



MEMORANDUM

on the

the Ugandan draft Access to Information Bill, 2004

by

**ARTICLE 19
Global Campaign for Free Expression**

**London
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I. Introduction

This Memorandum provides an analysis of Uganda's draft Access to Information Bill, 2004 (draft Law).¹ The draft Law is an effort to give effect to Article 41 of the Ugandan Constitution, which recognises the general right of all citizens to access information in the possession of the State.

ARTICLE 19 welcomes this effort to enact freedom of information legislation. We particularly welcome the legislative intent, indicated in the draft Law's preamble, to "eliminate the secretive and unresponsive culture hitherto existing on Government information and records ... to curtail the abuse of power, human rights violation and corruption by exposing officers and Government activities to the public ... and to improve and strengthen the culture of transparency and accountability in the public sector...." Positive provisions in the draft Law which further these goals include those creating relatively clear procedures for requesting information, a prohibition on

¹ The copy of the draft Law which we received is somewhat corrupted, probably as the result of an incompatibility between the file and the word processor which we used to open it. ARTICLE 19 accepts no responsibility for errors resulting from difficulties with reading or deciphering the text of the draft Law.

conditioning the right of access on reasons given by the requester, reasonably short deadlines imposed upon information officers for responding to information requests, a modest duty on officials to preserve requested information, and some protection for whistleblowers. In addition, we very much welcome the recognition that even exempt information should be released when release is in the public interest.

At the same time, we are concerned that the draft Law as presently constituted fails to conform fully to international standards. Difficulties include that it: accords a right of access in the first place only to citizens rather than to all persons; fails to specify or to cap fees that may be charged for accessing information; contains a wide range of exceptions, many of which are not subject to any type of harm test and some of which are drafted in vague terms that may invite abuse; fails to provide for cheap and speedy appeals to an independent administrative agency of denials of information requests; and fails to provide protection to public officials who, in good faith, release exempt information. Our concerns about these, and some other matters are outlined in detail below.

Section II of this Memorandum outlines international standards on freedom of expression and information, as developed under the *International Covenant on Civil and Political Rights* and the *African Charter on Human and People's Rights*. Section III contains our principal analysis, as well as our recommendations and suggestions for improvement. In addition to drawing on principles found in the international instruments, the analysis draws on ARTICLE 19's *The Public's Right to Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles),² as well as on ARTICLE 19's *A Model Freedom of Information Law* (the ARTICLE 19 Model Law).³ The ARTICLE 19 Principles have been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression.⁴

II. International and Constitutional Obligations

The *Universal Declaration of Human Rights* (UDHR)⁵ is generally considered to be the flagship statement of international human rights. Article 19 of the UDHR, binding on all States as a matter of customary international law, guarantees not only the right to freedom of expression, but also the right to information, in the following terms:

Everyone has the right to freedom of expression: this right includes the right to hold opinions without interference and to *seek, receive* and impart information and ideas through any media and regardless of frontiers....[emphasis added]

The *International Covenant on Civil and Political Rights* (ICCPR),⁶ which Uganda ratified in 1995, guarantees the right to information in similar terms, providing:

² (London: 1999). Available at <http://www.article19.org/docimages/512.htm> This is a standard-setting document based on international human rights treaties, as well as international best practice.

³ (London: 2001). Available at <http://www.article19.org/docimages/111.htm>.

⁴ See UN Doc. E/CN.4/2000/63, 5 April 2000.

⁵ UN General Assembly Resolution 217A(III), 10 December 1948.

⁶ Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.

Everyone shall have the right to freedom of expression: this right shall include freedom to *seek, receive* and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print.... [emphasis added]

Article 9 of the *African Charter on Human and People's Rights*⁷ provides general protection for freedom of expression. While this Article does not expressly protect the right to receive opinions and ideas, statements by the African Commission on Human and Peoples' Rights suggest that this right is implicitly be protected. For example, in 2002, the Commission adopted the *Declaration of Principles on Freedom of Expression in Africa*,⁸ which states:

IV
Freedom of Information

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
2. The right to information shall be guaranteed by law in accordance with the following principles:
 - everyone has the right to access information held by public bodies;
 - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
 - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
 - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
 - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
 - secrecy laws shall be amended as necessary to comply with freedom of information principles.
3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

While international law recognises that the right to information is not absolute, it is well established that any restriction on this right must meet a strict three-part test. This test requires that any restriction must be (1) provided by law, (2) for the purpose of safeguarding a clearly defined legitimate interest, and (3) necessary to secure the interest.

Critical to an understanding of this test 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 (in short, if the disclosures satisfies the harm test), and (2) the harm to the interest caused by disclosure is greater than the public interest in disclosure.⁹

⁷ Adopted at Nairobi, Kenya, 26 June 1981, entered into force 21 October 1986.

⁸ Adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002.

⁹ See ARTICLE 19 Principles, Principle 4.

In recognition of the importance of giving legislative recognition to freedom of information, in the past few years, a significant number of countries from around the world – including some of which include India, Israel, Jamaica, Japan, Mexico, Pakistan, Peru, South Africa, South Korea, Thailand, Trinidad and Tobago, and the United Kingdom, as well as most of East and Central Europe – have taken steps to enact legislation giving effect to this right. In doing so, they join those countries which enacted such laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia, and Canada.

Constitutional Guarantee

The fundamental importance of the right to information is formally recognised at Article 41 of the Ugandan Constitution, which provides:

- (1) Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.
- (2) Parliament shall make laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information.

As noted above, the preamble to the draft Law states that its purpose is to “fulfil the requirement of ... Article 41 of the Constitution” to enact laws “prescribing the classes of information referred to in [Article 41] and the procedure for obtaining access to that information.”

III. Analysis of the Draft Law

III.1 Scope of Application

Section 4 of the draft Law provides for access by all citizens to “information or records under the control of any government or Ministry or department, statutory information Corporation, authority or commission, government organ or agency or any other public body”. Explicitly excluded from the draft Law’s coverage are Cabinet records, records of court proceedings before the conclusion of applicable cases and personal information relating to a judicial officer hearing “a particular case or involved in a special tribunal or commission of inquiry”.

Analysis

While some laws do restrict the right to citizens in the way that the draft Law does, others do not and ARTICLE 19 is of the view that such a restriction is unnecessary and may unduly limit the right of access, including to people who fall between the cracks, as it were, such as refugees and stateless persons. In practice, there will be very few requests by non-residents/citizens, so there is no real cost-related rationale for restricting access in this way. Furthermore, broader access may well assist, for example, researchers from abroad, to the overall benefit of the people of Uganda.

In addition, while the draft Law, particularly by its reference to “any other public body”, would appear to impose on all public bodies the obligation to provide access to information of which they have control, the draft Law does not explicitly include within its scope private bodies which carry out public functions (such as maintaining roads or operating rail lines). In recognition of the increasing utilisation of such private bodies by governments, however, the ARTICLE 19 Principles state that the duty to disclose information should extend to any such private body and we recommend that the draft Law reflect this as well. Ideally, in addition, private bodies should be subject exercise or protection of a right.

Finally, the section 4 exclusions from the draft Law’s coverage of certain entities and persons is inappropriate. It is true that international law permits a public body to refuse to disclose information under certain circumstances, namely to protect a legitimate aim, where disclosure would significantly prejudice that aim and such prejudice is greater than the public interest in disclosure. But this is obviously a matter which requires a case by case assessment, based on the particular facts presented and which should be dealt with as part of the regime of exceptions rather than by simply excluding this information from the ambit of the law. The wholesale exclusion of certain entities from any obligation whatsoever to disclose information is, therefore, not consistent with international law. To take just one example, it would be of paramount public interest to know that a judicial officer hearing a particular case were not able to pass objective judgment in that case because, for example, he or she was a relative of the accused, or stood in debt to the accused. By excluding wholesale such information from the ambit of the freedom of information law, the judicial process may be open to just the kind of “abuse of power” which the draft Law’s preamble states it is intended to curtail.

Recommendations:

- Consideration should be given to extending the right of access to everyone, rather than just to citizens.
- The draft Law should apply to private bodies which perform public functions, as well as to public bodies. Consideration should also be given to subjecting private bodies which hold information necessary for the exercise or protection of a right to a duty of disclosure.
- Section 4(2), excluding wholesale certain classes of information and persons from the ambit of the draft Law, should be removed.

III.2 Access Procedures

Section 10 establishes that the Permanent Secretary of the Chief Executive Officer of each public body is that body’s information officer. It also requires every public body to appoint other officers as necessary to “provide quick access to its records to the public”.

Requests for information must be in writing, except where the requester cannot make a written request due to illiteracy or a disability (section 11(3)). Requests must identify the information sought but must also provide “sufficient particulars of the person requesting the information” (section 11(2)). Section 6(3) makes clear that a request “may not be affected” by any reason given for the need for such information, nor by any conclusion

that the relevant information officer may come to as to what the reason for the request might be.

Section 12 provides that, generally speaking, public bodies must respond to information requests within 30 days of their receipt, in writing, indicating whether or not the request has been granted, and they must provide access within that period where requests have been approved. This period may be extended for a period of 30 days under generally reasonable conditions (section 20).

Refusals of information requests must be accompanied by information as to whether the information exists and the reasons for the refusal (section 12(3)).

Various sections, principally uncontroversial and in many cases quite positive, govern the manner of access. For example, section 23 provides that access should be granted to a document or record in the form in which it was requested and section 8 provides that alternative formats for the requested information should be provided by the public body where necessary to accommodate a person with a disability. Section 9 provides for the provision of information in other than the official language upon request and when the provision of a translation would be in the public interest.

Analysis

These procedural provisions are largely in line with international standards. We note, however, a couple of minor difficulties. First, two different sections appear to govern time limits for responding, and extensions for responding, to information requests. Section 12(1) deals with the time deadlines for responses but section 19(1) also contains provisions on this topic, some of which duplicate those found in section 12(1) while others, including section 19(1)(c), relating to potential fees, add further substance on this question. Again, section 12(2) and section 20(1) both relate to extensions, and contain some duplicative provisions (for example, sections 12(2) and 20(1)(a), and sections 12(2)(b) and 20(1)(c)), but also some different provisions. For example, section 20(1)(b), providing for an extension where the records sought are located in a different district from that in which the information officer is situated, is not found in section 12(2). We recommend that these sections be combined as appropriate and that all duplicative provisions be removed.

Second, section 11's requirement that all requests be in writing – except certain requests from illiterate or disabled persons – may be too formalistic and inefficient in practice. Provision should be made for the possibility, in appropriate circumstances, for the making and servicing of oral requests, by any person. This can ensure a quick, informal system for release of information where there is no question of the information falling within the scope of the regime of exceptions.

Third, the requirement in section 11(2) that the requester provide “sufficient particulars” should make clear that such “particulars” relate only to name or address or other matters which would facilitate the public body's being able to communicate with the requester regarding the granting or refusal of the request. In cases where, for example, a person

makes an oral request for a document which can be provided to him or her on the spot (see previous paragraph), no personal information whatsoever need be required of him or her.

Fourth, Section 14 provides for the transfer of requests where the record contains economic information and another public body has a higher commercial interest in the information than the body which received the request. While we understand the motivation for this rule, we note that the concept of a greater commercial interest is an inherently flexible one, and may be used to transfer requests unnecessarily, resulting in undue delay in the processing of requests for information. It is always open to the body which receives the request to consult fully with any other body which has an interest in the information. This is a more appropriate way of addressing this issue than transferring the request.

Recommendations:

- Sections 12 and 20 should be consolidated, as indicated in the text.
- Provision should be made for oral requests, where appropriate, on a broader basis than currently provided for in the draft Law.
- The draft Law should specify that no more personal information should be required of the requester than is necessary to allow for communication with him or her regarding the information request.
- Section 14 should be amended to place the onus on the body receiving a request to consult with other affected public bodies rather than allowing for the transfer of such requests.

III.3 Fees

Section 22 provides that the Minister, after consultation, shall “prescribe the fees payable for access to information and may prescribe different amounts for different types of information”. Section 23 further provides that, where information requests have been approved, the requester shall be given access upon payment of the prescribed fee.

Analysis

This open-ended fee regime may potentially be subject to abuse. Nothing in the draft Law would prohibit differential fees being set based on the Minister’s subjective assessment of the “sensitivity” of the information – for example, relatively high, even prohibitive, fees being set for information relating to national security, and lesser fees for information which the Minister deems to be innocuous. Admittedly, the same provision would permit the Minister to take the positive step of providing for lower fees, or free access, for certain types of requests, particularly requests in the public interest, but this is not guaranteed or even promoted. Moreover, the draft Law sets no limits on the fee schedule, leaving open the possibility that access to certain information could be rendered virtually impossible for most Ugandans simply because the fees for access are too high.

It would be preferable if the draft Law included certain guiding rules relating to fees. It should specify that in no case should fees exceed the amount actually required for searching for and providing copies of the requested records or documents, and in no

event should the fees for copying exceed those charged in the commercial sector. Consideration should be given to explicitly providing for lower fees or free access for certain types of requests, particularly requests in the public interest or for personal information. Finally, consideration should be given to either providing that searching for documents should be free or for a fee structure whereby a set initial amount of time, for example two hours, is allocated free to requesters, who then only have to pay for additional time.

Recommendations:

- Fees should not be allowed to exceed the actual cost of searching for and providing copies of the records or documents requested.
- Requests in the public interest or for personal information should be subject to lower fee structures, or should be free.
- Time spent searching for records should either be free or should be limited; perhaps with an initial period available to requesters free of charge.

III.4 The Regime of Exceptions

It is well established that the right to information requires that all individual requests for information from public bodies must be met unless the public body can demonstrate that the information requested falls within the scope of a limited regime of exceptions. One of the most problematic issues for any freedom of information law is how to balance the need for exceptions and yet prevent those exceptions from undermining the very purpose of the legislation.

Under international law, freedom of information, like freedom of expression, may be subject to restrictions, but only where these restrictions can be justified on the basis of strict tests of legitimacy and necessity. International and comparative standards, including the ARTICLE 19 Principles, have established that a public authority may not refuse to disclose information unless it can show that the information meets the following strict three-part test:

- the information must relate to a legitimate aim listed in the law;
- disclosure must threaten to cause substantial harm to that aim; and
- the harm to the aim must be greater than the public interest in having the information.¹⁰

The first part of this test requires that a complete list of the legitimate aims that may justify non-disclosure should be provided in the access to information law; no other aims may be relied on to deny access. The second part of this test requires that the public authority demonstrate that disclosure would cause substantial harm to the legitimate aim. It is not enough for the information simply to fall within the scope of the legitimate aim, for example, by being related to national security. Instead, the public authority must also show that disclosure of the information would harm that aim. Otherwise, there is no reason not to disclose it. The third part of the test requires a balancing exercise to assess

¹⁰ Note **Error! Bookmark not defined.**, Principle 4.

whether the risk of harm to the legitimate aim from disclosure is greater than the public interest in accessing the information (this is often called the public interest override). If, taking into account all the circumstances, the risk of harm from disclosure is greater than the public interest in accessing the information, then the information may legitimately be withheld. This might not, however, be the case, for example where the information, while representing an invasion of privacy, also reveals serious corruption. It is implicit in the three-part test that exceptions to the right to information always be considered on a case-by-case basis.

The draft Law has a wide-ranging exception regime, comprising fully 12 sections. Generally speaking, the overall *aims* pursued by the exceptions, described below, are legitimate under international law. However, in many cases these aims are framed in unduly vague or broad terms. Furthermore, many exceptions are not subject to a requirement of a showing of a likelihood of harm from disclosure.

Vagueness and Overbreadth

The draft Law provides for a number of categories of exceptions, all with substantial sub-categories, which include: information obtained in confidence from foreign States, information related to defence or the conduct of international affairs (including intelligence), information relating to the detection and prevention of crime; personal information; commercial information; information involving confidence of third parties; information relating to the safety of individuals; information privileged in legal proceedings; information relating to the economic interests or financial welfare of the State; information relating to certain research by a third party; information relating to opinions or advice regarding policies or decisions; and requests which are vexatious in nature.

Analysis

As noted above, all of these are recognised generally as legitimate aims to be protected by exempting them from information disclosure. However, as set out in the draft Law, and in particular in the various sub-categories provided, many of them are either unduly vague or excessively broad.

It is not practicable, and we do not think it would be useful, to go through in detail each sub-provision in each section which provides a ground for refusal to disclose requested information. In some cases, the provisions are either vague or overbroad (or both) and they therefore leave the door open for abuse. Information officers, if they are so minded, will be able to take advantage of the breadth of these exceptions to deny information requests. Accordingly, as a general matter, we recommend review of all of the exceptions with a view to ensuring that they are drafted in the narrowest terms possible, always with an eye to avoiding the potential for abuse.

Three examples of problematical exceptions are listed below:

- Section 26(1)(c) exempts, among other things, “information relating to the performance ... or role of any ... personnel or ... person ... responsible for the

detection, prevention or suppression of subversive or hostile activities”. This category is far too broad, potentially exempting from disclosure any information about a person working in the area of detection even if such information relates to the person’s theft of public moneys or other corruption, or his or her salary as a public servant.

- Section 26(1)(g) exempts, among other things, “information on methods of ... collecting ... or handling information [relating to defence and intelligence]”. While some information falling within this category may legitimately be withheld, other information should be disclosed. For example, abusive information-collection techniques, such as illegal wiretapping and physical abuse of detainees, are subjects of high public interest and should be subject to disclosure.
- Section 26(1)(c) exempts “information relating to the characteristics, capabilities, performance, potential, deployment, functions or role of any defence establishment”. Once again, this is unduly broad and could be understood and including, for example, information about the number of armed personnel, information about a failure of the armed forces to meet certain basic minimum standards and so on. The idea that this information in any way protects national security is based on an outmoded and secretive view of government. An essential element in an effective military force is close public oversight leading to the rooting out of waste, inefficiency and corruption.

Lack of a General Harm Test

The draft Law fails to subject a wide range of exceptions to a harm test although, in a few cases, harm to the legitimate aim is required. In effect, therefore, these exceptions are blanket or class exceptions, in clear breach of the standards outlined above.

For examples, none of the specific exceptions described above as being overbroad required harm to the protected interest before the information may be withheld.

Some subsections do contain harm tests, but they vary considerably in strength. For example, section 26(1), in its first sentence (but not for any of its following sub-articles) provides for the withholding of information where disclosure “*could be injurious* to the conduct of international affairs and defence ...” (emphasis supplied).¹¹ Again, section 27(1)(c) permits withholding of information whose disclosure “could reasonably be expected to be injurious” to the enforcement of any law and order ...” Section 29(1)(c) permits the withholding of information which “could result in material financial loss ... or could prejudice the competitive position of a third party”. And section 31 permits the withholding of information if its disclosure “could lead to endangering the life or

¹¹ Article 26(1) employs the “could be injurious” standard twice in its preamble, but then goes on to provide: “without prejudice to the generality of the foregoing may refuse to release the following information” – after which nine different categories of defence-related exceptions are listed, none of which is explicitly subjected to a harm requirement. We do not believe that, as drafted, the “could be injurious” standard can be imported into these nine further categories.

property ... of an individual”. The draft Law does contains other, somewhat better, formulations of a harm requirement. For example, Article 33(1) refers to disclosures which could “materially jeopardize” the economic interests of the State while Article 34(1) refers to disclosures which would put research “to serious disadvantage”.

Analysis

As we noted above, the regime of exceptions should subject each exception to a strong harm requirement. The draft Law should adopt this approach, by allowing information to be withheld only where disclosure would be likely to cause serious prejudice to a legitimate interest.¹²

It is worth pointing out that a strong harm requirement undoes much of the damage potentially caused by a overbroad exceptions. This is because, where an exception is cast in excessively broad terms, much of the information in the zone of overbreadth would not, if disclosed, cause any harm to a legitimate interest. To take an example from above, if section 26(1)(c) was conditioned by a requirement of substantial harm to the detection, prevention or suppression of subversive or hostile activities, the concern noted, namely that it appears to exempt from disclosure information relating to possible corruption by public officials, would disappear. Indeed, one of the important rationales for a harm requirement is that this helps address the problem of overbreadth.

Recommendations:

- The exceptions should be reviewed to ensure that they are drafted in clear and narrow terms which protect only specific and legitimate public and private interests.
- Each of the exception categories should be subject to a harm test, cast in terms of a likelihood of serious prejudice to a legitimate interest.

III.5 Whistleblower Protection and Public Interest Override

Section 37 provides that information “may be” disclosed, even if it is exempt, in three circumstances: (a) where disclosure would reveal “evidence of substantial contravention of or failure to comply with any law”; (b) where the disclosure would reveal an “eminent [we assume the intended term is “imminent”] and serious public safety or environment risk; and (c) where the “public interest in the disclosure of the record clearly outweighs the harm contemplated in the disclosure”.

Analysis

Section 37 is a very welcome provision. There are areas, however, in which it could be improved.

First, the section really is performing two quite distinct functions. In the first place, it provides protection for “whistleblowers” – namely, for persons who release information, even if it is exempt, under the circumstances specified in sub-articles (a) and (b). Here, it is to be noted, that the section *permits* the disclosure of the information (“may be”

¹² For various formulations of an acceptably strong harm test, see the *Model Law*, Articles 25-32.

disclosed), precisely as it should do – while public officials, journalists, and the like, should not be subjected to penalties for disclosing even exempt information which falls within the categories outlined in section 37(a) and (b), they should not be obliged to do so.

Combined with this whistleblower protection, however, is the public interest override provision. Here, the “may be” formulation is quite out of place. In a fully compliant freedom of information regime, public bodies should be *obligated* to disclose information where this is in the overall public interest, regardless of whether it is exempt or not. Thus, section 37(c) should be cast in obligatory (“must”) terms rather than permissive (“may”) terms. For this reason, we recommend that section 37 be split into two different articles, a permissive article relating to whistleblowers and an obligatory article relating to public interest disclosures.

A further revision is necessary to the public interest override. As written, it imposes a heavy burden on the requester, who must not only show that the public interest in disclosure is greater than any potential harm resulting from disclosure, but that the public interest “clearly outweighs the harm”. This fails to respect the underlying rationale for a freedom of information law, namely that the *presumption* should be – as the Ugandan Constitution itself appears to provide – in favour of disclosure. Exceptions are, after all, merely deviations from the general rule in favour of disclosure of all information held by public bodies. Given this fact, instead of requiring requesters to show that the public interest is clearly served by disclosure, the burden should be on the public body to show that the potential harm to a legitimate interest resulting from disclosure would be greater than the public interest in disclosure. Absent such a showing, the rule should be that disclosure is required.

Recommendations:

- Section 37 should be split into two provisions: one on the protection of whistleblowers and the other relating to public interest disclosures.
- The public interest provision should provide for obligatory disclosures, where the public body fails to show that the harm from disclosure outweighs the public interest in disclosure.

III.6 Severability

The draft Law is silent on what should occur in the event that a requested document or record contains information, some but not all of which is legitimately exempt. Freedom of information laws in many countries address this situation by providing that in such cases the information which is not exempt should be disclosed, to the extent that it can reasonably be severed from the exempt information. We recommend the addition of such a provision to the draft Law.¹³

Recommendation:

- The draft Law should provide for the disclosure of the non-exempt portion of any

¹³ See Article 24 of the ARTICLE 19 Model Act for an example of such a “severability” provision.

document or record requested, even if the document or record contains some legitimately exempt material.

III.7 Appeals

Section 41 of the draft Law currently provides for an initial appeal to the Chief Information Officer (CIO). The CIO is, pursuant to section 40, the Permanent Secretary of the Public Service. Section 43(1)(d) provides for a “prescribed fee for complaints”.

Section 42 provides that the CIO may determine procedures for any investigation to be undertaken. According to section 44, a decision on appeal must be taken within 30 days, and the decision, along with reasons, must be communicated to both parties and must indicate to the parties their right to appeal the decision to the High Court.

Appeals to the High Court are possible, but conditioned on an appeal having been taken to the CIO. Section 48 provides that any court hearing an appeal shall have access to the records under dispute.

Finally, section 49(3) provides that the burden of proof falls on the party claiming that it has complied with the relevant provisions of the draft Law – in general, therefore, the burden will fall on the public body in the event of an appeal of its decision not to disclose requested information.

Analysis

Ideally, there should be three levels of appeal: first to a higher authority within the public authority, then to an independent administrative body and finally to the courts. Experience in other countries shows that an administrative level of appeal is crucial to the effective implementation of freedom of information legislation. Most democratic countries provide for such an appeal in their freedom of information laws. For purposes of this analysis, we treat the CIO as an administrative level of appeal, rather than as an internal appeal.

Based on this assumption, the appeals system provided in the draft Law is seriously flawed, both as to the substantive powers and procedures relating to the CIO appellate procedure and also as to the question of the independence of the CIO.

As to the first matter, we have a number of concerns. In the first place, the investigative powers of the CIO are left completely unspecified. In light of the fact that the draft Law explicitly empowers courts to review the documents and other information at issue in appeals before them, the draft Law’s silence on this matter with respect to the CIO would imply that the CIO does not have the power to review such documents and information; in any event, no subpoena power is provided for in the draft Law. Yet, without such power, it is quite unclear how the CIO could be in a position to render a fair and informed decision as to the merits of the public body’s refusal to disclose requested information.

The draft Law is also silent as to the effect of any decision of the CIO. It does specify that the CIO may affirm a decision by a public body or may “make a different decision”

(section 44(3)(b)). Yet it does not say what legal effect the CIO's decisions have. It is, therefore, unclear whether or not the CIO may issue injunctions commanding release of the disputed information or whether the CIO's decisions hortatory only. ARTICLE 19's view is that such decisions, if they are to truly play a positive role in ensuring and protecting the right to access to information, should be fully binding on public bodies.

Finally, the draft Law provides for a "prescribed fee" for complaints, without specifying what the fee is to be. As with fees for accessing information, fees for appealing negative decisions by public bodies should be minimal to ensure that the right to access information is not undermined for financial reasons. If the fees for an appeal are excessively high, this will be an incentive to public bodies to deny information requests, in the hope that the requester will not have the resources to appeal. To avoid this possibility of abuse, it is essential that appeals to the CIO, in addition to being swift, be cheap. We therefore recommend that guidelines relating to the fee structure be provided in the draft Law

Every bit as fundamental as the above points is the following: the CIO, who is after all the Permanent Secretary of the Ministry of Public Service, is obviously allied to, indeed is a part of, the government. Yet, it is of critical importance to the integrity of a freedom of information regime that the appeals process be truly independent, that is, free from political and other governmental pressure. To this end, freedom of information laws in many jurisdictions create separate and independent administrative bodies to which appeals of refusals to disclose requested information are to go in the first (or second) instance. In contrast to the CIO, these bodies are fully independent of government. Independence is typically secured, in part, through the appointments process for members of these bodies and through ensuring that members can command significant social support and respect. The bodies have the power to compel production of any document or record, to order the public authority or private body to disclose the record, to reduce any fees charged and to take appropriate steps to remedy any unjustifiable delays. The right of appeal to the courts provided for under these freedom of information regimes are *from* decisions by these administrative bodies.

Recommendations:

- The CIO, or preferably an independent administrative body, should be given full powers to subpoena witnesses, issue injunctions and to do such other things as are necessary to thoroughly investigate complaints and to render effective and binding decisions.
- The "prescribed fee" for appeals should either be eliminated or at least subjected to guidelines in the law which ensure that it does not pose a barrier to access to information.
- Instead of providing for the CIO to hear appeals, the draft Law should either establish a new independent administrative body to hear such appeals or allocate this task to an existing independent body.

III.8 Preservation of Documents and Records

Section 16 requires information officers to “ensure that the records concerned [in particular requests] are preserved until the request is met and where there is an appeal until all the procedures for appeal are exhausted”.

This provision is welcome, as far as it goes but it does not go far enough. As the draft Law itself recognises, the right of access is to *all* information held by public bodies (subject to the regime of exceptions). It follows that public bodies have an obligation to maintain all their records in a form that makes access as easy and efficient as possible. The draft Law should, therefore, provide for a comprehensive regime of record maintenance, including clear rules on the archiving and destruction of public records. A good example in this regard in the UK freedom of information law, which requires the equivalent of the minister of justice to set central standards relating to record keeping to which all public bodies are required to conform.

Recommendation:

- Section 16 should be supplemented by a full regime for maintaining records.

III.9 Protection for Innocent Release of Information

While the draft Law does, as noted above, provide protection for whistleblowers, it does not protect from civil and criminal liability and from employment sanctions officials who, pursuant to a request under the law, disclose information mistakenly but reasonably and in good faith. If officials can be penalised for making even reasonable mistakes, they will necessarily err on the side of caution and be reluctant to disclose information even if it should be disclosed. Given the culture of secrecy that normally prevails within government, such reluctance to disclose may already be a longstanding practice. For this reason, protection for reasonable, even if mistaken, disclosures under the law is important.

Recommendation:

- Protection for good faith disclosures should be provided for in the draft Law.

III.10 Duty to Publish

The draft Law provides, at section 51, that each public body shall report annually to the Parliament on the number of access requests it has received, on decisions made and on reasons for any denials. In addition, the CIO must report annually on complaints the office has handled.

This duty to provide to Parliament information obviously relevant to the securing of the freedom of information regime is welcome. But here too, the draft Law does not go far enough. As the ARTICLE 19 Principles make clear, freedom of information implies that public bodies must publish and otherwise widely disseminate documents of significant public interest, subject only to reasonable limits imposed by resources and capacity. Most freedom of information laws require public bodies to publish regularly accounts of what information they possess, operational information about how they function, guidance on

processes by which members of the public may provide input into policy and legislative proposals, and the content of and reasons for decisions affecting the public.¹⁴

The ARTICLE 19 Model Law, for example, provides for active publication of the following categories 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.¹⁵

Recommendation:

- The draft Law should expand the duty of public bodies to publish, along the lines indicated in the text.

III.11 Promotional Measures

Proper implementation of an access to information law requires measures to be taken both to ensure that the public are aware of their rights under the law and to address the prevailing culture of secrecy within public authorities. It is desirable that the independent administrative body mentioned above (in the event that the draft Law creates one), or some other appropriate public body, be allocated responsibility for both functions. The administrative or other public body should be required to produce and disseminate widely a guide to using the law, which is accessible to members of the general public. It should also be given a broader public educational role.

The draft Law creates a freedom of information regime which is in many ways complex – witness the complicated system of exceptions – and which imposes potentially demanding responsibilities on information officers and their appointees. It is not unlike, in this respect, freedom of information regimes in a wide range of other countries. Experience in these countries has shown that, in light of these complexities and

¹⁴ See ARTICLE 19 Principles, Principle 2 for more details.

¹⁵ Note 3, section 17.

responsibilities, it is essential that the officials charged with the day-to-day operation of the freedom of information system be given training in how to carry out their duties, including instruction in how to employ the exception regime with due regard to the presumed right of access, how to locate requested information efficiently, and so on. We recommend, therefore, that the draft Law promote such training by requiring public bodies to ensure appropriate training for those officials responsible for its implementation and by allocating an oversight role for training to an independent administrative body.

Recommendations:

- The draft Law should provide for an independent administrative body to ensure robust public education regarding all aspects of the freedom of information regime which the Law creates.
- The draft Law should require all public bodies to train officials who are responsible its implementation and allocate an oversight role in this regard to an independent administrative body.