



ARTICLE 19

Morocco: Draft Law on the Right to Access Information

April 2013

Legal analysis

Executive summary

In mid-2011, Moroccan voters approved a new Constitution that introduced, for the first time, a guarantee of the right of access to information held by public bodies. On 26 March 2013, consultations were opened on a Draft Law on the Right to Access Information (Draft Law), which aims to give effect to Article 27 of the new Constitution.

ARTICLE 19 welcomes this progress towards the adoption of a law, that will place Morocco among the rapidly growing number of countries which have enacted dedicated legislation on access to information.

The Draft Law has many features to commend it, such as:

- a strong focus on proactive disclosure of information,
- applicability to a wide range of public bodies and private entities which perform public functions;
- a relatively simple procedure for requesting access to information;
- and establishment of a dedicated administrative appeals body – the National Commission on the Right of Access to Information.

A major weakness is the regime of exceptions, which is grossly overbroad and has rightly attracted significant criticism. ARTICLE 19's key recommendations include the following:

- The right to access information and documents should not be limited to Moroccan citizens and legal persons, but be granted to any person (or legal entity) regardless of nationality.
- All persons should be permitted to file a request orally, not only those who are unable to do so in writing.
- If a request is not clear or an applicant seeks assistance, public bodies should be required to help the applicant formulate a sufficiently precise request free or charge.
- A new provision should be added to the Draft Law, stating clearly that no person shall be required to provide a justification or reason for requesting any information.
- The Draft Law should allow requesters to specify a preferred form in which to receive the information. This preference should be respected, unless there is a compelling reason not to.
- The exceptions regime of Article 19 of the Draft Law needs to be significantly overhauled. All exceptions should be made subject to a substantial harm test and public interest override. The protected interests should be defined more precisely and narrowly, and only legitimate interests should be protected.
- The National Commission on the Right of Access to Information should be vested with appropriate investigative powers, in particular the right to order the production of evidence, to examine any piece of information whose disclosure is being sought, and to compel witnesses to testify.

Summary of recommendations

Preamble

- The Preamble should not set the exercise of access to information “with responsibility and committed citizenship” as an objective of the Draft Law.

Persons entitled to access to information

- The right to access information and documents should not be limited to Moroccan citizens and legal persons, but be granted to any (natural or legal) person regardless of nationality. Article 2 of the Draft Law should be amended to this effect.
- A new provision should be added to the Draft Law, prohibiting discrimination in the way requests are handled based on the identity of the requester.

Bodies required to grant access to information

- Unclear expressions in the definition of “concerned authorities” should be clarified.

What may be requested

- For reasons of clarity, it would be better to define the right of access in terms of information, and not “information and documents,” as is currently foreseen by Article 2 of the Draft Law.
- Where an applicant requests a customised extract from an electronic database, the concerned authority should be required to generate the extract if the necessary search can be performed without undue difficulty.

Procedure for requesting access

- All persons should be permitted to file a request orally, not only those who are unable to do so in writing. Article 11 or 12 of the Draft Law should be amended to this effect.
- An applicant should not be required to identify the requested information “accurately and explicitly;” rather, the request should simply be sufficiently clear to be processed.
- If a request is not clear or an applicant seeks assistance, public bodies should be required to help the applicant formulate a sufficiently precise request free or charge.
- Article 11 of the Draft Law should state that the request form prescribed by regulation should be straightforward and should not require the applicant to supply any details that are not necessary to process the request.
- A new provision should be added to the Draft Law, stating clearly that no person shall be required to provide a justification or reason for requesting any information.

Processing of requests

- Article 13 of the Draft Law should require the ‘delegated person’ to respond to a request as promptly as possible; in other words, a response should be given before the expiry of the 15 working day deadline where possible.
- Extension of the deadline should be permitted only exceptionally, if responding to the request is unusually complex. The applicant should not only be informed of the delay, but should also be provided with the reasons for it.
- The Draft Law should allow requesters to specify a preferred form in which to receive the information. This preference should be respected, unless there is a compelling reason not to.
- Article 15 of the Draft Law should state clearly that the fee charged for copying and sending information may not exceed the *actual* cost.

- Consideration should be given to requiring the adoption of an official schedule of fees that public bodies may charge, and to waive the fee if the number of photocopies falls below a certain level.

Refusals and exceptions

- A request should only be refused on the grounds that it is unclear when the applicant has declined an offer to assist in clarifying the request, or if the request remains unclear despite the assistance given. Article 6 of the Draft Law should be amended to this effect.
- Consideration should be given to requiring public bodies to send an explanation to the National Commission on the Right of Access to Information whenever they refuse a request on the grounds that it is “blatantly exaggerated.”
- The exceptions regime of Article 19 of the Draft Law needs to be significantly overhauled. All exceptions should be made subject to a substantial harm test and public interest override. The protected interests should be defined more precisely and narrowly, and only legitimate interests should be protected.

Appeals

- Article 17 should state explicitly that a requester may complain about any failure to process his or her request in line with the requirements of the Law – not only a refusal to disclose information.
- The deadline to lodge a complaint should be calculated from the date on which the decision was communicated to the requester, or, if no decision was communicated, from the date by which the decision should have been taken.
- The Draft Law should clarify how the Commission’s head is appointed.
- The Commission should be vested with appropriate investigative powers, in particular the right to order the production of evidence, to examine any piece of information whose disclosure is being sought, and to compel witnesses to testify.
- The Draft Law should ensure that the procedure before the Commission is quick and affordable.

Proactive disclosure and promotion of open government

- Article 26 of the Draft Law should require the Commission to collect statistics on the functioning of the Law.

Criminal sanctions

- Article 35 of the Draft Law, which threatens civil servants with criminal sanctions for releasing information, should be deleted.

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About the Article 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at <http://www.article19.org/resources.php/legal/>.

If you would like to discuss this document further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org.

Introduction

On 1 July 2011, Moroccan voters approved a new Constitution that introduced, for the first time, a guarantee of the right of access to information held by public bodies. Civil society and media organisations had argued for several years that legislation on this subject should be developed, a position that was finally adopted by the Government in September of 2010, with the announcement that a law would be drafted ahead of the 4th Conference of the States Parties to the UN Convention against Corruption, held in Marrakech in October 2011.

That deadline was not met, but on 26 March 2013, consultations were opened on a Draft Law on the Right to Access Information (the Draft Law), which aims to give effect to Article 27 of the new Constitution.¹

ARTICLE 19 welcomes this progress towards the adoption of a law, which will place Morocco among the rapidly growing number of countries with a dedicated access to information legislation.

Through this analysis, we seek to make a practical contribution to the deliberations by providing an analysis of the Draft Law against international freedom of expression standards. The ARTICLE 19 has extensive experience in this field, having analysed numerous freedom of information laws in different countries over many years.² Furthermore, ARTICLE 19 has published two influential standard-setting documents on the right to access information: *The Public's Right to Know: Principles on Freedom of Information Legislation*³ (the ARTICLE 19 Principles) and *A Model Law on Access to Information*, which encapsulate international best practices in this area.⁴

The draft Law has many features to commend it, such as a strong focus on proactive disclosure of information, applicability to a wide range of public bodies and private entities which perform public functions, a relatively simple procedure for requesting access to information, and establishment of a dedicated administrative appeals body – the National Commission on the Right of Access to Information.

A major weakness in the draft is the regime of exceptions to the duty to disclose information, which is grossly overbroad and has rightly attracted significant criticism. If adopted unchanged, this provision risks eviscerating a law that, in many other respects, is progressive and would place Morocco ahead of many other countries in the region.

ARTICLE 19 hopes that this analysis will be helpful in discussion on final version of the Draft Law. We also stand ready to provide further assistance to legislators, legal experts and civil society in this process.

¹ The analysis is based on unofficial translation of the Draft Law from Arabic to English. ARTICLE 19 takes no responsibility for the accuracy of these translations or for comments based on mistaken or misleading translation.

² These analyses can be accessed also at <http://www.article19.org/resources.php?lang=en>.

³ ARTICLE 19, *The Public's Right to Know: Principles on Freedom of Information Legislation*, London, June 1999; available at <http://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>.

⁴ ARTICLE 19, *A Model Freedom of Information Law*, London, July 2001; available at <http://www.article19.org/data/files/pdfs/standards/modelfoilaw.pdf>.

International standards on the right of access to information

In recent years, the right to access information held by public bodies has rapidly gained international recognition as an integral part of the right to freedom of expression, and as an important condition for genuine democracy and the realisation of other rights.

This development reflects the belief that governments are servants of the people, and that they do not own the information they hold – rather, they manage it on behalf of the public. Access to this information has been described as the “oxygen of democracy” – as the ability of individuals to participate effectively in decisions that affect them depends on information, which also enables individuals to scrutinise the actions of their leaders and hold them to account.

International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) is one of the two core UN human rights treaties, adopted in 1966 to give binding legal effect to the rights articulated in the Universal Declaration of Human Rights. A large majority of States, 167 at present, are parties to the ICCPR and have undertaken to give effect to it through national law.⁵ Morocco ratified the ICCPR on 3 May 1979. Article 19 guarantees the right to freedom of expression:

1. Everyone shall have the right to freedom of opinion.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

For many years, it was unclear whether this right to “seek, receive and impart information” implied a duty for governments to guarantee access to the information held in their files. This question was resolved in 2011, when the UN Human Rights Committee – the body of independent experts that monitors implementation of the ICCPR – adopted General Comment No. 34⁶, confirming that “Article 19, paragraph 2 embraces a right of access to information held by public bodies.” The General Comment also elaborates on the duty of governments to put information of public interest in the public domain proactively and to “make every effort to ensure easy, prompt, and effective and practical access to such information.”⁷

Convention Against Corruption

The UN Convention Against Corruption was ratified by Morocco on 9 May 2007.⁸ The Convention reflects the view that access to information is key to holding officials to account

⁵ Article 2 of the ICCPR, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).

⁶ Adopted at the 102nd session, Geneva, 11-29 July 2011, UN Doc. CCPR/C/GC/34.

⁷ HR Committee, General Comment No. 34, CCPR/C/GC/34, at para 19.

⁸ The UN Convention against Corruption signature and ratification status website; available at:

and exposing wrongdoing; it places a clear obligation on Member States to facilitate the right of access to information held by public bodies.

Article 10 of the Convention notes the importance of taking measures to enhance transparency in public administration, including with regard to its organisation, functioning, and decision-making processes. This includes the duty of proactive information disclosure (Article 10 (c)) and the promotion of public participation (Article 13), including the obligation to ensure that the public has effective access to information and to respect, promote and protect the freedom to seek, receive, publish and disseminate information concerning corruption.

African Union Human Rights Instruments

Although Morocco is at present not a member of the African Union, the instruments adopted within this framework on the subject of access to information deserve mention. They represent good practice and would become directly relevant in the event Morocco joined the AU.

Article 9 (1) of the African Charter on Human and Peoples' Rights, the AU's basic human rights instrument, guarantees to every individual the right to receive information. The Declaration of Principles on Freedom of Expression in Africa⁹ (the Declaration), adopted by the African Commission in 2002, elaborates on this provision at Principle IV:

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

The African Union Special Rapporteur on Freedom of Expression and Access to Information has developed a draft model law on access to information reflecting international standards,¹⁰

<http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>

⁹ African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression in Africa, adopted 23 October 2002; available at: <http://www.achpr.org/sessions/32nd/resolutions/62/>.

¹⁰ Draft Model Law for AU States on Access to Information: <http://www.achpr.org/files/instruments/access->

which will be referred to in this analysis. Eleven African Union member states have now adopted a law or national regulation establishing the right of access to information.¹¹

Limitations on the right to freedom of information

While the right to freedom of expression and information is a fundamental right, it is not guaranteed in absolute terms. Article 19(3) of the ICCPR permits the right to be restricted under the following conditions:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order, public health or morals.

The requirements of Article 19(3) translate into a three-part test, whereby a public body must disclose any information which it holds and is asked for, unless:

- The information concerns a legitimate, protected interest listed in the law;
- Disclosure threatens substantial harm to that interest; and
- The harm to the protected interest is greater than the public's interest in having the information.¹²

Each part of the three-part test is further elaborated below.

Legitimate Protected Interest

Freedom of information laws must contain an exhaustive list of all legitimate interests on which a refusal of disclosure can be based. This list should be limited to matters such as law enforcement, the protection of personal information, national security, certain commercial interests, public or individual safety and protecting the effectiveness and integrity of government decision-making processes.¹³

Exceptions should be narrowly drawn to avoid capturing information, the disclosure of which would not harm a legitimate interest. Furthermore, exceptions should be based on content, rather than on the type of document sought. In addition, exceptions should, where relevant, be time-limited. For example, the justification for classifying information on the basis of national security may well disappear after a specific national security threat subsides.¹⁴

Substantial Harm

Once it has been established that the information falls within the scope of a listed legitimate aim, it must be established that disclosure of the information would cause substantial harm to that legitimate aim. Therefore this part of the test holds that simply because the information

[information/achpr_instr_draft_model_law_access_to_information_2011_eng.pdf](#).

¹¹ South Africa; Liberia; Uganda; Nigeria; Ethiopia; Tunisia; Guinea Conakry; Niger; Angola, Zimbabwe and Rwanda.

¹² ARTICLE 19's Principles, *op.cit.*, Principle 4.

¹³ See for example Articles 38-45 of the African Model Law for African Union Member States.

¹⁴ ARTICLE 19's Principles, *supra note 2*, Principle 4.

falls within the scope of a listed legitimate interest, does not mean non-disclosure is justified. Otherwise a class exception would be created that would seriously undermine the free flow of information to the public. Instead, the public body must demonstrate that the disclosure of the information would cause substantial harm to the protected interest.¹⁵

Harm Outweighs Public Interest Benefit in Disclosure

The third part of the test requires the information holder to consider whether, even if disclosure of information causes serious harm to a protected interest, there is nevertheless a wider public interest in disclosure. For instance, in relation to national security, disclosure of information exposing instances of bribery and corrupt practices may concurrently undermine defence interests. However, the disclosure may lead to eradicating corruption and therefore strengthen national security in the long-term. In such cases, information should be disclosed notwithstanding that it may cause harm in the short term.¹⁶

If applied properly, the three part test would rule out all blanket exclusions and class exceptions as well as any provisions whose real aim may be to protect the government from harassment or criticism, to prevent the exposure of wrongdoing, to avoid the concealment of information from the public or to preclude entrenching a particular ideology.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

Analysis of the Draft Law

Preamble

The Preamble to the Draft Law contains a number of important statements that will aid in its correct interpretation once adopted. In particular, ARTICLE 19 welcomes the fact that access to information is expressly recognised as a fundamental right protected both by the Constitution and by international law, including Article 19 of the ICCPR. We also welcome the objectives of the Draft Law articulated in the Preamble, such as strengthening trust between the authorities and the public, promoting participatory democracy, guaranteeing honesty in public affairs, enabling citizens to protect their rights and attracting investment.

One point of concern is the statement, towards the end of the Preamble, which one aim of the law is to ensure freedom of information “is exercised with responsibility and committed citizenship.” This could be interpreted in different ways; it could mean that civil servants should apply the law in a conscientious manner, but it could also be read as a justification to reject requests for information that are deemed “irresponsible” or “unpatriotic.” This would be highly problematic – the requester’s motive should play no part in deciding whether to disclose information.

Recommendation:

- The Preamble should not set the exercise of access to information “with responsibility and committed citizenship” as an objective of the Draft Law.

Persons entitled to access to information

Article 2 of the Draft Law states that the right to access information and documents is enjoyed by “[e]ach and every citizen, male or female, and every legal person under the Law of Morocco.”

On the one hand, it is positive that the right will be granted to all Moroccan (legal) persons without distinction. On the other hand, the choice for the word “citizen” implies that foreign nationals and stateless persons are not entitled to access information. Article 2 of the Draft Law contradicts Article 30 of the 2011 Constitution which states that foreign nationals shall enjoy fundamental freedoms recognized to Moroccan citizens, in accordance with the law.

The great majority of countries that have adopted access to information legislation in recent years have decided to avoid such a distinction, for a mixture of principled and practical reasons.

- First, human rights treaties such as the ICCPR require States to respect and ensure the rights – including access to information – of *all* persons present within their territory, without discrimination on any basis, including nationality (see Article 2(1)).
- Second, as the Preamble to the Draft Law recognises, improved transparency may help attract investment. Denying foreign companies the right to request information runs counter to this objective.

- Finally, in many cases it is not easy for a public body that receives a request for disclosure to determine the nationality of the requester. The time spent on systematically verifying this could easily exceed the time saved by not having to respond to requests from foreigners, who in many cases would anyway be able to find a Moroccan national willing to file the request on their behalf.

Apart from extending the right of access to non-citizens, we also believe the Draft Law should expressly prohibit any discrimination in the handling of requests based on the identity of the requester. In some countries, authorities have been known to charge higher fees or to delay the processing of a request from a critical journalist, or to arbitrarily dismiss requests from members of an ethnic minority. For example, in Sweden, the law expressly guarantees the right to file a request for information anonymously¹⁷ – a useful safeguard for persons who fear being discriminated against.

Recommendations:

- The right to access information and documents should not be limited to Moroccan citizens and legal persons, but be granted to any person regardless of nationality. Article 2 of the Draft Law should be amended to this effect.
- A new provision should be added to the Draft Law, prohibiting discrimination in the way requests are handled based on the identity of the requester.

Bodies required to grant access to information

An important question with any access to information law is which bodies are required to disclose the information they hold. Article 2 of the Draft Law states, simply, that information and documents may be requested from a “concerned authority.” Article 1 defines “concerned authorities” – in a somewhat circular manner – as “[e]very authority that is concerned with the application and enforcement of the provisions of this law”. Helpfully, however, the following examples of ‘concerned authorities’ are listed:

- Public administrations
- Public enterprises
- Local authorities
- The Parliament
- The Judiciary
- Every institution that is under the public law.
- Every institution that is controlled or funded by the aforementioned authorities.
- Every public or private enterprise entrusted with the management of a public service.

It seems clear, then, that the Law will apply not only to the executive branch of government, but also to the parliament and to judicial bodies, and under some circumstances to private sector bodies, too. This is broadly in line with international best practice and a welcome feature of the Draft Law.

¹⁷ See Article 14 of the Freedom of the Press Act of 1766: “No public authority is permitted to inquire into a person’s identity on account of a request to examine an official document, or inquire into the purpose of his or her request, except insofar as such inquiry is necessary to enable the authority to judge whether there is any obstacle to release of the document.”

The extent to which an access to information law should be applied to the private sector is a complex issue. It is clear that where traditional State functions are entrusted to a privatised body, the information relevant to this function should remain available to the public. A good case can also be made that private bodies which receive large amounts of public money ought to be accountable for how it is spent. The Model Law for African Union Member States, under Article 1(1), suggests that an access to information law should apply to any private body:

- (a) owned, controlled or substantially financed directly or indirectly by funds provided by government, but only to the extent of that financing;
- (b) carrying out a statutory or public function, but only to the extent of that statutory or public function.

However well the definition of “concerned authorities” is crafted, the experience of other States suggests that there will inevitably be debates, once the Law is implemented, about whether certain public or private bodies are obliged to comply with it. One approach followed in a number of countries, such as the United Kingdom, is to publish and regularly update a list of bodies that are in any case covered by the Law.

Recommendations:

- Unclear expressions in the definition of “concerned authorities” should be clarified.

What may be requested

Access laws in some countries allow the requester to ask for “information;” in others, the law guarantees access to “documents,” which is usually defined broadly and includes records of any kind, including audio and video recordings or electronic files. In practice, this distinction is not of much practical importance; under both systems, public bodies are usually required only to disclose information that is contained in an existing document, and are not under an obligation to generate new information or documents on request.

The Draft Law seems to combine both approaches: Article 2 provides that access may be requested to “information *and* documents” (emphasis added). In principle, this is not a bad idea, but a problem arises because the term “documents” is not defined anywhere. Although there is a definition of “administrative documents,” this is relevant only in Article 4, which states that “deposition of administrative documents that include the requested information in the “Archives of Morocco” shall not be deemed deterrent to the right of accessing to them”.

Moreover, the rest of the Draft Law is formulated in terms of access to information, not documents; for example, Article 6 states that a written justification must be given when “denying the access to information request” and Article 13 requires that the response to a “request to access information” is given within 15 working days. For reasons of clarity, it may be better to define the right of access only in terms of “information.”

A question that is likely to gain increasing importance is to what extent public bodies must respond to a request for an extract from an electronic database. If the applicant simply wants a copy of an existing document that is stored in a database, it is clear that it should be disclosed (unless one of the recognised exceptions applies). But some requesters will be interested in a specific piece of information that does not yet exist but can be generated with the help of a search query, such as the number of patients treated in a hospital between two

dates, the average level of fines imposed for a particular offence, or the total amount of subsidies paid to one recipient. In such cases, the question arises whether the public body is required to generate this ‘new’ information. A sensible approach taken in some countries is to require the public body to grant the request if the information can be extracted from the database without an unreasonable effort.

Recommendations:

- For reasons of clarity, it would be better to define the right of access in terms of information, and not “information and documents,” as is currently foreseen by Article 2.
- Where an applicant requests a customised extract from an electronic database, the concerned authority should be required to generate the extract if the necessary search can be performed without undue difficulty.

Procedure for requesting access

The Draft Law provides that a request for access may be made by post or e-mail to the responsible official within the public body in question, who will issue a receipt for it (Article 11). Each body covered by the law is required to appoint an official for these purposes (Article 5). A person who is unable to file a request in the ordinary way is allowed to apply orally; the responsible official will assist by reducing the request to writing and handing a copy of it to the applicant (Article 12). One thing that remains unclear is whether oral requests may also be made by people who are able to file a request in writing, but prefer not to. In our view, there is no reason to prohibit this.

Article 11 of the Draft Law requires the requester to identify the required information “accurately and explicitly.” In principle this is reasonable, since it is challenging for a public body to respond to a question that is not clear. On the other hand, the requester is not always aware of the working methods of the public body and the type of documents it holds, and it can be difficult for an outsider to formulate a very targeted request. The current wording of the draft Law risks a situation where requests that are drafted with reasonable care are nevertheless rejected because the responsible official considers the question insufficiently precise.

To resolve this problem, we recommend two amendments.

- First, a request should simply be clear enough to enable it to be processed; this is a less strict requirement than being ‘accurate’ and “explicit.”
- Second, public bodies should be required to assist a requester in formulating a request that complies with the requirements of the Law. Guidance could be taken from Article 12 of the Model Law for African Union Member States:

12 Duty to assist requesters

Where a person –

- (a) wishes to make a request to a public body or relevant private body; or
- (b) has made a request to a public body or relevant private body that does not comply with the requirements of this Act –

it is the duty of the information officer to take reasonable steps to assist the person, free of charge, to make the request in a manner that complies with this Act.

Article 11 of the Draft Law also mentions that a “request form template ... shall be specified by regulation.” There are some other countries that take this approach, but under the majority

of access laws globally, the applicant is simply required to identify the information requested and the address to which it should be delivered, without the need to complete a specific form. Prescribing a form has its advantages – it will assist applicants in providing all the necessary details and presenting their request in a way that makes it easy to process. On the other hand, the form should be as simple as possible and should not require the applicant to provide details that are not necessary to process the request. We recommend specifying this in the draft Law, since the standard form will be adopted by a regulation – which presumably means it could be amended quite easily without parliamentary scrutiny.

Furthermore, we note that the Draft Law fails to state one of the most important principles reflected in almost any modern access to information law: the applicant should not be asked to justify the request. This follows from the idea that the information held by public bodies is not their property, but is managed by them on behalf of the public. Accordingly, it is the public body which must justify a refusal, rather than the applicant who must justify the request.

Recommendations:

- All persons should be permitted to file a request orally, not only those who are unable to do so in writing. Article 11 or 12 should be amended to this effect.
- An applicant should not be required to identify the requested information “accurately and explicitly”; rather, the request should simply be sufficiently clear to be processed.
- If a request is not clear or an applicant seeks assistance, public bodies should be required help the applicant formulate a sufficiently precise request free or charge.
- Article 11 should state that the request form prescribed by regulation should be straightforward and should not require the applicant to supply any details that are not necessary to process the request.
- A new provision should be added to the draft Law, stating clearly that no person shall be required to provide a justification or reason for requesting any information.

Processing of requests

Once the request is received, the responsible official must ordinarily respond within a period of 15 working days (Article 13).

This duration is comparable to the time limit in most access laws; for example, the European Union also imposes a 15 working day deadline.¹⁸ One well-known problem across the globe is that public officials tend to ignore a request for the first days or weeks after it is received, and only begin to consider it once the deadline is approaching. Eliminating this problem completely seems impossible, but we recommend at least stating in the Draft Law that a request should be processed as promptly as possible – and in any case within the prescribed deadline.

Article 13 of the Draft Law allows the deadline to be extended once with an additional 15 working days, if “the delegated person failed to respond to the request in whole or in part within the first period”, the request “related to a large number of documents” or if it “required consultations”. The applicant must be informed of the delay.

¹⁸ See Regulation (EC) No 1049/2001 of The European Parliament and of the Council of 30 May 2001 Regarding Public Access to Documents, Article 7.

ARTICLE 19 notes that most access laws contain a similar rule, allowing the public body to take a limited amount of extra time if processing the request is unusually complex. However, the wording of Article 13 is too generous – extensions should be limited to exceptional cases and not be permitted in any instance where the responsible official has simply failed to meet the initial deadline or where some consultations were needed. It is foreseeable that under the current wording of Article 13, responding after 30 working days (*i.e.* 6 weeks, or more in periods with public holidays) will become the rule rather than the exception. We also recommend requiring the responsible official to explain the reasons for the delay in the notice to the applicant.

A positive provision is Article 14 of the Draft Law, which requires a response to be provided within two working days if the information is necessary to protect the life or freedom of a person. For the avoidance of doubt, it would be better to state that the *information* should be disclosed within this timeframe, rather than the response provided. We also welcome the requirement, under Article 16, for a public body to transfer a request if the information in question is held elsewhere, and to notify the applicant of this step.

An element that is missing from the Draft Law is the right of applicants to specify their preferred way of receiving the information. A person may have good reasons to want to inspect the original of a document, or to receive a searchable electronic file. The applicant's wish should be respected unless there is a compelling reason not to, such as where the documents in question could be damaged or the requested form of access would cause major inconvenience. Again, the Model Law for African Union Member States contains a useful example provision:

19 Form of Access

[...]

- (2) Subject to subsection (4) where the requester has requested access to information in a particular form, access shall be given in that form.
- (3) A requester may amend their preferred form of access on receipt of notice of the reproduction fees payable if access is granted in the form initially requested.
- (4) If the giving of access to information in the form requested by the requester would:
 - a. unreasonably interfere with the operations of the public body or relevant private body;
 - b. be detrimental to the preservation of the information;
 - c. having regard to the physical nature of the information, not be appropriate; or
 - d. involve an infringement of copyright subsisting in a person other than the public body, relevant private body or the State –
 access in that form may be refused and access may be given in another form.

One reason why requesters may prefer access to electronic files over paper copies is cost. Article 15 states in this regard that access to information shall be free, except that the applicant may be charged the cost of reproduction and delivery “according to the rates of public services and the applicable laws and regulations”. This is in line with international standards, but we recommend stating more explicitly that the applicant may be charged only the *actual* cost of reproduction and delivery. In some countries, public authorities have been known to discourage requesters by charging exorbitant fees per photocopied page. It would also be a good idea, rather than referring loosely to “applicable laws and regulations,” to require the adoption of an official schedule of fees which states how much public bodies may charge per photocopied page. Some countries don't charge at all if the number of pages

involved is small, since collecting a fee entails costs of its own and even a small fee might deter indigent requesters.

Recommendations:

- Article 13 of the Draft Law should require the “delegated person” to respond to a request as promptly as possible; in other words, a response should be given before the expiry of the 15 working day deadline whenever possible.
- Extension of the deadline should be permitted only exceptionally, if responding to the request is unusually complex. The applicant should not only be informed of the delay, but should also be provided with the reasons for it.
- The Draft Law should allow requesters to specify a preferred form in which to receive the information. This preference should be respected, unless there is a compelling reason not to.
- Article 15 of the Draft Law should state clearly that the fee charged for copying and sending information may not exceed the *actual cost*.
- Consideration should be given to requiring the adoption of an official schedule of fees that public bodies may charge, and to waive the fee if the number of photocopies falls below a certain level.

Refusals and exceptions

Article 6 of the Draft Law foresees five different circumstances in which a request may be refused in whole or in part: (1) the information doesn't exist; (2) a recognised exception applies; (3) the information is already publicly available and the applicant has been directed to where it can be found; (4) the request is “blatantly exaggerated” or the same person has filed an identical request twice before in the same year; (5) the request is unclear. The applicant must be informed in writing of the reasons for the refusal and of the right of appeal.

These rules are broadly appropriate, but some refinement is possible. As discussed previously, in cases where a request is unclear, an offer of help clarify the request should be made to the applicant. Refusing a request on the grounds that it is unclear is proper only if the applicant declines this offer or fails to respond within a reasonable time, or if the request remains insufficiently clear despite the assistance given.

Further, it is true that many access laws around the world allow requests to be refused if they are vexatious or manifestly unreasonable, but this calls for a subjective judgment. One way to help ensure this power is not misused would be to require public bodies to notify the National Commission on the Right of Access to Information (which will be discussed further below) and to explain the decision to it whenever a request is refused on these grounds.

One of the key provisions of the Draft Law is Article 19, which sets out the specific exceptions that may justify a refusal to disclose information. The article consists of two separate parts. Subparagraph (a) contains a number of absolute exceptions. Information related to “national defence, and internal and external security”, privacy, fundamental rights and freedoms, and ministerial deliberations on these subjects is excluded from disclosure in all cases, regardless of harm. Subparagraph (b) contains a set of relative exceptions: it lists a number of interests whose protection may justify non-disclosure if there is a risk of harm. These include international relations, the ability of the State to set the monetary, economic, and fiscal policies, the preparation of policies that do not require public consultation, court proceedings, administrative investigations, intellectual property rights, fair competition and “sources of information”.

This regime of exceptions is highly problematic and out of step with the international standards in this area. As discussed in the section on ‘Limitations on the right to freedom of information’ (see page 10), access to information should only be restricted if three conditions are met: the information relates to a legitimate interest recognised by law, its disclosure would cause actual harm to that interest (the ‘harm test’), and that harm is greater than the public interest in disclosure (the ‘public interest override’).

Subparagraph (a) clearly fails to meet the second and third conditions: the information listed here will be withheld even if disclosure causes no harm and serves an important public interest. This is quite plainly illogical. Subparagraph (b) at least contains a harm test, but here too the public interest override is absent. This means that information can be withheld under this subparagraph even if it is against the greater public interest to do so.

We strongly recommend making all the exceptions of Article 19 subject to a harm test and introducing a public interest override, along the lines suggested in the Model Law for African Union Member States.

36 Public interest override

- (1) Notwithstanding any of the exemptions in this Part, an information office 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.
- (2) An information officer must consider whether subsection (1) applies in relation to any information requested before refusing access on the basis of an exemption stated in this Part.

A number of the protected interests mentioned in Article 19 are also inappropriate. It is not clear why information on ‘fundamental rights and freedoms that are enshrined in the constitution’ would need to be withheld, or why ministerial or cabinet deliberations deserve protection, beyond the general protection for public policy that is under development and does not require citizen consultation (Article 19(b)(3)). It is also unclear what is meant by ‘sources of information’ or why these necessarily need to be shielded from disclosure. More generally, we consider that almost all of the protected interests should be defined more narrowly and precisely. The Model Law for African Union Member States could be helpful in this regard; it contains a carefully developed set of model exceptions in Part IV.

Fortunately, Article 19 is followed by a number of provisions that are fully in line with international standards. Article 20 states that, where information originates with a third party, the third party shall be consulted before the public body decides whether to disclose the information. Article 21 is a ‘sunset clause’, which creates a presumption that documents older than 15 years will be disclosed, notwithstanding any exception, unless the applicable law provides for a different period. Finally, Article 22 obliges a public body to grant partial access to those parts of the requested information to which no exception applies.

Recommendations:

- A request should only be refused on the grounds that it is unclear when the applicant has declined an offer to assist in clarifying the request, or if the request remains unclear despite the assistance given. Article 6 should be amended to this effect.

- Consideration should be given to requiring public bodies to send an explanation to the National Commission for the Right of Access to Information whenever they refuse a request on the grounds that it is ‘blatantly exaggerated’.
- The exceptions regime of Article 19 needs to be significantly overhauled. All exceptions should be made subject to a substantial harm test and public interest override. The protected interests should be defined more precisely and narrowly, and only legitimate interests should be protected.

Appeals

The Draft Law guarantees an applicant who is unhappy with the handling of his or her request several stages of appeal. In the first instance, a complaint must be filed to the head of the body in question (Article 17). While this is not explicitly stated, it would appear that a complaint could relate to any kind of failure to process the request correctly – not just a refusal to disclose, but also the charging of an excessive fee or a failure to provide reasons in writing, for example.

The complaint must be lodged within 60 days from the date of the application. It is not clear to us why this deadline is calculated from the initial application, rather than from the date on which the response is given – the consequence of this is that the amount of time available to lodge the appeal will depend on how quickly the public body delivers its decision. Moreover, if the public body exceeds the maximum of 30 working days (about 42 calendar days) to deal with the request, the deadline to complain may even expire before the reply is delivered. This would clearly be unreasonable. We recommend instead that the applicant should be entitled to lodge the complaint up to a certain number of days (e.g. 60 days) after receiving the reply from the public authority, or, if no reply is received, after the date on which the deadline to respond expired.

The head of the public body has 30 days to respond to the complaint; if the applicant remains unhappy with the outcome, the next step is an appeal to the National Commission for the Right of Access to Information (the Commission), a new administrative body to be established under the draft Law, which can issue binding decisions (Article 28).

The Commission will be composed of 11 members nominated by a range of different entities, including the judiciary, the Parliament, two representatives of two public administrations, the Archives and Anti-Bribery Authorities, the Personal Data Commission and the Human Rights Council.

ARTICLE 19 finds this is a bit unusual in the international context – in those countries that have established a separate administrative appeals body for access to information cases, it usually consists of a single Information Commissioner, assisted by staff. The structure proposed under the Draft Law could work – but its significant drawback is that almost all of the Committee’s members will be nominated by bodies that are themselves required to comply with the Law. The candidates that end up being chosen may not be people with a reputation as advocates for a high level of transparency.

We note that reference is made in various places to a head of the Commission – but it is unclear how this head is to be appointed.

The Draft Law is also largely silent on the procedure to be followed before the Commission, including the timeframe within which a complaint to it must be lodged. These matters can be

dealt with in rules of procedure adopted by the Commission itself; it is authorised to do so under Article 27. However, the Draft Law should at least vest the Commission with the necessary investigative powers, such as the right to order the production of evidence, to examine any piece of information whose disclosure is being sought, and to compel witnesses to testify. It is also important that the procedure before the Commission is quick and affordable – most requesters need the information they are seeking for immediate use, such as a news story, an ongoing court case or a business transaction, and will not appeal if the process is unable to deliver the information in time and at a modest price.

A decision of the Commission can be appealed further to the ordinary courts (Article 28).

Recommendations:

- Article 17 should state explicitly that a requester may complain about any failure to process his or her request in line with the requirements of the Law – not only a refusal to disclose information.
- The deadline to lodge a complaint should be calculated from the date on which the decision was communicated to the requester, or, if no decision was communicated, from the date by which the decision should have been taken.
- The Draft Law should clarify how the Commission's head is appointed.
- The Commission should be vested with appropriate investigative powers, in particular the right to order the production of evidence, to examine any piece of information whose disclosure is being sought, and to compel witnesses to testify.
- The Draft Law should ensure that the procedure before the Commission is quick and affordable.

Proactive disclosure and promotion of open government

Governments that are genuinely committed to transparency do not wait for citizens to request information; they publish it proactively. The Internet has made it possible for public authorities to make key information they hold widely available at relatively low cost, thus reaching many people who would probably never think of filing a request for access to information.

ARTICLE 19 welcomes the fact that proactive disclosure is a prominent feature of the Draft Law. Article 7 states that authorities covered by the law “shall publish the maximum amount of the information under their possession that is not covered by the exceptions”, and highlights a number of types of information that should be published in particular, including existing and proposed legislation, the authority's functions, structure and contact details, permits and licences, rights and responsibilities of citizens towards the authority, important events, types of information held by the authority, budgets, and so on. Article 9 requires public bodies to work towards disseminating the information they disclose upon request on the Internet and through other means – a sensible provision, since this will reduce the need to respond repeatedly to requests for the same information. Finally, Article 10 obliges authorities to keep their files in good order to facilitate access. These provisions correspond to international standards.

Another positive feature of the draft Law is the role given to the Commission to promote good practices in the field of access to information, in addition to its task as an appeals body. Amongst others, the Commission will be expected to provide expertise to public bodies on how to proactively publish information, undertake awareness-raising activities, issue recommendations, provide capacity-building, advise on legislation relevant to access to

information and to monitor the implementation of the Law (Article 26). In relation to this last point, we recommend tasking the Commission specifically with collecting statistics from public bodies, such as how many requests were received; the average time taken to respond; the percentage of requests granted in full, in part, or refused; the main grounds for refusal relied on, and so on. Such statistics are an important tool to assess the functioning of the access to information regime.

Recommendations:

- Article 26 should require the Commission to collect statistics on the functioning of the Law.

Criminal sanctions

Article 33 makes it a punishable offence for a civil servant to obstruct access to information in various ways, such as failing to disclose information without a valid ground, releasing information with intent to mislead or failing to answer urgent cases involving the safety or liberty of a person within 2 working days.

Article 35, by contrast, makes it an offence to disclose information to which an exception was applicable. This is problematic, as it is likely to have a significant ‘chilling effect’ on disclosure and promote a culture of excessive caution – realistically, a civil servant is going to be far more fearful of being prosecuted for disclosing too much information than for disclosing too little. It is undoubtedly legitimate for a government to put certain rules in place to protect highly sensitive/classified materials from unauthorised disclosure – but Article 35 goes well beyond this, making it an offence to disclose *any* information to which an exception may apply, regardless of the level of actual harm caused. As was seen above, Article 19 in many instances will require information to be withheld that could be released without any harm being done.

Moreover, it appears that disclosure of official secrets is already an offence under Chapter 446 of the Penal Code; it is not clear why an additional prohibition is needed in this law.

Recommendations:

- Article 35 of the Draft Law, which threatens civil servants with criminal sanctions for releasing information, should be deleted.