



Comment on the Draft Law of Mongolia on Freedom of Information

May 2006

This Comment is based on an English translation of the Draft Law of Mongolia on Freedom of Information (draft Law), received by ARTICLE 19 in May 2006.¹ A copy of the draft Law is appended to this Comment. The Comment is intended to assist Mongolian decision-makers and the Freedom of Information Law Working Group to ensure that the law finally adopted is, as far as possible, in accordance with international standards and comparative national best practice.

ARTICLE 19's Comment is based on international standards outlining best practice for access to information laws. We refer specifically to two of our key publications – *A Model Freedom of Information Law* (Model FOI Law) and *The Public's Right to Know: Principles on Freedom of Information Legislation* (Public's Right to Know) – which encapsulate the accepted international standards. Both of these publications are available on ARTICLE 19's website (www.article19.org).

1. General Comments

There are four essential components of a functioning freedom of information or access to information law: a presumption in favour of disclosure; procedural means by which the right of access may be exercised; a clearly defined regime of exceptions to the right of access; and the right to appeal any refusal to provide information or any other claimed breach of the right of access to an independent body. Each of these components are addressed below in relation to the draft Law.

Presumption in Favour of Disclosure

Article 1 of the draft Law describes its purpose as being to define the legal grounds for securing citizens' right to get information. Article 5.1 provides for the exercise of this right individually or jointly with others, and Article 9.1.1 places a responsibility on

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

bodies covered by the law to ensure the conditions for exercising the right. Nowhere, however, does the draft Law set out unequivocally the right of access. Such a statement in the law is critical to establishing the presumption in favour of disclosure. The following statement, drawn from Article 4 of the Model FOI Law, is an example of how the right of access can be set out clearly in law:

Any person making a request for information to a public body shall, subject only to the exceptions recognised in this law, be provided with access to that information.

The presumption in favour of access should apply broadly to all public bodies and private bodies undertaking public functions, as well as to all information, regardless of form or function, held by these bodies (see Articles 6 and 7 of the Model FOI Law). Articles 4.1.1 and 4.1.2 define public bodies broadly, and we commend this aspect of the draft Law. Article 4.1.3 defines information as information “about people, physical item, event and phenomenon.” This is probably quite broad but better practice is not to limit the categories of information in this way and simply refer to all information, whatever it is about. Again, this is fundamental to giving effect to the presumption in favour of disclosure.

Recommendations:

- The draft Law should incorporate such a clear and unequivocal statement of the right of access.
- Article 4.1.3 should be amended to make it clear that it applies to any information held by a public body, regardless of the subject matter of that information.

Procedural Matters

This is, in general, a strong aspect of the draft Law, although improvements should still be made. It is positive that the draft Law provides, at Articles 7 and 8.1.2, for the right to receive information in the form requested. At the same time, some of the provisions in Article 7.1 are not entirely clear, at least in translation (for example 7.1.3, which refers to making an inquiry about the information).

Article 8.2 refers to the responsibilities of citizens under the law. This is not found in most access to information laws and its purpose is unclear. Article 8.2.1 stipulates that citizens have a responsibility to comply with the provisions of the law. The draft Law sets out the procedure for making a request for information and the consequences of a failure to follow the correct procedures, for example, the rejection of their request. Other than that, it does not make sense to refer to citizens’ ‘responsibilities’, as such, under the law.

Article 8.2.2 states that citizens have a responsibility not to infringe the Constitution, other laws and other people’s rights and legitimate interests when exercising their right to information. It is clear that citizens must not breach other laws or the Constitution and this does not need to be repeated in this law. It is also not appropriate to provide for a responsibility not to infringe others’ legitimate interests. Either these are protected by law, in which case this responsibility is, as noted just above, already clear, or those interests are not protected by law, in which case one may ‘infringe’ them.

Article 14.6 provides for a response to a request for information to be made either orally or in writing. While access to information may be provided orally, for example, where the requester is illiterate, a written response should always additionally be provided. This is important, for example, as the basis for any appeal should the requester ultimately decide that his or her rights have not been respected.

Article 19 provides for fees for accessing information and Article 19.2 provides that such fees should not exceed the direct costs relating to providing the information. This is positive but a more detailed system relating to fees would be helpful. This could provide, for example, for fees to be charged only for larger requests for information (say, over 20 pages), for a central schedule of fees, for example, per page of photocopying above this limit, for a mechanism to ensure uniform fees across the public service, and for waiver of fees for indigent requesters or requests in the public interest.

Recommendations:

- The means of gaining access to information, set out in Article 7.1, should be clarified.
- Article 8.2, providing for citizens' responsibilities under the law, should be removed.
- Article 14.6 should be amended to ensure that a written response is always provided to a request for information.
- Consideration should be given to expanding upon Article 19, dealing with fees, as suggested above.

A Clearly Drafted Regime of Exceptions

The draft Law does not include its own regime of exceptions, instead referring simply to existing secrecy laws (Article 3.1). This is the most serious shortcoming in the draft Law. The existing secrecy laws are vastly overbroad and serve as the basis for a totally unnecessary level of secrecy within government. A central goal of any access to information law is to change long-standing secrecy practices with a view to promoting a more transparent civil service for the future. Simply deferring to secrecy laws will clearly fail to do this.

Instead, an access to information law should set out legitimate confidentiality interests in a clear and narrow regime of exceptions to the right of access. This is also critical to giving effect to the presumption in favour of disclosure. This regime should cover all legitimate confidentiality interests, but it should not be subject to further extension by secrecy laws, which undermines the right to access information. In other words, the carefully crafted regime of exceptions in the access to information law should be comprehensive and, when it comes into conflict with the overbroad and historic system of classification provided for in secrecy laws, it should prevail.

In accordance with international standards prescribing a three-part test for exceptions (see Principle 4 of the Public's Right to Know), all exceptions should be subject to a harm

test, so that it is only where the disclosure of information would actually harm a legitimate interest that non-disclosure may be justified. Thus, it is not appropriate to exempt all information about national security from disclosure; information should only be exempt where its disclosure would actually harm a national security interest. Finally, exceptions should be subject to a public interest override so that where, on balance, the larger public interest would be served, the information should still be disclosed even though this might harm a legitimate interest. This might be the case, for example, where otherwise sensitive national security information revealed evidence of corruption.

Article 3.2 exempts certain information covered by Article 4 of the Law on resolving application and request submitted by citizens to government organizations and officials. We are unable to comment on the legitimacy of this provision *per se* but, like all secrecy provisions, it should be dealt with as recommended above, that is to say by a specific exception in the access to information law.

Recommendation:

- The system for exempting information under the draft Law should be completely revised. The exclusion of information classified as secret by other laws should be removed and replaced with a carefully drafted regime of exceptions, in accordance with the standards set out above. In case of a conflict between this regime of exceptions and secrecy laws, the former should prevail.

The Right to Appeal

Articles 17.1, 18.1 and 18.2 provide for complaints to a higher official within the same body in case of a claimed breach of the right to access information. Article 18.3 provides for an appeal to the courts, while Article 18.4 provides for a right to make a complaint to the National Human Rights Commission.

ARTICLE 19 recommends just such a three-tier appeals system in the context of an access to information system. However, the scope of the right to complain to the National Human Rights Commission is not entirely clear. It is assumed, however, that such complaints will be processed in accordance with the provisions of the 2000 National Human Rights Commission of Mongolia Act. Pursuant to Article 17 of that law, the Commission has a number of non-binding powers regarding complaints, including to refer them to the courts, to make recommendations to public bodies on resolving complaints, to ask organisations to cease practices which violate human rights and to seek to resolve complaints through conciliation.

These are analogous to powers exercised by many Ombudsmen. In the context of general monitoring of human rights abuses, which may be varied in nature, these powers may be appropriate. In the very specific context of information requests, however, it is important that the administrative oversight body be able to order disclosure of the information, subject to any ruling to the contrary by a court. Timeliness is often of the essence in relation to information requests, and having to wait until a complaint is dealt with by a court is simply too time-consuming, and costly, for most requesters. Indeed, one of the

reasons an administrative oversight mechanism is so important in the first place is precisely to avoid the necessity of appealing to the courts.

Recommendation:

- An additional provision should be added to Article 18 making it clear that the National Human Rights Commission has the power to order disclosure of information.

2. Promotional Measures

One important area which the draft Law fails to address at all is the question of promotional measures to ensure its proper implementation. A range of measures should be put in place. These will depend on the context but some possibilities are outlined below.

Public Educational Measures and Training of Officials

A number of measures should be put in place to promote public awareness of their rights under the access to information law, as well as how they may exercise those rights. A central body, perhaps the National Human Rights Commission, should be given an overall role in publicising the law and in publishing a general guide on how to use it, in easy-to-understand language.

Just as the general public needs assistance in understanding its rights under the new law, officials need assistance in understanding their new obligations and how to interpret and apply the law. Indeed, training has proven to be key to promoting proper implementation of access to information laws. As with public education, there are significant benefits to placing responsibility for this in the hands of one central body, perhaps a body which already has a mandate in the area of training of civil servants. At the same time, this should not be understood as relieving public bodies of their primary responsibility to train their own officials.

Record Maintenance

It is only where records are maintained in good order that public bodies can provide efficient access to those records to the public. In many countries, this poses a serious barrier to effective access. Furthermore, the benefits of good record management go far beyond that of improved access to information; indeed, good record management is a key feature of good modern governance. One approach, which allows for standards on record management to be gradually increased over time, is to allocate central responsibility for setting binding standards in this area to one line ministry, such as the ministry of justice. That ministry can then consult with other ministries before establishing such standards and reviewing them from time-to-time as practices improve.

Reporting

Reporting can be an important way of helping implement access to information legislation. It can also enable civil society to monitor such implementation, and to identify weak points in the system and poor performers. All public bodies should be

required to report on the number of requests they have received under the law, how they dealt with them, how many were refused in whole or in part and what exceptions were relied upon, and so on. A central body with responsibility for the law, either a ministry or the National Human Rights Commission, should then be required to report to the Great State Khural (National Assembly) on overall implementation of the law. This provides the Khural with an opportunity to review progress and to make necessary adjustments in implementation strategy.

Punishments and Protections

Article 9.2 of the draft Law provides that it is an offence intentionally to destroy information or otherwise obstruct access. At the same time, civil servants who disclose information in good faith pursuant to a request should be protected against liability even if, in fact, the information should not have been disclosed. Furthermore, “whistleblowers” – individuals who release information on wrongdoing – should be protected against any employment or other sanction, again as long as they acted in good faith. This acts as an important information safety valve, ensuring that this sort of public interest information is released.

Recommendations:

- A central public body should be given responsibility for public education relating to the freedom of information law, including to publish a guide on how to use it.
- Similarly, one body should be given overall responsibility for leading on efforts to train public officials, working in conjunction with individual public bodies to this end.
- The law should provide for some system for promoting better management of records.
- A dual system of reporting on implementation, first by public bodies to one central body and second by that central body to the Great State Khural, should be put into place.
- Individuals who release information pursuant to a request, as well as those who release information on wrongdoing, should be protected against sanction, even if the information was legitimately secret, as long as they acted in good faith.

3. Miscellaneous Comments

True Information

Articles 6.1.2 and 9.1.3 refer to the provision of true information to requesters. It is not entirely clear what this means. If it means that public bodies must provide the information they actually hold, and in full, then it is a positive provision. If, however, it means that the content of the information must be true or accurate, then it is based on a misunderstanding of the proper role of an access to information law. The purpose of these laws is to provide access to the information public bodies actually hold, regardless of whether or not that information is correct. Indeed, sometimes, it will be significant to reveal that public bodies hold information which is erroneous, and this may even be the underlying purpose of a request. To suggest that public bodies should, in this case,

change the information to make it accurate so as to comply with the law on access to information would actually subvert one of the purposes of that law.

Obligation to Publish

Articles 15 and 16 provide for the release of information automatically, even in the absence of a specific request for it. This is an important aspect of a freedom of information regime, ensuring that key information reaches the public even if no one requests it. The obligations provided for are positive but they could be improved in two ways. First, a system could be put in place to increase the amount of information subject to automatic or routine disclosure over time and as public bodies become more efficient in handling information. For example, one public body – a ministry or the National Human Rights Commission – could be given the power to set minimum standards in this area, to which every public body would then be expected to conform.

Second, the specific information subject to disclosure in the draft Law could be reviewed to make sure it is as comprehensive as possible. Section 17 of the Model FOI Law calls for routine disclosure of the following types of information:

- (a) a description of its structure, functions, duties and finances;
- (b) relevant details concerning any services it provides directly to members of the public;
- (c) any direct request or complaints mechanisms available to members of the public regarding acts or a failure to act by that body, along with a summary of any requests, complaints or other direct actions by members of the public and that body's response;
- (d) a simple guide containing adequate information about its record-keeping systems, the types and forms of information it holds, the categories of information it publishes and the procedure to be followed in making a request for information;
- (e) a description of the powers and duties of its senior officers, and the procedure it follows in making decisions;
- (f) any regulations, policies, rules, guides or manuals regarding the discharge by that body of its functions;
- (g) the content of all decisions and/or policies it has adopted which affect the public, along with the reasons for them, any authoritative interpretations of them, and any important background material; and
- (h) any mechanisms or procedures by which members of the public may make representations or otherwise influence the formulation of policy or the exercise of powers by that body.

Recommendations:

- If Articles 6.1.2 and 9.1.3 mean that only information which is in substance correct should be provided in response to a request, then these provisions should be removed.
- Consideration should be given to providing for a central body to set minimum standards relating to routine disclosure, to that the extent of this obligation may be increased over time.
- Consideration should be given to increasing the list of categories of information currently subject to routine disclosure obligations.

**LAW OF MONGOLIA ON
FREEDOM OF INFORMATION**

CHAPTER ONE

GENERAL PROVISIONS

Article 1. Purpose of the law

1.1 The purpose of this law is to define the legal grounds of securing the citizen's right to get information and to regulate the relations on making of request for receiving information, reviewing of and responding to request and the penalties for violating the citizen's right to get information.

Article 2. Legislation on freedom of information

2.1 The legislation on freedom of information is comprised of the Constitution of Mongolia², the current law and all other relevant legislative acts.

2.2 If an international treaty to which Mongolia is a party provides otherwise, the provisions of the international treaty shall prevail.

Article 3. Scope of the law

3.1 This law shall not apply to the information which was classified as secrets of state, organization and individual /herein after referred to as "secret"/ in accordance with the laws of Mongolia.

3.2 This law shall not apply to receiving and reviewing of application, suggestion, statement and complaint as specified in Article 4, Law on resolving application and request submitted by citizens to government organizations and officials³.

3.3 This law shall apply to foreign citizens and stateless persons on similar bases.

Article 4. Definitions of the law

4.1. Terms used in this Law shall have the following meanings:

4.1.1. "Government organization" shall mean State Great Khural, organizations those report to it, Constitutional court, courts and prosecution offices of all instance, Government, Ministries, Government agencies, Local self governing and Administrative organizations, and other organizations those implement activities and services which are within the frame of government responsibility, on the bases of contract, in accordance with law, by state or local budget;

² "State Information" compilation 1992 №1

³ "State information" compilation 1995 №25

4.1.2. "Private legal entity that performs public service" shall mean a privately owned legal entity performing specific services to public in the branches of education, culture, science and health including the sectors of infrastructure such as transportation, energy and telecommunication in accordance with the regulations set by legislations; object

4.1.3."Information" shall mean a information, physical item and document containing information about people, physical item, event and phenomenon.

Article 5. Freedom of information

5.1. A Mongolian legal entity, a foreign and international organization, a Mongolian citizen, a foreign citizen and a stateless person /herein after referred to as "citizen"/ shall exercise the right to get information from government organization and private legal entity that performs public service by themselves or in cooperation with others.

5.2. Citizen enjoys the right to disseminate /utilize/ information, through publishing or reporting others, in his possession or received from others according to the procedures as mentioned in the present law.

Article 6. Principles of freedom of information

6.1. Following principles shall apply in securing the freedom of information:

6.1.1. Information should be open except those classified as secret in accordance with law;

6.1.2. Information should be true;

6.1.3. Information should protect the rights and legal interests of the third party.

CHAPTER TWO

REGULATION ON RECEIVING INFORMATION

Article 7. The forms of obtaining information

7.1. A citizen shall have the right to obtain information in following forms:

7.1.1. getting introduced with the documents and physical items relating to the information;

7.1.2. obtaining a copy of the document;

7.1.3. making an inquiry on the issues about the information;

7.1.4. getting oral explanation on the contents of the information;

7.1.5. getting informed about the official source of the information;

7.1.6. other forms not prohibited by law.

Article 8. Citizen's rights and responsibilities to obtain information

8.1. A citizen shall have the following rights in obtaining information:

8.1.1. to be equal;

8.1.2. to choose freely the form of receiving information;

8.1.3. not to explain the need and ground to obtain information;

8.1.4. to make complaint to authoritative organization and official if deems the right to obtain information is violated.

8.2. A citizen shall have following responsibilities in obtaining information:

8.2.1. to comply with the conditions and regulations on obtaining information mentioned in the present law;

8.2.2. not to infringe the Constitution, other laws, and other's rights and legitimate interests when exercising the right to obtain information.

Article 9. Responsibilities of the government organization and private legal entity that performs public service on providing with information

9.1. The government organization and the private legal entity that performs public service shall have the following responsibilities:

9.1.1. To ensure the condition of exercising the right to obtain information for citizens;

9.1.2. To receive the request by its jurisdiction on the compulsory bases;

9.1.3. To provide true and correct information in forms requested;

9.1.4. To respond to the citizens' requests within the period mentioned in the present law;

9.1.5. other responsibilities provided for by law.

9.2. The government organization and the private legal entity that performs public service shall be prohibited to intentionally destroy the available information in the organization or to prevent the citizens from exercising their right to obtain information.

9.3. The government organization and the private legal entity that performs public service should not transfer the requests in their own jurisdiction to other organization or official without any ground.

9.4. The government organization and the private legal entity that performs public service should approve their list of secret information in accordance with the grounds mentioned in provision 2, article 3, Law on Organization's secret and inform public.

Article 10. Making of request to get information

10.1. Request seeking information /herein further referred to as "request"/ is to be addressed in the name of government organization or private legal entity that performs public service that have a responsibility to respond on the matter.

10.2. The request shall be made either orally or in written form in Mongolian.

10.3. Citizen who does not have command of Mongolian language, may make a request in his/her own mother language and shall have the request translated and officially certified.

10.4. In a written request, a citizen shall include his/her full name, postal or residential address and telephone number and sign.

10.5. The officer who received the request made orally in person shall make the note of it and have the person who made the request, signed after introducing the note.

10.6. If a person making a request is not able to communicate due to reasons of blindness, muteness and deafness, the request shall be made through an interpreter and a relevant officer shall make the note of the request and the copy of the request shall be provided to the person who made the request.

10.7. If a request is made in written form in cooperation by citizens, it should be signed by all those made request or their representative may sign and attach a document certifying his/her right to represent.

10.8. Relevant officer of government organization or private legal entity that performs public service, who is receiving the request, is prohibited to demand anything more except those mentioned in the present law.

Article 11. Receipt and Registration of a request

11.1. The government organization or the private legal entity that performs public service must receive citizen's request and shall resolve in accordance with the regulations set by the present law upon reviewing the request.

11.2. The government organization or the private legal entity that performs public service shall establish a meeting room to receive citizen and a timetable for the receipt of request and shall notify public about it.

11.3. An officer who is responsible for the receipt of request shall make the note of the request made orally in person in meeting room and register it in special registration.

11.4. A request made in written form shall be received by an officer who is responsible for the chancellery matter of the organization and registered in accordance with appropriate procedures.

11.5. The request registered in accordance with the provision 11.4 of the present law should be transferred to the official who has an authority to resolve it.

Article 12. Reviewing of a request

12.1. An official who received the request shall take the any one of the following measures:

12.1.1. to provide with information;

12.1.2. to transfer the request to organization with relevant jurisdiction within 3 days, if the request does not fall under the authority of that organization and to notify the person who made the request.

12.1.3. to object to provide with information this belongs to secret.

12.2 A clarification may be made if the request of the person who made the request is not clear.

Article 13. Returning of a request

13.1. If the request does not have a specific name and address, it should be returned without review.

13.2. If the request does not meet the requirements specified in the present law, a response with ground about this should be provided to the citizen who made the request.

Article 14. Period and form of responding to a request

14.1. If it is possible to provide with immediate response to the request, it should be done so.

14.2. If it is impossible to provide with immediate response to the request, a response should be made within 14 days upon the receipt of the request.

14.3. If there is a ground to protect human life, health, and legitimate rights and interests of a person, response should be provided within 48 days.

14.4. In necessary case, this time limit may be extended up to 10 days by the head official of the organization.

14.5. A citizen who made the request shall be notified about the extension.

14.6. A response to the request shall be made either in written or orally in person.

14.7. A response to the request may be given through telephone or other communication means and this should be made note of in the registration and kept.

CHAPTER THREE

SPECIAL RESPONSIBILITIES OF GOVERNMENT ORGANIZATION TO SECURE THE CITIZEN'S RIGHT TO OBTAIN INFORMATION

Article 15. Providing with information from Government organization

15.1. Every government organization shall have an officer who is responsible for providing citizens with information.

15.2. An officer who is responsible for information matter shall carry out the mission of creating condition to provide citizens with true and correct information about the organization.

15.3. A government organization may specifically establish an information base for the purpose of providing citizens with information urgently.

15.4. A list of information which can be obtained from the organization shall be notified publicly.

15.5. Activities of government organization except those specifically mentioned in the law shall be open to public.

15.6. The government organization shall notify public about its decisions except those of confidential in accordance with law.

15.7. The government organization shall include in its annual report about the information provided to citizens.

Article 16. Government organization's responsibility to publish

16.1. The government organization has a responsibility to publish following decision and information:

16.1.1. Laws, other decisions of State Great Khural;

16.1.2. Draft of laws submitted to State Great Khural and the decisions of State Great Khural;

16.1.3. Decisions of Government, state central administrative or local administrative organization and Government agency for public compliance;

16.1.4. The working procedures of State Great Khural and Government sessions, and working regulations of Government, its cabinet members, Committee and council of the Governor;

16.1.5. Procedure for utilizing minutes of State Great Khural and Government sessions,

16.1.6. Regulations, structure, budget, staff, salary fund and report of government organization;

16.1.7. Procedures of government organization to receive and resolve the application and complaint by citizens.

16.2. Decisions and information mentioned in the provision 16.1 of the present law may be disseminated publicly through publishing in official press or use of means of telecommunication such as publicly accessible web page.

CHAPTER FOUR

OTHER

Article 17. Supervision on the activities of securing freedom of information

17.1. Whether the activities of the government organization or the private legal entity that performs public service to receive and resolve the request made comply with the legislation is supervised by the head of the organization.

Article 18. Making of complaint

18.1. A citizen may make a complaint to a higher level of organization or official of that organization or official if considers that the government organization or the private legal entity that performs public service violated his/her right to obtain information.

18.2. An organization and an official mentioned in provision 18.1 of the present law shall review and resolve the citizen's complaint in accordance with the "law on resolving the Application or Complaint made by citizens to government organization or official" and will provide with response.

18.3. A citizen retains the right to launch an complaint to the court if he/she did not receive response within the time limit provided for by provision 18.1 of the present law or does not agree with the decisions of higher level of organization or official.

18.4. A citizen retains the right to make complaint to National Commission for Human Right if the government organization or the private legal entity that performs public service objects to provide with information.

Article 19. Service fee

19.1. A citizen who received information from government organization or private legal entity that performs public service shall pay the service fee.

19.2. Amount of service fee mentioned in provision 19.1 of the present law should not exceed the direct cost relating to the providing of information.

Article 20. Liability imposed on the violation of legislation on freedom of information

20.1. Any person who is guilty of violating the provision 8.2.2 of the present law shall be imposed the fine of 5000-10000 togrogs by judge.

20.2. For violation of provisions 9.1, 9.2, 9.3, 9.4, and 11, 2, fine of 200 000-250 000 for organization, 15 000-30 000 for officer shall be imposed by judge.

Article 21. Entering into force

21.1 This law shall become effective from the day of in 200....

SIGNATURE