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To the People of Iceland:

One among many omissions from the 1944 constitution is a provision concerning freedom of information, a remarkable omission—and, at the time, not unique to Iceland. The omission is remarkable in view of history, because the 1766 Swedish constitution guaranteed the freedom of the press and a right to information (“tryckfrihetsförordningen” in Swedish), including the public’s right to access official documents.¹ The Swedish constitution, with these provisions, preceded the 1789 French Bill of Rights and the first amendment of the United States constitution in 1791. In our time, the right to information is increasingly seen as an integral part of human rights; so the United Nations General Assembly has recently resolved (see next section). This must, therefore, be accorded protections similar to other human rights. The guiding principle is transparency, which means that the legislature or other political authorities are not permitted to restrict the publication of information except subject to strict conditions described by law. This general rule (“offentlighetsprincipen” in Swedish, also referred to as sunshine laws in the United States) means that everyone is guaranteed access to official documents, court proceedings, and open meetings where political decisions are made.

The Constitutional Council bill from 2011 covers the right to information and freedom of opinion, expression, and the media in three separate provisions, as follows.

Article 14: Freedom of Opinion and Expression

This article proclaims:

- “Everyone has the right to freedom of opinion and belief and to the expression of his thoughts.
- Censorship or other similar restrictions on freedom of expression shall never be provided for by law. However, the freedom of expression may be restricted by law for the protection of children, security, health, or the reputation of others, as necessary in a democratic society.
- The government shall guarantee conditions that are conducive to open and informed public discussion. Access to the Internet and information technology shall not be curtailed except by a decision of a court of law and on the same substantive conditions that apply to restrictions on the freedom of expression.
- Everyone is accountable for the expression of his opinion before a court of law.”

Apart from a more strongly worded commitment to the freedom of opinion and expression compared with the 1944 constitution, the main novelty here is the requirement that the government guarantee conditions that are conducive to open and informed public discussion and access to the Internet, which concerns not only access to information but also freedom of expression. This is in keeping with the 2016 United Nations resolution that now defines access to the Internet

¹ Finland has similar provisions in its constitution.

as a human right.² This view rests on the observation that the Internet has contributed to increased public awareness of human rights and thereby empowered those who oppose injustice and discrimination. The Internet is a powerful catalyst of transparency, access to information, and public participation in promoting liberal democracy. Further, the Internet can play a key role in enabling citizens to call for equal justice, accountability, and respect for human rights. All this matters in Iceland where strong political forces openly fight transparency and flirt with the kind of illiberal democracy currently rising in Europe and elsewhere. For example, Iceland has seen a sharp increase in politically motivated libel suits.

Article 15: Right to Information

This article is new, and is inspired in part by the 1766 Swedish sunshine laws. It proclaims:

- “Everyone is free to gather and disseminate information.
- Government administration shall be transparent, and documents, such as minutes of meetings, shall be preserved and any submissions, their origins, process and outcome, shall be recorded and documented. Such documents shall not be destroyed except in accordance with law.
- Information and documents in the possession of the government shall be available without evasion and the law shall ensure public access to all documents collected or procured by public entities. A list of all cases and documents in public custody, their origin and content shall be available to all.
- The collection, dissemination and surrender of documents, their preservation and publication, can only be restricted by law for a democratic purpose, e.g., in the interest of protecting personal privacy, the security of the nation or the lawful work of regulatory authorities. It is permitted to restrict access by law to working documents, provided that no further steps are taken than necessary to preserve the normal working conditions of government authorities.
- As regards documents which are subject to confidentiality by law, information shall be available as regards the reasons for the confidentiality and the limits on the time of confidentiality.”

The key idea here is that the right to information is a fundamental human right and merits constitutional protection on par with other human rights. Transparency is the key to protecting the public’s right to information. By reducing opacity and secrecy, the right to information is intended to check the decisions and actions of public authorities.

The provision aims to protect civic freedom to gather, disseminate, receive, store, and manage information. Further, the provision requires the state to collect, publish, and share information and to secure the right of citizens to access information kept by the government. The state

² See United Nations, General Assembly, “Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development,” June 27, 2016, https://www.article19.org/data/files/Internet_Statement_Adopted.pdf, accessed January 9, 2018. See also how the *Independent* newspaper reported the resolution July 5, 2016: <http://www.independent.co.uk/life-style/gadgets-and-tech/un-declares-online-freedom-to-be-a-human-right-that-must-be-protected-a7120186.html>, accessed January 9, 2018.

is obliged to preserve existing documents to secure open access and to prevent documents from being destroyed by mistake or for dishonest purposes.³

There are good reasons for including these details in the new constitution. Icelandic media and the general public have often had difficulty obtaining information from the government, partly because the government has not kept a list of documents received or produced. Article 15 aims to strengthen the legal basis for a transparent and open society where the government cannot keep secrets from the public without just cause stipulated by laws. The aim is to improve public administration through increased transparency. Even so, as stated, there are exceptions to unfettered access, including, for example, clinical reports on patients and other such sensitive personal information.

Article 16: Freedom of the Media

This article proclaims:

- “The freedom of the media, their independence and transparency of ownership shall be ensured by law.
- The protection of journalists, their sources of information and whistle-blowers shall be ensured by law. It is not permitted to breach confidentiality without the consent of the person providing the information, except in the process of criminal proceedings and pursuant to a court order.”

This article is new, and is again inspired by the Swedish constitution—one fourth of which (one chapter of four) deals with press freedoms. Just as the government is not allowed to restrain the freedom of expression except “for the protection of children, security, health or the reputation of others, as necessary in a democratic society” as described above, the government is not allowed either to restrain the freedom of the press and other media. This provision reflects the prevailing view of information as a human right and of media as providers of information. The provision aims to protect media from interference or persecution by the government or others.

A free media requires independence and transparent ownership. Newspaper readers, radio listeners, and television watchers all need to know who owns these media to be able to form an opinion about their editorial independence. This is important to Icelanders: the 2010 National Assembly called for diversified ownership of the media.

The need for constitutional protection of journalists, their sources of information, and whistle-blowers follows from the need for free media. Such protection, like transparency, is necessary to keep the government, courts, corporations, interest organizations, and others in check. As a constitutional matter, absent protection for sources of information and whistle-blowers the media’s freedom, and democracy itself, could easily be undermined. This not only concerns the right to protect sources but also the obligation to do so in the interest of liberty and democracy. This interpretation accords with the Berne Convention for the Protection of Literary and Artistic Works, which is legally binding in Iceland.⁴ Article 16 will make it very difficult to justify the

³ A well-known case concerns the Reykjavik Chief of Police who, in 1976, hoping to be appointed Supreme Court Justice, had a member of his staff destroy—literally, set on fire—evidence of wiretaps that he did not want to fall into the hands of his successor. The story is recounted by Thór Whitehead (2006), “Smáríki og heimsbyltingin—Um öryggi Íslands á válegum tímum” (Small States and the World Revolution—On the Security of Iceland in Dangerous Times,“ *Þjóðmál*, vol. 3, 55–85.

⁴ See <http://www.wipo.int/treaties/en/ip/berne/>

exposure of a journalistic source or whistle-blower. And it will require new laws to make lawsuits against journalists more difficult.

As before, there is a reason why this detailed provision is included in the Constitutional Council's bill. The current state of the law has permitted a recent avalanche of lawsuits targeting Icelandic journalists, some resulting in verdicts against the journalists. True, some such verdicts have been overturned by the ECHR, but not all have, and even a journalist who succeeds at the ECHR has been unjustly required to defend against a speech-chilling action.⁵ And the journalist must resort to international bodies for protection, rather than relying on Icelandic law and the protection of Icelandic courts. When the state is ultimately required by the ECHR to pay damages after a verdict's reversal, everyone's time and money have been wasted—to say nothing of the daunting effect this prospect has for any journalist considering whether to publish an article that could result in litigation.

There is a long tradition of protecting press freedoms in Icelandic law. Even so, Icelandic politics and public administration remain marred by a pervasive culture of secrecy in which public authorities routinely seem to view the absence of a clear legal obligation to make information available as an open invitation to keep information from the public view.

Democracy Lives by Light

The right of journalists to protect their sources of information differs fundamentally from the confidentiality of doctors and lawyers, who have a professional duty not to share with others, even in court, confidential information they have acquired about their clients. A journalist's duty is the reverse: to share their information with the public. The constitutional protection accorded to journalists does not apply to the information they have gathered, but only to the sources of the information. This is a key distinction underlying the constitutional protection of sources and whistle-blowers. Freedom of the media is an important pillar of democracy and, therefore, merits constitutional protection.

The three provisions in the Constitutional Council's bill reviewed above aim to increase transparency and to counter a pervasive official culture of secrecy and submissive journalism. In Iceland, until recently, even the travel expenses of cabinet ministers and other public officials were not accessible to journalists or the general public. The problem persists. In the course of its work, one of the committees of the Constitutional Council was denied access to information about pension payments from the Pension Fund of Public Employees to those retirees receiving the highest payments. The request for this information was predicated on the common knowledge that some politicians and public officials receive multiple pensions, but names with amounts attached are kept from public view, a state of affairs that the constitutional bill aims to change.

Bank secrecy and confidentiality laws in Iceland are commonly used to stifle media coverage of alleged law violations by banks or their customers. This practice appears to be based on a fundamental misunderstanding. Confidentiality applies only to lawful behavior but not to alleged legal violations. For example, police are bound by confidentiality concerning legal wiretaps in criminal cases, but they have no such duty to remain silent concerning illegal wiretaps. In a well-known case, the Central Bank of Iceland has refused for years to disclose, even to a parliamen-

⁵ The experience of journalist Erla Hlynsdóttir is a case in point. On three separate occasions, the Supreme Court of Iceland found her guilty of having overstepped the limits of freedom of expression. On all three occasions, she was subsequently acquitted by the European Court of Human Rights, which required Iceland to award her damages. See <http://merlin.obs.coe.int/article.php?id=15303>, accessed January 9, 2018.

tary committee, the recording or the transcript of a telephone conversation between the governor of the bank and the prime minister where they discussed a huge loan (500 million euro) to an about-to-fail bank in October 2008. The bank has defended its decision by referring to the law on bank secrecy as if bank secrecy were intended to protect bankers, not bank customers. The transcript was leaked in 2017, just one year before the 10-year statute of limitations for a breach of trust charge lapses.

One final example: just before the 2017 parliamentary election the Reykjavík Sheriff's Department issued a gag order to the newspaper *Stundin*, prohibiting it from covering leaked documents that outlined dubious financial transactions by the prime minister during the 2008 crash.⁶ The gag order and the questions raised by *Stundin*'s coverage had re-ignited a debate about the corrosive effects of money in Icelandic politics, unequal justice, and the value of a free press. The gag order bars *Stundin* and its partners at investigative journalism outfit Reykjavík Media from further reporting based on the leaked documents from the windup committee of Glitnir bank. It remains to be seen whether the gag order will be upheld by the Reykjavík District Court or by the Supreme Court. The new constitution aims to put an end to such attacks against the freedom of the media.

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⁶ See *Stundin*, October 6, 2017: <https://stundin.is/grein/5550/>. Accessed January 10, 2018.