

CHRI's Preliminary Analysis of the Draft Model Law for African Union Member States on Access to Information

A Summary

A draft model law on access to information has been developed for Africa. The Special Rapporteur on Freedom of Expression and Access to Information appointed by the African Commission on Human and Peoples' Rights mooted this exercise in collaboration with the Centre for Human Rights, University of Pretoria, the Africa Freedom of Information Centre and various organisations, activists and experts working for the promotion of the right to information in different parts of the world. The draft model law was placed in the public domain for comment. Once adopted by the African Commission on Human and Peoples' Rights, this model law will guide African Union member States in their efforts to adopt information access law or review existing ones. A series of public consultations on the contents of this draft model law are underway. Commonwealth Human Rights Initiative (CHRI) has submitted a preliminary analysis of the draft model law along with recommendations for improvement. The detailed submission is contained in the attachment. A summary of our analysis is given below.

1. **Definitions:** The definition of the term "Information" can be improved upon in order to remove the sense of redundancy that it conveys. CHRI recommends that this definition be amended to make it more focused and inclusive allowing scope for coverage of newer forms of information that may be created in future. The draft model law creates three categories of information holders- public bodies, relevant private bodies and private bodies. This can be confusing. Whichever body is in the State sector must be covered under the category of public bodies and any body that does not receive any funds from the State or does not perform a public function must be treated as a private body. CHRI recommends that only two categories of information holders be retained. CHRI also recommends that repetition of clauses in the context of both categories be avoided in order to keep the draft model law simple.
2. **Proactive Disclosure:** The draft model law does not hold strong on proactive disclosure as the list of categories of information required to be disclosed proactively is much smaller than that found in the ATI laws of Mexico and India. CHRI recommends the addition of more categories of information to this list such as salaries and remuneration of officers and employees, details of expenditure on subsidy or social welfare programmes, details of recipients of permits, authorizations, concessions and contracts. This can ensure reduction in the number of formal requests for information. CHRI also recommends routine disclosure of facts and figures while formulating important policies, draft laws prior to their being finalized by the Government for tabling in Parliament and reasons for administrative and quasi-judicial decisions of any public officer.
3. **Response to Request:** The draft model law requires an information request to be dealt with in 30 days in ordinary circumstances. This is too long a period when compared with best practices in African countries with access laws. CHRI recommends that the draft model law provide for the disposal of requests in 21 days.

4. **Public Interest Override:** The draft model law in its present form does not give much guidance to the Information Officer for invoking public interest override over exemptions. Many access laws around the world have dealt with such provisions with broad descriptions or/and illustrations to facilitate disclosure of even exempt information in the public interest. CHRI recommends the inclusion of guidelines such as disclosure in the interest of protecting public health and safety or the environment or for combating corruption.
5. **Exemption relating to International Relations:** The draft model law exempts entire classes of information if it pertains to positions adopted in international negotiations and correspondence or exchanges with foreign governments or international agencies. Class exemptions are best avoided in ATI laws. CHRI recommends that the harm test is applied on a case by case basis instead of making entire categories of documents exempt from disclosure.
6. **Manifestly Frivolous or Vexatious Requests:** The draft model law permits an Information Officer to reject a request on grounds of it being frivolous or vexatious in nature. In the absence of further guidance in this regard this provision is likely to be abused to discourage even genuine requesters. CHRI recommends the inclusion of specific grounds when a request can be treated as vexatious or frivolous. All such decisions must be open to challenge before the independent oversight mechanism at the instance of the Information Officer.
7. **Right of Internal Review:** The list containing the circumstances under which a requester may apply for an internal review of the Information Officer's decision is restrictive. CHRI recommends that it be expanded to include instances such as absence of any decision from the Information Officer on a request or the decision to provide redacted information. CHRI also recommends that a requester should be allowed to make a request for review directly to the head of the public or private body and not through the Information Officer in order to avoid the problems of appeals going missing inexplicably.
8. **Oversight Mechanism- Term of Office:** The draft model law provides that a two-third majority of Parliament may authorise removal of an Information Commissioner. CHRI believes that this will lead to politicisation of the matter. Instead the charges against the Commissioner must first be investigated by an independent tribunal and the findings must be forwarded to Parliament. Parliament will then have an objective basis on which to debate the desirability of removing the Commissioner from his or her office.
9. **Provision for compensation:** The draft model law does not contain any provision for compensating a requester who suffers any loss or any detriment due to unlawful denial of an information request or unreasonable delay in providing the information. CHRI recommends that the independent oversight body be given the power to order compensation for the requester which must be borne by the information holder concerned.
10. **Application for Judicial Review:** As the draft model law seeks to create a special tribunal in the form of the Oversight Mechanism there must be a bar on the rights of any party to an information access dispute to approach a court for obtaining a stay on any proceeding under this law or the issuance of injunctions or interim orders interfering with any proceedings under this law. CHRI recommends that the model law bar all parties to a case from approaching the courts before exhausting all remedies under the information access law.
