Draft Model Law for African Union Member States on Access to Information

A PRELIMINARY ANALYSIS WITH RECOMMENDATIONS FOR CHANGE

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Introduction
Commonwealth Human Rights Initiative congratulates the Special Rapporteur, of the African Commission on Human and People's Rights, on Freedom of Expression and Access to Information, the Centre for Human Rights, University of Pretoria and all advocates of people's access to information in Africa and elsewhere for crafting a model information access law for members of the African Union. Such regional initiatives are to be welcomed and encouraged as localized problems of opacity in the working of governments and public authorities require home grown solutions that are in tune with international standards and best practices. CHRI through its offices in Delhi and Ghana has participated in various stages of deliberation on this draft model law.

The drafting team deserves appreciation for hammering together a set of provisions that will have to be acceptable to all member States of the African Union. This is no mean achievement given the rich diversity of systems, structures and practices relating to governance in various parts of Africa. CHRI supports the basic principles underlying the draft model law namely, presumption of access to information, narrowly drawn exceptions to disclosure that are subject to strict harm tests, quick and inexpensive access procedures and the provision for an independent body that will champion the cause of transparency in myriad ways and adjudicate over access disputes.

CHRI has attempted a critical analysis of some of the provisions of the draft model law with a view to making recommendations for strengthening them further. Given below is our reasoning and suggestions for improving some of the clauses in the draft model law.

1. Preamble:
The Preamble aptly anchors the draft model law on the international discourse on people's human right to access information from their governments which itself is an inseparable part of the larger international human rights discourse. The references to well-known formulations about the human right to information contained in international and regional rights charters hinge the draft model law upon the aspirations of all peoples to be treated with dignity by the State and its agencies. This grounding could be converted into *terra firma* acceptable to all Africans by adding to the Preamble the promises and commitments made to transparency in governance and developmental decision-making in sub-regional treaties and declarations by African States. For example, the ECOWAS treaty states the following as one of its objectives:

"(3)(2)(l) the encouragement and strengthening of relations and the promotion of the flow of information particularly among rural populations, women and youth organisations and socio-professional organisations such as associations of the media, business men and women, workers, and trade unions;"

Further, at Article 66(2) the State parties to the ECOWAS Treaty agree to cooperate in order to:

(f)… promote and encourage dissemination of information in indigenous languages, strengthening co-operation between national press agencies and developing linkages between them."

Similarly at Article 128 the East African Community Treaty of 1999 states as follows:

"3. The Partner States agree to promote enabling environment for the participation of civil society in the development activities within the Community."

It is not possible to ensure the meaningful participation of peoples in developmental activities unless they have access to all information about such processes. Access to information is key to ensuring people's participation in governance and developmental decision-making processes.

Recommendation #1:

Consideration may be given to linking to the Preamble the formulations mentioned above and other similar formulations on access to information contained in various communiqués and declarations emerging out of Africa in order to increase the potential for ownership of this draft model law in various parts of Africa.

2. Definitions:

2.1 *Information:* Clause 1(1) contains definitions of various terms used in the Act. This includes the definition of the term 'information'. It says, - "*information means any information regardless of form or medium in the possession or under the control of the public body, relevant private body or private body to whom a request has been made.".* Given the commonsensical understanding of the term 'information', the definition despite being exhaustive in nature does not yield itself to any greater clarity by the mere repetition of the term in the explanatory portion. Definitions serve as guides to authorities implementing the law as well as those who adjudicate disputes. So it would be useful to make the explanation more focused and yet exhaustive. Second, the last part of the definition of 'information' links its availability with the public, private or relevant private body to whom a request has been made. A very narrow reading of this clause (which is highly likely in situations where the bureaucracy might like to frustrate the effective use of the law) can mean that for a request received only such 'information' will be treated as 'information' as may be held by the body to whom the request has been made. Further, for the purpose of that request any information held by any other

agency will not be treated as information within the definition of the law. In order to avoid such absurd interpretations which are very likely in the initial stages of implementation it is better to delete the words "to whom a request has been made" from the definition. Information will still mean the same irrespective of whether a request has been made to a body covered by the law or not. Information will still be 'information' even in the absence of the right of access.

The term 'complaint' used in Clause 88 of the draft model law needs to be included in the Definitions Clause as it has a special meaning within the draft model law. This matter is discussed in detail at para #37 below.

Recommendation #2:

1. Consideration may be given to improving upon the current definition of 'information' as follows:

"Information means any data, fact, opinion, advice, statistic or any other tangible material in any form including records, documents, memos, e-mails, notings on a file or record, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, or data material in any electronic form in the possession or under the control of a body or authority having obligations under this Act."

2. Consideration may be given to inserting in Clause 2 a definition of the term 'complaint' as follows:

""complaint" means an application made by a person under Clause82 of this Act."

(See supportive arguments at para #37 below)

2.2 *Relevant private bodies:* In the Definitions Clause, the term – "*relevant private body*" is defined as any body owned, (a) *controlled or substantially financed directly or indirectly by funds provided by government, but only to the extent of that financing; or (b) carrying out a statutory or public function, but only to the extent of that statutory or public function."* This is a welcome provision in the Act in that it seeks to cover not only public bodies but also private bodies with the obligation to be transparent, if they satisfy certain conditions. However, this definition raises a few questions that must be addressed.

First, the label 'relevant private body' has the potential to create a considerable amount of confusion for the layperson. Such terms have not been used in any well-drafted access law elsewhere. There are three categories of entities that do not fall within the definition of a conventional government department, yet will fall within the rubric of an 'agency of the State'. The first is a statutory corporation that is established or owned and wholly controlled by the Government. The second category comprises of bodies that are substantially financed by public funds provided directly or indirectly by a government. The third category is made up of bodies that are in the private sector but

are mandated to carry out public functions or public services (formerly provided by a government department or statutory corporation). A fourth category can be that of Private Public Partnership projects where concessions may be given by the Government for performing a public service or developing an infrastructure project to a company wholly owned by private stakeholders. All such bodies must be covered by the access law and fully and the definitions Clause must specify them in such manner to avoid any confusion.

Second, the current definition extends only to the extent of substantial financing provided by the government to a relevant private body. Often it may not be easy to segregate between the privately and publicly funded activities of such a body. For example, should information about the directors on the board of a company or body carrying out publicly as well as privately funded activities be covered by the access law or not? The current definition can be interpreted to mean that such information will not be available to a requester as directors will also be responsible for making decisions on some privately funded activities.

Recommendation #3:

Consideration may be given to expanding the definition of 'public bodies' to include all State agencies as described above. The remaining agencies may be clubbed under 'private bodies'. This neat segregation can avoid confusion created by the use of three separate terms in the draft model law. Subsequently, all references to 'relevant private bodies' occurring elsewhere in the draft model law may be deleted.

(Consequently, all points of analysis given below will presume that only two categories of bodies are recognised by the draft model law as per the recommendation made above.)

3. Principles:

Clause 2(1)(d) lays down the principle that all bodies covered by the law shall 'accede' to the authority of the oversight mechanism in all matters relating to access to information'. This can conflict with the clause relating to judicial review where a body covered by this law may challenge a decision or direction of the oversight mechanism. In order to avoid conflict with the provision relating to judicial review contained in Part VII this Clause may be made subject to Part VII.

Recommendation #4:

Consideration may be given to inserting at the end of Clause 2(1)(d) the following words:

"Subject to the process of judicial review laid down in Part VII of this Act."

4. Objectives:

Clause 3 beautifully explains the objects of the Act. This is a better arrangement as it makes the objectives a part and parcel of the law unlike in the information access laws of India and Bangladesh where the objects are placed in the Preamble. Often it serves only as a guide as it is technically speaking not part of the text of the law itself. It is recommended that the draft model law include the objective of 'containing corruption' as ATI has great potential in this regard.

Recommendation #5:

Consideration may be given to inserting in Clause 3(3) the words; *"and contain corruption"* after the words: *"governance and development".*

5. Repetition of Clauses in Parts II and III

The draft model law repeats the obligations of all three categories of bodies covered by the Act in Parts II and III. For the sake of brevity, it is advisable to collapse them into one Part. This will trim the size of the draft model law as well. This can be done without destroying the integrity of the draft model law by using the well-defined term **"information holder"**.

Recommendation #6:

Consideration may be given to clubbing the common provisions relating to public and private bodies into one part.

6. Proactive Disclosure:

6.1 The draft model law rightly places emphasis on the proactive disclosure of information even before describing the processes of making written requests. This is in tune with international best practice standards. However 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. It is advisable to add more categories of information to this list so that people need file fewer information requests.

Recommendation #7:

Consideration may be given to adding the following categories of information to Clause 6:

- **the particulars of the organisation, functions and duties of a body;**
- **the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;**
- **a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as its part or for the purpose of its advice, and as to whether meetings of those boards,**

councils, committees and other bodies are open to the public, or the minutes of such meetings are accessible for public;

- **a directory of its officers and employees;**
- **the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;**
- **the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;**
- **particulars of recipients of concessions, permits or authorisations granted by it;**
- **details in respect of the information, available to or held by it, reduced in an electronic form;**
- **the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;**
- **the names, designations and other particulars of the Information Officer and the head of the information holder competent to undertake an internal review under Clause 54 of this Act; and**
- **any other information that may be prescribed in the Rules/Regulations.**

6.2 In addition to proactive disclosure in a periodic manner it is commonplace for ATI laws to place an obligation of routine disclosure of official information that have a bearing on the lives and well being of the people. These relate to proactive disclosure of facts and figures relating to important policies and making known the drafts of proposed legislation so that people may have time to discuss it and influence their elected representatives who may be intending to pass it into law in Parliament or oppose its enactment. Further, every person affected by an administrative or quasi-judicial decision has a right to know the reasons informing the decision. This is a basic principle of natural justice. The public bodies must be obligated to make such disclosures under the information access law.

Recommendation #8:

Consideration may be given to inserting a new Sub-Clause under Clause 6 as follows:

"Every public body shall :

a) **publish all relevant facts while formulating important policies or announcing the decisions which affect people;**

b) **publicise drafts of legislation, and subsidiary legislation (Rules and Regulations) for the purpose of public consultation prior to their adoption and**

c) **provide reasons for its administrative or quasi-judicial decision to any**

person affected by such decision.

7. Designation of Information Officer:

Clause 8(3) states that a person designated as Information Officer must be competent to exercise the powers and perform the duties and functions of the post. While this is desirable it needs to be clarified that once appointed as an 'Information Officer' an employee of the public or private body draws his/her powers from the statute irrespective of his/her position in bureaucratic hierarchy of the organisation. The Information Officer need not be made dependent on the regular chain of command or pecking order within the organisation for the purpose of dealing with information requests. Therefore the draft model law must vest lawful authority with the Information Officer to requisition the assistance of any officer or employee in his/her organisation and place a lawful obligation on such other officer whose assistance has been sought to provide such assistance on pain of penalty. This has been found to be very useful in jurisdictions like India where senior officers often try to make the Information Officer a scapegoat for not providing information. In several cases penalties have been imposed on such officers and not the Information Officer who was unable to deliver due to their non-cooperation.

Recommendation #9:

Consideration may be given to inserting new sub-lauses (5) and (6) under Clause 8 as follows:

"(5) An information officer may seek the assistance of any other officer as he or she considers it necessary for the proper discharge of his or her duties.

(6) Any officer, whose assistance has been sought under sub-clause (4), shall render all assistance to the information officer seeking his or her assistance and for the purposes of any contravention of the provisions of this Act, such other officer shall be treated as an information officer in that matter."

8. Requests for Access:

8.1 Clause 11(3) allows for the disposal of an oral information request through an oral response if it satisfies the requester. While this appears to be a noble provision this can be misused by an ill-intentioned applicant. For example, a requester may go back pretending to be satisfied with the response of the Information Officer and later file a complaint claiming that the officer refused to receive the information request in writing. Such instances are not uncommon in developing countries. It is important to provide some protections for the Information Officer as well. So it must be left to the judgement of the Information Officer as to whether he will record the oral request in writing and immediately give a written response also in writing.

Recommendation #10:

Consideration may be given to amending Clause 11(3) as follows (the subsequent sub-clause is also given the same number- this must be rectified in the final version)

"If an information officer is able to provide an immediate response to a person making a request orally and such response is to the satisfaction of the requester the information officer may at his or her discretion reduce the request and the response to writing and hand over a copy to the requester."

8.2 Clause 11(4) lays down the content for a request under this draft model law. However it leaves out an important element of the application, namely, address of the requester for correspondence.

Recommendation #11:

Consideration may be given to inserting in Clause 11(4) the words: "and address for communication" after the words: "requester prefers access".

9. Duty to Assist Requesters:

It is laudable that the draft model law places a duty on the Information Officer to assist a requester while making an application. However the provisions do not explain what kinds of assistance may be provided. Often requesters will have vague notions of the kind of information they want. In such scenarios, the Information Officer will have to work with them to make their requests concise and precise or where possible, help them to rewrite the request. In countries like India Information Officers refrain from providing this kind of assistance as the RTI Act does not explain what is meant by 'reasonable assistance'. So it is important to provide some guidance as to what is meant by the term 'assist.'

Recommendation #12:

Consideration may be given to adding an explanatory note below Clause 12 explaining the kinds of assistance that may be provided:

"Explanation: In this Clause "assist" means assisting the requester to draw up the request in more precise terms or to narrow down voluminous information requests to a more manageable size".

10. Response to Request:

10.1 Clause 13(1) requires an information request to be disposed of in 30 days ordinarily. This is too long a period when compared with best practices in African countries with access laws. The Ugandan ATI Act requires disposal of requests in 21 days. The recently enacted Nigerian FOI law requires disposal of requests in 7 days extendable by another 7 days. The draft model law could opt for a shorter time limit.

Recommendation #13:

Consideration may be given to substituting in Clause 13(1) the digit: "30" with the digit: "21".

10.2 It is commonplace for Information Officers in developing countries to wait for the last day of the statutory deadline for disposing requests. In order to discourage such an attitude the draft model law could be amended to build in a requirement for quick disposal of a request.

Recommendation #14:

Consideration may be given to substituting in Clause 13(1) the words: "as soon as reasonably possible" with the words: "as expeditiously as possible".

10.3 Clause 13(3)(a) requires the Information Officer to inform a requester of the reproduction fee payable, if any. However there is no requirement for advising the requester about the modes of fee payment. It is international best practice to provide for multiple modes of fee payment and leave the choice of mode of payment to the requester.

Recommendation #15:

Consideration may be given to inserting in Clause 13(3)(a) the words: "and the modes of fee payment permitted under the Act" after the words: "(if any) payable".

10.4 While refusing access to information, Clause 13(7)(a) requires the Information Officer to state adequate reasons for the refusal, including the provisions of the draft model law relied on. It is not linked to Clause 35 in Part IV which states that a request may be refused only if the information falls within the list of exemptions. If adopted, this provision can be used to play a lot of mischief. The current formulation can be interpreted as follows: there could be several reasons for denying access to information and they include the provisions of the draft model law. This interpretation allows an Information Officer to deny access to information on all kinds of flimsy grounds even though the law has an overriding effect on all other contrarian laws. Grounds such as: "my boss told me not to give you the information" or "our Official Secrets Act prevents us from disclosing this information" or "we are bound by an oath of secrecy" or "we are bound by a contract containing a confidentiality clause" also become valid for rejecting a request under the current formulation. There must be no room for such negative interpretations and access requests must be denied only on the basis of exemptions provided in the draft model law. For example, the Indian RTI Act states that rejection of an information request is possible only for reasons given in Sections 8 and 9 of the Act

which explain the exemptions to disclosure. A similar clarification of position as to what are reasonable grounds for rejection must be included in the draft model law as well.

Recommendation #16:

1. **Consideration may be given to substituting in Clause 13(7)(a) the word: "including" with the words: "based on".**
2. **In view of the above recommendation consideration may be given to deleting the words: "relied on" occurring at the end of Clause 13(7)(a).**

11. Transfer of a Request:

11.1 Clause 15 provides for a procedure for transfer of requests from one public authority to another if the requested information is held partly or wholly by that other public authority. This is good practice and saves the applicant the trouble of having to hunt for the correct public authority that may hold the necessary information. However this Clause does not grant the second public authority the same amount of time for disposal of the request as it would have been entitled to, had it received the request directly from the requester. There is no reason why the second public authority must not have the same amount of time to dispose the request as others. Several access laws give the full length of time to the second public authority also.

Recommendation #17:

Consideration may be given to amending Clause 15(4)(b) as follows:

"(4) for the purpose of calculation of the time limit specified in Clause 14 the date on which that public or private body received the application shall be deemed to be the date on which the application was made by the requester."

11.2 Experience from developing countries like India shows that transfer provisions are often misused to delay providing access to information. Information Officers often play soccer games with the request. In order to avoid such situations, the Information Officer of the public authority that received the request, originally, must be made responsible for transferring the request to the appropriate authority. Bureaucrats will resist this idea claiming ignorance of the job descriptions of other public or private bodies. This can be countered with the argument that all public and private bodies must do their proactive disclosure extensively and accurately so that an Information Officer may look them up on websites and make a decision on which public or private body to transfer the request to. If an Information Officer cannot do this there is even lesser chance of an ordinary requester being able to identify the appropriate public or private body to submit the request.

Recommendation #18:

Consideration may be given to inserting a new sub-clause (5) under Clause 15(4) as follows:

"(5) It shall be the responsibility of the Information Officer to transfer the request to the appropriate public or private body after making reasonable enquiry."

12. Information that cannot be Found or does not Exist:

Clause 17(3)(c) requires the Information Officer to give the requester access to information that was originally untraceable but found after a notice was issued under Clause 17(2), only upon payment of the reproduction fee. This is an unfair burden on the requester given his/her right to get the information free of charge after the lapse of the stipulated deadline [as guaranteed by Clause 21(c)]. The requester is not responsible for the safe-keeping of records in a public or private body. That is the responsibility of the employees of that organisation. If they fail to comply with their records keeping obligation there must be some disincentive to make them change their ways. The statutory auditor will notice that the public body is giving information free of cost because its records cannot be easily traced causing loss of reproduction costs that were due to the organisation. These kinds of lapses must be mentioned in the auditor's report so that action may be taken to provide technical assistance for improving records management in the organisation. If Clause 17(3)(c) were adopted as law in it current formulation, unscrupulous Information Officers would use it as an excuse to illegally extend the time limit for giving access to information. It would require only a simple affidavit (which no court will bother to verify unless a suit is filed by the applicant) to fool the applicant into believing that the information is not traceable. Then after taking his/her own sweet time the Information Officer may after six months or one year decide to give the information to the applicant and still collect fees for the same. This provision can be abused easily in this manner.

Recommendation #19:

Consideration may be given to substituting in Clause 17(3)(c) the words: "subject to the payment of any applicable reproduction fee" with the words: "free of cost if the information is discovered after the lapse of the time limits mentioned in Clauses 13 and 14 of this Act."

13. Deferral of Access:

Clause 18(2)(a) states that a decision of deferral of access will be communicated to the requester within a period of 30 days. This period of time appears to be unreasonably long because an Information Officer would come to know soon after identifying the requested information that it is due for release at a later date. There is no need to wait for 30 days to convey the decision of deferral to the requester. This period may be reduced to a week which is a reasonable period given the fact that the public body would be working on the presentation of the requested information to the concerned authority.

Recommendation # 20:

Consideration may be given to substituting in Clause 18(2)(a) the words: "30

days" with the words "7 days".

14. Form of Access:

14.1 Clause19(1) describes the forms in which a requester may be given access to information. This impressive list covers a wide range of forms in which information may be sought and obtained. However certain forms of access are missing from this list such as the right to take notes during inspection of a record or the right to obtain certified true copies of the document (as opposed to mere photocopies or manually made copies). Under the Indian RTI Act an applicant may even photograph or videograph a record during the inspection at his/her own expense. Further, there is no reference to obtaining certified samples of materials used by a public body for undertaking constructions of buildings or roads. Poor quality of materials used is a main cause of corruption in public works undertaken in developing countries. A requester must have access to certified samples of materials used by a public body as a matter of right. Such a right is guaranteed in the RTI laws of India and Bangladesh and has served very well for citizens who have used the same to unearth corruption in public works.

Recommendation # 21:

1. Consideration may be given to inserting in Clause 19(1)(a) the words: "and take notes manually or using photographic or videographic equipment at the expense of the requester" after the words: "opportunity to inspect the information".

2. Consideration may be given to replacing Clause 19(1)(b) with the following:

"manual copies, photocopies or certified true copies;"

3. Consideration may be given to inserting a new sub-clause (g) below Clause 19(1)(f) as follows:

"certified samples of materials used by the public body".

14.2 Clause 19(4) describes the circumstances under which access to information need not be granted in the form preferred by the requester. Sub-clause (4) makes "unreasonable interference with the operations of the public or private body is sought" as a ground for this purpose. Sub clause (5) makes "having regard to the physical nature of the information, not be appropriate" as another ground for refusal. Both these formulations are unduly broad and vague. Experience from developing countries like India, Bangladesh, Nepal and Mexico shows that the very act of making of an information request is treated by the bureaucrats as unreasonable interference in the operations of the public body. The ground "having regard to physical nature" may be misused even for the best preserved information. These clauses are likely to be misused if left unamended. It is common practice in RTI laws to mention more specific and reasonable grounds for not granting access to information in the form sought by the requester such as disproportionate diversion of resources of a public body or adverse impact on the safety and preservation of the record or document in question.

Recommendation #22:

1. Consideration may be given to amending Clause 19(4)(a) as follows:

"a) disproportionately divert the human or other material resources of the public or private body;"

2. Consideration may be given to amending Clause 19(4)(b) as follows:

"b) be detrimental to the safety or preservation of the information;"

3. Clause 19(4)(c) may be deleted.

14.3 Clause 19(4)(d) enables an Information Officer to reject a request for access to information in a particular form on the ground that it infringes the copyright of a private individual or private body. This formulation is problematic because it does not recognise the possibility of public sector commercial undertakings or State-owned or controlled Universities or academic institutions owning a copyright. Such interests must also be protected.

Recommendation #23:

Consideration may be given to amending Clause 19(4)(d) as follows:

"(d) involve an infringement of copyright subsisting in a private individual or private body or an academic institution or a commercial enterprise owned or controlled by the State."

15. Fees:

Under Clause 21(2) a public or private body may waive reproduction charges under two circumstances: if the information is of public interest or if the requester is indigent. Both provisions can create problems during their implementation. For example, all information held by a public body is given to it or obtained by it in the public interest. So all information that may be disclosed under the Act will then have to be given free of cost. This can drain the resources of governments. However it must also be conceded that information in which large segments of society have an interest, must be made available to them easily and free of cost. This dilemma may be overcome by taking recourse to Clause 6 relating to proactive disclosure. If the provisions contained in this Clause are expanded in the manner recommended at para #6 above, a wealth of information will be regularly and routinely available to people free of cost through various media including the Internet. So there will be no need for Clause 21(2) at all of this is done.

Second unless criteria for treating a requester as indigent is declared publicly, this provision will also be misused to give out information free of cost draining the public exchequer or the private body. So criteria must be fixed for treating someone as indigent. This must be left to the Government concerned as is done in India and Bangladesh.

Recommendation #24:

1. Consideration may be given to deleting Clause 21(3)(b).

2. Consideration may be given to inserting in Clause 21(3)(d) the words: "in light of the criteria for indigency adopted and publicly announced by the appropriate government."

16. Refusal:

Clause 35 obliges the information holder to refuse to grant access to information only if it falls under one or more exemptions listed in Part IV. While this is a noble provision it may be misused by unscrupulous Information Officers. The draft model law deals with procedures for seeking and obtaining information. This does not mean that access procedures under other existing laws will be extinguished. Clause 35 must be made applicable only to a request for information made under the access law and not under other laws. The current formulation can be misinterpreted to cover access procedures under other laws as well. This confusion may be removed by linking the Clause to requests made under this very law.

Recommendation #25:

Consideration may be given to inserting in Clause 25 the words: "on a request made under this Act" after the words: "refuse to grant access to information".

17. Public Interest Override:

Clause 36(1) lays down a vital principle underpinning the entire draft model access law. It states, *"Notwithstanding any of the exemptions in this Part, an information officer must grant a request for access to information if the public interest in the disclosure of the information outweighs the harm to the interest protected under the relevant exemption."* This is an important guiding light in any access to information law and this draft has right at the outset made this matter clear. However this may not be enough as guidance for jurisdictions that are more accustomed to holding information in secret. Illustrations of broad circumstances and considerations that must be taken into account while determining disclosure in public interest may be appended to this Clause.

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. Reference may be made to Canada's Access to Information Act[1] which, states as follows:

"*The head of a government institution may disclose any record requested under this Act, … if that disclosure would be in the public interest as it relates to public health,*

[1] Section 20(6), *Access to Information Act, 1983*, Canada may be accessed at: http://laws-lois.justice.gc.ca/PDF/A-1.pdf: accessed 11 August, 2011.

public safety or protection of the environment and, if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party."

Section 46 of South Africa's information access law (PAIA) mandates disclosure of exempt information if:

> *"(a) the disclosure of the record would reveal evidence of—*
>
> *(i) a substantial contravention of, or failure to comply with, the law; or*
>
> *(ii) an imminent and serious public safety or environmental risk; and*
>
> *(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."*[2]

Section 34 of Uganda's ATI Act illustrates similar public interest grounds for disclosure of exempt information.[3] The information access law of Trinidad and Tobago also gives an illustrative list of public interest grounds to be considered for disclosing exempt information. Section 35 states as follows:

> *"35. Notwithstanding any law to the contrary a public authority shall give access to an exempt document where there is reasonable evidence that significant -*
>
> *(a) abuse of authority or neglect in the performance of official duty;*
> *(b) injustice to an individual;*
> *(c) danger to the health or safety of an individual or of the public; or*
> *(d) unauthorised use of public funds,*
>
> *has or is likely to have occurred and if in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so."*[4]

The draft model law may be amended to include similar illustrations but at the same time leave the window open for more public interest grounds to be invoked in future.

Recommendation #26:

Consideration may be given to inserting a few illustrations of what will be disclosable in public interest along the lines of the information access laws of South Africa, Uganda, Trinidad and Tobago and Canada.

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[2] The complete text of the *Promotion Access to Information Act, 2000* (PAIA) may be accessed at: http://www.acts.co.za/Prom_of_Access_to_Info/Index.htm accessed 11 August, 2011.

[3] The complete text of Uganda's *Access to Information Act, 2005* may be accessed at: http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/uganda/uganda_ati_act_2005.pdf accessed 11 August 2011.

[4] The complete text of the *Freedom of Information Act, 1999* of Trinidad and Tobago may be accessed at: http://www.nalis.gov.tt/Socio_economic/THE-FREEDOM-OF-INFORMATION-ACT1999.htm accessed 11, August 2011.

18. Harm Test in Exemption Clauses:

It is laudable that all exemptions in the draft model law are subject to harm tests. However, the harm test contained in Clause 39(1)(a), Clause 41(1), Clause 42 (1), and Clause 44(1) can be interpreted to lower the bar considerably in order to insulate maximum information from disclosure. The term: "substantially prejudice" can in a strict interpretation mean "substantial injury" in many jurisdictions. However the term 'prejudice' also carries another meaning, namely 'bias'. If this meaning were to be applied to the context of Clause 39 any information whose disclosure would cause substantial bias against a legitimate commercial or financial interest may be exempted. Similarly in Clause 41(1) "substantial prejudice " could be interpreted to mean cause substantial bias against the security or defence of the State. A similar meaning may be attributed to the term in the context of international relations in Clause 42(1). In Clause 44 the adjective "substantial" is altogether dropped. These interpretations can be used to lower the harm thresholds considerably and immunize a lot of information from disclosure without justification. Instead if the phrases "substantial harm" or "substantial injury" were used it would raise the bar quite high and an Information Officer would not be able to invoke the exemption at will.

Recommendation #27:

1. Consideration may be given to substituting in Clause 39(1) the word: "prejudice" with the word: "harm" or "injure".

2. Consideration may be given to substituting in Clause 39(1) the word: "prejudice" with the word: "harm" or "injure".

3. Consideration may be given to substituting in Clause 42(1) the word: "prejudice" with the word: "harm" or "injure".

4. Consideration may be given to substituting in Clause 4(1) the word: "prejudice" with the words: "substantial harm" or " substantial injury".

19. Exemption relating to International Relations:

Sub-clauses (c) and (d) of Clause 42(2) create class or category exemptions. Entire classes of information, namely, positions adopted in international negotiations and correspondence or exchanges with foreign governments or international agencies are exempted from disclosure *in toto*. This is very broad and undesirable. Undue secrecy in the conduct of foreign affairs is the cause of many a diplomatic disaster and entire generations are cursed to suffer the consequences of unreasonable decisions or actions of a handful of diplomats and political leaders. Today secrecy is the bane of international trade negotiations as rights of entire populations are traded away without a modicum of consultation with the people in whose name such negotiations are claimed to be conducted. In an age of unequal power relationships especially in the international arena, the developing countries of Africa have a special duty of care to ensure that their peoples are given reasonable access to information about foreign relations and international negotiations as well. It is better that the harm test in this Clause be applied on a case by case basis instead of making entire categories of documents exempt from disclosure.

Recommendation #28:

Consideration may be given to deleting sub-clauses (c) and (d) of Clause 42(2).

20. Economic Interests of the State:

Clause 43 is also very broadly formulated so as to allow volumes of information to escape public scrutiny. There is no argument over the point that certain kinds of economic and financial information may be used by unscrupulous elements to impair the State's ability to manage the economy. Such information must be exempt from disclosure. Similarly if tax proposals are leaked prior to their disclosure to parliament hoarders and blackmarketeers may make windfall profits. An access law cannot be allowed to become an accessory for such actions. However Clause 43 is its current formulation is so broad that it can be used to deny access to information about currency or exchange rates or interest and tax rates even after announcing changes. People should have access to information post facto- especially the criteria applied and the reasons informing actions taken in relation to the aforementioned matters. So it is advisable to reformulate Clause 43.

Recommendation #29:

Sub-clause (2) of Clause 43 may be amended as follows:

"(2) For the purposes of this section, information whose disclosure may cause undue profit to be earned or loss to be incurred by any person or body may be exempted from disclosure."

21. Provision of Free and Open Advice:

Clause 47 is crafted to protect internal deliberations of officers and employees during a decision-making process. However the current formulation makes all opinion tendered by participants in the decision-making process inaccessible so long as they do not constitute the reasons for the decision taken. This is not a fair and just exemption. It is a very common occurrence in developing countries for wrong and illegal decisions to be taken despite the benefit of legal and sage advice being available to decision-makers by their own employees. Every such instance causes disillusionment to the sincere and honest officer or employee and gives a boost to the unscrupulous employee or Minister who stands to benefit from the decision taken based on illegal grounds. The people have a right to know what pros and cons were weighed before arriving at each decision. It is also important for people to know the thinking within public bodies even before a decision is taken so that wrong and illegal decisions are prevented from being made. Further sub-clause 2 in this Clause allows for non-disclosure on the grounds that disclosure is not in the public interest. This is a vague ground for refusal and is liable to be abused frequently by every Information Officer who is not pro-transparency. It is not enough to say that the disclosure of certain information is not in the public interest. It is necessary for the information officer to demonstrate which public interest will be injured

seriously by disclosure, or which public interest will be better guarded by keeping the information under wraps.

In some information access laws it is commonplace to include an exemption that prevents disclosure if it is likely to prejudice free and frank discussions within a public body. However some courts have frowned upon such class exemptions. If an officer is unable to express himself freely for fear of being discovered at a later date, such person is probably not fit to occupy any position of responsibility. A good transparency law strengthens the ability of a sincere and honest bureaucrat to speak the truth and record it on file. This is one of the major gains made after the implementation of the RTI Act in India and Bangladesh. Many public authorities and functionaries acknowledge that they have become more cautious about the advice they tender during a decision-making process out of the fear of being caught on the wrong foot at a later date. Given these serious concerns about according secrecy to deliberative processes within a public or private body, Clause 47 will have to be worded differently to avoid misuse.

Recommendation #30:

1. Consideration may be given to amending Clause 47 (1) as follows:

"(1) An information officer of a public or private body may refuse to grant a request –

(a) if the disclosure of such information may frustrate the deliberative processes aimed at arriving at decisions that are legal and legitimate."

2. Clause 47(2) may remain in its current formulation.

22. Redaction:

Clause 48 allows for the redaction of a record to remove exempt information before giving it to a requester. This is a good provision and is in tune with international best practice standards. However every decision of redaction must be subject to internal review and appeals to the independent oversight mechanism. This is done to ensure that no Information Officer illegally invokes the power of redaction to edit out information that the requester ought to have legitimately received. Clause 53 of the draft model law does not mention the possibility of seeking an internal review of a decision to provide a redacted version of the information. Clause 53 may be amended to allow for an internal review of the decision to provide redacted information to a requester. Similarly Clause 81 does not allow for the possibility of approaching the oversight mechanism against a decision to provide a redacted version of the information. Both mechanisms must allow for the possibility of mounting a challenge to a decision of redaction.

Recommendation: #31:

1. Consideration may be given to inserting a new sub-clause (f) under Clause 53(1)(e) as follows:

"(e) under Clause 48 to provide a redacted version of a record or document in response to a request".

2. Consideration may be given to substituting Clause 81(1)(n) with the following:

"(n) providing only a redacted version of a record or document in response to a request; or"

3. Consideration may be given to inserting a new Clause 81(1)(o) as follows:

"(o) regarding any other matter under this Act."

23. Manifestly Frivolous or Vexatious Requests:

Clause 50 of the draft model law seeks to empower the Information Officer to refuse a request on the ground that it is manifestly frivolous or vexatious. While a good access law must provide for situations where a requester may use it for harassing an Information Officer or information holder it is also necessary to set out the criteria for labeling a request as being manifestly frivolous or vexatious. If left to the discretion of the Information Officer, such powers can be abused to frustrate a requester and ultimately the statue's goal of ushering in transparency in the functioning of public and private bodies. Wherever a requester seeks information that is likely to indicate the occurrence of corruption or abuse of power, the Information Officer could use this clause to refuse access. A genuine request may be dubbed vexatious because the Information Officer may feel vexed at the possibility of exposure of his/her or his/her colleagues' corrupt actions. So the draft model law should contain some guidance for the Information Officer, the reviewing authority and the independent oversight mechanism to determine what constitutes a frivolous or vexatious request.

In the United Kingdom the Information Commissioner's Office has developed a guidance note for public bodies to deal with requests that are vexatious or frivolous.[5] It sets out criteria that may be applied to a request to evaluate if it is vexatious or frivolous. It includes the following grounds:

- If an applicant explicitly states that it is his or her intention to cause a public authority the maximum inconvenience through a request, it will almost certainly make that request vexatious.
- The authority has independent knowledge of the intention of the applicant.
- The request clearly does not have any serious purpose or value.
- The effect of redaction would be to render information worthless.
- The request is for information which is clearly exempt.
- The request can fairly be characterised as obsessive or manifestly unreasonable.

[5] ICO Freedom of Information Act Awareness Guidance No 22: Vexatious and Repeated Requests, may be accessed at:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_22_vexatious_repeated_requests.pdf accessed on August 11, 2011.

To this list may be added grounds such as: repeatedly making requests for the same information or using different formulations of words for seeking the same information; knowingly seeking personal information about employees or officers of a public or private body that is clearly not within the power or authority of such bodies to collect or generate; and seeking voluminous quantities of information or collated or compiled information despite knowing that it will not be available in that form with the information holder (often such requests are made by disgruntled or retired employees of the same body or a contractor who failed to get a contract through a fair and transparent competitive process.)

While such requesters cause a drain on a public or private body's time and resources and therefore must be discouraged, it is also necessary to ensure that genuine requesters are not treated in the same manner. The Municipal Freedom of Information and Protection of Privacy Act (MFOIPP Act) of Ontario, Canada is a good example of how vexatious requests may be handled by an information holder. The following procedure is stipulated for handling vexatious requests:

"A head who refuses to give access to a record or a part of a record because the head is of the opinion that the request for access is frivolous or vexatious, shall state in the notice:

(a) that the request is refused because the head is of the opinion that the request is frivolous or vexatious;

(b) the reasons for which the head is of the opinion that the request is frivolous or vexatious; and

(c) that the person who made the request may appeal to the Commissioner under subsection 39 (1) for a review of the decision."[6]

Similar provisions may be included in the draft model law.

Recommendation #32:

1. Consideration may be given to replacing Clause 50 with the following:

"When an information officer is satisfied on the basis of material facts that a request for access to information under this Act is frivolous or vexatious, he or she shall:

a) give notice of his or her decision that the request is frivolous or vexatious; and

b) mention the reasons including the material facts that formed the basis for arriving at such decision; and

c) inform the requester of his or her right to seek a review of the decision under Clause 53, subject to the provision in Clause 58."

[6] Section 20.1, *Municipal Freedom of Information and Protection of Privacy Act, 1990* may be accessed at: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90m56_e.htm#BK26, accessed on 11 August, 2011.

2. Consideration may be given to appending an explanatory note below Clause 50 as follows:

"Explanation: The following are illustrative examples of frivolous and vexatious requests:

- **If an applicant explicitly states in the request that it is his or her intention to cause the information holder the maximum inconvenience through the request;**
- **the request can fairly be characterised as obsessive or manifestly unreasonable;**
- **the requester makes repeated requests for the same information;**
- **the requester seeks personal information about employees of the information holder despite being aware that the information holder has no legal obligation to collect, maintain or generate such information; or**
- **the requester seeks voluminous information in a collated or compiled form despite being aware that there is no legal obligation on the information holder to collect or maintain such information in the form sought.**

24. Notice to Third Parties:

It is laudable that the draft model law lays down the procedure for dealing with requests for information about third parties. However it is necessary to iron out a few problems that are likely to arise from this procedure. First, there is no clear guidance for the Information Officer that he or she may reject the request straightaway if any of the exemptions are applicable. There is no need to invoke third party procedure at all in such cases. However if none of the exemptions are applicable and the Information Officer believes that the interests of the third party may be adversely affected by a decision of disclosure, he or she is required to seek their consent. So the Clause must indicate that this procedure will be applicable only when the Information Officer intends to disclose the information (this procedure implies that he or she has examined the request in the light of the exemptions and found that none are applicable).

Second, that the requester has sought commercial information of a private body must not be a ground for invoking third party procedure. All kinds of commercial information need not be kept confidential or disclosed only with the consent of the third party. Where disclosure of commercial information may cause injury to a third party of a nature that is not covered by Clause 39 then consent may be sought. So the Clause may be amended to ensure that all commercial information need not require the consent of the third party prior to disclosure.

Third, this Clause requires the Information Officer to identify the requester in the notice sent to the third party. While transparency is required in the procedures of a law of this nature, disclosing the name of the requester may endanger his or her life. This may be

a real and present danger where requesters may seek information relating to private bodies to hold them accountable for violations of law. Just as the third party has the right to object to disclosure of information, the requester must also have the right to choose whether his or her name must be disclosed to the third party. This protection will ensure that the requester is not harmed by the third party or any vested interests. Experience from developing countries shows that information requesters are also often whistleblowers against corruption and abuse of power. Third parties hire anti-social elements to cause harm to such requesters. Since 2005 at least 10 murders in India can be linked to the use of RTI by the victims. As the draft model law provides protection for whistleblowers it must also provide protection to requesters using the law.

Fourth, the Clause allows only a period of 10 days for a third party to seek a review of the decision of disclosure. This period is too short. It must be of the same duration as that available to a requester under Clause 53.

Recommendation #33:

1. Consideration may be given to substituting in Clause 52(1) the words: "If an information officer is considering a request for access to personal information of a natural third party or commercial or confidential information of a third party" with the words: "If an information officer considering a request intends to disclose personal information of a natural third party or commercial information of a third party treated as confidential information by that third party."

2. Consideration may be given to inserting in Clause 52(1)(b) after the words: "the name of the requester", the words: "if consent for disclosure of name has been obtained from the requester in writing".

3. Consideration may be given to substituting in Clause 52(8) the words: "10 days" with the words: "45 days".

(Please see arguments at para #26 below for reducing the limitation period for seeking internal review under Clause 54)

25. Right of Internal Review:

Clause 53(1) describes the circumstances under which a requester may apply for an internal review of the Information Officer's decision. However there is sufficient reason to expand this list in light of the analysis given at paras #22 and 23 above. Decisions such as providing a redacted version of the information requested or rejecting a frivolous or vexatious request must also be subject to internal review. Similarly if information is not received within the time limit despite paying the reproduction fee must also be amenable to challenge under this Clause. If the Information Officer refuses to provide reasonable assistance to a requester the latter must have recourse to the internal review procedure. There could be other violations of the model draft law as well. So it is necessary to provide a broad ground that will enable a requester to seek internal review of any other decision made by the Information Officer. Clause 53 may be amended to provide for these additional grounds.

Recommendation #34:

1. Consideration may be given to inserting a new sub-clause (f) under Clause 53(1)(e) as follows:

"(e) under Clause 48 to provide a redacted version of the information in response to a request;".

2. Consideration may be given to inserting a new sub-clause (g) under the recommended new sub-clause 53(1)(f) as follows:

"(f) under Clause 50 rejecting a request on the ground that it is frivolous or vexatious; or"

3. Consideration may be given to inserting a new sub-clause (h) under the recommended new sub-clause 53(1)(g) as follows:

(h) in relation to any other matter relevant to seeking or obtaining information under this Act."

26. Application for Internal Review:

Clause 54 describes the procedure to be followed for internal review of the decision of an Information Officer. A requester is required to file a request for review with the Information Officer of the public or private body. The Information Officer is then required to put up the matter to the head of the body. There is no reason why an aggrieved requester ought not to be allowed to make a request for review directly to the head of the public or private body. Instances of Information Officers destroying applications for internal review without submitting them to the higher authorities are not uncommon in other developing countries. It is also not proper to compel a requester to go back to the same Information Officer whose decisions or actions are the cause of the requester's grievance. Allowing the Information Officer five days to put up the review request to the head of the body is also a waste of time. Further, the period within which a review request against the decision of an Information Officer may be submitted is stipulated at 60 days. This is too long a time limit. It may be reduced to 45 days so that access disputes may be disposed off quickly.

Recommendation #35:

1. Consideration may be given to substituting the words "information officer" with the words "head of the public or private body" wherever occurring in Clause 54(1), (2), (3), (4) and (5).

2. Clause 54(6) may be deleted.

3. Consideration may be given to substituting in Clause 54(1) the digit: "60" with the digit: "45".

27. Access Granted Pursuant to Internal Review:

Clause 55 (1) under the sub-heading 'Access Granted' requires the reviewing authority to notify the requester of the reproduction fee payable for obtaining information. This innocent looking clause can be misused by the head of a public or private body that whenever a decision to grant access to information is taken post the review process, the information will be provided only upon payment of the reproduction fee. This clause nullifies the right of the requester to obtain information free of cost if the grounds mentioned in Clause 34 are satisfied. These rights of the requester must be made to survive until the matter is disposed of finally by the independent oversight mechanism or the appropriate courts. So Clause 55(1) must take these rights into account as well. Further in accordance with our argument at para **#10.4** above regarding the manner in which a request may be rejected, any rejection at the end of the internal review procedure must also comply with the same principles.

Recommendation #36:

1. Consideration may be given to inserting in Clause 55(1) the words: "Subject to the provisions of Clause 34" before the words: "If the head of the information holder".

2. Consideration may be given to renumbering the sub-clauses under Clause 55 as #1 occurs twice at the subheadings: "Decision on internal review" and "Access granted".

3. Consideration may be given to substituting in Clause 55(4)(a) the word: "including" with the words: "based on".

4. In view of the above recommendation consideration may be given to deleting the words: "relied on" occurring at the end of Clause 55(4)(a).

28. Oversight Mechanism- Remuneration:

It is important for the independent oversight mechanism to have necessary operational, financial and staffing autonomy. The draft model contains several provisions ensuring such autonomy to the oversight mechanism. One way of ensuring that the Commissioners will perform without fear or favour is to legally protect their remuneration or compensation packages. This must not be varied to the disadvantage of a serving Commissioner.

Recommendation #37:

Consideration may be given to inserting a new sub-clause (6) under Clause 62(5) as follows:

"(6) the salaries and benefits of a Commissioner shall not be varied to his or her disadvantage."

29. Oversight Mechanism- Appointment and General Powers:

The scheme of the independent oversight mechanism envisaged in the draft model law treats all Commissioners are equals. They are required to choose the Chairperson of the body through an internal procedure. While this may be desirable, experience from various countries shows that aspiring candidates lobby the appointing authorities or the selection committee for appointment to these positions. If selection of the Chairperson is subject to elections within the oversight mechanism, it will lead to politicking and groupism in such bodies. This can be avoided in the interest of maintaining stability of the institution, professionalism and commitment to work. It is advisable for the Chairperson to be appointed directly by the appointing authority with such a designation instead of leaving it to elections within the oversight body.

Recommendation #38:

1. Consideration may be given to inserting in Clause 60(1) the words: "Chairperson and the" after the words: "Selection and appointment of the".

2. Consideration may be given to inserting in Clause 60(2) the words: "the Chairperson and" after the words: "The head of state shall appoint".

3. Consideration may be given to deleting Clause 65(2).

30. Oversight Mechanism- Term of Office:

Clause 61(4) provides for the procedure of removal of Information Commissioners. While the procedure for removal is not concentrated in the hands of one authority it is necessary to prevent political considerations becoming the reason for removing Information Commissioners. In countries like India complaints of misbehavior or incapacity against an Information Commissioner are first inquired into by the highest court in the country and a report presented with recommendation to remove where the charges are proved. A similar procedure may be adopted by the draft model law. Further, 'misconduct' covers fewer actions than the term 'misbehaviour' as it can be linked to any behavior that is unbecoming of the dignity and prestige of the office of the Information Commissioner. It is advisable to make 'gross misbehavior' as a ground for removal instead of 'gross misconduct'.

Recommendation #39:

1. Consideration may be given to inserting a new sub-clause (5) below Clause 61(4) as follows:

"(5) It shall not be lawful for Parliament to pass a resolution for the removal of an Information Commissioner save on the basis of the findings of an inquiry into a complaint or physical or mental incapacity or gross misbehavior of such Information Commissioner undertaken by an independent tribunal."

2. The last sub-clause in Clause 61 is given the same number as the previous one. Consideration may be given to renumbering this sub-clause as "(5)".

31. Oversight Mechanism- Regulation of Procedure:

Clause 69 empowers the independent oversight mechanism to develop its own procedure for performing any duty or function under the draft model law. While this operational independence is to be welcomed, it is important for adjudication procedures to be regulated by statutory instruments that are subject to Parliamentary scrutiny. While it is commendable that a process of public consultation prior to the formulation of such procedures or their amendment is envisaged in the draft model law, they must necessarily be made subject to parliamentary scrutiny as a measure for avoiding arbitrary changes using public consultation as an excuse. As the oversight mechanism is a creature of a statute adopted by Parliament, it exercises powers vested in it by Parliament. Parliament has the power to make changes in the procedures adopted by the oversight mechanism for adjudicating over information access disputes. It is important to recognise this position and incorporate it into the draft model law.

Recommendation #40:

1. Consideration may be given to inserting a new sub-clauses (3) and (4) below Clause 69(2) as follows:

"(3) Any procedure adopted by the oversight mechanism for adjudicating an appeal or complaint submitted to it under this Act shall be notified in the Gazette.

(4) Every such notification shall be laid, as soon as may be after it is made, before Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, Parliament decides to make any modification in the notification or Parliament resolves that the notification should be annulled, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification."

32. Publication of Information Manual:

Clause 71(1) requires every public and private body to submit to the independent oversight mechanism, within 18 months of its commencement, an initial report detailing its operational plan to implement its obligations under this Act and an information publication plan in respect of its proactive disclosure responsibilities under Clause 6. Monitoring compliance of proactive disclosure is an important aspect of overseeing proper implementation of this Act and it is commendable that non-compliance can attract penalties. However there seems to be a typographical error in Clause 71(5) which reads – "*Recommendations of the oversight mechanism referred to in subsection (5) must be complied with and no appeal shall lie against such recommendations."* The recommendations are contained in sub-clause (4). The typographical error may be corrected.

Recommendation #41:

Consideration may be given to substituting in Clause 71(5) the digit "5" with the digit "4".

33. Effect of Non-compliance:

Under Clause 73, the independent oversight mechanism is vested with the power to impose fines on public and private bodies that fail to comply with their obligations under Division 3. This division deals with monitoring the publication of information by public bodies and relevant private bodies. Since Clause 6 also primarily deals with proactive publishing of information by all bodies covered by the draft model law, failure to comply with Clause 6 should also attract imposition of fines. The obligation to comply with Clause 6 and Division 3 should be treated at par since there is nothing, elsewhere in the Act, that compels a public or private body to comply with the duty of proactive disclosure. Consideration may be given to amending Clause 73 such that it covers Clause 6 also.

Recommendation #42:

Consideration may be given to inserting in Clause 73(1) the words: "and Clause 6 of this Act" after the words: "obligations under this Division 3."

34: Annual Reports to the Oversight Mechanism:

Clause 75 requires all bodies covered by the draft model law to submit annual reports regarding compliance. This is a commendable provision as it affords the oversight mechanism with the opportunity to monitor their performance. However Clause 75(3) requires all public bodies to submit their annual reports to Parliament directly. This is cumbersome and will only flood Parliament with information that it has no means to verify. It is a better idea to have the independent oversight mechanism to compile these reports and submit them along with its comments and recommendations to Parliament. Being a specialist body, the report of the oversight mechanism can be a sound basis for Parliament to discuss and debate the manner of implementation of the access law.

Recommendation #43:

Consideration may be given to amending Clause 75(3) as follows:

"(3) The oversight mechanism shall compile all annual reports received from public bodies and along with a detailed report of its own performance produce an annual report and submit the same to Parliament."

35. Application to the Oversight Mechanism:

Clause 81 provides the various grounds on which the independent oversight mechanism may be approached by an aggrieved requester. Given the analysis at paras **# 22** and #**23** above, of specific situations where a decision of the Information Officer may be challenged this list needs to be expanded. The requester should have the

opportunity of approaching the oversight mechanism against a decision to provide a redacted version of the information, refusal on grounds of the request being vexatious of frivolous after exhausting the internal review procedure. The Clause refers to the phrase 'internal appeal'. As this phrase is not used in Clause 53, the phrase 'internal review' is preferable.

Recommendation #44:

1. Consideration may be given to substituting in Clause 81(1)(a) the word: "appeal" with the word: "review".

2. Consideration may be given to amending Clause 81(1)(n) as follows:

"(n) to provide the requester with a redacted version of the information sought;"

3. Consideration may be given to inserting new sub-clauses (o) and (p) below the amended Clause 81(1)(n) as follows:

"(o) rejecting a request as frivolous or vexatious under Clause 50; and

(p) regarding any other matter under this Act."

36. Oversight Mechanism- Direct Access:

Clause 58 provides for a direct appeal to the independent oversight mechanism if the head of a body covered under this Act is also its Information Officer. It is necessary to link this provision to Clause 82 which lists the grounds on which a requester may directly approach the oversight mechanism. This link is missing in the current draft.

Recommendation #45:

Consideration may be given to inserting a new sub-clause (d) below Clause 82(1)(c) as follows:

"(c) where a requester is unable to submit a request for internal review for the reason that the head of the information holder is also the information officer."

37. Right to Make Representations:

Clause 88 clarifies as to who has the right to make a representation to the independent oversight mechanism. Sub-clause (1) uses the term 'complaint' which is not defined elsewhere in the draft model law. Presumably the reference is to "Direct Access" provided for certain special circumstances listed under Clause 82. The Definitions Section must contain a definition of the term 'complaint'. Second, this provision does not recognise the right of the Information Officer to make a representation before the oversight mechanism. Often head of public bodies are very busy and may not have the time to attend the proceedings of the oversight mechanism. So it is important for the draft model law to provide the Information Officer to make a representation before the oversight mechanism.

Recommendation #46:

1. Consideration may be given to inserting in Clause 2 a definition of the term 'complaint' as follows:

"'complaint' means an application made by a person under Clause82 of this Act.

2. Consideration may be given to inserting in Clause 88(1)(b) the words: "or the information officer" after the words: "the head".

38. Oversight Mechanism- Avoiding Repetition of Mention of Powers:

Clause 79 lists the various powers sought to be vested in the independent oversight mechanism to conduct investigations under the draft model law. Several of these powers are repeated in Clause 92. Such duplication may be avoided.

Recommendation #47:

Consideration may be given to combining the provisions of Clause 79 and Clause 92 so as to avoid repetition of the powers of the oversight mechanism.

39. Orders and Decisions:

The draft model law does not recognise the possibility of the appellant claiming compensation for loss or any detriment suffered as a result of unreasonable denial of access to information or unreasonable delay in providing access. In addition to penalty this has been seen to act as a potent tool for ensuring better compliance of bodies covered by the access laws operational in other countries. A similar clause may be inserted in Clause 96 empowering the oversight mechanism to award compensation to the appellant as may be justified. Such compensation must be paid by the information holder as compared with the penalty which must be paid by the Information Officer from his or her pocket.

Recommendation #48:

Consideration may be given to inserting in Clause 96(1)(h) the words: "or orders compensating any loss or detriment suffered by the requester" after the words: "cost orders".

40. Content and Publication of Decisions:

It is laudable that Clause 92 requires the independent oversight mechanism to publish all of its decisions. However there is no explicit mention of the right of an appellant or the information holder or third party that are parties to a dispute to get a copy of the decision free of cost. The draft model law must contain a provision that explicitly states that all parties to a case are entitled to a copy each of the decision of the oversight mechanism to be given free of cost.

Recommendation #49:

Consideration may be given to inserting a new sub-clause (3) below Clause 97(2) as follows:

"(3) the oversight mechanism must provide a copy of its decision to all parties to a matter free of cost in the first instance."

41. Application for Judicial Review:

Part VII provides for judicial review of a decision of the independent oversight mechanism. This is laudable. 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 a stay of any proceeding under this law, issue of injunctions or interim orders interfering with any proceedings under this law. Clause 99 is silent about this matter. So any party may take recourse to civil law or writ-based remedies to interfere with the proceedings launched under this law. The draft model law must contain provisions to prevent such occurrences.

Recommendation #50:

Consideration may be given to inserting a new sub-clause (3) below Clause 99(2) as follows:

"(3) No court or tribunal shall entertain any suit or application or other proceeding in respect of any order made under this Act and no such order shall be called in question save as per procedure provided in this Clause."

42. Transitional Provisions:

Part VIII deals with provisions that will remain in force for the first two years of commencement of the Act. It alters, for the initial two years, the provisions on dealing with time limits for the disposal of requests made under this Act. No explanatory paras have been provided for the rationale behind these provisions. Information Officers must be trained to handle requests sooner than later. Introducing laxity in the time limits does not augur well for the health of the nascent access regime. It is better to go easy on the penalties in the initial years instead of allowing the Information Officers extra time. When habituated to delayed responses they may actually prevail upon governments to press Parliament for extension of these transitional provisions beyond two years. The discipline of dealing with information requests in a timely manner must be inculcated and emphasised from day one.

Recommendation #51:

Consideration may be given to deleting Part VIII.

43. Operation of the Law:

Part IX deals with miscellaneous provisions but emphasises an important principle that all information that was held by an information holder on the date of the commencement of the Act will be technically accessible to any person under the Act, subject to the exemptions. This is laudable as it prevents information holders from claiming that the access law must apply only to information generated after its commencement. Along with this provision it is also important to provide a time limit for compliance of bodies established after the enactment of an access law. If no deadline is set for them to implement the law within their jurisdiction requesters will be frustrated with the excuse that they are not prepared to deal with information requests yet.

Recommendation #52:

1. Consideration may be given to numbering the existing Clause 101 as Clause 101(1).

2. Consideration may be given to inserting a new sub-clause (2) under the proposed Clause (101)(1) as follows:

"(2) Where a public or private body comes into existence after the commencement of this Act, such body is required to take all steps to implement the provisions of this Act within its jurisdiction within a period of 180 days, under the guidance of the oversight mechanism."

Conclusion:

The draft model law takes into account all the major principles that ought to inform a progressive information access law. However as the popular saying goes, the devil is in the details. The analysis and the recommendations given above are based on CHRI's first-hand experience of drafting, using and monitoring such laws in different parts of the Commonwealth. The biggest challenge for this draft model law will be adaptability in the 50+ jurisdictions in Africa. Adaptability must not be allowed to become an excuse for diluting the provisions of the model law while passing domestic legislation. It is advisable to provide explanatory notes for various clauses in the manner of the model law adopted by the Organisation of American States.[7] This can be incorporated in the annexure to the model law. These explanatory notes can provide guidance to law-makers who may not be as familiar with the nitty-gritty of information access laws.

CHRI will be happy to assist advocates of people's access to information in Africa to strengthen the model access law further and assist in the advocacy for its adoption by member State of the African Union.

[7] The complete text of the model law and the explanatory notes are accessible at: http://right2info.org/resources/publications/Model%20Law.%202607%20%20Eng.doc/view accessed 11 August, 2011.