ARTICLE 19

Morocco: Draft Law Regarding the Right to Access Information

September 2017

Legal analysis

Executive Summary

The Government of Morocco has undertaken two important initiatives in its efforts to improve transparency and governance in the Kingdom: The adoption of the Draft Law Regarding the Right to Access Information (the Draft Law) and the joining of the Open Government Partnership.

Both of these initiatives represent important progress towards ensuring that all persons in Morocco will be able to achieve their right to information. They also promise positive outcomes for Moroccan people and their government by increasing accountability, reducing corruption and improving public services.

However, as it currently stands, the Draft Law is incapable of achieving these goals and requires significant revisions to meet an acceptable level of adequacy under International law.

Recommendations (in brief):

1. Clarify that the application of this Law should prevail in case of conflicting interpretation of other legislation or regulation restricting access to information.

2. Add the presumption of disclosure as a general principle informing the interpretation of the Law.

3. Amend the definition of "information" to include any information received by or under the control of the requested relevant body in the exercise of its activities.

4. Extend the list of concerned bodies and institutions in the Law to include all those bodies that are owned or controlled – totally or partially – or funded – directly or indirectly – by public funds, to the extent of that funding.

5. Extend the right of access to information to all natural or legal persons, regardless of their citizenship or residency.

6. Revise all exemptions to ensure that they are all subject to the harm/public interest test before being invoked.

7. Clarify that information that may disrupt confidential deliberations of Government and Cabinet meetings or confidential administrative research and investigation does not apply when the public interest overrides the harm of the disclosure.

8. Specify that the exemption for the "protection of personal life" should only apply to private, personal information held by public bodies and should not apply to information regarding individuals acting in a public capacity.

9. Extend the list of proactively published information to include the process for policy or decision making, public procurement, impact assessment studies and financial information.

10. Remove restrictions on forms to submit a request and the obligation for requesters to provide their ID so long as they provide sufficient contact details.

11. Establish a duty of the information officer to assist the requester to make sure the request for access is clear and compliant with the Law.

12. Reduce the deadline for reply to urgent requests to a maximum of 48 hours.

13. Ensure that requests are responded to, whenever possible, in the form preferred by the requester.

14. Clarify that only reasonable reproduction fees can be imposed on the requester and such costs in any case should never exceed the actual costs incurred by the relevant body.

15. Ensure that the information released is in an open data format for easy reuse.

16. Allow the free reuse of information for any purpose under an open license.

17. Review the structure, chair and composition of the Commission on the Right of Access to Information so as to strengthen its independence and autonomy from the Government and to avoid conflicts of interests with the commission in charge for the protection of private data.

18. Eliminate the appointment of the civil society representative by the Head of the Government and increase the representation of civil society and media stakeholders within the Commission on the Right of Access to Information.

19. Ensure that all officials who deliberately mishandle or damage, destroy, alter or refuse access to information in breach of the Law are subject to criminal and administrative fines, not just disciplinary measures.

20. Clarify that anyone who has disclosed any information, including professional secrets, acting in good faith should be exempt from liability.

21. Remove Article 29 which criminalises receivers of information for any alteration in the content of the information which causes damage to the relevant body or which results in its "use, reuse or harm to the public interest".

22. Include a provision requiring a specific public authority to review existing laws and repeal those that conflict with this Law.

23. Adopt a separate law to specifically protect whistleblowers.

24. The Government should engage broadly in a participatory consultation with civil society and citizens in the development of the New Action Plan (NAP). The NAP should include extensive commitments on implementation of the ATI law and adoption of other laws on whistleblowing and public consultation.

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About the ARTICLE 19 Right to Information Programme

The ARTICLE 19 Right to Information Programme advocates for the development of progressive standards on access to information at the international and regional levels, and their implementation in domestic legal systems. The Right to Information Programme has produced a number of standard-setting publications, which outline international and comparative law and best practice in areas such as national security and privacy.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Right to Information Programme publishes a number of legal analyses each year, commenting on legislative proposals, as well as existing laws that affect the right to information. This analytical work frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at http://www.article19.org/resources.php?tagid=464&lang=en

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I. Introduction

In this analysis, ARTICLE 19 reviews the most recent publicly-available version of the Draft Law 31.13 Regarding the Right to Access Information adopted by the Parliamentary House of Deputies of the Kingdom of Morocco.[1]

While we welcome both this initiative and the Government announcements on joining the Open Government Partnership, we remain concerned that the current text of the Draft Law presents some significant shortcomings in its efforts to comply with international law standards on access to information.

In its current form, the Draft Law represents progress in comparison with former drafts previously analysed. In particular, we welcome:

- the removal from Article 14 of the requirement of a direct interest in the information requested as well to indicate the purpose of the request before the information could be released;
- the subsequent elimination from Chapter VI of the provisions which established criminal sanctions for any person who incorrectly or falsely stated the reason for his/her request and any person who reused the information for other purposes than those originally stated;
- the reintroduction of provisions in Chapter V establishing a Commission on the Right to Access Information, which had been eliminated in the previous version of the Draft Law.

However many of the remaining flaws in the Draft Law remain unchanged from the previous version analysed.

II. Analysis of the Draft Law

A. General Principles

Article 1 outlines the purpose of the Draft Law to define and regulate the right to access information in accordance with the provision of the Constitution. However, the Article does not specify that in cases of conflicts with any other legislative or regulatory provisions restricting access to information, the implementation of this Law should prevail. This is not consistent with the principle of the primacy of the Freedom of Information Act as also acknowledged by the African Commission on Human and People's Rights in the Model Law of Access to Information in Africa.[2] Like many other countries, Morocco has a large body of existing law which may affect the disclosure of information by public bodies. Many of these laws do not adequately reflect international standards on human rights. As a law based on a constitutional provision, the Draft Law should have primacy over other non-constitutional

[1] This analysis is based on an unofficial translation of the Draft Law and should be read in conjunction with previous analyses produced by ARTICLE 19.

[2] Article 4, Model Law on Access to Information for Africa, prepared by the African Commission on Human and Peoples' Rights, http://www.achpr.org/files/news/2013/04/d84/model_law.pdf; also see: Article 4 (4), Kenya, Access to Information Act 2016; Article 5, Turkish Law on the Right to Information Law No. 4982 of 2003

laws when a conflict emerges between them. However, it is our experience that officials do not always make that distinction and often instead make decisions based on the previous experience with older laws rather than fully applying the newer act.

Article 1 also fails to clarify that the Law as a whole must be reasonably interpreted and applied in a way that prefers the right to access information to any other restrictive interpretation. The presumption of disclosure is another principle acknowledged by the international human rights standards and endorsed by the Model Law of Access to Information to Africa and incorporated into several national laws.[3]

Furthermore, in defining what is considered "information" for the purposes of this law, Article 1 lists a series of examples of documents in material "produced by" the relevant bodies or "used for correspondence" by the same bodies. This definition, similar to the one adopted in the previous version of the Draft Law, risks leaving out of the scope of the Law all the other relevant documentation that is simply in possession or under the control of the relevant bodies, in contrast with the international standards acknowledged by the African Commission on Human and People's Rights in its Model Law of Access to Information in Africa.[4] Other national laws, such as the recently approved Organic Law for the Right of Access to Information of Tunisia, clarify that the scope of the law includes any information received by the relevant bodies while exercising their activities, whatever the date, medium or form.[5]

Recommendations

- *Include a provision establishing that the application of this Law should prevail in case of conflicting interpretation of other legislation or regulation restricting access to information.*
- *The presumption of full disclosure should be explicitly added to the principles informing the interpretation of the Law.*
- *The definition of "information" relevant for the purposes of this Law should be amended to include any information received by or under the control of the requested relevant body in the exercise of its activities.*

B. Definition of Concerned bodies and Institutions

Article 1 of the Draft Law outlines a series of bodies and institutions to which it applies. The list includes public as well as private bodies in charge of providing public services. We believe that the definition of the private bodies subject to the Law should be more specific and include all those bodies that are owned or controlled – totally or partially – or funded – directly or indirectly – by public funds, to the extent of that funding. A more precise description of the relevant private bodies is included in other national laws and in the Model Law of Access to Information in Africa.[6]

[3] Articles 2 (c) and Article 5, Model Law on Access to Information for Africa.

[4] Article 1, Model Law on Access to Information for Africa.

[5] Article 3, Organic Law No. 2016-22 of 24 March 2016 on the Right of Access to Information, Official Journal of the Tunisian Republic, No. 26, 29 March 2016, p. 949.

[6] See Article 2, Organic Law No. 2016-22 of 24 March 2016 on the Right of Access to Information, Official Journal of the Tunisian Republic, No. 26, 29 March 2016, p. 949; Section 6, UK Freedom of Information Act as

Recommendation

- *The list of concerned bodies and institutions in the Law should be extended to clearly include all those bodies that are owned or controlled – totally or partially – or funded – directly or indirectly – by public funds, to the extent of that funding.*

C. Application of the Law to Non-Citizens

Article 3 of the Draft Law restricts access to only citizens while Article 4 extends it to legally resident foreigners. This remains inconsistent with international law which recognises that the right to information is a fundamental human right available to all persons, regardless of citizenship or residency. This is also recognised in numerous countries including Tunisia, Lebanon, France, the United States, and the United Kingdom.[7] Furthermore, the principle of access to information available to all persons regardless of citizenship or residency is one of the fundamental principles acknowledged by the African Commission on Human and People's Rights in its Model Law of Access to Information in Africa.[8]

Recommendation

- *Extend the right of access to information to all natural or legal persons, regardless of their citizenship or residency.*

D. Fees

Article 5 of the Draft Law acknowledges the principle that access to information should be free but subsequently allows charging fees for non-specified services established by regulations and for all reproduction, processing and shipping costs. This norm is unchanged from the previous version of the Draft Law and fails to comply with international law standards, which only allows an information holder to charge the requester a "reasonable" reproduction cost and does not require any payments in relation to processing the request for information. As the UN Human Rights Committee emphasizes in General Comment No. 34 on Article 19 of the ICCPR, "Fees for requests for information should not be such as to constitute an unreasonable impediment to access to information."[9] This principle is also further elaborated by the African Commission on Human and People's Rights in its Model Law of Access to Information in Africa, which specifies that no reproduction fee shall be paid:

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amended by the Protection of Freedoms Act 2012; Article 1, Model Law on Access to Information for Africa

[7] Article 9, Organic Law No. 2016-22 of 24 March 2016 on the Right of Access to Information, Official Journal of the Tunisian Republic, No. 26, 29 March 2016, p. 949; Article 1, Right to Access Information Law, of 9 January 2017, Lebanon; Article L300-1, Code for the Relationships between the Public and the Administration as amended by Article 9 of Law No. 2016-1321 of 7 October 2016 (aka "Digital Republic Law") https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000031366350; Article 3(a), United States Freedom of Information Act, 1970; Section 1.1, UK Freedom of Information Act, 2000.

[8] Article 12, Model Law of Access to Information in Africa.

[9] United Nations, Human Rights Committee, General Comment No. 34 – Article 19, Freedom of Opinion and Expression, par. 19, at www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf

(a) for the reproduction of personal information of the requester, or where the request is made on behalf of another person, the personal information of the person on whose behalf the request is made;

(b) for the reproduction of information which is in the public interest;

c) where an information holder has failed to comply with the time for responding to a request […];

(d) where the requester is indigent.

Recommendation

- *Amend the provision on fees to specify that only reasonable reproduction fees can be imposed on the requester and such costs in any case should never exceed the actual costs incurred by the relevant body.*

E. Reuse of Information

Article 6 of the Draft Law provides for a limited reuse of information obtained under its provisions but with three major qualifications: it must be "for legitimate purposes"; it must be made "without change or distortion"; and it must not cause "prejudice to public interest or others' rights". The draft appears to be largely unchanged from the previous version. The vague formulation of these provisions is likely to significantly undermine the reuse of information by potential users, for fear that they will be subject to legal sanctions if the information they use upsets powerful organizations or individuals.

The Draft Law should rather make it clear that there are no limitations on the reuse of information for non-commercial or commercial purposes. Information to which a requester is granted access is thereafter information in the public domain, as acknowledged, amongst others, by the African Commission on Human and People's Rights in the Model Law of Access to Information in Africa.[10]

The European Union Directive on the re-use of public sector information (aka "PSI Directive") establishes that all content that can be accessed under national freedom of information laws in principle is re-usable for commercial and non-commercial purposes beyond its initial purpose of collection, with very limited exceptions.[11] In practice, this allows any person to publish documents or information obtained from public bodies on websites, social media platforms or other means of dissemination. The provisions of the French Code for the Relationships between the Public and the Administration also establish the principle that all information produced or received on any support by the public administration can be reused by anyone for other purposes than those for which the documents were originally intended.[12]

[10] Article 86, Model of Access to Information in Africa.

[11] DIRECTIVE 2013/37/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:175:0001:0008:EN:PDF

[12] Article L321-1, Code for the Relationships between the Public and the Administration as amended by Article 9 of Law No. 2016-1321 of 7 October 2016 (aka "Digital Republic Law"): https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000031366350

Recommendations:

- *Amend the provision in order to allow the free reuse of information for any purpose under an open license.*

F. Exemptions

Chapter II of the Draft Law includes the provisions regulating exemptions to access information. This part is unchanged from the previous versions and is the most problematic part of the Draft Law, since the categories outlined are overly broad and do not provide sufficient clarity on how to identify important and sensitive information in need of protection. Furthermore, no mention is made of the necessity to apply the harm test in order to decide whether the damage to the interest protected under the exemption outweighs the public interest in releasing the information.

Harm and Public Interest

The principles of showing harm and considering public interest are the cornerstone of international standards on freedom of information. They are included in the Model Law of Access to Information in Africa endorsed by the African Commission on Human and People's Rights as well in several national laws, including the recently approved Organic Law on the Right to Access Information in Tunisia.[13]

The Tunisian Organic Law requires that harm must be "serious either immediately or subsequently" before the information can be withheld from public release. Under EU law, "the mere fact that a document concerns an interest protected by an exception to the right of access [...] is not sufficient to justify the application of that provision." Public bodies must show how the release of the information would "specifically and actually undermine the interest protected by the exception".[14] Most of the exemptions in the Model Law of Access to Information in Africa also require that the release of the information "would cause substantial prejudice" or "would cause substantial harm" to the interest to be protected.

In addition, the public interest in the release of the information must be considered. A public interest test is an important measure for ensuring that exemptions do not hide information regarding the functioning of public bodies which the public should know about. In Tunisia, all exemptions are subject to the public interest if the information relates to:

- Information for which disclosure is necessary in order to expose or investigate serious violations of human rights or war crimes or to prosecute their perpetrators, provided that this does not infringe with the best interests of the State;

- When the general public interest outweighs the interest in protecting, due to a serious threat to the health, safety or environment or due to a criminal act.[15]

[13] Article 25, Model Law of Access to Information in Africa; Article 24, par. 2, Organic Law No. 2016-22 of 24 March 2016 on the Right of Access to Information, Official Journal of the Tunisian Republic, No. 26, 29 March 2016, p. 949.

[14] Case C-350/12, Council of the European Union v in't Veld.

[15] Organic Law, §26.

This approach is also recommended by the Parliamentary Assembly of the Council of Europe, which has called on nations to grant access to information even "in cases normally covered by a legitimate exception, where the information in question outweighs the authorities' interest in keeping it secret".[16] Examples of areas in which public interest would normally override the interest in secrecy are those where the information requested would:

- make an important contribution to an ongoing public debate;
- promote public participation in political debate;
- expose serious wrongdoings, including human rights violations, other criminal offences, abuse of public office and deliberate concealment of serious wrongdoing;
- improve accountability for the running of public affairs in general and the use of public funds in particular;
- benefit public health or safety.

Overly broad categories

Article 7 sets out 13 categories of information that may be exempt from the right to information. While these categories are generally the same as those found in other laws around the world, most are notably brief despite encapsulating wide areas of information in their descriptions. Examples include: "national defence", "internal and external security of the State", and "State's monetary, economic or financial policies". As drafted, these categories of information are likely to cause confusion over the scope and sensitivity of the information under protection which in turn, may result in information in the public interest being withheld. We believe that these categories should be more clearly defined to ensure that the principle of maximum disclosure is fulfilled. In particular, we wish to highlight several categories which are potentially harmful to the general goal of ensuring access to information:

"Secret" or confidential information

Article 7 of the Draft Law establishes that exemptions to the right to access information include "secret information" and defers its definition to unspecified special legislative provisions in force. Such an approach raises the danger that officials may simply designate any information that they wish to keep from the public as "secret" without any standards or oversight. As the African Commission on Human and People's Rights clarifies in its Model Law on Access to Information in Africa, information cannot be exempt from access simply on the basis of its classification status as "secret".[17]

Furthermore, Article 7 includes exemptions for information whose disclosure may disrupt "confidential deliberations of Government and Cabinet" meetings as well as "confidential administrative research and investigations, unless authorised by special administrative authorities". However, these exceptions should also be subject each time to the harm test to assess whether the harm to the relevant public bodies is greater than the public interest in disclosing that information.

Protection of national defence and security of the State

[16] COE Parliamentary Assembly, Resolution 1954 (2013) National security and access to information, 2 October 2013. http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20190&lang=en.

[17] Article 26, Model Law of Access to Information in Africa.

Article 7 of the Draft Law includes information related to national defence or the internal and external security of the State among the exemptions to the right to access. The Draft Law should specify and outline the exact meaning of these concepts for the purposes of its implementation. The Model Law on Access to Information in Africa, for example, provides an exhaustive series of examples which include information related to military tactics or operations for the prevention of subversive activities, intelligence related to the defence of the State or the identity of a confidential source.[18] It is also worth reminding that the UN Human Rights Council stated in General Comment 34, "it is not compatible with [the ICCPR], for instance, to invoke [official secrets or sedition laws] to suppress or withhold from the public information of legitimate public interest that does not harm national security."[19]

Protection of personal life

Article 7 of the Draft Law provides an exemption for the "protection of personal life". This exemption should be further clarified to ensure that it only applies to private personal information held by public bodies. This exemption should be harmonised with the relevant legislation on data protection in such a way that the two rights are balanced based on the public interest.[20]

The law should also specify that such exemption does not apply to information pertaining to an individual acting in a public capacity. The African Model Law stipulates that the privacy exemption does not apply if "the information relates to the position or functions of an individual who is or was an official of the information holder or any other public body or relevant private body".[21] Under the Yemen Freedom of Information Law of 2012, for example, personal information cannot be released if it is "[p]ersonal data which, if disclosed, may be considered as an unwarranted violation to the privacy of the individual, unless the personal data are connected to the duty or function or public office held by that individual."[22]

Recommendations

- *Specify that all exemptions, especially those in the first paragraph of Article 7, require the prior application of the harm test, which would only allow the withholding of information if its release would cause serious harm to one of the protected interests set out in the exemptions and the public interest test, which means that no exemption can be invoked unless the relevant body can show that the harm caused by the disclosure of the information to the interest protected by the exemption would override the public interest in such disclosure.*

- *Clarify that the exemption based on "secret information" as defined by other laws cannot be invoked without having previously applied the harm test and when the public interest in disclosure overrides the interest in keeping the information secret.*

[18] Article 30, Model Law of Access to Information in Africa.

[19] United Nations, Human Rights Committee, General Comment No. 34 – Article 19, Freedom of Opinion and Expression, par. 30, at www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf

[20] For a detailed analysis on how this can be achieved, see Banisar, David, The Right to Information and Privacy: Balancing Rights and Managing Conflicts (March 10, 2011). World Bank Institute Governance Working Paper. Available at SSRN: http://ssrn.com/abstract=1786473

[21] Article 27(g), Model Law of Access to Information in Africa.

[22] Law (13) for the Year 2012 Regarding the Right of Access to Information, §25(B).

- *Amend Article 7 where it exempts from access information that may disrupt confidential deliberations of Government and Cabinet meetings or confidential administrative research and investigation, clarifying that such exemption does not apply when the public interest overrides the harm of the disclosure.*

- *Specify that the exemption for the "protection of personal life" should only apply to private personal information held by public bodies and should also not apply to information regarding individuals acting in a public capacity. This exemption should be harmonised with the relevant legislation on data protection in such a way that the two rights are balanced based on the public interest.*

G. Improvement to the System of Publishing Information

Chapter 3 of the Draft Law includes provisions on the proactive publication of information by public bodies, that is, on their own initiative without the need for requests.

There are substantial benefits to this approach. In particular, research around the world has found that public bodies which proactively make information available benefit from a reduced number of requests for basic information and subsequently minimise the quantity of requests to which they must respond. Furthermore, there are significant social and economic benefits in making such information available.

List of published information

Article 10 sets out 19 categories of information which bodies can publish using different media, including online national data portals. We believe that the list needs further elaboration, especially with regard to details on decision-making procedures, budgets and expenditures for national bodies, public procurement and policy documents. For example, the Model Law on Access to Information for Africa prepared by the African Union's Commission on Human and Peoples' Rights recommends that bodies should publish monthly[23]:

> (e) whether meetings of the public body or relevant private body, including its boards, councils, committees or similar other bodies, are open to members of the public and, if so, the process for direct or indirect engagement; but where a meeting is not open to the public, the body must proactively make public the contents of submissions received, the process for decision making, and decisions reached;
>
> (f) detailed information on the design and execution of any subsidy programmes implemented with public funds, including the amounts allocated and expended, the criteria for accessing the subsidy, and the beneficiaries;
>
> (g) all contracts, licences, permits, authorisations and public-private partnerships granted by the public body or relevant private body;
>
> (h) reports containing the results of surveys, studies or tests, including scientific or technical reports and environmental impact assessment reports, prepared by the public body or relevant private body;

[23] Model Law on Access to Information for Africa, Prepared by the African Commission on Human and Peoples' Rights, Part II.

In Tunisia, the new Organic Law on the Right to Access Information also includes the obligation to publish and update periodically:

- Policies and programs of interest to the public;
- Any information concerning the public finances, including detailed data related to the budget at the central, regional and local levels, information on public debt, national accounts, and data on how public expenditures are broken down and of the main public finance indicators.[24]

Furthermore, the Right to Access to Information Law in Lebanon provides that each administration shall publish annual reports on its activities, including "the approved general policies and projects of the concerned administration which have been implemented and which have not been implemented and the reasons why, and any suggestions that contribute to the development of the work of the department".[25]

By way of practical example, the UK Government has released a Local Government Transparency Code which sets out the minimum data that should be proactively published by local authorities, how often they should be published and in which desirable form.[26]

Recommendations

- *The list of proactively published information should be revised and extended to include more detailed categories including the process for policy or decision making, public procurement, impact assessment studies and financial information.*

H. Improving Procedures for Access to Information

Removal of Interest

ARTICLE 19 welcomes the removal from the Draft Law of the provision which allowed only those with a demonstrable "direct interest" to access information and the purpose of the request should be specified.

The Article should also emphasise that in any case, the modalities of the request to be designed by the competent Commission should never include again the requirement to provide the reasons or the interests of the requester. This principle is made explicit in several laws on access to information, including the Organic Law on the Right of Access to Information of Tunisia, and is also acknowledged by the African Commission on Human and People's Rights in the Model Law on Access to Information for Africa.[27]

Form of request and response

[24] Article 6, Organic Law No. 2016-22 of 24 March 2016 on the Right of Access to Information, Official Journal of the Tunisian Republic, No. 26, 29 March 2016, p. 949.

[25] Article 8, Lebanon Right to Access to Information Law of 9 January 2017.

[26] See UK Local Government Transparency Code 2015, https://www.gov.uk/government/publications/local-government-transparency-code-2015

[27] Article 11, Organic Law No. 2016-22 of 24 March 2016 on the Right of Access to Information, Official Journal of the Tunisian Republic, No. 26, 29 March 2016, p. 949; Article 13 (5), Model Law on Access to Information for Africa

The current version of Article 14 of the Draft Law establishes that the form of the request to access information shall be decided by the competent Commission on the Right of Access to Information and in any case, it must include the applicant's Identity Details (ID). However, in order to comply with international standards including the Model Law on Access to Information for Africa prepared by the African Union's Commission on Human and Peoples' Rights, the provision should include the possibility of submitting a request either orally or in writing, even electronically, and should not mandate the requester to provide their ID, so long as they provide a name and an address where they can be contacted for a reply.[28]

Furthermore, the provision should ensure that requests are responded, whenever possible, in the form preferred by the requester.[29]

Timeline for responding to urgent requests of access

Article 17 of the Draft Law establishes a deadline of three working days maximum to respond to an urgent request for information aimed at protecting human lives, their safety or freedom. This deadline is too long when compared with the international standards on freedom of information. The Model Law on Access to Information for Africa, for example, establishes that such special requests must be dealt with within a maximum of 48 hours within receipt.[30] The same deadline is adopted by the Organic Law on the Right of Access to Information in Tunisia.[31]

Refused access

Article 18 of the Draft Law requires the relevant body to justify in writing the refusal to provide access and outlines a series of cases for justified refusal. One of the potential justifications for refusal is when the request "is not clear". This justification is overly broad and is compounded by the absence of a duty for the competent information officer to assist the requester in order to make the request be compliant with the Law. The duty to assist requesters, including those with impairments or disabilities, is acknowledged by the African Union's Commission on Human and Peoples' Rights in its Model Law on Access to Information in Africa and is also reproduced in the Organic Law on the Right of Access to Information of Tunisia.[32]

Article 19 and Article 20 of the Draft Law regulate the right of the requester of information that has not been replied to or fulfilled to ask for an internal review of the decision and only after such review is concluded, the requester may resort to the oversight mechanism provided by the competent Commission on the Right for Access to Information. While we welcome both provisions, we notice that they omit the possibility of accessing directly the oversight mechanism to review the decision whenever the original request for access was reasonably believed to be urgent to protect the life of safety of a person. This possibility should be added in compliance with the international standards incorporated by

[28] Article 13 (6), Model Law.

[29] Article 21 (2), Model Law.

[30] Article 15 (2) and 16 (1), Model Law

[31] Article 17, Organic Law No. 2016-22 of 24 March 2016 on the Right of Access to Information

[32] Article 14, Model Law on Access to Information for Africa; Article 9, Organic Law No. 2016-22 of 24 March 2016 on the Right of Access to Information.

the African Commission on Human and People's Rights in its Model Law on Access to Information in Africa.[33]

Granted Access and Open Data

Article 15 of the Draft Law provides that the information can be obtained either through direct access at the premises of the relevant body or by email when the information is available in electronic format. Several national laws on access also provide that the information released should be in open data format for easy reuse.[34] The specification of this requirement would be in line with the principles of transparency and accountability promoted by the Open Government Partnership recently joined by the Government of Morocco.

Recommendations

- *Review Article 14 to explicitly include the possibility of submitting a request either orally or in writing, even electronically.*
- *Remove the obligation for the requesters to provide their ID, so long as they provide a name and an address that is sufficient for the information holder to contact them for a reply.*
- *Amend Article 14 so as to ensure that requests are responded, whenever possible, in the form preferred by the requester.*
- *Amend Article 17 to reduce the deadline for reply to urgent requests to a maximum of 48 hours only.*
- *Introduce a provision within Article 18 to impose a duty of the information officer to assist the requester to make sure the request for access is clear and compliant with the Law.*
- *Introduce a provision to ensure that the information released is in an open data format for easy reuse.*

I. Commission on the Right of Access to Information

We welcome the re-introduction in the current Draft Law of the setting up of the Commission on the Right of Access to Information, which had been omitted in the previous version. Nearly every country around the world with a freedom of information law has included an external oversight mechanism tasked with the monitoring and enforcement of the law. These bodies are considered to be a crucial interface between the public and the bureaucracy to make the law work more effectively. In 50 countries, that is an independent Information Commission.

Under Article 22 of the current Draft Law, the Commission is established at the Presidency of the Government. This provision is problematic according to international law, which clearly requires that human rights bodies are functionally and administratively independent from all public authorities. The

[33] Article 74, Model Law.

[34] See, for example, Section 11 (1a), UK Freedom of Information Act 2000 as amended by the Protection of Freedoms Act 2012

Paris Principles, endorsed by the UN General Assembly, set minimum standards for such bodies.[35] The roles of specialised information commissions builds on these principles which have been further elaborated by the African Commission on Human and Peoples' Rights in the Model Law on Access to Information for Africa.[36]

According to Article 22 of the Draft Law, the Commission on the Right of Access to Information should be chaired by the president of the La Commission Nationale de contrôle de la protection des données à caractère personnel (CNDP). Article 25 also extends the application of the law regulating the administrative structure of the CNDP to the Commission on the Right of Access to Information. We believe that these two provisions undermine the principles of independence, autonomy and impartiality that should inform the operations and administration of the Commission.

Furthermore, in outlining the membership of the Commission, Article 22 provides a majority of representatives appointed by the Government and establishes that the only representative of civil society should also be appointed by the Head of the Government. This is also a breach of the principles of independence, autonomy and impartiality of the oversight mechanisms established by international law and further elaborated by the African Commission on Human and Peoples' Rights in the Model Law on Access to Information for Africa.

Recommendations:

- *Review the structure, chair and composition of the Commission on the Right of Access to Information so as to strengthen its independence and autonomy from the Government and to avoid conflicts of interests with the commission in charge for the protection of private data.*

- *In particular, amend Article 22 to eliminate the appointment of the civil society representative by the Head of the Government and increase the representation of civil society and media stakeholders within the Commission on the Right of Access to Information*

J. Sanctions

ARTICLE 19 welcomes the removal from the current Draft Law of the previous provisions which introduced criminal sanctions for any person who incorrectly or falsely states the reason for their request (former Article 26), for any person who reuses the information for other purposes than those stated in the original request (former Article 27) and for tampering with or using the information obtained in a way which negatively harms the public interest (Article 28). As previously stated, those provisions failed to comply with the three-part test of Article 19 within the ICCPR, which requires that any limitations to freedom of expression must be provided by law, legitimate and proportionate.

Article 27 of the current Draft Law establishes that mandated officers responsible for receiving and handling information are subject to disciplinary measures according to the legislation in force if they refuse to provide the information as required by the Law, unless they show "good intentions". We believe that the imposition of merely disciplinary measures does not constitute an effective deterrent

[35] UNGA Resolution, 48/134, National institutions for the promotion and protection of human rights, A/RES/48/134, 20 December 1993.

[36] Articles 45 and 53, Model Law on Access to Information for Africa.

against the violations of the norms of the Law. In addition to disciplinary measures, mandated officers who refuse to grant or obstruct access to the information in accordance with the Law without a reasonable cause should also be liable to fines or other criminal sanctions, as envisaged by the Model Law on Access to Information for Africa prepared by the African Commission on Human and Peoples' Rights.[37]

Article 28 of the Draft Law considers as criminal offenders individuals who disclose professional secrets as defined by the relevant norms of the Criminal Code. However, the Article omits to exempt from these provisions anyone who has disclosed any information, including professional secrets, in good faith. This protection against liability of disclosers of information in good faith is acknowledged by the Declaration of Principles on Freedom of Expression in Africa and included in the Model Law on Access to Information for Africa prepared by the African Commission on Human and Peoples' Rights.[38]

On the other hand, Article 29 of the Draft Law establishes that the receivers of information will be criminally liable for any alteration in the content of the information which causes damage to the relevant body or which results in its "use, reuse or harm to the public interest". This provision is inconsistent with the internationally acknowledged principle that "public bodies hold information not for themselves but as custodians of the public good"[39] and that once the information is released, it is in the public domain[40] and therefore can be adapted, combined and re-used for commercial or non-commercial purposes as long as a clear reference is made to its original source. Furthermore, this criminal provision undermines the purposes of the Law as it would likely deter many people from submitting requests to access information and therefore fails to meet the criteria of legitimacy and proportionality of the three-part test on limitation to freedom of expression established by Article 19 (3) of the ICCPR.

Recommendations:

- *Article 27 should clearly state that all officials who deliberately mishandle or refuse access to information in breach of the Law should be subject to criminal sanctions, including fines, and to administrative sanctions, including dismissal in the more serious cases.*
- *Administrative and criminal fines should be extended to cases of deliberate destruction, damage or alteration of the information held in order to deny or obstruct access to it.*
- *Article 28 Law should specify that anyone who has disclosed any information, including professional secrets, acting in good faith should be exempt from liability.*
- *Article 29 should be deleted.*

[37] Article 88, Model Law on Access to Information for Africa

[38] African Commission on Human and People's Rights, Declaration of Principles on Freedom of Expression in Africa, 17-23 October 2002, Part IV par. 2; Article 86 Model Law on Access to Information for Africa

[39] Declaration of Principles on Freedom of Expression in Africa, Part IV par. 1.

[40] Article 86 Model Law on Access to Information for Africa

K. Relationship with other Laws

In many countries, the right to information laws include provisions which call for the systematic review and repealing of existing laws which conflict and specifically state that the law overrides other laws which conflict with its provisions.[41]

Furthermore, they may specifically state that the law governing the right to information overrides other laws in conflict with its provisions. In order to give full effect to the aims of the law on the right to information, similar provisions should be included in the Draft Law.

Currently, the Draft Law contains neither of those provisions, and will likely lead to a conflict of laws and confusion among officials over which law controls the release and use of information.

Recommendations:

- *Include a provision requiring a specific public authority to review existing laws and repeal those that conflict with its provisions.*
- *Include a provision which states that the Law overrides all conflicting laws and create a mechanism for reviewing them for repeal.*

L. Law on Whistleblower Protection

One area currently not adequately addressed by Moroccan law is the protection of whistleblowers. Whistleblowing is a means of promoting accountability by allowing any individual to disclose information about misconduct whilst simultaneously protecting that individual from sanctions or legal repercussions. Whistleblowing relates to all forms of disclosure from both public and private organisations. The disclosure can be internal, to a higher-ranking official within the organization for example, or to an external authority such as regulatory bodies, ombudsmen, anti-corruption commissioners, elected officials and the media.

Whistleblowing is also a distinct from laws and policies on the protection of witnesses. There is often confusion on this issue with many governments and media mistaking witness protection laws for whistleblowing laws.[42]

There are an increasing number of international instruments that recognise the importance of whistleblowing and require or encourage countries to adopt measures to encourage and protect disclosures. Most of these agreements are in the field of anti-corruption but there is also increasing recognition of the importance of whistleblowing for free speech and good governance. These include the United Nations Convention Against Corruption and the African Union Convention on Preventing and Combating Corruption.

[41] See article 24, Right to Access to Information Law of 9 January 2017, Lebanon.

[42] See e.g. Council of Europe Parliamentary Assembly, The protection of "whistleblowers": Introductory memorandum, AS/Jur (2008) 09, 3 April 2008. http://omtzigt.cda.nl/Portals/13/docs/whistle%20blowers%20memo%200mtzigt.doc

Over 100 countries have adopted some form of whistleblower protection law relating to corruption, environmental protection and anti-trust law. In many countries, including South Africa, the UK, Canada, Uganda and Ghana, a comprehensive whistleblower law has been adopted. In Tunisia, a comprehensive whistleblowing law was recently adopted in February 2017.

The current law in Morocco relating to whistleblowing is mainly focused on issues relating to protections for witnesses and only provides limited protection for whistleblowers. Further, the range of issues that it applies to is limited to corruption and related crimes.[43]

In comparison, the recently adopted Tunisian Law on the Denunciation of Corruption and the Protection of whistleblowers[44]. It defines corruption broadly to cover all types of abuse in public and private bodies:

> Any illegitimate action against laws and regulations in force damaging or likely to damage public interest, the misuse of power of authority or functions to receive personal benefits, including all forms of bribery in the public and private sectors, misappropriation, embezzlement or squandering of public funds, abuse of power, all forms of illicit enrichment, breach of trust, mismanagement of moral entities' funds, money laundering, conflict of interest, tax evasion, impeding decisions of the judiciary and all other acts endangering public health, safety, or environment.

Similarly, a French law adopted in 2016 also provides broad protections for whistleblowers across a variety of sectors:[45]

> a crime or an offense, a grave and obvious violation of an international commitment ratified or approved regularly by France, of a unilateral act of an international organization taken on the basis of such commitment, of the law or regulation, or a grave threat or harm to the general interest, of which this person has acquired personal knowledge.

The Tunisian law mandates that the Good Governance and Anti-Corruption Commission protect whistleblowers from a variety of disciplinary sanctions including:

> exclusion, dismissal, rejecting promotions or transfer, or forced transfer, continuous harassments, covered sanctions, and in general any abusive measure against them, either physical or moral, or threats to enforce them against whistleblowers or against others closely related to them.

We would recommend that the following principles be considered and incorporated in a new bill which would more comprehensively protect a wider range of disclosures[46]:

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[43] Dahir n° 1-11-164 du 19 kaada 1432 (17 octobre 2011) portant promulgation de la loi n° 37-10 modifiant et complétant la loi n° 22-01 relative à la procédure pénale en matière de protection des victimes, des témoins, des experts et des dénonciateurs en ce qui concerne les infractions de corruption, de détournement, de trafic d'influence et autres

[44] Law n°2017-10 of 7 March 2017 on denunciation of corruption and the protection of whistleblowers

[45] LOI n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, a6

[46] For more information, see Banisar, David, Whistleblowing: International Standards and Developments (February

- **Broad application.** The law should have a broad application. It should cover a wide variety of wrongdoing including violations of laws, rules and ethical norms, abuses, mismanagement, failures to act and threats to public health and safety. It should apply to public and private sector employees and also those who may face retribution outside the employer–employee relationship such as consultants, former employees, temporary workers, volunteers, students, benefit seekers, family members and others. It should also apply to national security cases.

- **Disclosures procedures.** The law should set up reasonable requirements to encourage and facilitate internal procedures to disclose wrongdoing. However, the procedures should be straightforward and easily allow for disclosure to outside organisations such as higher bodies, legislators and the media in cases where it is likely that the internal procedure would be ineffective. There should be easy access to legal advice to facilitate disclosures and reduce misunderstandings.

- **Outside agency.** The law should create or appoint an existing independent body to receive reports of misuse and corruption, advise whistleblowers and investigate and rule on cases of discrimination. However, this body should not have exclusive jurisdiction over the subject. The whistleblower should be able to also appeal cases to existing tribunals or courts. Legal advice and aid should be available.

- **Confidentiality.** The law should allow for whistleblowers to request that their identity should remain confidential as far as possible. However, the body should make the person aware of the problems with maintaining confidentiality and also make clear that the protection is not absolute.

- **Protection against retribution.** The law should have a broad definition of retribution that covers all types of job sanctions, harassment, loss of status or benefits, and other detriments. Employees should be able to seek interim relief to return to the job while the case is pending or be allowed to seek transfers to other equivalent jobs within the organisation if return to the existing one is not advisable due to possible retribution.

- **Compensation.** Compensation should be broadly defined to cover all losses and to restore the individual to their prior situation. This should include any loss of earnings and future earnings. This loss should not be capped. There should also be provisions to pay for the pain and suffering incurred because of the release of such information and any subsequent retribution.

- **Protection of free speech.** The law should recognise that there is a significant importance in free speech whistleblowing. Public interest and harm tests should be applied to each release and for public bodies it should be expressly stated that the unauthorised release of any information that could have been released under freedom of information laws cannot be sanctioned.

- **Waiver of liability.** Any act of authorised disclosure should be made immune from liability under other acts such as the Official Secrets Act and other libel/slander laws. An even more significant move would be to eliminate archaic Official Secrets Acts, which has already been done in New Zealand.

- **Rewards.** In some cases, whistleblowers should be rewarded for making disclosures that result in the important recovery of funds or discoveries of wrongdoing. Qui Tam cases, such as those used in the US, may be an appropriate mechanism for such recoveries.

- **No sanctions for misguided or false reporting.** The law should still protect whistleblowers who make a disclosure in good faith even if the information was not to the level of a protected disclosure. The law

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1, 2011). CORRUPTION AND TRANSPARENCY: DEBATING THE FRONTIERS BETWEEN STATE, MARKET AND SOCIETY, I. Sandoval, ed., World Bank-Institute for Social Research, UNAM, Washington, D.C., 2011. Available at SSRN: http://ssrn.com/abstract=1753180

should not allow for the threat of criminal sanctions against whistleblowers who make false disclosures. In cases of deliberate falsehoods, allowing for normal sanctions such as loss of job should be sufficient.

- **Extensive training and publication.** Governments and private bodies should be required to adopt management policies to facilitate whistleblowing and train employees on its provisions. A high level manager should supervise this effort and work towards developing an internal culture to facilitate disclosures as non-confrontational processes.

- **Reviews and disclosures.** Government bodies and large corporate bodies should be required to publish annually a review of disclosures and outcomes, reports on discrimination and outcomes including compensation and recoveries. The law should require a regular review of the legislation to ensure that it is working as anticipated.

Recommendations:

- *Begin drafting of a comprehensive whistleblower protection act based on the above principles.*

III. Joining the Open Government Partnership

We welcome the announcement of Morocco's commitment to join the Open Government Partnership[47]. Until now, Morocco has not been eligible to join the OGP because it lacked an access to information law. By adopting such a law in line with international standards, Morocco will meet the minimum OGPs Minimum Eligibility Criteria.

For Morocco, joining OGP marks a committed approach to making citizens partners in the policy-making process. Implementing open government is also an important contribution to promoting economic prosperity, good governance, ethics and the fight against corruption, transparency of the budget, and access to information and citizen participation in public policy-making.

Many reforms are needed to build an open government and implement its principles in line with international best practices and the aspirations of Morocco's new Constitution. Adopting a strong and progressive access to information law in line with international standards is pivotal to building the basis for effective and meaningful citizens' engagement and pursue OGP accession.

We also recommend that Morocco develops a participatory approach to its open government strategy which engages in real consultation with civil society and citizens. The National OGP Action Plan (NAP)

[47] The Minister of Urbanism and Town Planning leading the Moroccan delegation to the Summit of the OGP initiative, held on December 7-9 in Paris, presented the official letters of Morocco to join the Open Government Partnership (OGP) in December 7.

needs to include transparency and accountability reforms that can reinforce open government policies and practices and their institutional and legal frameworks for implementation.

The NAP will be the occasion to push ahead the implementation of the new ATI law by including commitments to develop capacities of civil servants, to adopt implementing texts of the law and other measures needed to ensure the effectiveness of the access to information commission. The NAP should reinforce the ATI law by other texts that can reinforce the legal framework for transparency, participation and fight against corruption (Whistle-blower Protection Act, public consultation framework etc).

OGP brings together governments and civil society organizations as true partners. It's important that Morocco institutionalize a mechanism for dialogue and collaboration with civil society to avoid any limitations and restrictions on civil society operations and any attacks against human rights defenders and journalists in Morocco.

Recommendations:

- *The Government should engage broadly in a participatory consultation with civil society and citizens in the development of the New Action Plan. The NAP should include extensive commitments on implementation of the ATI law and adoption of other laws on whistleblowing and public consultation.*

IV. Conclusion

The current version of the Draft Law Draft Regarding the Right to Access Information in Morocco is an improvement from the previous versions and a welcome step forward towards increasing transparency and access to information. However, it still has many significant flaws which will undermine its effectiveness.

The Government of Morocco's announcement of their intention to join the Open Government Partnership on 7 December 2016 further demonstrates Morocco's commitment to the principles of transparency, accountability and improved civic participation in decision making and policy formulation highlighted in the Open Government Declaration endorsed by all the OGP members.[48]

However, it has now been five years since the first draft of this bill was proposed, two years since its discussion in Parliament, and a year since its adoption by the lower chamber. This raises concerns about the willingness of the Government of Morocco to adopt to law. In the meanwhile, Lebanon, Tunisia and South Sudan have all adopted laws and are in the process of implementation.

[48] Open Government Partnership, Open Government Declaration of September 2011, at https://www.opengovpartnership.org/open-government-declaration

In order to fully comply with the principles supported by the OGP membership, ARTICLE 19 believes that the text of the current Draft Law should be reviewed in line with the recommendations outlined above, which reflect the best practices and international standards and on freedom of information. We urge Parliament to take this last opportunity to improve the bill before adoption and make it compliant with international standards and best practices.