



MEMORANDUM

on the

Draft Malawian Access to Information Bill

by

ARTICLE 19
Global Campaign for Free Expression

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I. Introduction

This Memorandum analyses the draft Access to Information Bill (draft Bill), prepared by MISA-Malawi. ARTICLE 19 welcomes this initiative as a positive step to advance freedom of expression and information in Malawi. The draft Bill is extremely progressive in nature and it addresses most of the key issues and elements needed in an effective freedom of information law, including broad definitions of public authorities and information, a right to access some information held by private bodies, good procedures for accessing information, a right to appeal any refusals to disclose information and a system of sanctions for intentional contravention of the law.

There are, however, some omissions and weaknesses that we recommend be addressed. For example, the draft Bill fails to provide protection for good faith disclosures pursuant to the law, some of the exceptions are not made conditional upon a showing of harm to the protected interest and the obligation actively to publish information could be broader.

This Memorandum analyses the draft Bill against two key ARTICLE 19 publications in this area, *The Public's Right to Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles)¹ and *A Model Freedom of Information Law* (the ARTICLE

¹ (London: ARTICLE 19, 1999). Available at: <http://www.article19.org/docimages/512.htm>.

19 Model Law).² The former sets out principles based on international and comparative best practice and has been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression.³ The latter translates these principles into legal form.

II. International and Constitutional Obligations

II.1 General Guarantees

Article 19 of the *Universal Declaration of Human Rights* (UDHR),⁴ a UN General Assembly resolution, binding on all States as a matter of customary international law, sets out the fundamental right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

The *International Covenant on Civil and Political Rights* (ICCPR),⁵ a formally binding legal treaty, guarantees the right to freedom of opinion and expression also at Article 19, in terms very similar to the UDHR. Malawi ratified the ICCPR in December 1993. By ratifying the ICCPR, State Parties agree to refrain from interfering with the rights protected therein, including the right to freedom of expression. However, the ICCPR also places an obligation on State Parties to take positive steps to ensure that rights, including freedom of expression and information, are respected. Pursuant to Article 2 of the ICCPR, States must “adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” This means that States must create an environment in which a diverse, vigorous and independent media can flourish, and provide effective guarantees for freedom of information, thereby satisfying the public’s right to know.

Freedom of expression is also guaranteed by the three regional human rights treaties, the *African Charter on Human and Peoples’ Rights*,⁶ which Malawi ratified in November 1989, the *American Convention on Human Rights*⁷ and the *European Convention on Human Rights*.⁸

II.2 Freedom of Information

In the earlier international human rights instruments, freedom of information was not set out separately but was instead included as part of the fundamental right to freedom of

² (London: ARTICLE 19, 2001). Available at: <http://www.article19.org/docimages/1112.htm>.

³ Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, para. 43.

⁴ UN General Assembly Resolution 217A(III) of 10 December 1948.

⁵ UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

⁶ Adopted at Nairobi, Kenya, 26 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

⁷ Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978.

⁸ Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953

expression. Freedom of expression, as noted above, includes the right to seek, receive and impart information. Freedom of information, including the right to access information held by public authorities, is clearly a core element of the broader right to freedom of expression. There is little doubt as to the importance of freedom of information. The United Nations General Assembly, at its very first session in 1946, adopted Resolution 59(I), which states:

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.⁹

The right to freedom of information as an aspect of freedom of expression has repeatedly been recognised by the UN. The UN Special Rapporteur on Freedom of Opinion and Expression has provided extensive commentary on this right in his Annual Reports to the UN Commission on Human Rights. In 1997, he stated: “The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large ... is to be strongly checked.”¹⁰ His commentary on this subject was welcomed by the UN Commission on Human Rights, which called on the Special Rapporteur to “develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications”.¹¹ In his 1998 Annual Report, the Special Rapporteur declared that freedom of information includes the right to access information held by the State:

[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems....¹²

In 2000, the Special Rapporteur provided extensive commentary on the content of the right to information as follows:

- Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; “information” includes all records held by a public body, regardless of the form in which it is stored;
- Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
- As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;

⁹ Adopted 14 December 1946.

¹⁰ Report of the Special Rapporteur, 4 February 1997, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1997/31.

¹¹ Resolution 1997/27, 11 April 1997, para. 12(d).

¹² Report of the Special Rapporteur, 28 January 1998, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, para. 14.

- A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;
- All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
- The law should establish a presumption that all meetings of governing bodies are open to the public;
- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;
- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.¹³

Once again, his views were welcomed by the Commission on Human Rights.¹⁴

In November 1999, the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – came together for the first time in November 1999 under the auspices of ARTICLE 19. They adopted a Joint Declaration which included the following statement:

Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.¹⁵

The right to freedom of information has also explicitly been recognised in all three regional systems for the protection of human rights.

The African Commission on Human and Peoples' Rights recently adopted a Declaration of Principles on Freedom of Expression in Africa,¹⁶ Principle IV of which states, in part:

¹³ Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, note 3, para. 44.

¹⁴ Resolution 2000/38, 20 April 2000, para. 2.

¹⁵ 26 November 1999.

¹⁶ Adopted at the 32nd Session, 17-23 October 2002.

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.

Within the Inter-American system, the Inter-American Commission on Human Rights approved the Inter-American Declaration of Principles on Freedom of Expression in October 2000.¹⁷ The Principles unequivocally recognise freedom of information, including the right to access information held by the State, as both an aspect of freedom of expression and as a fundamental right on its own:

3. Every person has the right to access information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.
4. Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

Within Europe, the Committee of Ministers of the Council of Europe adopted a Recommendation on Access to Official Documents in 2002.¹⁸ Principle III provides generally:

Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

The rest of the Recommendation goes on to elaborate in some detail the principles which should apply to this right. Of particular interest is Principle IV, which states:

IV. Possible limitations to access to official documents

¹⁷ 108th Regular Session, 19 October 2000.

¹⁸ Recommendation No. R(2002)2, adopted 21 February 2002.

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

- i. national security, defence and international relations;
- ii. public safety;
- iii. the prevention, investigation and prosecution of criminal activities;
- iv. privacy and other legitimate private interests;
- v. commercial and other economic interests, be they private or public;
- vi. the equality of parties concerning court proceedings;
- vii. nature;
- viii. inspection, control and supervision by public authorities;
- ix. the economic, monetary and exchange rate policies of the state;
- x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.¹⁹

The Commonwealth, of which Malawi is a member, has recognised the fundamental importance freedom of information on a number of occasions. As far back as 1980, the Commonwealth Law Ministers declared in the Barbados Communiqué that, "public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information."²⁰

More recently, the Commonwealth has taken a number of significant steps to elaborate on the content of that right. In March 1999, the Commonwealth Secretariat brought together a Commonwealth Expert Group to discuss the issue of freedom of information. The Expert Group adopted a document setting out a number of principles and guidelines on the right to know and freedom of information as a human right, including the following:

Freedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions.²¹

These principles and guidelines were adopted by the Commonwealth Law Ministers at their May 1999 Meeting in Port of Spain, Trinidad and Tobago. The Ministers formulated the following principles on freedom of information:

1. Member countries should be encouraged to regard freedom of information as a legal and enforceable right.
2. There should be a presumption in favour of disclosure and Governments should promote a culture of openness.
3. The right of access to information may be subject to limited exemptions but these

¹⁹ *Ibid.*

²⁰ See:

http://www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards/communiqué/default.htm.

²¹ Quoted in *Promoting Open Government: Commonwealth Principles and Guidelines on the Right to Know*, background paper for the Commonwealth Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development (London: 30-31 March 1999).

- should be narrowly drawn.
4. Governments should maintain and preserve records.
 5. In principle, decisions to refuse access to records and information should be subject to independent review.²²

The Law Ministers also called on the Commonwealth Secretariat to take steps to promote these principles, including by assisting governments through technical assistance and sharing of experiences.

The Law Ministers' Communiqué was considered by the Committee of the Whole on Commonwealth Functional Co-operation whose report, later approved by the Heads of Government,²³ stated:

The Committee took note of the Commonwealth Freedom of Information Principles endorsed by Commonwealth Law Ministers and forwarded to Heads of Government. It recognized the importance of public access to official information, both in promoting transparency and accountable governance and in encouraging the full participation of citizens in the democratic process.²⁴

International law recognises that the right to information is not absolute. However, restrictions on it must be narrowly circumscribed. Specifically, any restriction on the right must meet a strict three-part test. This test, which has been confirmed as applying generally to freedom of expression (of which freedom of information is an essential component part) by both the UN Human Rights Committee²⁵ and the a number of national and international courts,²⁶ requires that any restriction must be provided by law, be for the purpose of safeguarding a legitimate interest, and be 'necessary' to secure this interest.

Critical to an understanding of this test in the specific context of freedom of information 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 and (2) the harm to the interest caused by disclosure is greater than the public interest in disclosure.²⁷

National freedom of information laws have been adopted in record numbers over the past ten years in a number of countries, 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. These countries join a number of other countries which enacted such laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia and Canada, bringing the total number

²² *Communiqué*, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999).

²³ The *Durban Communiqué* (Durban: Commonwealth Heads of Government Meeting, 15 November 1999), para. 57.

²⁴ *Communiqué*, Commonwealth Functional Co-operation Report of the Committee of the Whole (Durban: Commonwealth Heads of Government Meeting, 15 November 1999), para. 20.

²⁵ For example, in *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.

²⁶ See, for example, the European Court of Human Rights' decision in *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90.

²⁷ See ARTICLE 19 Principles, note 1, Principle 4.

of States with freedom of information laws to over 55. A growing number of inter-governmental bodies, such as the European Union, the UNDP, the World Bank and the African Development Bank, have also adopted policies on the right to information. With the adoption of a strong freedom of information law, Malawi would join a long list of nations which have already taken this important step towards guaranteeing freedom of information.

II.3 Constitutional Guarantees

The 1994 Constitution of the Republic of Malawi contains separate guarantees for freedom of opinion, freedom of expression, freedom of the press and the right of access to information as follows:

Freedom of Opinion

34. Every person shall have the right to freedom of opinion, including the right to hold opinions without interference to hold receive and impart opinions.

Freedom of Expression

35. Every person shall have the right to freedom of expression.

Freedom of the Press

36. The press shall have the right to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to public information.

Access to Information

37. Subject to any Act of Parliament, every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his rights.

Section 44 provides for limitations on certain rights, including those found at sections 34-37, as follows:

(2) Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

(3) Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, shall be of general application.

The Constitution provides for the applicability of international law in the following terms:

International Law

211. (1) Any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement.

(2) International agreements entered into before the commencement of this Constitution and binding on the Republic shall form part of the law of the Republic, unless Parliament subsequently provides otherwise or the agreement otherwise lapses.

(3) Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall have continued application.

It may be noted that Malawi ratified the ICCPR in 1993 and the *African Charter on Human and Peoples' Rights* in 1989, that is to say prior to the adoption of this Constitution, so that they are, pursuant to section 211(2) of the Constitution, part of the law of the Republic.

III. Detailed Analysis of the Draft Law

This section analyses the draft Law and makes recommendations and suggestions for improvement throughout.

III.1 Scope of the Draft Law

The definition of public bodies covered by the draft Law, provided in the Second Schedule, is very broad and in line with best international practice.

Information is defined in section 1(2) as any material which communicates any matter “relating to the management, administration, operations or decisions of a public authority, regardless of its form, characteristics or when it was created”. Section 3(2), however, states that the law shall apply to all information under the control of a public authority, a much broader definition. The same formulation – that is, ‘under the control of a public authority’ – is used in section 5(1)(a), setting out the general right to access such information.

The definition in section 1(2) should be brought into line with the operational definitions used in sections 3(2), 5(1)(a) and elsewhere in the draft Law. It is well-established that the right of access should apply to all information held by, or under the control of, public authorities, not just information which relates to the functions of these authorities.

Pursuant to section 5(3) of the draft Law, those vested with a right of access are citizens or permanent residents. While some laws do restrict the right to citizens and residents, 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 Malawi.

Recommendations :

- The definition of information in section 1(2) should be amended by bringing it into conformity with the operational definition provided in other sections of the draft Law.
- Consideration should be given to expanding the right of access to include everyone, not just citizens and permanent residents.

III.2 Regime of Exceptions and Exclusions

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.²⁸

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 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.

Article 3(2) of the draft Law provides that it shall not apply to information covered by an ethical or professional rule of confidentiality or to records relating to proceedings before a court or tribunal. These are blanket exclusions from the ambit of the law, which are not covered by a harm test or public interest override. ARTICLE 19 is of the view that such exclusions are never legitimate and that all information should be covered, subject to a (comprehensive) regime of exceptions, based on a requirement of harm and a public interest override.

In any case, we note that these exclusions are overbroad and hence cannot be justified. The ethical exclusion covers any rule of confidentiality by any profession or practice. The latter is not defined. There may be any number of such rules which do not respect the basic standards of openness being promoted by the freedom of information law.

²⁸ Note 1, Principle 4.

Furthermore, any profession could adopt new confidentiality rules simply to avoid application of the law to them. This provision, therefore, effectively grants open-ended power to professions and practices – whatever they may be – to overrule the law. Such a power is clearly not acceptable or justifiable. Instead, legitimate professional confidentiality rules should be dealt with through the regime of exceptions, for example through an exception relating to breach of confidence or to general protection for confidentiality where disclosure of the information would prejudice the interests of a third party.

The wholesale exclusion of court records relating to proceedings is similarly unjustifiably broad. It may be noted that this exclusion does not come to an end even when the proceedings are completed (or even when all appeals have been exhausted). Furthermore, there is no requirement that disclosure in any way harm or prejudice the parties to the case or the outcome of the case. For example, a record of an open session in the court would be excluded from the ambit of the law, even though a journalist present at the hearing could reproduce it verbatim in a public newspaper. ARTICLE 19 recommends again that this be dealt with through the general system of exceptions, linked to a requirement of harm. The ARTICLE 19 Model Law recognises exceptions for legally privileged information (the only specific professional confidentiality exception recognised, consistent with court rules relating to evidence) and where disclosure would harm the administration of justice, which includes legal proceedings.

The regime of exceptions is set out in sections 6-12 of the draft Law.

The draft Law does set out clearly the aims which may justify a refusal to disclose information and these aims are all recognised as legitimate under international law. However, the draft Law fails to include some aims which are widely recognised as necessary. If, as is the case with the draft Law, the access law prevails over other legislation, something ARTICLE 19 strongly recommends, it is at the same time necessary to include a comprehensive list of exceptions in the access law. One legitimate interest which does not appear to be protected by the draft Law, for example, is public economic interests.

More seriously, some of the exceptions in the draft Law are not conditioned by a harm test. For example, the draft Law exempts all information which “involves the private interests of a third party.” (section 8) Although in the definitions section of the draft Law, information relating to the public function of a public official is excluded from the definition of personal information (section 2), section 8 specifically exempts the information described above, which includes, but is not limited to, personal information.

This is an unduly broad personal information exception. It could, for example, be understood as including business interests, even though the information in question was not personal in any way, if the business was a ‘private interest’. Furthermore, there is no requirement of harm or detriment to a private interest. The ARTICLE 19 Model Law, in contrast, provides as follows:

A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would involve the unreasonable disclosure of personal information about a natural third party.²⁹

It then excludes some personal information from the ambit of this exception, including where “the individual is or was an official of a public body and the information relates to his or her function as a public official.”³⁰ This appears to have been the intention of the draft Law, based on the definition of personal information, but in fact section 8 fails to respect this limitation.

Section 9(a) exempts information which “relates to the defence or security of a foreign government and which is communicated in confidence by or on behalf of such foreign government”. It would be preferable if the reference here was to the security of the State, instead of the government as such. In any case, there is no requirement of a risk of harm to security; it suffices if the information simply relates to defence. The purchase of pencils by a defence ministry may be deemed to relate to defence, but disclosure of this information in no way poses a risk of harm to security. As with other exceptions, this exception should be made conditional upon harm. The ARTICLE 19 Model Law provides for the following exception in favour of foreign States:

A body may refuse to communicate information if: –

...

(c) the information was obtained in confidence from another State or international organisation, and to communicate it would, or would be likely to, seriously prejudice relations with that State or international organisation.³¹

Section 12 provides that where a request involves confidential commercial interests of a third party, that party shall be notified and, where that party gives reasons as to why disclosure would cause harm, the authority shall refuse to disclose the information. While harm to the commercial interests of third parties is certainly a legitimate ground for non-disclosure, and while this exception does appear to incorporate a harm test, we suggest that the test should not hinge on whether the third party makes a case that harm would occur but rather on an objective assessment of an actual likelihood of this. As a result, we suggest that the third party be provided with an opportunity to present a case of a risk of harm, but that the information should only be subject to withholding if, on an objective assessment, there is a serious likelihood of that harm actually resulting.

We note that the draft Law contains a very clear and comprehensive public interest override at section 10.

Recommendations:

- The exclusions set out in section 3(2) of the draft Law should be removed and these interests dealt with through the general regime of exceptions, as for other

²⁹ Note 2, section 25(1).

³⁰ *Ibid.*, section 25(2)(d).

³¹ *Ibid.*, section 27.

confidentiality interests.

- At a minimum, these exclusions should be significantly narrowed so that they only cover information which would otherwise legitimately be covered by an exception.
- The list of legitimate aims recognised in the draft Law for withholding information should be reviewed to ensure that it is comprehensive.
- All of the exceptions listed in the draft Law should be conditional upon a showing of a serious risk of harm to the protected interest.

III.3 Obligation to Publish

The draft Law, at section 16, places an obligation on public authorities to publish certain information even in the absence of a request, often referred to as the obligation to publish. Section 16(1) sets out the details of what must be published, which includes a description of the structure, function and responsibilities of the authority, and a description of the general categories of information held and of all manuals and other documents covered by the access law. The draft Law also includes an enforcement mechanism for this obligation and provides, at section 16(4), for the Commission to give directions in this regard and to prescribe model publication schemes.

It is unclear what the precise powers of the Commission are in this regard, or whether it is required or just able to prescribe publication schemes. Regardless, the list of items for publication set out in the draft Law is very short and it would be preferable if the law set out in more detail the scope of this obligation. The ARTICLE 19 Model Law, for example, provides for an obligation to publish the following 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.³²

Furthermore, consideration should be given to requiring public authorities to report annually to the Commission on their information activities, to facilitate reporting by the

³² *Ibid.*, section 17.

Commission, to ensure the availability of full statistical information in this area and to assist in monitoring the various public authorities.

Recommendations:

- The draft Law should provide for a more detailed and extensive list of information which public authorities are required to publish, even in the absence of a request.
- The draft Law should clarify the role of the Commission in relation to the obligation to publish, preferably by requiring it to prescribe a model publication scheme which sets minimum standards to which all public authorities must conform in this area.
- Consideration should be given to requiring all public authorities to report to the Commission on an annual basis on their activities in implementing the law.

III.4 Enforcement of Commission's Decisions

Individuals may make an application to the Commission to review any refusal by a public authority to provide them with information and, where it considers the information should have been disclosed, the Commission shall make recommendations to this effect to the public authority. Section 36(1) of the draft Law provides for the Commission to request that the public authority notify it of any action the authority has taken to implement its recommendations. Pursuant to section 39, where the public authority fails to comply with a decision of the Commission, it may require that authority to make good this default and, in case of a failure to do so, the Commission may apply to the High Court for an order compelling the authority to comply.

This is clearly intended to be a system of enforceable orders by the Commission. At the same time, it is possible that the High Court will treat any application by the Commission as an opportunity to review the matter, either in full or as a matter of judicial review. It would, therefore, be preferable simply to provide that any failure to comply with a decision of the Commission shall be treated as a contempt of court. This would, of course, be without prejudice to any appeal by the public authority to the courts.

Recommendation:

- A failure to comply with a decision of the Commission should be treated as a contempt of court.

III.5 Omissions and Miscellaneous Provisions

Obligation to Maintain Records

Pursuant to section 14(2), every public authority must maintain all records for ten years. While the intention behind this is no doubt laudable, it is probably unrealistic in practice, given the large volume of material regularly produced by public authorities. Instead, the draft Law should make provision for a comprehensive system of record maintenance which involves not only keeping records, but also sets standards by which they should be maintained, as well as systems for destroying records and transferring other records to the public archives or making other arrangements for longer-term maintenance.

One possibility is to provide for a central authority, for example the Minister of Justice, to set, from time-to-time, record maintenance standards which are binding upon all public

authorities. This provides for a flexible system which is sensitive to the needs of public authorities and yet promotes good record maintenance.

Commission as Conduit for Requests

Section 20(1)(b) of the draft Law provides that one of the functions of the Commission is to act as a conduit for requests for access to information by the public, including by collecting the requested information. This seems a unduly onerous obligation to place on the Commission; there is no reason why members of the public should not make their own requests, with the possibility of applying to the Commission where such requests have not been met. Furthermore, it is not clear how the Commission would serve as an appeals body for a request in which it had been directly involved.

Form of Communication

Section 29(1) of the draft Law provides for a number of ways in which a public authority may provide access to information, including a copy, an opportunity to inspect the information and so on. Instead of providing this latitude to the public authority, the draft Law should provide instead that requesters may specify the form in which they would prefer to access the information, subject only to reasonable limitations, for example to preserve the record or where this would be unduly onerous for the public authority.

Promotional and Educational Activities

The experience of countries which have already introduced freedom of information legislation shows that a change in the culture of the civil service from one of secrecy to one of transparency is a slow and difficult process, which can take many years. To assist in this process, it is important to train public authority employees and to promote the idea of freedom of information, both within government and in society-at-large. Possible activities in this regard include:

- training public authority employees on the scope and importance of freedom of information, procedures for disclosing information and maintenance of records;
- providing incentives for public bodies which successfully apply the law;
- setting up a public education campaign on the right to access information, the scope of information available and the manner in which rights may be exercised under the new law.

Section 20 of the draft Law sets out the functions of the Commission but those listed above are not included. Consideration should be given to expanding the functions of the Commission to cover these important promotional activities.

Good Faith Disclosures

The draft Law provides protection for whistleblowers at section 11. It does not, however protect those who disclose information pursuant to the law, reasonably and in good faith, but mistakenly. Such protection is essential to help alter the culture of secrecy that prevails in the civil service in most countries. Otherwise, civil servants will always be concerned that they may mistakenly disclose information, with the result that they will err of the side of caution by refusing to disclose information. This is particularly

problematical during the early days of implementation of a freedom of information law, when the prevailing practice has been to refuse access to information.

Recommendations:

- Consideration should be given to providing for a comprehensive system of record maintenance in the draft Law.
- Consideration should be given to whether or not it is practical or appropriate for the Commission to act as a conduit for requests by members of the public.
- Section 29 should be amended to make it clear that requesters may specify the form in which they would like to access information.
- Consideration should be given to expanding the functions of the Commission to cover the promotional activities noted above.
- The draft Law should provide protection to those who, reasonably and in good faith, disclose information pursuant to the law.