on official documents.

Analysis

In line with best practice, there should be three levels of appeal in relation to requests for information: to a higher authority within the public body which originally refused the request, to an independent administrative body and to the courts.

Article 15 provides for the right to lodge an administrative appeal, by which is meant an internal appeal to the public authority in order to review the original decision. Under the terms of this article, the procedures governing such an appeal are contained in the Code of Administrative Procedures. However, the provisions of this Code constitute a significant stumbling block to the public's right to access official documents. The internal appeals process can take an extremely long time and must be exhausted before the right to judicial review is engaged. Under the terms of the Code, where a public authority takes no action following a request for information, an appeal cannot be launched for three months following the initial request. The review of the appeal may then last a further month before a decision is reached. The time for processing internal appeals should be

dramatically shortened; best practice suggests 30 days should be the absolute maximum for deciding upon appeals relating to requests for information.

Articles 19 and 20 of the Code also contain fairly restrictive provisions relating to the release of information. For example, Article 19 states that anyone who participates in an administrative procedure is obliged not to divulge information which is classified as a State secret or that is "of a personal nature". These provisions have been superseded by the FOI Law and the Code should be amended to make clear that the release of official information relating to administrative procedures is now governed by the FOI Law.

In our experience, it is essential that requesters have a right to appeal refusals to grant access to an independent administrative body. Initiating a judicial appeal is an extremely significant step which many people are either unable or unwilling to take and which, in any case, is likely to be costly as well as very lengthy. The right to appeal to an independent administrative body whose process is cheap and rapid is therefore vital. Appeals could be made to 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.

The People's Advocate, the Albanian Ombudsman, has a formal role in implementing the FOI Law. The Law, however, does not specify whether or not this includes a right to appeal any refusal to grant access to the People's Advocate, although this is apparent in the law governing that office.

The People's Advocate has fairly extensive powers of investigation and he appears to be independent of political influence, since he may not be a member of a political party or take part in any other political, State or professional activity. Furthermore, the services of the People's Advocate are free of charge.[23] On the other hand, the processing of appeals by the Advocate is too slow. Article 17 of the Law "On the People's Advocate" gives him 30 days in which to consider an appeal before even commencing his investigation. Ideally the maximum deadline for deciding an appeal relating to a request for information should be 30 days.

Far more serious, however, is that the People's Advocate lacks any real power upon concluding his investigation. Upon conclusion of an investigation, the People's Advocate has the power to "make recommendations on how to remedy the infringement to the administrative organ that, in his judgment, has committed the violation".[24] Should he consider the reply or measures taken by a public organ in response to his recommendations insufficient, he has the right to refer the case to a "higher organ in hierarchy".[25] If he remains unsatisfied, he may present a report to the Assembly, which shall include proposals for specific measures to remedy the violations. He may also make

[23] Law 8454 "On the People's Advocate", Article 16
[24] *Ibid*., Article 21.
[25] *Ibid*., Article 24.

a recommendation to the public prosecutor to start an investigation if he finds that a criminal offence has been committed.[26]

We do not consider that these powers are sufficient. In order to give the People's Advocate real 'teeth', he 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.

Recommendations:

- Appeals from a refusal to disclose information should go to an independent administrative body with the power to enforce its decisions and, in particular, to compel public authorities to release information where non-disclosure is unjustified.
- A strict time-limit of 30 days should be imposed for deciding any appeals from a refusal to provide information.

III.5 The Destruction of Records

To protect the integrity and availability of records, the law should provide that obstruction of access to, or the wilful 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.

Recommendations:

- The Law should criminalise obstruction of access to, and the wilful destruction of records.
- The Law should also put in place a system to establish minimum standards for the maintenance of records by public bodies.

III.6 Obligation to Publish

Article 8 states:

> A Public Authority shall make available to the public and duplicate by itself, in sufficient quantity and appropriate formats, official documents that facilitate the information of the public on:
>
> a) information as to where its central and local organs are situated, places, as well as the names of the employees from whom the public can receive information, submit requests or receive answers;
>
> b) rules, procedures and methods by which different forms can be obtained, explanations about their scope and contents or about the documents and necessary certificates for filling in these forms;
>
> c) general legal rules based on which the public authority acts, general policies implemented by the public authority, as well as changes made to them;

[26] *Ibid.*, Article 21.

d) detailed explanations on working methods and procedures of the public authority.

Analysis

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.

Public bodies should, at 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.

Article 8 of the Law governs the regime under which public authorities are obliged to make official documents available without a public request. Although this article sets out in general terms the types of information public bodies are required to disseminate, it could be far more detailed as to the exact kinds of information covered. This would prevent the obligation being interpreted too narrowly. In particular, provisions compelling public bodies to provide detailed explanations of the processes through which members of the public can provide input into major policy or legislative proposals would be a welcome addition.

Recommendation:

- The Law should be more specific about the types of information public bodies are obliged to publish. In particular, public bodies should be required to ensure that the public are aware of the processes through which they can contribute to the discourse surrounding policy or legislative proposals made by public bodies.

III.7 Promotion of 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. Promotional activities are, therefore, an essential component of a freedom of information regime. As discussed previously, Article 8 makes limited provision for the dissemination of information of public interest. However, the Law does not put in place a system for ensuring that the public are aware of their rights to access information and how these may be exercised. For example, in a country where literacy levels are low,

provisions should be made to ensure people are made aware of their rights through a variety of means, including the broadcast media.

The Law should also provide for a number of mechanisms to address the problem of a culture of secrecy within government, including through training.

Crucially, there are no provisions establishing a presumption that all meetings of governing bodies, apart from in exceptional circumstances, should be open to the public. Article 23(3) of the Albanian Constitution provides:

> Everybody is given the possibility to follow meetings of collectively elected organs.

The FOI Law is a good place to provide for implementation of this important constitutional provision.

Recommendations:

- The Law should include putting in place systems to ensure that the public are aware of their rights.
- The Law should put in place mechanisms to address the culture of secrecy in government.
- Consideration should be given to adding a section to the FOI Law establishing a presumption that meetings of public bodies, except in certain exceptional circumstances, should be open to the public.

III.8 Whistleblowers

The Law also fails to offer protection to whistleblowers, individuals who release 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.

Protection from criminal and civil liability should also be extended to those who release information pursuant to the freedom of information law, where the individual in question acts reasonably and in good faith.[27]

Recommendations:

- The Law should be amended to provide protection for whistleblowers.
- Protection should also be extended to those individuals who release restricted information as the result of innocent error having acted in good faith.

[27] See Articles 47 and 48 of the ARTICLE 19 Model Freedom of Information Law, note 3.

III.9 Costs

Article 13 states:

> 1) The public authority may fix fees, which shall be fixed beforehand for the supply of information on official documents, in case this requires expenses.
> 2) Fees for standard services or for those for which an experience has already been established are made available to the public. Fees for other services are decided on a case by case basis, and are communicated to the interested parties at the moment of acceptance of the request.
> 3) Fees cannot exceed the costs incurred for the supply of the information. This cost shall consist of only the direct material cost incurred for the supply of the information.
> 4) The data envisaged in Article 8 shall be given free of charge.
> 5) Procedures and decisions for the fixture of fees on the information service are official documents, pursuant to the understanding of this law.

Analysis

The provisions of Article 13 are a positive step towards ensuring that individuals are not deterred from making requests for information by excessive costs involved in the process. At the same time, consideration could be given to extending these rules to further facilitate access to information. Specifically, fees could be waived or significantly reduced for requests for personal information or for requests in the public interest. In some jurisdictions, higher fees are levied on commercial requests as a means of subsidising public interest requests.

Recommendation:

- Consideration should be given to providing that requests for personal information or information whose disclosure is in the public interest are free of charge or subject to a reduced rate of fees.