ARTICLE 19

Morocco: Second Draft Law on the Right of Access to Information

Legal analysis

ARTICLE 19

Executive summary

In September 2013, ARTICLE 19 examined the Draft Law No 31.13 on the Right of Access to Information of Morocco (Draft Law). This is the second time in less than six months that ARTICLE 19 has analysed draft legislation on the right to information from Morocco. In April 2013, ARTICLE 19 published its analysis of an earlier version of the Draft Law, which spotlighted major weaknesses in the proposed legislation.

Yet, as reflected by this analysis, our recommendations have not been comprehensively heeded in the preparation of the Draft Law. Indeed, notwithstanding a number of positive changes to the provisions (such as the removal of the nationality requirement to exercise the right to information), the Draft Law remains fatally flawed for various reasons, most notably due to the continued adherence to an overbroad system of exceptions.

Morocco's failure to positively respond to ARTICLE 19's critiques of the earlier version of the Draft Law is disappointing because there has been a sense expectation for about three years that the Moroccan government would adopt sound legislation on the right to information in conformity with international standards. Importantly, the Universal Periodic Review of Morocco in July 2012 urged such reform. Moreover, the deficiencies of the Draft Law draw attention to and compound Morocco's worsening record more generally on freedom of expression and media freedom issues.

On the basis of international standards on the right to information and in an effort to provide a practical contribution to the on-going discussions in Morocco on the subject, ARTICLE 19 advances some specific recommendations for the development of the Draft Law. Key among them is the call for the overhaul of the regime of exceptions in accordance with international standards. All exceptions should be made subject to a substantial harm test and public interest override so that a concerned body may only refuse an applicant access to information if the harm to the interest protected under the relevant exemption that would result from the release of the information demonstrably outweighs the public interest in the release of the information. The Draft Law should also stipulate that extension of the deadline for responding to requests should only be permitted in exceptional circumstances and if responding to a request is unusually complex and the applicant should not only be informed of the delay, but should also be provided with reasons for it. In addition, the procedure before the oversight body, National Commission to Ensure the Right of Access to Information, should be speedy and affordable, for which the Draft Law should expressly provide.

Summary of recommendations

1. The statement in the Preamble of the Draft Law - stating that it establishes a framework to practice the right of access to information "in a spirit of responsibility and committed citizenship according to clear and simple procedures" - should be deleted.
2. The Draft Law should include a new provision prohibiting discrimination in the way requests are handled based on the identity of the requester.
3. The Draft Law should include a new provision providing for the possibility of submitting anonymous requests for information.
4. The Draft Law should clarify the definition of "bodies concerned with the implementation of the provisions of this law" particularly with respect to private bodies.

5. The Draft Law should provide that 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.
6. Article 9 (ex-Article 11) should not require applicants to identify the requested information "clearly and precisely," but rather provide that requests should simply be sufficiently clear to be processed.
7. Article 9 (ex-Article 11) should state that any request form prescribed under the law (eg through regulation) should be straightforward and should not require the applicant to supply any details that are not necessary to process the request.
8. Article 9 (ex-Article 11) should state that a person who wishes to obtain access to information may make a request in writing or orally to the information officer of a concerned body.
9. Article 9 (ex-Article 11) should state that where a person with a disability wishes to make a request, an information officer must take all necessary steps to assist the person to make the request in a manner that meets their needs.
10. Article 10 (ex-Article 13) should state that extension of the deadline for responding to request should only be permitted in exceptional circumstances and if responding to a request is unusually complex. The applicant should not only be informed of the delay, but should also be provided with reasons for it.
11. Article 10 (ex-Article 13) should state that the concerned bodies must provide information sought (rather than respond to the request) in a timely manner and not exceeding two days in urgent cases where the information is necessary for the protection of the life or liberty of the person.
12. The Draft Law should allow requesters to specify a preferred form in which to receive the information. This should be respected unless there is a compelling reason to the contrary.
13. The Draft Law should state that if an applicant with a disability is prevented by that disability from reading, viewing or listening to information requested in the form in which it is held by the concerned body, the latter should take reasonable steps to make the information available in a form in which it is capable of being read, viewed or heard by the applicant if she/he so requests.
14. Article 12 (ex-Article 15) should state clearly that the fee charged to cover the expenses of copying and sending the information to the applicant must not exceed the actual cost.
15. 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.
16. The exceptions' regime under Article 17 (ex-Article 19) still needs to be significantly overhauled in accordance with international standards. All exceptions should be made subject to a substantial harm test and public interest override so that a concerned body may only refuse an applicant access to information if the harm to the interest protected under the relevant exemption that would result from the release of the information demonstrably outweighs the public interest in the release of the information.
17. The protected interests contained in Article 17 (ex-Article 19) should be defined more precisely and narrowly. Furthermore, only legitimate interests recognised in international standards should be protected.
18. Article 14 (ex-Article 17) should expressly state 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.
19. The Draft Law should clarify how the head of the National Commission to Ensure the Right of Access to Information (its President) is to be appointed.

20. The Draft Law should clearly state the powers of the Commission, specifically the powers of investigation, the right to order the production of evidence, to examine any information whose disclosure is being sought and to compel witnesses to testify.
21. The Draft Law should provide that the procedure before the Commission is speedy and affordable.
22. Article 32 (ex-Article 35) of the Draft Law, which threatens civil servants with criminal sanctions for releasing information, should be deleted.

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About 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 and develops policy papers and other documents. This 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 materials developed by the Law Programme are available at http://www.article19.org/resources.php/legal/.

If you would like to discuss this policy brief 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

In this analysis, ARTICLE 19 examines Draft Law No 31.13 on the Right of Access to Information of Morocco (Draft Law).

This is the second time in less than six months that ARTICLE 19 has analysed draft legislation on the right to information from Morocco. In April 2013, ARTICLE 19 published its analysis of an earlier version of the Draft Law which spotlighted major weaknesses in the proposed legislation.[1] These included our objections to as a "grossly overbroad" regime of exceptions, citizenship as a requirement for exercise of the right to of access to information, a vague definition of concerned authorities and problematic procedures for requesting access – and provided a set of specific recommendations guiding the Moroccan drafters in the reformulation of its provisions in accordance with Morocco's international human rights law obligations and international, regional and comparative standards on the right to information.

Yet, as reflected by this analysis, our recommendations have not been comprehensively heeded in the preparation of the Draft Law. Indeed, notwithstanding a number of positive changes to the provisions, the Draft Law remains fatally flawed for various reasons, most notably due to the continued adherence to a broad system of exceptions, which would significantly inhibit the exercise of the right to information in Morocco.

The Moroccan state's failure to positively respond to ARTICLE 19's critiques of the earlier version of the Draft Law is disappointing and problematic for various reasons.

- *First*, there has been a sense expectation for about three years that the Moroccan government would adopt sound legislation on the right to information in conformity with international standards. The new Constitution, which was adopted on 1 July 2011, guarantees the right to access information held by public authorities, and the government has expressed its commitment to the enactment of legislation to implement that right since September 2010.[2]

- *Second*, by failure to adopt a comprehensive legislation on right to information, Morocco does not respect its obligations under international law, notably, under Article 19 of the International Covenant on Civil and Political Rights (which Morocco ratified on 3 May 1979) and its authoritative interpretation by the Human Rights Committee,[3] as well as the African Charter on Human Peoples' Rights (to which Morocco is not party) and the African Union's Model Law on Access to Information for Africa developed by the African Union's Special Rapporteur on Freedom of Expression and Access to Information.[4]

- *Third*, the two versions of the Draft Law that have so far appeared, suggest that Morocco is not really serious about responding to the recommendation, which was included in

[1] ARTICLE 19, Morocco: Draft Law on the Right to Access Information, Legal Analysis, April 2013; available at http://www.article19.org/resources.php/resource/3711/en/morocco:-draft-law-on-the-right-to-access-information.
[2] Article 27 of the Moroccan Constitution of 2011.
[3] See General Comment No 34 on freedom of opinion and expression, 12 September 2011, CCPR//C/GC/34 at para 19.
[4] Model Law for African Union States on Access to Information http://www.achpr.org/files/news/2013/04/d84/model_law.pdf

the conclusions of Morocco's Universal Periodic Review in July 2012, that the state should reform the law to "allow freedom of information *in line with international standards*" (emphasis added).[5]

- *Four*, the continued weaknesses of the Draft Law draw further attention to and indeed compound criticisms of Morocco's human rights record, particularly in relation to freedom of expression, implying that Morocco's state authorities also do not care if the people of Morocco are denied the right to information in a full and meaningful sense. In recent years, credible, global human rights NGOs have drawn particular attention to the high levels of arrest, harassment and intimidation of journalists critical of authorities and the criminalisation and imprisonment reliance, under the Press Law and Penal Code, of individuals for peaceful expression deemed as insulting to the king, Islam, state institutions and private individuals.[6]

ARTICLE 19 stands ready to support the process of adopting the most progressive legislation on right to information in Morocco. We hope that the comments in this analysis - informed by international and regional human rights law on the right to information and best practices in this area[7] – will be considered by the drafters and addressed in the final version of this important law.

[5] Human Rights Council, Morocco: Report of the Working Group on the Universal Periodic Review, 6 July 2012, A/HRC/21/3, para 129.90. See also the statement from UNESCO towards Morocco's Universal Periodic Review that similarly recommended: "provisions be added to existing legislation to guarantee freedom of information in line with international standards". Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, 6 July 2012, A/HRC/WG.6/13/MAR/2, para 30 (UNESCO submission to the UPR on Morocco, paras 27 and 34).

[6] For some recent examples of international concern about Morocco's record on freedom of expression issues, see for example: Amnesty International, "Morocco holding independent editor over coverage of al-Qa'ida video", press release, 18 September 2013; Human Rights Watch, "Morocco: Free Student Imprisoned for Insulting King", press release, 16 July 2013; Freedom House, "Moroccan Government Charges Editor with Criminal Defamation", press release, 28 January 2013.

[7] Relevant international standards are summarised in our analysis of the earlier version of the draft legislation and will not be reviewed again here. The analysis also draws from ARTICLE 19's two key standard-setting documents on the right to information – *The Public's Right to Know: Principles on Freedom of Information Legislation* and *A Model Law on Access to Information; see* ARTICLE 19, The Public's Right to Know: Principles on Freedom of Information Legislation (London: June 1999) http://www.article19.org/data/files/pdfs/standards/righttoknow.pdf; ARTICLE 19, A Model Freedom of Information Law (London: June 2001) http://article19.org/data/files/pdfs/standards/modelfoilaw.pdf

Analysis of the Draft Law

Improvements from the earlier draft

Although many of ARTICLE 19's main criticisms of that earlier version of the Draft Law remain unaddressed, ARTICLE 19 recognises that the Draft Law does improve on the earlier version in various ways. This part does not highlight all the positive features of the Draft Law and commend the drafters in this respect (eg the provision in Article 13 (ex-Article 16) allowing for transfers of requests to another body), but rather draws attention to the improvements that directly speak to some of the criticisms indicated by ARTICLE 19 in its April 2013 analysis of an earlier version of the draft law.

- Article 2 of the Draft Law now states that "each person" has the right of access to information. This marks a major and positive change to the earlier version of the Draft Law that stated that only citizens and legal persons could and rely on the right.
- The term "documents" is removed from Article 2, making this provision more consistent with the rest of the Draft Law and clarifying its material scope to cover simply "information".
- Article 6 now indicates that a request for information may be refused it is not clear even though assistance has been provided to the person requesting the information.
- Article 9 (ex-Article 11) of the Draft Law now requires that the "mandated person must provide assistance to the person presenting the request where necessary".
- Article 9 (ex-Article 11) of the Draft Law now indicates that requests for information do not need to "[mention] reasons or justifications for presenting the request", thus removing the requirement for applicants to justify their information requests.
- Article 10 (ex-Article 13) now states that a responsible official must respond to a request for access to information "*in a timely manner or as soon as possible with the condition that this does not exceed* 15 working days" (emphasis added).
- Article 14 (ex-Article 17) now states that an applicant for information may complain to the head of the body in question after receiving no response "within 30 days from the legal period for the response is expired or from the date of the response". In so doing, the length of time available to lodge an appeal thus no longer depends on how quickly the public body delivers its decision as before.
- Article 21 (ex-Article 23) specifies that the National Commission to Ensure the Right of Access to Information "is considered an independent and specialised body with full legal capacity and financial independence".
- Article 23 (ex-Article 25) sets out how the "general administrator" is to be appointed: from three persons proposed by the President of the Commission from outside its members and for a period of five years, renewable once.
- Article 24 (ex-Article 26) emphasises that the commission will undertake its task of providing "continuous support" to concerned bodies towards … the proper implementation of the right to access information" in an effort to "consolidate transparency" and the "culture of good governance".
- Article 24 (ex-Article 26) requires the Commission to ensure the "adoption and management of a statistics and data base related to the implementation of this law". This further strengthens the provisions on proactive disclosure, already a prominent feature of the Draft Law.

- Article 28 (ex-Article 31) now also obliges the commission to publish its decisions, the complaints it received and how it has "performed to address them".

The remainder of this analysis will highlight the outstanding deficiencies with the Draft Law, including those that were already pinpointed by ARTICLE 19. ARTICLE 19 strongly urges Morocco's state authorities to positively respond to the recommendations to address these shortfalls in drafting the final version of the law.

Barriers to the Right to Information

Preamble

The amended Preamble still retains the statement that the law is intended to "[establish] a framework to practice [the right of access to information] in a spirit of responsibility and committed citizenship". "Relevant bodies", as defined by Article 1(b), would decide on the meaning of such nebulous terms of "responsibility" and "committed citizenship" and do so according to their own standards and political perspectives. This provision of the Preamble therefore accords them significant leeway and scope for interpreting the law restrictively in relation to requests that have been submitted to them and, more specifically, rejecting information requests on the grounds that they are "irresponsible" or "unpatriotic" in their opinion.

Recommendation

- The Preamble should not state that the law establishes a framework to practice the right of access to information "in a spirit of responsibility and committed citizenship according to clear and simple procedures". This provision should be deleted.

Persons entitled to exercise the right of access to information

Notwithstanding the change to Article 2 expanding its scope from "all citizens and all legal persons" to "each person", the Draft Law still lacks a provision prohibiting any discrimination in the handling of requests for information based on the identity of the requester. As stated in our previous analysis, we recommend that there should be such a non-discrimination provision because there is evidence that in some countries authorities charge higher fees or delay the processing of a request from a journalist who is known to be critical of public authorities or arbitrarily dismiss requests from members of certain groups, such as ethnic minorities. We recommend that the Draft Law should include express safeguards to such discrimination through a general non-discrimination provision as well as a provision guaranteeing that a request for information may be made anonymously.[8]

Recommendations

- The Draft Law should include a new provision prohibiting discrimination in the way requests are handled based on the identity of the requester.
- The Draft Law should include a new provision providing for the possibility of submitting anonymous requests for information.

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[8] See Article 14 of the Freedom of the Press Act 1766 of Sweden which states: "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."

Bodies required to grant access to information
The Draft Law retains an almost identical list of "bodies concerned with the implementation" of its provisions to the earlier draft. This now includes "each contractor mandated to manage a public facility". In this way, the Draft Law now omits any direct reference to private entities. The application of the law to private entities needs to be further clarified, however. As emphasised by ARTICLE 19's previous analysis, the Model Law for African Union Member States suggests that access to information should apply to any private body:

> (a) owned totally or partially or controlled or financed, directly or indirectly, by public funds, but only to the extent of that financing; or
>
> (b) carrying out a statutory or public function or a statutory or public service, but only to the extent of that statutory or public function or that statutory or public service;

Recommendation:
- The Draft Law should clarify the definition of "bodies concerned with the implementation of the provisions of this law" particularly with respect to private bodies.

Material scope
Article 1(a) indicates that the term "information" in the Draft Law encompasses the following: "facts and data expressed in the form of numbers, letters, illustrations or pictures, or any other form, whatever the medium it is expressed through, paper or electronic or otherwise", as "reports, studies, statistics, periodicals, publications, memorandums, records, correspondence, consultant opinions, administrative decisions and judicial decisions, judgements and orders". Information contained on electronic database may be conceivably covered by the phrase "or any other form", an addition to the Draft Law.

However, ARTICLE 19 recommends that the Draft Law should provide that when 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.

Recommendation:
- The Draft Law should provide that 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 making requests for information
Despite some changes, the procedure for making requests for information remains flawed and does not meet the recommendations of ARTICLE 19's earlier analysis in various ways. Article 9 (ex-Article 11) of the Draft Law still indicates that a request for information must state "clearly and precisely the information sought to be acquired". Yet applicants are frequently unaware of the working methods of public bodies and the type of information they hold. Consequently, it can be very difficult for an applicant to formulate a targeted request for information.

As ARTICLE 19 indicated previously, the wording of the Draft Law risks a situation where requests that are drafted with reasonable care are nonetheless rejected because the official responsible considers the requests insufficiently clear and precise.

Article 9 (ex-Article 11) provides that requests may be "presented in accordance with the form included in annex 1 of this law or in a written manner where necessary" and may also be made by mail or e-mail in exchange for a notification of receipt. As we indicated previously, the Draft Law should specify that any form required under the law – through, presumably, a regulation – should be as simple as possible and should not require the applicant to provide details that are not necessary to process the request. It is interesting to note that, instead of clarifying that oral requests may also be made by people who are able to file a request in writing but prefer not to, the Draft Law appears to omit any possibility of filing an oral or verbal request at all by deleting the first part of Article 10 (ex-Article 12). The Draft Law's provisions should provide that any person should be allowed to file a request for information orally, whether or not they are able to do so in writing.

As indicated above, Article 9 (ex-Article 11) of the Draft Law now requires that the "mandated person must provide assistance to the person presenting the request where necessary". However, this provision does not make clear that such assistance should be made available without charge in order to comply with the legislation.[9] Furthermore, there should be an express provision recognising that disabled people may face particular challenges in making requests for information and requiring officials responsible for processing requests to provide assist to such individuals according to their specific needs.

Recommendations:

- Article 9 (ex-Article 11) should not require applicants to identify the requested information "clearly and precisely", but rather provide that requests should simply be sufficiently clear to be processed.
- Article 9 (ex-Article 11) should state that any request form prescribed under the law (eg through regulation) should be straightforward and should not require the applicant to supply any details that are not necessary to process the request.
- Article 9 (ex-Article 11) should state that a person who wishes to obtain access to information may make a request in writing or orally to the information officer of a concerned body.
- Article 9 (ex-Article 11) should state that where a person with a disability wishes to make a request, an information officer must take all necessary steps to assist the person to make the request in a manner that meets their needs.

Processing of requests

Public bodies may take a limited amount of extra time if processing a request for information is unusually complex. However, the wording of Article 10 (ex-Article 13) remains too generous in this regard. The current wording of the Draft Law states that the initial period of responding to requests of 15 days "can be extended to another 15 days if the mandated person was unable to fully or partly respond to the request of the concerned person in the original period and if the request is related to a large amount of information, or if the request requires a consultation from another before the delivery of the requested information". Yet extensions should only be allowed in *exceptional* cases and not permitted when, for example, the

[9] These standards are reflected in the Model Law on Access to Information for Africa at para 15.

responsible official has simply failed to meet the initial deadline or to ensure necessary consultations were conducted because of incompetence.

As ARTICLE 19 already pointed out, the lack of robust wording of this provision is likely to mean that there is a real risk that it will become regular practice for concerned bodies to respond after 30 working days (ie 6 weeks or more in periods with public holidays) if the Draft Law is adopted.

ARTICLE 19's previous analysis commended Article 11 (ex-Article 14) for its requirement that a response should be provided within two working days if the information sought "is necessary for the protection of the person or his freedom". We restate our recommendation that for the avoidance of doubt, it would be better to state that the *information sought* should be disclosed within two working days in such urgent cases, rather than a response provided.

An element that still remains entirely absent 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 file. The applicant's wish should be respected unless there is a compelling reason to the contrary, such as where the documents question could be damaged or the requested form of access would cause major inconvenience. ARTICLE once again highlights the Model Law on Access to Information for Africa as a useful example. Article 21 on Forms of Access states:

> (1) Access to information must be given to a requester in one or more of the following forms:
> (a) a reasonable opportunity to inspect the information;
> (b) a copy of the information;
> (c) in the case of information that is an article or thing from which sounds or visual images are capable of being reproduced, the making of arrangements for the person to hear, view, record or copy those sounds or visual images;
> (d) in the case of information by which words are recorded in a manner in which they are capable of being reproduced in the form of sound or in which words are contained in the form of shorthand writing or in codified form, provision by the information holder of a written transcript;
> (e) in the case of information which is held on a computer, or in electronic or machine-readable form, and from which the information holder concerned is capable of producing a printed copy of the information or part of it, by supplying such a copy; or
> (f) in the case of information available or capable of being made available in computer readable form, by supplying a copy in that form.
>
> (2) Subject to subsection (4), where the requester has requested access to information in a particular form, access must be given in that form.
>
> (3) A requester may amend their preferred form of access on receipt of notice of the reproduction fees, translation fees or transcription fees payable if access is granted in the form initially requested.
>
> (4) If giving access to information in the form requested by the requester is likely to -
> (a) unreasonably interfere with the operations of the information holder;
> (b) be detrimental to the preservation of the information; or
> (c) having regard to the physical nature of the information, not be appropriate,
> access in that form may be refused if access is given in another form authorised under this Act.

Article 12 (ex-Article 15) of the Draft Law indicates that access to information should be free, except that the applicant may be charged the cost of the reproduction of information and delivery "according to the invoicing of public services, the laws and regulations that are applicable". As we have previously recommended, the provision should specify that the applicant should only be charged the *actual* cost of reproduction and delivery. Furthermore, rather than referring to "applicable" laws and regulations, the Draft Law should require the adoption of an official schedule of fees which states how much public bodies may charge per photocopied page.

In addition, the Draft Law should also provide that reasonable steps should be taken to make information available in an accessible form to persons with disabilities, who may be prevented from reading, viewing or listening to the information in the form the concerned body holds it.

Recommendations:

- Article 10 (ex-Article 13) should state that extension of the deadline for responding to request should only be permitted in exceptional circumstances and if responding to a request is unusually complex. The applicant should not only be informed of the delay, but should also be provided with reasons for it.
- Article 10 (ex-Article 13) should state that the concerned bodies must provide information sought (rather than respond to the request) in a timely manner and not exceeding two days in urgent cases where the information is necessary for the protection of the life or liberty of the person.
- The Draft Law should allow requesters to specify a preferred form in which to receive the information. This should be respected unless there is a compelling reason to the contrary.
- The Draft Law should state that if an applicant with a disability is prevented by that disability from reading, viewing or listening to information requested in the form in which it is held by the concerned body, the latter should take reasonable steps to make the information available in a form in which it is capable of being read, viewed or heard by the applicant if she/he so requests.
- Article 12 (ex-Article 15) should state clearly that the fee charged to cover the expenses of copying and sending the information to the applicant must 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.

Exceptions

Article 6 of the Draft Law now provides that a request for access to information may be completely or partially refused if, among other things, "the required information is not clear despite [the responsible official's] presenting assistance to the person that requested the information". This is a progressive step in the Draft Law, as indicated above.

However, the regime of exceptions to the principle of disclosure of information remains deeply problematic, despite some minor changes. Subparagraph (a) indicates a list of four (previously five) types of information which would justify absolute or blanket exemptions: that which is "related to national defense", "internal and external state security" or "private lives of individuals" or "that would affect fundamental rights and freedoms stated in the Constitution". (The previous draft also exempted "deliberations of the Ministerial Council and

the Government Council related to the exceptions mentioned above", which is removed from the Draft Law.) Subparagraph (b) then contains relative exceptions indicating eight types of information that may be justifiably withheld from release, if disclosure "would lead to harm". Such information encompasses information about the following: relationships with another state or intergovernmental organisation; the state's ability to manage monetary, economic and fiscal policies; a public policy under preparation; court proceedings; administrative studies and investigations; intellectual property rights; fair and legitimate competition; and "sources of information".

As stated previously, the regime for exceptions established by Article 17 (ex-Article 19) remains extremely problematic and contrary to international standards. One could argue that the inclusion of the new phrase at the beginning of Article 17 (ex-Article 19), stating that the entire provision is "for the purpose of protecting the supreme interests of the homeland and public interest", means that it could be interpreted even more restrictively according to what public bodies believe are the *state's* interests which may well not be the same as public interests. It is recalled that restrictions on the right to information should only be imposed if three conditions are met: *first*, the information relates to a legitimate interest recognised by law; *second*, its disclosure would cause actual harm to that interest (the "harm test"); and *third*, 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 since the information contained in that subparagraph would be withheld even if its disclosure would cause no harm and serves an important public interest. While subparagraph (b) contains a harm test, it neglects the public interest override. This means that information can be withheld under this subparagraph even if it is against the greater public interest to do so.

As before, ARTICLE 19 strongly recommends that all the exceptions indicated in Article 17 (ex-Article 19) should be subject to a harm test and a public interest override along the same lines suggested in the Model Law on Access to Information for Africa. Article 25 states:

> (1) Notwithstanding any of the exemptions in this Part, an information holder may only refuse a requester access to information if the harm to the interest protected under the relevant exemption that would result from the release of the information demonstrably outweighs the public interest in the release of the information.
> (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.

Some of the protected interests indicated in Article 17 (ex-Article 19) are also inappropriate. It is unclear why information "that would affect fundamental rights and freedoms that are enshrined in the Constitution" would necessarily need to be withheld or what is meant by "sources of information" and why these also need to be shielded from disclosure. As stated previously, ARTICLE 19 considers that almost all of the protect interests should be defined more narrowly and precisely.

The Model Law on Access to Information for Africa could be helpful in this regard: it contains a carefully developed set of model exceptions in Part III on such grounds as: personal information; commercial and confidential information; protection of individual life, health and safety; national security and defence; international relations, economic interests of the state; law enforcement; legally-privileged documents and academic and professional examination recruitment processes.

The regime of exceptions remains the most concerning aspect of the Draft Law.

Recommendation:

- The exceptions' regime under Article 17 (ex-Article 19) still needs to be significantly overhauled in accordance with international standards. All exceptions should be made subject to a substantial harm test and public interest override so that a concerned body may only refuse an applicant access to information if the harm to the interest protected under the relevant exemption that would result from the release of the information demonstrably outweighs the public interest in the release of the information.
- The protected interests contained in Article 17 (ex-Article 19) should be defined more precisely and narrowly. Furthermore, only legitimate interests recognised in international standards should be protected.

Appeals

Article 14 (ex-Article 17) has been almost completed revised since the previous draft. The provision obliges the head of the body in question "to study the complaint and inform its presenter of the decision taken on this matter" 15 days starting from the date of its receipt, which is preferable to the previous time limit was 30 days starting from the day of receipt. According to Article 15 (ex-Article 18), the applicant may then "present a complaint to the President of the National Commission to Ensure the Right of Access to Information" as established by Article 21 (ex-Article 23). Article 26 (ex-Article 28) provides that the decisions issued by the Commission are considered binding, although this provision no longer mentions the possibility of any further appeal to the judiciary. This is now encompassed by a new Article 16 which provides that any applicant may appeal the decision of the head of a concerned body to the courts within 60 days from the receipt of the decision of the President of the commission or from the date of on which the deadline to respond has expired.

Recommendations:

- Article 14 (ex-Article 17) should expressly state 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.

Information Commission

In Article 22 (ex-Article 24) the Draft Law increases the number of members of the National Commission from 11 members to 12 members who would be nominated by different entities including the judiciary, two representatives of the public administration who should have the rank of at least director, parliamentary representatives of the Houses of Representatives and Counsellors nominated by their respective Speakers, the Director of the Archives, the President of the Anti-Corruption Authority, the Personal Data Commissioner and the National Council of Human Rights or the President of the union of civil society organisations focussing on the right of access to information, and also the Ombudsman.

Although Article 23 (ex-Article 25) specifies how a "general administrator" is to be appointed, the Draft Law remains silent on how the head of the Commission, its President, is to be appointed. Notwithstanding the provision in Article 25 (ex-Article 27) indicating that the Commission will prepare its own rules of procedures, the Draft Law still lacks any provisions setting out in detail the powers of the Commission and the procedure to be followed, in particular the timeframe within which a complaint to it must be lodged. Clearly, the procedure

before the Commission needs to be quick and affordable for applicants, whether they are journalists requiring material for a news story, civil society organisations investigating state or corporate abuses, lawyers requiring material for court case or business transactions, or ordinary individuals.

Recommendations:

- The Draft Law should clarify how the Commission's head (its President) is to be appointed.
- The Draft Law should clearly state the powers of the Commission, specifically the powers of investigation, the right to order the production of evidence, to examine any information whose disclosure is being sought and to compel witnesses to testify.
- The Draft Law should provide that the procedure before the Commission is speedy and affordable.

Criminal sanctions

The Draft Law retains exactly the same problematic provisions on criminal sanctions as the previous draft and therefore attracts the same criticism. Article 30 (ex-Article 33) makes it a criminal 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 two working days. Article 32 (ex-Article 35) makes it an offence to disclose information to which an exception under Article 17 (ex-Article 19) was applicable.

As stated before, this provision is likely to have a significant "chilling effect" on disclosure of information and will promote a culture of excessive caution in the civil service. Realistically, a civil servant is going to be far more fearful of being prosecuted for disclosing too much information than for disclosing too little. Article 32 (ex-Article 35) goes far beyond the rules required to protect highly sensitive/classified materials from unauthorised disclosure by making it an offence to disclosure *any* information to which an exception may apply, regardless of the level of actual harm caused. The deeply flawed regime of exceptions that is retained means that in many instances information will be withheld irrespective of the harm done.

Recommendation:

- Article 32 (ex-Article 35) of the Draft Law, which threatens civil servants with criminal sanctions for releasing information, should be deleted.